Golden Gate University Law Review

Volume 50
Issue 2 *Comments Edition*

Article 1

January 2020

Front Matter

GOLDEN GATE UNIVERSITY LAW REVIEW

VOLUME 50 AUGUST 2020 NUMBER 2

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Subscription price is $35.00 per year. International shipping carries an additional $7.00 charge. Subscriptions are renewed automatically unless a cancellation is received 30 days before publication. Claims for issues not received must be filed within six months of publication or they will not be honored without additional charges. Back issues may be ordered directly from William S. Hein & Co., Inc., 2350 N Forest Rd, Getzville, NY 14068. Orders may also be placed by calling Hein at (800) 828-7571, via fax at (716) 883-8100, or email to order@wshein.com. Back issues can also be found in electronic format on HeinOnline, http://heinonline.org. Microfilm copies of back issues are available from NA Publishing, (800) 420-6272.

Notification of change of address must be received 30 days in advance of publication to ensure prompt delivery. Notification should include both the old and new addresses and zip codes.

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Golden Gate University Law Review

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Article 2

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Preface

PREFACE

Welcome to Volume 50 of the *Golden Gate University Law Review.* The *Golden Gate University Law Review* is a student-run organization that publishes two issues each academic year: the *Ninth Circuit Survey* and the *Comments Edition*. The *Ninth Circuit Survey* issue features student-written Case Notes and Case Summaries focused exclusively on decisions of the United States Court of Appeals for the Ninth Circuit. The *Comments Edition* is a general interest edition, comprised of student-written Comments and Outside Articles written by practicing attorneys, judges, and academics. The *Comments Edition* provides a forum for students and legal professionals to explore deeply relevant and contemporary topics in the broader legal landscape.

Since its establishment in 1969, the *Golden Gate University Law Review* has been dedicated to publishing scholarly writing on a wide range of legal topics that contributes to the broader legal discourse on a state, national, and international level. This year's *Comments Edition* continues this tradition. In the recent years leading up to the publication of this issue, America has experienced some of the most controversial legal conversations in our nation's history, and this trying period has greatly influenced the development and focus of this *Comments Edition*.

Each focusing on a particularized legal topic, the articles in this issue evaluate the strengths and weaknesses of existing law and practice, and propose changes to ensure the fair and just administration of the law. The topics of these articles include: the shortcomings of the domestic recycling program, collective bargaining as a tool in disputes involving misclassified independent contractors, and the efficacy of an Equal Rights Amendment in relation to Black women. In addition, this publication includes a transcript of a symposium on the appointment of Brett Kavanaugh to the United States Supreme Court bench.

We would like to begin by thanking our outside article contributors, Megan Manning and Stephanie Deskins. We would also like to express our gratitude to: Dean Anthony Niedwiecki, who has been an advocate for the journal and has provided us with continued support; Academic Dean Mark Yates for providing his invaluable guidance and expertise to *Golden Gate University Law Review*; Heather Varanini, who has our deepest gratitude for her editorial and Bluebook assistance; and Professor Jennifer Babcock for her expert guidance and continued support as *Golden Gate University Law Review's* Faculty Advisor. Finally, we offer our sincerest thanks to each author for their articles, as

these Comments represent the culmination of each authors' time, passion, and devotion to critical issues.

As the Editor-in-Chief and Managing Editor for the 2019–2020 year, we have inspired by hard work and dedication of the 2019–2020 *Golden Gate University Law Review* Staff Writers, Associate Editors, and Executive Board Members who worked tirelessly to make this edition possible. A law review issue is never an individual effort, but instead the result of much collaboration. It is our distinct privilege to present this edition of the *Golden Gate University Law Review Ninth Circuit Survey*.

Kyndal Currie
Editor-in-Chief

Leticia Chavez
Managing Editor

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Discussion Transcript: The Road to Kavanaugh

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Caroline Fredrickson
American Constitution Society

DISCUSSION TRANSCRIPT

THE ROAD TO KAVANAUGH, MARCH 15, 2019, GOLDEN GATE UNIVERSITY SCHOOL OF LAW

INTRODUCTORY REMARKS:

ANTHONY NIEDWIECKI: Dean of the School of Law, Professor of Law, Golden Gate University School of Law.

DISCUSSION PARTICIPANTS:

PAUL KIBEL, Professor of Law; Co-Director of the Environmental Law Program, Golden Gate University School of Law.

CAROLINE FREDRICKSON, President of the American Constitution Society.

DEAN NIEDWIECKI: For those that don't know, I'm Anthony Niedwiecki. I'm the Dean of the Golden Gate University School of Law. I want to welcome you to this exciting presentation. This idea grew out of the actual confirmation process that maybe, we need to do something and have a discussion about this particular process.

I'm an employment discrimination lawyer. So watching those hearings [was] very reminiscent of the Anita Hill hearings back many, many years ago, but what I use as an example of sexual harassment and the treatment of sexual harassment law at the time. So this was a very interesting period for us. And I know around the school, all the TVs were on and everybody was watching very closely.

And so, we have a lot of interest here on the confirmation process, but also a lot of interest with what the Supreme Court is going to look like now that Kavanaugh's joined the bench.

And so today, we're really, really happy to be able to welcome the President from ACS to join our discussion with one of our professors

about the Kavanaugh confirmation process and the impact that he will have on the court. I have a really deep interest, and I'm very proud to say, I've been with ACS and supported ACS from the very beginning.

I've been a faculty advisor at two previous schools that I worked at. And I was sharing that I have a couple of my best memories as a professor related to ACS. I went to their national conference in 2003. And this was right after *Lawrence v. Texas* was decided. And Ruth Bader Ginsburg, as most the students here know is a big idol of mine, spoke at lunch that day and talked a lot about the influence of international precedent and international materials in Supreme Court cases.

And that was a heated issue at the time. And it seeped its way into the *Lawrence* decision. That was a very, very interesting discussion and the first time I saw her actually speak. But the more interesting and funn[ier] thing for me was later that night at the convention, they had a Janet Reno dance party. And I got to dance with Janet Reno. So I have very fond memories of ACS.

[Laughter]

ACS has done a lot of great things and really has moved law schools and the legal profession to look at things from a progressive bent. The Federal Society has been very good over the history in terms of building up a strong bench. And ACS came in to do the same thing. I know that [at] one of my former schools I was enemy number one for the Federal Society, because we started the ACS. Because I think they knew the possibilities, and that's been realized.

So, let me introduce our two guests today. President Fredrickson joined ACS in 2009 as their President. During her tenure, ACS has grown significantly. They have chapters in almost every law school. They've got thousands of members across the county. And they've got chapters in almost all the states.

Before she joined the ACS, she was a director of ACLU's Washington Legislative Office; General Counsel and Legal Director of [Unintelligible] Pro-Choice America. She served as Chief of Staff to Senator Maria Cantwell of Washington and Deputy Chief of Staff to Senate Democratic Leader, at the time, Tom Daschle of South Dakota.

She worked in the Clinton Administration. She served as Special Assistant to the President for Legislative Affairs. She has her JD from Columbia and her BA from Yale in Russian and Eastern European Studies. She also clerked for the Honorable James Oaks of the United States Court of Appeals for the 2nd Circuit. So, with this wide range of experiences, you know she's going to bring a lot to the discussion today.

She's joined by our own professor, Paul Kibel. I really want to thank him. He took the lead in organizing this. And he saw the value of this discussion. But I do want to note one thing. We did invite members from the Federalist Society. And nobody took our offer. So, you can interpret that however you want to about today's discussion.

Professor Kibel, who organized this, is a prolific scholar. He teaches environmental law and water law. He is the Director of our Center for Urban Environmental Law. Our environmental law program is, as you know, consistently ranked as one of the top environmental law programs across the country and a lot due to the work that he does. He's been a wonderful faculty member. And I know he's going to bring a lot to the table for the discussion.

Before I bring them up on the stage, I want to say thank you to the Bar Association of San Francisco and all the people at GGU who have made this happen today. So, without further ado, let's bring up our guests: Paul Kibel and Caroline Fredrickson.

PROFESSOR KIBEL: We're not going to wear our microphones.

FREDRICKSON: We'll project.

PROFESSOR KIBEL: Thank you for those introductory remarks, Dean. I want to say a couple things at the outset. Thank you so much for coming out today. We're really excited for this conversation. We are going to be recording it for two reasons. One, the plan is to propose the video of the dialogue in conjunction with Golden Gate's Law Review.

We're also going to be preparing a transcription of the proceedings with an idea towards actually publishing the exchange that we have here, as well. And my understand is also that you are working with the law review on a piece related to the Kavanaugh [unintelligible] for the law review, as well. So there will be some scholarly outputs.

I want to begin to explain the format that we've settled on, which I hope should work well. We've divided the dialogue into part one and part two. Part one is going to be about the confirmation and appointment process that took place related to Brett Kavanaugh. And we're going to spend about 30 minutes.

We've worked up some question and discussion topics about that. After we have that dialogue, we're going to open it up to questions on that part of it to the audience for about 10 minutes or so, for questions and discussion with all of you related to that.

For part two, we're going to shift gears and talk about jurisprudence and talk about issues relating to how having Brett Kavanaugh on the Court may change the Court's decision making, looking at issues such as

originalism, federalism, executive authority, abortion, women's reproductive rights, and views of deference to federal agencies; issues that are related to what he will bring as a justice on the court, as opposed to the appointment process.

And the last thing I'll mention — just to elaborate — when this began, the idea was to have three chairs up here. I don't know about three tables, but certainly three chairs. And the other chair was going to be occupied by a representative from the Federalist Society. We thought it would be very productive in a dialogue format, as opposed to speech format, to have that type of discussion.

We contacted a number of prominent people: Steve Calabresi, professor at Northwestern, one of the co-founders of the Federalist Society; Professor Oren Currey at USC Law School; and Professor Jonathan Hadler at Case Western. We even contacted George Conway III. George Conway III — Kelly Conway's husband, but also prominent legal thinker on the conservative side and helped co-found [unintelligible] Checks and Balances recently.

I'm not going to speculate about the reasons. But we did not have any takers for that. So we were left with the decision about whether or not to proceed with the dialogue or proceed with the dialogue with just Carolyn. And we felt like the fact that we didn't get a response from the people we approached was not a reason not to proceed, at least [unintelligible].

FREDRICKSON: We got a response. It was just, "No."

PROFESSOR KIBEL: Well, the only real "no" we got was from Calabresi. I think the others were more nuanced. "We'd love to. But we're so busy" type responses. But before we get into the format, I wanted to give you time to talk about how you view the role of ACS in terms of its formation in particular, as the Dean mentioned, in some sense its relationship or maybe, a leftist counterpart to the Federalist Society. I wanted to give you a chance to talk.

FREDRICKSON: Sure. First, let me thank you, the law school, the Dean, and all of you for hosting me here and for our ACS chapters that have been involved. I know we have a great, strong chapter here at Golden Gate. I hope you're all members. If not, you can sign up immediately after this discussion. But I also wanted to wish a happy birthday to Ruth Bader Ginsburg, whose birthday is today and also, the Dean, who I know is celebrating his birthday this weekend.

I think that's auspicious. to be sharing a birthday with Ruth Bader Ginsburg, may she live forever. And I think she is. I actually had a

chance, on the plane out here, I finally caught up with the documentary. And to see her working out with her trainer and looking quite robust and fit. And I know she's back in full action after her . . .

You know, she is really, absolutely a board. This is her third bout with cancer. She's still doing all her pushups and workouts and so forth. And she's really indestructible. It's so impressive.

So ACS. I'd also like to think we're indestructible. But we're a nation-wide network committed to the fundamental values of the constitution. "We the people in order to form a more perfect union," the preamble to the Constitution lays out, in such beautiful and empowering and inspirational language, what this nation is dedicated to achieving: effective government, democracy, liberty, and justice for all.

And with the Post-Reconstruction Amendments, we add equality to that list of core values that we believe in; that absolutely infiltrate everything we believe about the law and Constitution values.

So I would encourage you — and we have a constitutional law professor in the room — next time you're thinking about the Constitution and questions, go back and read the Preamble. It's not there just to look pretty at the beginning and have the big W, you know. They wrote beautifully back then. It's actually there to tell you how to understand the document that follows.

So that's what we are deeply committed to. We've been building a network across this country of lawyers, law professors, law students, judges, elected officials, and concerned Americans who are committed to ensuring that those values are how our constitution and our justice system operate. So it's very important to us to build the next generation, which is why the law students are such a critical part of ACS. You're the ones who are going to transform this nation for the better.

And we're in a moment where certainly most of us—even George Conway, many people on the Right—understand that we're in a pivotal, dangerous moment for our democracy. We have real stresses in our constitutional system, our system of separation of powers and checks and balances.

I know this is why George Conway has founded this group called Checks and Balances. Because the presidential power has become so great and the congressional power has been withering. But that's just to say we're here, we exist, because of you. Because we want to work with the students as well as their mentors, the wonderful law professors you have here, and the lawyers you work with along the way, to make sure you succeed even where we might not.

And that is to make sure that those enduring values in the Constitution really do see themselves expressed in legal decisions in judges —

and a few of you might become judges. I'd encourage you to think about it — in cases brought by the others of you who are going to be practicing lawyers; or carrying out the ideas expressed by the law professors that you may become or the civil rights lawyers, the environmental lawyers. Or you could be a corporate lawyer and do pro bono work.

But there are so many ways in which you are going to be responsible for making this world a better place. And not to put all the burden on you, but that is really what ACS is all about.

PROFESSOR KIBEL: So, we're going to dive into part one. And in preparation for this, we discussed and came up with five sub-topics for part one and part two. And we're going to proceed with the dialogue. So, I'm going to start with topic number one. This is related to matters of confirmation. I'll just lay it out for you.

Very late in the Senate confirmation process for Brett Kavanaugh, California Senator Dianne Feinstein went public with certain allegations by Dr. Christine Blasey Ford related to alleged sexual misconduct that occurred at an earlier period of her life by Brett Kavanaugh. And after the disclosure of the allegations by Dr. Ford, several other women came forward with allegations of sexual misconduct.

And there were also related allegations related to excessive drinking by Brett Kavanaugh that tied in with some of those allegations regarding the sexual conduct. And then in the context of the actual Senate confirmation hearing, both Dr. Ford and Brett Kavanaugh testified to questions related to those allegations. I'm just sort of framing that.

So, my question to you is what are your thoughts about the extent to which the process in the senate confirmation hearing was fair? And in using that word fair, I'm saying both in terms of being fair to Dr. Christine Blasey Ford, but also being fair to Brett Kavanaugh, as well. And do you think there are ways that it could have been handled better?

FREDRICKSON: Before I get into the specifics of the Kavanaugh process, I do think it's really important to put this in a bigger context. And that is the process by which this White House and the Senate Republicans have approached judicial nominations generally and looking back to President Obama's final year in office, when Justice Scalia died.

And there was a vacancy created on the Supreme Court, which, in every other presidency, would have enabled the President to fill that vacancy. But because Senator McConnell, who is the Republican leader, had been basically obstructing every opportunity that President Obama had to fill any judicial vacancy for two years, they declared immediately after Justice Scalia passed away that President Obama would not be able to fill that vacancy, no matter whom he nominated.

And President Obama, being President Obama, a great conciliator, somebody who tried to reach across the aisle frequently — some people might think too frequently or naively; and perhaps particularly so in this case — nominated a wonderful judge named Merrick Garland, who is a wonderful judge, but is definitely one of the more moderate members of the DC Circuit on the older side — a white male — and really trying very hard to bring along the Republicans, all of whom had served in the Senate when Merrick Garland was nominated to the DC Circuit. Who had supported him, and in fact, had even said very affirmatively before Barack Obama nominated Merrick Garland, that if he were to nominate somebody like Merrick Garland, well, of course, we would support him.

But once it was, in fact, Merrick Garland, they couldn't support Merrick Garland. So, I'm giving you a little of this context. Because I think it's important to understand how bitter the Democrats were; how very much the Democrats felt and many people feel, that the Gorsuch seat was a stolen seat and that the Supreme Court's makeup is illegitimate.

Because the person who should have been on that Court should have been Merrick Garland. And yet, it wasn't. So, there's a lot of anger and distrust that permeates this whole process. So then when you get to Kavanagh, the system had really broken down even further. Because the President had been told by McConnell, "Don't nominate Kavanaugh." Kavanaugh was not on the original list.

Because Brett Kavanaugh has a record that included millions of pages of documents that were at the National Archives. Because he served in government for so long and had been in the White House Counsel's office in the Bush Administration in a time when the President had expressed an incredibly extreme view of presidential authority, which involved signing statements that suggested that over 1,000 provisions of federal statutes that Congress had passed were unconstitutional, and basically saying, "I don't have to abide by these."

Brett Kavanaugh was involved in all of that. He also worked on the impeachment of President Clinton, the Starr Report, and so forth. So there was just an incredible, massive amount of documentation that, in any other circumstance would have been produced to the Senate, would have been object for the Senate to spend a lot of time researching to get a better sense of who is Brett Kavanaugh, what he's been involved in.

That was not produced. So let me just say how illegitimate this was that, not only did the Republicans not allow those documents to be produced—the National Archives said they could do it, it just was going to take them a little bit of time; they said, "We can get this smaller amount

of documents for you by six weeks from now." But even that, Senate Republicans refused—and the White House.

And instead, they put in charge of the process a White House operative named Bill Burke, who in the Bush White House, had actually worked for Brett Kavanaugh. He worked for Brett Kavanaugh, so was involved, most likely, in a lot of the most controversial decision making that Brett Kavanaugh was involved in.

So think about somebody who is very self-interested in making sure that the documents that might implicate Brett Kavanaugh in any type of illegal actions by the Bush Administration— remember the torture issues; detainees; illegal, warrantless wiretapping—this was all the kinds of things that Brett Kavanaugh was likely involved in and Bill Burke, as a result, was also involved in.

So they called out of this much, much, much more massive trove of documents a very, very, very limited set of documents, pre-approved by Bill Burke and the White House and given to the Senate. And the Democrats barely got to see those. I know this is a long answer.

But I think it's just a sort of—we haven't even gotten to the sexual assault issues—but we're already at a place where building on all the anger and distrust about the Merrick Garland process—but now you have a situation where the nominee is shrouded in mystery. So that produces even more doubt. Because people were wondering, "Well, what's there? What are you so afraid of?"

PROFESSOR KIBEL: So I think the comments you are setting up are completely relevant. And I appreciate it. I guess, if you can speak directly. Both across the political spectrum, there were people who felt that the way the Senate confirmation hearings proceeded were unfair or maybe, disrespectful to Dr. Blasey Ford. There were also people on the Right who felt that it was unfair in some ways—the timing of it, the nature of it—to Brett Kavanaugh.

I'm just interested in hearing your thoughts—in light of what you just explained—about the process itself and what your views are of it in ways, given the allegations that were made, how it might have been handled better?

FREDRICKSON: Right. I think most of you probably recall — I mean, we're all kind of riveted on it—there were actually several women who came forward and in support of Dr. Ford or with their own allegations. And it seemed like a critical matter to get to the bottom of. And Senator Flake, Republican from Arizona, asked for an FBI investigation.

However, again, it was in form, but not substance. Because they also imposed great limits on the FBI. They did not actually talk to most of the

people who were named to support the statements of these women, just a very small portion of the people that Dr. Christine Blasey Ford mentioned, and then not exploring the charges brought by any of these other women, and done in a very short fashion — produced to the Senate, I believe, the day before the vote in a single copy for all the Senators to see.

They have to go to a secure location one by one to read it. So is this process fair? I think it was a circus. It was so obvious—the more I talk about it, brings back so many bad memories. I just, you know, I would love for a moment, if we could change this whole process, and have a system where our judges were chosen in a rational way to be people who were committed to upholding the values of the Constitution and interpreting the law in a way consistent with the core understandings of legal interpretation, and that it wasn't this terrible system.

But I have never seen anything like this. And I have been involved in a lot of judicial nomination battles. But I think what happened with Brett Kavanaugh—one of the reasons I think he's going to bear a stain for however long he serves on the Court—is that no one—very few people—are going to think that he's there entirely legitimately. Because there's so much we don't know. And yet, and it may still be, and is very likely to happen, that the documents that were not produced will be made public at some point in time.

And we will start to actually know what Brett Kavanaugh was involved in. And when you have a Supreme Court who then—when one finds out who has had his fingerprints on all of these kinds of decisions—I think that's going to be a profound moment for us to think through whether we have a process of selecting Justices that is rational or appropriate.

PROFESSOR KIBEL: So to segue from that, I'm going to skip over one of the comments. Because you already hit on it in terms of the FBI investigation. But after Brett Kavanaugh testified, there were certain statements that were made and, sort of in the context of Dr. Ford's allegations, that he viewed the whole presentation of the allegations as part of a larger Clinton-inspired conspiracy and listed a number of people that he thought were associated with this conspiracy to attack and discredit him personally.

And after watching this, retired former United States Supreme Court Justice John Paul Stevens issued a public comment, which was somewhat controversial, which was that having watching Kavanaugh's response to the allegations—particularly laying out this conspiracy theory—that he thought that Kavanagh lacked the temperament and im-

partiality to serve on the U.S. Supreme Court; this coming from a former U.S. Supreme Court Justice that was appointed by a Republican president.

So I guess my question for you, and it's a pretty open one: Essentially what do you make of Justice John Paul Stevens's comments? Do you think that they were appropriate under the circumstances? And how do those types of comments speak to the point you just mentioned, which is, you just called it a, "stain"? But do statements like that during the confirmation process really go to the credibility of Kavanaugh as a Justice, and maybe more importantly, the Supreme Court and the judiciary as an institution? Is that a narrow question?

FREDRICKSON: It is. And I think what Justice Stevens put his finger on was something that was very troubling to people who watched the hearings. And did all of you watch the hearings? Yeah. So it was deeply upsetting in so many ways to see Dr. Ford testify—the trauma. And to have Brett Kavanaugh react in a way like he was a victim and his tirade, I think, was very off-putting to people who don't expect that.

If you've watched judicial nomination hearings, particularly Supreme Court hearings, the nominees make an enormous effort to be very calm, to exude judicial temperament in the process, and not to be petulant or angry or indulge in a tirade. And so I think it was just—for people whose expectations were really upset—and I think what Justice Stevens was reflecting was, "We're not comfortable with somebody who is going to sit on the Supreme Court who behaves this way in front of a nominations hearing.

What does that bode considering what we are used to? So I think a lot of it was just expectations about how judges behave and even if subject to questioning that, some people might feel, was unfair or, you know, the allegations—perhaps not everybody thought that it was appropriate to bring those forward. Even so, I think just the demeanor was deeply upsetting to people across the spectrum.

PROFESSOR KIBEL: A final question I have and then we'll open it up, as a result of the November 2018 elections, the Democrats are now in control of the House of Representatives. And some of the Democratic members of the House have indicated their intentions to hold hearings related to Justice Kavanaugh—in particular, hearings possibly related to whether he perjured himself as part of the Senate confirmation process. And that may be separate from what you mentioned about using the hearing process possibly to get in some of the documents that weren't disclosed.

But what I was interested in hearing from you about is: What do you make of the prospect of the House holding hearings on a sitting Justice

on the Supreme Court about whether he perjured himself during his confirmation process? And it's sort of two-part. One is: Do you see any precedent for that type of hearing by Congress or the House? And how might that hearing speak to the issues that you said about the legitimacy of Kavanaugh as a Justice or the institution of the U.S. Supreme Court?

FREDRICKSON: Well, I'm not laughing because it's a funny topic. I'm just thinking about all the investigations that the House is doing right now. I'm not sure when they're going to get to Kavanaugh. And they may have bigger fish to fry. I'm actually testifying myself a week after next for the House Judiciary Committee on the pardon power.

So their focus right now is on other issues: the role of whether tax returns should be produced by the President or other matters. So I think it's an interesting question. It's rather unprecedented. Although there was a process of impeachment against a Supreme Court justice very early in the new republic. The justice was actually acquitted and stayed on the Supreme Court.

I think it's troubling that Kavanaugh may have perjured himself. Whether or not this is the appropriate way to remedy it, I don't know. I think it raises a lot of questions about how politicized do we want our court system to be. Do we want to open that Pandora's box of impeachment for justices? Where will it go?

I can certainly see people on the Right who want to impeach justices who support women's access to reproductive care. Will it become a substantive process? I don't know. I think it has not been indulged by Jerry Nadler, the Chair of the Committee, I don't believe. But he's laid out a whole list of priorities. I don't think this is up there or in there at all.

So if the Democratic president wins in the next election and the House remains in Democratic hands, would they have hearings? They may well have hearings. Would they start an impeachment process? I'm still thinking it's pretty unlikely.

PROFESSOR KIBEL: We'll open it up to questions. But I wanted to make one comment. Because it links part one to part two. One of the things that I find interesting is, if the House Democrats were to call for these hearings and potentially proceed with impeachment, that would potentially provide precedent for a Republican-controlled House to do that against appointees by a Democratic president.

So when you switch the roles the question you have is: Is this a precedent? And I think it relates to some of the discussion we'll have in part two about executive authority and why some traditional conservative voices are somewhat concerned about President Trump's expansive view

of presidential authority. Because they recognize at some point in time, you're going to have a Democratic president back.

And any precedent that you establish for expansive presidential authority is not going to be limited to conservative presidents. It's going to apply. So there are some complex issues. But with that, looking at where we are timewise, let's spend about ten minutes opening it up.

And I ask for right now, if you could focus your questions about the confirmation and appointment process. We're going to have a second opportunity for questions related to matters of jurisprudence related to Justice Kavanaugh. So let me open it up now. If you can identify yourself.

JOHN GALLENGER: I'm John Gallenger. I'm an alum here. And I teach election law. I think it's unlikely this president would call you for advice. But the next president might, as Professor Kibel alluded to.

So in a scenario where the next president has made an appointment that he [unintelligible] is a good appointment on all the issues—one of our Supreme Court Justices from California perhaps—and something similar emerges during the confirmation process; someone comes forward, whether it's a sexual assault allegation or something else that's [unintelligible], and the President called you the day after that. Would you advise the President to immediately withdraw or stand behind the nominee? What would your advice be?

FREDRICKSON: You know, I think it's really important to make sure that we take allegations seriously. I think we're all reeling somewhat from what's been happening in Virginia. And I don't think Progressives want to be hypocritical. We can't be. It shouldn't be hypocritical on these really important issues on whether there has been behavior that violates someone else's liberty, personal autonomy.

And so they have to be taken very seriously. Whether that means absolutely the minute somebody says something, withdrawing. That seems like the wrong response. Because it would offer too easy a target for people who oppose the nominee for substantive reasons to dredge up somebody who might say anything. However, saying that, I do think there has to be a real investigation.

And I think what we saw with Dr. Ford was that her allegations did not get taken seriously by this White House and were not explored. If they had explored them, if there had been a real investigation, and it had been shown that no such thing has happened, then I think, the stain would have been removed on Brett Kavanaugh. But I think we have to live our values.

And I would never recommend to a president to ignore allegations of sexual assault against a nominee. I was actually, like the Dean, an employment and labor lawyer before I went to work on the Hill. These issues are very important to me. And some of you may have been at a book talk I did a couple of years ago on my book, "Under the Bus: How Working Women Are Being Run Over," which explores a lot of issues around race and gender in employment, particularly.

And I was the General Counsel and Legal Director of NARAL Pro-Choice America. I'm absolutely committed to gender equity. And I would certainly hope that any president who would call me for advice would be similarly committed. So I hope that answers your question.

STEPHANIE: My name is Stephanie. I'm a 1L here. You had mentioned that if documents were released in regards to [unintelligible] what Kavanagh has been involved in that that would lead to more initiation for the Senate or for the courts to change the process of selecting justices. Why is it that numerous sexual allegations haven't been able to do that? Why is it that we need those documents to come out?

FREDRICKSON: Well, I think, maybe, not quite exactly what I said. Number one, it's important to have a thorough review. For somebody who has a lifetime appointment—where we've never impeached a justice—sitting on a court that, I think, is so enormously powerful—perhaps more powerful than it has ever been in terms of the impact on the American system of government, democracy, and personal autonomy. So the idea that we confirm somebody with having less than a tenth of the documents that were available is extremely troubling for any normal process and has not been allowed to happen in the past.

The issue with Kavanaugh was just that the volume of documents was enormous. . That was their problem; they picked him. And they shouldn't have denied Senators the ability to review his record. It's his record. Just because it was big, they shouldn't take it off the table. The issues of his personal conduct are separate and a separate reason to raise concerns about him.

Again, it might have been that they went through all the documents and found out that he never worked on any of the troubling issues. Or he never perjured himself, which is one of the allegations about when he was nominated to sit on the DC Circuit. He was asked about his involvement in decisions by the Bush Administration. And it seemed like he actually said things that were not true.

And so there were concerns that he already perjured himself in his prior hearing. And so without all those documents, it was hard to know what he'd been in involved in and whether he had already lied about it.

The personal allegations were a totally different set of issues. They're separate problems for him. And you can't just sort of say one didn't work, and so therefore, the other.

I think you have to remember that these are two very different areas of concern that were raised about Brett Kavanaugh.

JOE HUTCHINSON: Joe Hutchinson. I'm a 1L. In light of Justice Kavanaugh's accusations that there was some kind of conspiracy going on, did you find it alarming at all that all of the sexual allegations against him were dropped?

FREDRICKSON: No, actually; not at all. What I find alarming is that Dr. Ford is still in hiding. She's actually still under personal death threats; has not been able to get back to teaching. And I'm very close to somebody who has been regularly in touch with her who also had worked with Anita Hill.

So I think if you look at what happens generally, very few allegations of sexual assault are actually brought forward by women particularly, but by all who were assaulted. They're not necessarily actionable legally at the point they were brought forward. These women weren't expecting him to go to jail. I think they were really concerned about the idea that he might be on the Supreme Court for the rest of his life and have the ability to affect all of us in ways that are very hard to remedy.

Apart from a constitutional Amendment, Congress can do very little. And even if it's a statutory decision, it's very rare for Congress to overturn the Supreme Court. So actually, no. I think the legal process versus whether he should be a justice—we weren't engaged in a courtroom. He wasn't on trial for rape or sexual assault. The question was: Should he have this incredibly privileged office of being a Supreme Court justice when there are these blemishes on his character? I think it's a totally different set of questions and a totally different standard.

PROFESSOR KIBEL: We'll take one more.

GABE: I'm Gabe. I'm also a 1L at Golden Gate. And my question is with regard to the nomination process itself and appointment of justices. In an area where we hope to minimize politics and have a review of our laws, is there a way that you see, absent a constitutional Amendment, to make that happen and avoid situations like we had with Garland, and now with perhaps Gorsuch and Kavanaugh, to where their presence or lack of presence on the Court is a direct result of politics?

FREDRICKSON: Thank you. That's a great question. Actually, there is a lot of discussion about possible reform ideas for appointment of judges and justices. There are many who would argue that there should be term limits for Supreme Court justices, some for all of the federal judges, including Steve Calabresi, who wrote a law review article with a more liberal scholar about term limits.

And one of the reasons is that in past times, serving on the Supreme Court was sort of the capstone of a career. It wasn't your career. You don't get nominated fairly young to serve on the Supreme Court. Like Earl Warren, he had already been governor of California. He'd had this incredible record of achievement. And he went up to the Supreme Court as sort of an elder statesman. Then, the average time of service was eighteen years.

It's now become such a long period of time that justices serve really out of whack with the way it has been traditionally. So Steven Calabresi and another law professor had proposed these 18-year terms. He thinks it should be, or needs to be, a constitutional Amendment. But many others argue that it doesn't need to be—a lot of constitutional law professors; and you're probably familiar with all this discussion—who think that actually, there is no reason that you couldn't create a senior status for Supreme Court justices, just as there is on the courts of appeal—on the trial courts in the federal system.

And you could keep the nine—nine by the way, not in the constitution; just FYI, it's just a statute that sets the number—so you could have your group of nine refreshed regularly. And then the ones who go onto senior status. after a period of eighteen years could go off and ride the circuits. So there's a whole literature about different ways to depoliticize the process.

You could take the decisions about which cases the Court hears away from the justices and their clerks who have become more and more political over years and make that a decision of a group of judges drawn from the circuit courts or a group of law professors and judges. There are lots of different ideas about how to approach this.

But I think there are many people, certainly among those that we work with—many academics—who are thinking really that the system [Laughs] is not functioning very well. Progressives don't want to just do the mirror of what the Right did and jam somebody down, somebody who doesn't have the respect or support of many. Ruth Bader Ginsburg, for those of you who watched RBG, you know she got ninety-three votes in favor.

As Oren Hatch said in the documentary, "I didn't agree with her on many things. But she was certainly qualified. And that's the President's

prerogative." And so she serves on the Court without this cloud hanging over her head—that she shouldn't be there because the process was warped. And I think it's very unfortunate. And you see the stature of the Court going down and down in the views of the American people. Because they see this process.

And they see the nominees as not being exactly legitimate or being just as much political players as Senators and House members and the President. So it's something I'm very interested in. We have a lot of literature on it. I would encourage you to look at it. I'm very hopeful. Because as I said, I find the process pretty sickening. I would rather spend my time on other things than an increasingly politicized, nasty, partisan process to choose people who are supposed to be impartial and neutral. [Laughs] It really is not the best way to do business.

PROFESSOR KIBEL: We are going to move onto part two. We are going to leave matters of confirmation behind and move onto matters of jurisprudence. We have a pretty meaty list of topics. I'm not sure we're going to be able to get to all of them. But we will start.

Matter of jurisprudence number one: originalism. Without getting too far into the jurisprudential weeds, originalism is a school of jurisprudence that was certainly embraced by former Justice Antonin Scalia, also embraced by current Justice Clarence Thomas.

It's an approach that holds, in general, that where you have constitutional language that is fairly open and is susceptible to multiple interpretations, and you are a judge reviewing or interpreting that language, the judge should select the interpretation that is most consistent with the understanding of the people that initially adopted it. That you go back to that period of time, and that's the interpretation.

So the question that I have for you—and I'll start with a fairly open question, and maybe we can get more specific—is: What are the indications that Justice Kavanaugh will embrace an Originalist approach? And how might this affect some of his decision making?

Before we get into it though, I want to bring in the discussion that we had on the phone as we were preparing for this, which I think is somewhat relevant. One of the things that Caroline talked about when we were planning this was an interesting question—and I'll pose it to all of you; and maybe you'll pick up on it, if you want—is: Were the Founding Fathers Originalists?

Or framed another way: Did the Founding Fathers desire or expect that their particular notions of what the constitutional language meant should be controlling on future justices? And I think where this conversation came up is [that] there are certain provisions in the Constitution

that are very precise, right? Federal courts have subject matter jurisdiction over diversity and federal question.

They weren't vague about that. They were very specific. Issues of how many representatives each state gets, or how many Senators each state gets, or the way the veto process works—the drafters of the Constitution were very clear and precise in those areas.

And yet, in other areas, they chose language like "due process, right to bear arms, freedom of the press"—much more open language. And I think what this raises a question of is: Was the choice of using that more open language that was not defined in a precise way an indication to provide latitude to future judges to interpret those terms as they deemed appropriate in the context of their times?

Because if they had wanted to lock in a particular meaning, they could have done so. And they didn't. So I'll let you answer this question with one last comment. I was with my daughter who just turned fourteen. And she's reading *Romeo and Juliet*. And we were noticing as we were talking about it, that Shakespeare in general, as a playwright, provides very little direction in terms of stage direction or costume.

He cares about his words a great deal. But in terms of how you produce it, no. So when people say, "Well, are you putting on the play in a way that is true to Shakespeare?" Shakespeare didn't have any particular notion of how you were supposed to produce his plays. That's sort of reflected from the way he wrote his plays. So with that question hovering out there . . . .

FREDRICKSON: I seem to remember one very famous stage direction was something like, "Exit, chased by a bear."

[LAUGHTER]

PROFESSOR KIBEL: What type of bear?

FREDRICKSON: I don't know. [Laughs] It was in *The Winter's Tale* or something. Anyway, great question. As you said, there's no real indication that the Founders were Originalists. In fact, to the contrary, Thomas Jefferson said something exactly to the opposite: that we basically shouldn't have the dead hand of history determining what we should do in the future. And that we should be renewing our Constitution at regular intervals; I think he said every twenty years.

And in fact, it's instructive to think about what Chief Justice Marshall said. "It is a Constitution we are expounding." Meaning very much, that it's the role of judges to—certainly judicial review—that it's not a statute book. It is an inspirational document meant to set the general

values to guide judges in our nation in how the laws would be adopted and implemented, but very imprecise on a lot of issues.

And the irony with those who call themselves, "Originalists," is that they attempt to lock down this vague meaning; meaning in areas where it's convenient—say the Second Amendment; the right to bear arms—while ignoring the language at the beginning of the Amendment. And Justice Scalia actually said, "Well, it's just whatever—verbiage." You know, "The militia clause—surplusage." I can't remember the exact word he used. But basically, ignore the man behind the curtain. Just pretend that didn't exist.

And yet, historians could tell you that the states were very concerned about their militias being disbanded. And therefore, that language was really important to them. Because the Second Amendment was about their militias and the preservation of the independent militias against what they feared was an overly strong federal government. And so you could spend a lot of time—and I can find my historian, and you can find your historian—and we can debate without ever finding evidence that James Madison said, "My dictionary is better than your dictionary."

And therefore, we should append that to the Constitution. "I'll only look at Webster's, as opposed to the Oxford." Whatever. So anyway, that all being said, Kavanaugh is sort of originally, an Orginalist-ish. He's not given lots and lots of speeches about it. But I think you could say he's generally a follower of that approach. But again, it's something of convenience. And when it works, you use it. When it doesn't work, you abandon it.

And I think the Fourth Amendment is a great example of how this plays out generally with Originalists. So Randy Barnett, who is a well-known law professor—expounder of the Originalist approach — does say that it's actually kind of hard to apply Originalism to contemporary questions. [Laughs] Well, okay, except the ones that you think we can apply them too, right?

So in the Fourth Amendment context, somehow, you can draw out of the protections that existed in the Fourth Amendment—your house and personal effects—from government intrusion. And we can say in the modern times, "Well, it's logical to extend that to your cell phone or GPS tracking, or if you grow marijuana in your basement, when the cops come by with their thermal imaging systems and determine whether you have a heat lamp in your basement."

It's probably not a problem anymore in California. [Laughs] It's all legal here. But just to say the conservative justices thought that was fine. And somehow that's not living constitutionalism? That seems to me that is exactly what the more progressive constitutional law scholars would

say, which is [that] you look at the principals behind these provisions: protection of your personal autonomy from government intrusion and that should protect what's on your computer and maybe your body and so forth.

I think that's one of the reasons that Originalism is critiqued so easily as being very outcome-oriented and basically, only ever produces conservative outcomes.

PROFESSOR KIBEL: So apart from general critiques of Originalism, given what you know about how Brett Kavanaugh approaches it, do you see certain types of issues—constitutional or otherwise—where you see him (whether you agree with it or not is a separate question) but where you anticipate or see him applying an Originalist approach to those issues or constitutional questions?

FREDRICKSON: You know, I think it's sort of an ad hoc — he's not been extremely doctrinaire. And so I think he is going to be in the same camp that Gorsuch is in, that Scalia was in—that when it works, it works, and when it doesn't, you abandon it. Not like Clarence Thomas, who is sort of uniquely almost consistent in his approach to—he wants to throw out every precedent that he believes is inconsistent with his view of the Constitution. It's a very radical idea.

A lot of you are 1Ls? Any 2Ls or 3Ls? So you've spent some time talking and thinking about stare decisis and sort of the way that the common law develops. One of the things I think is very frightening about the kind of people who consider themselves, or call themselves, "Extreme Originalists," is their willingness to abandon that approach to the evolutionary process of the law; something that gives our legal system stability, gives litigants some idea of what the law says.

It is profoundly an element of rule of law. People know when they go into a courtroom, the law that the courts will apply, and somebody like Clarence Thomas will just throw that out the window; and it doesn't matter how old the precedent is or how long it's been relied on by courts subsequently. If he thinks it's not consistent with his view of the Constitution, it's got to go no matter what impact that has on the legal system.

Kavanagh is not like that. I mean, he's more consistent in wanting a conservative outcome. If originalism works, he'll use it. If it doesn't, he won't.

PROFESSOR KIBEL: We've got a couple questions here. I'm going to turn to one about presidential authority, just to make sure we get into that. Another important constitutional question that comes up is the issue of the scope and limits of presidential authority. In terms of Neil Gorsuch,

who also at times is an Originalist, my understanding — you can correct me here — one of the tenants of Gorsuch's originalism is that he thinks the Founding Fathers were particularly concerned about excessive presidential authority; essentially, the prospect of the president becoming a king that was above the law.

So Gorsuch is an originalist that ends up, at least in some of his scholarship, taking a somewhat limited view of executive branch authority. Because he thinks that's consistent with the Founding Fathers. My understanding is that—at least in his legal career, some of his opinions, but also some of the work he did in the Bush Administration—Kavanaugh is an Originalist that has not come to the same conclusion as Gorsuch and actually used executive authority very expansively.

We'll talk a little later about the border and more specifics. But to open it up more generally, do you see potential tension or clashes between Gorsuch and Kavanagh on this issue of executive branch presidential authority—a rift within the conservative wing of the Court?

FREDRICKSON: Yeah. Well, I certainly hope so in part, because I think there's so much at stake. The Supreme Court may have cases in front of it that deal with the Mueller investigation. And I think this is going to be a very important question to see if the conservative justices all step up to protect the President at the expense of checks and balances, at the expense of rule of law.

Will Gorsuch break? I don't know. I hope so. But I think it's really important to note what tradition Brett Kavanaugh comes out of. There's something called the "Unitary Executive." Have any of you encountered this? I see you have. So you know this is a view, as expounded by Steve Calabarasi, that all executive power resides in the president.

And therefore, everything that happens in the executive branch must be determined by the president; that is, he can hire and fire everybody. Congress has no ability to delegate to these administrative agencies. There's a whole set up building up of the presidential power in an extreme way that is very controversial, especially because the Constitution does not say all executive power shall be vested in the president.

And even the original Constitution separates power, not just between executive, judiciary, and legislative, but also among the branches there are different—and at the time the Constitution was created, there were prosecutors that were run by judges— that were appointed by judges. There was a whole array of ways that things were mixed constitutionally.

But this vision means that the Congress can't put any limits on the President's ability to fire somebody. So creating an independent prosecutorial model, like a special counsel, is very illegitimate under that

view. And so that's where sort of this tension will come up. Is the investigation legitimate? Could the President simply terminate Mueller or any of those others without process?

And I think that case may well be coming. Does the President have to respond to a subpoena? Is the President, in fact, above the law? I think, as you said, the possibility that Gorsuch—and I think it's self-evident, personally—that one of the reasons we had a revolution was to not have a king, was to not have somebody with absolute power, but in fact, have a democracy subject to checks and balances.

I think Kavanaugh's view is very frightening and is not just a-historical, but is actually contrary to a fundamental understanding of what gave rise to the American republic.

PROFESSOR KIBEL: So I'm going to segue from that more general discussion about executive authority to some more current events dealing specifically with the fall. And I may encourage you to speculate a little about what you know about how Kavanaugh might approach this. As many of you know, last month, Congress did not provide full funding for the border wall with Mexico.

President Trump issued a national emergency declaration where he indicated that he was going to reallocate certain funds from the military and the Defense Department to make up for the shortfall to complete the border wall. What is interesting to note—and I will welcome your thoughts on this Caroline—in connection with Trump's declaration of the national emergency to complete the border wall, many leading conservative voices, not ACS, have taken the position that the President's use of a national emergency declaration to complete the wall is inappropriate.

And the two that I wanted to mention specifically are the magazine *The National Review* and the Cato Institute in Washington DC. In February 15, *The National Review* wrote that President Trump's national emergency declaration, "Is the proclamation of the monarch, not an argument by a president." This gets back to King George III. "And that it should fail in court."

The National Review article went on to state, "A border wall is a civilian structure to be manned by civilian authorities to perform a civilian mission. The troops would not be creating a military fortification for military Use. Not only is the wall not military construction, it's also not necessary to support the Use of armed forces, unless one wants to make the fantastical argument that the wall somehow protects the troops who are building the wall."

The Cato Institute, a well-established conservative voice, wrote also on February 19, 2019, an article on it at the Cato At Liberty blog: "No reasonable person can look at the southern border and agree that it rises to the level of a national emergency." The Cato Institute article continued, "The most common argument in favor of the national emergency is that there is an epidemic of immigration-induced crime and death on the border. This is simply not the case. The crime rate in the twenty-three counties along the U.S. border with Mexico is below that of the counties in the United States that do not lie on the border."

"Violent and property crime rates are both slightly lower along the border. And the homicide rate along the border is 35 percent below the homicide rate in non-border counties. Resident illegal immigrants are less likely to be incarcerated or convicted of crimes than native-born Americans. The estimated illegal incarceration rate in 2016 was 47 percent below that of native-born Americans."

Where I'm going with this is, one, I'm curious to hear about the extent to which ACS as an organization is actually collaborating, or in discussions with, groups like the Cato Institute and *The National Review*, with whom you often don't align.

And two, as you think about a case coming before the Supreme Court over, essentially, whether this national emergency using these funds in this way is constitutional. And Justice Kavanaugh—how does information like this coming from the Right, *The National Review*, the Cato Institute affect—we're obviously speculating—the way a justice like Kavanaugh would approach this question?

FREDRICKSON: Well, it's a very good question. And it is important to understand that these pubic expressions of concern are really rather new for many on the Right, particularly *The National Review*. Cato is a little bit different. And if you're not familiar with Cato, it's a Libertarian organization. It has always stood a little bit apart from the Republican Party. It was outspoken in favor of gay marriage.

And immigration is another place where it's an organization that we've been able to work with. *The National Review*, however, is generally extremely conservative on pretty much everything. So that was very interesting to see expressions of concern coming out of that quarter.

But I think what we're seeing is that, for these conservative organizations that have been identified with the idea that we should have a small government, that we're worrying about overweening power—even if they think that perhaps, in the constitutional structure, the President is stronger than we might think the President should be—the federal government still should not be that enormous and powerful.

And I think looking at a president able to override traditional separation of powers—that the Congress is the body that appropriates and determines where money goes; it's the classic determination of what the Congress does is the budget, and that the President can simply ignore—I think is very troubling to them.

So I think it may give some ability for the conservative justices to feel a little bit more empowered to start to question the President. In the travel ban case, they didn't do that so much. So we'll see. But even if the justices don't, there's a lot of unease among those on the Right who are really worried about where this could be going.

The idea that a president could redo the appropriations process and ignoring—in this situation we have here is that Congress was in the Republican control for two years of Trump's presidency and never funded this wall, despite Donald Trump asking them to; so basically, rejection of that funding demand. So we have a direct clash here. It remains to be seen.

I think Kavanaugh himself has expressed extreme deference to presidential authority and this idea of the Unitary Executive. Whether Gorsuch or John Roberts is willing to go along with that, that's where your questions are.

PROFESSOR KIBEL: We don't know. And obviously, some of the concerns that we're seeing here are related to any precedent that would be established by upholding President Trump's ability to do this with the national wall could be relied on by a Democratic President for other national emergencies. I think Nancy Pelosi hinted at nation gun violence — we think that's a national emergency.

FREDRICKSON: Climate change.

PROFESSOR KIBEL: Climate change. So there's some recognition that the argument, while it may support a Republican president now, could establish a precedent that would run.

FREDRICKSON: And in areas where you actually show there was an emergency.

PROFESSOR KIBEL: Yeah. So I'm going to skip ahead to our fifth topic, partially because of time. But partially because I think it relates to the executive. And this relates to the issue of judicial review of administrative agencies. And this is actually a little more in my wheelhouse. Because I deal with natural resources and environmental agencies and the relationship of judicial review of agency actions and being part of that.

So as some of you may know, particularly those of you who've taken environmental law or some courses involving administrative law, about three decades ago there was a decision, *Chevron v U.S. Supreme Court*, which focused on when federal agencies are interpreting statues where the language is arguably somewhat ambiguous or susceptible to multiple interpretations, what should be the role of judicial review in reviewing those agency interpretations.

And what came out of the *Chevron* case is what's known as the *Chevron* doctrine or *Chevron* deference, which is essentially this: that if the agency's interpretation of an arguably ambiguous or open statute is a reasonable one, the reviewing court should not substitute its own view for the agency's. That is the deference part of it. And in some sense, because these are executive agencies, especially if you adopt a Unitarian view, this is the executive branch interpreting it.

Sorry to keep pitting Gorsuch against Kavanaugh. But it's very convenient. Justice Gorsuch has done a fair amount of scholarship and some concurring and dissenting opinions indicating that he is somewhat uncomfortable with *Chevron* deference. And he questions whether it's appropriate for courts—judges—to delegate to agencies the task of interpreting statutes. He's gone so far as to suggest it may actually be an unconstitutional abdication. Not quite sure where he is on that.

But I guess my question on that in terms of Justice Kavanaugh . . . . Obviously, a lot of the work of the government is undertaken not by Congress; it's undertaken by the agencies that implement these statutes. What do we know or what do you think might be Kavanaugh's approach to this issue of judicial review of agency actions and interpretation and the viability of *Chevron* deference?

FREDRICKSON: It's an important question. And actually, they are very aligned. Kavanaugh has been extremely critical of *Chevron* deference. I actually have a quote from him. He wrote an article in the *Harvard Law Review* where he critiqued explicitly the *Chevron* doctrine. He gave a speech at Notre Dame. He said, "The *Chevron* doctrine encourages agency aggressiveness on a large scale." So the Unitary Executive theory is inconsistent with deference to agency decision making.

Because agencies were given this role by statute to be able to flesh out—you don't want Congress to write statutes that are going to lay out every single provision in terms of what the EPA should do to understand how many parts per billion of some kind of a chemical you can have in the water, and you can still meet the Clean Water Act tests.

So Congress writes the statutes and leaves to the agencies to draft regulations based on their expertise and understanding of what Congress

was intending. So the critique of *Chevron* is that it was inappropriate. Congress cannot create this system where the agencies have the power to interpret statutes apart from what the President wants them to do, right? So it is sort of the flipside of the same understanding of the strong role of the presidency and that can't be divided and undermined by this kind of independence of these executive branch agencies.

So the two of them are quite consistent together on this. And I think for those of us who believe that many of these statutes that have been interpreted by the agencies, including the Clean Water Act and the Clean Air Act, worker protection areas like the OSHA Act—Occupational Safety And Health—that it's critical that you have this expertise in the agencies to be able to determine, and with greater specificity than Congress can, how to protect people to make sure that children aren't going to school with lead in the water system, that the air we breathe is relatively clean, and that workers aren't working in incredibly dangerous conditions in a factory.

So this is an area where these extreme views are going to clash with what the vast majority of Americans expect their government to do. We've benefitted so much from these vital statutes—you know better than anybody—the Clean Water Act. It used to be that rivers would burst into flames in this country, before the Clean Water Act was passed, from industrial waste. We've done a lot to repair that. And this extreme view would undermine the agency's ability to do that.

PROFESSOR KIBEL: I think, based on my experience with the *Chevron* doctrine, one of the interesting aspects is the way it cuts both ways politically. So when I was in law school, learning about the *Chevron* doctrine, it was the case *Chevron—Natural Resources Defense Council v. Chevron*—was a situation where the agency had interpreted—this was in the Bush—I—Reagan Administration—the statute such that it limited environmental protection.

So the view was that Chevron enabled a Republican administration to interpret environmental statutes narrowly to undercut environmental protection. But what was interesting to watch under *Chevron* is that the Clinton Administration came in. And they issued regulations. And *Chevron* deference actually upheld those. So it actually didn't really end up being a Left-Right issue.

And what I think is interesting is that if you think, "Okay, you're opposed to *Chevron* deference," well, the Trump Administration right now is busy issuing interpretations of statutes to which a court should have no deference. It should substitute its own view. So regardless of which side you—you may have different views.

FREDRICKSON: I disagree with that, actually, and fundamentally. Because I think that the role of government is seen so differently by Democratic presidents and Republican presidents. And to have an effective administrative state that actually was able to provide these protections for the environment and so forth, certainly there are going to be some examples where *Chevron* cuts the other way.

But I think that the construct of deference to the expertise in the agencies generally is protective, as opposed to—and I'll say this, because the way that the courts have approached Donald Trump's efforts to undo regulations has actually been very critical in most places. Because what they're just tried to do is ignore the facts and just repeal the regulations.

You actually have to go through a whole process. You have to have data under the Administrative Procedures Act that has some rational basis for why you're making the changes. And they haven't bothered to do that. So they've gotten caught up thinking—again, sort of the imperial presidency at work—but this Administration has not felt that it needs to abide by that kind of rule making process.

And so for those of you who are ACS members, which I hope means is all of you, we've actually been engaging our chapters, our members, and a lot of students particularly to participate in the rule making process by filing comments as this Administration has tried to change the rules around a whole variety of issues and women's healthcare, and particularly Title IX, Title X regulations, for family planning and so forth.

Because it's really important to express the views of how these statutes should be understood, what the regulations should look like. Because they actually have to look at these comments. And they have to account for them. Even if they are going to say, "I disagree with it," they can't just say, "I disagree with it," and that's the end of it. They have to say, "I disagree with it. And here's why."

It might be that their arguments aren't very persuasive. But they actually have to put some data in there. So it's sort of a long answer. But I think that's why the *Chevron* case has elicited much more critique on the Right than on the Left.

PROFESSOR KIBEL: So, we have five topics. But I'm looking at the time. And I'm going to cut to the last one so we have time for questions. And it returns to some of your earlier work before coming to ACS.

I wanted to ask you some questions about abortion and women's reproductive rights. So February 2019 US Supreme Court decision in *June Medical Services vs. Gee*, Justice Kavanaugh, in one of his first opinions on the Court, issued a dissenting opinion that advocated for

upholding the Louisiana law that imposed limits on when abortions could be performed.

So, I guess my question for you, using the *June Medical Services* case as a starting point, is: What does his dissenting opinion in *June Medical Services*, as well as his other opinions on the DC Court of Appeals, tell us about how he approaches the issues of abortion and women's reproductive rights?

FREDRICKSON: I think he gave us a very strong indication of how he's approaching it. For those of you who haven't followed this case, this is an exact repeat of a case called *Whole Women's Health*. It dealt with the same kind of limitations of the state trying to impose additional requirements on clinics that serve women that are unrelated to medical need—in fact, contrary— made it much more expensive to run these clinics; made it harder to find doctors that had admitting privileges at the local hospital; turning the center into basically a full-fledged hospital; and making it result in these places shutting down most of the clinics and eliminating the ability of women to get reproductive care, including abortion.

And so *Whole Women's Health* was decided. And they found that it was an undue burden under the *Casey* standard to impose these new requirements. Well, this case presents the exact same issue. And we see where this court will go with one more vote. And it was actually surprising that they didn't flip *Whole Women's Health* so quickly.

It was just with Justice Kennedy stepping off the court. We're very close to seeing those kinds of cases starting to go the other way. But I think Kavanaugh has announced where he is. And I think we've got a lot to worry about.

PROFESSOR KIBEL: Can you tell, for those of us who haven't read his dissenting opinion, a little about what he announced in terms of what his position is?

FREDRICKSON: I think what he said was they have to go back and prove that this would actually—in much more detail—how this would actually limit the clinic's ability to function. They already had all that data. It was just a way of giving the state another bite at the apple.

PROFESSOR KIBEL: I had some questions in here also about federalism. But I think looking at where we are time-wise, maybe we'll get to them in question and answer. But I want to leave some time for all of you. So let's open it up. And once again, part two is really focused on what we're calling matters of jurisprudence rather than the appointment process. So

if you could try to focus your questions there, that would be great. Yes, Professor Christensen in the back.

PROFESSOR CHRISTIANSEN: This relates directly to the question you just answered about the *Whole Women's Health* transition. It seems to me that the person it's hard to be right now is Chief Justice Roberts. With the Court as it's aligned now, there are going to be so many issues. And we already saw that [unintelligible].

When [unintelligible] the Court is ready to radically reverse itself from a decision that happened in the last 10 years? [Unintelligible] transition from a conservative Court with some moderates in the middle to a conservative Court without moderates in the middle. What do you think is going to happen? Are we going to see decisions where we [unintelligible], more radical option [unintelligible]?

Or are we going to see a lot of decisions where we just redefine [unintelligible]? Are we going to see an overturning of [Unintelligible] and marriage equality? Are we just going to see increased religious exemptions? And I want you to answer that question. But also, in the context of—I'm a constitutional law professor; I like to [unintelligible]. And when I look for the fifth vote to uphold marriage equality on the current or to uphold *Casey*, I [unintelligible].

FREDRICKSON: Well, I think that's math. It's not much you can do about that. So math matters. I am extremely frightened about what this means. I think the Chief Justice does have concerns about the legitimacy of the Court and what it looks like to reverse. It's not just reversing a precedent that you could say, "Well, it was forty years ago. Times have changed." But to reverse a precedent from two years ago, because one justice has changed.

I think it's very unsettling; the idea that it's so easy to manipulate that way and on such profound matters. So I think he'll be concerned about the optics of that. That being said, he'd like to overturn *Casey*, and he wasn't with the majority on *Whole Women's Health*. So he does not agree. And in this case, he simply was saying, "The Court shouldn't be doing this, this way."

I think *Obergefell* is another one where he may try and moderate where the Court goes. You'll see Thomas and Gorsuch and Kavanaugh and Alito saying, "It was wrong. Throw it out, whatever the consequences." I think Roberts will try and do the religious exemptions instead, and say, "Okay, you can get married."

"But if a photographer doesn't want to come to your wedding, that's okay, no matter what the state's statutes say—the human rights statutes

say—the florist, the baker, and the dressmaker, the whatever." And then all of the sudden you'd see LGBTQ people can get married, but they actually can't get married in a church. And they can't get married in a restaurant.

And they can be excluded from . . . . It's very contrary to the way we understand our Constitution under the Fourteenth Amendment and the implications that religious exemptions can trump these basic fundamental human rights. Where does it stop? Does it stop with race? Is race different? Is religion different? Do you do it to Muslims, Jews? I mean, these are really profound questions.

I think it's scary enough in the religious exemption. I don't think he wants them to go and overturn *Obergefell* and *Roe* in an explicit way. Because that gets everybody's attention in a way that these other decisions don't.

So I think five is the magic number. And I think for anybody who didn't vote in the presidential election—and I'm not endorsing a candidate and I'm not partisan—but I tell you if any of these things matter to you, I certainly hope you participate and get everybody you know to participate in the upcoming elections. Because these are all choices that are going to be determined by who sits on the Supreme Court. And there will be other vacancies shortly, no doubt.

MATTHEW BASANT: I'm Matthew Basant. I'm a 3L here and I'm also the Golden Gate University ACS President. My question is: With the way the First Amendment has blossomed to the forefront in the last few years, do you think that the current makeup is likely to take any large stance about free speech, particularly, free political speech? There's one case in particular that's originating out of Pennsylvania where a rapper was convicted. And that was upheld by the Supreme Court of Pennsylvania for terrorist threats in a song. So I was just wondering if you have any thoughts about how free speech might transform under this current [unintelligible]?

FREDRICKSON: It's a great question. One of the things that is of great concern is in the area of money in politics. The whole line of cases starting with *Buckley*, *Citizens United*—there are still a few provisions of that original post-Watergate campaign finance reform legislation still standing. I think the Court may find that spending limits—they're gone; contribution limits . . .

Billionaires can spend as much money as they want on independent expenditures. Corporations—there are very little limits on coordination between independent expenditures and campaign funds. I think that under the view of the majority of this Court, it may all come tumbling

down. And we will just have a free-for-all where money is free to do anything in politics. It's very dismaying.

I think some of the issues about hate speech and violent speech are more difficult to see exactly how the court comes out; how they dealt with the patent case with The Slants. And there's no coherence in it. So it's hard for me to exactly . . . . And if you have any thoughts . . . .

PROFESSOR CHRISTIANSEN: It just doesn't break down on that traditional liberal-conservative . . . And [unintelligible].

FREDRICKSON: They tend to sort of have their own—bring their own—personal views into this. Think about the Crush videos. You read those cases with the—gross, I won't even describe them. But I think Alito in that one—even though he wants to dismantle every remaining piece of campaign finance legislation—he really thought it was terrible that these videos showed little animals being crushed. And you can limit the First Amendment rights of people watching these terrible videos.

But you can't limit the rights of the Koch brothers to intervene in politics in any way they want to. So I think the First Amendment is a mess. This court has completely destroyed any coherent understanding. I actually have to recommend a book called, "Madison's Music," which is a wonderful First Amendment book.

And it talks about the First Amendment as being a democracy-enhancing Amendment and how each provision is sort of about your own personal protection of conscience, protection of speech, protection of advocacy—basically, your ability to petition the government. It moves from the personal and individual conscience level to the participation in the political process.

I think it's a very compelling argument for how the First Amendment should be understood, which then leads you to: *Buckley v. Vallejo* is wrongly decided; *Citizens United*, wrongly decided; *Free Speech Now*, wrongly decided—all of those. Because they don't understand that the First Amendment is actually about enhancing democracy, as opposed to allowing rich people to buy it.

GABE FLEISCHER: Gabe Fleischer; 1L. In looking at gay marriage, the right to choose, how do we balance out in a constitutional aspect women's right to choosee, while in the instance of gay marriage, looking a different direction when we look at say a baker's right to choose or a dress maker's right to choose who they provide services to? How do you balance out those choice factors and [unintelligible]?

FREDRICKSON: I would say that's a bit of a confusion, I think, in how you pose the question. The Fourteenth Amendment guarantees equal protection of the law to all people. And that means that you can't be denied services. And under the civil rights laws, which were Congress interpreting the meanings of those constitutional Amendments, they understood that when you are actually running a business, and you are accredited by the government—you have the license and all that—you have to serve everybody. Have you taken con law yet?

GABE FLEISCHER: I have.

FREDRICKSON: So the famous cases involving public accommodations, the—*Heart of Atlanta Hotel,* thank you; it's been a long time since I've been in law school—people were saying it violates our religious right. We don't want to have African Americans staying here. Or if they didn't want to serve them in the restaurants, at the lunch counters. It's exactly the same argument they made.

There's been very consistent understanding that, under our civil rights statutes, there are an appropriate understanding of the Constitution that services cannot be denied to people for illegitimate reasons. And that is based on who you are. And so the same argument has got to apply, in my mind and I think in the minds of people who understand the constitution as expressing those core values. You can't deny people services in this country based on the color of their skin, their gender, their sexual orientation, their religion, and their national origin.

So, if you're practicing your business, just as though you can't deny African Americans the right to stay in your hotel, you can't deny gay Americans the right to stay in your hotel. It's the exact same principal. So, I think where it gets distorted is the argument that you're making—the way the other side; the people who want to deny LGBTQ people their full autonomy as human beings—they set that up as the choice, right? It's like it's an equivalent choice. It's not.

If you're doing business, it's like any other business you have to have access for people with disabilities, right? You could say, "I raise a constitutional objection to putting a ramp to come up the stairs into my building. Because my religion says I don't have to serve people in a wheelchair." We reject that argument. Because it's not a good one. We're not allowing people to discriminate based on who you are as a human being, an immutable characteristic.

PROFESSOR KIBEL: So, I'm going to exercise a prerogative and ask the final question, since it was in our list anyway. And we didn't get to it, because we're getting near the end of our time. The topic or question we

had discussed related to federalism: the relationship between the federal government and federal law and state governments and state law. And there are a number of issues related to this.

But two of them that we had flagged. One is the issue of federal preemption of state law. And the other is that we do have certain federal laws that, in the statute, preserve a particular place for state law. And I'll mention two of those. And then I'll propose it as a question related to Kavanaugh. The United States Bureau of Reclamation runs a lot of large water projects in the western United States, including the Central Valley Project here in California.

Section 8 of the Reclamation Act says that the Bureau of Reclamation has to comply with state water law in operating its projects, which is very relevant in California where we're dealing with fisheries and releases from dams and issues of how they operate those structures.

Another example would be something called the Coastal Zone Management Act—the CZMA. The CZMA provides the federal government with authority to approve certain off-shore activities like oil drilling. But it says that they need to make a consistency determination; that it's consistent with state coastal policy, which provides our state Coastal Commission with the opportunity to adopt policies that the federal government has to act consistently with.

So, to frame this as a question: If I can bring that back to Kavanaugh, kind of like with *Chevron* deference, in the past thirty or forty years, the issue of state's rights has been framed primarily as a conservative effort to restrict overreaching preemption by the federal government. Certainly, that's been the case in the areas that I work in: environment and natural resources.

Yet, now, we're seeing what ACS and others have described as progressive federalism, where states like California are looking for a restrictive view of federal preemption and expansive view of state's rights to protect themselves from what the federal government is doing. What is your sense of Kavanaugh's position on the issue of state's rights and federalism, and more particularly, how it might relate to progressive federalism and the use of state law with positions that are maybe more often associated with the political Left?

FREDRICKSON: It's interesting. I think federalism and preemption are somewhat akin to originalism and textualism with Kavanaugh.

PROFESSOR KIBEL: Convenient?

FREDRICKSON: Convenient, yeah. And you can see in a range of issues, he's had some rulings in the First Amendment where efforts at the local

level to provide net neutrality are preempted. Those internet companies' First Amendment rights are prevalent. So preemption, he believes in, there. Gun regulation—another area where one expects him to be favorable to efforts to preempt, to challenge, local restrictions.

But when it came to abortion, he's got a different approach. So it's kind of a mixed bag. It's rather outcome-driven. He's certainly very deferential to the state—to Louisiana—when it comes to restrictions on women's access to the clinics. So I think federalism is one of those where we'll figure it out after we get the outcome; work your way backwards.

PROFESSOR KIBEL: I'm sure you're familiar with the Dean at Yale Law School. Heather Gerken has written a lot about federalism and progressive federalism. And she coined a phrase which I really think is spot on, which is, "Fair-weather federalism."

FREDRICKSON: [Laughs]

PROFESSOR KIBEL: And she said it applies to the Right and the Left, that people are really not as intellectually or ideologically committed to state's rights or the federal government as they often proclaim. They're more committed to the issues that they care about. And if state law will allow them to get there, they'll argue for state's rights in federal law.

And I think her point was simply that both on the political Left and political Right, many of us are actually fair-weather federalists. [Laughs] And I think there's a fair amount of truth to that. So with that, I would like to once again thank you for making the journey and sharing your thoughts with us.

FREDRICKSON: Thank you very much.

[Applause]

PROFESSOR KIBEL: Any closing thoughts, pitches, insights for us?

FREDRICKSON: No, I just encourage you all to join ACS. You've got the President here who can sign you up right now. Participate in the process; run for office; vote for people; become a judge. But just participate however you can to make this country a better place. I want to thank you in advance for all you're going to do.

PROFESSOR KIBEL: Okay, great.

[Applause]

[End of recorded material]

Golden Gate University Law Review

Volume 50
Issue 2 *Comments Edition*

Article 5

January 2020

Making It Usable Again: Reviving the Nation's Domestic Recycling Industry

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ARTICLE

MAKING IT USABLE AGAIN: REVIVING THE NATION'S DOMESTIC RECYCLING INDUSTRY

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INTRODUCTION

Blue recycling bins situated throughout the Memphis International Airport collect travelers' recyclable bottles and paper each day. The airport's janitorial staff then empties the bins, sending all of their contents to a local landfill.[1] As deceptive and troubling as this practice of landfilling recyclables may seem, it is now commonplace throughout the coun-

[1] *See* Michael Corkery, *As Costs Skyrocket, More U.S. Cities Stop Recycling*, N.Y. TIMES (Mar. 16, 2019), https://www.nytimes.com/2019/03/16/business/local-recycling-costs.html.

try. Philadelphia sends half of its collected recyclables to an incinerator.[2] Even Oregon, a state often revered for its sustainability practices, has been increasingly shipping its recyclables to the dump.[3] For decades, communities across the United States had saved money by sending much of their recyclable material to China for sorting and processing rather than recycling it domestically.[4] However, that arrangement abruptly ended when China recently placed stringent restrictions on its importation of recyclable waste as part of broader revisions to the country's own environmental policy plan.[5] This sudden change by a single foreign government has quickly created a recycling crisis in the US, where communities have long lacked the infrastructure necessary to recycle their own trash.

In the face of these new challenges, today's US has a unique opportunity to finally develop its own modern, sustainable recycling system. The nation's current domestic recycling system accounts for over 750,000 stable jobs, $35 billion in wages, and almost $7 billion in tax revenue.[6] Despite the important role recycling plays in the US economy, the stateside processing of many types of recyclables has long been viewed as costly and unjustifiable.[7] For instance, Prince George's County, Maryland generated nearly $1 million in annual revenues by selling its recyclables to China before the country imposed its importation restrictions; now the county must spend $3 million a year on alternative means of disposing of its recyclables.[8] And Stamford, Connecticut earned $95,000 through its recycling program in 2017, only to be set back $700,000 in 2018 in efforts to dispose of the waste they could no longer recycle.[9] Such new costs and declining revenues are beginning to put upward pressure on retail waste disposal prices and could ultimately

[2] Hundreds of municipalities in the US have cancelled all or part of their recycling programs in response to China's restrictions. *Id*.

[3] *See* Livia Albeck-Ripka, *Your Recycling Gets Recycled, Right? Maybe, or Maybe Not*, N.Y. TIMES (May 29, 2018), https://www.nytimes.com/2018/05/29/climate/recycling-landfills-plastic-papers.html?rref=collection%2Fbyline%2Flivia-albeck-ripka&module=inline.

[4] *See generally* Colin Parts, *Waste Not Want Not: Chinese Recyclable Waste Restrictions, Their Global Impact, and Potential U.S. Responses*, 20 CHI. J.INT'L L. 291 (2019).

[5] *See* Mingjie Hoemmen, *Vertical and Horizontal Modes of Injustice in Air Pollution: A Comparison of Law and Society in China and the U.S.,* 59 NAT. RESOURCES J. 347, 361-364 (2019).

[6] Along with the financial benefits, recycling is also environmentally beneficial. *See* Waste360 Staff, *China's Recycling Regulations: How American Cities Can Benefit*, WASTE 360 (Sep. 26, 2018), https://www.waste360.com/legislation-regulation/china-s-recycling-regulations-how-american-cities-can-benefit.

[7] *See* Corkery, supra note 1.

[8] In addition to Maryland, Bakersfield in California transitioned from receiving $65 per ton of recyclables to owing $25 per ton of recycling since China implemented its export restrictions. *See* Edward Humes, *The US Recycling System Is Garbage*, SIERRA (Jun. 26, 2019), https://www.sierraclub.org/sierra/2019-4-july-august/feature/us-recycling-system-garbage.

[9] *See* Humes, *supra* note 6.

have significant, adverse effects on the nation's broader economy.[10] The increased landfilling of recyclables occurring because of these shifts is also imposing significant environmental costs that could be eliminated if adequate domestic recycling infrastructure were in place.

This Article describes the major shortcomings of existing US federal, state, and local laws related to the recycling of solid waste; explains why these deficiencies are more costly to the US today than ever before; and identifies a set of specific policy strategies capable of supporting the development of a modernized, efficient, and profitable domestic recycling system. The Article ultimately recommends a multi-faceted approach to improving the nation's domestic recycling programs that could ultimately usher in a new era of sustainable and cost-justifiable US recycling.

Section I of this Article describes the history and development of US recycling programs, outlining how the nation became highly dependent on China to process much of its recyclable solid waste and how new Chinese solid waste importation restrictions have created solid waste disposal crises across the US. Section II highlights how major gaps and deficiencies in existing US recycling policies have hindered the development of adequate domestic recycling infrastructures and systems. Section III examines various policies and actions that private companies, municipalities, states, and the federal government are now considering or employing in efforts to address the nation's recycling crisis. Section IV then proposes several specific strategies capable of finally promoting the development of a cost-effective and sustainable domestic recycling system.

I A HISTORY OF EXPORTING TRASH

For most of the past century, the US has been a prolific producer of trash. Dubbed by some as the planet's biggest "throwaway society" because of its notoriously consumptive and wasteful culture, the US has had widespread recycling programs for less than 50 years.[11] Even during this period, the nation's recycling programs have often relied on exporta-

[10] The relief China provided was short lived, and now the US is suffering from the financial ramifications. Some question whether or not China's restrictions should be challenged within the World Trade Organization. *See* Colin Parts, *supra* note 4 at 305.

[11] The author concludes, "in a world of finite resources it makes no sense to act as if they were infinite. It is simply beyond common sense to throw valuable materials into landfills." *See* Brett Godush, *The Hidden Value of a Dime: How A Federal Bottle Bill Can Benefit the Country*, 25 VT. L. REV. 855, 857 (2001) citing Anthony R. DePaolo, *Plastics Recycling Legislation: Not Just the Same Old Garbage*, 22 B.C. ENVTL. AFF. L. REV. 873, 874-75 (1995) ("Recycling efforts started in cities and college campuses in response to the proliferation of the 'throwaway society.'").

tion to dispose of much of the country's recyclable material, leading to remarkably little domestic investment in recycling infrastructure.

A. THE DEVELOPMENT OF DOMESTIC RECYCLING IN THE 20TH CENTURY

US waste management policies have evolved across multiple stages over the past century.[12] During World War II, concerns about resource scarcity compelled the federal government to implement large-scale waste recovery programs aimed at promoting, reusing, and reducing waste.[13] Government propaganda posters distributed in the 1940s encouraged Americans to recycle tin, scrap, paper, and rubber.[14] However, after the war ended, interest in recycling quickly waned and the country embraced its "throwaway" culture more strongly than ever.[15]

It took 30 years after the end of World War II for the US government to finally begin implementing permanent domestic recycling policies.[16] In the 1970s, the impetus for embracing recycling policies was not a war effort but growing concerns about the nation's ballooning waste problem. Still, even in those early years of US waste management policy, it was evident that recycling strategies and alternative means of reducing landfill waste were often in tension with one another. Overflowing landfills led to the opening of the country's first recycling mill in Pennsylvania in 1972, followed by the introduction of curbside recycling programs in a small number of communities a year later.[17] However, many other communities turned to waste incineration—an antiquated and less environmentally friendly form of waste disposal—that first became widespread in the 1960s as a means of avoiding landfill-related health

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[12] *See* Crystal Ward Kent, *Could Opportunity Rise From The Chinese Recycling Crisis?*, WASTE ADVANTAGE (Jan. 1, 2019), https://wasteadvantagemag.com/could-opportunity-rise-from-the-chinese-recycling-crisis/ ("The U.S. was once a 'make it work,' kind of place where nothing was wasted and everything was used until used up. However, post-World War II affluence led to a gradual degrading of this mindset").

[13] *See* Godush, *supra* note 11 at 857.

[14] *See* Karen Fishman, *Scrap for Victory!*, Library of Congress (Jan. 15, 2015), https://blogs.loc.gov/now-see-hear/2015/01/scrap-for-victory/ ("During World War II scrap drives were a popular way for everyone to contribute to the war effort. By recycling unused or unwanted metal for example, the government could build ships, airplanes and other equipment needed to fight the war").

[15] *See* Godush, *supra* note 11 at 857.

[16] *See* Anthony R. DePaolo, *Plastics Recycling Legislation: Not Just the Same Old Garbage*, 22 B.C. ENVTL. AFF. L. REV. 873, 874-76 (1995).

[17] Around this time, Woodbury, New Jersey became the first city to mandate recycling, and curbside recycling began to gain momentum throughout the US. *See* Rick Leblanc, *Recycling Progress in the US,* THE BALANCE SMALL BUS. (June 25, 2019), https://www.thebalancesmb.com/recycling-progress-in-the-u-s-2878054.

hazards.[18] Indeed, the 1970s saw a resurgence of waste incineration in response to the implementation of state and federal waste disposal regulations that were difficult for localities to meet.[19] During this period when recycling strategies were still in their embryonic stages, burning waste was an appealing alternative to the mounting challenges of diminishing landfill space and tightening regulations.[20] Waste-to-energy facilities were also first seriously explored during this age, promising to use heat from trash incineration to produce energy but also generating their own environmental and health risks.[21]

Because of decades of minimal investment in solid waste recycling infrastructure in the US, environmentally hazardous strategies such as incineration and landfills are often viewed as the most economical short-term solutions to the waste crisis.[22] Although incinerating trash does reduce its physical footprint, it can also release harmful toxins into the air. For instance, some experts believe that the burning of plastic waste at an incineration plant is contributing to a dioxins fog, which is in turn increasing asthma and cancer cases in Chester, Pennsylvania, where rates of these illnesses are higher than those in the rest of the state.[23] Environmental injustices often accompany such toxic air pollution from incineration plants because these plants commonly reside in low-income, minority communities.[24]

Although incinerating trash releases carbon monoxide, nitrogen oxide, mercury, lead, and other harmful emissions into the atmosphere, dumping solid waste into landfills instead is often not much better because it generates its own environmental and health hazards.[25] For instance, reliance on landfills to dispose of solid waste generates significant emissions of methane, which is a far more potent greenhouse

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[18] *See* Ana Isabel Baptista and Kumar Kartik Amarnath, *Garbage, Power, and Environmental Justice: The Clean Power Plan Rule*, 41 WM. & MARY ENVTL. L. POL'Y REV. 403, 404 (2017).

[19] California passed the state's first major recycling bill where all cities and counties had to divert 50% of waste from landfills by recycling or composting by 2000. *See* Kaylee Beam, *China is refusing most U.S. recyclables. That may mean higher trash bills in the Coachella Valley*, THE DESERT SUN (Aug. 11, 2019), https://www.desertsun.com/story/news/environment/2019/08/11/palm-springs-coachella-valley-china-recycling-markets-education-trash-bills/1751480001/.

[20] *See* Baptista and Amarnath, *supra* note 14 at 404.

[21] Alana Semuels, *Is This the End of Recycling?*, THE ATLANTIC (Atlantic Media Company, Mar. 6, 2019), https://www.theatlantic.com/technology/archive/2019/03/china-has-stopped-accepting-our-trash/584131/.

[22] Oliver Milman, *Since China's Ban, Recycling in The US Has Gone Up In Flames,* WIRED (Feb. 27, 2019), https://www.wired.com/story/since-chinas-ban-recycling-in-the-us-has-gone-up-in-flames/.

[23] *Id.*

[24] *Id*.

[25] *See* Thomas F. Irwin, *Slowing the Rush to Burn: The Need To Revise Federal Municipal Solid Waste Policy To Prioritize Recycling Over Incineration*, 19 VT. L. REV. 891, 893 (1995).

gas than carbon dioxide.[26] In fact, decomposing organic waste in landfills is the third largest source of methane in the US.[27] Landfilling waste also allows non-biodegradable plastics to break down into microbeads and enter water systems, infecting water and seafood.[28]

Despite these dangers, some argue that landfills still offer the most practical solution for waste problems in the US. In an infamous *New York Times* article, John Tierney wrote that "Recycling is Garbage" and "the simplest and cheapest option is usually to bury garbage in an environmentally safe landfill."[29] According to Tierney, "all the trash generated by Americans for the next 1,000 years would fit on one-tenth of 1% of the land available for grazing."[30] However, the US started exporting waste partly due to decreasing landfill space.[31]

B. CHINA'S PRIOR ROLE IN US RECYCLING

Although the 1970s brought some notable advancements in America's fledgling recycling system, the country's growing reliance on the exportation of recyclable waste to China in the decades that followed ultimately slowed that progress. As China rapidly industrialized in the late 20th century, its demand for raw materials soared. Across the Pacific, the US had an excess supply of materials in the form of reusable waste, and China became increasingly willing to take it. Soon a recyclables trading system emerged that sent millions of tons of American waste to China for processing, and then back to the US as recycled goods.[32] Because this system made it more economical for US communities to export their recyclables across the Pacific than to process them

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[26] *See* Steven Ferrey, *Converting Brownfield Environmental Negatives into Energy* Positives, 34 B.C. ENVTL. AFF. L. REV. 417, 429 ("While both carbon dioxide and methane contribute to global warming, methane has twenty-one times the global warming potential of carbon dioxide").

[27] *See* Semuels, *supra* note 21.

[28] *See* Charles Grosenick, *The Price of Plastic*, 42-SPG ADMIN. & REG. L. NEWS 34, 34 (2017).

[29] Despite America's best intentions by shipping over 100 million tons of waste to China to avoid American landfills, a significant amount of its waste ended up in the oceans. *See* J. Frank Bullitt, *Recycling: America's False Religion*, ISSUES & INSIGHTS (2019), https://issuesinsights.com/2019/06/05/recycling-americas-false-religion/.

[30] *Id*.

[31] Congress enacted the Resource Conservation and Recovery Act in 1976 because of issues from landfilling and the lack of disposal space. *See* Jennifer R. Kitt, *Waste Exports to the Developing World: A Global Response*, 7 GEO. INT'L ENVTL. L. REV. 485, 490 (1995).

[32] *See* Leslie Hook and John Reed, *Why The World's Recycling System Stopped Working*, FIN. TIMES (Oct. 24, 2018), https://www.ft.com/content/360e2524-d71a-11e8-a854-33d6f82e62f8.

domestically,[33] exportation became a critical aspect of the nation's waste management strategy.[34]

Unfortunately, America's reliance on waste exportation to China over the past couple of decades has greatly hindered the development of recycling infrastructure. Because they no longer domestically processed most of their recyclable waste, many municipalities and waste management companies across the US began implementing "single-stream" recycling—programs under which all recyclables are placed into a single bin and collected together rather than being sorted into different bins based on recyclable material types.[35] Such single-stream recycling is a relatively inexpensive and easy waste collection method, but it also mixes recyclable materials in ways that often contaminate them with food or moisture and thereby make them much more costly to reuse.[36] Fortunately for the US, for decades, China was willing to employ its cheap labor to sort through America's contaminated trash. So single-stream recycling was generally an adequate approach.[37]

China's willingness to sort through the world's contaminated waste ultimately enabled that country to grow into a waste importing superpower, and the US became one of its key suppliers.[38] China was collecting roughly 66% of the world's global plastic waste as of 2016, with the US alone contributing close to 1.5 million tons of plastic in that year.[39] China was also collecting more than half of the world's paper scrap, including over 13 million tons per year from the US.[40] And because of all of the contamination contained within that recyclable scrap, China

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[33] *See* Parts, *supra* note 4 at 303 ("It is generally cheaper to transport scrap from Los Angeles across the Pacific Ocean rather than ship it overland to a mill in Pennsylvania or Virginia").

[34] *See* Kent, *supra* note 12.

[35] *See* Humes, *supra* note 6.

[36] For a discussion about some issues associated with contamination, *see generally Pollution Prevention and Rethinking "Waste"*, 49 ENVTL. L. REP. NEWS & ANALYSIS 10515 (2019).

[37] *Id*.

[38] *See* Tribune News Service, *US cities scramble to rewrite rules on recycling after China restricts foreign garbage*, S. CHINA MORNING POST (July 3, 2018) https://www.scmp.com/news/china/policies-politics/article/2153628/us-cities-scramble-rewrite-rules-recycling-after-china ("Recyclable scrap has been the United States' biggest export to China by volume and was valued at 5.6 billion.").

[39] *See* Jeff Spross, *America Has A Recycling Problem. Here's How to Solve It.* THE WEEK (Feb. 11, 2019), https://theweek.com/articles/819488/america-recycling-problem-heres-how-solve; Tribune News Service, *supra* note 38; Kimiko de Freytas-Tamura, *Plastics Pile Up as China Refuses to Take the West's Recycling*, N.Y. TIMES (Jan. 11, 2018), https://www.nytimes.com/2018/01/11/world/china-recyclables-ban.html?module=inline.

[40] Waste is America's sixth largest export to China. *Id.*

was also importing 500 pounds of non-reusable trash per ton of recyclables.[41]

The US recycling industry's heavy reliance on China over the past few decades helped to keep Americans' recycling costs relatively low, but it also led to inadequate waste management policies and insufficient US investment in recycling technologies and infrastructure.[42] The nation has long been relying primarily on landfills and incineration to deal with the waste it could not export overseas.[43] These decades of underinvestment and outdated policies have ultimately turned today's domestic recycling into an economically unappealing business,[44] even though the recycling industry is expected to add up to $850 billion by 2025 to the global GDP.[45] Under these current conditions, most waste management companies tend to profit more by disposing of recyclables in landfills than in recycling them. [46] Recycling programs also increasingly involve elevated financial risks in the US because of increased volatility in the costs and market pricing associated with them.[47] And since waste disposable within the US often involves private, profit-driven companies, these risks and elevated costs have deterred many waste management companies from heavily investing in recycling on their own.[48] This dearth of investment in domestic recycling has ultimately slowed innovation and further perpetuated widespread reliance on incineration and landfills.[49]

C. CHINA'S "GREEN FENCE" AND "NATIONAL SWORD" POLICIES

Several major deficiencies in US recycling policy have become increasingly evident in recent years as China has stopped importing as much American trash. In particular, the Chinese government in recent

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[41] *See* Ted Oberg, *Houston among cities seeing recycling costs going up,* ABC 13 (Dec. 12, 2018), https://abc13.com/finance/13-investigates-earth-friendly-recycling-becoming-more-costly/4888172/.

[42] *See generally* Jennifer R. Kitt, *Waste Exports to the Developing World: A Global Response*, 7 GEO. INT'L ENVTL. L. REV. 483 (1995) ("Rich countries are sending their garbage to poor, developing countries. The motivation is money: rich countries want to save it and poor countries want to earn it. . .. The industrialized world should be responsible for managing its own wastes").

[43] *See* Baptista and Amarnath, *supra* note 14 at 404.

[44] *See* Spross, *supra* note 39.

[45] *See* Irma S. Russell, *The Green Economy: Strategic Planning for A Future?,* 86 UMKC L. REV. 913, 925 (2018).

[46] *See* Adele Peters, *All the Ways Recycling Is Broken and How to Fix Them,* FAST COMPANY (Apr. 4, 2019) https://www.fastcompany.com/90321566/all-the-ways-recycling-is-broken-and-how-to-fix-them.

[47] *See* Erin Biba, *Everything Americans Think They Know About Recycling Is Probably Wrong,* NBC NEWS (Apr. 14, 2019), https://www.nbcnews.com/think/opinion/everything-americans-think-they-know-about-recycling-probably-wrong-ncna994261.

[48] *See* Spross, *supra* note 39.

[49] *Id*.

years has actively fought against what it calls "yang laji" (foreign garbage), targeting illegal waste trading and contaminated recyclables in an effort to address environmental concerns and streamline China's domestic recycling industry.[50] These policies have greatly reduced the volume of waste importation into China—a change that continues to affect the US today.

The "Green Fence," implemented in 2013, was China's first major policy change restricting the importation of waste. The campaign was primarily aimed at temporarily reducing the importation of plastic waste.[51] China's open-arms acceptance of plastic waste over previous decades had kick-started a major challenge: massive quantities of imported plastic waste were beginning to build up within China.[52] For ten months, China's Green Fence policies limited the amount of contaminated garbage China was willing to accept.[53] Unprepared for such a sudden change, many communities throughout the US were focused to respond to Green Fence by temporarily sending much of their recyclable waste to landfills and other countries.[54]

Four years later, in 2017, China made permanent many aspects of its formerly temporary Green Fence policies. Among other things, China indefinitely banned the importation of nonindustrial public waste, restricted impurity levels for certain types of waste to 0.5%, and began refusing to accept 24 types of previously accepted materials. [55] Because the use of single-stream collection in the US causes contamination levels for its recyclable waste to far exceed China's new allowances, the US has been increasingly unable to find foreign takers for its recyclable waste and unable to economically process that waste at home.[56]

In addition to China's domestic environmental protection concerns, the country's recent frustrations over US trade policies have further damaged recycling-related commerce between the two countries. Among

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[50] *See* Waste360, *supra* note 6.

[51] *See* Amy L. Brooks, Shunli Wang & Jenna R. Jambeck, *The Chinese import ban and its impact on global plastic waste trade*, SCI. ADVANCES (Jun. 20, 2018), https://advances.sciencemag.org/content/4/6/eaat0131.

[52] *See* Parts, *supra* note 4 at 298 ("Among other environmental problems the country was confronting, there were mountains of trash slowly accumulating across the country").

[53] *See* Ying Xia, *China's Environmental Campaign: How China's "War on Pollution" is Transforming the International Trade in Waste*, 51 N.Y.Y. J. Int'l L. & Pol. 1101, 1164-65 (2019).

[54] *See Id.* at 1165 ("Similar to what happened during Operation Green Fence, without an international consensus on the control of waste trade, China's foreign waste ban has redirected waste shipments to countries that have not restricted the trade. News reports show that major waste exporting countries have once again turned to countries in Southeast Asia, the Middle East, and Africa").

[55] *See* Waste360, *supra* note 6, Albeck-Ripka, *supra* note 3.

[56] For a detailed explanation of the Basel Convention which governs international waste exportation and importation, *see* Eric V. Hull, *Poisoning the Poor for Profit: The Injustice of Exporting Electronic Waste to Developing Countries*, 21 DUKE ENVTL. L. & POL'Y F. 1, 15-18 (2010).

other things, the Trump Administration's imposing of tariffs on Chinese steel and aluminum appeared to have heightened tensions between the countries.[57] These hefty tariffs may have influenced China's decisions to impose new waste importation restrictions, including the country's 2019 and 2020 bans on importation of plastics, stainless steel, metal scrap, and insulated wire.[58]

In recent years, private and public waste management entities within the US have responded to the challenges emanating from China's new importation policies in various ways. Some have tried exporting their garbage to other Asian countries with cheap labor that were willing to sort through Americans' contaminated waste,[59] such as Vietnam, Malaysia, Thailand, and India.[60] Unfortunately, other developed countries across the world also grappling with China's policy changes have inundated these alternative countries with waste as well, prompting them to enact their own waste importation restrictions.[61] India and Thailand have adopted China's 0.5% contamination limit, making them non-viable alternative destinations for America's single-stream recyclable trash.[62] Facing fewer and fewer exportation options, the US continues to struggle to find ways to actually recycle its recyclable waste.

II. Current Challenges Plaguing the Domestic Recycling System

The US recycling crisis initially emerged and continues today because the nation has relied too long on exporting waste to China and has thus become incapable of processing its own recyclable trash. Referencing China's increasing waste restrictions, the president of the US Association of Plastic Recyclers recently quipped that "[China] has given [the US] the opportunity to begin inventing in the infrastructure we need" to domestically process the nation's own waste.[63] Of course, the first step toward building cost-effective and sustainable recycling infrastructure in the US is to critically assess the nation's existing recycling policy landscape.[64] As the following subsections describe, US policies presently fail

[57] *See* Kent, *supra* note 12.

[58] *See* Waste360, *supra* note 6.

[59] *See* Parts, *supra* note 4 at 303.

[60] *Id.* at 303, 304.

[61] *Id.* at 304.

[62] *See* Corkery, *supra* note 1.

[63] *See* Biba, *supra* note 36.

[64] *See generally* W. Kip Viscusi, Joel Huber, & Jason Bell, *Lessons from Ten Years of Household Recycling in the United States*, 48 ELR 10377 (2018).

to adequately support both major components of a healthy recycling system: collection and processing.

A. No National Plan

The US presently lacks a cohesive national policy plan to address its recycling problems. States and localities handle their waste differently, and there is no uniform labeling system for recyclables. This lack of uniformity and coordination is among the major obstacles to building a cost-effective and sustainable domestic recycling system.

1. A Patchwork of State and Local Laws

Because cities across the US have long been collecting solid waste at the local level and then exporting it at the national level, the nation's municipalities have adopted inconsistent waste practices that often work against each other in ways that hinder domestic recycling.[65] Some US cities today are investing money in innovative recycling technologies, while others are completely shutting down their recycling programs.[66] Other cities still collect recycling but do not actually recycle the waste.[67] These variations in city and state waste management policies often confuse citizens and complicate efforts toward greater national-level coordination.

Because of the absence of a robust federal recycling policy structure in the US, an inefficient patchwork of incentives and regulations currently exists among states and cities across the country.[68] For instance, the US has struggled to implement a cohesive strategy to address its growing plastic waste crisis. Worldwide, more than 400 tons of plastic was manufactured in 2015.[69] Almost 80% ended up in a landfill, 12% was incinerated, and only 9% was recycled.[70] These numbers are partly a result of communities across America implementing conflicting and non-uniform plastic policies. Some cities have banned certain plastic products while other states refuse to allow their cities to implement bans.[71] Those

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[65] *Id.*

[66] California has successfully implemented single-use plastic bans, but there are ten states with preemption laws that do not allow plastic bag bans. *See* Sarah J. Morath, *Our Plastic Problem*, 33 Nat'l Res. & Env't 45, 46 (2019).

[67] *See* Corkery, *supra* note 1.

[68] For a discussion of microbead patchwork state laws that lead to federal action, *see* Ethan D. King, *State Preemption and Single Use Plastics: Is National Intervention Necessary?*, 20 Sustainable Dev. L. & Pol'y 31, 31 (2019).

[69] *See* Morath, *supra* note 66 at 45.

[70] *Id*.

[71] *Id.* at 47.

who cannot ban plastic, but also do not want to invest in recycling, choose to ultimately incinerate the plastic or throw it in a landfill. Landfills continue to be the easiest avenue for disposing of plastic, despite the harm they bring. All of these various policies create a patchwork that the federal government struggles to compensate for.

On the other hand, the federal government's existing forays into recycling policy have often been passive and deferential in ways that have limited their effectiveness.[72] Much of US federal waste policy takes this arms-length approach, which allows states and cities to largely pursue their own policy strategies and promotes minimal coordination across jurisdictions. Although many aspects of recycling need to be handled at the local level, certain other aspects are difficult to manage effectively without federal oversight.[73]

2. Inconsistent Labeling

One of the most problematic consequences of the nation's heavy reliance on municipality-level recycling policy is the lack of a standardized labeling system for collecting recyclable retail products. Existing recycling symbols in the US are often difficult for customers to understand and do not align with the collection policies of municipalities. This lack of coordination breeds confusion: 94% of Americans claim to recycle but 26% of them are uncertain about the recyclability of certain materials.[74] This uncertainty is costly because a single incorrectly recycled item can contaminate an entire bin of recyclable materials.

B. SPOTTY ACCESS TO COLLECTION SERVICES

Because existing recycling collection resources throughout much of the US are woefully inadequate, improving waste collection methods is another critical step towards improving the US recycling system.[75] For

[72] For example, Congress enacted the Save Our Seas Act in 2018. The Act only gave the Marine Debris Program the power to work with other agencies and organizations to target marine debris at home and abroad. The Act itself never took direct action for limiting debris like plastic. *See* Save Our Seas Act of 2018. Pub. L. No. 115-265, 132 Stat. 3742 (2018).

[73] Authority for more possible federal regulation of recycling stems from the Commerce Clause, the Resource Conservation and Recovery Act, and the Environmental Protection Agency. *See generally* Christina M. Everling, *Chasing Results from the Chasing Arrows: Strategies for the United States to Stop Wasting Time and Resources When it Comes to Recycling*, 52 J. MARSHALL L. REV. 147 (2018).

[74] *See* Semuels, *supra* note 21.

[75] Ninety percent of Americans believe that recycling collection sites should be more conveniently located. Sixty-five percent of Americans agree that they would likely not recycle if it is inconvenient. *See* Leblanc, *supra* note 17.

starters, many Americans do not have reasonable access to recycling. From 2015 to 2019 alone, more than 40% of recycling centers closed.[76] In part because of these trends, about 40% of households in the US currently do not even have access to recycling at home.[77] Put differently, about 34 million rural homes and 16 million apartments in the US presently have no means of recycling their waste.[78]

The US also has demographic and geographic characteristics that can significantly complicate recyclable waste collection. Major disparities in access presently exist between rural and urban communities, and between impoverished and wealthy ones. Most cities do not have recycling centers and thus transport their recycling waste elsewhere; rural communities often cannot afford those transportation costs and are thus more likely to send their waste directly to landfills.[79] Many rural areas also lack the population density needed for economical investment in recycling trucks and bins.[80] Municipalities with low median income levels are also less likely to separate collected recyclables because residents are less willing or able to bear the accompanying costs of that service.[81] Addressing these and other waste collection challenges will be a crucial step toward developing sustainable and efficient domestic recycling policies that consider environmental justice.[82]

C. DEFICIENCIES IN THE RECYCLING PROCESS

In addition to improving its recyclable waste collection capabilities, the US needs to invest heavily in the development of new infrastructure capable of domestically processing most of the nation's recyclable waste. Processing problems begin with the consumer and continue with processing centers. The country's longstanding heavy reliance on waste exportation has led to minimal investments in recycling infrastructure over the past few decades. Improving consumer education and investing in new processing plants to affordably sort through and recycle the nation's waste will be crucial to overcoming the convenience of landfills and incineration.[83]

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[76] *See* Beam, *supra* note 19.

[77] *See* Peters, *supra* note 46.

[78] *Id.*

[79] *See* Albeck-Ripka, *supra* note 3.

[80] Trucks cost approximately $300,000 each. *See* Peters, *supra* note 46.

[81] *See* Semuels, *supra* note 21.

[82] *See generally* John C. Dernbach et. al., *Sustainability as a Means of Improving Environmental Justice*, 19 J. ENVTL. & SUSTAINABILITY L. 1 (2012).

[83] *See* Parts, *supra* note 4 at 294.

1. Consumers' Role in Processing Recyclables

At least some of America's challenges in developing an effective recyclables processing system stem from confusion among citizens regarding how to properly recycle. Decades of public "reduce, reuse, recycle" campaigns have transformed many Americans into "aspirational" recyclers.[84] Aspirational recyclers hope that an item is recyclable and thus throw it into the recycling bin, ultimately contributing to the bin's contamination.[85] Contaminated recycling supplies that have unrecyclable materials mixed into them are often prohibitively expensive to sort using existing technologies. Sadly, such contamination problems have led some cities to send collected recycling directly to landfills rather than advise citizens to stop putting the wrong materials into their recycling bins.[86]

Reducing trash contamination levels through education and other efforts is crucial to the success of domestic recycling in the US. As of 2014, 80% of American communities were using single-stream recycling collection, meaning that all recyclable material is being collected in a single bin.[87] Such predominant use of the single-stream model makes it very difficult to decrease contamination levels in supplies of recyclable material. For instance, it is possible to increase the amount of recycled glass from 40% to 90% by collecting it separately from other materials rather than through single-stream collection.[88] So long as different recycling materials are collected together, the US will have to use workers or sophisticated equipment to separate garbage and examine waste quality before it can be processed here or exported elsewhere. And although material recovery facilities increasingly have automated sorting capabilities, human labor[89] is still typically required for a portion of the sorting.[90] In short, until most American recyclables are no longer contaminated, it will be more economical to use other means of disposal.

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[84] *See* Biba, *supra* note 36.

[85] *See* Albeck-Ripka, *supra* note 3.

[86] *Id.*

[87] *See* Nicole Javorsky, *How American Recycling Is Changing After China's National Sword*, BLOOMBERG CITYLAB (Apr. 1, 2019), https://www.citylab.com/environment/2019/04/recycling-waste-management-us-china-national-sword-change/584665/.

[88] *See* Mitch Jacoby, *Why Glass Recycling In The US Is Broken*, C & EN (Feb. 11, 2019) https://cen.acs.org/materials/inorganic-chemistry/glass-recycling-US-broken/97/i6.

[89] For a discussion about the role of waste pickers within the larger labor market, *see* Supriya Routh, *Embedding Work in Nature: The Anthropocene and Legal Imagination of Work as Human Activity*, 40 COMP. LAB. L. & POL'Y J. 29, 45-47 (2018).

[90] *See* Beam, *supra* note 19.

2. Infrastructure's Role in Processing Recyclables

Another barrier separating the US from an effective domestic recycling policy is the nation's lack of recyclables processing centers. Even though American cities generate enormous quantities of potentially recyclable waste every week, many have nowhere to send it for processing. It is predicted that China's new restrictions on waste importation will allow 37 million tons of waste to accumulate in the US by 2030 alone.[91] Some cities have responded to China's actions by merely holding onto waste materials in hopes that a cost-effective means of processing it will emerge or China will reconsider its current restrictive policies.[92] However, policymakers in states such as California are fearful of storing hazardous materials that could fuel wildfires, and officials in some other states are doubtful that affordable recycling pathways will appear for many types of recycling materials anytime in the near future.[93]

To attract large amounts of private investment into recycling collection and processing infrastructure, the US will also need to strengthen its recycled materials markets. Presently, acquiring and producing new materials often costs less than producing recycled secondary materials.[94] Until there is sufficient market demand for recyclable materials and the prices of such materials are competitive with those of virgin materials, the nation's recycling industry is likely to continue to languish.

The economic realities of domestic recycling have long created additional obstacles to the expansion of domestic recycling infrastructure.[95] Recycling is a "loss leader" and generally has been regarded as an expensive extra service that companies reluctantly bundle with other waste services to win bids with municipalities.[96] Because recycling services are largely managed by private industry in the US, their availability is closely tied to their profitability.[97] As described above, until recently the

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[91] *See* Tribune News Service, *supra* note 38.

[92] *See* Albeck-Ripka, *supra* note 3.

[93] *Id.*

[94] *See* Semuels, *supra* note 21. In the words of one author, "Every time you rinse a jug or a can or a jar in your kitchen, you are in some small way competing with oil drillers, cotton pickers, miners, and lumberjacks all over the world because you too are creating a commodity." *See* Henry Grabar, *Recycling Isn't About the Planet. Its's About Profit.* SLATE (Apr. 5, 2019) https://slate.com/business/2019/04/recycling-dead-planet-profit-americans-commodities-china.html.

[95] Private processing plants are heavily dependent on profits and are not always welcomed by their communities, like landfills. *See generally* Gary Abraham, *Concepts of Community in Environmental Disputes: Farmersville and Western New York's Garbage Wars,* 7 BUFF. ENVTL. L.J. 51 (2000).

[96] The loss recycling companies are facing due to rising costs no longer make even bundling recycling services feasible for many. *See* Corkery, *supra* note 1.

[97] One factor contributing to recycling profitability is whether or not recycled materials are cheaper than virgin materials. *See* Spross, *supra* note 39.

US exported much of its recyclable waste to China instead of developing more costly domestic facilities to process it.[98] If China were to reopen itself to imported recyclable waste or if other countries began filling that role, building expensive domestic processing plants today could ultimately feel like a poor investment.

In summary, the US recycling system in its current state is wholly incapable of recycling its own waste in the face of China's new waste importation restrictions. Accordingly, aggressive and innovative new policies are needed to develop a profitable and efficient domestic recycling industry capable of sustainably processing the nation's own trash.[99]

III. EXISTING POLICY RESPONSES TO THE RECYCLING CRISIS

In recent years, responses to the global recycling crisis have varied greatly across different levels of government within the US and across various countries abroad. Some governments have attempted to influence consumer behavior through educational campaigns,[100] bottle bills,[101] surcharges,[102] and mandated recycling in an attempt to place greater responsibility on the consumer.[103] Others have enacted outright bans on certain plastics.[104] With China no longer accepting trash, some advocates have even begun pushing for a new comprehensive federal recycling plan capable of finally modernizing the country's recycling system.[105] The

[98] Exporting waste allowed cities and private companies to heavily rely on single-stream recycling, instead of sorting recyclables into categories. *See* Humes, *supra* note 6.

[99] *See generally* Douglas L. Tooley, *Singapore's Environmental Management System: Strengths and Weaknesses and Recommendations for the Years Ahead*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 169, 245 (1998).

[100] *See generally* John Dernbach, *Next Generation Recycling and Waste Reduction: Building on the Success of Pennsylvania's 1988 Legislation*, 21 WIDENER L.J. 285, 314 (2012) ("DEP should make education about recycling and waste reduction a priority").

[101] *See generally* Christina M. Everling, *Chasing Results from the Chasing Arrows: Strategies for the United States to Stop Wasting Time and Resources When it Comes to Recycling*, 52 J. Marshall L. Rev. 147, 168-71 (2018).

[102] *See* Andrew J. Berge, *Michigan's Waste Problems: How Expansion of the Bottle Bill and Other Options Could Help Michigan Defeat the Dormant Commerce Clause and Out-of-State Waste*, 23 T.M. COOLEY L. REV. 303, 329 (2006) (citing John F. Katers & Dawn M. Walczak, *Analysis of Wisconsin Municipal Solid Waste Landfilling Trends and the Impact of Recycling Fee Increases on the Amount of Imported Waste*, 6 (2005)).

[103] *See generally* Nicholas M. Vaz, *Are You Gonna Eat That?: A New Wave of Mandatory Recycling has Massachusetts and Other New England States Paving the Way Toward Feasible Food Waste Diversion and a New Player in Alternative Energy*, 27 VILL. ENVTL. L.J. 193, 198 (2015).

[104] *See* Abigail Hogan and Alexander Steinbach, *A Polymer Problem: How Plastic Production and Consumption is Polluting our Oceans*, GEO. ENVTL. L. REV. ONLINE (2019).

[105] *See generally* Everling, *supra* note 101 at 150 ("[T]he United States needs to implement national recycling policies to catch up with the progress of other developed nations").

following are brief descriptions of some of these new recycling policy efforts.

A. CONSUMER-FOCUSED POLICIES AND PROGRAMS

Targeting the actions of consumers is one strategy some governments are using to improve recycling rates and reduce the volume of new landfill waste. National and subnational governments across the world have developed policies that educate, incentivize, and even punish residents all in attempts to promote better recycling practices among their citizens.

1. Educational Campaigns

Numerous municipalities have implemented educational campaigns aimed at reshaping the recycling norms of their residents. The goal of these campaigns is to increase applicable knowledge in hopes of ultimately changing behavior.[106] For instance, Palm Springs, California has developed brochures and utilizes "oops" stickers designed to let residents know when their recyclable trash was contaminated.[107] By notifying residents when they place inappropriate items in their trash bins, Palm Springs hopes to eventually curb contamination rates.[108] Washington, D.C. has also trialed a curbside feedback program that provided one recycling truck route with tags informing residents on whether they were recycling correctly.[109] Another route was not given tags.[110] Impressively, the garbage of residents on the route that received feedback exhibited a nearly 20% decrease in contamination.[111] As trials like this one suggest, tag programs and similar initiatives can do much to shape consumers' behavior by helping consumers better understand how their individual choices create environmental harms and what they can do to mitigate those harms.[112]

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[106] *See* Ann E. Carlson, *Recycling Norms*, 89 CAL. L. REV. 1231, 1254, 1269 (2001) ("Informational campaigns can increase knowledge and signal the importance of desired behavior. . .. A change in law or architecture, for example, could end up affecting social norms or vice versa").

[107] *See* Beam, *supra* note 19.

[108] *Id.*

[109] *See* Javorsky, *supra* note 87.

[110] *Id.*

[111] *Id*.

[112] *See* Katrina Fischer Kuh, *Personal Environmental Information: The Promise and Perils of the Emerging Capacity to Identify Individual Environmental Harms*, 65 VAND. L. REV. 1565 (2012).

2. Bottle Bills

Some states have sought to increase recycling through bottle deposit bills, which incentivize people to recycle bottles and cans in return for cash. At least six states are presently contemplating joining the list of ten states that already provide refundable container deposits for single-use beverage containers.[113] Bottle bills are incredibly effective at increasing recycling rates: the states that offer refunds have recycling rates of roughly 98%, compared to just 33% for states without bottle bills.[114]

Governments in other parts of the world are similarly utilizing bottle deposit programs.[115] Norway charges a refundable deposit on all single-use beverage containers,[116] and in 2016 Norway had a total return rate of nearly 92%.[117] Germany's national bottle bill, enacted in 2003, has likewise led to recycling rates of more than 98% in that country.[118]

Concededly, if more governments in the US were to adopt bottle bills, there could be some losers. Many Americans rely on bottle deposit rebates as either a total or supplemental form of income.[119] "Canners" are individuals who collect empty cans and bottles from the trash and take them to redemption centers.[120] If bottle bills were to result in very high redemption rates, rebates could become unsustainable overtime. The legislature could address this concern by requiring a 10-cent deposit for an item and only an 8-cent return. Bottle bills could be successful in spite of these challenges, as long as they capture enough revenue to fund all program operating costs.

Bottle bills often encounter political opposition and have thus been most successful to date when implemented at the state or local level.[121] Industry stakeholders have defeated more than 2,000 bottle bills in the US in the last 25 years.[122] Despite this, some still argue bottle bills are

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[113] *See* Humes, *supra* note 6.

[114] *Id.*, *See* Jacoby, *supra* note 88.

[115] *See* Spross, *supra* note 39.

[116] *See Norway*, Bottle Bill Resource Guide (Jan. 13, 2020), http://www.bottlebill.org/index.php/current-and-proposed-laws/worldwide/norway.

[117] *Id*.

[118] *See* Matt Wilkins, *More Recycling Won't Solve Plastic Pollution*, SCI. AM. (July 6, 2018), https://blogs.scientificamerican.com/observations/more-recycling-wont-solve-plastic-pollution/.

[119] Canning is a common form of income for homeless people. *See* Francesca Berardi, *Meet the street nun helping people make a living from New York's cans,* THE GUARDIAN (Mar. 1, 2019), https://www.theguardian.com/us-news/2019/mar/01/new-york-city-canning-bottles-street-nun.

[120] It is estimated that up to 8,000 citizens support themselves through canning in New York City alone. *Id.*

[121] Because bottle bills have historically been so successful, they should remain a viable option that some states or municipalities may be able to successfully pursue.

[122] *See* Godush, *supra* note 11.

the best way to boost recycling, as states with bottle bills have the highest recycling rates in the nation.[123]

3. Plastic Bag Charges

Charging consumers for using plastic bags is another approach some jurisdictions have used to reduce plastic waste and generate revenue to support recycling efforts.[124] In 2015, the United Kingdom enacted a charge on all single-use plastic bags causing an 80% decrease in use.[125] Ireland's per bag fee reduced the total average number of bags per person a year to 14 from 328.[126]

In the US, however, some states and localities have faced strong opposition when attempting to adopt plastic bag tax initiatives. For instance, state preemptive laws in Arizona prevented a local nickel-a-bag tax in that state.[127] Per-bag charges or taxes have been met with similar challenges from industry stakeholders in other states.[128] Some opponents of these charges have asserted that charging consumers for plastic bags may disproportionately impact low-income individuals in ways that contravene other important public policy goals.[129] Fortunately, there are usually means of addressing these concerns. Minneapolis recently enacted a per bag charge that creates exceptions for low-income individuals receiving certain benefits, like food stamps.[130] Per bag fees may encourage

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[123] The six states are Arkansas, Florida, Illinois, New Jersey, Tennessee, and West Virginia. *See* Humes, *supra* note 6.

[124] *See* Bridget M. Warner, *Sacking the Culture of Convenience: Regulating Plastic Shopping Bags to Prevent Further Environmental Harm*, 40 U. MEM. L. REV. 645, 667 (2010) ("A consumer-paid fee on plastic bags is a powerful tool for changing consumer behavior in the checkout lane. The fee is not an absolute for each trip to the store; rather, the decision is up to the consumer: pay the fee for each bag used, bring sustainable reusable bags when shopping, or do not use a bag. Providing these choices will put an end to the mindless consumption of plastic carryout bags and will raise public awareness about the role individual choices collectively play with regard to litter and waste management").

[125] *See* Grosenick, *supra* note 28 at 35.

[126] *Id.*

[127] *See* Kate Juon, *Infrastructure in the Context of Human Development: Recycling as a Nation*, 18 SUSTAINABLE DEV. L. & POL'Y 16, 16 (2018).

[128] In Denton, Texas, the city attempted to regulate fracking but was ultimately preempted by state law when the Texas legislature enacted its own fracking legislation. This highlights a difficult part of creating change within cities. For change to occur at the local level, cities must have the resources to overcome interest groups as well as not be preempted by state laws that may affect plastic and waste regulation. Garrett Mize, *Big Cities in a Bigger State: A Review of Home Rule in Texas and the Cities that Push the Boundaries of Local Control*, 57 S. TEX. L. REV. 311, 340 (2016).

[129] *See* Matt Sepic, *Nickel per simple-use store bag approved by Minneapolis City Council*, MPR NEWS (NOV. 22, 2019), https://www.mprnews.org/story/2019/11/22/fees-for-singleuse-store-bag-on-way-to-minneapolis-city-council-approval.

[130] *Id.*

consumers to invest in reusable bag options, but any such legislation should only do so in a manner that respects individual dignity.[131]

4. Recycling Mandates

A few cities have even sought to improve consumer recycling practices by imposing penalties on citizens who fail to recycle correctly.[132] In Cleveland, Reno, Newton, and Marin County in California, residents receive warnings and fines for incorrect recycling.[133] Other cities such as Seattle have enacted mandatory recycling policies.[134] In 2006, Seattle targeted declining recycling rates by requiring businesses to sort paper, cardboard, and yard waste, and households to sort basic recyclables.[135] By punishing their residents, cities hope to encourage proper recycling and ultimately decrease contamination.

Some states have similarly mandated recycling and are fining consumers for incorrect recycling under increasingly stringent state recycling laws.[136] In Washington, it is unlawful to place cans, glass bottles, or cardboard in landfills.[137] Wisconsin, New Jersey, North Carolina, Pennsylvania, Massachusetts, Connecticut, and California also have mandatory laws for recycling plastic bottles.[138] Naturally, the provisions in these laws vary significantly from state to state. Connecticut law explicitly mandates exactly how residents must sort through their trash.[139] Legislation in some other states, such as Montana, consists merely of suggestions on how citizens should recycle.[140] Such variations in laws

[131] For a discussion about California's plan to avoid financial burdens on lower income citizens and concerns about reusable bag cleanliness, *see* Qiying Zhu, *The California Plastic Bag Ban: Where Do We Go from Here?,* 5 ARIZ. J. ENVTL. L. & POL'Y 1053 (2015) at 1056.

[132] Recognizing that sorting through contaminated garbage is expensive, these cities are using fines and other financial penalties to pass along those extra costs to the citizens creating them. *See* Jeremy Berke, *The American recycling system is on the verge of breaking down, and it could mean higher costs for homeowners*, BUS. INSIDER (May 14, 2018), https://www.businessinsider.com/recycling-system-is-breaking-down-2018-5.

[133] *See* Humes, *supra* note 6.

[134] *See* Mandatory Plastic Recycling, The Association of Plastic Recyclers, https://plasticsrecycling.org/resources/state-recycling/mandatory-plastic-recycling-legislation.

[135] *Id.*

[136] *See* Viscusi, *supra* note 64 at 10379.

[137] *See* Grabar, *supra* note 94.

[138] *See Mandatory Plastic Recycling*, THE ASS'N OF PLASTIC RECYCLERS, https://plasticsrecycling.org/resources/state-recycling/mandatory-plastic-recycling-legislation.

[139] *See* Viscusi, *supra* note 64 at 10379.

[140] *See* Viscusi, *supra* note 64 at 10379 ("Montana's goal law states, 'It is the goal of the state to reduce, through source reduction, reuse, recycling, and composting, the amount of solid waste that is generated by households, businesses, and governments and that is either disposed of in landfills or burned in an incinerator.'").

across states and localities may cause problems for visitors and new residents, especially if there are monetary penalties.

Internationally, South Korea has found considerable success with its mandatory recycling program.[141] South Korea successfully incorporated recycling into its citizens' daily lives through its Wastes Control Act enacted in 1986, which emphasizes a "shared responsibility" approach to waste management.[142] South Korea has a polluter-pay system under which citizens pay for the waste they create.[143] South Korea also adopted a national bin system with easy color-coded bins for different types of recyclables.[144]

Unfortunately, instituting a similar polluter-pay system would likely not be a feasible option for the United States.[145] The stringency of South Korea's system is inherently inconsistent with the predominant norms in American culture,[146] where laws that intrude into one's behaviors within their home often provoke opposition.[147] South Korea also has vastly different logistical and transportation concerns than the US, where the costs of processing recyclables can vary substantially across different regions of the country.[148]

B. RESTRICTIONS ON SINGLE-USE MATERIALS

At the municipality level, cities are also trying to impose restrictions on certain types of single-use materials as an additional means of reducing solid waste. Palm Springs is considering limiting local vendors to two specific types of plastic, which forces them to rethink how they package their products.[149] The city is focusing on recyclable plastics used for water bottles, soft drinks, condiment containers, milk jugs,

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[141] Juon, *supra* note 127 at 16.

[142] Through the Wastes Control Act, recycling in South Korea has increased from 10% to 80%. *Id.*

[143] In 2013, citizens were also required to pay for their food waste which has led to a 10% reduction of food waste in Seoul. *Id.*

[144] Spross, *supra* note 39.

[145] The average American citizen creates almost five pounds of waste each day. Citizens below the poverty line are already struggling to afford surcharges imposed by municipalities to process waste in light of China's restrictions and could likely not afford any additional surcharges. Semuels, *supra* note 21.

[146] Juon, *supra* note 127 at 16.

[147] Katrina Fischer Kuh, *When Government Intrudes: Regulating Individual Behaviors That Harm the Environment*, 61 DUKE L.J. 1111, 1169 (2012).

[148] *See* Albeck-Ripka, *supra* note 3.

[149] *See* Beam, *supra* note 19.

shampoo bottles, and cleaning supplies.[150] Other cities have banned plastic bags or at least tax them.

Some states have responded to the growing waste crisis by enacting legislation that progressively phases out or completely bans the use of certain types of difficult-to-recycle materials. California passed the California Circular Economy and Plastic Pollution Reduction Act[151] which aims to decrease single-use packaging by 75% while increasing the use of compostable materials for single-use products.[152]

Single-use plastics are also increasingly facing bans overseas.[153] Nearly 60 countries have enacted some form of plastic bag legislation.[154] Developing countries often ban plastic bags, as they do not have sufficient waste collection or disposal systems.[155] In 2016, France became the first nation to enact a large-scale plastics ban by banning single-use plastic cups, plates, and cutlery, taking effect in 2020.[156] China saved 1.6 million tons of oil in the first year after it enacted its plastic bag ban.[157] India has also enacted a plastic bag ban that will take effect by 2022, though its implementation and enforcement has not been consistent.[158]

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[150] Polyethylene terephthalate is a recyclable plastic often used for soda bottles. Milk containers are made of high-density polyethylene. Both types of polyethylene are useful because they can be recycled into non-single use plastic objects such as traffic cones, shower stalls, automotive parts, and much more. *See* Heather P. Behnke, Kathleen M. Bennett, & Amy L. Du Vall, *Recycling: Anything but Garbage*, 5 BUFF. ENVT'L. L.J. 101, 110 (1997).

[151] *See* Beam, *supra* note 19.

[152] The California Supreme Court upheld the right of California cities to implement bag bans without environmental impact research. *See* Scott Rodd, *Banning the Bans: State and Local Officials Clash Over Plastic Bags*, PEW (Jan. 29, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/01/29/banning-the-bans-state-and-local-officials-clash-over-plastic-bags.

[153] Countries that have banned plastic bags, taken regulatory action, or passed plastic bag legislation according to the author include China, Canada, Chile, Mexico, Australia, India, some European countries and some East African countries. *See* Hannah M. Diaz, *Plastic: Breaking Down the Unbreakable*, 19 FLA. COASTAL L. REV. 85, 96 (2018).

[154] For a complete list of countries that have enacted legislation concerning banning plastic bags and the year of that country's legislation enactment, *see Which Countries Have Banned Plastic Bags?*, WORLDATLAS, https://www.worldatlas.com/articles/which-countries-have-banned-plastic-bags.html (last visited Feb. 8, 2020).

[155] Bangladesh was the first country to ban plastic bags in 2002. *See* Morath, *supra* note 66, at 47.

[156] France's ban was part of its Energy Transition for Green Growth Act, which also banned plastic bags in an effort to promote a circular economy. *See generally* James McAuley, *France Becomes the First Country to Ban Plastic Plates and Cutlery*, WASH. POST (Sept. 19, 2016).

[157] China enacted the ban to combat "white pollution," which describes Styrofoam packaging and plastic bags. China banned the production of bags less than 0.025mm thick and disallowed grocery stores from giving free bags to consumers. *See* Jonathan Watts, *China plastic bag ban 'has saved 1.6 tonnes of oil'*, THE GUARDIAN (May 22, 2009) https://www.theguardian.com/environment/2009/may/22/china-plastic-bags-ban-success (last visited Feb. 8, 2020).

[158] While Indian officials have fined some businesses who continue to use plastic bags, there is generally no follow through or recheck with an offending business. Additionally, political parties use a variety of plastics in their advertisements and administrative officials have not been successful in enforcing restrictions on political parties. Nearly every state in India has seen problems with

Because of their propensity to constrain consumer choice, proposed bans or restrictions on single-use plastics can be contentious in some jurisdictions.[159] In fact, legislatures in at least 17 states have enacted a "ban on bans," preempting their cities from banning plastic bags.[160] Some argue that innovative environmental protections are the product of local cities, and bans would harm innovation.[161] Groups such as the American Progressive Bag Alliance, a division of the Plastics Industry Association, have supported legislation[162] that attempts to prohibit cities from passing legislation to ban bags, even in populous states like California.[163]

A federal bill aimed at banning certain single-use plastics would likely be met with opposition similar to that faced by various state bans in the past. Like bottle bills and bag taxes, a federal single-use plastic ban carries federalism challenges despite its potential to greatly decrease plastic waste.[164] While the Supremacy Clause of the Constitution would allow a federal bill banning single-use plastics to take priority over states' preemption laws that ban bans, such federal legislation is unlikely to pass in the current political gridlock.

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enforcement of their plastic ban. *See* Athar Parvaiz, *Why India Passed One of the World's Toughest Anti-Plastic Laws: Does It Stand a Chance?*, HUFFPOST (July 3, 2018) https://www.huffpost.com/entry/single-use-plastic-ban-india_n_5b3a09b6e4b0f3c221a28a07 (last visited Feb. 9, 2020).

[159] For example, the city of Bisbee, Arizona enacted a plastic bag ban in 2012 that was later repealed when the State of Arizona threatened to otherwise withhold nearly $2 million in state aid. *See* Rodd, *supra* note 152.

[160] For a detailed list of which states have a state-wide ban, state-wide preemption laws, and pending preemption legislation, *see* Sarah Gibbens, *see The Complicated Landscape of Plastic Bans in the U.S.*, NAT'L GEOGRAPHIC (Aug. 15, 2019) https://www.nationalgeographic.com/environment/2019/08/map-shows-the-complicated-landscape-of-plastic-bans/#close (last visited Feb. 10, 2020).

[161] *See generally* Sarah Fox, *Home Rule in an Era of Local Environmental Innovation*, 44 ECOLOGY L.Q. 575 (2017).

[162] The Plastic Industry Association has not disclosed specific amounts or sources of its funding. However, it spent $320,000 from January to September in 2019 on federal lobbying. *See* Samantha Maldonado, Bruce Ritchie & Debra Kahn, *Plastic Bags Have Lobbyists. And They're Still Winning*, POLITICO (Jan. 13, 2020) https://www.politico.com/states/new-york/albany/story/2020/01/13/plastic-bags-have-lobbyists-and-theyre-still-winning-1248888 (last visited Feb. 11, 2020).

[163] In California, the American Progressive Bag Alliance invested over $3 million to try to defeat California's plastic bag ban, bags which generate $100-$150 million-a-year in business. *See* Jeff Guo, *A Plastic Bag Lobby Exists, and it's Surprisingly Tough,* WASH. POST (Mar. 3, 2015) https://www.washingtonpost.com/blogs/govbeat/wp/2015/03/03/a-plastic-bag-lobby-exists-and-its-surprisingly-tough/ (last visited Feb. 8, 2020).

[164] The California Coastal Commission picked up around 65,000 bags on its annual cleanup day along beaches and rivers in 2010 before California enacted a statewide ban in 2014. In 2016, the same annual cleanup day picked up only about 24,000 bags. *See* Rodd, *supra* note 152.

C. Expanding and Improving Domestic Processing Systems

Because relying on China to take America's recyclable trash is no longer a viable option, municipalities and states are increasingly reevaluating their own recyclables processing capabilities. Some localities, realizing they are unable to domestically process all of the materials they previously collected, are opting to limit which items they continue to collect. Other localities are addressing these challenges by placing larger burdens on consumers through utilization of multi-stream recycling. Meanwhile, both the private and public sector are investing heavily in new technologies and new services to expand the country's recycling capabilities.

1. Limiting the Types of Recyclables Collected

Some cities have responded to the recent recycling crisis by instructing citizens to not recycle every type of recyclable material. Strictly reducing which items a city wants to recycle allows for easier recycling and less contamination. It also focuses a city's investment in fewer material markets which helps keep those specific materials out of landfills and incinerators. The city of Marysville, Michigan cut eight of eleven recyclable material categories from its collection efforts.[165] In doing so, the city is focusing its resources on recycling plastic, which is arguably one of the most important materials to keep out of landfills. Palm Springs, California is contemplating collecting only bottles and cans in order to easily transition from single-stream recycling to a multi-stream bin.[166] This would decrease contamination and allow for the collected items to actually be recycled rather than ruined by organic waste and other non-recyclables.

Reducing the number of items collected can help keep recycling programs afloat. Fewer recycling varieties means less overall waste that has to be sorted through. It may allow cities to capitalize on specific recyclable materials. It will also ultimately channel all other materials directly into landfills or incinerators. In a country like America, buying and consuming is a sign of wealth and prosperity. If Americans are not able to

[165] Marysville, Michigan is no longer accepting newspaper, glass jars, paperboard, and more. Residents can only recycle plastics #1-#8, tin, aluminum, and bundled corrugated cardboard. *See* Jim Bloch, *Marysville's New Refuse Collection Contract Reflects Global Recycling Crisis,* THE VOICE (Mar. 20, 2019). https://www.voicenews.com/news/marysville-s-new-refuse-collection-contract-reflects-global-recycling-crisis/article_1aead1c8-4b48-11e9-8544-fb5d53b8c64f.html (last visited Feb. 8, 2020).

[166] Palm Springs found that most of the waste generated downtown was not recyclable, besides cans and bottles. *See* Beam, *supra* note 19.

consume less, recycling less types of materials will not fully target the ever-growing waste problem this country is facing.[167] It could also force cities to decide on which materials are worth recycling. If there is a lack of diversity in the materials different cities are focusing on processing, then the secondary materials market will be flooded by certain types of recycled materials and deficient in others.

2. Adopting Multi-Stream Recycling

Another potential means of improving the nation's recycling system could be to invest in multi-stream recycling capabilities.[168] This approach has taken hold in Berkeley, California, which has developed a two-compartment curbside bin that separates paper from other recyclables.[169] This method of separating out paper helps keep paper free of moisture or food contamination that could otherwise make it un-recyclable. The ability to keep recyclables as separate as possible could decrease the amount of labor needed to sort through the materials before the repurposing process.

Although multi-stream recycling could help address many of America's waste problems, it also creates its own logistical and financial challenges. Not every community in the country is well suited to transition to multi-stream recycling in the short run. Large cities and small rural farming communities tend to have somewhat different types of trash and disparate amounts of available financial resources, which can impact how successful multi-stream recycling might be across various localities. Multi-stream recycling not only requires new recycling bins; it may also change how collected recycling is transported. To separately collect a range of different materials, cities may need more trucks and workers. Transportation and labor constraints are already an obstacle in rural and low-income communities, and multi-stream recycling would only exacerbate those challenges.

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[167] *See generally* Bradley A. Harsch, *Consumerism and Environmental Policy: Moving Past Consumer Culture*, 26 ECOLOGY L.Q. 543 (1999).

[168] "Multi-stream recycling refers to the process of separating recyclables by material type prior to collection. These recycled materials are then kept separate throughout the whole of the recycling process. This type of recycling may also be known as source-separated recycling, dual stream recycling, or sorted stream recycling." *See Which is best for me - Single-Stream Recycling vs. Multi-Stream Recycling?,* GLASDON, https://us.glasdon.com/faq/benefits-of-single-stream-vs-multi-stream-recycling (last visited Feb. 27, 2020).

[169] Berkeley's recyclables are some of the cleanest and most coveted in the business, according to Martin Bourque, the executive director of Ecology Center which manages the private, domestic curbside recycling program in Berkeley. *See* Humes, *supra* note 6.

3. Promoting Investment in Recycling Technologies and Infrastructure

Yet another potential means of addressing the recycling crisis is through policies that promote greater private investment in recycling-related technological innovation. Numerous companies throughout today's US are investing in and opening new recyclables processing facilities. They are also developing new technologies to sort materials and to help offset the high levels of contamination that result from single-stream collection methods. A few companies are even offering consumers new, more sustainable choices for recycling-related services and products.

Some private companies are responding to the recent changes in US recycling markets by opening new domestic processing plants.[170] Interestingly, a fraction of these new plants are backed by overseas investors.[171] Nine Dragons, a Chinese manufacturer, has already purchased at least two recycling plants in the US and plans to invest more than $300 million into the facilities.[172] However, some communities do not want the congestion and pollution associated with new facilities.[173]

Private companies are also developing new recycling processing technologies, including innovative new machines for sorting waste.[174] In some cases, these robotic sorting machines can work twice as fast as their human counterparts.[175] Recology, one of the most advanced recycling plants on the West Coast, sorts through more than 750 tons of waste a day with the aid of new technology.[176] This new technology not

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[170] Carbonlite Industries, a main recycler in the United States, processes over 4 billion plastic bottles a year, has two operational plants with two more on the way, enabling the company to process more than 10 billion bottles each year. *See* Humes, *supra* note 6.

[171] Investment and construction of new recycling facilities are needed to expand domestic capabilities, but they are only part of a larger solution. *See* Spross, *supra* note 39.

[172] Nine Dragons is China's leading producer of cardboard and paper. *See* Hook and Reed, *supra* note 32.

[173] Residents opposed a new recycling plant because of the potential air pollution and because the plant only transferred existing jobs; it did not create any new jobs. *See* Derrick Blakley, *New Recycling Plant Not Welcomed By Some Residents*, CBS Chi. (July 9, 2018). https://chicago.cbslocal.com/2018/07/30/907427-recycling-plant-protested-residents/.

[174] New sorting technology helps reduce processing costs by increasing sorting efficiency. Some machines that use optical recognition technology can sort out cardboard boxes, regardless of whether they have retained their original shape. Other machines use optical recognition technology, or various magnets, air blasts to help sort items of various weights. There are even some machines that can open bags of waste. *See* Spross, *supra* note 39.

[175] *See* Lori Ioannou and Magdalena Petrova, *America Is Drowning In Garbage. Now Robots Are Being Put on Duty to Help Solve the Recycling Crisis*, CNBC (July 27, 2019), https://www.cnbc.com/2019/07/26/meet-the-robots-being-used-to-help-solve-americas-recycling-crisis.html.

[176] *See* Hook and Reed, *supra* note 32.

only reduces costs; it also reduces risks of injury or death to the human workforce.[177]

Additionally, a few US companies are offering innovative new recycling-related retail services. One such service is "Loop," where items are delivered to consumers in reusable containers.[178] Another service, Recycled City, based in Phoenix, Arizona, provides a weekly pickup service for composting.[179] Of course, services like Loop and Recycled City may not be accessible to all.[180] And like any new strategy, these services and business models are also generally unproven and are likely to encounter logistical difficulties as they expand.

4. Banning the Exportation of Recyclables

Refusing to export waste and forcing cities and towns to deal with their own garbage is one other strategy that some countries are using to incentivize investments in their own recycling systems. Australia has moved to ban exportation of recyclables and has heavily focused on recycling innovations.[181] Prime Minister Scott Morrison has emphasized that Australia's waste is Australia's responsibility.[182] The country recognizes the need to reduce the overall quantity of materials that need be recycled, but has also extensively focused on developing new innovations to deal with waste.[183]

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[177] *See* Ioannou and Petrova, *supra* note 175.

[178] Once the consumer has finished an item, they return the container and it is refilled instead of going into a landfill. *See* Spross, *supra* note 39.

[179] *See generally* RECYCLED CITY: FARMLAND FOR THE FUTURE (Jan. 13, 2020), https://www.recycledcity.com.

[180] These services are likely not accessible to lower income communities due to their higher enrollment costs and continued monthly subscription costs. These new services are generally only available in limited geographic markets and may offer only limited and pricier items.

[181] Australia is moving to eventually ban the exportation of any recyclable material to increase domestic processing of materials and keep waste from ending up in the ocean. *See* Livia Albeck-Ripka, *Recycling is in Crisis. Could These Innovations be the Answer?,* N.Y. TIMES (Aug. 12, 2019), https://www.nytimes.com/2019/08/12/world/australia/recycling-plastic-trash.html.

[182] *See* Australian Associate Press, *Australia will ban export of recyclable waste 'as soon as practicable', PM vows*, THE GUARDIAN (Aug. 9, 2019), https://www.theguardian.com/environment/2019/aug/09/australia-to-ban-export-of-recyclable-waste-as-soon-as-practicable-pm-vows.

[183] Australia is home to the first road paved with Reconophalt, a mixture of asphalt and recycled materials. They have sought to decentralize recycling and reduce the initial costs associated with creating large reclamation and processing centers by building smaller portable recycling centers. Additionally, Australian companies like Closed Loop recycle around 7 million coffee cups a year and turn them into sturdy materials that can be used to create other products like benches, hangers, or planter boxes. Australia utilizes detritus processing facilities where the trash collected by street sweepers is separated into organic and nonorganic materials then used for various projects or sold to other facilities. Each detritus processing facility prevents up to 21,000 tons of waste from ending up in landfills each year. The Australian Council of Recycling has acknowledged the importance of a "National Waste Policy." *See* Albeck-Ripka, *supra* note 181.

Unfortunately, totally banning the exportation of recyclable solid waste is not a viable option for today's US. Although the US should continue to push for the development of more domestic processing capabilities and should consider the ethical repercussions of exporting waste, an outright recyclables exportation ban in the short run would likely have severe adverse effects on the nation's economy. Australia, as an island nation, faces different logistical transportation challenges than those of the US. For example, if a facility in Vancouver, Canada developed a method to recycle and process a material that no facility in the Pacific Northwest could, it might be more economically feasible to send waste across the border to that facility. Because the US shares lengthy land borders with two nations, an outright ban on waste exportation would likely not be successful.

D. LEVERAGING THE RESOURCES OF PRIVATE INDUSTRY TO IMPROVE RECYCLING

Although America's private sector has played an important role in improving the recycling industry, more private investment is necessary if the US is to succeed in building an adequate domestic recycling system. It is important to implement policies that force producers to accept responsibility[184] while continuing to encourage voluntary environmental governance[185] to improve domestic recycling.

1. Expanding Producer Responsibility

Requiring manufacturers to bear more responsibility for the disposability of their products is a potentially powerful means of encouraging sustainable manufacturing practices and thereby reducing waste. The European Union instituted an Extended Producer Responsibility program in 1994 based on this type of strategy.[186] The program essentially seeks to reduce the amount of product packaging waste and to increase the amount of product packaging that is recycled.[187] The 25-year-old pro-

[184] For a detailed discussion concerning extended producer responsibility, *see generally* Nicole C. Kibert, *Extended Producer Responsibility: A Tool for Achieving Sustainable Development*, 19 J. LAND USE & ENVTL. L. 503 (2004).

[185] For a detailed discussion concerning private environmental governance, *see generally* Nicole Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129 (2013).

[186] *See* Humes, *supra* note 6.

[187] Objectives of an extended producer responsibility program include creating a sustainable production and consumption policy, incentivizing ecodesign, reducing landfilling and developing recycling and recovery channels, and fully internalizing environmental costs. *See Extended Producer Responsibility: Getting it Right*, WASTE MGMT. WORLD, https://waste-management-world.com/a/extended-producer-responsibility-getting-it-right 2015-04-17.

gram, which collects roughly $3.5 billion in fees each year from manufacturers,[188] has been successful at helping 65% of packaging to be recycled within the European Union.[189]

Imposing additional responsibilities on manufacturers in the US has historically been a difficult task. Keep America Beautiful, a non-profit formed by beverage companies in the 1950s, was specifically designed to place recycling responsibility on the public rather than on manufacturers.[190] Over the years, the non-profit has actively opposed bottle bills and other legislation that would increase manufacturer waste management responsibility.[191] Accordingly, Keep America Beautiful has been described as "the first corporate greenwashing front"—a stakeholder group aimed at shifting waste-related concerns away from responsible manufacturer practices and onto the general public.[192] While any successful recycling strategy requires cooperation and commitment from both manufacturers and consumers, nonprofits like Keep America Beautiful make it difficult to adopt any future federal US legislation that imposes an extended producer responsibility. However, some states have shown that it is possible to overcome these inherent difficulties. Washington state is pushing Plastic Packaging Stewardship legislation that regulates American waste and its effect on polluting other countries. The goal is to force American manufacturers to become responsible for the materials they put out into the world.[193]

2. Encouraging Voluntary Corporate Action

Governments can also potentially leverage the power of private industry to improve recycling and reduce waste by finding ways to reward and encourage voluntary corporate commitments related to waste reduction. Several notable companies are already making efforts to address environmental issues on their own—a trend known as private environmental governance—in ways that help to reduce solid waste and en-

[188] The EU's Extended Producer Responsibility program encourages manufacturers to utilize sustainable packaging and charges manufacturers annual fees. *See* Humes, *supra* note 6.

[189] *Id*.

[190] Keep America Beautiful teamed up with the Ad Council and produced campaigns such as the "Crying Indian" in the 1970s and recently the "I Want to Be Recycled" campaign. *See* Wilkins, *supra* note 118.

[191] *See generally* Christina M. Everling, *Chasing Results from the Chasing Arrows: Strategies for the United States to Stop Wasting Time and Resources When it Comes to Recycling*, 52 J. MARSHALL L. REV. 147 (2018).

[192] *See* Wilkins, *supra* note 118.

[193] *See* Jan Dell, *157,000 Shipping Containers of U.S. Plastic Waste Exported to Countries with Poor Waste Management in 2018*, PLASTIC POLLUTION COALITION (Mar. 6, 2019). https://www.plasticpollutioncoalition.org/blog/2019/3/6/157000-shipping-containers-of-us-plastic-waste-exported-to-countries-with-poor-waste-management-in-2018.

courage recycling.[194] For instance, Starbucks has pledged to stop using disposable straws.[195] Disney has also announced its plans to stop using plastic straws and stirrers on its properties.[196]

Of course, a major disadvantage of private environmental governance is that it is voluntary and generally unenforceable.[197] For example, if a company publicly pledges to reduce plastic consumption by 50% over the next five years, the company is not necessarily bound by its publicized commitment. The consequences of failing to meet its goal are minimal and mostly involve poor publicity.[198] Finding ways for companies to make binding voluntary commitments like these could unleash greater benefits from these approaches.

IV. STRATEGIES FOR IMPROVING THE US RECYCLING SYSTEM

Although governments across the US have already adopted a wide range of recycling-related policies, more cost-effective, coordinated, and aggressive approaches will be needed for the country to finally develop a sustainable and adequate domestic recycling system. Such policies must not only significantly reduce the amount of solid waste—especially plastics—Americans generate each day; they must also substantially increase the nation's capacity to affordably process recyclables.

As the following materials describe, one means of furthering these goals would be to impose a new federal tax on single-use plastics. The revenue generated from the tax could fund tax credits and grant programs to encourage businesses and localities to develop recycling technologies and build domestic recycling infrastructure.[199] A new plastic tax would discourage manufacturers from recklessly producing single-use plastic items, and such tax credit and grant programs would increase the demand for recycled materials and spur the development of more domestic recycling infrastructure. These changes, together with the nationwide adoption of a new, uniform, color-coded label and bin system to support greater use of multi-stream collection methods, could do much to improve recycling throughout the US.

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[194] *See generally* Michael P. Vandenbergh, *The Emergence of Private Environmental Governance,* 44 ENVTL. L. REP. NEWS & ANALYSIS 10125 (2014).

[195] *See* Christiana Caron, *Starbucks to Stop Using Disposable Plastic Straws by 2020*, NY TIMES (July 9, 2018), https://www.nytimes.com/2018/07/09/business/starbucks-plastic-straws.html.

[196] *See* Lindsey Ellefson, *Disney is the latest company doing away with plastic straws,* CNN (Aug. 1, 2018), https://www.cnn.com/2018/07/26/us/disney-plastic-straws-trnd/index.html.

[197] *See* Morath, *supra* note 66 at 48.

[198] *Id.*

[199] For a historical look at environmental taxes, *see generally* Mona L. Hymel, *Environmental Tax Policy in the United States: A "Bit" of History*, 3 ARIZ. J. ENVTL. L. & POL'Y 157 (2013).

A. CONFRONTING THE RECYCLING INDUSTRY'S EXTERNALITY PROBLEMS

Many of the challenges facing the US recycling system are attributable to various positive and negative externality problems.[200] Positive externality problems often hinder recycling-related activities because many of the benefits associated with those activities accrue to others.[201] Negative externality problems likewise discourage optimal levels of recycling because many of the environmental, health, and other costs associated with landfilling and trash incineration are not borne by those engaged in these activities.[202] Without government intervention to correct these market failures, sub-optimally low levels of recycling tend to result.[203]

1. Positive Externalities and Recycling

There are many positive externality problems associated with the US recycling system that are likely to result in sub-optimal levels of recycling activity without government intervention.[204] Even non-recyclers benefit when someone recycles materials that would have otherwise ended up in landfills and threatened to contaminate drinking water sources or cause other environmental harms. Recyclers also increase market supplies of recycled materials, leading to lower market prices that benefit many who are not involved in the recycling activity. And recycling activities spare manufacturers from having to use as many virgin materials, thereby preserving more natural resources. Recycling can even generate general economic growth: recycling in the US accounts for 757,000 jobs, $36.6 billion in wages, and $6.7 billion in tax revenue.[205] Unfortunately, recyclers do not capture many of these broader social benefits when they engage in recycling activities, leading to sub-optimally low levels of recycling.

The most straightforward means of addressing recycling-related positive externality problems are policies that enable recyclers to capture more of the broader social benefits of their recycling activities. Pigouvian subsidies, whether in the form of tax credits, grants, or other programs, have long been viewed as optimal solutions to positive exter-

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[200] *See* Troy A. Rule, SOLAR, WIND AND LAND: CONFLICTS IN RENEWABLE ENERGY DEVELOPMENT 3-8 (2014).

[201] *See* Donald J. Boudreaux &Roger Meiners, *Externality: Origins and Classifications*, 59 NAT. RESOURCES J. 1, 1 (2019).

[202] *Id.*

[203] *See* Rule, *supra* note 205 at 3.

[204] *Id*.

[205] *See* Waste360, *supra* note 6.

nality problems because of their capacity to help actors directly internalize the external benefits of their actions.[206] As described in the materials below, if structured properly, such subsidies could potentially promote more optimal levels of private recycling activity.

2. Negative Externalities and Recycling

Recycling may also be framed as suffering from negative externality problems because those who dispose of recyclable waste in landfills or incinerators often do not bear all of the costs of those actions, leading to excessive reliance on those activities.[207] Many municipalities charge a flat rate to all residents for solid waste disposal services regardless of whether the residents use recycling bins or dispose of even recyclable wastes in trash bins instead.[208] However, the environmental and health costs of landfilling or burning those wastes are often significantly higher. And disposing of recyclable waste, rather than recycling it, also requires that more trees be harvested, more minerals be mined, and potentially more energy be expended to generate additional virgin materials. Often, those who burn or landfill recyclable waste do not bear many of these broader societal costs of their actions, leading to excessive landfilling and incineration.

Pigouvian taxes have long been viewed as the classic means of correcting negative externality problems because of their capacity to require actors to internalize the costs of their actions and thereby lead to more optimal levels of the taxed activity.[209] Pigouvian taxes are often viewed as preferable to command-and-control regulation because they spare policymakers from having to estimate both the net social costs and the net social benefits of the taxed action.[210] When calibrated properly, they can deter actors from excessively engaging in activities that harm others and have an ancillary benefit of generating government revenue.[211]

In light of the externality problems affecting US recycling markets and the lack of adequate government intervention to address them, it is hardly surprising that the US has long underinvested in its recycling in-

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[206] *See* Lily L. Batchelder et. al., *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 44 (2006).

[207] *See* Rule, *supra* note 205 at 6.

[208] *See Solid Waste Rates*, CITY OF PHOENIX, https://www.phoenix.gov/publicworks/garbage/terms (last visited Mar. 19, 2020).

[209] When an actor engages in an action that benefits themselves but harms others without being held liable for those harms, actors may engage in excessive amounts of that activity. *See* Jonathan S. Masur, Eric A. Posner, *Toward A Pigouvian State*, 164 U. PA. L. REV. 93, 100 (2015).

[210] Under command-and-control regulation, policymakers consider both costs and benefits. However, Pigouvian taxes only requirepolicy makers to consider costs. *Id*. at 95.

[211] *Id*. at 100.

frastructure. Fortunately, there are policy strategies, including tax and subsidy programs like those described below, capable of reversing these challenges and putting the US on a course toward a more optimal level of recycling activity.

B. INCENTIVIZING HIGHER LEVELS OF RECYCLING PARTICIPATION

New federal taxes on single-use plastics, federal tax credits for certain recycling-related investments, and grant programs for recycling-related research could help to address many of the externality problems currently plaguing recycling markets. As described in the following paragraphs, if structured appropriately, such policies could greatly accelerate the nation's development of an effective and sustainable domestic recycling system.

1. A Federal Plastic Tax

To help address the negative externality problems associated with those types of plastics that are difficult or costly to recycle, Congress could consider taxing manufacturers who produce items with such plastics on a dollars-per-ton basis.[212] The amount of this tax could vary depending on the type of plastic, creating additional incentives for manufacturers to avoid the most unrecyclable plastics types. For instance, items made with relatively easy-to-recycle plastics such as Plastic #1 (typically found in water bottles), Plastic #2 (typically found in milk jugs), or Plastic #5 (found in various food containers such as ketchup bottles) could be taxed at $2.00 per ton.[213] In contrast, items made with Plastics #3, #4, #6, and #7, which are generally not as easily recyclable and impose comparatively greater costs on society, could be taxed at $4.00 per ton.[214] Ideally, such differential plastic taxes would apply only to nondurable goods, which primarily consist of single-use items, and would apply to imports as well as domestically-produced products.

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[212] A Pigouvian tax imposes a tax on a party equal to the harm they create and impose on others. *See generally* Masur and Posner, *supra* note 214.

[213] These numbers are provided solely for illustration purposes and may well be far too low to have their intended effects. For instance, in 2017 Coca-Cola used 3 million tons of plastic. *See Coca-Cola reveals how much plastic it uses*, BBC NEWS, (Mar. 14, 2019), https://www.bbc.com/news/newsbeat-47569233. Even if all the plastic Coca-Cola used was plastic #1, #2, or #5, the company would owe just $6 million in plastic taxes based on a $2-per-ton rate.

[214] *See What numbers of plastic are safe for water bottles? The Numbers Behind Water Bottles*, THE BERKEY https://theberkey.com/blogs/water-filter/what-numbers-of-plastic-for-water-bottles-are-safe-for-you-the-numbers-behind-plastic-bottles.

2. Federal Tax Credits

The federal government could help to mitigate the positive externality problems associated with recycling and encourage greater private investment in certain recycling-related activities by introducing new tax credit programs.[215] Federal income tax credits allow taxpayers to qualify for reductions in their tax liability by claiming credits for particular types of expenditures.[216] Congress could enact legislation offering such credits for qualifying investments in new recyclables processing facilities and infrastructure development, uses of recycled materials in domestically manufactured products, and other recycling-related expenditures. Similar to other investment tax credit programs, the credits claimable under such legislation could be made proportionate to the size of the taxpayer's qualifying investment.[217]

Congress has successfully used tax credit programs in the past to promote greater private investment in important sustainability technologies. For instance, Internal Revenue Code Section 48C allows for businesses to claim a 30% tax credit for qualified investments in solar technology.[218] A tax credit is also available for purchases of qualifying energy-efficiency building upgrades or products such as air conditioning units or LED lighting.[219] These tax credit programs address positive externality problems by effectively subsidizing targeted activities. This enables actors to internalize more of the social benefits of their actions. Tax credits have proven highly effective in the context of renewable energy and could have positive effects for the domestic recycling industry as well.[220]

3. Federal Research and Development Grants

Creating new recycling-focused federal grant programs could also potentially accelerate domestic recycling-related research and develop-

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[215] *See* Batchelder et. al., *supra* note 211 at 44.

[216] Tax credits may be either refundable or nonrefundable. Refundable tax credits allow taxpayers to receive a refund even if they owe less. Conversely, nonrefundable tax credits only allow a taxpayer to receive a refund for no more than the amount they owe. *See Credits and Deductions for Individuals*, IRS, https://www.irs.gov/credits-deductions-for-individuals (last visited Mar. 19, 2020).

[217] *See* 26 U.S.C. § 48C (2020).

[218] *Id*.

[219] *Id*.

[220] The solar industry has seen an average annual growth rate of 48% in the last decade. The Solar Investment Tax Credit has helped increase the national solar capacity to nearly 78 gigawatts, enough energy to power 14.5 million homes. See *Solar* Industry Data: *Solar* Industry Breaks 20 GW Barrier — Grows 34% Over 2013, SOLAR ENERGY INDUS. ASS'N, http://www.seia.org/research-resources/solar-industry-data (last visited Mar. 19, 2020).

ment in the US. One advantage of grant programs is that they provide immediate funding for targeted activities rather than requiring taxpayers to wait to claim tax credits.[221] Even non-taxpaying entities such as municipalities and state governments could potentially be eligible for such grants. In addition to funding research, these grants could support a wide range of important activities and investments, such as educational campaigns, new municipally-owned recycling plants and sorting equipment, or new city-owned bins in public places to help facilitate multi-stream recycling.

The US federal government has enacted grant programs on many occasions to encourage states, local governments, and private entities to invest in various types of environmentally-focused activities.[222] For example, the US Department of Energy has previously awarded $25 million to support the development of geothermal wells[223] and millions more in federal grants have been awarded in the past to promote wetlands conservation.[224] Like tax credits, federal grants for qualifying recycling investments are subsidies that help recipients internalize more of the social benefits of their actions, which promotes higher levels of private investment in US recycling.[225]

C. IMPROVING THE LABELING AND COLLECTION OF RECYCLABLES

The federal government could further accelerate the development of an effective domestic recycling system through improvements to the labeling and collection process for recyclable materials. The US currently recycles just 34%of its municipal solid waste, even though the EPA estimates that 75% of that waste could be recycled.[226] A uniform, nationwide, color-coded labeling and bin system that clearly indicates to consumers how to recycle various items could help to improve those numbers. The nation's recycling rate would also improve if municipalities narrowly limited the universe of materials collected and processed, and adopted multi-stream collection practices focused solely on the items they opted to collect.

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[221] *See* Nancy E. Shurtz, *Eco-Friendly Building from the Ground Up: Environmental Initiatives and the Case of Portland, Oregon*, 27 J. ENVTL. L. & LITIG. 237, 337 (2012).

[222] For a list of current federal grants, *see* Grants.gov, https://www.grants.gov/web/grants/search-grants.html (last visited Mar. 19, 2020).

[223] *See Geothermal Wells of Opportunity*, GRANTS, https://www.grants.gov/web/grants/view-opportunity.html?oppId=324194 (last visited Mar. 19, 2020).

[224] *See* National Coastal Wetlands Conservation Grant Program, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/coastal/CoastalGrants/ (last visited Mar. 19, 2020).

[225] *See* Batchelder et. al., *supra* note 211 at 44.

[226] *See* Biba, *supra* note 36.

1. Creating a Clear and Uniform Recyclables Labeling System

Adopting a uniform, national, color-coded recyclables labeling and bin system would do much to increase the volume and quality of domestic recycling activities in the US.[227] Although instituting a nationwide color-coded label system would be costly, the long-term potential rewards of doing so seem likely to exceed those costs. Recycle Across America states that standardized labels are the "#1 solution for the environment today."[228] The recycling numbers currently found on most recyclables confuse consumers, contribute to America's contamination problem, and do not correlate to municipalities' processing capabilities.[229] New labels on waste items could clearly indicate to the consumer how they should be recycled, by matching the label color to a corresponding colored waste bin.[230] A similar system exists in South Korea.[231] Standardized color-coded labels could improve recycling 50-400%, help reduce bin contamination, and decrease sorting expenses.[232]

A new color-coded labeling and bin system would also reduce confusion and support the tailoring of recycling strategies to local and regional needs. The widespread contamination of recyclable materials today results in part because of confusion resulting from differences among cities with regard to which recyclables they will accept,[233] because municipalities vary widely in their approaches to that question.[234] If nationwide color-coded labeling and bins were in place, municipalities would be freer to tailor their use of colored bins to collect only those recyclable items they can most affordably and easily process.[235]

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[227] Over a quarter of Americans are unsure whether an item can be recycled. *See* Leblanc, *supra* note 17.

[228] *See The Solution and About Us*, RECYCLE ACROSS AM. (Jan. 13, 2020), https://www.recycleacrossamerica.org/the-solution-about-us.

[229] *See* Natalie Rademacher, *When in doubt, throw it out.' A struggling market spurs drive for better recycling*, TWIN CITIES (Dec. 8, 2019), https://www.twincities.com/2019/12/08/when-in-doubt-throw-it-out-amid-struggling-recycling-market-the-narrative-is-changing/.

[230] For example, every purple bin in the nation could be designated for glass items, every red bin in the nation could be designated for aluminum items, etc. Other main recyclables include cardboard, paper, plastic #1, and plastic #2.

[231] *See* Spross, *supra* note 39.

[232] *Id.*

[233] Color-coded labels could also reduce contamination, and therefore reduce associated sorting costs. The average truckload of recyclable materials headed to a recovery facility is 25% contaminated with non-recyclable goods. In order to clean out the contaminated quarter of materials, facilities rely on expensive human labor, equipment, and slowing conveyor belts, all of which further increase the cost of recycling. *See* Maddie Stone, *Recycling is Broken*, GIZMODO (Mar. 5, 2019) https://earther.gizmodo.com/recycling-is-broken-1833063010.

[234] *See* Biba, *supra* note 36.

[235] Transient cities, like Washington, D.C., have different lists of acceptable recyclables than neighboring counties and cities, creating confusion. *See* Juon, *supra* note 127 at 16.

In Congress, Representative Betty McCollum has been attempting to help address this issue by advocating for funding to expedite the standardization of recycling labels.[236] McCollum specifically pushed for such funding in a 2020 appropriations bill, arguing it would be a cost-effective means of improving recycling rates nationwide and decrease contamination. However, such standardization has faced some pushback from private industry because it would require countless manufacturers and companies to add new labels their packaging.

2. Simplifying the Universe of Recycled Materials

At the local level, many municipalities and waste management companies could increase the efficiency of their recycling systems by more narrowly limiting which recyclables they collect and process. Many municipalities and waste management companies are willing to recycle only those items for which the monetary costs of recycling are less than those of placing the item in a landfill.[237] As China's actions have made it difficult for many municipalities to find processing facilities for certain recyclables in recent years, some have responded by storing those items.[238] Others, such as the City of Deltona, Florida have terminated recycling programs all together.[239] An arguably more sensible approach is to impose stricter strategic limits on which recyclable items are accepted. For instance, to preserve the financial viability of its recycling program, Marysville, Michigan recently limited its collection to three out of 11 categories of recyclable items.[240]

Limiting the scope of acceptable recyclable materials not only reduces recycling costs; it can also improve recycling rates by reducing contamination. Some localities continue to accept items that they cannot process because they are concerned that consumers will not restart recycling those items in the future.[241] However, this is a costly mistake that allows consumers to dispose of additional nonrecyclable items, which increases sorting costs and can send entire loads of materials to landfills.

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[236] *See* Natalie Parletta, *Historic U.S. Bill To Clean Up Recycling at the Bin and Save Billions*, FORBES (May 23, 2019), https://www.forbes.com/sites/natalieparletta/2019/05/23/historic-u-s-bill-to-clean-up-recycling-at-the-bin-and-save-billions/#281eba7c55a9.

[237] *See* Sarah Gonzalez, *China's New Recycling Policy Could Give U.S. an Opportunity to Rethink Its Process,* NPR (Aug. 1, 2019), https://www.npr.org/2019/08/01/747368598/chinas-new-recycling-policy-could-give-u-s-an-opportunity-to-rethink-its-process.

[238] *See* Albeck-Ripka, *supra* note 3.

[239] *See* Javorsky, *supra* note 87.

[240] *Id*.

[241] *See* Albeck-Ripka, *supra* note 3.

Some materials are more financially viable[242] for cities to recycle than others.[243] Because of this, cities with limited recycling capabilities should focus on the most economically feasible recyclables as they develop the means to expand their recycling capabilities.

3. Implementing Multi-Stream Collection

The widespread adoption of multi-stream recycling practices that make use of a uniform labeling system like that just described could be one additional way to meaningfully increase recycling in the US. The contamination rates of collected recyclable materials are quite high in the US because Americans typically place all types of recyclables in a single bin.[244] Reducing contamination can greatly reduce processing costs by shifting much of the sorting and preparation of such materials onto consumers. If the US were to adopt a uniform national color-coded label and bin system as described above, consumers would be more informed regarding which types of recyclable items were accepted in any given context allowing for an easier transition to multi-stream collection.

Ideally, businesses and governments that manage public spaces would use multi-stream recycling with bins for every color and residents would use at least a dual-bin recycling approach.[245] As of 2014, roughly 80% of American communities used single-stream collecting methods for recyclable materials—a dramatic increase from 2005, when just 29% of US recyclables were collected with single-stream systems.[246] Single-stream recycling, through which all recyclables are placed into a single bin and picked up by one truck, is typically less expensive than multi-stream recycling but is considerably more inefficient.[247] Switching to multi-stream recycling could be a costly investment for some municipalities. Despite these costs, multi-stream recycling is a necessary step for reforming the recycling system.

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[242] Glass can be infinitely recycled with no loss in quality. For every six metric tons of recycled glass used by manufacturers in the place of virgin glass, roughly one metric ton of CO_2 emissions are cut. However, if a locality lacks the ability to process glass items, the transportation costs associated with glass can be heavy. While localities should prioritize recycling glass, they should not do so unless it is financially feasible. *See* Jacoby, *supra* note 88.

[243] Some items that require higher amounts of energy to recycle increase processing costs. *See Recycling Issues*, ZERO WASTE AM., http://www.zerowasteamerica.org/RecyclingIssues.htm.

[244] Berkeley's residential bins have a compartment for paper and a compartment for other recyclables. *See* Ioannou and Petrova, *supra* note 175.

[245] Despite many localities' recycling programs discontinuing due to costs, Berkeley's dual-stream recycling program has flourished. *See* Humes, *supra* note 6.

[246] *See* Javorsky, *supra* note 87.

[247] In communities with single-stream recycling, approximately 40% of glass is processed into new materials. *See* Humes, *supra* note 6.

V. CONCLUSION

After decades of exporting most of its recyclables to China, the US now has a reason and opportunity to develop its own cost-effective and modern domestic recycling system. Although there are significant obstacles to creating an effective domestic recycling industry in the US, through proactive and innovate policymaking, the emergence of such an industry is possible. If America were to create greater labeling uniformity across states and localities, provide better signaling and education to consumers, and promote far more private investment in recycling research and infrastructure development, the US could finally advance its recycling system into the 21st century.

The fact that domestic recycling of solid waste is often more expensive than landfill disposal or incineration is due partly to negative and positive externality problems affecting these activities. Governments could significantly mitigate those problems through appropriate tax and subsidy policies. Taxes on single-use and difficult-to-recycle plastics could help to reduce negative externality problems associated with these materials. Conversely, tax credits and grant programs for recycling research and recycling infrastructure development could address positive externality problems hindering the advancement of these activities.

Instituting multi-stream recycling and nationwide, uniform, color-coded labeling and bin systems could further improve recycling practices by better educating citizens and thereby reducing contamination problems. Hopefully, through coordinated and concerted policy efforts focused on these strategies, the US will finally establish a sustainable and cost-effective recycling system capable of benefiting generations of future Americans.

Golden Gate University Law Review

Volume 50
Issue 2 *Comments Edition*

Article 6

January 2020

The Dynamex Dichotomy and the Path Forward

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COMMENT

THE *DYNAMEX* DICHOTOMY AND THE PATH FORWARD

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INTRODUCTION

Maria Alvarez, Gary Branson, and Max Galvan share a common misfortune. Maria Alvarez was a janitor who cleaned theaters in Los Angeles, California, where she earned about $5 per hour with no days off, sick days, or holidays.[1] This was until she was fired after being injured on the job and requesting a lighter workload.[2] Gary Branson drives 60 hours per week for Uber and is still homeless.[3] Max Galvan is a truck driver in Southern California making only $10 per hour despite working for the same company more than 13 years.[4] These workers share the common fate of being misclassified as independent contractors, and thereby being deprived of access to basic employee protections and benefits.[5] Some employers misclassify their employees as independent contractors to reduce their labor costs, such as workers' compensation insurance, payroll taxes, and wages.[6] Misclassification is highly prevalent in trucking, construction, and janitorial services.[7] Most recently, independent contractor misclassification has also been notable in the gig economy.[8]

The gig economy is a collection of markets that connects consumers with on-demand service providers ("gig workers"), and it has revolutionized the way in which consumers seek and receive services, such as transportation and household tasks.[9] The ease of calling an Uber or Lyft, as opposed to hailing a cab, led to a decrease in arrests for driving under

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[1] Gene Maddaus, *How America's Biggest Theater Chains are Exploiting Their Janitors*, VARIETY, https://variety.com/2019/biz/features/movie-theater-janitor-exploitation-1203170717/ (last visited Dec. 30, 2019).

[2] *Id*.

[3] Carolyn Said, *He Drives 60 Hours Per Week for Uber. He's Still Homeless*, *Campaigns*, INDEP. DRIVERS GUILD, https://drivingguild.org/about/ (Sept. 23, 2019, 9:43 AM), https://www.sfchronicle.com/business/article/He-drives-60-hours-a-week-for-Uber-He-s-still-14457115.php.

[4] Rebecca Smith et al., *The Big Rig: Poverty, Pollution, and The Misclassification of Truck Drivers at America's Ports*, NELP & CHANGE TO WIN 5 (Dec. 8, 2010), https://teamster.org/sites/teamster.org/files/povertypollutionandmisclassification.pdf.

[5] *See* Maddaus, *supra* note 1; Said, *supra* note 2; Smith *supra* note 3.

[6] Catherine Ruckelshaus & Ceilidh Gao, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, NELP (Dec. 19, 2017), https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-on-workers-and-federal-and-state-treasuries-update-2017/.

[7] *See* Dr. Lalith de Silva et al., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, PLANMATICS, INC. iii (Feb. 2000), http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf; Sara Hinkley et al., *Race to the Bottom: How Low-Road Subcontracting Affects Working Conditions in California's Property Services Industry*, UC BERKELEY LABOR CTR. (Mar. 8, 2016), http://laborcenter.berkeley.edu/pdf/2016/Race-to-the-Bottom.pdf.

[8] Stephanie L. Alder-Paindiris, *Independent Contractor Claims Proliferate*, Nat'l Law Rev. (Dec. 12, 2019), https://www.natlawreview.com/article/independent-contractor-claims-proliferate.

[9] Nathan Heller, *Is the Gig Economy Working?*, NEW YORKER (May 15, 2017), https://www.newyorker.com/magazine/2017/05/15/is-the-gig-economy-working.

the influence in major cities.[10] Similarly, it transformed the way in which many workers seek and perform work, as many gig workers enjoy flexibility and control over their work schedule.[11] Gig workers can work for multiple platforms and also have authority over how much they work.[12] Some have hailed that Uber and, more broadly, gig-economy work, represents the future of work,[13] but this is a troubling proposition. Gig-economy work is largely founded on a model that relies on classifying most of its workforce as independent contractors who, as opposed to employees, do not receive benefits such as overtime or sick pay and are not covered by minimum-wage laws or workers' compensation benefits.[14]

The increasing prevalence of employers classifying their workers as independent contractors spurred a debate about when it is appropriate to employ independent contractors, as opposed to employees. In April 2018, the California Supreme Court issued a landmark decision in *Dynamex Operations West v. Superior Court.*[15] *Dynamex* provided a new test for determining whether a worker should be classified an employee or an independent contractor.[16] The new test provides increased protections against the misclassification of workers as independent contractors by creating a presumption of employee status.[17] In September 2019, the California Legislature codified the *Dynamex* test and clarified its application by approving Assembly Bill 5 ("AB 5").[18]

This Comment posits that the *Dynamex* decision created a dysfunctional dichotomy by bringing many misclassified workers into the purview of the Industrial Welfare Commission's ("IWC") Wage Orders, while excluding the same workers from other protections and benefits that employees are entitled to under the Labor Code. By codifying the "ABC" Test into the Labor Code, AB 5 corrected some of the inconsis-

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[10] Gary Richards, *DUI Arrests Down Sharply in California Cities – Thanks to Lyft and Uber?*, MERCURY NEWS (May 15, 2018, 12:12 PM), https://www.mercurynews.com/2018/05/10/drunk-driving-arrests-decline-in-some-cities/.

[11] James Sherk, *The Rise of the "Gig" Economy: Good for Workers and Consumers*, HERITAGE FOUND. 3-4 (Oct. 7, 2016), http://thf-reports.s3.amazonaws.com/2016/BG3143.pdf.

[12] Sherk, *supra* note 10, at 6.

[13] *See,* Lawrence Mishel, *Uber and the Labor Market: Uber Drivers' Compensation, Wages, and the Scale of Uber and the Gig Economy*, ECON. POL'Y INST. 1 (May 15, 2018), https://www.epi.org/files/pdf/145552.pdf (commenting on *Dispatches From the New Economy: The On-Demand Economy and the Future of Work*, INTUIT (Jan. 28, 2016), https://www.slideshare.net/Intuit Inc/dispatches-from-the-new-economy-the-ondemand-workforce-57613212/14-The_ondemand_economy_is_accelerating).

[14] Bloomberg Opinion Editorial Board, *California Could be a Model for Gig Economy Fairness*, BLOOMBERG (Jan. 24, 2019, 2:00 AM), https://www.bloomberg.com/opinion/articles/2019-01-24/california-gig-economy-regulations-a-grand-bargain-is-possible.

[15] Dynamex Operations W. v. Superior Ct., 4 Cal. 5th 903 (2018).

[16] *Id.* at 916.

[17] *Id.* at 954-55.

[18] CAL. LAB. CODE § 2750.3 (2020).

tency that *Dynamex* created. Nevertheless, while *Dynamex* and AB 5 provide a critical framework for combating misclassification and the resulting worker exploitation, this Comment argues that they fall short of bringing misclassified independent contractors into the purview of the most important employee right: collective bargaining.

Accordingly, this Comment proposes a framework that would afford misclassified independent contractors the right to collectively bargain with the party employing them. This Comment explores the potential for a statewide labor relations scheme specifically for independent contractors, as well as the guild model as pathways for collective bargaining. Part I defines the problem of independent contractor misclassification and provides an overview of the *Dynamex* decision, relevant background, and subsequent decisions interpreting *Dynamex*. Part II highlights the shortcomings of *Dynamex* in adequately addressing the independent contractor problem. Part III discusses Assembly Bill 5 as a promising solution to combating misclassification. Finally, Part IV provides recommendations for a path to collective bargaining for workers misclassified as independent contractors.

I. AN OVERVIEW OF INDEPENDENT CONTRACTOR MISCLASSIFICATION

While employees in the United States are largely protected by various state and federal laws, workers classified as independent contractors do not enjoy safeguards against exploitation and abuse.[19] According to the Internal Revenue Service, an independent contractor is someone who is self-employed and performs services that are not subject to control by an employer.[20] The United States Department of Labor estimates that there are 10.6 million workers classified as independent contractors in the country.[21] Employers may avoid costs and legal obligations by misclassifying workers as independent contractors.[22] A study found that between 10% and 30% of employers misclassify their workers.[23]

[19] *See* Catherine Ruckelshaus & Ceilidh Gao, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, NELP (Dec. 19, 2017), https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-on-workers-and-federal-and-state-treasuries-update-2017/.

[20] Internal Revenue Service, *Independent Contractor Defined*, IRS (last updated Apr. 24, 2018), https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined.

[21] Econ. News Release, U.S. Dep't of Labor, Bureau of Labor Statistics, Contingent and Alternative Emp't Arrangements Summary (June 7, 2018), https://www.bls.gov/news.release/conemp.nr0.htm.

[22] Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53, 55 (2015).

[23] de Silva et al., *supra* note 6.

Misclassified workers are not entitled to minimum wage, overtime compensation, family and medical leave, unemployment insurance, workers' compensation benefits, or protections against workplace discrimination.[24]

Worker misclassification may harm the labor market by providing an unfair competitive advantage to employers who misclassify workers.[25] The Internal Revenue Service estimates that misclassification costs federal revenues $1.6 billion annually.[26] By avoiding increased labor costs, businesses that misclassify workers gain an advantage over businesses that follow the law and incur corresponding labor costs.[27] For example, misclassifying employees shifts $831.4 million in unemployment insurance taxes and $2.54 billion in workers' compensation premiums to law-abiding businesses each year.[28]

When there is no clear standard for employers to discern who can be an independent contractor or who can be an employee, employers struggle to comply with the law. The employer may be incentivized to classify workers according to the employer's best interest rather than the legally appropriate classification.[29] Workers are even less likely than employers to be aware of misclassification, or to pursue a remedy for misclassification.[30]

In response to the growing number of statistics about the harms of worker misclassification, several states across the country have enacted statutes that alter the requirements for classifying a worker as an independent contractor, and the enforcement structure against employers who misclassify workers.[31] Some states, such as Massachusetts, have adopted the "ABC" Test in their statutory definition of independent contractor.[32] The "ABC" Test is a three-prong test that consists of the following factors: (A) the worker is free from employer direction and control; (B) the

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[24] U.S. Dep't of Labor, Wage & Hour Div., *Employee Misclassification as Independent Contractors*, U.S. DEP'T OF LABOR, http://www.dol.gov/whd/workers/misclassification/ (last visited Nov. 15, 2018); *Coverage*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, http://www.eeoc.gov/employers/coverage.cfm (last visited Nov. 15, 2018).

[25] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-717, EMPLOYEE MISCLASSIFICATION: IMPROVED COORDINATION, OUTREACH, AND TARGETING COULD BETTER ENSURE DETECTION AND PREVENTION 39 (2009), https://www.gao.gov/assets/300/293679.pdf.

[26] *Id*.

[27] Sarah Leberstein & Catherine Ruckelshaus, *Independent Contractor vs. Employee: Why Independent Contractor Misclassification Matters and What We Can Do to Stop It*, NELP 4 (May 2016), https://www.nelp.org/wp-content/uploads/Policy-Brief-Independent-Contractor-vs-Employee.pdf.

[28] *Id.*

[29] Deknatel & Hoff-Downing, *supra* note 21, at 65.

[30] *Id.*

[31] *Id.* at 58.

[32] *Id.* at 65.

service performed is outside the usual course of business of the employer; and (C) the individual is customarily engaged in an independently established trade, profession, occupation, or business of the same nature as that involved in the service performed.[33] For example, under Massachusetts' "ABC" Test there is a presumption of employee status that is rebuttable only when the employer can prove all three factors.[34]

The California Legislature adopted the "ABC" Test later. However, the California Legislature recognized the harms that result from misclassification as early as 2011, when it passed a law rendering it unlawful to willfully misclassify individuals as independent contractors.[35] The law imposes civil penalties of $5,000 to $25,000 per violation.[36]

A. CALIFORNIA LAWS PROTECTING EMPLOYEES

The California Legislature created the Industrial Welfare Commission ("IWC") in 1913 to regulate the hours, wages, and conditions of employment.[37] Though the IWC was founded to protect women and minors, its authority and scope has grown to include all employees in California.[38] The IWC issues Wage Orders setting meal and rest break requirements, minimum wage, and overtime pay for employees.[39] Presently, there are 18 different Wage Orders.[40] Each Wage Order applies to a discrete class of workers based on the nature of their work.[41] For example, Wage Order 9 applies to workers in the transportation industry and includes provisions requiring that work is paid at one-and-one half the rate of regular pay after eight hours and twice the rate of pay after 12 hours of work.[42] It also requires that employers provide meal periods of at least 30 minutes after five hours of work, among other things.[43] It is important to distinguish the Wage Orders, which govern the specifically enumerated requirements therein, from the broader California Labor Code, which is written and amended by the California Legislature.[44]

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[33] *Id.* at 65; MASS. GEN. LAWS ch. 149, § 148B(a)(1)-(3) (2014).

[34] *Id.*; § 148B(a)(1)-(3) (2014).

[35] S.B. 459, Reg. Sess. (Cal. 2011).

[36] *Id.*

[37] Martinez v. Combs, 49 Cal. 4th 35, 52 (2010).

[38] *Id.* at 55.

[39] CAL. CODE REGS. tit. 8, § 11010 (2018).

[40] Martinez, 49 Cal. 4th at 57.

[41] Indus. Welf. Com'n Wage Order, CAL. DEP'T OF INDUS. REL., https://www.dir.ca.gov/iwc/wageorderindustriesprior.htm (last visited Mar. 12, 2019).

[42] Indus. Welfare Comm'n, WAGE ORDER No. 9-2001 § (3)(A)(1) (2001).

[43] § (11)(A).

[44] *See generally*, CAL. LAB. CODE.

The California Labor Code offers a variety of protections and remedies to employees.[45] Some commonly asserted employee remedies under the Labor Code include waiting time penalties and liquidated damages.[46] While the Wage Orders mandate proper payment of the minimum wage and overtime pay,[47] Labor Code section 203 provides that where an employer willfully fails to pay any wages when an employee is discharged or quits, waiting time penalties are assessed against the employer for an amount equivalent to the employee's daily rate, until the owed wages are paid, for up to 30 days.[48] Similarly, Labor Code section 1194.2 provides that, when an employer fails to pay the minimum wage, the employee is entitled to liquidated damages in the amount equal to the unpaid minimum wages with interest.[49] These two provisions help illustrate that the Wage Orders and the Labor Code operate in conjunction when practically applied. Typically, when an employee brings a claim for Wage Order violations, the employee may assert remedies under the Labor Code simultaneously.[50]

When an employee suffers an injury arising out of the course of employment and the injury is caused by the employment, the employee will receive workers' compensation benefits.[51] Under Labor Code section 3700, all California employers must provide workers' compensation insurance benefits to their employees.[52] Workers' compensation insurance provides five basic benefits for injured employees or their survivors: (1) medical costs to recover from a work-related injury; (2) temporary disability benefits to cover lost wages while the employee recovers; (3) permanent disability benefits to compensate an employee who does not fully recover; (4) supplemental job displacement benefits to help pay for retraining or skill enhancement in the event the employee does not fully recover; and (5) death benefits paid to survivors if an employee dies from a work-related injury.[53] Workers' compensation benefits protect the employee as well as the employer, as employers are

[45] *See e.g.,* CAL. LAB. CODE §§ 203, 1194.2 (2019).

[46] *Id*.

[47] Indus. Welfare Comm'n, WAGE ORDER No. 9-2001.

[48] Cal. Lab. Code § 203 (2019); GEORGE ABELE & KIRBY WILCOX, 1 MATTHEW BENDER PRACTICE GUIDE: CALIFORNIA WAGES AND HOURS § 5.16(b)(1) (Matthew Bender & Company, Inc. 2018).

[49] § 1194.2.

[50] Labor Comm'n, *Policies and Procedures for Wage Claim Processing*, CAL. DEP'T OF INDUS. REL., https://www.dir.ca.gov/dlse/policies.htm (last visited Nov. 15, 2018).

[51] Edward Baskauskas, 2 CALIFORNIA EMPLOYMENT LAW § 20.20 (Kirby Wilcox et al. eds., Matthew Bender & Company, Inc. 2019).

[52] § 3700.

[53] Division of Workers' Comp., *Answers to Frequently Asked Questions About Workers' Compensation for Employees*, CAL. DEP'T OF INDUS. REL., https://www.dir.ca.gov/dwc/WCFaqIW.html#5 (last visited Mar. 10, 2019).

shielded from tort liability for an injured worker under the exclusive-remedy doctrine.[54] Workers' compensation benefits do not extend to independent contractors, despite the fact that they may extend to minors, prison inmates, and undocumented workers.[55]

Finally, collective bargaining is an important right only afforded to employees and not independent contractors. Collective bargaining is the process by which employees negotiate collectively with their employers over working conditions.[56] In the private sector, collective bargaining is governed by federal law under the National Labor Relations Act ("NLRA").[57] The NLRA aims to protect the rights of employees and employers while encouraging collective bargaining.[58] The NLRA explicitly excludes independent contractors from its definition of "employee."[59]

B. THE CALIFORNIA SUPREME COURT ATTEMPTS TO ADDRESS THE INDEPENDENT CONTRACTOR PROBLEM IN ITS LANDMARK *DYNAMEX* DECISION

1. Preceding Decisions

For almost three decades, prior to *Dynamex*, California used a multi-factor test to determine employee versus independent contractor status: the *Borello* test.[60] The *Borello* test consists of the following factors: (1) whether the employer has a "right to control" the manner and means of the work completed; (2) the employer's right to discharge the workers; (3) whether the workers are engaged in a distinct occupation or business; (4) the nature of the work performed; (5) the skill required in the particular occupation; (6) whether the employer supplies the instrumentalities, tools, and the place of work; (7) the length of time for which the services will be performed; (8) the method of payment; (9) whether the work is part of the regular business of the employer; and (10) whether the parties believed they were creating an employer-employee relationship.[61] Under *Borello,* the burden of proving employee status is on the worker.[62]

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[54] Baskauskas, *supra* note 50.

[55] *Id.*

[56] Ralph M. Goldstein, *The Obligations of Collective Bargaining*, 18 B.U. L. REV. 750, 751 (1938).

[57] 29 U.S.C. §§ 151-169 (2019).

[58] § 151.

[59] *Id.*

[60] S.G. Borello & Sons, Inc. v. Dep't of Indus. Rel., 48 Cal. 3d 341, 351 (1989).

[61] *Id.*

[62] *Id.* at 349.

After *Borello* and prior to *Dynamex*, two decisions clarified the definition of the term "to employ" under the California Wage Orders. In *Martinez v. Combs*, agricultural workers sued their employer, a farming company, and two produce merchants that did business with the farming company.[63] The workers claimed they were jointly employed by the produce merchants, such that the produce merchants were therefore liable for unpaid minimum wages and penalties.[64] The California Supreme Court found that, under the Wage Orders, the term "to employ" had three alternative definitions.[65] First, it meant to exercise control over the wages, hours or working conditions.[66] Second, it also meant to "suffer or permit to work,"[67] meaning that the employer "knows or has to reason" to know the worker works for them.[68] Finally, "to employ" also means to engage, thereby creating a common law employment relationship.[69] The court in *Martinez* found that the produce merchants had not employed the agricultural workers under any of these three definitions.[70]

Four years later, *Ayala v. Antelope Valley Newspapers, Inc.* added to the discussion about the proper test to determine employee versus independent contractor status.[71] In *Ayala,* a group of newspaper carriers sued the newspaper company they worked for, alleging Wage Order violations and that the company misclassified them as independent contractors.[72] First, the court needed to discern whether the workers were employees to determine whether the class could properly be certified for a class-action suit.[73] Here, the court had the opportunity to decide whether it would apply *Martinez* to find an employment relationship under any of the three definitions of "employ" in the Wage Orders, or whether it would apply the traditional multi-factor test.[74] The court deliberately decided not to rule on which test should govern and stated that it was a "question for another day."[75] Accordingly, the court used the *Borello* test because the plaintiff's theory was that they were employees under the *Borello* test.[76] The court ultimately remanded the case for further proceedings to

[63] *Martinez*, 49 Cal. 4th at 42-43.
[64] *Id.*
[65] *Id.* at 64.
[66] *Id.*
[67] *Id.*
[68] Morillion v. Royal Packing Co., 22 Cal. 4th 575, 585 (2000).
[69] *Martinez*, 49 Cal. 4th at 64.
[70] *Id.* at 77.
[71] Ayala v. Antelope Valley Newspapers, Inc., 59 Cal. 4th 522, 531 (2014).
[72] *Id.* at 528-29.
[73] *Id.* at 529.
[74] *Id.* at 530-31.
[75] *Id.* at 531.
[76] *Id.*

give the trial court an opportunity to reach a decision applying the proper legal inquiry.[77]

2. The Dynamex *Decision*

The plaintiffs in *Dynamex* were parcel delivery drivers for a courier and delivery-service company that operated a number of business centers in California.[78] Prior to 2004, Dynamex classified its California drivers as employees, but in 2004 it converted all its drivers to independent contractors upon concluding that the conversion would generate economic savings for the company.[79] The drivers brought suit claiming they were incorrectly classified as independent contractors as opposed to employees.[80] They also claimed that Dynamex violated provisions in the California Wage Orders as well as the Labor Code.[81]

Though the trial court initially denied class certification, the California Court of Appeal reversed, and the trial court eventually certified the class in 2011.[82] While the plaintiffs asserted that the new legal standard from *Martinez* was the correct standard to determine employee versus independent contractor status, Dynamex contended that *Martinez* did not apply.[83] Dynamex argued that *Martinez* strictly applied to questions of joint-employer status and not to determine independent contractor status.[84] Instead, Dynamex argued that *Borello* was the correct standard to determine whether the plaintiffs were employees or independent contractors.[85] Under the *Borello* standard, it is more difficult to prove that a worker is an employee.[86] The trial court agreed with the plaintiffs' position, stating that *Martinez* was not limited to joint-employment questions and that the *Martinez* decision represents a "redefinition of the employment relationship."[87]

In 2012, Dynamex renewed its previous motion to decertify the class.[88] The trial court denied the motion and Dynamex appealed.[89] The

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[77] *Id.* at 540.

[78] *Dynamex Operations W.*, 4 Cal. 5th at 917.

[79] *Id.*

[80] *Id.* at 919.

[81] *Id.*

[82] *Id.* at 919-20.

[83] *Id.* at 920-21.

[84] *Id.*

[85] *Id.* at 921.

[86] *C.f. S.G. Borello & Sons, Inc.*, 48 Cal. 3d at 355-59, *with Martinez*, 49 Cal. 4th at 42-43 (The *Borello* test consists of a multi-factor assessment, whereas the *Martinez* test provides for three alternative definitions of employment.)

[87] *Dynamex Operations W.*, 4 Cal. 5th at 92.

[88] *Id.* at 924.

[89] *Id.*

California Court of Appeal approved Dynamex's motion regarding to the claims arising from Labor Code violations.[90] However, it denied the motion for claims arising from Wage Order violations, holding that the *Martinez* test was proper for Wage Order claims, but not for Labor Code claims.[91] Then Dynamex petitioned for review of the appellate court's conclusion that the Wage Order definitions of "to employ" and "employer," as construed by *Martinez*, may be relied on to determine whether a worker is an employee or an independent contractor under the California Wage Orders.[92]

The California Supreme Court affirmed the Court of Appeal's decision and concluded that the second alternative definition of "to employ" and "employer" in the Wage Orders, "to suffer or permit to work," properly applies to the question of whether a worker should be classified as an employee or independent contractor.[93] The court noted that the legislature intended expansive reach of the "suffer or permit to work" standard as a means of providing maximum protections to workers and law-abiding businesses.[94] It further asserted that the standard must be interpreted and applied broadly to include all workers who can "reasonably be viewed as working in the hiring entity's business."[95] The court also expressed concern that multi-factor tests that consider "all the circumstances," like *Borello*, afford businesses greater opportunity to evade wage and hour laws.[96] As a consequence, the court presented a new three-prong test to determine whether a worker has been "suffer[ed] or permit[ted] to work" and is thus an employee or an independent contractor under the California Wage Orders.[97]

Under the new standard, there is a presumption that the worker is an employee.[98] The employer may overcome the presumption by establishing each of the three factors in the following "ABC" Test:

> (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and*
> (B) that the worker performs work that is outside the usual course of the hiring entity's business; *and*

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[90] *Id.* at 924-25.
[91] *Id.*
[92] *Id.* at 925.
[93] *Id.* at 943.
[94] *Id.* at 952-53.
[95] *Id.* at 953 (2018) (alteration omitted) (quoting *Martinez*, 49 Cal. 4th at 49).
[96] *Id.* at 954.
[97] *Id.* at 956-57.
[98] *Id.* at 957.

> (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.[99]

To satisfy the "A" prong, workers must be free from the hiring party's control as well as from the actual control of the hiring party regarding the manner and detail of the work performed.[100] The "B" prong seeks to distinguish work that is traditionally performed by employees versus work that is traditionally performed by independent contractors.[101] The court offers two opposing examples: a plumber repairing a leak at a retail store and a seamstress making dresses in her home for a clothes manufacturing business.[102] The first is an example of an independent contractor relationship, while the second is an example of an employment relationship.[103] Finally, prong "C" seeks to differentiate situations where the worker has "independently chosen the burdens and benefits of self-employment" from those where workers have been subjected to the independent contractor label through unilateral action by the hiring entity.[104]

3. Subsequent Decisions

Though the *Dynamex* decision was issued less than two years ago,[105] California courts have interpreted the limitations of *Dynamex.*[106] In *Curry v. Equilon Enterprises*, a service station manager brought suit against the owner of the gas station where she worked, Equilon Enterprises.[107] The plaintiff alleged several Wage Order violations, including failure to pay overtime and missed break periods.[108] The plaintiff signed an employment contract with American Retail Services, a limited liability company that had a multi-site operations contract with Shell.[109] The plaintiff argued that Shell was a joint-employer and suggested that the "ABC" Test should be used to define "suffer or permit to work" in the joint-employer analysis.[110] The California Court of Appeal reasoned that the California Supreme Court's analysis in formulating the "ABC" Test

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[99] *Id.* at 957 (emphasis in original).
[100] *Id.* at 958.
[101] *Id.* at 959.
[102] *Id.*
[103] *Id.* at 960.
[104] *Id.* at 962 (quoting *S.G. Borello & Sons, Inc*., 48 Cal. 3d at 354).
[105] *Id.* at 903.
[106] *See e.g.,* Curry v. Equilon Enters., 23 Cal. App. 5th 289 (2018); Garcia v. Border Transp. Grp., 28 Cal. App. 5th 558 (2018).
[107] *Curry*, 23 Cal. App. 5th at 292.
[108] *Id.* at 292-93.
[109] *Id.*at 294-95.
[110] *Id.* at 312.

was rooted in policy reasons uniquely related to the issue of misclassification.[111] Therefore, the court found that placing the burden on the employer to prove the "ABC" Test factors in order to absolve itself of joint-employer liability does not serve the policy goals the court intended in *Dynamex.*[112] In sum, this decision established that the "ABC" Test may not be used to establish joint employment.

Another recent case that highlighted the limitations of *Dynamex* is *Garcia v. Border Transportation Group*.[113] In *Garcia*, a taxi driver sued Border Transportation, the company he worked for as a driver, alleging several claims under the Wage Orders as well as claims not under the Wage Orders.[114] The trial court granted summary judgment for the Border Transportation, finding that Garcia was an independent contractor under *Borello.*[115] By the time the case reached the California Court of Appeal, *Dynamex* was decided by the California Supreme Court.[116] Hence, the Court of Appeal applied the "ABC" Test to Garcia's Wage Order claims and reversed summary judgement, finding that he was an employee.[117] However, the court noted that *Borello* remained the proper test to determine employee versus independent contractor status for non-Wage Order claims.[118] The court further noted that *Borello* remained the standard for workers' compensation.[119] Though *Dynamex* was explicit in that it did not apply to non-Wage Order claims, *Garcia* clarified this point further.[120] *Garcia* exemplifies situations where California workers may be found to be employees under the Wage Orders but not under the Labor Code.

II. THE NARROW SCOPE OF *DYNAMEX* CREATES AN UNWORKABLE DICHOTOMY

Overall, the "ABC" Test provides increased protections against misclassification by creating a presumption of employee status, setting a high threshold for overcoming the presumption by requiring that all three prongs must be satisfied, and by setting forth a clear test that is accessible for employers and workers alike. Nevertheless, because the court's decision was narrowly tailored to the Wage Orders exclusively, the

[111] *Id.* at 314.
[112] *Id.*
[113] *Garcia*, 28 Cal. App. 5th at 558.
[114] *Id.* at 563-64.
[115] *Id.* at 564.
[116] *Id.*
[117] *Id.*
[118] *Id.* at 571.
[119] *Id.*
[120] *Id.*

"ABC" Test was only useful to determine a worker's status as it related to Wage Orders because it did not apply to determining employee status for claims arising out of the Labor Code or workers' compensation.[121] The California Supreme Court explicitly acknowledged that the absence of an easily and consistently applied standard "leaves both businesses and workers in the dark with respect to basic questions relating to wages and working conditions that arise regularly."[122] The narrow applicability of its "ABC" Test to Wage Order claims exacerbated the very problem the court acknowledged.

While the "ABC" Test brought many misclassified workers into the purview of the IWC's Wage Orders, ensuring proper payment of the minimum wage and overtime pay, the same workers remained excluded from other protections and benefits that employees are entitled to. This dichotomy offered employers seeking to violate the law new opportunities to evade responsibility. It also created potential for confusion for law-abiding employers and workers seeking to assert their rights.

The penalties set forth in the Labor Code serve to deter employers from violating the law.[123] This deterrent effect serves the "critically important objectives" of the Wage Orders as stated by the *Dynamex* court: to benefit both workers and law-abiding businesses by eliminating the competitive advantage enjoyed by employers who offer substandard wages.[124] When workers are classified as employees under the Wage Orders, but not under the Labor Code, these workers are denied some of the remedies designed to make employees whole and deter misconduct by employees. By creating a two-tiered system where workers found to be employees under *Borello* have access to these remedies, and workers found to be employees under *Dynamex* do not, California effectively undermined its wage and hour laws.

Workers' compensation protections further illustrate the dichotomy between protections for employees under *Dynamex* as opposed to employees under *Borello*.[125] A worker who met the standard to be an employee under the *Dynamex* "ABC" Test was not entitled to workers' compensation benefits unless they also met the *Borello* standard.[126] This dichotomy allowed employers to lawfully exclude employees from workers' compensation benefits if the worker was not considered an employee under *Borello*. This had the potential to create situations where employ-

[121] *Dynamex Operations W.*, 4 Cal. 5th at 943.
[122] *Id.* at 954.
[123] CAL. LAB. CODE §§ 203, 1194.2 (2019).
[124] *Dynamex Operations W.*, 4 Cal. 5th at 952.
[125] *See* CAL. LAB. CODE, Div. 4, Pt. 1, Ch. 4 (2019).
[126] *See Garcia*, 28 Cal. App. 5th at 571.

ees who were injured in the course of employment did not have any access to workers' compensation benefits.

While *Dynamex* attempted to curb misclassification by providing a more straightforward test to determine employee versus independent contractor status, the narrow scope of the decision fell short of this objective. By limiting application of the "ABC" Test exclusively to the Wage Orders, the decision failed to effectively limit opportunities for misclassification. Furthermore, the exclusion of *Dynamex* employees from workers' compensation benefits made them even more vulnerable to misclassification. After this decision, workers considered employees under *Dynamex* could justifiably rely on their employee status to bring them into the purview of workers' compensation, only to find out, once they were injured, that they are not protected unless they were also employees under *Borello.*

III. ASSEMBLY BILL 5 AS A PROMISING SOLUTION

After much debate, Assembly Bill 5 ("AB 5") emerged as a promising solution to the uncertainty that *Dynamex* caused. In response to the *Dynamex* decision, leading gig-economy companies and business groups initially sought to undo the decision, while labor groups sought to clarify and expand its application through executive and legislative action. Major technology companies including Uber, Lyft, InstaCart, DoorDash, PostMates, and TaskRabbit, argued that their business model would not be viable if they were to implement traditional employee-employer structures.[127] The California Chamber of Commerce also mobilized to garner support from restaurant associations, retailers, trucking companies, and individual workers to call for legislation to overturn *Dynamex.*[128] In their marketing materials on the "I'm Independent Coalition" website, the Chamber of Commerce describes *Dynamex* as "overturn[ing] . . . employment law that allowed individuals to work as independent contractors."[129]

Worker advocate groups, such as the California Labor Federation, voiced opposition against business groups' efforts to overturn *Dynamex.*[130] In a letter to then-Governor Brown, they voiced their oppo-

[127] Josh Eidelson, *Gig Firms ask California to Rescue Them from Court Ruling*, BLOOMBERG (Aug. 6, 2018, 12:15 PM), https://www.bloomberg.com/news/articles/2018-08-05/gig-firms-ask-california-dems-to-rescue-them-from-court-ruling.

[128] *Id.*

[129] *About Us*, I'M INDEPENDENT COALITION, IMINDEPENENT.CO, https://imindependent.co/about/ (last visited Nov. 15, 2018).

[130] Eidelson, *supra* note 122.

sition to any attempt to "delay or alter" the *Dynamex* ruling.[131] Labor groups immediately voiced support for a new bill to codify *Dynamex*.[132] Furthermore, labor groups expressed their openness to incorporating changes to the bill to "clear up the intent" of the test to prevent liability for small businesses that, for example, bring a one-time contractor to perform a service.[133]

In December 2018, Assembly Member Lorena Gonzalez introduced Assembly Bill 5 to codify the *Dynamex* decision and clarify its application.[134] Assembly Member Gonzalez commented that maintaining the new *Dynamex* standard was "essential for maintaining solid employment for workers in a changing economy."[135] She added that AB 5 offered a quicker resolution than litigation to addressing *Dynamex's* implications for issues like workers' compensation and unemployment insurance.[136] In a contentious process with many competing interests, the bill was rewritten a half-dozen times.[137]

Governor Gavin Newsom signed AB 5 in its final form on September 18, 2019.[138] Under AB 5, effective January 1, 2020, California workers are classified as employees by default, unless their employer can show they can satisfy all three prongs under *Dynamex's* "ABC" Test: (A) the worker is free form control by the hiring entity; and (B) the worker performs work outside the usual course of business as the hiring entity; and (C) the worker is customarily engaged in an established trade, occupation, or business of the same nature as the work performed.[139] While several occupations are exempted from AB 5, app-based companies are not exempt from the law.[140]

After failed efforts to secure an exception under AB 5, Uber, Lyft, and DoorDash pledged $90 million for a ballot initiative seeking to ex-

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[131] *Id.*

[132] Alexei Koseff, *Labor Pushes to Protect California Ruling that Redefines Who is an Employee*, SACRAMENTO BEE (Dec. 3, 2018, 6:10 PM), https://www.sacbee.com/news/politics-government/capitol-alert/article222466405.html.

[133] *Id.*

[134] Assemb. B. 5, 2019-2020 Reg. Sess. (Cal. 2018).

[135] Koseff, *supra* note 127.

[136] *Id.*

[137] John Myers, Johana Bhuiyan, Margot Roosevelt, *Newsom Signs Bill Rewriting California Employment Law, Limiting Use of Independent Contractors,* L.A. TIMES (Sept. 18, 2019, 3:55 PM), https://www.latimes.com/california/story/2019-09-18/gavin-newsom-signs-ab5-employees0independent-contractors-california.

[138] *Id.*

[139] CAL. LAB. CODE, § 2750.3 (2020).

[140] *Id.*

empt its drivers from AB 5.[141] Though the initiative claims that drivers will receive guaranteed pay equal to 120% the minimum wage, economists estimate that the pay guarantee for drivers under the ballot initiative is the equivalent of $5.64 per hour.[142] Most recently, Uber and Lyft filed a lawsuit in federal court attempting to block AB 5 and arguing that it violates equal protection and due process under state and federal law.[143]

Despite AB 5's numerous exceptions, 64% of workers who are independent contractors at their main job are now subject to the "ABC" Test.[144] If the law survives the challenges mounted against it, it stands to significantly curb misclassification. Importantly, AB 5 empowers the Attorney General and certain city attorneys to bring action for injunctive relief against companies suspected of misclassification.[145] This provides for increased enforcement of the law, thereby reducing the incidence of misclassification by deterring it or suing employers who violate the law. Altogether, AB 5 offers a promising solution for independent contractor misclassification because it provides a uniform standard that is easier for employers to comply with, while providing important enforcement mechanisms. Nevertheless, AB 5 does not address collective bargaining for on-demand platform workers. Without collective bargaining, a dysfunctional dichotomy persists by depriving certain workers of the right to organize for better wages, benefits, and working conditions, effectively maintaining an underclass of workers.

IV. A PATH FORWARD: COLLECTIVE BARGAINING FOR INDEPENDENT CONTRACTORS

Collective bargaining encourages labor and management to negotiate employment relationships that work in the context of the industry, market, company, and community.[146] On average, unionized workers

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[141] Kate Conger, *Uber, Lyft, and DoorDash Pledge $90 Million Fight Driver Legislation in California,* NY TIMES (Aug. 29, 2019), https://www.nytimes.com/2019/08/29/technology/uber-lyft-ballot-initiative.html.

[142] Ken Jacobs & Michael Reich, *The Uber/Lyft Ballot Initiative Guarantees only $5.64 per Hour*, UC BERKELEY LAB. CTR. (Oct. 31, 2019), http://laborcenter.berkeley.edu/the-uber-lyft-ballot-initiative-guarantees-only-5-64-an-hour/.

[143] *Uber and Postmates File Lawsuit Challenging California's New Independent Contractor Law,* NAT'L LAW REV. (Dec. 31, 2019), https://www.natlawreview.com/article/uber-and-postmates-file-lawsuit-challenging-california-s-new-independent-contractor.

[144] Sarah Thomason, Ken Jacobs, Sharon Jan, *Estimating the Coverage of California's New AB 5 Law,* UC BERKELEY LAB. CTR. (Nov. 2019), http://laborcenter.berkeley.edu/wp-content/uploads/2019/11/Estimating-the-Coverage-of-Californias-New-AB-5-Law.pdf.

[145] CAL. LAB. CODE, § 2750.3 (2020).

[146] Michelle Chen, *Union Benefits Go Far Beyond the Workplace,* THE NATION (Jan. 22, 2019), https://www.thenation.com/article/unions-labor-welfare/.

earn 16% more than nonunionized workers.[147] Union members also pay more taxes by virtue of earning more income.[148] Furthermore, employer expenditures on fringe benefits are two and a half times higher per hour for unionized workers.[149] Employees may maximize the benefit they derive from an employment relationship through collective bargaining, and it follows that employees without collective bargaining rights are in a substandard position of employment than those with collective bargaining rights.

In the private sector, collective bargaining is governed by federal law under the National Labor Relations Act ("NLRA").[150] The NLRA aims to protect the rights of employees and employers while encouraging collective bargaining.[151] The NLRA explicitly excludes independent contractors from its definition of "employee."[152] The National Labor Relations Board ("NLRB"), the board that enforces the NLRA, uses a common-law test to determine whether a worker may be deemed an employee and subject to protection under the NLRA.[153] The NLRB considers the following factors in its inquiry: (a) the extent of control which the master may exercise over the details of the work; (b) whether the one employed is engaged in a distinct occupation or business; (c) whether the work is done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the worker supplies the instrumentalities, tools, and the place of work; (f) the length of time the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is part of the regular business of the employer; (i) whether or not the parties believe they are creating a master-servant relationship; and (j) whether the principal is or is not in business.[154] Under this test, many workers considered employees under the "ABC" Test may not be employees under the NLRB's test.

The NLRB issued an advice memo concluding that Uber drivers are independent contractors under its common-law test.[155] Therefore, the NLRB foreclosed the possibility of granting ride- share workers access to

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[147] *Id.*

[148] *Id.*; *see also* Aaron Sojourner & José Pacas, *The Relationship Between Union Membership and Net Fiscal Impact*, IZA INST. OF LAB. ECON. 2, (Jan. 2018), http://ftp.iza.org/dp11310.pdf.

[149] Aaron Sojourner & José Pacas, *The Relationship Between Union Membership and Net Fiscal Impact*, IZA INST. OF LAB. ECON. 2, (Jan. 2018), http://ftp.iza.org/dp11310.pdf.

[150] 29 U.S.C. §§ 151-169 (2019).

[151] § 151.

[152] *Id.*

[153] SuperShuttle DFW, Inc., 367 NLRB No. 75 (2019).

[154] SuperShuttle DFW, Inc., 367 NLRB No. 75 (2019).

[155] NLRB Advice Memo, *Uber Technologies, Inc.* Case Nos. 13-CA-163062 and 14-CA-158833 & 29-CA-177 483 (Apr. 16, 2019).

collective bargaining protections for the foreseeable future. Nevertheless, workers, labor organizations, and governments may consider novel frameworks by which gig-economy workers may access collective bargaining because without access to collective bargaining, many gig-economy workers will remain in a subpar employment position.

A. Creating a State Labor Relations Scheme for Independent Contractors

California lawmakers ought to consider creating a state regulatory scheme granting collective bargaining rights to workers who are viewed as independent contractors by the NLRB. California would thereby create its own version of the NLRA for this class of workers. Workers who are employees under the "ABC" Test and independent contractors under the NLRB's common-law test are in a unique position because of their hybrid status for the purpose of collective bargaining. Since the NLRA does not provide protection to this hybrid class of employee-independent contractors, a state law specifically tailored to empower hybrid employee-independent contractors to collectively bargain would offer a new opportunity for them to engage in collective bargaining to improve their working conditions.

Some may argue that such a labor relations scheme would be preempted because the NLRA already governs labor relations and collective bargaining. However, it would likely avoid preemption, as the NLRA has left open the field for regulation of independent-contractor labor relations and collective bargaining.[156] The NLRA excludes independent contractors from its purview, and this allows state law to fill in to regulate in the area of hybrid employee-independent contractor labor relations.

The Agricultural Labor Relations Act ("ALRA") provides a model for a labor relations scheme for independent contractors. The ALRA emerged to fill a gap federal law left open.[157] The NLRA's exclusion of agricultural workers allowed California to create the ALRA to protect workers otherwise left without collective bargaining protection and therefore subject to exploitation.[158] The ALRA was created pursuant to California's policy:

> to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions

[156] 29 U.S.C. § 151 (2019).
[157] Cal. Lab. Code §§ 1140-1166.3 (2019).
[158] 29 U.S.C. § 151 (2019).

> of their employment, and to be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. For this purpose this part is adopted to provide for collective-bargaining rights for agricultural employees.[159]

A state regulatory scheme for independent-contractor collective bargaining may be subject to an antitrust challenge under the Sherman Act because collective bargaining may inhibit competition between independent contractors.[160] However, it would likely survive such a challenge. Under *Parker v. Brown*, state and municipal authorities are immune from federal antitrust lawsuits for actions taken pursuant to a clearly expressed state policy that, when legislated, had foreseeable anticompetitive effects.[161] California lawmakers may frame the stated policy purpose of the independent contractor collective bargaining law as a mechanism to facilitate commerce and protect its residents from substandard working conditions, thereby countering antitrust challenges. Furthermore, the hybrid employee-independent contractor workers subject to the regulatory scheme would bear little resemblance to business owners in any significant way, thus further undermining any serious antitrust challenge. Though erecting a regulatory scheme and corresponding agency requires a vast amount of resources, California may find it a worthwhile option to consider to protect its workforce and economy.

B. THE GUILD MODEL

Another option that workers and labor groups should consider is organizing a guild for independent contractors. A guild is an association of people in shared occupations who work collectively to pursue mutual goals.[162] Guilds existed for thousands of years, dating back to the medieval ages.[163] Historically, guilds worked together to set prices for goods, facilitate contract enforcement, and solve information asymmetries.[164] A guild is distinct from a labor union because labor unions represent employees that work for a common employer, while guilds provide an organizational mechanism by which independent contractors or business

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[159] CAL. LAB. CODE § 1140.2 (2019).

[160] *See* 15 U.S.C. § 1 (2019) (The Sherman Act prohibits activities that inhibit interstate commerce and market competition).

[161] Parker v. Brown, 317 U.S. 341 (1943).

[162] Sheila Ogilvie, *The Economics of Guilds*, 28 J. OF ECON. PERSPECTIVES 169, 169-70 (2014).

[163] *Id.* at 170-71.

[164] *Id.* at 174.

owners can negotiate collectively with decision-makers to advocate for their shared interests.[165] Unlike labor unions, guilds are not subject to the rights and responsibilities granted to unions under the NLRA.[166] Thus, employers are not obligated to bargain with guilds over wages, benefits, or working conditions.[167]

Recently, a group of independent contractor ride-share drivers in New York organized a guild to negotiate with Uber over improvements to their working conditions.[168] The guild formed a compensation fund that provides substitute income for injured drivers when they are hurt and unable to work.[169] Furthermore, the guild has successfully advocated for higher pay, access to restrooms for drivers while on the road, and healthcare.[170]

California gig-economy workers could benefit from following suit and organizing a guild to negotiate with technology companies for better wages and increased protections. Absent legislation to form a state regulatory scheme allowing independent contractors to unionize, the guild model would afford independent contractors with the greatest leverage to demand better wages and more protections through collective action. For example, workers may bargain collectively to demand that technology companies contribute to a welfare fund to provide healthcare coverage and protections for injured workers, as well as to increase the rates paid to workers.

However, given that guilds do not have the right to compel a company to negotiate like unions do, gig-economy companies may refuse to recognize the guild and refuse to negotiate with it. If gig-economy companies agree to negotiate with the guild, technology companies may demand that the guild concede that its workers are, in fact, not employees. By collectively resigning to and accepting the independent-contractor status, gig-economy workers would be perpetually cast as second-class workers and would be worse off in the long term. Nevertheless, absent a more viable option, the guild model would be an effective vehicle to bring about improvements to the wages, benefits, and working conditions of gig-economy workers.

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[165] GUILD ASS'N, https://guildassociation.org (last visited Mar. 10, 2019).

[166] *My Employer Says I am an Independent Contractor. What Does That Mean?,* COMM. WORKERS OF AM., https://cwa-union.org/about/rights-on-job/legal-toolkit/my-employer-says-i-am-independent-contractor-what-does-mean (last visited Mar. 15, 2019).

[167] *Id.*

[168] *About the IDG*, INDEP. DRIVERS GUILD, https://drivingguild.org/about/ (last visited Mar. 10, 2019).

[169] *Id.*

[170] *Campaigns*, INDEP. DRIVERS GUILD, https://drivingguild.org/about/ (last visited Mar. 10, 2019).

CONCLUSION

Independent-contractor misclassification is a serious problem that has received large-scale attention from lawmakers and the public over the past two years as a result of the landmark *Dynamex* decision. Though *Dynamex* fell short of providing a standard that would effectively curb misclassification, it provided a clear "ABC" Test to replace the traditional multi-factor test.[171] Nevertheless, *Dynamex* created an unworkable dichotomy by applying the new "ABC" Test to Wage Order claims, while maintaining the traditional multi-factor test for Labor Code claims. This created the potential for situations where some employees would fall under the purview of some California employment protections, but not others.

AB 5 cured *Dynamex's* most substantial defect by codifying the "ABC" Test as the standard test for determining employee versus independent contractor status under the Labor Code.[172] AB 5 provides uniformity and predictability regarding who is an employee and who is an independent contractor. However, it does not ensure that all workers classified as employees under its "ABC" Test have access to collective bargaining.

The ills of misclassification will persist so long as collective bargaining is denied to some employees. Without access to collective bargaining employees do not have the right to negotiate with their employer to address grievances and improve working conditions. Employee status alone is insufficient to allow workers to gain access to livable wages and fair working conditions. California must take its work one step further than AB 5 by enacting a statewide regulatory scheme modeled after the ALRA to allow workers who are employees under AB 5 and whom the NLRB does not recognize as employees to engage in collective bargaining. Alternatively, gig-economy workers should consider organizing a guild for industry-wide bargaining with the gig-economy companies that employ them.

California's bold action to combat misclassification is a model for other jurisdictions to follow. AB 5 brings workers into the purview of California employment protections. However, it does not provide them a vehicle to seek wages, benefits, and working conditions above the minimum protections the Labor Code provides. Collective bargaining is the remaining component necessary to allow California gig-economy workers the greatest opportunity to fair wages, benefits, and working conditions.

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[171] *Dynamex Operations W.*, 4 Cal. 5th at 964.

[172] CAL. LAB. CODE, § 2750.3 (2020).

Golden Gate University Law Review

Volume 50
Issue 2 *Comments Edition*

Article 7

January 2020

That Was Then, This Is Now: The Revival of the Proposed Equal Rights Amendment and the Co-optation of the #MeToo Movement

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COMMENT

THAT WAS THEN, THIS IS NOW: THE REVIVAL OF THE PROPOSED EQUAL RIGHTS AMENDMENT AND THE CO-OPTATION OF THE #METOO MOVEMENT

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INTRODUCTION

History, as well as the art that portrays it, has rendered Black[1] women as supporting characters in both the Black and white spaces they navigate.[2] Both their oppressors and their contemplators oft only consider Black women for the help that they are able to provide.[3] However, the very same have averted their gaze when positions are reversed and Black women need the help.[4]

This pattern of selectively considering the experiences and needs of Black women has existed in the United States of America since Black people's introduction into it by way of the transatlantic slave trade.[5] It is

[1] For a long time, there has been controversy over whether writers should capitalize the term "Black," especially where the writer will not also capitalize the term "white." According to English language mechanics, writers should capitalize the name of ethnic, national, or religious groups to confer honor. However, writers have the choice whether to bestow or withhold this honor. When writers decide to capitalize the term "Black" but not the term "white," the choice is politically signifying. Omi Leissner, *Naming the Unheard Of*, 15 NAT. BLACK L. J. 109, 110 n. 6 (1997–98). For the purposes of this Comment, I will capitalize the term "Black."

[2] *See*, *e.g.,* Nadra Kareem Little, *5 Common African American Stereotypes in TV and Film*, THOUGHTCO. (Oct. 4, 2018), https://www.thoughtco.com/common-black-stereotypes-in-tv-film-2834653 (listing the most pervasive types of supporting roles that Black characters often fulfill in film and television).

[3] *See*, *e.g*., Carolyn M. West, *Mammy, Sapphire, and Jezebel: Historical Images of Black Women and Their Implications for Psychotherapy*, 32 PSYCHOTHERAPY THEORY RESEARCH & PRACTICE 458, 459 (1995) (explaining that a pervasive Black, female stereotype is that of the Mammy—the faithful, domestic servant to white households); *see also*, *e.g*., Nadra Kareem Little, *5 Common African American Stereotypes in TV and Film*, THOUGHTCO. (Oct. 4, 2018), https://www.thoughtco.com/common-black-stereotypes-in-tv-film-2834653 (listing popular supporting roles that Black people fulfill in film and television, and including in the list helping roles).

[4] *See*, *e.g*., Black Women & Sexual Violence, https://now.org/wp-content/uploads/2018/02/Black-Women-and-Sexual-Violence-6.pdf (last visited Jan. 2, 2020) (stating that Black women's claims of sexual abuse are often ignored, due to misconceptions regarding Black women's sexuality); *see also*, *e.g*., Jeffrey J. Pokorak, *Rape as A Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L. J. 1, 8 (2006) (exploring the government's refusal to criminalize the rape of slave women during the slavery era).

[5] *See* LERONE BENNETT, JR., BEFORE THE MAYFLOWER: A HISTORY OF BLACK AMERICA 89 (6th ed. 1987) (examining the role of the "Mammy," and finding that the role existed as early as the slave era and that the role involved the care of the children of white slave owners); *see also*, Lerone Bennett, Jr., Before the Mayflower: A History of Black America 87 (6th ed. 1987) ("The rape of a slave woman, a Mississippi court ruled, is an offense unknown to common or civil law.").

during this then-ensuing, 200-year,[6] institutionalized enslavement that white slave owners used enslaved Black women to nurse their white children.[7] Yet, contemporary courts would rule that the rape of these same women was "unknown to [their] laws."[8] Over 100 years following the end to American slavery, and while encapsulating the similarly selective gaze of Black men upon Black women,[9] Alice Walker ("Walker") wrote the novel *The Color Purple*.[10] This work features protagonist Celie, a young Black girl whose sexually abusive father forces her into a lifetime of caring for a likewise Black and abusive husband.[11]

Modernly, scholars condemn both the Black and white communities for the ongoing pattern of their men overlooking the plights of Black women, while benefitting from their contributions.[12] In accordance with such condemnations, the third millennium has comprised of social efforts to spotlight the unique ways in which Black women experience oppression, and the equally unique injuries that these women sustain as a result.[13] In the midst of these efforts is the #MeToo movement.[14]

Tarana Burke ("Burke")—herself a Black woman[15]—founded the #MeToo movement primarily to assist young, Black women and girls

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[6] *Id*. at 86.

[7] *Id*. at 89.

[8] *Id*. at 87.

[9] *See* E. R. Shipp, *Blacks in Heated Debate over 'The Color Purple,'* THE NEW YORK TIMES (JAN. 27, 1986), https://www.nytimes.com/1986/01/27/us/blacks-in-heated-debate-over-the-color-purple.html (examining some scholars' opinions that *The Color Purple* portrayed the distrust and hatred that Black women have of Black men, due to the cruelty that Black men have inflicted on Black women); *see also* Alice Walker, *The Color Purple* (1992) (featuring the character Celie, who dedicates the earlier parts of her life to serving her Black father and, later, husband, who both in turn sexually abuse her).

[10] ALICE WALKER, THE COLOR PURPLE (1st ed. 1992).

[11] *Id*.

[12] *See, e.g*., Courtland Milloy, *Where Are Black Men in the Fight for Black Women?*, WASH. POST (Nov. 13, 2018), https://www.washingtonpost.com/local/where-are-black-men-in-the-fight-for-black-women/2018/11/13/63030e0c-e771-11e8-a939-9469f1166f9d_story.html (including critiques from various commentators on the absence of Black men in the efforts to support Black, female journalists whom President Trump has targeted with white supremacist tropes, and underscoring that Black men benefit from Black women's political efforts).

[13] *See*, *e.g*., *About: History & Vision*, ME TOO., https://metoomvmt.org/about/#history (last visited Nov. 19, 2018) (explaining that the purpose of the #MeToo movement is to explore and address the needs of specific communities—such as that of Black women—against whom sexual violence is perpetrated); *see also*, *e.g*., *Fill the Void. Lift Your Voice. Say Her Name*., AFR. AM. POL'Y F., https://aapf.org/shn-moms-network (last visited Jan. 2, 2020) (identifying the purpose of the Say Her Name campaign to be to bring awareness to the numerous Black women and girls who have experienced racist police violence).

[14] *See id*. (providing that the mission of the #MeToo movement is to address the sexual violence perpetrated against young Black women and girls).

[15] Sandra E. Garcia, *The Woman Who Created #MeToo Long Before the Hashtag*, THE NEW YORK TIMES (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html [https://perma.cc/RG8R-LKNN].

who have survived sexual violence.[16] As for her inspiration for advocating primarily on behalf of young Black women and girls, Burke credits a thirteen-year-old Black girl who once shared with Burke that she had been sexually assaulted.[17] "I didn't have a response or a way to help her in that moment, and I couldn't even say 'me too,'" Burke explained.[18]

Although the movement began in 2007,[19] it was not until a 2017 Twitter post by white actress Alyssa Milano ("Milano") that the movement garnered its presently sizable support.[20] On October 15, 2017, Milano posted on Twitter to show support for survivors of sexual violence.[21] This was in the wake of the growing number of individuals accusing Hollywood film producer Harvey Weinstein of sexual assault and harassment.[22] Milano wrote on Twitter: "If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet."[23] Within 24 hours after Milano' post, she garnered over 12 million responses from over 4 million users across multiple social media platforms, including Facebook.[24]

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[16] *About*, ME TOO., https://metoomvmt.org/about/#history (last visited Nov. 19, 2018).

[17] Sandra E. Garcia, *The Woman Who Created #MeToo Long Before the Hashtag*, THE NEW YORK TIMES (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html [https://perma.cc/RG8R-LKNN].

[18] *Id*.

[19] Alanna Vagianos, *Tarana Burke Tells Black Women Me Too Is 'Your Movement Too,'* HUFFPOST (Sept. 10, 2018), https://www.huffingtonpost.com/entry/tarana-burke-tells-black-women-me-too-is-your-movement-too_us_5b967c8fe4b0162f472f65f6.

[20] *See* Sandra E. Garcia, *The Woman Who Created #MeToo Long Before the Hashtag*, THE NEW YORK TIMES (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html [https://perma.cc/RG8R-LKNN] (including an image of Milano's Twitter post, which is dated from 2017, and explaining that, soon after Milano's Twitter post, others flooded social media to share their experiences of sexual abuse).

[21] *See id*. (showing an image of a Twitter post from Milano's account that is dated October 15, 2017 and includes language encouraging others to use the "MeToo" hashtag in support of survivors of sexual abuse).

[22] *More Than 12M "Me Too" Facebook Posts, Comments, Reactions in 24 Hours*, CBS NEWS (Oct. 17. 2017), https://www.cbsnews.com/news/metoo-more-than-12-million-facebook-posts-comments-reactions-24-hours/.

[23] Sandra E. Garcia, *The Woman Who Created #MeToo Long Before the Hashtag*, THE NEW YORK TIMES (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html [https://perma.cc/RG8R-LKNN].

[24] *More Than 12M "Me Too" Facebook Posts, Comments, Reactions in 24 Hours*, CBS NEWS (Oct. 17. 2017), https://www.cbsnews.com/news/metoo-more-than-12-million-facebook-posts-comments-reactions-24-hours/.

Since Milano's Twitter post,[25] the media has gone as far as to credit her has having created the #MeToo movement.[26] Beyond incorrectly crediting Milano for founding the movement, media has also attributed the movement itself as having revived past efforts to enact the proposed Equal Rights Amendment ("proposed Amendment").[27]

Advocates strive to enact the proposed Amendment out of a belief that the proposed Amendment, once enacted, would help attain equal treatment across genders.[28] According to its advocates, the Amendment's enactment is necessary because women do not and would not otherwise have equal rights under the United States Constitution.[29] At a June 5, 2018 shadow hearing on ratifying the proposed Amendment, Milano testified in support of ratification: "I do not have equal rights under our Constitution. I have a three year old [*sic*] daughter named Bella. She does not have equal rights under the Constitution, either."[30]

This Comment argues that the anticipated effect of an Equal Rights Amendment on the experiences of Black women and girls who have survived sexual violence is incongruent with the original tenets of the #MeToo movement. To provide context, Part I of this Comment recounts historical efforts to enact the proposed Equal Rights Amendment. Part I also details the concept of "intersectionality," as well as modern campaigns that embrace its meaning to advance the social position of Black women.

In evaluating the efficacy of an Equal Rights Amendment, Part II of this Comment defines the contours of Black women's experiences in surviving sexual assault. This Part identifies observed patterns in the context of sexual assault perpetrated against Black women, and then shows how these patterns arose from pervasive, Black, female stereotypes originat-

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[25] Sandra E. Garcia, *The Woman Who Created #MeToo Long Before the Hashtag*, THE NEW YORK TIMES (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html [https://perma.cc/RG8R-LKNN].

[26] Rochelle Riley, *#MeToo Founder Blasts the Movement for Ignoring Poor Women*, DETROIT FREE PRESS (Nov. 15, 2018), https://www.freep.com/story/news/columnists/rochelle-riley/2018/11/15/tarana-burke-metoo-movement/2010310002/.

[27] Marsha Mercer, *#MeToo Fuels A Comeback for the Equal Rights Amendment*, USA TODAY (March 1, 2018), https://www.usatoday.com/story/news/2018/03/01/metoo-movement-fuels-1970-s-comeback-era/385667002/.

[28] *See* Miranda Leitsinger, *The Equal Rights Amendment: What You Need to Know*, Cal. Rep. (Apr. 30, 2019), https://www.kqed.org/news/11743996/the-equal-rights-amendment-what-you-need-to-know (explaining that the desire to enact the proposed Equal Rights Amendment stems from the belief that a Constitutional amendment pertaining to the treatment of gender will make it less likely that the government will uphold state actions that are discriminatory against gender).

[29] *See, e.g.,* Alyssa Milano, *Alyssa Milano: I Don't Have Equal Rights Under the Constitution — Yet*, CNN (Oct. 5, 2018), https://www.cnn.com/2018/10/05/opinions/kavanaugh-metoo-equal-rights-amendment-alyssa-milano/index.html (testifying, in the absence of an operating Equal Rights Amendment, that she does not have equal rights under the Constitution).

[30] *Id*.

ing from the slavery era. Part III continues the discussion by exploring the anticipated effect of an Equal Rights Amendment on Black women. Then, this Part compares the proposed Amendment's anticipated effect to the unique experiences and needs of Black, female survivors, to in turn show that the proposed Amendment would not adequately remedy Black, female survivors of sexual assault.

Last, Part IV offers two ways in which #MeToo advocates might reconcile their invigorated push for the enactment of an Equal Rights Amendment with the original tenets of the movement. This Part argues that only by supplementing it with support for a modified reasonable person standard and a special damage calculation will efforts to enact an Equal Rights Amendment harmonize with the mission of the #MeToo movement. Only then will the cycle of co-optation end and Black women be made whole.

I. AN OVERVIEW OF THE PROPOSED EQUAL RIGHTS AMENDMENT AND MODERN SOCIAL CAMPAIGNS

A. THE RISE, FALL, AND REVIVAL OF THE PROPOSED EQUAL RIGHTS AMENDMENT

The proposed Equal Rights Amendment was born on the heels of a monumental achievement for American women.[31] On August 26, 1920, Secretary of State Bainbridge Colby certified the ratification of the Nineteenth Amendment to the United States Constitution ("Constitution"),[32] and on July 23, 1923, the National Women's Party ("Party") met to celebrate.[33] The Nineteenth Amendment granted women the right to vote[34]—a right for which both the Party and the preceding generations of women's suffrage supporters had fought for almost a century.[35]

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[31] *See* Thomas H. Neale, *The Proposed Equal Rights Amendment: Contemporary Ratification Issues*, CONGRESSIONAL RESEARCH SERVICE 1, 1 (July 18, 2018), https://fas.org/sgp/crs/misc/R42979.pdf (explaining that, following the ratification of the Nineteenth Amendment, Alice Paul announced to the National Women's Party her plans to draft a proposed Equal Rights Amendment).

[32] *19th Amendment to the United States Constitution*, OUR DOCUMENTS, https://www.ourdocuments.gov/doc.php?flash=false&doc=63 (last visited Mar. 15, 2019).

[33] Thomas H. Neale, *The Proposed Equal Rights Amendment: Contemporary Ratification Issues*, CONGRESSIONAL RESEARCH SERVICE 1, 1 (July 18, 2018), https://fas.org/sgp/crs/misc/R42979.pdf.

[34] *19th Amendment to the United States Constitution*, OUR DOCUMENTS, https://www.ourdocuments.gov/doc.php?flash=false&doc=63 (last visited Mar. 15, 2019).

[35] *Id*.

Alice Paul ("Paul") was the leader of the Party during the time that it celebrated the enactment of the Nineteenth Amendment.[36] In fact, it was at this July 23, 1923 celebration that Paul first announced her plan to create and propose to Congress yet another constitutional Amendment.[37] Although many women suffragists were satisfied with the amount in which the Nineteenth Amendment advanced women's social position, Paul believed that true equality for women had not yet been achieven.[38] Accordingly, Paul's newly proposed Amendment became known as the "Equal Rights Amendment."[39]

In the same year that Paul first announced her plans for the proposed Amendment, the Party submitted what ultimately became the first of many drafts to the 68th Congress—a draft that Congress later rejected.[40] As initially submitted to Congress, the text of the proposed Amendment provided, "Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction."[41] After its initial rejection, advocates continuously rewrote and resubmitted the proposed Amendment to every session of Congress, until the legislature finally passed it in 1972.[42] By the time that the states received the proposed Amendment to vote on ratification, its text stated, "Equality of rights shall not be denied or abridged by the United States or by any State on account of sex."[43] This is the language that remains today.[44]

Thirty-eight states needed to approve the proposed Amendment by 1979 to ratify it.[45] However, by the time that the deadline passed, only 35 states had agreed to ratification.[46] Although Congress added an additional three years to the initial seven-year ratification period, by 1982, the same 35 states had ratified the proposed Amendment.[47] Consequently, the proposed Amendment expired.[48]

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[36] Thomas H. Neale, *The Proposed Equal Rights Amendment: Contemporary Ratification Issues*, CONGRESSIONAL RESEARCH SERVICE 1, 1 (July 18, 2018), https://fas.org/sgp/crs/misc/R42979.pdf.

[37] *Id.*

[38] *The History of the Equal Rights Amendment*, ALICE PAUL INSTITUTE, https://www.alicepaul.org/era/ (last visited Mar. 15, 2019).

[39] *Id*.

[40] *Id*.

[41] *Id.*

[42] *Id*.

[43] S.J. Res. 6, 115th Cong. (2017).

[44] *Id*.

[45] Thomas H. Neale, *The Proposed Equal Rights Amendment: Contemporary Ratification Issues*, CONGRESSIONAL RESEARCH SERVICE 1, 1 (July 18, 2018), https://fas.org/sgp/crs/misc/R42979.pdf.

[46] *Id*.

[47] *Id*.

[48] *Id*.

Although the ratification period for the proposed Amendment ended long ago, extant advocacy in favor of enacting the proposed Amendment has not.[49] Present-day advocates insist that there is still a need for an Equal Rights Amendment to the Constitution.[50] They urge Congress to vote once again—this time in favor of the proposed Amendment—and to then submit the proposed Amendment to the states for ratification.[51] Alternatively, they ask that Congress uphold the actions of the 35 states that had already ratified the proposed Amendment by 1982, and then re-extend the ratification period to allow the requisite three more states to join.[52]

To support their argument in favor of the continued need for an Equal Rights Amendment, both advocates and legal scholars analogize it to the Fourteenth Amendment to the Constitution.[53] Unlike the failed Equal Rights Amendment, the states have long ratified the Fourteenth Amendment.[54] In interpreting the Equal Protection Clause of the latter Amendment, the United States Supreme Court has treated both race and gender classifications as presumptively invalid.[55]

Nevertheless, some perceive that the Constitution affords greater protection on the basis of race than gender.[56] This perception arises because the government's burden of surmounting the presumption of inva-

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[49] *See*, *e.g.*, Alyssa Milano, *Alyssa Milano: I Don't Have Equal Rights Under the Constitution — Yet*, CNN (OCT. 5, 2018), https://www.cnn.com/2018/10/05/opinions/kavanaugh-metoo-equal-rights-amendment-alyssa-milano/index.html (recounting Milano's modern-day efforts to enact the proposed Amendment).

[50] *See*, *e.g.*, *id*. (stating that Milano testified in favor of ratifying the proposed Amendment and implying in her testimony that women do not and would not enjoy equal rights under the Constitution in the absence of an Equal Rights Amendment).

[51] *The History of the Equal Rights Amendment*, ALICE PAUL INSTITUTE, https://www.alicepaul.org/era/ (last visited Mar. 15, 2019).

[52] *Id*.

[53] *See*, *e.g.*, Lisa Baldez et. al., *Does the U.S. Constitution Need an Equal Rights Amendment?*, 35(1) U. CHI. J. LEGAL STUD. 243, 245–47 (2006), https://cpb-us-e1.wpmucdn.com/sites.dartmouth.edu/dist/d/73/files/2012/11/ERA.pdf (resolving whether there is still need for an Equal Rights Amendment and analyzing the way in which the Fourteenth Amendment operates to draw a conclusion).

[54] *See* 14th Amendment to the U.S. Constitution: Civil Rights (1868), OUR DOCUMENTS, https://www.ourdocuments.gov/doc.php?flash=false&doc=43 (last visited Mar. 15, 2019) (providing that the states ratified the Fourteenth Amendment in 1868).

[55] *See* 16B AM. JUR. 2D *Constitutional Law* § 861 (2018) (explaining that the government has the burden of justifying challenged gender classifications); *see also* 16B AM. JUR. 2D *Constitutional Law* § 862 (2018) (explaining that the government has the burden of proving that racial classifications do not violate notions of equal protection).

[56] *See* Lisa Baldez et. al., *Does the U.S. Constitution Need an Equal Rights Amendment?*, 35(1) U. CHI. J. LEGAL STUD. 243, 247-49 (2006), https://cpb-us-e1.wpmucdn.com/sites.dartmouth.edu/dist/d/73/files/2012/11/ERA.pdf.

lidity is lessened when a gender classification is disputed.[57] According to proponents of an Equal Rights Amendment, the differing burdens show that there is lessened protection based on gender, inherent in the Constitution itself.[58]

The argument follows then that the Equal Rights Amendment would heighten protection based on gender by requiring the government to show more to uphold gender classifications.[59] Advocates theorize that the government would have to make the same showing as it would in defending race-based classifications, which would then lessen the likelihood of gender classifications being upheld.[60] Regardless of the merits, this theory then does not resolve the question as to whether the predicted results would align with and further the mission of the #MeToo movement.

B. CO-OPTATION BOTH WITHIN AND WITHOUT THE #METOO MOVEMENT

Proponents of an Equal Rights Amendment have narrowly focused on remedying gender-based injustices.[61] However, other advocates have honed their efforts on advancing the position of women who have incurred harm on account of both their race and gender.[62] Since the turn of

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[57] *See* 16B AM. JUR. 2D *Constitutional Law* § 861 (2018) (explaining that the government need only show that a gender classification is substantially related to an important government interest to prevail); *see also* 16B AM. JUR. 2D *Constitutional Law* § 862 (2018) (explaining that the government has the high burden of proving that a racial classification is narrowly tailored to a compelling government interest).

[58] *See* Miranda Leitsinger, *The Equal Rights Amendment: What You Need to Know*, Cal. Rep. (Apr. 30, 2019), https://www.kqed.org/news/11743996/the-equal-rights-amendment-what-you-need-to-know (explaining that the desire to enact the proposed Equal Rights Amendment stems from the belief that a Constitutional amendment pertaining to the treatment of gender will make it less likely that the government will uphold state actions that are discriminatory against gender).

[59] Lisa Baldez et. al., *Does the U.S. Constitution Need an Equal Rights Amendment?*, 35(1) U. CHI. J. LEGAL STUD. 243, 246 (2006), https://cpb-us-e1.wpmucdn.com/sites.dartmouth.edu/dist/d/73/files/2012/11/ERA.pdf.

[60] *See* Miranda Leitsinger, *The Equal Rights Amendment: What You Need to Know*, Cal. Rep. (Apr. 30, 2019), https://www.kqed.org/news/11743996/the-equal-rights-amendment-what-you-need-to-know (explaining that the desire to enact the proposed Equal Rights Amendment stems from the belief that a Constitutional amendment pertaining to the treatment of gender will make it less likely that the government will uphold state actions that are discriminatory against gender).

[61] *See, e.g.,* Alyssa Milano, *Alyssa Milano: I Don't Have Equal Rights Under the Constitution — Yet*, CNN (OCT. 5, 2018), https://www.cnn.com/2018/10/05/opinions/kavanaugh-metoo-equal-rights-amendment-alyssa-milano/index.html (defining Milano's mission to be to achieve equal rights across gender, without mention of other social factors).

[62] *See, e.g., About*, ME TOO., https://metoomvmt.org/about/#history (last visited Nov. 19, 2018) (explaining that the purpose of the #MeToo movement is to address the plight of Black, female survivors of sexual abuse); *See also, e.g., Herstory*, BLACK LIVES MATTER, https://blacklivesmatter.com/about/herstory/ (last visited Nov. 19, 2018) (providing that the intent behind the Black

the most recent millennium, the desire behind these efforts has catalyzed Black women into starting various social justice movements.[63] Consistent with their founders' desires, the purpose behind these movements has been to address the injustices that Black women uniquely experience as both gender and racial minorities.[64]

Thus, the theory of "intersectionality" underlies and thereby unites these recent movements. University of California, Los Angeles, law professor Kimberlé Crenshaw ("Professor Crenshaw") introduced the theory of intersectionality in her 1991 *Stanford Law Review* article entitled *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*.[65] Professor Crenshaw defined intersectionality as the reality that arises when one is dually a racial and gender minority.[66]

Professor Crenshaw also elaborated on tensions that arise for individuals who belong to more than one minority group.[67] As she explained, one's oppressive experiences that are unique to being the former compound and overlap with one's oppressive experiences that uniquely arise from being the latter.[68] Particular to Black women, their status as a gender minority distinguishes their oppressive experiences from those of Black men.[69] Likewise, their status as a racial minority distinguishes their oppressive experiences from those shared by white women.[70]

Ultimately, Professor Crenshaw dictated that the result of having intersectional needs is that those needs often remain unmet. For example, Black women's oppressive experiences are often ill-addressed because anti-misogynist efforts cater to white women—a racially-privileged sub-

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Lives Matter movement is to combat police brutality against Black people, including those who belong to other overlapping social groups).

[63] *See e.g. About*, ME TOO., https://metoomvmt.org/about/#history (last visited Nov. 19, 2018) (stating that it was founded in 2006); *see also, e.g., Herstory*, BLACK LIVES MATTER, https://blacklivesmatter.com/about/herstory/ (last visited Nov. 19, 2018) (providing 2013 as the founding date of the movement).

[64] *About*, ME TOO., https://metoomvmt.org/about/#history (last visited Nov. 19, 2018) (stating that it was founded in 2006); *Herstory*, BLACK LIVES MATTER, https://blacklivesmatter.com/about/herstory/ (last visited Nov. 19, 2018) (providing 2013 as the founding date of the movement).

[65] Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1251-52 (1991).

[66] *Id*. at 1252.

[67] *Id*. at 1251–52.

[68] *See id.* (explaining that when individuals are members of more than one minority group, the interests of those groups tend to conflict and might result in tension).

[69] *See id*. at 1251–53 (1991) (situating women of color into the intersection of race and gender and explaining the difficulties that might arise for such women when they attempt to address certain forms of oppression).

[70] *See id*. at 1252 (1991) (situating women of color into the intersection of race and gender and explaining the difficulties that might arise for such women when they attempt to address certain forms of oppression).

set of women—while similarly, anti-racist efforts cater to Black men, whose gender confers privilege. Professor Crenshaw concluded by urging Black women to assert the difference that their race makes in anti-misogynist discourse and that their gender makes in anti-racist discourse. In this way, Professor Crenshaw proposed, social discourse will meet Black women's intersectional needs.ep]

Four Black women have put Professor Crenshaw's article to practice, more than a decade following its release.[71] In 2006, Tarana Burke founded the #MeToo movement, which operated primarily to assist young Black women and girls who have survived sexual violence.[72] The Black Lives Matter movement followed in 2013, which Patrisse Khan-Cullors, Alicia Garza, and Opal Tometi founded to combat the violence that the government systematically inflicts upon members of the Black community.[73] Advocates of the Black Lives Matter movement also intended to emphasize the violence directed at Black women and queer Black youth.[74]

The #MeToo movement garnered only minimal support from the white feminist community, immediately following its conception. For example, in 2016—approximately 10 years following the founding of the #MeToo movement—Black actress and comedian Leslie Jones ("Jones") starred in a remake of the film *Ghostbusters*, alongside an otherwise all-white, female cast. Following the announcement of the film and the corresponding cast list, Jones was subjected to a barrage of disparaging Twitter messages. The language in many of the Twitter posts likened Jones to a primate, often calling her "an ape." There was no massive outrage at the attacks that Jones had to endure. However, it was only a year later that white actress Alyssa Milano posted one message on Twitter and garnered over 12 million responses within 24 hours.

Similar to the fate of #MeToo movement, the focus of the Black Lives Matter movement has shifted away from the Black, female victims that the movement was initially designed to protect. Although police brutality is a reality that affronts Black people of all genders, when it comes to Black women, police brutality is often also sexual in nature. Even when the discussion pertains solely to use of excessive force—a form of police brutality that has resulted in the death of a significant number of Black women—Black women have rarely been the focal point of mass outcries and campaigns.

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[71] Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991).

[72] *About*, ME TOO., https://metoomvmt.org/about/#history (last visited Nov. 19, 2018).

[73] *Herstory*, BLACK LIVES MATTER, https://blacklivesmatter.com/about/herstory/ (last visited Nov. 19, 2018).

[74] *Id*.

To the contrary, Black men and boys who have died from excessively forceful police tactics have become household names. To bridge the gap in visibility, community organizers have urged the public to "say her name," and have created a movement with this phrase as its title.

Now, the media has credited the #MeToo movement as having sparked the renewed fervency in support of enacting a long-proposed Equal Rights Amendment. However, the media's attribution comes during a time when Black women have begun to voice their frustration with the fact that the #MeToo movement no longer advances the interests of Black women and girls. These women say that, "pretty girls" and "Hollywood" have co-opted the movement instead. "The #MeToo movement has forgotten us," they have concluded.

It is necessary to explore and define Black women's experiences with sexual violence to then evaluate whether the perceived objective of the #MeToo movement to enact an Equal Rights Amendment aligns with the express mission of the movement. To accomplish this, the following section discusses the way in which Black women experience the sexual violence perpetrated against them. The following section also draws upon the historical treatment of Black women to add context.

II. BLACK, FEMALE STEREOTYPES AND BLACK WOMEN'S EXPERIENCES OF SEXUAL VIOLENCE

America's system of institutionalized slavery, though now abolished,[75] has informed many of the stereotypes and patterns of oppression that contribute to Black women's experiences with sexual assault.[76] Many of the Black stereotypes that have persisted to present day were created to justify the enslavement of Black people.[77] Unlike the American slave system, which is no longer enforceable following its abolition,[78] these same stereotypes continue to reinforce many of the patterns that uniquely arise surrounding the sexual assault of Black women.[79]

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[75] U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

[76] *See* Andrea L. Dennis, *Because I Am Black, Because I Am Woman: Remedying the Sexual Harassment Experience of Black Women*, 1996 ANN. SURV. AM. L. 555, 561 (1996) (crediting the historical treatment of Black women as the cause of Black women's unique experiences with sexual harassment, and drawing support from as early as the slave era).

[77] *Popular and Pervasive Stereotypes of African Americans*, NAT'L MUSEUM OF AFR. AM. HIST. & CULTURE, https://nmaahc.si.edu/blog-post/popular-and-pervasive-stereotypes-african-americans (last visited Dec. 1, 2019).

[78] U.S. CONST. amend. XIII, § 1.

[79] *See* Andrea L. Dennis, *Because I Am Black, Because I Am A Woman: Remedying the Sexual Harassment Experience of Black Women*, 1996 ANN. SURV. AM. L. 555, 562 (1996) (arguing that although the most pervasive Black, female stereotypes originated during the slavery era, the

Observed patterns pertaining to the sexual assault of Black women are numerous.[80] Moreover, the assault patterns arise due to a wide range of factors, spanning from reporting practices to perpetrators' motivations for assault.[81] As numerous and diverse the relevant assault patterns,[82] most fall under one of two broader categories describing Black women's positions in society: (1) hypervisibility, or (2) invisibility.[83] The following discussion juxtaposes hypervisibility and invisibility of Black women in society, as well as the corresponding stereotypes that have contributed to these realities.

A. THE IMAGE OF JEZEBEL AND THE HYPERVISIBILITY OF BLACK WOMEN AS VICTIMS OF SEXUAL VIOLENCE

The three most prevalent stereotypes of Black women are popularly conceptualized in the form of a trifecta.[84] The first in the trifecta is the image of the "Jezebel."[85] Jezebel personifies the stereotype that Black women are hypersexual, promiscuous, and laden with animalistic and uncontrollable sexual urges.[86] Jezebel also conjures up the image of Black women as manipulative.[87] Accordingly, Jezebel is often visualized as

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same stereotypes exist at present day and contribute to the unique sexual harassment that Black women experience).

[80] *See*, *e.g.*, *Black Women & Sexual Violence*, https://now.org/wp-content/uploads/2018/02/Black-Women-and-Sexual-Violence-6.pdf (last visited January 2, 2020) (listing no less than three assault patterns, each pertaining to Black, female survivors' reporting habits; resources for Black, female sexual assault survivors; or the correlation between Black women's survival of sexual violence and their subsequent incarceration).

[81] *See*, *e.g.*, *id*. (explaining that many Black women are refrain from reporting their Black, male assaulters for fear of reinforcing the stereotype of Black people as aggressive and dangerous); *see also*, *e.g.*, Andrea L. Dennis, *Because I Am Black, Because I Am A Woman: Remedying the Sexual Harassment Experience of Black Women*, 1996 ANN. SURV. AM. L. 555, 562–63 (1996) (explaining that the perception of Black women as sexually available remains following the slave era, and recounting the facts of a case in which in the midst of sexually harassing a Black woman, the perpetrator expressed his wish that slavery would return so that the perpetrator could sexually train the Black, female victim).

[82] *See*, *e.g.*, Carolyn M. West, *Sexual Violence in the Lives of African American Women: Risk, Response, and Resilience*, RESEARCHGATE 1, 3–4 (Aug. 14, 2014), http://www.drcarolynwest.com/publications/2006-sexual-violence.pdf (listing various risk factors for Black women as pertaining to sexual violence).

[83] Vrushali Patil & Bandana Purkayastha, *Sexual Violence, Race and Media (In)Visibility: Intersectional Complexities in a Transnational Frame*, 5 SOCIETIES 598, 599 (2015); Kimberle Crenshaw, Race, Gender, and Sexual Harassment, 65 S. Cal. L. Rev. 1467, 1469–70 (1992).

[84] *See*, *e.g.*, Andrea L. Dennis, *Because I Am Black, Because I Am A Woman: Remedying the Sexual Harassment Experience of Black Women*, 1996 ANN. SURV. AM. L. 555, 561 (1996) (listing the Black, female stereotypes of "Sapphire," "Mammy," and "Jezebel" in a triad).

[85] Rasul A. Mowatt et al., *Black/Female/Body Hypervisibility and Invisibility*, 45 J. Leisure Res. 644, 650 (2013).

[86] *Id*.

[87] *Id*.

having light skin, long hair, and curves—all features popularly believed to be alluring to men.[88]

The Jezebel stereotype lends itself to efforts to justify sexual violence against Black women.[89] The theory that arises is that Black women are incapable of being raped due to them always seeking and being available for sexual intercourse.[90] This theory also contributes to perpetrators' motivations for sexually abusing Black women.[91] Many scholars turn to the depiction of Black women in pornography to support the assertion that misconceptions regarding Black women's attitudes toward sexual intercourse motivate their sexual abuse and exploitation.[92]

Both the pornography industry and pornographers financially the stereotype of Black women as sexually insatiable.[93] It is with the understanding that an overwhelming majority of consumers subscribe to the notion of white, male dominance that pornographers endeavor to sexually satisfy their consumers by playing upon gender and racial stereotypes.[94] Due to their dual statuses as gender and racial minorities, the pornography industry exploits Black women in a way that utilizes the intersection of both stereotypes.[95] The image of Black women as sexually voracious is an example of such a stereotype that combines racial and gender pre-conceptions.[96]

Pornographers' depiction of the Jezebel perpetuates the social disadvantage that slavery conferred upon Black women, consistent with the fact that the stereotype of Black women as sexually insatiable arose dur-

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[88] *See id*. (explaining that women embodying the Jezebel stereotype are thought to use their physical features to ensnare others, as well as capture their devotion and material wealth).

[89] *Id*.

[90] *Id*.

[91] *See id*. (explaining that the Jezebel stereotype justifies exploitation of Black women and that sexual exploitation fosters violence against women); *see also* Andrea L. Dennis, *Because I Am Black, Because I Am A Woman: Remedying the Sexual Harassment Experience of Black Women*, 1996 ANN. SURV. AM. L. 555, 561 (1996) ("[T]he Jezebel stereotype most obviously support[s] the sexual exploitation of Black women . . . .").

[92] *See*, *e.g*., Rasul A. Mowatt et al., *Black/Female/Body Hypervisibility and Invisibility*, 45 J. Leisure Res. 644, 650 (2013) (identifying pornography as a form of commercialized sexual exploitation of Black women, as imagined in the image of the Jezebel); *see also*, *e.g*., Jewel D. Amoah, *Back on the Auction Block: A Discussion of Black Women and Pornography*, 14 NAT. BLACK L. J. 204, 210 (1997) (arguing that pornographers play upon Black, female stereotypes by depicting Black women as sexually insatiable, all to sexually satisfy consumers, who largely share "white supremacist notions of dominance").

[93] Jewel D. Amoah, *Back on the Auction Block: A Discussion of Black Women and Pornography*, 14 NAT. BLACK L. J. 204, 211 (1997).

[94] *Id*. at 210.

[95] *Id*. at 209.

[96] *Id*. at 209–10 (explaining that pornographers depict Black women in accordance with both gender and racial stereotypes, then also offering the image of "an unsatiable [*sic*] sex animal" as one way that pornographers depict Black women).

ing the slavery era.[97] Moreover, it is exactly this harkening to slavery that motivates pornographers to create art around the idea of the Jezebel.[98] The motive is economic and pornographers acquire it in a way relevant to the historical treatment of Black women's bodies.[99]

The way in which pornographers become economically motivated to exploit Black women by utilizing the image of the Jezebel is related to one of the original justifications for enslaving Black women.[100] The image of the Jezebel originates from a time when Black, female slaves' value largely derived from their ability to bear more slaves.[101] Thus, the rape of Black, female slaves was used to impregnate Black, female slaves and thereby maintain the slave population.[102] At the time, the rape of a Black, female slave did not constitute a crime.[103] To the contrary, to justify the practice of raping enslaved women, many conjured up and entertained the idea of the Jezebel[104]—a woman incapable of being raped, because she always made herself available for sexual intercourse.[105]

Modern pornographers draw upon the justification for slavery that underlies the stereotype of the Jezebel by depicting Black women as teeming with insatiable, animalistic lust.[106] Furthermore, many pornographic depictions feature Black women laden in tools of bondage, adopting a submissive posture, and surrounded by white men.[107] This depiction is reminiscent of the trappings of slavery, which enslavers used to reinforce the belief that Black people were inferior to their white counterparts[108]—a belief foundational to the very institution of slavery.[109]

Accordingly, when viewers who adhere to the idea of white, male dominance consume these oft-depicted images of white men restraining a

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[97] *Id*. at 210–11.

[98] *Id*. at 211.

[99] *Id*. at 210–11.

[100] Carolyn M. West, *Mammy, Sapphire, and Jezebel: Historical Images of Black Women and Their Implications for Psychotherapy*, 32 PSYCHOTHERAPY THEORY RESEARCH & PRACTICE 458, 462 (1995).

[101] *Id.*

[102] *Id*.

[103] Jeffrey J. Pokorak, *Rape as A Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L. J. 1, 8 (2006).

[104] *Id*. at 9–10.

[105] Rasul A. Mowatt et al., *Black/Female/Body Hypervisibility and Invisibility*, 45 J. Leisure Res. 644, 650 (2013).

[106] *See* Jewel D. Amoah, *Back on the Auction Block: A Discussion of Black Women and Pornography*, 14 NAT. BLACK L. J. 204, 210–11 (1997) (discussing the racist stereotypes that underly the depictions of Black women in pornography and identifying as a frequent depiction of Black women the image of Black women as sexually insatiable).

[107] *Id*. at 210.

[108] *Id*.

[109] *Id*.

seemingly wanton and animalistically lustful Black woman, they derive sexual satisfaction from the displays of gender and racial superiority.[110] Thus, both the pornographers and the pornography industry become economically motivated to exploit the Jezebel stereotype, while leaving Black women in no better position than before.[111] The sexual exploitation of Black women is itself an act of sexual violence.[112] However, pornographic depictions that perpetuate the image of the Jezebel are also relevant to motivations to sexually abuse Black women in other ways.[113]

For example, in numerous sexual harassment cases brought by Black women, fact findings show that in the midst of harassing the Black, female claimants, the harassers expressed their desire to emulate certain pornographic depictions.[114] In *Brooms v. Regal Tube Company*, for instance, the harasser showed the Black, female claimant a photograph depicting interracial sodomy and told the claimant that the photograph demonstrated the "talent" of Black women.[115] The harasser later showed the claimant a different photograph, which was a racially-charged depiction of bestiality, and told the claimant that she would emulate the depicted image.[116] Serving as another example, in *Continental Can Company v. Minnesota*, the harasser, while referencing the movie *Mandingo*, expressed to the claimant that he wished that slavery would resume so that he could sexually train the claimant and make her his property.[117]

All of the preceding anecdotes involved a harasser motivated by depictions of Black, female sexuality,[118] and the examples also share another commonality—all of the sexual depictions are consistent with the

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[110] *See id*. at 209–11 (explaining that consumers embracing notions of white, male dominance derive sexual satisfaction from pornographic depictions of male and white superiority, and then stating that pornographers often depict Black women in slave-like bondage and surrounded by white men).

[111] *Id*.

[112] Rasul A. Mowatt et al., *Black/Female/Body Hypervisibility and Invisibility*, 45 J. Leisure Res. 644, 650 (2013) (labeling commercialized sexual exploitation as a pervasive form of sexual violence that affronts Black women).

[113] *See*, *e.g*., Andrea L. Dennis, *Because I Am Black, Because I Am A Woman: Remedying the Sexual Harassment Experience of Black Women*, 1996 ANN. SURV. AM. L. 555, 563–64 (1996) (discussing perpetrators' express references to pornographic depictions of Black women while sexually harassing Black women).

[114] *E.g*., *id*.

[115] *Brooms v. Regal Tube Co*., 881 F.2d 412, 417 (7th Cir. 1989).

[116] *Id*.

[117] *Continental Can Co. v. Minnesota*, 297 N.W.2d 241, 246 (Minn. 1980).

[118] *See Brooms,* 881 F.2d at 417 (finding that while harassing the Black, female claimant, the harasser expressed a desire to emulate certain pornographic depictions of Black women); *see also Continental Can*, 297 N.W.2d at 246 (recounting the harasser's reference to the movie *Mandingo* and statement to the Black, female claimant that he wished that slavery could return so that he sexually train and own her).

idea of Black women as Jezebels. The image of the Jezebel embodies the belief that Black women are hypersexual and possess sexual urges that are animalistic in nature.[119] In *Brooms* and *Continental Can*, the depictions that the harassers referenced pertained either to the perceived sexual prowess, or to the animalistic or sexual nature of Black women,[120] which are all qualities subsumed under the idea of the Jezebel.[121] In this way, the Jezebel stereotype at least partially motivated the harassers' sexual abuse of the Black, female claimants.

The preceding exploration of the pornography industry and review of individual instances of sexual misconduct reveals that Black, female stereotypes partially motivate perpetrators to sexually abuse Black women. However, recurring motivations for sexual violence are not the only recognized patterns in the context of the sexual assault of Black women.[122] Beyond the one pertaining to the visibility of Black women, another recognized pattern, with corresponding Black, female stereotypes underlying it,[123] relates to the invisibility of Black, female survivors' experiences with sexual assault.[124]

B. How the Images of Mammy and Sapphire Contribute to the Invisibility of Black Women's Experiences of Sexual Violence

The remaining two of the most prevalent Black, female stereotypes are those of the "Mammy"[125] and of the "Sapphire."[126] Mammy embod-

[119] Rasul A. Mowatt et al., *Black/Female/Body Hypervisibility and Invisibility*, 45 J. Leisure Res. 644, 650 (2013).

[120] *See Brooms*, 881 F.2d at 417 (stating that the harasser lauded a pornographic photograph for showing Black women's sexual "talent"); *see also Continental Can*, 297 N.W.2d at 246 (explaining that the harasser referenced the movie *Mandingo* before expressing a desire to sexually own the Black, female claimant).

[121] Rasul A. Mowatt et al., *Black/Female/Body Hypervisibility and Invisibility*, 45 J. Leisure Res. 644, 650 (2013).

[122] *See*, *e.g.*, *Black Women & Sexual Violence*, https://now.org/wp-content/uploads/2018/02/Black-Women-and-Sexual-Violence-6.pdf (last visited January 2, 2020) (listing no less than three assault patterns, each pertaining to Black, female survivors' reporting habits; resources for Black, female sexual assault survivors; or the correlation between Black women's survival of sexual violence and their subsequent incarceration).

[123] *See*, *e.g.*, *id.* (explaining that many Black women are refrain from reporting their Black, male assaulters for fear of reinforcing the stereotype of Black people as aggressive and dangerous).

[124] *See* Andrea L. Dennis, *Because I Am Black, Because I Am A Woman: Remedying the Sexual Harassment Experience of Black Women*, 1996 Ann. Surv. Am. L. 555, 562 (1996) (stating that abuse claims of Black women fitting the description of the "Mammy" stereotype would go unbelieved, due to the asexual nature of such women).

[125] Rasul A. Mowatt et al., *Black/Female/Body Hypervisibility and Invisibility*, 45 J. Leisure Res. 644, 651 (2013).

[126] *Id*. at 652.

ies the image of Black women as a darker-skinned, large-framed, asexual, yet nonthreatening and nurturing figure.[127] Understood to have remained as a domestic servant in the households of former slave owners following the abolition of slavery. Mammy is also believed to exhibit undying loyalty, subordination, and self-sacrifice in executing her domestic duties.[128] Following the abolition of slavery, it is even believed that Mammy remained in the households of former slave owners.[129] With the traits of Mammy falling short of Eurocentric beauty, Black women who emulate this stereotype are viewed as devoid of attractiveness or femininity.[130]

Distinct from the image of the Mammy, the Sapphire stereotype—also known as the angry Black woman stereotype—personifies the belief that Black women are aggressive, domineering, and emasculating.[131] Largely reinforced by the radio show *Amos N' Andy*, which featured Sapphire as the hostile and nagging wife of the Black, male character Starfish, the image of Sapphire portrays Black women as strong-willed and contemptuous of Black men.[132] Similar to the image of the Mammy,[133] Sapphire is imagined to be of a darker complected and large—though not obese,[134] somewhat unlike Mammy.[135]

Although the stereotypes of the Mammy and the Sapphire are antitheses,[136] they similarly correlate with the visibility of Black women's experiences of sexual violence.[137] Their shared correlation relating to the visibility of such experiences is that Black women who embody the qualities of Mammy or Sapphire are either often ignored or not often believed

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[127] *Id*. at 651.

[128] Carolyn M. West, *Mammy, Sapphire, and Jezebel: Historical Images of Black Women and Their Implications for Psychotherapy*, 32 PSYCHOTHERAPY THEORY RESEARCH & PRACTICE 458, 459 (1995).

[129] *Id*.

[130] Rasul A. Mowatt et al., *Black/Female/Body Hypervisibility and Invisibility*, 45 J. Leisure Res. 644, 651 (2013).

[131] *Id*. at 652.

[132] Carolyn M. West, *Mammy, Sapphire, and Jezebel: Historical Images of Black Women and Their Implications for Psychotherapy*, 32 PSYCHOTHERAPY THEORY RESEARCH & PRACTICE 458, 461 (1995).

[133] *See* Rasul A. Mowatt et al., *Black/Female/Body Hypervisibility and Invisibility*, 45 J. Leisure Res. 644, 651 (2013) (describing Mammy as having a darker complexion and large stature).

[134] Carolyn M. West, *Mammy, Sapphire, and Jezebel: Historical Images of Black Women and Their Implications for Psychotherapy*, 32 PSYCHOTHERAPY THEORY RESEARCH & PRACTICE 458, 461 (1995).

[135] *Id*.

[136] *Id*.

[137] *See id*. at 562 (explaining that claims of sexual violence expressed by women befitting the image of the Mammy or Sapphire are often unbelieved).

when they claim sexual abuse.[138] The claims of Black women who exhibit the characteristics of Mammy are not believed because of existing skepticism that someone would lust for a seemingly asexual woman.[139] Claims of sexual abuse by women who emulate Sapphire are often ignored because society views such women as "troublemakers" who lack loyalty.[140]

Thus, claims of sexual abuse by Black women befitting either stereotype are ignored out of suspicion that such claims are dishonest.[141] Furthermore, this practice of ignoring Black women's claims of sexual violence both directly and indirectly obscures the visibility of sexual violence perpetrated against Black women. The practice directly threatens visibility of Black women's experiences because it is impossible for individuals to know that in which they do not believe. This lack of knowledge that stems from disbelief thwarts advocacy efforts, because it is likewise impossible for individuals to combat that of which they are not aware.

The indirect relationship between the distrust of Black women's claims of sexual assault and their visibility relates to such women's reporting practices and, partially, the internalization of Black, female stereotypes.[142] Generally, Black women share a reluctance to report their experiences of sexual violence, following their occurrence, due in part to their awareness of Black, female stereotypes aligning with the images of Sapphire and Mammy.[143] Black women often refrain from notifying authorities of these specific acts of violence, resigned to the likelihood that others will either ignore or distrust their claims of sexual violence.[144]

The reporting practices of Black, female survivors of sexual violence and the perpetrators' motives for sexually abusing Black women show that Black women experience sexual violence in a way that uniquely implicates their dual statuses as gender and racial minorities. Subscribers to the #MeToo movement endeavor to address the unique

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[138] Andrea L. Dennis, *Because I Am Black, Because I Am A Woman: Remedying the Sexual Harassment Experience of Black Women*, 1996 ANN. SURV. AM. L. 555, 562 (1996).

[139] *Id*.

[140] *Id*.

[141] *Id*.

[142] *See Black Women & Sexual Violence*, https://now.org/wp-content/uploads/2018/02/Black-Women-and-Sexual-Violence-6.pdf (last visited January 2, 2020) (attributing in part Black, female survivors' reluctance to report instances sexual violence to an awareness of myths surrounding their sexuality).

[143] *Id*.

[144] *Id*.

injuries inflicted upon Black, female, survivors of sexual violence.[145] Thus, the proposed Equal Rights Amendment aligns with the ideology driving the movement only if the effect of the proposed Amendment is to remedy the intersectional injuries of these Black, female survivors.

III. THE INADEQUACY OF THE PROPOSED EQUAL RIGHTS AMENDMENT

A wealth of scholarship exists supporting of the idea that Black women will likely benefit from the enactment of an Equal Rights Amendment.[146] There are three main theories supporting the idea that Black women will benefit from an Equal Rights Amendment.[147] Such scholars assert various reasons in support of their view.[148] The following discussion will only elaborate on three of these operating theories. Notably, although scholars have circulated the following theories since as early as 1971,[149] they still underly modern-day arguments in favor of an Equal Rights Amendment.[150]

First, scholars contend that an Equal Rights Amendment would psychologically benefit Black women.[151] The implementation of an Equal Rights Amendment would confer upon Black women a new, constitutionally-protected status on account of their gender.[152] The recognition alone that their gender is worthy of constitutional protection would have a positive, psychological effect on Black women.[153] As concludes this theory, the Equal Rights Amendment is the only available means by which Black women would be able to realize such advantages.[154]

Second, some argue that the effort required to persuade Congress and the states to enact an Equal Rights Amendment would require signif-

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[145] See *About*, ME TOO., https://metoomvmt.org/about/#history (last visited Nov. 19, 2018) (explaining that the mission of the #MeToo movement is to spotlight the experiences of young Black women and girls).

[146] *See*, *e.g.*, Pauli Murray, *The Negro Woman's Stake in the Equal Rights Amendment*, 6 HARV. C.R.C.L. L. REV. 243, 243 (1971) (asserting that Black women have the most to gain from the enactment of the Equal Rights Amendment).

[147] *See*, *e.g.*, *id*. at 258–59 (asserting that Black women have the most to gain from the enactment of the Equal Rights Amendment).

[148] *See*, *e.g., id*. (listing three broad ways in which an Equal Rights Amendment would benefit Black women).

[149] *See, e.g.*, *id*. (discussing all three theories in a 1971 publication).

[150] *See*, *e.g.*, Sage Howard, The ERA: Why Black Women Need It the Most, We News (Aug. 8, 2018), https://womensenews.org/2018/08/the-era-why-black-women-need-it-most/ (advocating for the enactment of an Equal Rights Amendment and supporting this position by arguing that the Amendment would help combat pervasive forms of gender discrimination).

[151] *E.g.*, Pauli Murray, *The Negro Woman's Stake in the Equal Rights Amendment*, 6 HARV. C.R.C.L. L. REV. 243, 258 (1971).

[152] *Id*.

[153] *Id*.

[154] *Id*.

icant, mental exertion—all of which would be educational to Black women.[155] Furthermore, discussions surrounding the debate to enact the proposed Amendment would unavoidably involve detailed review of all extant law and policy affecting.[156] Black women would also enjoy a platform from which they are more effectively able to draw attention to problems specifically affecting Black women, in interacting with multiple levels of government to garner support for the proposed Amendment.[157]

Last, proponents of an Equal Rights Amendment predict that it will obviate the powerlessness that Black women experience.[158] With this newly-bestowed authority, Black women would be able to participate in societal decision-making processes in a way equal to their more privileged counterparts.[159] In turn, Black women will begin to fill more leadership positions and acquire the ability to guarantee that their rights are protected, instead of having to rely on higher-powered others.[160]

The three preceding theories are alike because they all pertain to ways in which an Equal Rights Amendment would address Black women's experiences with gender-based oppression.[161] They are also alike in that they fail to show how an Equal Rights Amendment would remedy oppression that Black women experience at the intersection of gender and race. This absence of any mention of intersectionality reveals that, although it might improve Black women's social position on account of gender, an Equal Rights Amendment is unlikely to remedy the harms that are unique to Black women's dual-minority status.

Other factors also reveal the inadequacies of an Equal Rights Amendment in attempting to remedy harms that Black women uniquely incur. For example, the text of the proposed Amendment is itself evidence that an Equal Rights Amendment would not address harms that arise from both racism and misogyny. The current version of the proposed Amendment states, "Equality of Rights under the law shall not be denied or abridged by the United States or by any State on account of sex."[162] Gender is the only classification expressly protected by the pro-

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[155] E.g., *id*.

[156] *Id*.

[157] *Id*.

[158] *Id*. at 259.

[159] *Id*.

[160] *Id*.

[161] *See id*. at 258–59 (identifying ways in which an Equal Rights Amendment would elevate Black women's social position as women, yet omitting any discussion of difficulties that draw upon both Black women's gender and race).

[162] S.J. Res. 6, 115th Cong. (2017).

posed Amendment.[163] The absence of any mention of race in the language of the proposed Amendment suggests that the drafters did not intend for it to address injuries incurred on account of race.

It is likely that the proposed Amendment would advance the social position of Black women, if enacted.[164] However, the proposed Amendment would not as fully remedy the oppressive injuries that Black women incur as it would for those incurred by white women. This is because the proposed Amendment only addresses gender-based oppression.[165] While the entirety of white women's minority status stems from their gender,[166] the same is not so for Black women.[167] After all, Black women also experience racialized oppression,[168] which the proposed Amendment would leave unaddressed.[169]

The proposed Equal Rights Amendment is not a wholly lacking remedy, but is rather an incomplete one. Thus, in lieu of completely abandoning the proposed Amendment, a way to reconcile its effect with the mission of the #MeToo movement is to supplement it with another legal device—this additional device that addresses both the gendered and racial aspects of Black women's experiences of sexual violence perpetrated against them.

IV. SUPPLEMENTAL REMEDIES TO THE PROPOSED EQUAL RIGHTS AMENDMENT

The very process of amending the Constitution is wholly unamenable to addressing intersectional needs. It is a bedrock principle in Amer-

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[163] *See id*. ("Equality of Rights under the law shall not be denied or abridged by the United States or by any State on account of sex.").

[164] *See* Pauli Murray, *The Negro Woman's Stake in the Equal Rights Amendment*, 6 HARV. C.R.C.L. L. REV. 243, 243 (1971) (arguing that Black women will benefit from ratification of the proposed Equal Rights Amendment).

[165] *See*, *e.g.,* S.J. Res. 6, 115th Cong. (2017) (reciting the text of the proposed Equal Rights Amendment, which excludes any mention of race or provides any other indication that the proposed Equal Rights Amendment will address race-based injuries).

[166] *See* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1251–52 (1991) (explaining that when individuals are members of more than one minority group, the interests of those groups tend to conflict and might result in tension, and then contrasting the experience with that of white women).

[167] *See id*. (explaining that women of color's experiences are both raced and gendered).

[168] *See id*. at 1251–52 (stating that the oppressive experiences of women of color implicate their dual statuses as gender and racial minorities).

[169] *See* Pauli Murray, *The Negro Woman's Stake in the Equal Rights Amendment*, 6 HARV. C.R.C.L. L. REV. 243, 258–59 (1971) (exploring the ways in which an Equal Rights Amendment would combat gender-based oppression, yet neglecting discussion of race-based oppression).

ican law that, although the Constitution is a "living document,"[170] there is a strong presumption against amending it.[171] This presumption arises from the view that the Constitution should be stable, in the sense that it enumerates the core, foundational principles that govern the nation.[172] Furthermore, the Constitution is believed to operate in a realm separate from, and higher than, politics.[173] To continue altering the Constitution in accordance with ever-changing political and social revelations, notwithstanding their merit, undermines the purpose and function of this founding document.[174]

Unlike the proposed Equal Rights Amendment—or all constitutional amendments, for that matter—which is resistant to social whims,[175] there are other legal devices better-suited to addressing intersectional concerns.[176] Due to their ability to remedy individuals who incur intersectional injuries,[177] these devices would supplement an enacted Equal Rights Amendment. Accordingly, affiliates of the #MeToo movement should advocate for a modified, reasonable person standard, as well as apportioned damages, both to be used in litigating claims for sexual violence brought by Black, female claimants.

A. THE VALUE OF A MODIFIED REASONABLE PERSON STANDARD

In adjudicating claims of sexual harassment, courts have determined the severity of the harassment by adopting the perspective of the claimant.[178] Thus, instead of inquiring whether a reasonable person would engage in the allegedly harassing behavior, courts question whether a reasonable person would feel harassed by the alleged conduct.[179] Beyond merely adopting the victim's perspective, courts have also articulated the

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[170] *See, e.g*., Joe Carter, *Justice Scalia Explains Why the 'Living Constitution' Is a Threat to America*, ACTION INST. (May 14, 2008) (stating that the modern view is that the Constitution is a living and evolving document).

[171] Kathleen Sullivan, *Constitutional Amendmentitis*, AM. PROSPECT (Dec. 19, 2001), https://prospect.org/power/constitutional-amendmentitis/.

[172] *Id*.

[173] *Id*.

[174] *Id*.

[175] *See id*. (explaining that society imagines the Constitution to remain impervious to contemporary social whims).

[176] *See* Angela Onwuahi-Willig, *What about #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L. J. F. 105, 109–10 (2018) (proposing a modified reasonable person standard to address the intersectional experiences of Black, female sexual assault claimants).

[177] *See id*. (detailing how a modified reasonable person standard would address the intersectional injuries and concerns).

[178] *E.g*., Ellison v. Brady, 924 F.2d 872, 878–79 (9th Cir. 1991).

[179] *Brady*, 924 F.2d at 878–79.

need to consider how gender influences perception.[180] For example, courts have warned that men and women tend to disagree on the objectionableness of some modes of conduct.[181]

Inquiry into individuals' perspectives, while considering their gender alone, does not implicate the concept of intersectionality. However, courts should also consider how race influences perception, for reasons similar to those that persuaded the courts to consider the effect of gender.[182] In this way, courts would call for the consideration of both the race and the gender of Black, female claimants, as well as how these same women's experiences as double minorities informs the sexual violence perpetrated against them. Some scholars have already called on courts to consider the perspective of "a reasonable person *in the* [*claimants*] *intersectional and multidimensional shoes*. . . ."[183]

From a broader view than of the help this modified standard would be to individual, Black, female claimants, this modification would also help improve the overall social position of Black women. Whereas the stereotypes of Mammy and Sapphire contribute to societal distrust and ignoring of Black women's claims of sexual violence[184], a modified reasonable person standard forces decisionmakers to consider Black women's allegations of sexual abuse, and moreover, to resolve how the claimants' Blackness informs their perceptions of the abuse. This added consideration would restore credibility to long-discredited women.[185]

B. DAMAGES AS AN OPPORTUNITY TO EXPLOIT RACISM, MISOGYNY, AND BLACK, FEMALE STEREOTYPES

Another way to supplement the recent push for an Equal Rights Amendment is by altering damage calculations in discrimination lawsuits. Currently, prevailing claimants in discrimination lawsuits are entitled to recover for the shame and humiliation experienced on account of the discriminatory conduct, among other things.[186] In assessing the severity of the emotional injury, courts are instructed to rely on the facts of the case that relate to the severity of the discriminatory conduct.[187] Thus,

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[180] *Id.*

[181] *Id*.

[182] Angela Onwuahi-Willig, *What about #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L. J. F. 105, 109–10 (2018).

[183] *E.g*., *id*. (emphasis in original).

[184] Andrea L. Dennis, *Because I Am Black, Because I Am A Woman: Remedying the Sexual Harassment Experience of Black Women*, 1996 ANN. SURV. AM. L. 555, 562 (1996).

[185] *See id*. (stating that the claims of sexual violence by Black women embodying the Mammy or Sapphire often go unbelieved).

[186] Kate Sablosky Elengold, *Clustered Bias*, 96 N.C. L. R. 457, 503–04 (2018).

[187] *Id*. at 504–05.

the amount of damages becomes directly proportional to the claimants' experiences of degradation.[188]

This measure of damages invites factfinders to explore the dimensions of claimants' harm. Particular to Black women, the harm that follows from another's discriminatory conduct relates to the claimants' experiences with at least racism, misogyny, and the perpetuation of Black, female stereotypes related to sexuality.[189] This also occurs when Black, female claimants' Blackness and womanhood are not expressly implicated in a given discrimination lawsuit.[190]

Thus, there is an incentive for claimants to allege race and gender discrimination, since they will receive a higher damages award upon courts finding evidence of both.[191] In this way, individuals of dual-minority status, in particular, Black women, are able to exploit the very practice that injured them: discrimination.[192] Beyond bestowing upon Black women a newfound power that they have long been without, this damages calculation remedies them as a whole, where society has long tried to separate their Blackness from their womanhood and dissect their experience into parts.[193] This is also the benefit of intersectional remedies: the acknowledgment of the whole of a group whose efforts are often co-opted and eclipsed.[194]

CONCLUSION

Although an Equal Rights Amendment would benefit Black women in some ways,[195] the #MeToo movement's perceived push for its enact-

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[188] *Id*.

[189] *Id*. at 505–06.

[190] *See id*. at 507 (explaining that the race and gender of a claimant in a discrimination lawsuit might affect the outcome, regardless of whether those factors are directly involved).

[191] *Id*.

[192] *See id*. at 505–06 (explaining that claimants of dual minority status are able to exploit the discrimination perpetrated against them by alleging as many forms as possible, which will thereby increase the damage award upon a successful verdict).

[193] *See* Vuyanich v. Republic Nat'l Bank, 82 F.R.D. 420, 434–35 (1979) (prohibiting a Black woman from serving as representative of a putative class because her interests as a woman conflicted with those of the Black, male class members and her interests as a Black individual conflicted with those of the white, female class members).

[194] *See* Rochelle Riley, *#MeToo Founder Blasts the Movement for Ignoring Poor Women*, DETROIT FREE PRESS (Nov. 15, 2018), https://www.freep.com/story/news/columnists/rochelle-riley/2018/11/15/tarana-burke-metoo-movement/2010310002/ (detailing Black women's frustrations with the fact that "Hollywood" and "pretty girls" have taken over the #MeToo movement).

[195] *See* Pauli Murray, *The Negro Woman's Stake in the Equal Rights Amendment*, 6 HARV. C.R.C.L. L. REV. 243, 243 (1971) (arguing that Black women will benefit from ratification of the proposed Equal Rights Amendment).

ment is inconsistent with the movement's original tenets.[196] Ignited by widespread dissatisfaction with the lack of discussion pertaining to Black women's experiences in social discourse, a Black woman[197] founded the #MeToo movement.[198] Although the movement's original goal was to advocate on behalf of young, Black, female survivors of sexual violence, Hollywood and the white feminist community later co-opted it.[199] This co-optation further relegated Black women to a state of invisibility, a state that the #MeToo movement was designed to combat.[200]

Now, the media has credited the #MeToo movement for inciting a recent spike in efforts to enact the long-proposed Equal Rights Amendment.[201] Regardless of whether this is a misattribution, the proposed Amendment misaligns with the original intent behind the #MeToo movement, which was to more fully address the experiences of Black, female survivors of sexual violence. However, this is also where the proposed Amendment fails to align with the movement's mission. Due to its own qualities,[202] as well as other qualities inherent to the constitutional amendment process,[203] an Equal Rights Amendment would fail to provide Black women full redress for sexual harms.

From a broad viewpoint, an Equal Rights Amendment would benefit Black women.[204] However, its inadequacies arise from the fact that such

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[196] *See, e.g., About*, ME TOO., https://metoomvmt.org/about/#history (last visited Nov. 19, 2018) (explaining that the purpose of the #MeToo movement is to address the plight of Black, female survivors of sexual abuse).

[197] Sandra E. Garcia, *The Woman Who Created #MeToo Long Before the Hashtag*, THE NEW YORK TIMES (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html [https://perma.cc/RG8R-LKNN].

[198] *See About*, ME TOO., https://metoomvmt.org/about/#history (last visited Nov. 19, 2018) (recounting Tarana Burke's founding of the #MeToo movement).

[199] *See* Rochelle Riley, *#MeToo Founder Blasts the Movement for Ignoring Poor Women*, DETROIT FREE PRESS (Nov. 15, 2018), https://www.freep.com/story/news/columnists/rochelle-riley/2018/11/15/tarana-burke-metoo-movement/2010310002/ (exploring the assertion that "Hollywood" and "pretty girls" have taken over the #MeToo movement).

[200] *See, e.g., About*, ME TOO., https://metoomvmt.org/about/#history (last visited Nov. 19, 2018) (explaining that the purpose of the #MeToo movement is better spotlight the plight of Black, female survivors of sexual abuse).

[201] Marsha Mercer, *#MeToo Fuels A Comeback for the Equal Rights Amendment*, USA TODAY (March 1, 2018), https://www.usatoday.com/story/news/2018/03/01/metoo-movement-fuels-1970-s-comeback-era/385667002/.

[202] *See*, *e.g.,* S.J. Res. 6, 115th Cong. (2017) (reciting the text of the proposed Equal Rights Amendment, which excludes any mention of race or provides any other indication that the proposed Equal Rights Amendment will address race-based injuries).

[203] *See* Kathleen Sullivan, *Constitutional Amendmentitis*, AM. PROSPECT (Dec. 19, 2001), https://prospect.org/power/constitutional-amendmentitis/ (explaining that there should be resistance to amending the Constitution to accommodate contemporary social and political notions).

[204] *See* Pauli Murray, *The Negro Woman's Stake in the Equal Rights Amendment*, 6 HARV. C.R.C.L. L. REV. 243, 243 (1971) (arguing that Black women will benefit from ratification of the proposed Equal Rights Amendment).

an Amendment would have no way of accounting for the significance of intersectionality on Black women's experiences of sexual violence.[205] Thus, an Equal Rights Amendment would only partially advance the social position of Black women, who exist at the intersection of at least race and gender.[206] Only when administered in conjunction with other, intersectional devices—such as a modified reasonable person standard and damage apportionment—would an Equal Rights Amendment align with the ideology of the #MeToo movement. Moreover, only then do Black women finally rise alongside the revival of this long-proposed Amendment.

[205] *See*, *e.g.,* S.J. Res. 6, 115th Cong. (2017) (providing the language of the proposed Equal Rights Amendment, which is devoid of mention of social factors beyond gender).

[206] *See* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1251–53 (1991) (situating women of color into the intersection of race and gender and explaining the difficulties that might arise for such women when they attempt to address certain forms of oppression).