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The Sovereign School District: What the Structure of our Public Education System Teaches Children About Citizenship

SAMUEL DAVIS*

INTRODUCTION

I grew up in Port Jefferson, New York, a bucolic village on the North Shore of Long Island. Like me, the vast majority of children who live in the Village of Port Jefferson—population approximately 8,000—attend Port Jefferson Union-Free School District ("UFSD").[1] Reflecting Port Jefferson's demographics, Port Jefferson UFSD is well-resourced: the median household income in Port Jefferson is $113,750, and the district spends more than $23,000 per child on student instruction and support.[2] Also reflecting Port Jefferson's demographics, Port Jefferson UFSD is racially and socioeconomically homogenous: 84 percent of its students are white, and less than 3 percent live in families with incomes below the poverty level.[3]

Port Jefferson UFSD serves most of Port Jefferson as well as a small, incorporated village fully encompassed within it, the Village of Belle Terre.[4] The Village of Belle Terre is even wealthier and whiter than Port Jefferson: apparently, not a single family in Belle Terre lives in poverty.[5] The median home price is over $900,000.[6] Growing up, the distinction between Port Jefferson and Belle Terre was fuzzy. The border between the two villages is nothing more than a small placard next to a stop sign on a sleepy, forested road.

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* J.D., Yale Law School, B.A., Duke University. This Article evolved out of discussions (and heated arguments) with Professor Owen Fiss, to whom the author is greatly indebted. Special thanks as well to the staff of the Connecticut Public Interest Law Journal for their thoughtful editing. All errors and omissions are the author's own.

[1] *Port Jefferson Union Free School District, NY*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/Programs/Edge/ACSDashboard/3623490 (last visited Jan. 19, 2024).

[2] *Id.*

[3] *Id.*

[4] *See State and Local Elected Officials*, PORT JEFFERSON SCHOOL DISTRICT, https://www.portjeffschools.org/boe/elected_officials (last visited May 28, 2024) (noting the relevant elected officials); *see also* WESTERN SUFFOLK BOCES OFFICE OF SCHOOL PLANNING AND RESEARCH, LONG RANGE PLANNING STUDY: PORT JEFFERSON UNION FREE SCHOOL DISTRICT, https://www.portjeff.k12.ny.us/download/PDFs/Bond2022/LongRangeUpdate2021-22.pdf (2021–22) (encompassing the relevant villages).

[5] *Quick Facts, Port Jefferson Station CDP, New York; Port Jefferson Village, New York*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/portjeffersonstationcdpnewyork,portjeffersonvillagenewyork/PST045218 (last visited Jan. 30, 2024).

[6] *Belle Terre, NY*, BEST PLACES, https://www.bestplaces.net/city/new_york/belle_terre (last visited Jan. 19, 2024).

I never truly understood why Belle Terre existed at all until my first year of law school, when I learned that the Village of Belle Terre was the site of an important Supreme Court case. Justice Douglas, writing for a seven-two majority, affirmed Belle Terre's right to impose zoning regulations prohibiting more than two unrelated individuals from living together.[7] The Court sanctioned Belle Terre's goal of maintaining the Village as "[a] quiet place where yards are wide, people few, and motor vehicles restricted . . . where family values, youth values and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[8]

Port Jefferson UFSD does not, however, serve children who live in a hamlet abutting Port Jefferson's southern border, Port Jefferson Station. Children who grow up in Port Jefferson Station go instead to the Brookhaven-Comsewogue UFSD.[9] Port Jefferson Station has a slightly different demographic profile than the Village of Port Jefferson—it is the same size, but more diverse and less affluent.[10] Growing up, children know Port Jefferson and Port Jefferson Station were distinct in a way that Port Jefferson and Belle Terre are not; the dividing line between Port Jefferson and Port Jefferson Station was, literally, a set of train tracks.

This distinction was mirrored in Brookhaven-Comsewogue UFSD, which was more diverse than Port Jefferson UFSD, spent less per pupil, had a larger student population, and served far more students living in poverty.[11] Families with young children were certainly aware of the distinctions: in a representative online discussion, parents agreed that despite their geographic proximity, Port Jefferson and Port Jefferson Station "are worlds apart" and "[n]ot even remotely in the same universe."[12]

Port Jefferson and Port Jefferson Station may be distinct, but it is not immediately obvious *why*. They share the same physical space and are administered by the same local government.[13] Indeed, if you ask someone what distinguishes the community of Port Jefferson from the community of Port Jefferson Station, residents are likely to point you to the schools. If your children attend Port Jefferson UFSD, you are part of the Port Jefferson community; if your children attend Brookhaven-Comsewogue UFSD, you are not.

But this distinction is tautological. Nothing essential distinguishes Port Jefferson from Port Jefferson Station—nothing meaningfully distinguishes

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[7] Vill. of Belle Terre v. Boraas, 416 U.S. 1 (1974).

[8] *Id.* at 1537.

[9] *See District Our Schools*, COMSEWOGUE SCHOOL DISTRICT, https://www.comsewogue.k12.ny.us/district/our_schools (last visited May 28, 2024) (identifying the schools in Port Jefferson Station).

[10] U.S. CENSUS BUREAU, *supra* note 4.

[11] *Brookhaven-Comsewogue Union Free School District, NY*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/Programs/Edge/ACSDashboard/3615780 (last visited Feb. 4, 2024).

[12] StephM & Crookhaven, *City-Data Forum: Port Jefferson Station*, CITY-DATA, http://www.city-data.com/forum/long-island/912065-port-jefferson-station.html (last visited Jan. 19, 2024).

[13] Alex Petroski, *Village Seeking State Aid to Revitalize Port Jeff Station*, TBR NEWS MEDIA (Sept. 29, 2016), http://tbrnewsmedia.com/village-seeking-state-aid-to-revitalize-port-jeff-station/.

them at all, except the school district boundary lines. Whatever differences exist today between Port Jefferson and Port Jefferson Station, school district boundary lines likely contribute to them. Affluent families seek to locate in Port Jefferson because residency grants them access to a smaller, better-resourced school. Property values rise. Less affluent families are pushed out. Because of the United States' pervasive racial wealth gap,[14] and the legacy (and ongoing practice of) illegal racial steering,[15] the families entering Port Jefferson are disproportionately likely to be white. Port Jefferson's whiteness is, at least for some, implicitly or otherwise, an attractive (and wealth-generating) feature in its own right.

The reason Port Jefferson and Port Jefferson Station are distinct communities is because residents of each send their children to different schools. They send their children to different schools because the boundaries of each school district divide the two communities rather than include them both. If the district boundary lines tracked municipal boundaries—if, for example, a unified district encompassed the Town of Brookhaven, a municipality that residents of both Port Jefferson and Port Jefferson Station share membership in—then, over time, the distinctions between the two communities would collapse. The two communities would fund their children's education out of a common purse. Port Jefferson's relative appeal to homeowners would likely diminish too, and if home values diminished, the demographic differences between Port Jefferson and Port Jefferson Station might diminish also.

This article aims to call attention to an underappreciated but pervasive driver of inequality and the perpetuation of racial hierarchy: the political choice about where to draw school district lines. The impact of school segregation and inequality on American society is no secret. However, less attention has been paid to the school district itself as an institutional entity. The school district is a distinctly American institution justified in legal, educational, and political discourses for its supposed democracy-fostering features. According to the dominant narrative, school districts are democratic because they facilitate "local control" by communities over the public schools where they send their children. As the Supreme Court has written, "[local] control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society."[16] There is "[n]o single tradition in public education . . . more deeply rooted than local control over the operation of schools[.]"[17] It is no doubt true that providing communities with the authority to govern their own school districts has

[14] *See, e.g.*, Thomas Shapiro, Tatjana Meschede, & Sam Osoro, *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide*, INST. ON ASSETS AND SOC. POL'Y (Feb. 2013), https://heller.brandeis.edu/iasp/pdfs/racial-wealth-equity/racial-wealth-gap/roots-widening-racial-wealth-gap.pdf.

[15] Ann Choi, Keith Herbert, & Olivia Winslow, *Long Island Divided*, NEWSDAY (Nov. 17, 2019), https://projects.newsday.com/long-island/real-estate-agents-investigation.

[16] Wright v. Council of Emporia, 407 U.S. 451, 469 (1972).

[17] Milliken v. Bradley, 418 U.S. 717, 741–42 (1974).

significant democratic appeal. Schools are a primary site for civic engagement, interpersonal bonding, and community-building; communities are, in at least some domains, better positioned to make choices about their children's education than distant state authorities. Local control may indeed enable "[e]ach locality . . . to tailor local programs to local needs," offering community members the opportunity to "participat[e] in the decision[-]making process that determines how [] local tax dollars will be spent."[18]

Yet the school district, as it has been enshrined in contemporary life, enables practices that are antithetical to American democracy. This is because the Supreme Court has defined local control to include two powers, understood as inherent rights of communities acting through school districts, that reproduce the very constitutional injuries identified in *Brown v. Board of Education*. These powers are the authority to fund local schools through local property taxes, and the authority to define the geographic boundaries one's own school community. Without basis in law and lacking in normative justification, the assignment of these powers to school districts endows them with the principles and powers of sovereignty.

These powers turn the logic justifying local control on its head. Rather than tasking functional communities with public school governance to facilitate democratic participation and decision making, the sovereign school district creates "perverse" communities that dispossess marginalized communities of the right and ability to exercise democratic control over their schools.[19] The sovereign school district fosters communities which "limit interactions with, and therefore responsibility towards, other . . . residents of different socioeconomic" or racial identity, "reinforcing internal cohesion" but diminishing the possibility of multiracial, pluralistic "community building."[20] These communities are predicated on, and make concrete, racially exclusionary self-understandings that "permit and encourage" parents to "hoard [their] wealth on one side while children on the other side are left with little."[21] By granting these powers to the sovereign school district, the law entrenches racial hierarchy, exacerbates interdistrict resource inequality, and undermines public education's democratic function.

This Article attempts to disturb the prevailing narrative, which treats the school district as essential and, in its institutional form, generally beneficial to the ideal of democratic self-governance, by illustrating and critiquing the conflation of local control with school district sovereignty. The former requires only that citizens of a community be granted authority to shape the schools they send their children to; the latter endows individual citizens with the right to fund schools through intradistrict property taxes

[18] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49–50 (1973).

[19] Nadav Shoked, *An American Oddity: The Law, History, and Toll of the School District*, 111 NW. U. L. REV. 945, 1005 (2017).

[20] *Id.*

[21] Charles R. Lawrence III, *Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy)*, 114 YALE L.J. 1355, 1377 (2005).

and to define the scope of their own community by fixing school district boundary lines.

This Article exposes the ideological underpinnings of school district sovereignty and its democracy-distorting consequences. It aims to highlight school district sovereignty as a political choice not compelled by, and in fact anomalous within, the law, and to begin developing an oppositional discourse. It proceeds in three parts. First, this Article briefly traces how, across a series of cases in the second half of the twentieth century, the Supreme Court moved away from *Brown v. Board of Education's* holistic concern for public education's democratic function and towards an overriding preoccupation with preserving school district sovereignty. This shift embraced a constitutional understanding of school district boundary lines as inviolable: it took for granted that (some) parents possessed an inherent right to control how their school districts were funded and who could attend their children's schools, a view at odds with black letter local government law and inconsistent with the Supreme Court's treatment of municipal boundaries in other domains.

Second, this piece examine how endowing school districts with the powers of sovereignty undermines the very function and purposes that public education is supposed to serve in a democratic society. This analysis is anchored in the vision of the prerequisites of democratic self-governance and theory of democratic equality that underpins the Supreme Court's seminal decision in *Brown*. Briefly summarized, these requirements include a polity composed of citizens that relate to each other on terms that recognize each other's and their own equality; a political process that enables deliberative decision-making among political equals; and outcomes that do not convey expressive or stigmatic harms towards any one social group. From here, this section describes the ways school district sovereignty frustrates meaningful democratic self-governance.

The primary democratic harm is that school district sovereignty perpetuates racial segregation in public education, inhibiting efforts to integrate public schools that should have been required in the aftermath of *Brown*. Yet school district sovereignty corrodes democracy in ways that are distinct from and go beyond its consequences for school desegregation. These second-order democratic harms emanate from the two anti-democratic powers that legal deference to school district sovereignty protects: control over funding and control over boundary-setting. Exercised together by school districts, these two powers give rise to a landscape of inequality that thwarts democratic community-building and democratic governance by (1) producing interdistrict inequalities that grant privileged communities full democratic rights while dispossessing marginalized communities of theirs, instantiating two tiers of citizenship among supposed democratic equals; and (2) fostering a deracialized or colorblind legal and popular understanding of education that assigns blame to marginalized communities for educational disparities that are, in truth, structural,

collective failings. In turn, this creates an educational landscape where democratic control is subsumed by private, individualized decision-making, diminishing public education's status as an issue of collective concern.

This Article concludes by beginning to sketch a conceptual framework for combatting the democracy-corroding effects of school district sovereignty. The most direct way to confront school district sovereignty would be to unbundle the powers that inhere in local control, moving away from a funding regime based on property taxes and reducing communities' power to establish their own school district boundary lines. Short of this, reform efforts should prioritize strategies that undermine school district sovereignty's self-perpetuating logic. These strategies should seek to destabilize privileged parents' settled expectations of what residence in any one school district accords them; build school districts into meaningful sites for participatory democratic governance; and empower marginalized communities to foster cross-racial political coalitions.

Ultimately, the goal of this Article is to denaturalize school districts and call attention to their crucial role in ordering American life. Where political actors choose to draw and maintain school district boundary lines does not reflect some essential, indivisible community: it constitutes communities, on both sides of the dividing line. Yet once the lines are drawn, they tend to disappear. You grow up knowing where your community ends, but you do not grow up knowing why.

I. HOW SCHOOL DISTRICT SOVEREIGNTY SUBSUMED PUBLIC EDUCATION'S DEMOCRATIC PRINCIPLES

A. *Public Education's Democratic Function.*

Since its inception, public education has played a central role in supporting the institutions and practices of democratic self-governance. This theory is rooted in the vision of Thomas Jefferson, who believed that public schools were necessary to create citizens capable of governing themselves through politics,[22] and John Dewey, who saw public education as fundamental to establishing the preconditions of democratic life, which included the "recognition of common interests among citizens, and the related commitment to reconsider our individual interests in light of understanding the interests of others"—the knowledge, attitudes, and beliefs necessary for legitimate public decision-making in a pluralistic democracy.[23] These historical understandings informed the Supreme Court's approach to public education in *Brown v. Board of Education. Brown* is first and foremost about disestablishing state-sanctioned racial segregation in public education. But it is also a case about "citizenship, community, and the

[22] *See, e.g.*, Johann Neem, *Is Jefferson a Father of Democratic Education?*, 21 DEMOCRACY & EDUC. 2 (2013).

[23] AMY GUTMANN, DEMOCRATIC EDUCATION, 77 (rev. ed. 1999).

special role that public education plays in defining and creating community."[24]

Public education's primary democratic function is to ensure that every citizen can participate in the process of self-governance on equal terms. In a liberal democratic society, schools are a primary site for conscious social reproduction: it is through schooling that one generation inculcates in the next a sense of themselves as situated within a society that is organized around a shared commitment to a set of (contested) values. Education is necessary for citizens to "participat[e] in democratic politics, to choos[e] among (a limited range of) good lives, and to shar[e] in the several sub-communities, such as families, that impart identity to the lives of its citizens."[25] *Brown* recognizes this. Education is "the very foundation of good citizenship."[26] It is "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."[27] It acculturates children to assume their place in a democratic society.

Democratic society is predicated on the idea of equal citizenship: within the political sphere, everyone has an equal opportunity to shape the governance decisions that bind them all equally.[28] To provide for equal citizenship, the state must provide every child equal access to the prerequisites of citizenship—to the institutions and experiences, like public education, that help children develop that which is required to fully participate in democratic life. Just as it is unconstitutional to formally exclude a group of children from the political community, it is profoundly antidemocratic to undermine equal citizenship by prohibiting certain classes of children from fully accessing the institutions that communicate what is needed to become a full and equal citizen. This is because education is a prerequisite for "performance of our most basic public responsibilities[.]"[29] Equal citizenship requires that *all* children have the opportunity to develop the skills and understandings that public education transmits. This is why it is "doubtful that any child may reasonably be expected to succeed in life if [they are] denied the opportunity of an education."[30]

This vision of the relationship between public education and citizenship presupposes a political process that demands educated citizens. It is predicated on "[t]he ideal of the autonomous individual capable of meaningful choice and informed decision[-]making[.]"[31] Education is a foundation of democratic life because democratic self-governance requires

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[24] Lawrence, *supra* note 21, at 1375.
[25] GUTMANN, *supra* note 23, at 42.
[26] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).
[27] *Id.*
[28] *See generally* Robert Post, *Democracy and Equality*, 603 ANNALS AM. ACAD. POL. AND SOC. SCI. 24 (2005).
[29] *Brown*, 347 U.S. at 493.
[30] *Id.*
[31] *See* Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 432 (2006).

citizens who possess "the cognitive skills of information processing, logical analysis, and conceptual thinking" that enable them to "identify [their] beliefs, values, and commitments and to think and act in a manner consistent with those choices."[32] It is antithetical to democratic equality for the state to make second-class citizens, either formally (by differentially allocating citizenship rights) or functionally (by failing to provide them equal access to citizenship prerequisites like public education).

Depriving groups of children equal access to the prerequisites of citizenship also symbolically marks those children off as lesser members of the democratic community. For Black children, segregation "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[33] This sense of inferiority "affects the motivation of a child to learn" and "has a tendency to [retard] the educational and mental development of [black] children[.]"[34] Children internalize that they are devalued by segregation: they recognize that the political community sees them as subordinate to "real" citizens. They experience formally democratic decision-making not as legitimate expressions of *their* community's will, but as an imposition by the dominant group, as a form of oppression.[35]

This "feeling of inferiority" is mirrored in white children's unjust feelings of superiority, which foments racial oppression by legitimating their "unchecked white privilege."[36] This is "dehumanizing" because it causes white children to pathologize their Black peers, inviting the former to "believ[e] in [their own] racial superiority[.]"[37] Racially segregated public schools condition all children to disbelieve in the foundational sociopolitical principle that, in America, citizens from different racial groups have equal worth. Citizens who come to understand that society sees members of their own race as inherently superior or inferior, and whose belief is produced and legitimated by the state, cannot be equal participants in democratic life.[38]

In a democratic society, all citizens "have a just claim to stand in relations of equality with their fellow citizens."[39] All citizens must be able to credibly see themselves as equals to their fellow citizen: they must credibly believe that their fellow citizen views them as equals too.[40] It is this mutual recognition of equality that instills in citizens "the warranted conviction that they are engaged in the process of governing themselves."[41] In a pluralistic society, democratic decision-making inevitably produces

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[32] *Id.* at 433.
[33] *Brown*, 347 U.S. at 494.
[34] *Id.*
[35] Post, *supra* note 28, at 27.
[36] Angela Onwuachi-Willig, *Reconceptualizing the Harms of Discrimination: How* Brown v. Board of Education *Helped to Further White Supremacy*, 105 VA. L. REV. 343, 347 (2019).
[37] *Id.*
[38] *See generally* ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION (2010).
[39] *Id.* at 18.
[40] *See* Post, *supra* note 28, at 29.
[41] *Id.* at 26.

outcomes that contravene many citizens' preferences. Accordingly, it is only when the decision-making process is conducted by "political participants . . . [who] treat all individuals affected by the political process as their equals[,]" and who "render equal respect and concern . . . to people based on the capacity of all people to generate their own equally worthy visions of the good," that such decision-making can begin to be accepted as legitimate.[42] Where this equality exists, even citizens who disagree with political choices can experience them as acts of "self-determination[,]" because they recognize the government as "their own, as representing them . . . as in some way responsive to their own values and ideas."[43] By contrast, where there is foundational inequality, some citizens instead experience "collective decision making" as "oppressive and undemocratic."[44]

As *Brown* understood, segregated public education makes the mutual recognition of political equality impossible: this is why "separate but equal" public education is "*inherently*" unconstitutional.[45] By contrast, integrated public education fosters foundational equality by powerfully signaling to children that they all start from a place of equal worth, that the State believes equally in their capacity to develop into citizens. Integrated schools also foster the kinds of interpersonal interactions and durable relationships that make mutual recognition of one another's equal humanity possible. Although *Brown* addressed the constitutional injury that inhered in racially segregated public schools, it pointed towards a broader principle: that any technique for organizing public schools which thwarts children's capacity to see each other and themselves as foundational equals undermines public education's democratic function.

II. THE TURN TOWARD MILLIKEN AND THE SACRED SCHOOL DISTRICT

As the Supreme Court sought to implement school desegregation in the aftermath of *Brown*, it could have drawn upon and further elaborated public education's democratic principles. When confronted with competing arguments about how to administer public education, it could have privileged approaches which ensured that children would grow up believing that children who did not look like them were, nonetheless, their equals as citizens. But this is not what the court did. Following *Brown*, the Court's attention to public education's democratic principles wavered. Instead, the court came to view the school district as the sole, and exhaustive, guarantor of public education's democracy-enhancing function. It reinforced this belief by deferring to the prerogatives of the school district and reflexively enlarging its institutional powers. In effect, the Court came to assert that

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[42] James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1475 (1990).

[43] Post, *supra* note 28, at 27.

[44] *Id.*

[45] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

protecting school district sovereignty was a legitimate goal in its own right, and that preserving school district sovereignty would, *ipso facto*, ensure the realization of public education's democratic function.[46] This evolution enshrined school district sovereignty in American law, while destroying the capacity of public schools to foster meaningful democratic life.

A. *The Turn from Democracy to Sovereignty.*

The Supreme Court initially recognized school districts as administrative realities, but not necessarily hallowed or sacrosanct institutions.[47] It acknowledged that school desegregation remedies would likely need to accommodate the fact of their existence given their universality, but the Court did not initially treat school districts as presumptively legitimate, constitutional, or democratic. Instead, the Court hoped that relying on school districts would enable local communities, instead of the federal courts, to manage the various administrative questions school desegregation implicated.

On re-argument in *Brown v. Board of Education* (*Brown II*), the Supreme Court rejected the NAACP-Legal Defense Fund's proposal that school districts be afforded one year to achieve full desegregation.[48] Instead, the Justices would require school districts found to be in violation of *Brown I* to desegregate their schools with "all deliberate speed."[49] Undoubtedly, as has been extensively documented, the court was concerned that more rapid intervention would have produced unmanageable backlash among recalcitrant white communities and politicians.[50] But this concern was buried in the language of administrative necessity: the court would defer to local authorities who had "primary responsibility for elucidating, assessing, and solving" local educational challenges to provide solutions to the "varied local school problems" that desegregation efforts would inevitably confront.[51]

While the Court did not expressly endorse school districts as normatively appealing institutions, its formulation meant that the very same local school boards which had perpetuated unconstitutional conditions of segregation would, under federal supervision, be tasked with ending it. The Court permitted communities some measure of autonomy, channeled through the existing institutional apparatus of the school district, perhaps as a counterweight to its refusal to condone the communities' choice to maintain segregated schools. Yet this choice was not legally compelled. The Court could have ordered *states* to implement desegregation remedies by

[46] *See supra* Section II.A–B.

[47] *See supra* Section II.A–B.

[48] *See* Brief for Appellants in Nos. 1, 2 and 3 and for Respondents in No. 5 on Further Reargument at 10–11, 23, Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955).

[49] Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955).

[50] *See generally* Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AMER. HIST. 81 (1994).

[51] *Brown II*, 349 U.S. at 298–99.

abolishing recalcitrant local school districts or subjecting them to direct oversight.[52] In the face of "massive resistance" from white parents,[53] however, the Court deferred to the very method of organizing public education that helped produce the unconstitutional conditions it had set out to solve.

The Court's philosophical commitment to school districts deepened over time. In *Wright v. City of Emporia*, the court blocked a city's effort to secede from a consolidated county district on the grounds that permitting it to do so would undermine the court-ordered desegregation plan.[54] Yet even then, the majority went out of its way to note that "[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society."[55] In truth, it was Chief Justice Burger's dissent which presaged the Court's emerging treatment of school districts, where he argued that "[t]o bar the city of Emporia from operating its own school system is to strip it of its most important governmental responsibility, and thus largely to deny its existence as an independent governmental entity."[56] This presumed that municipalities possessed inherent or autonomous powers distinct from the sovereign state that grants their charter. This may have been true in Virginia where, uniquely among states, municipalities are accorded such powers in the state constitution.[57] Yet this logic would not be confined to Virginia. Instead, it laid the groundwork for the court's animating normative framework in approaching public education.

The Court extended its assumption of municipal autonomy to school districts in *San Antonio Independent School Dist. v. Rodriguez*, when it refused to disturb a statewide school financing scheme that required each district to largely fund itself through property tax revenue.[58] This majority found no constitutional harm in the massive interdistrict funding disparities this funding system produced.[59] To justify its refusal to intervene, the Court cited its "lack of specialized experience and knowledge" relative to state and local educational authorities regarding "the most persistent and difficult questions of educational policy."[60] But for the first time, a majority expressly justified its deference to local school boards on democratic grounds.

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[52] *See* Lee v. Macon Cnty. Bd. of Educ., 267 F. Supp. 458 (M.D. Ala. 1967), *aff'd sub nom.*; Wallace v. United States, 389 U.S. 215 (1967) (ordering statewide desegregation); Symposium, *First Panel: Vindicating the Promise of* Brown*—School Desegregation and the Civil Rights Act—Past, Present, and Future*, 26 PAC. L.J. 772, 777 (1995) ("The resistance to desegregation was such that we came up with the statewide lawsuits. Slim Barrett, who's here today, tried the *Lee v. Macon County* case, which was the first one. We went after all of the school systems that HEW could not get to desegregate on a statewide lawsuit. Once we got that established as a principle in *Lee v. Macon County*, we were able to bring statewide suits elsewhere.").

[53] *See, e.g.*, NAACP Legal Def. Fund, *The Southern Manifesto and "Massive Resistance" to* Brown, https://www.naacpldf.org/brown-vs-board/southern-manifesto-massive-resistance-brown/.

[54] Wright v. Council of Emporia, 407 U.S. 451, 469 (1972).

[55] *Id.*

[56] *Id.* at 479 (Burger, C.J., dissenting).

[57] *Id.*

[58] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

[59] *Id.*

[60] *Id.* at 42.

According to the Court, preserving local control was necessary to facilitate "continued research and experimentation" in education by encouraging "a large measure of participation in and control of each district's schools at the local level."[61] The Court explicitly conceptualized school districts as sovereign entities, drawing an analogy to "the Nation-State relationship in our federal system."[62] Its claim that "[t]hese practical considerations, of course, play no role in the adjudication of the constitutional issues presented here" rang hollow to the children denied access to even a baseline level of equitable interdistrict funding.[63]

Justice Marshall, dissenting separately, saw that deference to school districts did not inherently advance democratic principles. Invoking *Brown*, Justice Marshall argued that sanctioning a locally-derived funding scheme, even when it produced such stark interdistrict educational inequities, reflected an "unsupportable acquiescence [to] a system which deprives children in their earliest years of the chance to reach their full potential as citizens."[64] While agreeing that "local control of public education, as an abstract matter, constitutes a very substantial state interest[,]"[65] he recognized that public education's democratic purpose was not *actually* furthered by local control channeled through school districts drawn around highly unequal, racially stratified communities. If the majority had examined the practical effect of Texas' funding system, Justice Marshall argued, the Court would have to recognize that it did not serve democratic principles when only those districts with sufficient property wealth could choose "the level of sacrifice they wish to make for public education."[66]

Importantly, Justice Marshall would have struck down the Texas school financing system as an inappropriate *means* of furthering the state's legitimate goal of providing for democratic control over public education. Meaningful democratic control required a financing system that provided *all* communities with sufficient resources to fund an adequate public education by making tradeoffs among different educational policy options. Under this paradigm, the Court would have treated the funding system as a state policy choice that was acceptable to the extent it was tailored to the state's compelling interest in providing communities with democratic control over public education. By contrast, the *San Antonio* majority treated school districts as sovereigns: as a sovereign, the school district had an inviolable right to raise its own revenues and dispose of them however the community pleased and, as citizens of a sovereign, district residents were shielded from claims made by anyone outside their sovereign's boundary lines.

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[61] *Id.* at 43, 49.
[62] *Id.* at 50.
[63] *Id.* at 58.
[64] *Id.* at 71–72 (Marshall, J., dissenting).
[65] *Rodriguez*, 411 U.S. at 126.
[66] *Id.* at 127–28.

Over the dissents of Justices White, Marshall, Brennan, and Douglas in *Milliken v. Bradley*[67] the majority accorded school districts another power of sovereignty: the right to territorial self-definition. The majority in *Milliken v. Bradley* refused to question school district boundary lines even though failing to do so ensured that the constitutional imperative requiring educational authorities to "make every effort to achieve the greatest possible degree of actual desegregation . . ." would not be achieved.[68] The majority disclaimed the federal judiciary's authority to grant interdistrict relief in remedial desegregation cases. It declared that "the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country."[69] It put school districts at the very core of America's commitment to public education, asserting that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."[70] Although the majority once again stated that school district boundary lines were not "sacrosanct," its decision ensured that they would be.[71]

The majority invoked a parade of horribles that district consolidation would produce, including the "logistical and other serious problems attending large-scale transportation of students" and the "array of other problems in financing and operating this new school system."[72] At least implicitly, the majority expressed the view that the scale at which decision making would occur in a consolidated school district would have been both inefficient and undemocratic, that a consolidated district would abrogate the democratic rights of some communities contained therein.[73] Yet the majority never explained why these problems would only be present in a consolidated school district, and not in *every* school district. Under the majority's logic, Detroit Public Schools—which served approximately 276,000 students at the time *Milliken* was decided—should have been understood as undermining the conditions of local control and violating many communities' democratic prerogatives for the myriad self-defined

[67] Milliken v. Bradley, 418 U.S. 717, 762 (1974) (Douglas, J., dissenting); *id.* at 777–78 (White., J., dissenting); *id.* at 794 (Marshall, J., dissenting).

[68] *Id.* at 775 (White, J., dissenting) (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1971)).

[69] *Id.* at 741.

[70] *Id.* at 741–42.

[71] *Id.* at 744.

[72] *Id.* at 743.

[73] *Milliken*, 418 U.S. at 743.

communities within city boundaries.[74] Clearly, the district could have been broken down into more administrable sub-units: it certainly encompassed many communities that defined themselves as independent from and autonomous of others within Detroit Public Schools. The only distinguishing feature was that those sub-communities within Detroit Public Schools had not already marked themselves as distinct by drawing boundary lines around their self-defined "territory."

The Court's attachment to school districts cannot be understood as merely a concern for preserving the mechanisms of governance that local control facilitated. Michigan could have attempted to create a consolidated school district that preserved every citizen's right to participate in the governance of the schools to which they sent their children. Instead, its concern for local control conflated democratic participation with community self-definition. Thus, local control came to mean much more than access to an institution and mode of governance through which democratic decision-making could be channeled: it became a sword that could be used to interpose against claims made by residents of neighboring areas asserting a different definition of what constituted the relevant community. The Court would not interrogate whether those definitions of community were the "right" ones, an issue the dissent thought ripe for adjudication in *Milliken*.[75] The court would not permit an inquiry into whether the definition of community best served public education's democratic purposes, either. Instead, the majority reflexively deferred to the prerogatives of certain self-defined communities which previously had the power to draw school boundary lines.

Justice Marshall, writing again in dissent, refused to treat existing school districts as sovereigns whose boundary lines were inviolable. In contrast to the majority—which did not question the premise that suburban "communities" had a right to a school district whose boundaries encompassed them but excluded the City of Detroit—Marshall expressed warranted doubt that democratic control in suburbs required a boundary dividing them from Detroit Public Schools, arguing instead that "the city of

[74] The Court presumed that consolidation of small independent school districts would make local control impossible, without explaining how or why local control was possible in the substantially larger Detroit system. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717, 742–43 (1974) ("The Michigan educational structure involved in this case, in common with most States, provides for a large measure of local control, and a review of the scope and character of these local powers indicates the extent to which the interdistrict remedy approved by the two courts could disrupt and alter the structure of public education in Michigan. The metropolitan remedy would require, in effect, consolidation of 54 independent school districts historically administered as separate units into a vast new super school district.") (internal citations omitted).

[75] *Id.* at 769 (White, J., dissenting) ("Finally, it is also relevant to note that the District Court found that the school district boundaries in that segment of the metropolitan area preliminarily designated as the desegregation area in general bear no relationship to other municipal, county, or special district governments, needs or services, that some educational services are already provided to students on an inter-district basis requiring their travel from one district to another, and that local communities in the metropolitan area share noneducational interests in common, which do not adhere to school district lines, and have applied metropolitan solutions to other governmental needs.") (internal quotations omitted).

Detroit and its surrounding suburbs must be viewed as a single community."[76] The suburbs could properly be considered part of the Detroit Public Schools community because both the city and its surrounding suburbs formed a "single cohesive unit," recognized as "an area of economic and social integration"; for Justice Marshall, this justified judicial intervention mandating consolidation if a consolidated district would foster compliance with *Brown's* constitutional mandate.[77]

Justice Marshall concluded with the ominous but prescient prediction that the court's failure to confront the problem of racially exclusionary, self-defining communities would have long-term democratic consequences. Just as the public's "strident" opposition to desegregation remedies in the 1970's was rooted in "[r]acial attitudes ingrained in our Nation's childhood and adolescence," so too would "allow[ing] our great metropolitan areas to be divided up each into two cities—one white, the other black[,]" lead society down a path that "our people will ultimately regret."[78] Treating school districts as sovereign entities would cause a constitutional injury to go unremedied today, and it would ensure that children would grow up into adults unwilling and ill-equipped to recognize each other as equal citizens.

This move towards endowing the school district with sovereign powers enabled resistance to judicial interventions that would have required municipalities to reorganize in order to realize constitutional and democratic principles. The Court entrenched the sovereign school district as the privileged mechanism for administering public education. Going forward, the Court would continue to presume its democratic legitimacy—it would not ask whether this method of administering schools was consistent with public education's democratic function. As Cheryl Harris has written, holding school district boundary lines functionally inviolable signaled to white parents that the factors that produced *de facto* segregation, like residential steering and exclusionary zoning, which school district boundary lines reflected and exacerbated, "would be left undisturbed."[79] Extant self-determinations of who comprised the proper school district "community"—secured by those with access to the political power to draw and maintain school district boundary lines in the first place—would be accorded unquestioning judicial respect. Education funding systems that concentrated resources in privileged communities, thus perpetuating the very dynamics that made those communities privileged in the first place, were protected against illegitimate claims by citizens of *other* sovereigns. By eliding the sovereign school district's democratic deficits and assuming its democratic legitimacy, the Supreme Court evaded its responsibility for ensuring that public education could fulfill its role in sustaining democratic life.

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[76] *Id.* at 804 (Marshall, J., dissenting).
[77] *Id.*
[78] *Id.* at 814–15.
[79] Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1757 (1993).

B. *The Anomaly of School Districts at the Supreme Court.*

Milliken guaranteed that school districts would be afforded special status in American law. Fundamental black letter local government law holds that school districts, like all municipal governments, are administrative units created by sovereign states to effectuate governmental purposes, subject to revision, consolidation, and dissolution, and lacking entirely in "independent identity or constitutional status that makes them separate or in any way autonomous from state authority."[80] This baseline legal principle should have dictated the outcome in *Milliken*. In Michigan, as the *Milliken* dissenters noted, it was a settled matter doctrinally that school districts were derivative entities of the state, lacking independent status in state law.[81] Yet rather than following this principle and treating school districts like other municipal entities—as, in effect, a policy choice about how to structure government to advance some state interest, and thus subject to means-end scrutiny—the Court treated school districts as indivisible sovereign entities whose boundaries were legitimately beyond the reach of the judiciary.

The Court treated school districts as sovereign in part because it understood boundary lines as demarcating coherent, cohesive communities. Rather than view district boundary lines as encompassing contingent "communities," the Court adopted a "naturalizing view of political geography" that endowed school district communities with "prepolitical meaning."[82] School district boundary lines were tautologically legitimated by the fact of the community within it, rather than appropriately viewed as the result of ongoing political contestation, as one potential (and incomplete) political settlement among many possibilities. In the post-*Brown* desegregation decisions recounted above, the Court would fall back on this view to "justify . . . failures to consider the effect of boundaries and space on racial segregation."[83] Policymakers, politicians, and the public would follow suit. The school district, perhaps the quintessential derivative municipal entity in local government law, was instead endowed with the property of "sovereignty" or "territoriality," as befitting an inviolable political community.[84] The first order political choice of where to fix the sovereign's boundaries was encoded by law and then made invisible.

One core principle of territoriality is that the sovereign is indivisible: its boundaries cannot be altered without its citizens' consent. In turn, school district residents, like citizens of a sovereign nation, are expected only to "seek[] to advance [their] welfare . . . while bearing no or very limited duties to outsiders."[85] Education funding systems predicated on local property

[80] Myron Orfield, *Milliken, Meredith, and Metropolitan Segregation*, 62 U.C.L.A. L. REV. 363, 391 (2015).

[81] *Milliken*, 418 U.S. at 794–95 (Marshall, J., dissenting).

[82] Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1858–59, 1872 (1994).

[83] *Id.* at 1857.

[84] Aaron J. Saiger, *The School District Boundary Problem*, 42 URB. L. 495, 508–09 (2010).

[85] *Id.* at 509.

taxes reinforce this bounded understanding of whose welfare the community is responsible for. The Court's education jurisprudence would presume that it was natural and legitimate for school district residents to "address [their own] problems with [their] own resources, making very limited or no claims on others and not worrying about spillovers."[86] Under the sovereignty paradigm, the only democratically legitimate way to administer public education was to respect district prerogatives: to hold one school district accountable for the problems of another, to allow outsiders to make demands on a school district's resources, was akin to dispossessing sovereign citizens of their right to self-govern.

For the court to ascribe sovereignty to school districts rested on a view of the presumptive legitimacy of the political communities that the boundary lines encompassed. Yet the history of American school district formation did not justify such an understanding. School district boundary lines were pervasively shaped by efforts to define community through racial exclusion in order to maintain racial hierarchy. Thus, one reason school district boundaries track county lines in the South is because "segregation imposed diseconomies of scale on district operations and required larger land-area districts"—that is, school district boundary lines were expressly crafted to solve the problem of the inefficiency of operating dual systems serving one community and make racial segregation possible.[87] In the North, where school district boundaries are more frequently congruent with smaller municipal sub-entities, the process of municipal formation itself was frequently a means of enforcing racial segregation and hierarchy.[88] Municipal government formation permitted privileged white communities to directly pull levers of law and policy to exclude racial minorities through strategies like exclusionary zoning and selective annexation, while facilitating "private" acts of discrimination like redlining and racial steering.[89] In fact, during the "suburbanization boom" of the 1950s that produced many of the municipal boundaries the Court would eventually confront, "the most important predictor of the formation of new local governments was proximity to cities with large black populations that had the power to annex new territories."[90] "New city formation functioned to block incorporation into mixed-race cities, where whites would have to share

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[86] *Id.*

[87] William A. Fischel, *The Congruence of American School Districts with Other Local Government Boundaries: A Google-Earth Exploration* (rev. ed. Apr. 2010) (unpublished working paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=967399.

[88] *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) ("Today's racial segregation in the North, South, Midwest, and West is not the unintended consequence of individual choices and of otherwise well-meaning law and regulation but of unhidden public policy that explicitly segregated every metropolitan area in the United States.").

[89] *See generally* Ben Marsh, Allan M. Parnell, & Ann Moss Joyner, *Institutionalization of Racial Inequality in Local Political Geographies*, 31 URB. GEOGRAPHY 691 (2010), http://www.cedargroveinst.org/Urban_Geography.pdf (describing various strategies for creating and perpetuating racially stratified municipalities including selective annexation and underbounding).

[90] ANDERSON, *supra* note 38, at 68.

public services and tax revenues with blacks."[91] School district boundary lines were where the Court found them in the twentieth century because of pervasive efforts to manipulate techniques of governance to entrench racial segregation and hierarchy. From the perspective of public education's supposed democratic functions, these communities were clearly undeserving of the privileges of sovereignty—and the assumption of constitutional and democracy legitimacy—that the Court saw fit to extend.

Further, this judicial solicitousness towards municipal lines is anomalous within the Court's jurisprudence. In election law cases, the Court routinely disestablished extant boundary lines that impeded superseding constitutional principles.[92] When a state or locality is accused of racial gerrymandering—when it deprives minority voters of their right to an equal opportunity to participate in the democratic process—it is not exculpatory for the municipality to claim that its districts reflect a functional political community. The presence of a definable community may be a legitimate factor in redistricting, but "a state runs a risk of a legal challenge if it does not redraw boundaries to account for [shifts] in racial demography" because the Voting Rights Act and the Equal Protection Clause together impose "a continual duty to fulfill the requirements of those laws."[93] Legal and constitutional imperatives do not typically yield to boundary lines selected and maintained by the state.

By contrast, when the Court adjudicates public education cases, it acts as if there is "no principle other than local control" to guide its decision-making.[94] As Myron Orfield has noted, there is no principled reason why the Supreme Court should "redraw[] [voting districts] to protect individual voting rights in spite of rational and legitimate local government interests" but remain unwilling to require "school districts . . . to cooperate with each other to protect the rights of black children to attend nonracially segregated schools[.]"[95] The principle that justifies this distinction—school district sovereignty—was not compelled by local government law or by the history of school district formation. When the contingent reality of where district boundaries lay undermined efforts to realize constitutional principles, and where an alternative arrangement could better meet that requirement were available, the Court need not have deferred to that contingent reality. Instead, the Supreme Court sacrificed democratic principles to respect a school district it had unnecessarily endowed with democratic legitimacy and the powers of sovereignty.

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[91] *Id.*

[92] *See, e.g.*, Allen v. Milligan, 599 U.S. 1, 29 (2023) (noting that courts have redrawn congressional and state legislative districts on numerous occasions to comply with Section 2 of the Voting Rights Act).

[93] Christopher A. Suarez, *Democratic School Desegregation*, 119 PENN. ST. L. REV. 747, 773 (2015).

[94] *Id.* at 780.

[95] Orfield, *supra* note 80, at 414.

III. CITIZENSHIP AND DEMOCRACY WITHIN THE SOVEREIGN SCHOOL DISTRICT

The Supreme Court's embrace of the sovereign school district as a democratic ideal in its own right had significant consequences for the health of American democracy. The primary issue this shift occasioned was the one the *Milliken* dissenters were most concerned about: it undermined efforts to realize *Brown's* constitutional requirement for desegregated public schools, exacerbating the problem while shifting it from one of intra- to inter-district racial isolation.[96] By deferring to the self-organized "citizens" of sovereign school districts, the Court disclaimed responsibility for interrogating whether boundary lines reinforced perverse community-formation; by entrenching a funding system largely dependent on intradistrict wealth, the court legitimized these "citizens'" efforts to exclusively concentrate resources on their own children, without regard for the resulting inequalities. In turn, school districts became more segregated and more unequal.[97]

Yet the two features of school district sovereignty the court consecrated in its post-*Brown* education cases—deference to self-defined district borders and approval of funding schools predominantly through in-district property taxes—had profound consequences for American democracy that extend well beyond the constitutional injury of racial segregation. While racial segregation is itself inimical to democracy, undermining the possibility that citizens will recognize citizens of other races as equal members of a shared community and distorting democratic decision making by irrationally excluding minority voices, entrenching school district sovereignty also corrodes democracy in less visible ways. These effects largely go unnoticed because school district sovereignty is conflated with local control of public education. Whereas entrenching the former requires assigning to parents the rights of citizens of sovereign political communities, respecting the latter demands only respect for the institutions and practices that facilitate parental participation in the communal governance of their children's public schools. Fostering local control can, when appropriately circumscribed, be a good thing: it deepens a community's sense of responsibility for its children and supplies flexible context-specific education management. Local control can facilitate parental involvement that "probably improves academic

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[96] *See* Kendra Taylor, Erica Frankenberg, & Genevieve Siegel-Howley, *Racial Segregation in the Southern Schools, School Districts, and Counties Where Districts Have Seceded*, 5 AM. EDUC. RSCH. ASS'N 1, 6 (2019), https://journals.sagepub.com/doi/full/10.1177/2332858419860152.

[97] Erica Frankenberg & Chungmei Lee, Race in American Public Schools: Rapidly Resegregating School Districts Harvard Univ.: C.R. Project (Aug. 2002), https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/race-in-american-public-schools-rapidly-resegregating-school-districts/frankenberg-rapidly-resegregating-2002.pdf ("From the late 1960s on, some districts in all parts of the country began implementing such plans although the courts made it much more difficult to win desegregation orders outside the South and the 1974 Supreme Court decision against city-suburban desegregation made real desegregation impossible in a growing number of overwhelming minority central cities.").

achievement" and contributes to the creation of the civic institutions that engender the development of "genuine functional communities."[98]

Local control does not, however, demand the full suite of rights accorded to the citizens of sovereign school districts. The right to community self-definition and the hoarding of community resources are not inherent features of local control. These rights are not required for parents to vote in school board elections, organize extracurricular events, establish parent support groups, demand changes to the curriculum, and otherwise enjoy the benefits that emanate from participating in civic life. As the *San Antonio ISD* dissenters recognized, providing these rights undermines the very democratic goals to which local control aspires.[99] This occurs primarily in two ways: first, by producing interdistrict inequalities that dispossess marginalized communities of their capacity and right to exercise democratic control over public education, and second, by fostering a sense of community that is at once predicated on racial exclusion but blind to the role race plays in ostensibly democratic decision making. A closer examination of these two consequences of school district sovereignty reveals how a doctrine justified by public education's fundamental importance to American democracy instead corrodes democratic life.

A. *How School District Sovereignty Produces Inequalities that Diminish the Possibility of Democratic Governance in Marginalized Communities.*

School district sovereignty perpetuates interdistrict inequality by shielding privileged communities from claims on their resources: school district "citizens" tax *themselves* to provide for *their own* welfare, without regard for the consequences imposed on outsiders. School district sovereignty marks privileged communities as distinct from marginalized ones and, in the process, exacerbates the magnitude of interdistrict inequality. As residents "sort[] themselves across districts by income," districts that attract wealthier parents "become increasingly wealthy while those that fail become ever more poor and distressed."[100] This produces a one-way ratchet effect: the "pull" to relocate into increasingly homogenous and well-resourced districts becomes stronger, as does the "push" to leave increasingly impoverished districts facing concomitantly magnified levels of concentrated need. At the same time, wealthy communities accrue further wealth by incorporating the value of living in a privileged school district into their property values, thus expanding the pool of resources they have

[98] Saiger, *supra* note 84, at 520.

[99] Charles J. Ogletree Jr., *The Legacy and Implications of San Antonio Independent School District v. Rodriguez,* 17 Rich. J.L. & Pub. Int. 515 (2014) (explaining that Justice Marshall's dissent "found the state's only justification -- the importance of local educational control -- to be an excuse rather than a justification for the educational inequity that was presented to the district court" and also, "[t]he need for local educational control did not suggest that there also must be local fiscal control and -- even if local fiscal control was judged important . . .") (internal citations omitted).

[100] *Id.* at 500.

available even as their level of baseline educational need diminishes due to the dispersion of less wealthy families in the face of rising property values.

While some states try to ameliorate interdistrict inequalities through state-level equalization systems, many do not, and even those that do are typically unable to fully close massive interdistrict funding gaps.[101] Further, school district sovereignty attenuates political support for equalization efforts by making the school district community the node of political advocacy. Sovereignty legitimizes a community's demand for policies that improve their own schools but fail to address outsiders' problems. Because wealthy districts have greater property value and can achieve desired levels of education spending with a lower tax effort than poorer districts, there is limited political support for meaningful equalization efforts.[102] Wealthy communities are incented to advocate for self-preservative policies that foreswear state or federal interference that would interfere with their sovereign community.

The democratic consequences of school district sovereignty are profound. This section highlights two ways that the interdistrict inequalities produced by school district sovereignty undermine the possibility of democratic control in marginalized communities: by *functionally* constraining the space for democratic decision making over public education, including by excluding parents in marginalized communities from public education's governance structures, and by laying the ground work for *formally* dispossessing marginalized communities of their right to exercise democratic control over public education. Viewed against privileged communities' sacrosanct right to exercise democratic control over their schools, this democratic disparity works to constitute two tiers of citizenship by marking off members of marginalized communities as pathologically deficient and democratically unworthy. In practice, guaranteeing the "sovereignty" of privileged school districts produces interdistrict inequalities so stark that marginalized communities are rendered unworthy of their core democratic rights.

1. *Diminishing marginalized communities' ability to realize their education policy preferences.*

The interdistrict inequalities that school district sovereignty entrenches diminishes the functional capacity of marginalized parents to collectively govern their communities' schools. Pervasive underfunding dramatically narrows the possible space for and scope of decision making over public education. This is because, as Justice Marshall rightly noted in his *San*

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[101] *See, e.g.*, BRUCE D. BAKER & SEAN P. CORCORAN, THE STEALTH INEQUALITIES OF SCHOOL FUNDING: HOW STATE AND LOCAL SCHOOL FINANCE SYSTEMS PERPETUATE INEQUITABLE STUDENT SPENDING, CTR. FOR AM. PROGRESS, (Sept. 19, 2012), https://www.americanprogress.org/article/the-stealth-inequities-of-school-funding/.

[102] *See, e.g.*, Erin E. Kelly, Note, *All Students Are Not Created Equal: The Inequitable Combination of Property-Tax-Based School Finance Systems and Local Control*, 45 DUKE L. J. 397, 397–98 (1995).

Antonio dissent, a community's capacity to exercise local control is contingent on its capacity to (1) fund programs and initiatives it deems necessary to improving public schools within its district, and (2) make tradeoffs between funding for public schools and other priorities that residents in the district may have.[103] Functionally, a wealthier community has far greater democratic control over their public schools than a poorer one.

Yet even if funding levels are bolstered by state and federal equalization, poorer districts do not exercise anything approaching the same level of democratic control as wealthy ones: poorer districts definitionally serve student populations with much higher levels of concentrated need, demand a greater allocation of resources to achieve that which is possible with far fewer resources in a wealthy district, and are generally less effective at teaching students than districts with less concentrated poverty.[104] For example, the amount of funding required to ensure that all students in the 3rd grade are literate in a poor district is, generally, greater than the amount required in a wealthy one. The poorer district must devote a far greater share of its resources merely to ensuring basic competency or even providing a minimal level of stability and safety in school buildings. This is due to a combination of wealthier parents' greater capacity to invest in early education and other intellectually stimulating environments for their children pre-formal schooling, the accumulated disadvantage that accrues each year a child is enrolled in a lower-quality educational program, and the unique stressors children living in poverty face which inhibit effective teaching and learning in the classroom.[105] This restricts democratic control in poorer communities because the higher tax effort required to sustain a minimally adequate level of education leaves poorer localities with less

[103] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 73–74 (1973) (Marshall, J., dissenting) ("regardless of the enthusiasm of the local voters for public education, the second factor—the taxable property wealth of the district—necessarily restricts the district's ability to raise funds to support public education.8 Thus, even though the voters of two Texas districts may be willing to make the same tax effort, the results for the districts will be substantially different if one is property rich while the other is property poor. The necessary effect of the Texas local property tax is, in short, to favor property-rich districts and to disfavor property-poor ones.").

[104] *See* Sean F. Reardon, Ericka S. Weathers, Erin M. Fahle, Heewon Jang, & Demetra Kalogrides, *Is Separate Still Unequal? New Evidence on School Segregation* 1 (Stanford CEPA, Ctr. for Educ. Pol'y Analysis, Working Paper No. 19-06), available at https://cepa.stanford.edu/sites/default/files/wp19-06-v082022.pdf ("The association of racial segregation with achievement gap growth is completely accounted for by racial differences in school poverty (termed 'racial economic segregation'). Thus, racial segregation is harmful because it concentrates minority students in high-poverty schools, which are, on average, less effective than lower-poverty schools.").

[105] Daniel Schneider, Orestes P. Hastings, & Joe LaBriola, *Income Inequality and Class Divides in Parental Investments*, 83 AM. SOCIOLOGICAL REV. 475, 477 (2018), https://journals.sagepub.com/eprint/jn7n8iH98Gua7KIdEeWk/full ("Examining parental investments of money and time along the axes of education and income shows clear stratification. There are substantial differences in parents' expenditures on children by parents' income group. . . . Parental time investments in children are also strongly patterned by socioeconomic status . . . . There also appear to be widening gaps by class in parental investments of time."); Clancy Blair, & C. Cybele Raver, *Poverty, Stress, & Brain Development: New Directions for Prevention and Intervention*, 16 ACAD. PEDIATRICS 30, 30 (2016), https://www.academicpedsjnl.net/action/showPdf?pii=S1876-2859%2816%2900026-7 ("Effects of poverty on brain development start early and are seen in infancy.")

revenue to devote to ameliorating background conditions like childhood poverty, leaving already disadvantaged parents with comparatively less discretionary income to invest in their children's wellbeing.[106] On the whole, wealthier communities are characterized by less extra-educational need, which translates into reduced demands on educational spending, even as they retain greater flexibility to make tradeoffs holistically due to the lower tax effort required to maintain high quality schools.

2. *Diminishing marginalized communities' capacity to participate in the collective governance of their public schools.*

Beyond constraining marginalized communities' policy choices in administering their schools, the massive interdistrict inequalities school district sovereignty facilitates also works to exclude marginalized parents from the governance process itself. This exclusion emerges from the lived experience of attending and attempting to exercise democratic control over underfunded school districts serving student populations with high levels of concentrated poverty. Whereas citizens in privileged communities exercise control over their schools through participating in various formal and informal governance mechanisms, citizens in marginalized communities often experience schools as institutions of oppression and control. In the former, governance structures invite citizens in, enabling them to exercise influence over the collective management of their children's education; in the latter, governance structures are inaccessible, unwieldy, and undemocratic. This differential character "construct[s] systematic forms of inequality and exclusion, exacerbating systemic racial and economic inequities."[107] Parents experience governance not as the fulfillment of a civic responsibility and exercise of a right of citizenship, but as "domination," as "arbitrary" power that "undermines freedom" and constructs two classes of citizenship.[108] This experience can be illuminated through the lens of what legal scholar K. Sabeel Rahman calls "exclusionary strategies."[109] These strategies work to inhibit marginalized citizens' capacity to exercise their right as citizens to participate in the governance of the collective civic institutions upon which they and their community depend.[110]

The first exclusionary tactic Rahman identifies is bureaucratization, which arises when "policymakers deliberately make the process of accessing or enrolling in vital services difficult for a specific subset of the population."[111] As discussed previously, the funding system that school

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[106] *See, e.g.*, CATHERINE BROWN, SCOTT SARGRAD, & MEG BANNER, HIDDEN MONEY: THE OUTSIZED ROLE OF PARENT CONTRIBUTIONS IN SCHOOL FINANCE, CTR. FOR AM. PROGRESS (Apr. 8, 2017), https://www.americanprogress.org/article/hidden-money/.

[107] *See* K. Sabeel Rahman, *Constructing Citizenship: Exclusion and Inclusion Through the Governance of Basic Necessities*, 118 COLUM. L. REV. 2447, 2450 (2018).

[108] *Id.* at 2458.

[109] *Id.* at 2447.

[110] *Id.* at 2447–48.

[111] *Id.* at 2452.

district sovereignty enables undermines marginalized children's access to even the minimally adequate education necessary to develop into a full and equal citizen. But this lack of resources also undermines marginalized districts' capacity to maintain safe, modern, healthy public-school buildings. In marginalized districts, decrepit school facilities are shockingly common.[112] School buildings lack adequate heating and ventilation, expose children to toxic chemicals, fail to provide sufficient classroom space, and cause children to miss school by necessitating school closures due to weather and by exacerbating (or causing) severe respiratory ailments and other illnesses,[113] as the COVID-19 pandemic illustrated. Many districts are forced to shutter schools, sometimes unexpectedly, requiring children to travel for hours to attend unfamiliar schools and imposing significant burdens on caregivers.[114] They must navigate byzantine enrollment processes that benefit families with the cultural and resource capital necessary to work the system. Once they get to school, marginalized children are subjected to intrusive "security" measures, enforced by "school resource officers" that transform schools from welcoming communities into heavily-policed institutions of control.[115] They experience disciplinary policies that pathologize Black children's behavior and literally exclude them from school buildings through disproportionate suspensions and expulsions.[116] Enrolling in, accessing, and maintaining a connection to the public school is transformed from a building block of everyday community life into an ordeal that both symbolically and meaningfully excludes marginalized citizens.

The second exclusionary tactic is privatization and financialization, which occurs when a governance authority "transfers the financing and control of these goods from public hands to private operators and financial investors, introducing problematic revenue-generating incentives and shrouding the goods from greater public accountability."[117] This occurs frequently in financially distressed districts which, while retaining their formal "sovereignty," are instead governed by private entities expressly shielded from community accountability. In some districts, this occurs through the widespread transference of responsibility for operating

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[112] *See, e.g.*, Corsica D. Smith, *Continued Disparities in School Facilities: Analyzing* Brown v. Board of Education*'s Singular Approach to Quality Education*, 3 TENN. J. OF RACE, GENDER, & SOC. JUST. 39 (2014).

[113] *See, e.g.*, Andre M. Perry, *Baltimore Students Need More Than Space Heaters; They Need Justice*, BROOKINGS (Jan. 10, 2018), https://www.brookings.edu/articles/baltimore-students-need-more-than-space-heaters-they-need-justice/; Elinor Simons, Syni-An Hwang, Edward F. Fitzgerald, Christine Kielb, Shao Lin, *The Impact of School Building Conditions on Student Absenteeism in Upstate New York*, 100 AM. J. PUB. HEALTH 1679, 1679–85 (2010) (documenting correlation between school facilities issues like poor ventilation, mold, and plumbing issues with student absenteeism).

[114] *See, e.g.*, Carrie Spector, *Research Finds Racial Disparity in School Closures*, PHYS ORG (Oct. 23, 2023), https://phys.org/news/2023-10-racial-disparity-school-closures.html.

[115] *See, e.g.*, Jack Denton, *When Schools Increase Police Presence, Minority Students Are Harmed Disproportionately*, PAC. STANDARD (Feb. 15, 2019), https://psmag.com/education/after-parkland-schools-upped-police-presence-has-it-made-students-safer.

[116] *See, e.g.*, Brenda L. Townsend, *The Disproportionate Discipline of African American Learners: Reducing School Suspensions and Expulsions*, 66 EXCEPTIONAL CHILD. 381 (2000).

[117] Rahman, *supra* note 107, at 2452.

ostensibly public schools to private for-profit "Education Management Organizations." For-profit school operators are legally accountable to shareholders and their private owners and must deliver educational services at a sufficiently low-cost to generate a profit on the per-pupil funding the company receives to educate each child.[118] Even non-profit charter school operators have the potential to introduce distorting financial incentives, as their sustainability depends on their capacity to attract sufficient numbers of students—and in some cases, sufficient numbers of the right kind of students (e.g., those who need less resources to adequately educate)—leading to ethically dubious practices like paying families to enroll their children in certain schools.[119] Although non-profit charter operators may be *accountable* to public entities, they are *governed* by independent charter school boards frequently comprised of private sector leaders and donors whose children are not enrolled in the school they manage.[120] Privatization and financialization also arises from the wide-spread outsourcing of contracts for school support services to privately-managed for-profit companies, whose profit imperatives may lead to decision making that prioritizes factors other than academic success.[121] Decisions about how to administer public schools are transformed from publicly accountable community decisions aiming to promote educational achievement into opaque decision making by private actors with self-serving financial motivations.

The third exclusionary tactic is fragmentation, which arises when governance structures make it harder for marginalized communities to hold authorities accountable by "limit[ing] putative equal access regimes through decentralization and the imposition of state or local jurisdictional boundaries."[122] School district sovereignty itself guarantees a fragmented governance regime. While the right to an adequate public education is typically derived from state constitutions, the entity primarily responsible for ensuring that right is vindicated is the local school district. In this balkanized system, the devolution of authority to sovereign school districts differentially empowers each community's governing authority the power to deliver a quality public education. Citizens in marginalized communities are substantially less capable of asserting political pressure to achieve their educational goals because their district is substantially less capable of marshalling the necessary resources to achieve them.

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[118] *See* Mark Binelli, *Michigan Gambled on Charter Schools. Its Children Lost.*, N.Y. TIMES (Sept. 5, 2017), https://www.nytimes.com/2017/09/05/magazine/michigan-gambled-on-charter-schools-its-children-lost.html.

[119] *See, e.g.*, Rachel M. Cohen, *Cash Incentives for Charter School Recruitment: Unethical Bribe or Shrewd Marketing Technique?*, INTERCEPT (May 18, 2018, 12:57 PM), https://theintercept.com/2018/05/18/charter-school-recruitment-financial-incentives/.

[120] *See* J. Celeste Lay & Anna Bauman, *Private Governance of Public Schools: Representation, Priorities, and Compliance in New Orleans Charter School Boards*, 55 URB. AFFS. REV. 1006 (2017).

[121] *See, e.g.*, Sean Cavanaugh, *Schools Evaluate Whether to Privatize Support Services*, EDUC. WEEK (Apr. 22, 2013), https://www.edweek.org/ew/articles/2013/04/24/29ii-privatize.h32.html.

[122] Rahman, *supra* note 107, at 2452.

Fragmentation also occurs when marginalized communities are required to further decentralize governance authorities within their own district boundaries. For example, in some under-resourced, predominantly minority-serving school districts, financial pressures have occasioned the wholesale transfer of governance authority from local school boards to charter-management organizations (CMOs).[123] There may be dozens or even hundreds of CMOs operating schools within a single school district, some of which are outposts of national organizations, each with its own governance board. Parents experience their own locally controlled school district not as a unified entity but instead as an assortment of independent providers they must navigate between to find an adequate option for their child. The school district, a supposed building block of collective civic life, becomes something akin to a technology platform, ostensibly maintaining some measure of oversight authority through the process of selecting education "providers" but devolving the actual administration of public schools entirely to independent entities. These independent entities are even less capable of delivering the kind of systemic or structural reform necessary to achieve educational equity for the community as a whole, diminishing parents' capacity to wield political pressure to effectuate better district-wide outcomes, especially relative to parents' in truly unified, consolidated school districts.

A final exclusionary tactic, one not expressly contemplated by Rahman's framework, is when marginalized communities are formally dispossessed of their legal governance rights. The mechanism by which this occurs is the takeover, wherein the state eliminates or significantly diminishes a local school board's governance authority and assigns it to itself or to an ostensibly independent entity.[124] Typically, state laws trigger mandatory takeovers of school districts that face a risk of fiscal insolvency or persistently fail to meet academic benchmarks. While these legal consequences attach only to the "failing" district, that district's "failure" to meet state benchmarks typically results from the predictable consequences of underfunding, exacerbated by the socioeconomic sorting that school district sovereignty facilitates.

When student populations drop precipitously—for example, due to post-industrial urban depopulation in the Midwest—school districts suffer a loss of revenue and a diminished funding base due to their reliance on local property taxes. Sovereign boundary lines give relatively privileged parents the option to flee to a nearby suburb, cabining the effects of a metropolitan-wide economic crisis within the most marginalized districts.[125] In this way, the *Milliken* Court's decision to endow school district's with sovereign

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[123] *See, e.g.*, Emmanuel Felton, *New Orleans Argues Whether an All-Charter City Can Be Truly Democratic*, THE NATION (May 21, 2019), https://www.thenation.com/article/archive/new-orleans-public-education-charter-democracy/.

[124] *See* Kristi L. Bowman, *State Takeovers of School Districts and Related Litigation: Michigan as a Case Study*, 45 URB. LAW. 1 (2013).

[125] Orfield, *supra* note 80, at 437.

territoriality "made local self-government in Detroit and Michigan's other predominantly black cities impossible" because it gave privileged white families the assurance that "it was safe to flee and that [the court] would protect them" without regard for the children left behind.[126] This creates the conditions that demand state intervention—a rapidly diminished tax base, an increasingly needy student population, and the collective traumas of deindustrialization are a recipe for financial distress and academic struggles. Unsurprisingly, then, it is disproportionately predominantly Black communities that are subject to state takeovers. According to one study, more than "50 percent of . . . black citizens [in Michigan] lived in cities where local control was removed" as of 2013.[127] "Nearly 85 percent of takeovers occur in districts where blacks and Latinos make up the majority of the student population . . . " and states are far more likely to retain local school boards when they takeover majority white districts.[128]

Takeovers aim to reverse the dynamics that perpetuate depopulation by curing whatever governance failures ostensibly caused the school district's distressed condition. During a takeover, the entity or individual assuming governance responsibility is supposed to do so temporarily, for only whatever period of time is necessary to cure the defect that triggered the takeover in the first place—generally, fiscal strain or persistent academic underperformance. In practice, takeovers are rarely successful in improving a district's financial position or academic performance,[129] likely because those conditions are caused by underlying interdistrict structural inequalities as opposed to than the district's own governance failings.

Further, the conceptual underpinnings of dispossessing marginalized school districts of local control to reverse depopulation are confused, at best. If democratic control is a fundamental aspect of effective school governance, it seems exceedingly unlikely that depriving a community of even the formal authority to govern its own schools will catalyze meaningful progress towards a thriving public education system. Nor is it likely to incent other families to join that community—indeed, it is likely instead to drive remaining families with means away. Takeovers typically give rise to a host of conditions that would be unthinkable in predominantly white school districts. These conditions include deferring educational decision making to unelected, unaccountable technocrats funded by national foundations and supported by for-profit consultants, the proliferation of charter schools that prioritize performance on high-stakes test and implement strict codes of school discipline, and dramatic policy overhauls that frequently include

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[126] *Id.* at 452.

[127] *Id.* at 455.

[128] *See* DOMINGO MOREL, TAKEOVER: RACE, EDUCATION, AND AMERICAN DEMOCRACY 50 (Oxford Univ. Press) (2018).

[129] *See* Alan Greenblatt, *The Problem With School Takeovers*, GOVERNING (May 21, 2018), https://www.governing.com/archive/gov-school-takeovers-newark-new-jersey.html (discussing studies arguing that takeovers "do very little if anything to improve student performance, while dramatically driving up rates of [teacher] turnover.").

mass school closures, teacher layoffs, and increased reliance on unproven educational technology.[130]

Given that takeovers are typically unsuccessful as alternative governance strategies, it is appropriate to view them as part of a legal regime that punishes and pathologizes "undeserving" or "flawed" communities by recharacterizing collective social failures as individual ones. Subjecting these communities to invasive supervision reinforces stereotypical notions of its members' lack of autonomy, competence, and commitment to education. In this view, certain communities do not get democratic rights because they are thought to be incapable of exercising them. State takeover regimes reflect a "moral construction" of the purportedly contingent condition that causes the state to retract certain citizens' democratic rights, ascribing reason for dramatic state intervention to the communities' "flawed character" rather than the state's own failures to create a society where all communities can exercise meaningful democratic self-governance.[131] It treats citizens of those communities not as "equal citizens of the state," with the same rights as all other citizens to make claims on the state's responsibility to provide for their welfare, but as "subjects of a state that sees them as a social problem."[132] This treatment embodies and expresses negative, stereotypical attitudes, casting residents in struggling districts as "second-class citizens."[133] It reinforces culturally-determinate and essentialist understandings that ascribe school district performance to certain communities' lesser moral worth and lesser commitment to their children, rather than the structural conditions that privileged communities' help create and which the notion of school district sovereignty hides from legal or political concern.

B. *How School District Sovereignty Produces Racially Exclusionary Community Identities While Eliding the Function of Race in Public Education.*

School district sovereignty further corrodes democracy by reifying racially exclusionary community-formation while, at the same time, obscuring the central role race plays in constituting the "communities" that school district boundary lines reflect. The harm is deeper than the fact of racial segregation alone: the features of school district sovereignty, the establishment of sacrosanct district boundary lines through which governance and funding are conducted, makes racially identifiable

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[130] *See, e.g.*, Molly Gott & Derek Seidman, *Mapping the Movement to Dismantle Public Education*, JACOBIN (June 4, 2018), https://jacobin.com/2018/06/public-education-privatization-koch-brothers-teachers.

[131] Danielle Keats Citron, Comment, *A Poor Mother's Right to Privacy: A Review*, 98 B.U. L. REV. 1139, 1145 (2018).

[132] *Id.* at 1146.

[133] *Id.* (citing KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 113 (2017)) (explaining how aggressive state interventions presuppose that targeted population is less-than-equal and signal that targets are dependent subjects in need of saving from themselves, rather than autonomous equal citizens of the polity).

communities coherent, politically salient, and legitimate, without acknowledging race as the central organizing principle. Instead, the school district serves as a bloodless stand-in.

School district sovereignty contributes to what John O. Calmore terms the "racialization of space," which he defines as "the process by which residential location and community are carried and placed on racial identity."[134] Space becomes "racialized" when patterns of residential location are fixed along racially identifiable lines, transforming location into "an index of the attitudes, values, behavioural inclinations, and social norms of the kinds of people who are assumed to live [there]."[135] Racialized space encourages non-residents to adopt culturally deterministic or biological supremacist models that ascribe residents' outcomes to the "fact" of their race. It invites people to assume that marginalized communities look and act a certain way because they live in a certain place, and they live in a certain place because they look and act a certain way. This elides the background structural conditions that produce concentrated poverty and the dynamics of racial sorting in the first place. Latent racial prejudices supply non-residents with "'common sense' explanations" for what happens to certain people who live only in certain areas: the realities of living in concentrated poverty then produce outcomes which confirm that underlying prejudice.[136]

By constructing political space along racially identifiable lines, the features of school district sovereignty allow privileged white communities to maintain racial hierarchy without forcing them to confront the moral discomfort of acting in a consciously discriminatory way. They permit white citizens to claim that racial segregation arises naturally, without the need for overt exclusion or violence. This makes inequality a natural feature of political geography, a condition that arises out of the differential capacities of citizens of different sovereign communities rather than a common, intertwined societal failing. It excludes marginalized citizens from the community of citizens who can make legitimate claims on governing authorities with the power to meet their political demands, who can enact policies that would help to disestablish racial hierarchy. As Gregory Weiher has written:

> The drawing and redrawing of political boundaries is a more subtle strategy than confrontation, but its effects are more pervasive and enduring. Indeed, if political boundaries are appropriately drawn, confrontation is not required to maintain racial separation. The "second class citizen," though he or she may be relatively disadvantaged, may

[134] John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope from a Mountain of Despair"*, 143 U. PA. L. REV. 1233, 1235 (1995).

[135] *Id.* at 1236 (alteration in original).

[136] *Id.* at 1242–43 ("This reciprocal, or mutual, causation of race and representation is also a significant aspect of racialization and racial formation. Social situations give rise to the circumstances and the structures of inequality that sustain particular notions of race.").

> nevertheless gain some satisfaction by insisting upon the rights shared by all citizens. The non-citizen, one who is outside the political space, can make no claim upon the resources or guarantees of the polity, no matter how wretched may be his or her situation. Political boundaries that give geographic manifestation to racial antipathies permit citizenship to be manipulated to serve racial purposes.[137]

In this manner, school district sovereignty enforces racial hierarchy while obviating the need for the kinds of overtly racially discriminatory acts that would trigger judicial intervention under modern day Equal Protection Clause doctrine. Sovereign boundaries assign problems produced by all of society to the residents of a circumscribed political entity, explain those problems as resulting from that community's own failings, and then preclude that community's residents from making claims for redress on the authorities actually capable of delivering meaningful relief.

School district sovereignty provides a mechanism for acting upon the latent biases that racialized space perpetuates and confirms. The "cost" of avoiding disfavored racial space is low, at least for relatively well-off parents: they can simply move into another school district with minimal disruption to their lives, guaranteeing their child's access to schools within an agreeable racial community but still benefiting from access to the broader metropolitan region.[138] Parents who flee urban school districts need not acknowledge the role racial prejudice plays in that choice. The choice to move to a different community on the grounds that it has "better schools" is an available explanation for a choice that is motivated, at least indirectly, by race and which perpetuates racial hierarchy; it is, for many Americans who hold otherwise liberal racial views, a morally palatable grounds for a decision that otherwise cuts directly against their stated values. School district sovereignty rationalizes prejudice-informed choices by concretizing and making visible the consequences of educational disparities: it is generally at the unit of the school district that the data wealthy and white parents ostensibly select upon, such as test scores, class sizes, per-pupil funding, and student demographics, are reported. These decisional factors are legible without reference to a parent's underlying racial views—they are "facts" that provide parents with the information they need to make the best choices for their children. But this process, shielded from judicial intervention by the doctrine of school district sovereignty, reproduces and exacerbates the underlying interdistrict inequalities that fuel racial and socioeconomic stratification, and thus undermine the possibility of true democratic equality between the citizens of different, highly unequal school district sovereigns.

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[137] ANDERSON, *supra* note 38, at 64.

[138] *See, e.g.*, Saiger, *supra* note 84, at 504.

1. *Fostering colorblindness and suppressing political discourse about race.*

School district boundary lines that entrench racialized space exacerbate the inequalities that racially identifiable school districts produce by directing attention away from systemic, collective efforts to improve public education and towards opportunity-hoarding by privileged communities.[139] Racialized space gives white parents a "rational" reason to avoid sending their children to "urban" districts, because the dynamics that concentrated poverty produces within school systems *are* undeniably harmful to children, and can justify efforts (by all parents) to seek out other options for their children.[140] This child-serving rationale supplies "already advantaged communities [with] a positive, legally sanctioned, and politically persuasive rationale for making choices that further cement advantage for their children."[141] These choices, in the aggregate, entrench the subjugation and exclusion of marginalized citizens from the democratic community. White parents' perception of racialized space has significant consequences for the long-term health of American democracy because it incents them to deprive their children of opportunities for meaningful cross-racial interactions at a formative age, supplying instead an early lesson in racial discomfort, avoidance, and bias that children quickly pick up on.[142]

This dynamic prefigures and reinforces the Supreme Court's turn towards color-blindness as the defining principle animating the Equal Protection Clause. The Court has adopted an aspirational goal of colorblindness as a present-day constitutional norm mandating equal treatment of all individuals without accounting for their race. Yet the Court fails to account for the conditions in which colorblindness would produce equality; colorblind justice could only be possible when racial prejudice, discomfort, and avoidance are no longer salient within democratic decision making and when the inequitable social conditions that racial ordering has produced are disestablished. This assumption of the normative desirability of colorblindness permits political leaders to "effectively ignore the legacy of public policies that resulted in inequality," including the school district boundary lines that produce and reinforce racialized space, legitimating the choices of parents by permitting them to "seek separate schools for their children and/or those who can afford to live in relatively homogeneous

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[139] *See, e.g.*, Genevieve Siegel-Hawley, Sarah Diem, & Erica Frankenberg, *The Disintegration of Memphis-Shelby County, Tennessee: School District Secession and Local Control in the 21st Century*, 55 AM. EDUC. RSCH. J. 651, 659 (2018) [hereinafter Siegel-Hawley].

[140] *See, e.g.*, Stephen J. Schellenberg, *Annotated Bibliography: The Impact of School-Based Poverty Concentration on Academic Achievement & Student Outcomes*, POVERTY & RACE RSCH. ACTION COUNCIL (2009), https://www.prrac.org/pdf/annotated_bibliography_on_school_poverty_concentration.pdf.

[141] Siegel-Hawley, *supra* note 139, at 653.

[142] *See* Luigi Castelli, Cristina Zogmaister, & Silvia Tomelleri, *The Transmission of Racial Attitudes Within the Family*, 45 DEVELOPMENTAL PSYCH. 586, 586 (2009) (finding that a mother's implicit racial attitudes were a significant predictor of a child's racial attitudes).

neighborhoods [while] easily justify[ing] such moves without regard to race."[143]

It is this race-effacing logic—the permission structure it enacts, the neutral-seeming rationality it embeds, the palliative child-centric justifications it supplies—that best explains why parents who resist alterations to school district boundary lines or assignment policies express such shock and outrage when they are accused of acting out their racial views. In a vacuum, parents choosing what is "best" for their children is no more a democratic problem than the state treating all children equally without regard for their race. But society does not exist in a vacuum. In each case, adopting a colorblind decisional norm perpetuates racial hierarchy because it occurs against a backdrop of racial oppression which the norm itself invites the decisionmaker to ignore. Baseline assumptions about school district sovereignty, that political boundary lines emerge naturally and reflect authentic communities, obscure the reality that school district boundaries result from pervasive racial ordering, imposed, enforced, and encouraged by the state.

Parent testimony in opposition of efforts to facilitate greater levels of school integration in Howard County, Maryland, illustrates the democracy-corroding mode of deliberation about public education that school district sovereignty produces. As many parents argued, altering school boundary lines to bring in more minority students would lead to an influx of "[c]hildren who are being reared by [p]arents or caregivers who care nothing about the education of their children," "urbanized people of color," "[b]ad undisciplined children," and "[b]lack families . . . [that] don't value education like other cultural groups."[144] This change in demographics would be "counterproductive . . . to our goal of creating a more cohesive community"[145] As evidence justifying why the community could only be maintained by excluding these families, they cited the very real struggles children face in Baltimore Public City Schools: but these struggles result from the choice to systematically underfund a district which serves a student population with far greater levels of concentrated need, a policy these parents (as Maryland residents) have (at a minimum) tolerated.[146] In turn, these problems confirm their own (often, but not always, unstated) beliefs about Black parents' and Black children's attitudes towards education. They ignored how their own choices to locate in a nearby school district and embrace a system that funds schools through local property taxes produced

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[143] Siegel-Hawley, *supra* note 139, at 659.

[144] *See* Edwin Rios, *Racists in One of America's Richest Counties Are Freaking Out Over a "Forced Busing" Proposal*, MOTHER JONES (Oct. 7, 2019), https://www.motherjones.com/politics/2019/10/racists-in-one-of-americas-richest-counties-are-freaking-out-over-a-forced-busing-proposal/.

[145] *Id.*

[146] *See, e.g.*, Liz Bowie & Talia Richman, *Civil Rights Groups Ask Court to Force Maryland to Spend Hundreds of Millions More on Baltimore Schools*, BALT. SUN (Mar. 8, 2019, 1:25 PM), https://www.baltimoresun.com/maryland/baltimore-city/bs-md-lawsuit-aclu-20190307-story.html.

the very conditions in Baltimore that they feared. They could ascribe the consequences of this system and their own political choices instead to empirical fact: "It's not racism. It's reality."[147]

Few parents expressed a sense of responsibility for, or concern about, the children upon whose backs their privilege could be sustained—few expressed a sense of equality or commonality with those children or their parents as fellow citizens of their city, their state, and their nation, despite their common membership in multiple overlapping shared political communities.[148] Concern for these children was not part of their own decision about where to send their own children to school: that decision is self-consciously understood as private, deracialized, and circumscribed by the artificial boundaries of a self-selecting "community."[149] Confronted for the first time with the suggestion that their educational decisions have something to do with race, they are indignant: "We resent being called racist because we want the best for our children. If the opponents want the best [sic] for their children (1) they would get involved with their school (2) they would teach their children (3) they would have made better choices."[150] The fact that they could make crucial decisions about public education without consciously considering race, and then express genuine shock at the idea that their decision to entrench intergenerational privilege at the expense of Black children would imply something about their racial views, is an indictment of and crisis for American democracy.

2. *Undermining the possibility of public deliberation about public education.*

School district sovereignty is a problem for democracy in another sense in that it distorts and obscures collective decision-making about public education. To fulfill its democratic promise, public education must emerge from a decision-making process that fosters collective deliberation and mutual reliance, a coming-together where the community deliberates collectively to meet its own "need to convey knowledge, culture, and skills to its children as well as to transmit values and create relationships."[151] It is this joint act of governance that makes a group of parents into a school

[147] Rios, *supra* note 144.

[148] *Cf.* Siegel-Hawley, *supra* note 139, at 669 (quoting a "leading suburban stakeholder" of a predominantly white Memphis suburb who stated: "I certainly, selfishly, want [my community's] schools, whoever's running them, to have the very best opportunity for our children. I want Memphis children to have a good education, but I'm elected to make sure [my] 57,000 people have a high quality of life. So that's my primary responsibility.").

[149] *Id.* at 668 (describing similar statements by residents of a Memphis suburb which "typified a white suburban perspective that saw local control of schools as a deeply desirable, almost unquestionable, ideal. It was imbued with powerfully resonant themes of close-knit relationships and communities, with children near the adults making decisions for them. For white suburbanites, the local control ideal also represented a colorblind way to discuss issues that the demographics of the new districts suggested were racially and economically patterned.").

[150] Letter from Timothy Rey, Howard Cnty. Resident, to Howard Cnty. Council (Sept. 19, 2019) (on file with Howard County Maryland Council).

[151] Lawrence, *supra* note 21, at 1376.

community, because it "take[s] the private act of parental care and entrust[s] it to the collective."[152] Accordingly, a school that fulfills public education's democratic function is public in the sense that it results from a community's deliberative decision making, it fulfills the community's shared responsibility to its children, and it expresses what the community values in educating its children. Perversely, school district sovereignty obviates the need for this kind of collective decision-making process.

Against a backdrop of school district sovereignty and the resultingly massive interdistrict inequalities it fosters, public schools, although formally governed publicly, are instead constituted through individualized decision making that resembles market ordering. Individualized consumer choices are not susceptible to deliberative, collective reasoning about the salience of race in public life, and school districts boundary lines that obscure racial considerations in decision making do not help. Instead of acknowledging and grappling with these racial considerations, parents adopt a framework wherein attachment to school districts is "cloaked in the colorblind language of local control," which focuses on ostensibly neutral considerations like educational achievement, school quality, and parental choice, while "limit[ing] the development of a more collective perspective."[153] In turn, the animating purpose of education shifts "from balancing the needs of all children in the district to focusing on individual children," in tension with public education's public function, which presupposes decision making through public governance that aims to "benefit[] the collective" and provide for a measure of baseline equality across society.[154] School district sovereignty concentrates legal and political attention on the individual school district rather than the overall public education system; districts (or even individual schools) are the unit at which parents advocate for improvements to their child's public education. This in turn defines the parent's scope of concern for the quality of education the state provides. While abstractly parents might care about educational quality throughout the nation or state that they live in, parents have an overriding concern about the quality of the public schools their own children attend.

In a society where interdistrict inequalities are extreme, the most salient decision parents make is fundamentally a "private" one; the most important decision is which community to join. This choice prefigures the vast majority of educational outcomes that parents ostensibly care about—the school district's level of funding, student test scores, class size, etc. The determinism associated with this choice obviates the need for ongoing engagement and community-building. The dismal turnout rates in school district board elections[155] and lack of community participation in public

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[152] *Id.*

[153] Siegel-Hawley, *supra* note 139, at 656, 659.

[154] *Id.* at 658.

[155] *See, e.g.*, Julia Payson, *Test Scores and School Boards: Why Election Timing Matters*, BROOKINGS INST. (Mar. 22, 2017), https://www.brookings.edu/articles/test-scores-and-school-boards-why-election-timing-matters/yem5vgdg (noting the 12% turnout rate in school board elections).

school governance[156] strongly suggest that whatever interests and concerns many parents have regarding their own children's education, they are largely vindicated through that initial "private" choice. Fundamentally then, parents' major decision regarding their child's education are experienced as decisions about where parents should send *their* children, not what kind of schools a community should provide for *all children including their own*. Education becomes something personal and private, to be deliberated about only within the individual family unit, without any need or opportunity for public debate or justification.

Because the choice to locate in one school district or another necessarily predates membership in a school community, educational decisions are primarily experienced as one-off expressions of private associational right rather than acts of collective decision making. Such decisions are not subject to communal deliberation or the scrutiny of public values. Yet these private, individualized decisions in the aggregate are what determine how public education is provided in all school districts, not just the ones parents select for their own children. This means individual private choice effectively fixes distributional outcomes rather than deliberation and collective decision making, which is difficult to square with any democratic vision of public education. It also invites the omission of race as a motivating factor in conversations about public education. Reformers talk frequently and insistently about "urban" schools, but the process that produces the "problems" in urban schools that demand fixing is deracialized. Challenges that urban school districts uniquely face are real and demand attention. But the very term "urban school reform" connotes a lack of public concern for education: it points instead other people's problems, people who suffer certain conditions by virtue of the (racialized) space they inhabit, people whose problems must be solved for them because they have proven their incapacity to solve them on their own.

In conceptualizing problems produced by inter-group relations as manifesting only in the marginalized group, the privileged group both eschews responsibility and narrows its breadth of concern for educational outcomes to the boundaries of its own district. Rather than recognizing the "choice" to leave an "urban" school district for a "suburban" one as inexorably bound up in and conditioned by race, parents (and courts) "cease to experience white flight in racial terms, as behavior that violates the spirit and moral mandate of *Brown*, and rationalize it as the exercise of the constitutionally protected liberty of family autonomy and intimacy."[157] These choices are individualized, brought outside the scope of collective concern and inside the high walls of familial privacy, and deracialized, wrenched out of the context of historical and ongoing racial exclusion and

[156] *See generally* Natalie Gomez-Velez, *Public School Governance and Democracy: Does Public Participation Matter?*, 53 VILL. L. REV. 297 (2008).

[157] Lawrence, *supra* note 21, at 1390.

into one of rational choice compelled by a parent's primary duty to secure their own child's flourishing.

Charles Lawrence poignantly illustrates this dynamic in recounting the conversations he had with other young parents in navigating his child's education in D.C. Public Schools. Lawrence, a Black man committed to sending his children to an integrated public school, describes his hesitance to bring these underlying racial dynamics into the discourse when discussing educational options with his white neighbors:

> I do not speak of these things because there is an unspoken agreement that we will not speak of racism and its consequences when our friends, neighbors, or colleagues must make choices about the lives of their children. If I speak of the racism that has created these conditions, I will likely be heard to call my colleague racist. I would be misunderstood, and I do not want to offend. I tell myself that I just do not have the time or energy for this complicated conversation, but I feel guilt for my silence. I am participating in the taboo against the conversations that must be had. . . . When my colleague asks about a good school for his son, he is not engaging me in a conversation about what school is best for his children and mine, much less for the poor black children who live in D.C. When parents search for a good school for their children, they do not see the project as collective, as about how we will engage the political process as a community to determine what is best for all our children and see to it that they get it.[158]

Transforming public deliberation into private decision-making strips the community of a primary site for engaging in the kinds of honest, difficult conversations a functioning democratic polity must conduct. Citizens fail to develop the capacity to engage in that conversation in the first place because they have no reason to: it would uncomfortably and unnecessarily publicize a seemingly private choice. Parents do not have to justify their decision about where to send their children to school to themselves, to the community they choose to join, to the community they refuse to join, to the public at large, to anyone. Public education becomes the product of private individual choices, not collective political decision making, while background inequalities and the persistent salience of race remain unacknowledged and undisturbed.

[158] *Id.* at 1356–57.

CONCLUSION: RECONSTRUCTING DEMOCRATIC COMMUNITIES BY DECONSTRUCTING THE SOVEREIGN SCHOOL DISTRICT

The school district has been idealized as an institution that fosters and respects democratic prerogatives. Yet the Supreme Court's decision to endow school districts with the prerogatives of sovereignty, and the widespread embrace of school district sovereignty by those committed to maintaining their own privileged status in America's racial hierarchy, results in a public education system that in practice fails to realize public education's democratic functions. In light of this disjunction—between the democracy-fostering aim of public education and its democracy-corroding reality—it is past time for Americans to reexamine their commitment to school district sovereignty. This reexamination should directly confront the very democracy-corroding features that the current attachment to school district sovereignty sustains. It should involve reasoning publicly and collectively about how we as citizens want to provide public education to *all* children, not just our own; it should not shy away from hard truths about the persistent importance of race and racial animus in shaping our own beliefs; it should treat public education as a site and moment for engaging in the building blocks of civic life, where a pluralistic community negotiates difference and attempts to identify a core set of shared values.

There is ample reason to be doubtful that America is ready for this conversation: America could appropriately be described as one long fight between those who seek to bring about such a reckoning and those who seek to avoid it. As an intermediary strategy, then, advocates seeking to help public education meet its democratic purpose should focus on fostering conditions that make this kind of public conversation more possible.

One way reformers could pursue this goal is by making it harder for communities to define themselves along racially and socioeconomically homogenous terms. Currently, groups of parents in many states are empowered by law to define themselves as a community and draw school district boundary lines that exclude parents who are not. Unsurprisingly, community self-definition often tracks racial and socioeconomic lines, as relatively privileged parents in urban and semi-urban enclaves seek to secede from more diverse consolidated school districts to create "splinter" school districts where they can concentrate their resources on a less-needy student body.[159] To counteract this, reformers should work to destabilize privileged communities' expectations of what is to be gained by secession, diminishing their incentive to leave by heightening the risk that they will not be able to maintain the boundaries of their self-defined community. States could eliminate the possibility of voluntary secessions by repealing laws that

[159] *See, e.g.*, Kendra Taylor, Erica Frankenberg, & Genevieve Siegel-Hawley, *Racial Segregation in the Southern Schools, School Districts, and Counties Where Districts Have Seceded*, 5 AREA OPEN 1 (2019); P.R. Lockhart, *Smaller Communities are "Seceding" From Larger School Districts. It's Accelerating School Segregation.*, VOX (Sept. 6, 2019, 5:30 PM), https://www.vox.com/2019/9/6/20853091/school-secession-racial-segregation-louisiana-alabama.

provide for it. Short of this, states could take steps to ensure that school district secession reflects democratic values by, for example, empowering residents of the entire school district to vote on secession (rather than just the seceding "community"), requiring the seceding district to produce an equity and inclusion plan (including, if necessary, ongoing interdistrict funding transfers) to counteract any negative externalities secession produces, or subjecting secession efforts to supervision by a larger political entity vested with the ultimate authority to approve or reject secession petitions on the basis of statutorily prescribed factors. Another strategy would involve state-level action to merge fragmented school districts into larger, more diverse, consolidated school districts, which have been proven to diminish segregation and improve intradistrict educational equity.[160] More subtly, states and localities can combat the incentives driving school district fragmentation by attenuating the link between residential location and school assignment. They can take actions that diminish parents' confidence that locating in one neighborhood will guarantee their children access to one particular kind of school in perpetuity—one proposal, periodic school district redistricting, would disturb perverse community-formation by unsettling parental expectations, but still provide for local control within externally defined boundaries in order to build "neighborhood polities of 'friends and familiar enemies'" in school districts that "remain local even as their membership becomes fluid."[161]

Another way of building momentum for addressing the perverse consequences of school district sovereignty is by regenerating schools and school districts as sites for participatory democracy and civic life. In a system comprised of massively unequal "sovereign" districts, the need for collective deliberation is attenuated because whether a parent lives within a privileged or marginalized school district determines so much about their child's education. The most salient decision parents make about public education is where to send their children, with stark interdistrict inequalities dramatically narrowing the range of democratic decision making available to parents in poorer districts and obviating the need for democratic decision making in wealthier ones. This undermines the capacity of school districts to serve as sites for creating civic communities that engage together in acts of self-governance. Undoubtedly, mitigating inter-district inequalities will likely lead to greater democratic decision-making in school districts. But more must be done to build up school districts as a piece of the civic infrastructure that fosters genuine community. To combat this inequality-induced apathy, reformers should work to revitalize school districts as sites for civic life by building in structures for community participation, deliberation, and decision-making. For example, communities could build

[160] *See* Sarah Diem, Genevieve Siegel-Hawley, Erica Frankenberg, & Colleen Cleary, *Consolidation vs. Fragmentation: The Relationship Between School District Boundaries and Segregation in Three Southern Metropolitan Areas*, 119 PENN. ST. L. REV. 687, 688 (2015).

[161] Saiger, *supra* note 84, at 534.

in periodic opportunities for structured deliberation about their public schools that expressly center controversial issues—something akin to the "school integration charrette" held in Durham, North Carolina during the 1970s, co-led by Black civil rights activist Ann Atwater and local Ku Klux Klan Grand Wizard C.P. Ellis.[162] Other efforts might focus on innovating school accountability mechanisms that require community participation and input. The overarching goal would be creating mechanisms that invite community members into school district governance to act *as a collective*, fostering a broader sense of the importance of public education in their community that goes beyond their individualized concern for their own children.

Finally, reformers should seek to combat racial hierarchy directly by helping to build community power in marginalized school communities. By entrenching profound interdistrict inequalities, school district sovereignty excludes racial minorities from democratic life by depriving them of a safe, caring, challenging public school environment. This undermines education's democratic function by inducing the transformation of public schools into institutions of control, instead of institutions that nurture and cultivate the next generation of citizens. These stark inequalities create a profound risk that reform efforts which aim to reduce marginalization by increasing racial and socioeconomic integration will reproduce oppressive hierarchies by requiring marginalized communities to assimilate to the norms and expectations of privileged communities. To reduce this risk, investments in community-building—and a respect for the voices of marginalized communities whose prerogatives are routinely abrogated in the existing system—should be foregrounded. For example, while school finance litigation has had only limited success in equalizing resources between privileged and marginalized school districts and has drawn warranted criticism for prioritizing monetary resources over structural determinants of segregation and inequality, community-led advocacy efforts for funding equality could lay the groundwork for more radical claims on the public education system. Equalization efforts should actively reaffirm the collective, interdependent, and universal importance of public education in *all* communities. Successful equalization efforts could help produce a virtuous cycle that bolsters democracy—mitigating interdistrict inequality would begin to disturb the logic that produces racial and socioeconomic sorting and an attachment to the sovereign school district.

What these reform efforts will lead to is not entirely clear. It is, in theory, possible that an attachment to school district sovereignty is reconcilable with a democratic public education system, that American society can be transformed such that deference to community prerogatives expressed through inviolable school district governments both embodies and promotes, rather than undermines, equality. Ultimately, the end-state may

[162] *See* OSHA GRAY DAVIDSON, THE BEST OF ENEMIES: RACE AND REDEMPTION IN THE NEW SOUTH 247–50 (2007).

be less important than the efforts to achieve something different. By prioritizing reform efforts that take as their primary aspiration the reinvigoration of democratic equality in public education—and by doing so in a way that practices norms of mutual respect, collective deliberation, and communal concern—reformers will open up new space for change, one that moves this nation's schools closer to their idealized functions. By challenging the ossified attachment to sovereign school districts, America can move closer towards achieving public education's democratic dream.

Child Labor Trafficking: The Overlooked Child Welfare Issue

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ABSTRACT

This article examines the mobilization of the child welfare system to better protect child sex trafficking victims and argues that this same attention would benefit child labor trafficking victims. It discusses the impacts of The Preventing Sex Trafficking and Strengthening Families Act in 2014 and The Justice for Victims of Trafficking Act in 2015, similar updates to federal and state laws, including The Trafficking Victims Prevention and Protection Reauthorization Act in 2022, and how these legislative frameworks could have benefited child labor trafficking victims as well as child sex victims while saving resources. Finally, it presents recommendations for bringing child labor trafficking into the purview of the child welfare system.

ARTICLE CONTENTS

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INTRODUCTION: INTERSECTION BETWEEN CHILD WELFARE AND TRAFFICKING

Reports and media coverage from across the country highlight the connection between the commercial sexual exploitation of children (hereinafter CSEC) and the child welfare system throughout the United States. Some estimate that as many as 80% of CSEC victims have had contact with the child welfare system.[1] In 2020, records from The National Child Abuse and Neglect Data System reveal that child welfare agencies determined 953 children and youth to have experienced sex trafficking that year.[2] In California, the California Child Welfare Council found that 50% to 80% of CSEC victims were formerly involved with the child welfare

[1] ADMIN. FOR CHILD., YOUTH & FAMILIES, U.S. DEP'T OF HEALTH & HUM. SERVS., GUIDANCE TO STATES AND SERVICES ON ADDRESSING HUMAN TRAFFICKING OF CHILDREN AND YOUTH IN THE UNITED STATES 3 (2013).

[2] CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2020 45 (2022), https://www.acf.hhs.gov/sites/default/files/documents/cb/child-maltreatment-report-2020_0.pdf.

system.[3] In Connecticut, the Department of Children and Families reported that 86 out of 88 children identified as victims of trafficking for exploitation had previously received child welfare services.[4]

Compared to trafficking children for sexual exploitation, the issue of child labor trafficking in the United States is less researched and less frequently highlighted by the media. However, evidence demonstrates the need for the child welfare system to pay equal attention to this issue. In 2023, due to a 69% increase in children being employed illegally by companies, the Departments of Labor and Health and Human Services announced the formation of an interagency task force to combat child labor exploitation, among other actions.[5] Part of this "increase" may have resulted from a lack of prior agency focus on child labor. Other contributing factors to this increase include the influx of unaccompanied migrant children and a lack of resources after government officials send minors with sponsors in the United States.[6] Child labor trafficking victims work in various industries, including agricultural work, restaurant service, hair braiding, domestic work, forced peddling, and a range of illegal work activities.[7] When victims are trafficked to perform illegal work, such conduct is commonly called human trafficking for forced criminality to distinguish situations where the labor performed may otherwise be lawful. The nuances of trafficking for forced criminality encompass and parallel the dynamics of sex-trafficked children arrested and convicted of crimes of commercial sex they were forced to commit. Traffickers orchestrate and direct their victims to commit crimes, like using false identification in the workplace or forcing them to steal. The upshot is greater control because the victims feel complicit in the criminal acts and are often misidentified as perpetrators of crime by the police instead of as victims. Identification and protection of child labor trafficking victims is possible with proper attention and care. However, exploitation, abuse, and the arrest of children for crimes they were forced to commit will continue if people ignore this crime or believe it does not occur in child welfare systems in the United States.

In light of the pervasive commercial exploitation of children in America for labor and sexual services, this article will discuss (1) the intersection of CSEC victims and the child welfare system; (2) the similar intersection of

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[3] CHILD.'S BUREAU, *supra* note 1; KATE WALKER, CAL. CHILD WELFARE COUNCIL, ENDING THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN: A CALL FOR MULTI-SYSTEM COLLABORATION IN CALIFORNIA 11 (2013).

[4] CHILD.'S BUREAU, *supra* note 1.

[5] Press Release, U.S. Dep't of Health & Hum. Servs., *Departments of Labor and Health and Human Services Announce New Efforts to Combat Exploitative Child Labor* (Feb. 27, 2023), https://www.hhs.gov/about/news/2023/02/27/departments-labor-and-health-and-human-services-announce-new-efforts-combat-exploitative-child-labor.html.

[6] Hannah Dreier, *Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.*, N.Y. TIMES (Feb. 28, 2023), https://www.nytimes.com/2023/02/25/us/unaccompanied-migrant-child-workers-exploitation.html.

[7] FREEDOM NETWORK USA, CHILD TRAFFICKING FOR LABOR IN THE UNITED STATES (2015), https://freedomnetworkusa.org/app/uploads/2016/12/HT-and-Child-Labor.pdf [hereinafter FNUSA].

child labor trafficking victims and the child welfare system, including the dynamics of human trafficking for forced criminality that both sex and labor trafficking victims experience; (3) protections provided solely for sex trafficking victims in the child welfare system in The Preventing Sex Trafficking and Strengthening Families Act[8] (hereinafter SFA) and The Justice for Victims of Trafficking Act[9] (hereinafter JVTA); (4) updates to federal and state legislative definitions of child abuse to include human trafficking, including the critical update in The Trafficking Victims Prevention and Protection Reauthorization Act[10] (hereinafter TVPRA), to include all forms of human trafficking; and (5) recommendations for state child welfare systems to protect all child trafficking victims, including those exploited for labor.

A. *Commercial Sexual Exploitation of Children and the Child Welfare System*

State and federal governments have recognized that the child welfare system is one of the critical targets for the early identification and prevention of trafficking children for sexual exploitation. Media sources and reports have documented U.S. citizen youths trafficked in the sex industry.[11] Federal law clearly states that any person under 18 engaging in commercial sex is a victim of human trafficking.[12] Data concerning the connection between minors trafficked for commercial sex and the child welfare system are readily available as many states continue to arrest children for commercial sex acts despite federal and some state laws identifying them as victims. A review of juvenile records for commercial sex convictions generally shows whether a youth had prior involvement with the child welfare system. One study in 2012 found that of 72 commercially sexually exploited children processed through Los Angeles County's Succeed Through Achievement and Resilience Court Program, 56 of them (78%) received child welfare services.[13] In 2010, of the 174 youth under the age of 18 arrested for prostitution-related charges, 59% were or had been involved in the child welfare system.[14] Kamala Harris described the foster care system in California as "not working," expressly pointing to this high percentage of

[8] Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, 128 Stat. 1919 (2014).

[9] Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 227.

[10] Trafficking Victims Prevention and Protection Reauthorization Act of 2022, Pub. L. No. 117-348, 136 Stat. 6211 (2023).

[11] OFF. OF THE ASSISTANT SEC'Y FOR PLAN. & EVALUATION, U.S. DEP'T OF HEALTH & HUM. SERVS., HUMAN TRAFFICKING INTO AND WITHIN THE UNITED STATES: A REVIEW OF THE LITERATURE 10 (2009); KRISTIN FINKLEA, ADRIENNE L. FERNANDES-ALCANTARA, & ALISON SISKIN, CONG. RSCH. SERV., No. R41878, SEX TRAFFICKING OF CHILDREN IN THE UNITED STATES: OVERVIEW AND ISSUES FOR CONGRESS 29 (2015).

[12] Sex Trafficking of Children by Force, Fraud, or Coercion, 18 U.S.C. § 1591(a).

[13] WALKER, *supra* note 3, at 1.

[14] ALLISON NEWCOMBE, ERIN FRENCH, KATE WALKER BROWN, & MICHELLE GUYMON, BUILDING BRIDGES: HOW LOS ANGELES COUNTY CAME TOGETHER TO SUPPORT CHILDREN AND YOUTH IMPACTED BY COMMERCIAL SEXUAL EXPLOITATION 23 (2020).

children arrested for commercial sex with ties to the child welfare system.[15]

However, these same data are not available for labor-trafficked children forced to commit other crimes by their traffickers, as cases of children committing these crimes would not be per se trafficking. There is also a lack of data because traffickers force children to work in various otherwise legal industries. The tragedy is that although child labor trafficking may be just as prevalent as trafficked children for sexual exploitation in the child welfare systems, members of the government have stalled legislative solutions, calling for "[m]ore investigation and discussion" before addressing the issue.[16] For example, in California, organizations such as the County Welfare Directors Association of California actively lobby against broadening the definition of abuse or neglect to include labor trafficking.[17] As a result, assembly bills in 2020 2022, and 2023 failed.[18] Thus, despite a "premature" characterization in 2014, legislators have still not addressed the issue today.[19]

B. *Child Labor Trafficking and the Child Welfare System*

Although data on sex and labor trafficking in the United States are incomplete, what is known is that human trafficking of children spans diverse industries nationwide, such as agriculture, restaurant work, hair and nail salons, peddling rings, domestic work, commercial sex, forced begging, and drug smuggling or cultivation.[20] Since 2007, the National Human Trafficking Hotline (NHTH) has identified 1,686 potential cases of child labor trafficking in the United States and 914 cases involving trafficking for sexual exploitation and trafficking for other forms of labor.[21] The labor trafficking cases tracked by the NHTH included child victims engaged in sales peddling and begging (402); domestic work (223); traveling sales crews (221), food service work (100); agriculture (91); health and beauty services (366); restaurant and food services (100), agriculture (91) and construction (84).[22] Statistics, however, do not tell the whole story because child welfare and law enforcement personnel's current training focuses on trafficking for commercial sexual exploitation, not labor trafficking, among children and youth.

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[15] Marisa Gerber, *State Official Links Troubled Foster Care System to Human Trafficking*, L.A. TIMES (Jan. 30, 2015, 7:10 PM), https://www.latimes.com/local/lanow/la-me-ln-foster-care-human-trafficking-20150130-story.html.

[16] GOVERNOR EDMUND G. BROWN, JR., A.B. 2035 VETO MESSAGE (Sept. 29, 2014).

[17] Letter from Cathy Senderling-McDonald, Exec. Dir., Cnty. Welfare Dirs. Ass'n. of Cal., to Lisa Calderon, Assembly Hum. Servs. Comm. Chair (Mar. 29, 2022) (on file with author).

[18] Assemb. B. 1985, 2019–2020, Reg. Sess. (Cal. 2020); Assemb. B. 1985, 2021–2022, Reg. Sess. (Cal. 2022); S. B. 998, 2023–2024, Reg. Sess. (Cal. 2023).

[19] Assemb. B. 2035, 2013–2014, Reg. Sess. (Cal. 2014).

[20] OFF. OF SAFE & HEALTHY STUDENTS, U.S. DEP'T OF EDUC., *Human Trafficking of Children in the United States, A Fact Sheet for Schools* (Dec. 3, 2013), https://www2.ed.gov/about/offices/list/oese/oshs/factsheet.html; OFF. ON TRAFFICKING IN PERS., U.S. DEP'T OF HEALTH & HUM. SERVS., NATIONAL LISTENING SESSION ON DATA TRENDS IN TRAFFICKING 45 (2020) [hereinafter OTP].

[21] OTP, *supra* note 20.

[22] *Id.*

Some specific case examples of labor-trafficked children identified and interviewed by The Coalition to Abolish Slavery & Trafficking (CAST) in the United States include:

> Mary, a young Mexican girl, who was forced to peddle tamales on the street and was sexually assaulted in her family's home. While peddling on the street, a woman noticed bruises on her body and called the police. Police dropped Mary off at the local homeless shelter. She waited for help for over two months before being identified as a child trafficking victim by a staff member.[23]
>
> Jessica, who was 17 when traffickers recruited her to sell magazines in the southern United States. She was forcibly transported and made to work in various locations in the United States and finally escaped when she was 18. She went to a police department for help, but the police department considered her homeless and did not identify hers as a labor trafficking case.[24]
>
> Liz and Marty, two American youths, who were homeless after their families kicked them out. They answered a website ad for au pair services and traveled to the host family's home. There they were forced to work every day and sexually assaulted by the father of the household, who used drugs to sedate them.[25]
>
> Marco, 16, who was forced to smuggle drugs into the United States. He was violently beaten and watched as a friend was killed in front of him. Marco was convicted for selling drugs and sentenced to time in a juvenile hall instead of being identified as a victim of human trafficking.[26]

These examples demonstrate that child victims of labor trafficking are victims of abuse and neglect in similar and overlapping ways to children trafficked for commercial sexual exploitation. CAST looked at its client data of over 1,300 clients from 2010 to early 2019, and CAST data showed that almost half of its clients were labor-trafficked. CAST's data also show that under-18 and transitional-aged youth (18–24) constituted 37.5% of CAST's trafficked population.

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[23] Client Intake Interview with Mary R., Alliance to End Slavery & Trafficking (ATEST) (Nov. 20, 2014) (on file with author).

[24] *Id.*

[25] *Id.*

[26] *Id.*

Two studies spanning from 2016 to 2018, which focused on CSEC and labor trafficking among homeless and runaway youth, show similarity to CAST's data. Covenant House, a runaway and homeless youth organization, interviewed 911 homeless youth in 13 cities. The youths were aged 17-25. In one study examining ten cities, including 2 in California, 124 of 641 youth were trafficked—92 for sex, 52 for labor, and 22 for both sex and labor. Thus, 74 out of 166 (45%) trafficked youth were trafficked for labor (including labor plus sex).[27] In Los Angeles, the proportion of trafficking for sexual exploitation and trafficking for labor was equal. The Covenant House study further found that labor trafficking was more prevalent than trafficking for sexual exploitation among homeless youth in Oakland, California (19% vs. 15%).[28] Significantly, when looking at the connection to the child welfare system in the 10-city study, youth with a history of involvement in the foster care system accounted for 26% of all labor-trafficked youth. The researchers concluded that "[y]outh between the ages of 17 and 19 need special attention because of their unique vulnerabilities."[29]

Data from Florida also show a strong connection between child labor trafficking and the child welfare system. In July 2018, after a lengthy study of over one million youth in the Florida child welfare system, the researchers found that 9% of trafficked youth in the child welfare system were labor trafficked.[30] The researchers, although documenting far fewer labor trafficking cases identified, found that labor trafficking allegations were more likely to be verified than sex trafficking allegations.[31] The authors posit that child labor trafficking under-identification can be remedied within the child welfare system with proper training. However, barriers exist.[32] For example, one caseworker in Florida ceased reporting suspected child labor when she found law enforcement unwilling to take such cases.[33]

The Covenant House study, the CAST data, and Florida's child welfare data establish that child labor trafficking is a real phenomenon, nearly as prevalent as child sex trafficking. And the child welfare system is intertwined with both types. Yet, despite these facts, many federal and state protections exclude child labor trafficking.

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[27] LAUREN T. MURPHY, LOY. UNIV. NEW ORLEANS MODERN SLAVERY RSCH. PROJECT, LABOR AND SEX TRAFFICKING AMONG HOMELESS YOUTH 4 (2016).

[28] *Id.* at 13.

[29] *Id.* at 5.

[30] Deborah A. Gibbs, Sue Aboul-Hosn, & Marianne N. Kluckman, *Child Labor Trafficking Within the U.S.: A First Look at Allegations Investigated by Florida's Child Welfare Agency*, 6 J. HUM. TRAFFICKING 435, 444 (2020).

[31] *Id.* at 440.

[32] *Id.*

[33] Dreier, *supra* note 6.

C. *Child Labor Trafficking Often Involves Similar Dynamics to CSEC*

Traffickers use common methods to lure and control similarly vulnerable children into both labor trafficking and/or sex trafficking Notably, a 2013 study demonstrated that the identification of sex and labor trafficking cases could occur using a single questionnaire and appropriate training.[34] The study found that labor-trafficked children, similarly to children trafficked for sexual exploitation, are often recruited by family members or close family friends at an early age (e.g., two children recruited at 11 and 14).[35] The report further concluded that "[t]he dynamics of labor trafficking appeared very similar to those of sex trafficking, with traffickers exploiting vulnerable people's desperation and isolation."[36] The documentation of these overlapping factors and similarities is crucial to a thorough understanding. For example, due to the nature of this crime, many child trafficking victims will not self-identify as victims, regardless of the type of trafficking, since they often experience intense shame and distrust of authority figures.[37] Self-identification is also challenging for all child trafficking victims because many feel emotionally bonded or physically dependent on their traffickers.[38]

According to health professionals, both types of trafficking—labor and sex—are equally harmful to children physically and psychologically:

> The adverse health effects associated with child sex *and labor* trafficking are numerous and include traumatic injury from sexual and physical assault or work-related injury, sexually transmitted infections, nonsexually transmitted infections, chronic untreated medical conditions, pregnancy and related complications, chronic pain, complications of substance abuse, and malnutrition and exhaustion. Mental health consequences may include depression with suicide attempts, self-harm, flashbacks, nightmares, insomnia and other sleep problems, anxiety disorders, hypervigilance, self-blame, helplessness, anger and rage control problems, dissociative disorders, posttraumatic stress disorder, and

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[34] COVENANT HOUSE, HOMELESSNESS, SURVIVAL SEX AND HUMAN TRAFFICKING: AS EXPERIENCED BY THE YOUTH OF COVENANT HOUSE NEW YORK 6 (2013).

[35] *Id.*

[36] *Id.* at 13.

[37] FNUSA, *supra* note 7, at 2; EVA KLAIN, AMANDA KLOER, DIANE EASON, IRENA LIEBERMAN, CAROL SMOLENSKI, ROBIN THOMPSON, AM. BAR ASS'N CIVIL LEGAL REMEDIES FOR HUMAN TRAFFICKING VICTIMS PROJECT, MEETING THE LEGAL NEEDS OF CHILD TRAFFICKING VICTIMS: AN INTRODUCTION FOR CHILDREN'S ATTORNEYS & ADVOCATES 13 (2009) [hereinafter KLAIN & KLOER].

[38] FNUSA, *supra* note 7; Natalie Kitroeff, *Stockholm Syndrome in the Pimp-Victim Relationship*, N.Y. TIMES (May 3, 2012, 12:18 PM), https://archive.nytimes.com/kristof.blogs.nytimes.com/2012/05/03/stockholm-syndrome-in-the-pimp-victim-relationship/.

other comorbid conditions.[39]

The healthcare system is making strides to recognize labor trafficking, and the child welfare system needs to follow suit. In the 2020 article *Child Labor Trafficking Essentials for Forensic Nurses*, the author highlights that although child sex trafficking has been given more attention, forensic nurses are likely to encounter victims of child labor trafficking in their practice and that pediatric nurses need education in this area to identify and respond to this issue.[40]

Additionally, children trafficked for sexual exploitation or labor are often arrested for the crimes their traffickers force them to commit.[41] Recent studies show that traffickers often compel children to commit criminal acts like drug dealing, shoplifting, or theft, not just commercial sex. The 10-city survey of homeless youth served by Covenant House found that "[t]he vast majority (81%) of labor trafficking cases reported in this study were instances of forced drug dealing."[42] Drug sales occurred both through familial networks and coercion, as well as organized crime and gang activity. Additionally, "[o]ne youth compared the drug trade to sex trafficking, describing it as psychologically coercive and physically violent."[43] A 2023 study of youth in New Jersey focused on looking at labor trafficking by forced criminality (LTFC) found that half of all identified human trafficking survivors among youth facing homelessness have been labor trafficked.[44] Among this group, the most common type of labor trafficking is LTFC."[45] CAST's client data reflect traffickers enslaving children in drug cultivation, drug smuggling, drug "mule" activity, and drug extortion. Other common examples of unlawful conduct are stealing jewelry from persons, stealing checks from mailboxes, theft from jewelry stores, and other shoplifting. Many of CAST's child labor-trafficked clients were enslaved by drug cartels, gangs, and other organized criminal entities, in addition to family members and guardians. "Traveling Sales Crews" and "Peddling Rings" are also often identified as common forms of child labor trafficking, usually involving U.S. citizens.[46]

While legitimate sales are not crimes, some transactions can defraud

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[39] Jordan Greenbaum, Dana Kaplan, & Janine Young, *Global Human Trafficking and Child Victimization*, 140 PEDIATRICS at 1, 3–4 (2017) (emphasis added).

[40] Gail Hornor, *Child Labor Trafficking Essentials for Forensic Nurses*, 16 J. FORENSIC NURSING 215 (2020).

[41] Malika Saada Saar, *There Is No Such Thing As a Child Prostitute*, WASH. POST (February 17, 2014, 3:26 PM), https://www.washingtonpost.com/opinions/there-is-no-such-thing-as-a-child-prostitute/2014/02/14/631ebd26-8ec7-11e3-b227-12a45d109e03_story.html.

[42] MURPHY, *supra* note 27.

[43] *Id.* at 32.

[44] Julia Einbond, Kaitlyn Zedalis, & Hanni Stoklosa, *A Case of Mistaken Identity: The Criminalization of Victims of Labor Trafficking by Forced Criminality*, 59-1 CRIM. L. BULL. Art. 2 (2023).

[45] *Id*.

[46] U.S. DEP'T OF HEALTH & HUM. SERVS. REGION XI, CALIFORNIA: EFFORTS TO COMBAT HUMAN TRAFFICKING 1 (2017).

the buyer or misrepresent where the proceeds go (e.g., to sham "charities"). As such, some such activities can constitute forced criminal behavior. For example, a 2015 study of "traveling sales crews" by Polaris found that "[m]anagers control nearly all aspects of the lives of [teenage] crew members," including isolating them from outside society, imposing long work hours, employing "cult-like" peer pressure, confiscating identification, denying food, and making threats, including the threat of abandonment.[47] Twenty-four percent reported physical assault, and "[s]exual assault was also reported in dozens of cases."[48]

There is growing recognition that sex trafficking victims are victims of labor trafficking when they are forced to recruit, monitor, post online, or engage in other activities at the behest of their trafficker, promoting the commercial sex scheme. A victim is often sexually exploited by their trafficker, but they also may be forced into labor trafficking if they must recruit other individuals, teach others the "rules of the game," post ads for the other individuals, handle money made by other victims, and even dole out punishments.[49] Thus, the tasks traffickers force victims to commit can convert the victims into sex traffickers by definition, but by definition, they are also victims of labor trafficking for forced criminality.

Further, the most under-recognized area of child labor trafficking for forced criminality is likely gang-involved youth. For example, it has been documented in Central America that gangs "actively recruit, train, arm, and subject children to engage in illicit activities – including assassinations, extortion, and drug trafficking."[50] Further research in the UK has demonstrated gangs traffic "Runners" (young men aged 12–15 years who deal and move drugs) and "Teenies" (young men less than10 years of age who are used to transport goods), using their victim's infancy as a shield to law enforcement.[51]

The upshot is that those child labor trafficking victims, like children trafficked for sexual exploitation, are at risk of being detained or arrested—for crimes their traffickers forced them to commit—by law enforcement personnel, likely untrained in recognizing child labor trafficking. For example, a labor-trafficked child could develop a criminal record, a reputation, and a jaded view of authority that will burden the child for years. These consequences cause the child to remain vulnerable to the child's

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[47] POLARIS, KNOCKING AT YOUR DOOR, LABOR TRAFFICKING ON TRAVELING SALES CREWS 1 (2015).

[48] *Id.*

[49] DOMINIQUE ROE-SEPOWITZ JAMES GALLAGHER, KIMBERLY HOGAN, & TIANA WARD, MCCAIN INST., A SIX-YEAR ANALYSIS OF SEX TRAFFICKERS OF MINORS: EXPLORING CHARACTERISTICS AND SEX TRAFFICKING PATTERNS (2021), https://www.mccaininstitute.org/resources/reports/a-six-year-analysis-of-sex-traffickers-of-minors/.

[50] Thomas Boerman & Adam Golob, *Gangs and Modern-Day Slavery in El Salvador, Honduras and Guatemala: A Non-Traditional Model of Human Trafficking*, 7-3 J. HUM. TRAFFICKING 241–57 (2021).

[51] Alessandra Glover Williams & Fiona Finlay, *County Lines: How Gang Crime is Affecting Our Young People*, 104 ARCHIVES DISEASE CHILDHOOD 730, 730–32 (2019).

traffickers or to being re-trafficked, as the systems designed to protect the child see the child as a criminal. These are the same vulnerabilities frequently highlighted for CSEC children Additionally, in not training child welfare workers and others to understand that sex trafficking can include labor trafficking for forced criminality, children in this area will continue to be criminalized for labor their traffickers forced them to commit, including particularly serious crimes that could include charges of sex trafficking of another minor, despite being a victim themselves.[52]

Such similar dynamics suggest that *all* commercially exploited children need specialized, comprehensive services and protections. All trafficked children need immediate access to shelter, medical care, and therapy through a child welfare system uniquely designed to protect abused children. All trafficked children have safety concerns and complex legal rights, and many require criminal justice advocacy, especially when their trafficking involves organized criminal networks and gangs. Thus far, child welfare systems in the United States have failed to identify and serve all child trafficking victims appropriately. As policymakers explore the role of child protective agencies in responding to trafficking, they must address labor trafficking and trafficking for sexual exploitation to protect all children from exploitation, abuse, and neglect.

II. FEDERAL FRAMEWORK FOR CSEC TRAFFICKING AND THE CHILD WELFARE SYSTEM

Five bills were introduced in the United States House and Senate in 2013–2014 that dealt with child trafficking and the child welfare system.[53] The primary focus of the proposed legislation was data collection, training centered on best practices, and reporting child welfare efforts involving child trafficking to Congress. The first bill, which attracted the most co-sponsors, was the Strengthening the Child Welfare Response to Trafficking Act.[54] It included provisions regarding data collection, training, and federal reporting requirements, which applied comprehensively to both children trafficked for sexual exploitation and children trafficked for labor. Yet none of the remaining proposed bills used the full federal definition of trafficking in persons, which includes labor trafficking.[55] Out of all the proposed

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[52] Alexandra F. Levy, *Innocent Traffickers, Guilty Victims: The Case for Prosecuting So-Called 'Bottom Girls' in the United States*, 6 ANTI-TRAFFICKING REV. 130 (2016).

[53] Strengthening the Child Welfare Response to Human Trafficking Act of 2013, S. 1823, 113th Cong. (2013); Preventing Sex Trafficking and Improving Opportunities for Youth in Foster Care Act, H.R. 4058, 113th Cong. (2014); Improving Outcomes for Youth at Risk for Sex Trafficking Act of 2013, S. 1518, 113th Cong. (2013); Supporting At-Risk Children Act, S. 1870, 113th Cong. (2013); Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, 128 Stat. 1919 (2014).

[54] Strengthening the Child Welfare Response to Human Trafficking Act of 2013, S. 1823, 113th Cong. (2013).

[55] *Id.*; Improving Outcomes for Youth at Risk for Sex Trafficking Act of 2013, S. 1518, 113th Cong. (2013); Supporting At-Risk Children Act, S. 1870, 113th Cong. (2013); Preventing Sex Trafficking and Improving Opportunities for Youth in Foster Care Act, H.R. 4058, 113th Cong. (2014).

legislation around these issues in 2013–2014, only the SFA, which excludes labor trafficking victims from its provisions, was ultimately passed into law.[56]

By excluding child labor from data collection and reporting, this new law failed to meet the goal of providing more competent, targeted services to all potentially exploited youth in the child welfare system. In addition to the moral imperative to protect vulnerable children, a more expansive definition of child trafficking would also provide long-term financial benefits for the government. Further, more comprehensive data collection would lead to more efficient provision of government-funded services, ultimately leading to more significant cost savings for taxpayers.

A. *The Preventing Sex Trafficking and Strengthening Families Act of 2014 (SFA)*

The SFA became federal law on September 29, 2014.[57] As the title suggests, Congress aimed at preventing youth in the foster care system from becoming victims of sex trafficking.[58] First, the act adds many substantive requirements for the state plans for foster care.[59] Under the SFA, the state plan must demonstrate that the state agency has developed policies and procedures for identifying, documenting, and determining appropriate services for any youth for whom the state agency has responsibility for placement, care, or supervision whom the state has reasonable cause to believe is, or is at risk of being, a victim of sex trafficking or a severe form of trafficking in persons.[60] This reference to "a severe form of trafficking in persons" is the only possible hint of labor trafficking victims in the SFA, despite this language found in the context of defining the term "sex trafficking victim."[61] The SFA also authorizes a state to develop these same policies and procedures for any individual under the age of 26, regardless of whether the individual was ever in the foster care system.[62]

Additional provisions also specifically protected missing and runaway youth. For example, a new state plan requirement directs states to implement protocols for locating and responding to children who have run away from foster care, including screening missing children upon their return to determine if the child is a possible sex trafficking victim only.[63] This

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[56] Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, 128 Stat. 1919 (2014).

[57] *Id.*

[58] *Id.*

[59] *Id.* at § 111.

[60] *Id.* at §§ 101, 111; State Plan for Foster Care and Adoption Assistance, 42 U.S.C.A. § 671(a)(9) (West 2023).

[61] 42 U.S.C.A. § 675(9)(B) (West 2018); Improving Outcomes for Youth at Risk for Sex Trafficking Act of 2013, S. 1518, 113th Cong. (2013).

[62] 42 U.S.C.A. § 671(a)(9) (West 2023); Strengthening the Child Welfare Response to Human Trafficking Act of 2013, S. 1823, 113th Cong. (2013).

[63] 42 U.S.C.A. § 671(a)(35) (West 2023); Preventing Sex Trafficking and Improving Opportunities for Youth in Foster Care Act, H.R. 4058, 113th Cong. (2014).

requirement also directs state agencies to immediately report information on missing or abducted youth to law enforcement authorities for entry into the National Crime Information Center database of the Federal Bureau of Investigation and to the National Center for Missing and Exploited Children.[64] The remaining provisions of the SFA focus on reporting and future research regarding trafficking youth for sexual exploitation.

The SFA also established the National Advisory Committee on the Sex Trafficking of Children and Youth in the United States (Committee), which advises the Secretary of Health and Human Services, the Attorney General, the Committee on Finance of the Senate, and the Committee on Ways and Means of the House of Representatives on policies concerning the nation's response to the sex trafficking of minors in the United States.[65] Congress directed the Committee to issue a report on State results and evaluation by January 2019.

This Committee first met in September 2018. During the first day of the meeting, appointed committee members discussed the need to look at the sex *and labor* trafficking of youth.[66] Nevertheless, during the second day of the meeting, the minutes indicate that, "[f]or the purpose of this committee, the focus will be on sex trafficking, and address child labor trafficking when related to its nexus to child sex trafficking."[67] The Committee issued its report in September 2020, outlining many recommendations.[68] Despite the focus of the Committee on CSEC, notably in some recommendations, screening for sex *and* labor trafficking was recommended to "ensure proper identification."[69]

In 2022, the Committee issued another report detailing preliminary results from self-assessments conducted by twenty-nine states.[70] The survey results indicated that three states screened for sex and labor trafficking.[71] However, with just one tangential reference to labor trafficking in one recommendation out of 127, the concern remains that legislators and federal government agencies will mostly receive reports and information on CSEC and, therefore, will not have the information they need to address the needs of all child victims appropriately. It is often a self-fulfilling prophecy that

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[64] 42 U.S.C.A. § 671(a)(35)(B) (West 2023).

[65] National Advisory Committee on the Sex Trafficking of Children and Youth in the United States, 42 U.S.C.A. § 1314b (West 2014); Strengthening the Child Welfare Response to Human Trafficking Act of 2013, S. 1823, 113th Cong. (2013).

[66] NAT'L ADVISORY COMM. ON THE SEX TRAFFICKING OF CHILD. & YOUTH IN THE U.S., SUMMARY OF MEETING SEPTEMBER 13–14, 2018, 7–8 (2018).

[67] *Id.* at 13.

[68] NAT'L ADVISORY COMM. ON THE SEX TRAFFICKING OF CHILD. & YOUTH IN THE U. S., BEST PRACTICES AND RECOMMENDATIONS FOR STATES (2020), https://www.acf.hhs.gov/sites/default/files/documents/otip/nac_report_2020.pdf.

[69] *Id.* at 17.

[70] NAT'L ADVISORY COMM. ON THE SEX TRAFFICKING OF CHILD. & YOUTH IN THE U.S., PRELIMINARY STATE SELF-ASSESSMENT SURVEY OVERVIEW (2022), https://www.acf.hhs.gov/sites/default/files/documents/otip/NAC%20Preliminary%20State%20Self-Assessment%20Survey%20Overview_January%202022.pdf.

[71] *Id.* at 27.

states can ignore an issue when they are not required to collect data on it or report the specialized services provided. With few states reporting limited data, the true picture of child labor trafficking is elusive. And other agencies, such as the National Center for Missing and Exploited Children, by statute, are only required to receive reports on CSEC, ignoring labor trafficked youth.[72]

B. *The Justice for Victims of Trafficking Act of 2015 (JTVA)*

Further solidifying the federal focus on trafficking for sexual exploitation in the child welfare system, instead of focusing on all forms of trafficking, the JTVA became federal law in 2015.[73] The JVTA expanded the federal definition of "child abuse and neglect" and "sexual abuse" under the Victims of Child Abuse Act of 1990 to include sex trafficking—but not labor trafficking.[74] Additionally, under the JVTA, effective May 2017, states are required to have in place procedures (1) to identify and assess all reports involving children known or suspected to be victims of sex trafficking, and (2) to train child protective services workers about identifying, assessing, and providing comprehensive services for children who are sex trafficking victims, including efforts to coordinate with State law enforcement, juvenile justice, and social services agencies, such as runaway and homeless youth shelters.[75] These provisions focus states on training and collecting data on trafficking children for sexual exploitation, but not child labor trafficking.

III. FEDERAL AND STATE FRAMEWORKS FOR CHILD LABOR TRAFFICKING

A. *Federal Action Addressing Child Labor Trafficking in the Child Welfare System*

Since becoming federal law, Congress has amended and reauthorized The Victims of Trafficking and Violence Protection Act, hereinafter "TVPA," frequently to better prevent human trafficking, protect victims, and prosecute offenders.[76] Recently, Congress amended this legislation through the TVPRA of 2022.[77] Notably, the TVPRA now directs state agencies to categorize child labor trafficking as child abuse.[78] However, the TVPRA of 2022 did not update the SFA, so the focus of data collection and reporting

[72] Reporting Requirements of Electronic Communication Service Providers & Remote Computing Service Providers, 18 U.S.C. § 2258A.

[73] Justice for Victims of Trafficking Act of 2015, Pub. L. 114-22, 129 Stat. 227.

[74] *Id.* at § 802(c)(1).

[75] *Id.* at § 802(b).

[76] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464.

[77] Trafficking Victims Prevention and Protection Reauthorization Act of 2022, Pub. L. No. 11-348, 136 Stat. 6211 (2023).

[78] *Id.* at § 133.

by state agencies is still limited to sex trafficking.[79]

B. *State Action Addressing Child Labor and Sex Trafficking in the Child Welfare System*

A review of state child abuse statutes reveals that at least thirteen states have taken action since the passage of the SFA in 2014 to update the definition of child abuse to include both trafficking for sexual exploitation and labor trafficking specifically. States whose definitions of child abuse expressly include labor trafficking are Connecticut,[80] Hawaii,[81] Illinois,[82] Indiana,[83] Kansas,[84] Kentucky,[85] Louisiana,[86] Massachusetts,[87] Mississippi,[88] North Carolina,[89] North Dakota,[90] Texas,[91] and Utah.[92] In all these states, the word "trafficking" is used in the relevant statutes, and it is defined to include *labor* as well as sex trafficking. Six states have followed the federal approach and included only sex trafficking or CSEC in their definition of state child abuse, including California,[93] Colorado, Florida, Iowa, Maine, and Minnesota. More than twenty-five states have yet to take action in this area. Those states must understand the importance of addressing both labor trafficking and trafficking for CSEC in their child welfare systems and have the correct information to make this decision.

The exclusion of child labor trafficking from the definition of child abuse has many consequences. First, a labor-trafficked child could be left in a trafficking situation because the law does not provide court protection. Further, child welfare and court personnel will not undergo training to look for child trafficking and, as such, will not identify victims. Finally, the data and statistics generated within the child welfare system will not include child labor trafficking, which will stymie the generation of data-driven policies.

IV. CHILD LABOR TRAFFICKING VICTIMS COULD HAVE EQUALLY BENEFITED FROM FEDERAL AND STATE PROTECTIONS

The role of child welfare in the prevention and intervention of human trafficking extends beyond protecting children trafficked for sexual exploitation. The SFA and the JVTA were essential steps forward in

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[79] Strengthening the Child Welfare Response to Human Trafficking Act of 2013, S. 1823, 113th Cong. (2013).

[80] CONN. GEN. STAT. ANN. § 53-21 (West 2024).

[81] HAW. REV. STAT. ANN. § 350-1 (West 2024).

[82] 325 ILL. COMP. STAT. ANN. 5/3 (West 2024).

[83] CONN. GEN. STAT. ANN. § 53-21 (West 2024).

[84] KAN. STAT. ANN. § 21-5426 (West 2024).

[85] KY. REV. STAT. ANN. § 529.010 (West 2024).

[86] LA. CHILD. CODE ANN. art. 610 (West 2024).

[87] MASS. GEN. LAWS ANN. ch. 265, § 51 (West 2024)

[88] MISS. CODE ANN. § 97-3-54.1 (West 2024).

[89] N.C. GEN. STAT. ANN. § 115C-375.20 (West 2024).

[90] N.D. CENT. CODE ANN. § 50-25.1-02 (West 2024).

[91] TEX. PENAL CODE ANN. § 20A.02 (West 2024).

[92] UTAH CODE ANN. § 76-5-309 (West 2024).

[93] CAL. WELF. & INST. CODE § 300(b)(4) (West 2024).

assisting CSEC trafficking victims through the child welfare system, but they failed child labor trafficking victims by ignoring them. Therefore, it is essential to identify, document, protect, and serve all child victims of human trafficking who come into contact with the child welfare system.

It is far more cost-effective to include all child trafficking victims—those trafficked for both sexual exploitation and labor—in any reforms made to the child welfare system to deal with the following child commercial exploitation issues:

> *Data Collection and Training:* Many of the changes needed in the child welfare system start with data collection and training. Development of these materials and resources is a one-time cost, and including all forms of child trafficking will not add to the initial expense. Further, as seen, CSEC may turn into labor trafficking and vice versa, and thus, organizations should collect information on all forms of trafficking up front, preventing later costs.
>
> *Tailored Services:* Children trafficked for sexual exploitation and labor need similar tailored services to the unique dynamics of human trafficking. These services include access to shelter, necessities, mental health and medical care, case management, and legal services.
>
> *Commerce:* Child trafficking, at its core, is about child exploitation for commercial purposes. The dynamics of why and how traffickers recruit children into CSEC trafficking or labor trafficking are strikingly similar, as are the bonds many children experience with their traffickers. Many children in both CSEC trafficking and labor trafficking experience "traumatic bonding" by becoming emotionally and physically dependent on their traffickers, making it challenging to identify potential trafficking victims.[94] Similarly to victims of CSEC trafficking, child victims of labor trafficking are often economically vulnerable to exploitation due to their need to provide financially for themselves or their families.[95]
>
> *Human Trafficking for Forced Criminality:* Both sex and labor trafficking victims are vulnerable to human trafficking for forced criminality. Until there is a greater understanding in the child welfare system and throughout

[94] FNUSA, *supra* note 7, at 3; KLAIN & KLOER, *supra* note 36, at 13; Kitroeff, *supra* note 38.

[95] FNUSA, *supra* note 7, at 3; OFF. OF THE ASSISTANT SEC'Y. FOR PLAN. AND EVALUATION, *supra* note 11.

> the states that children can be forced to commit crimes that are the very labor or service that makes up the crime of child labor trafficking, children will continue to be arrested for the vast array of crimes their traffickers forced them to commit. Indeed, child sex trafficking victims may suffer from being arrested and convicted of the most serious crimes, including sex trafficking of minors. We will also continue to arrest some of the most vulnerable youth: those trafficked for gang-related activities. Then the cycle of exploitation, abuse, and criminalization of youth will continue.

V. MODEL HUMAN TRAFFICKING GUIDELINES FOR CHILD PROTECTION AGENCIES

In order to effectively fight child labor trafficking, federal and state legislation regarding the role of child protection agencies must focus on data collection, training, prevention, identification, and serving potential victims.[96] This multi-faceted strategy will preemptively protect children who are vulnerable to trafficking while also identifying and serving children victimized by trafficking. In addition, many of the following suggested guidelines mirror established protections for CSEC trafficking victims, and thus, legislators should broaden statutory language to include victims of labor trafficking as well.

A. *Recommendation 1: Data Collection*

Child protection agencies should implement a formal protocol for standardized data collection and regular reporting on at-risk trafficked youth. Standardized data collection on all trafficked youth should include separate categories for sexual exploitation and labor, an indication of whether labor-trafficked youth also experienced sexual violence, gender/gender identity, race/ethnicity, sex, whether the child was trafficked by a family member or exploited by a third party, age at recruitment, and the number of traffickers. It should also clearly identify if a sex or labor trafficked child experienced LTFC.

Given the sole focus of federal legislation on CSEC trafficking, many states do not follow this practice. For example, in 2017, the California Child Welfare Council adopted the WestCoast Children's Clinic Commercial Sexual Exploitation – Identification Tool (CSE-IT), which screens only for the commercial sexual exploitation of children.[97] Since 2015, WestCoast has

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[96] *Human Trafficking Guidelines for Child Protection* Agencies, ALL. TO END SLAVERY AND TRAFFICKING (May 13, 2013, 8:00 AM), https://endslaveryandtrafficking.org/human-trafficking-guidelines-for-child-protection-agencies/.

[97] DAVID T. PERRY, DANNA BASSON, & HANNAH HALEY, WESTCOAST CHILD.'S CLINIC, UNIVERSAL SCREENING MAKES EXPLOITATION VISIBLE 4 (2022), https://www.westcoastcc.org/wp-content/uploads/2022/12/WCC_Universal-Screening-Brief_August2022.pdf.

trained 8,000 service providers to recognize the signs of exploitation. These providers screened 134,000 youth and identified 15,197 youth with clear indicators of commercial sexual exploitation.[98] However, these workers did not receive training or guidance on identifying all forms of commercial exploitation of children. But recent research suggests a broadening approach—developing screening tools for sex and labor trafficking.[99]

B. *Recommendation 2: Training*

All human trafficking training for child protection agencies should cover trafficking for commercial sexual exploitation and labor trafficking of foreign national and U.S. citizen children. This training should also contain explicit explanations of human trafficking for forced criminality, and case examples of children trafficked to commit a wide array of crimes. Child protection agencies should involve specialized service providers and human trafficking survivors in both the development and the delivery of the training, provided survivors receive compensation and support for such work. Providers can include runaway homeless youth services, LGBT youth organizations, and anti-trafficking and victim services agencies. All staff should be required to attend introductory human trafficking training and should attend continuing education training no less than once a year. This training must cover all forms of trafficking of girls, boys, and transgender youth. Advanced human trafficking training should be available and ideally required for those likely to interface with potentially trafficked youth. Child protection agencies should implement a formal protocol to ensure that basic human trafficking training is mandatory and regularly available for target staff. Child protection agencies should also contact emergency response partners, including police and emergency medical staff, to partner on basic training where possible.

Basic human trafficking training should include types of human trafficking, identification of trafficked youth, dynamics of exploited youth including forced criminality, the importance of early assessment of the therapeutic needs of trafficked youth, and understanding how child protection settings, group homes, foster homes, and emergency shelters are targets for trafficking. Advanced training topics around trafficked youth could include building trust, interview methods, safety issues, engaging parental or support systems, applying client-centered practice methods, available legal and financial benefits, criminal victim witness management, understanding risk factors for recruitment, understanding forms of legal redress, understanding the intersection between domestic and intimate partner violence with trafficking of minors, identifying marginalized youth

[98] *Id.*

[99] Makini Chisolm-Straker, Elizabeth Singer, David Strong, George T. Loo, Emily F. Rothman, Cindy Clesca, James d'Etienne, Naomi Alanis, & Lynne D. Richardson, *Validation of a Screening Tool for Labor and Sex Trafficking Among Emergency Department Patients*, J. AM. COLL. EMERGENCY PHYSICIANS OPEN, 2021, at 1.

populations at risk for less visible trafficking, trafficked youth with developmental delays, undocumented trafficked youth, and working with migrant farm worker youth. Accessible resources, such as The SOAR to Health and Wellness Training Program, provide "Responding to Human Trafficking Through the Child Welfare System" modules, among others.[100]

C. *Recommendation 3: Prevention*

Training programs should explore early identification of youth at risk of trafficking for all front-line staff and implement a formal protocol for identifying at-risk youth. In addition, agencies should develop specialized programming or therapy for youth at risk for trafficking. Additionally, agencies should utilize organizations and speakers who can educate staff about youth at risk of trafficking. Further, agencies should identify and cultivate links to external programs for at-risk youth. Finally, child protection agencies should consider partnering with schools to do outreach and training, as schools are critical locations for prevention efforts. They should also work closely with the police, district attorneys' offices, and public defenders' offices to ensure that all personnel who may encounter youth forced to commit crimes for their traffickers' benefit or review cases involving youth facing criminal charges receive training on this topic. They must also coordinate appropriate referral processes for these agencies to refer youth to child welfare programs instead of arresting them or criminally charging them. These protocols should generally be the same as those in place for CSEC youth.[101]

D. *Recommendation 4: Identification*

Child protection agencies should implement a formal protocol for identifying trafficked youth. While understanding that there are no magic-button intake questions, child protection intakes should be updated to include several critical questions about human trafficking, including human trafficking for forced criminality. For example, if the child answers "Yes" to these questions, the agency should refer the child to a human trafficking case management specialist for a more comprehensive screening. However, the term "human trafficking" should not be used with youth, as this is often a misunderstood or unclear term. Instead, screening questions should utilize youth-friendly terminology and focus on survival activities to identify potentially trafficked youth.

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[100] SOAR Online, NAT'L HUM. TRAFFICKING TRAINING AND TECH. ASSISTANCE CTR., https://nhttac.acf.hhs.gov/soar/soar-for-individuals/soar-online (last visited Jan. 16, 2024).

[101] NAT'L ADVISORY COMM. ON THE SEX TRAFFICKING OF CHILD. AND YOUTH IN THE U.S., *supra* note 62, at 33.

E. *Recommendation 5: Serving and Engaging Potential Victims*

Agencies should provide training to help key front-line child protection staff engage with youth who may be victims of trafficking. Outreach workers, truancy officers, age-out planners, and other key stakeholders should receive training to help them engage vulnerable youth, including homeless youth communities, youth with mental illness, and youth with developmental delays.

Child protection agencies should make every effort to designate specialist caseworkers to specifically focus on working with youth identified as trafficked or strongly suspected as trafficked. Agencies should allow extended time in these cases because identifying trafficked youth often takes longer. Agencies should refer identified trafficked youth to therapists who have received advanced human trafficking training, especially those who understand the complex dynamics of human trafficking for forced criminality. Agencies should also share information about enrollment in Victims of Crime Act of 1984 compensation or other state benefits programs and provide referrals to attorneys with expertise in criminal victim witness advocacy or immigration expertise when needed.[102]

Finding safe housing for trafficked youth can be challenging. Available options will depend on various factors, including gender, sexual orientation, and safety. Because this population often lacks stability, children who leave placement must be able to return to the same placement if they choose to do so. For example, it could take months or longer for youth to self-identify, so services should not be contingent on identification. Housing options should include placement with family or former guardian(s) with specialized support for family reunification, placement in specialized foster care with additional support, or referential residential care facilities. In addition, agencies should consider secure placement as a last resort and, when used, modeled after the strict requirements for children designated as harm to themselves or others.

CONCLUSION

The collective experiences of anti-trafficking organizations and youth services organizations working throughout the United States demonstrate the urgent need for child welfare agencies to identify and protect child victims of labor trafficking. To comprehensively address the problem of child trafficking, states must make a greater effort to collect data on the impact and scope of child labor trafficking within their borders. The child welfare system is a crucial place for this data collection effort to start. Future legislation at the state and federal levels should prioritize protecting *all* child trafficking victims. At the federal level, this could be achieved by simply amending the SFA and JVTA to cover children trafficked for labor under its

[102] Victims of Crime Act of 1984, Pub. L. No. 98-473, § 1402, 98 Stat. 2170, 2170–71 (codified as amended at 34 U.S.C. § 20101).

provisions. Together, federal and state governments can combat the problem of child labor trafficking on the front lines by requiring child welfare agencies to report more wide-ranging data, offer specialized training, and provide competent services that identify and protect vulnerable youth. To quote Kamala Harris, "[p]art of what is insidious about human trafficking . . . is that people don't see what they're seeing."[103]

[103] Gerber, *supra* note 15.

Transgender Panic in Higher Education: An Argument for the Expansion of Title IX

EMMA N. DIAMANTI*

ABSTRACT

Title IX has evolved to include gender identity, specifically transgender status, under the definition of "sex" within the law, but that inclusivity has wavered under different administrations and under different courts. While the Supreme Court ruled in *Bostock v. Clayton County* that "sex" under Title VII included sexual orientation and gender identity, Title VII and Title IX apply differently to employees versus students. Additionally, court rulings have varied on whether gender identity is covered under Title IX, and *Bostock* does not specifically rule on this issue, which means the only way to protect America's transgender students is through expanding discriminatory protections under Title IX to include more than "sex." Transgender students are currently facing heightened discrimination and outright bans in collegiate athletics nationwide, and the Supreme Court has not yet ruled on the constitutionality of these attacks. Through a comparison of cases and concerning legislation, this piece will argue that the language of Title IX is too vague, and protections against transgender students in America's higher education institutions must remain cemented in an expansion of law to include "gender identity" in writing, which specifically protects this extremely vulnerable group.

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INTRODUCTION

Attacks against LGBT individuals, especially transgender individuals,[1] have risen significantly in recent years. This current wave of anti-Queer and anti-transgender legislation and hysteria across the United States, heighted through the media, is a targeted, purposeful effort to "exclude Queer people, especially transgender people, from full recognition and participation in public life."[2] Anti-transgender legislation, including "bathroom bills," book bans and collegiate athletic bans,[3] both reinforce the gender binary and ostracize transgender students from their own education. From personal to political violence, transgender college and university students remain a particularly vulnerable subset facing these attacks.

According to a 2017 study, transgender college students, compared to cisgender male students, experience the highest odds of involvement in crimes involving sexual victimization, including attempted sexual penetration, sexual penetration without consent, and being in a sexually abusive relationship.[4] Additionally, researchers found that, compared to male and female students, transgender students are also more likely to experience victimization regarding violent crimes.[5] Based on college survey data, a majority of the estimated one million transgender individuals in the United States are either of college age (ages 18–24) or belong to the age group approaching college age (ages 13–17).[6] Despite their prevalence in the "college age" category, transgender individuals are less likely to attend college than non-transgender individuals.[7] The disparity in college attendance between transgender individuals and their cisgender peers emphasizes the need for promotion of enrollment, attendance and graduation of transgender individuals in higher education.[8]

In order to promote equality in higher education and to protect transgender college students, gender-based violence at colleges and universities must be reduced. Transgender students are more likely than non-transgender students to experience (1) physical fights, (2) physical assault,

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[1] Stacey B. Griner, Cheryl A. Vamos, Erika L. Thompson, Rachel Logan, Coralia Vázquez-Otero, & Ellen M. Daley, *The Intersection of Gender Identity and Violence: Victimization Experienced by Transgender College Students*, 35 J. INTERPERSONAL VIOLENCE 5704, 5706 (2020) ("Although transgender people are in the statistical minority, population-based samples have indicated that up to 0.5% of the population identify as transgender, which is estimated to be about one million people.") [hereinafter Griner].

[2] Sara Brightman, Emily Lenning, Kristin J. Lurie, & Christina DeJong, *Anti-Transgender Ideology, Laws, and Homicide: An Analysis of the Trifecta of Violence*, 2023 HOMICIDE STUD. 1, 3, 7 (studying homicides and fatal violence against transgender individuals using the framework of the "trifecta of violence"—violent ideology, violent policies and laws, and violent actions).

[3] *See id.* at 3–4, 10.

[4] Griner, *supra* note 1, at 5705.

[5] *Id.*

[6] *Id.* at 5707.

[7] *Id.*

[8] *See* KERITH J. CONRON, KATHRYN K. O'NEILL, & LUIS A. VASQUEZ, UCLA WILLIAMS INST. & THE POINT FOUND., EDUCATIONAL EXPERIENCES OF TRANSGENDER PEOPLE, (Apr. 2022), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Higher-Ed-Apr-2022.pdf.

(3) verbal threats and (4) sexual assault;[9] 35% of transgender students reported experiencing harassment in school.[10] Additionally, 87% of transgender students who reported harassment stated that the motive behind said harassment was their gender identity.[11] This mistreatment of transgender students leads to a particularly troubling cycle of violence and victimization, as those who have been victimized during college are "more likely to experience incarceration, homelessness, participation in sex work, unemployment, and increased rates of health concerns, including smoking, drug and alcohol use, HIV diagnoses, and suicide later in life."[12] Many transgender students leave higher education, and among those who leave, only 30% return to receive a degree.[13] Transgender students report considering abandoning their higher education institutions at high rates, for fear of violence due to their gender identity.[14] Despite these significant concerns, transgender students are less likely to report that their universities responded positively to reports of harassment.[15] The prevalence and allowance of the mistreatment of transgender college students remains significantly concerning, as one historic piece of legislation has been established and interpreted to protect against this discrimination and harassment.

The United States Congress, in 1972, passed Title IX as part of the Education Amendments to the Civil Rights Act of 1964.[16] Title IX provides legal protection against discrimination on the basis of sex, or gender, for both students and employees of educational institutions.[17] Title IX states that, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[18]

Since its establishment, different jurisdictions and different administrations have interpreted "sex" under Title IX to include or exclude gender identity, or transgender status.[19] During the Obama administration, the U.S. Departments of Education and Justice released a joint guidance document purporting that Title IX's protections extend to transgender students.[20] However, the Trump administration reversed these protections in

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[9] Griner, *supra* note 1, at 5707.
[10] *Id.* at 5708.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] Griner, *supra* note 1, at 5708.
[16] Iram Valentin, *Title IX: A Brief History*, 2 HOLY CROSS J. L. & PUB. POL'Y 123, 123 (1997).
[17] *Id.* at 124.
[18] 20 U.S.C. § 1681(a).
[19] *See* Suzanne Eckes, *Sex Discrimination in Schools: The Law and Its Impact on School Policies*, 10 LAWS 1 (2021).
[20] *Id.* at 7–8; *accord* Catherine E. Lhamon, Assistant Sec'y for C.R., U.S. Dep't of Educ. & Vanita Gupta, Principal Deputy Assistant Att'y Gen. for C.R., U.S. Dep't of Just.., Dear Colleague Letter on

2017.[21] Currently, under the Biden administration, gender identity is meant to be included under Title IX, as President Biden stated "[i]t is the policy of my Administration that all students should be guaranteed an educational environment free from discrimination on the basis of sex . . . including discrimination on the basis of sexual orientation or gender identity."[22] Despite this statement, the Biden Administration has also proposed a rule which would allow for limitations on transgender college students' participation in athletics.[23] The proposed rule would eliminate categorical bans under Title IX, but would also provide schools flexibility in developing their own participation policies based on "reasonable" restrictions.[24] While this rule has yet to be implemented,[25] the U.S. Department of Education, under the Biden administration, *did* release a final rule on April 19, 2024 regarding the expansion of Title IX's protections to transgender students.[26] The 2024 rule applies the Supreme Court's reasoning in *Bostock v. Clayton County*, prohibiting "discrimination and harassment based on sexual orientation, *gender identity*, and sex characteristics in federally funded education programs."[27] However, five states have already sued the Biden administration over this rule, and other Republican officials have publicly refused to enforce it.[28] Additionally, the Supreme Court has not yet ruled on precisely what is covered under Title IX in the wake of athletic bans or the heightened violence towards transgender students, nor have they ruled on

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Transgender Students 1 (May 13, 2016) (rescinded), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

[21] Eckes, *supra* note 19, at 8.

[22] Exec. Order No. 14021, 86 Fed. Reg. 13803 (Mar. 8, 2021).

[23] *See* NCAA, *Transgender Student-Athlete Participation Policy*, SPORT SCI. INST., https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx (Apr. 17, 2023) ("Beginning Aug. 1, 2024, participation in NCAA sports requires transgender student-athletes to provide documentation no less than twice annually" demonstrating compliance with sport-specific inclusion standards for transgender athletes, e.g., testosterone levels and mitigation timelines); *see also* INT'L OLYMPIC COMM., *IOC Framework on Fairness, Inclusion and Non-discrimination on the Basis of Gender Identity and Sex Variations*, (2021) https://stillmed.olympics.com/media/Documents/Beyond-the-Games/Human-Rights/IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf. The NCAA's new policy aligns with the International Olympic Committee's framework; both collegiate and professional athletes remain affected in similar ways by new legislation or executive orders.

[24] U.S. DEP'T OF EDUC., *Fact Sheet: U.S. Department of Education's Proposed Change to its Title IX Regulations on Students' Eligibility for Athletic Teams*, (Apr. 6, 2023) https://www.ed.gov/news/press-releases/fact-sheet-us-department-educations-proposed-change-its-title-ix-regulations-students-eligibility-athletic-teams.

[25] The new rules released by the Biden Administration are set to take effect on August 1st, 2024. Zach Montague & Erica L. Green, *Biden Administration Releases Revised Title IX Rules*, THE NEW YORK TIMES (Apr. 19, 2024), https://www.nytimes.com/2024/04/19/us/politics/biden-title-ix-rules.html

[26] 34 C.F.R. § 106 (2024) (Unofficial Version).

[27] *Fact Sheet: U.S. Department of Education's 2024 Title IX Final Rule Overview* U.S. DEP'T OF EDUC. (2024), https://www2.ed.gov/about/offices/list/ocr/docs/t9-final-rule-factsheet.pdf (emphasis added).

[28] Jo Yurcaba, *Five Republican-led States Sue Over Biden's New Title IX Transgender Protections*, NBC NEWS (Apr. 29, 2024, 6:26 PM), https://www.nbcnews.com/nbc-out/out-politics-and-policy/five-republican-led-states-sue-bidens-new-title-ix-transgender-protect-rcna149855 ("Republican attorneys general in Louisiana, Mississippi, Montana and Idaho filed a separate lawsuit [from Texas Attorney General Ken Paxton] . . . arguing that the rule exceeds the Education Department's authority, in part because it redefines sex to include gender identity.").

the Biden Administration's rule. However, in the case of *West Virginia v. B.P.J., by Jackson*, dissenting Justices Alito and Thomas stated that the issue of transgender bans regarding participation in women's sports will likely reach the Supreme Court soon, and that they would have ruled in favor of the State in granting their application to vacate an injunction which allows a transgender student to participate on teams which align with her gender identity.[29]

Although Title IX has evolved to include gender identity under "sex," that evolution has depended upon each administration since Title IX's inception.[30] Additionally, when the Supreme Court does rule on Title IX in the context of higher education, these rulings will remain subject to challenges, loopholes and potential overruling in the future. From discrimination to harassment to outright bans in extracurricular activities or facilities, transgender students are already finding it hard enough to attend and complete university. Student protections should not depend upon the current political climate, or upon whether a student cannot only argue that they have faced discrimination, but that their discrimination fits under the definition of "sex" within Title IX. Title IX's language is too vague, and despite the general understanding that transgender students remain protected under Title IX, the only way to ensure that these students are *always* protected, and that this discrimination is reasonable and accessible to prosecute, is to expand the language of Title IX to include "on the basis of sex, sexual orientation and gender identity, including transgender status." Finally, the United States Congress must introduce guidelines for the interpretation of Title IX regarding collegiate athletic bans, access to intimate facilities and general discrimination specifically, as these areas remain particularly challenging for both universities and courts to navigate.

I. DISCUSSION

A. *History of Title IX*

The establishment of Title IX marked an important milestone in the United States' higher education policy. In response to sex discrimination within colleges and universities nationwide, Title IX served to increase access to higher education, specifically targeting women.[31] This shift in the law brought attention to discriminatory admissions policies, creating new safeguards for women in higher education at the federal level.[32] Title IX demonstrated gender-consciousness in higher education policy, which

[29] West Virginia v. Jackson *ex rel*. B.P.J., 143 S. Ct. 889, 889 (2023) (Alito, & Thomas, JJ., dissenting).

[30] *See generally* Eckes, *supra* note 19, at 7–8.

[31] *See generally* Paul J. Van de Graaf, *The Program-Specific Reach of Title IX*, 83 COLUM. L. REV. 1210 (1983).

[32] *The History, Uses, and Abuses of Title IX*, 102 BULL. AM. ASS'N UNIV. PROFESSORS 69, 71–72 (2016).

unlike previous education laws directly called for gender equality in education.[33] Changing the dynamic of higher education, the aftermath of Title IX's passage saw a drastic increase in the proportion of women enrolled in colleges and universities, and by the 1980s, more women were receiving bachelor's degrees than men.[34]

Over the years since Title IX's establishment, the law's coverage has expanded. In the 1990s, Title IX's protections were extended to victims of sexual harassment, and the Supreme Court has stated, "[h]aving previously determined that 'sexual harassment' is 'discrimination' in the school context under Title IX, we are constrained to conclude that student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute."[35] In addition to the inclusion of sexual harassment, varying courts and administrations have expanded Title IX further to include sexual orientation.[36] Gender identity has also been included under the expansion of Title IX, but the extent of this expansion, especially in the context of higher education, is largely debatable. Unlike the inclusion of sexual harassment under Title IX, which remains heavily supported nationwide, transgender individuals have not been afforded that security. Court decisions, like varying administrations, may always be overturned or worked around, which is why protections for transgender individuals under the umbrella of gender identity must be concrete.

B. *Argument for the Expansion of Title IX*

1. *Concerning legislation*

Transgender individuals, including college students, have been facing legislative attacks in numerous states, in addition to the federal level. On April 20 of 2023, the House of Representatives passed H.R. 734, or the "Protection of Women and Girls in Sports Act of 2023," which seeks to prohibit all transgender women and girls from participating on sports teams which align with their gender identity.[37] The bill would amend the Education Amendments of 1972, or Title IX specifically, "to provide that for purposes of determining compliance with title IX of such Act in athletics, sex shall be recognized based solely on a person's reproductive biology and genetics at birth."[38] While transgender students are already facing discrimination both publicly and politically, our federal government aims to undermine the purpose of Title IX, arguing for blatant discrimination against transgender

[33] Deondra Rose, *Regulating Opportunity: Title IX and the Birth of Gender-Conscious Higher Education Policy*, 27 J. POL'Y HIST. 157, 176 (2015).
[34] *Id.*
[35] Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650 (1999).
[36] *E.g.*, Exec. Order No. 14021, *supra* note 22, at 13803.
[37] H.R. 734, 118th Cong. §§ 1–2 (2023).
[38] *Id.*

individuals based on their gender identity.[39] The amendment, which affects all levels of education, also includes, "It shall be a violation of subsection (a) for a recipient of Federal financial assistance who operates, sponsors, or facilitates athletic programs or activities to permit a person whose sex is male to participate in an athletic program or activity that is designated for women or girls."[40] Similar bills have been proposed federally prior to H.R. 734, but this is the first bill of its kind to have passed through Congress.[41] H.R. 734 remains a significant concern for the inclusion of gender identity under Title IX, and the amendments would undue how Title IX has been interpreted as recently as the Biden Administration.[42] Not only are these amendments incompatible with Title IX, but they directly target transgender individuals,[43] thereby calling into question if Title IX covers gender identity more broadly than athletics.

In addition to attacks on the federal level, in 2023 alone state lawmakers have filed at least 340 anti-LGBTQ+ bills, with at least 25 passing.[44] While few of these bills directly target higher education, not only does how the law treat transgender individuals expand to *every* level of federally assisted education, but transgender college students are suffering indirectly from these national attacks on gender identity.[45] Despite not being directly targeted by discriminatory legislation across the nation, many queer and transgender college students' mental health will be affected, and while cisgender students focus on their studies, transgender students are worrying about their rights and whether they are protected under the law. For example, Alex Noon, a second-year law student at the University of Florida, is transgender.[46] Noon reports that, despite some supportive faculty members, other instructors have deadnamed[47] him in class.[48] Regarding the current wave of discriminatory legislation, Noon reported, "[i]t's a huge mental

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[39] *See generally* Eric Bradner, Steve Contorno, & Kate Sullivan, *Republicans Ramp Up Attacks on Transgender People, in Statehouses and on the Campaign Trail*, CNN POL. (Apr. 30, 2023, 8:06 AM), https://www.cnn.com/2023/04/30/politics/republicans-transgender-attacks-statehouse-haley-trump/index.html.

[40] H.R. 734 § 2.

[41] Kel O'Hara, *'Equity' or Exclusion? How H.R. 734 Strips Trans Students of Their Civil Rights*, EQUAL RTS. ADVOCS. (May 16, 2023), https://www.equalrights.org/viewpoints/equity-or-exclusion-how-h-r-734-strips-trans-students-of-their-civil-rights/.

[42] *See, e.g.*, Exec. Order No. 14021, *supra* note 22.

[43] *See* Delphine Luneau, *House Majority — Instead of Doing Literally Anything that Would Actually Make Schools Better or Safer — Opts to Attack Trans Kids by Passing Discriminatory H.R. 734*, HUM. RTS. CAMPAIGN (Apr. 20, 2023), https://www.hrc.org/press-releases/house-majority-instead-of-doing-literally-anything-that-would-actually-make-schools-better-or-safer-opts-to-attack-trans-kids-by-passing-discriminatory-h-r-734.

[44] Olivia Sanchez, *Many LGBTQ+ College Students Feel the Weight of a National Pile-up of Negativity*, HECHINGER REP. (Dec. 9, 2022), https://hechingerreport.org/many-lgbtq-college-students-feel-the-weight-of-a-national-pile-up-of-negativity/.

[45] *Id.*

[46] *Id*.

[47] *Deadname*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/deadname (last visited Mar. 23, 2024) ("The name that a transgender person was given at birth and no longer uses upon transitioning.").

[48] Sanchez, *supra* note 44.

weight that a lot of queer people now have to deal with tenfold."[49] Noon goes on to state "[a] lot of people just exist as they are and then do their school. But to be queer or trans or anything under the LGBTQ identity and be dealing with emotional and mental exhaustion—plus, then having to still give yourself enough energy and resources to complete schoolwork—is really difficult."[50] Noon's account of his own experiences in higher education illustrates how, even if legislation is not directly targeting higher education students, these bills and acts *are* negatively impacting students.

2. Bostock v. Clayton County

Bostock v. Clayton County[51] remains the closest Supreme Court interpretation of "sex" under Title IX, through Title VII, available to us. Based upon the principles of statutory interpretation, "sex" under both Titles may be read with similar definitions.[52] *Bostock* comprised multiple cases of employment discrimination on the basis of sexual orientation or gender identity.[53] Clayton County, Georgia, fired Gerald Bostock for his "conduct," which consisted of participating in a gay recreational softball league.[54] Altitude Express fired Donald Zarda just days following Zarda mentioning being gay.[55] Finally, R.G. & G.R. Harris Funeral Homes fired Aimee Stephens, who presented as a male when she was hired, but later informed her employer of her intentions to "live and work full-time as a woman."[56] Each of these employees sued under Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of sex.[57] Title VII states that it is "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."[58] The Supreme Court held that "[a]n employer who fires an individual merely for being gay or transgender defies the law,"[59] thereby establishing the rule that an employer violates Title VII when it intentionally fires an employee based *in part* on the employee's sex. Additionally, "sex" includes gay or transgender individuals because discrimination based on an employee being gay or transgender still requires the employer to intentionally consider an employee's sex. Therefore, "an employer who intentionally penalizes an

[49] *Id.*
[50] *Id.*
[51] Bostock v. Clayton Cnty., 590 U.S. 644 (2020).
[52] U.S. DEP'T JUST., C.R. DIV., TITLE IX LEGAL MANUAL, https://www.justice.gov/crt/title-ix (Sept. 4, 2023) ("It is generally accepted outside the sexual harassment context that the substantive standards and policies developed under Title VII apply with equal force to employment actions brought under Title IX. . . . In many areas Title VII case law is also looked to for guidance in how to establish a Title IX violation.").
[53] *Bostock*, 590 U.S. at 653–54.
[54] *Id.* at 653.
[55] *Id.*
[56] *Id.* at 653–54.
[57] *Id.* at 654.
[58] 42 U.S.C. § 2000e–2(a)(1).
[59] *Bostock*, 590 U.S. at 683.

employee for being [gay] or transgender also violates Title VII."[60] The Court stated that intent plays an important role in discrimination;[61] in discriminating against gay or transgender employees, an employer *intends* to rely on "sex" in its decision to discriminate, which also connects sexual orientation and gender identity to "sex" under the Title VII.

The Court expands upon its ruling by outlining two principles behind discrimination under Title VII.[62] First, the Court states that how an employer views their practices is irrelevant, and when an employer fires an individual on the basis of their gay or transgender status, the employer is intentionally discriminating against that individual at least *in part* due to their sex.[63] Second, the individual's sex does not need to be the primary, or even the sole, cause of the discriminatory action.[64] Other factors aside from sex may include the employee's same-sex relationship, or their presentation as a different sex from their assigned sex.[65]

One point the Court addresses which remains relevant to Title IX is the statutory definition of "sex" versus the distinction between "sex" and "gender."[66] The employers argued that,

> discrimination on the basis of [gay] and transgender status aren't referred to as sex discrimination in ordinary conversation. If asked by a friend (rather than a judge) why they were fired, even today's plaintiffs would likely respond that it was because they were gay or transgender, not because of sex.[67]

However, the majority was unconvinced by this line of reasoning, purporting that conversational definitions of "sex" do not control Title VII's legal analysis; discrimination against gay or transgender employees intentionally applies sex-based reasoning.[68] The employers argue that sexual orientation and gender identity do not fall under the definition of "sex," and therefore remain distinct concepts, stating that if Congress meant to include sexual orientation and gender identity, they would have mentioned them specifically within Title VII.[69] The Court rejects that argument as well, as when Congress elects to establish a broad rule with no exceptions, the Supreme Court chooses how to apply said rule.[70]

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[60] *Id.* at 644.
[61] *Id.* at 659–60.
[62] *Id.*
[63] *Id.* at 660.
[64] *Id.* at 661.
[65] *Bostock*, 590 U.S. at 661.
[66] *Id.* at 655.
[67] *Id.* at 666.
[68] *Id.* at 666–67.
[69] *Id.* at 669.
[70] *Id.*

While the majority's points in *Bostock* remain promising for Title IX interpretation, the dissent, written by Justice Alito and joined by Justice Thomas, makes some troubling points.[71] The dissent highlights how neither sexual orientation nor gender identity appears in Title VII.[72] Over the years, bills have been introduced in Congress to include sexual orientation, and, more recently, gender identity.[73] However, Justice Alito notes that none of these efforts have proved fruitful.[74] The dissent also mentions Title IX in the context of women's sports, stating that the issue of transgender individuals competing on teams which align with their gender identity "has already arisen under Title IX, where it threatens to undermine one of that law's major achievements, giving young women an equal opportunity to participate in sports."[75]

Numerous Justices on the Supreme Court view transgender protections under Title IX in direct competition with the protections which it provides women.[76] The dissent states that including gender identity under Title IX will effectively force women to compete against "biological males," which puts female students at a disadvantage.[77] Justice Alito also points to housing on college campuses, as "[t]he Court's decision may lead to Title IX cases against any college that resists assigning students of the opposite biological sex as roommates."[78] Title IX allows schools to maintain "separate living facilities for the different sexes," but the *Bostock* dissent worries that this decision may be utilized to argue that transgender students must be allowed to live in whichever facility aligns with their gender identity.[79]

While the *Bostock* decision serves as a promising interpretation for transgender students under Title IX, differences between Title VII and Title IX, as the dissent highlights, may call for a different definition of "sex" under the respective statutes. Recent developments, including *Bostock*, in Title VII cases involving transgender individuals, will provide new arguments which plaintiffs may utilize in Title IX complaints,[80] but until gender identity is included in Title IX and cemented in the law, transgender students will continue to face legislative and judicial attacks on their protection in higher education.[81]

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[71] *Bostock*, 590 U.S. at 683 (Alito, J., dissenting).

[72] *Id.* at 683.

[73] *Id.* at 683–84 (citing H.R. 5, 116th Cong. (2019)).

[74] *Id.*

[75] *Id.* at 727.

[76] *See id.* at 727. *Bostock*, 590 U.S. at 791 (Kavanaugh, J., dissenting) ("The women's rights movement was not (and is not) the gay rights movement. . .").

[77] *Id.* at 727 (Alito, J., dissenting).

[78] *Id.* at 728.

[79] *Id.*

[80] *See* Erin Buzuvis, *"On the Basis of Sex": Using Title IX to Protect Transgender Students from Discrimination in Education*, 28 WIS. J. L. GENDER, & SOC'Y 219, 236 (2013).

[81] *See, e.g.*, H.R. 734, 118th Cong. (2023).

3. *Relevant case law*

Another promising case, which cites *Bostock*, examines Idaho's "Fairness in Women's Sports Act,"[82] a categorical ban on the participation of transgender women and girls in student athletics.[83] *Hecox v. Little* examined whether the Federal District Court for the District of Idaho abused its discretion by preliminarily enjoining the Act.[84] The Court of Appeals upheld the district court's decision, affirming the grant of preliminary injunctive relief.[85] Section 33-6202 of the Act set forth the "legislative findings and purpose," clarifying that the primary purpose of the law is to ban transgender women from "biologically female" teams.[86] Citing Idaho Code § 33-6202(11), the court finds that the Act explicitly targets *all* transgender women, as it states that "a man [sic] who identifies as a woman and is taking cross-sex hormones 'had an absolute advantage' over female athletes."[87] Additionally, the court noted that Representative Ehardt introduced the bill as a "preemptive" strike, allowing Idaho to "remove [transgender women] and replace them with the young gal that should have been on the team."[88] The court reasons that discrimination based on transgender status is a form of sex-based discrimination, which is subject to heightened scrutiny.[89] The court then cites *Bostock*, stating that the Supreme Court recently held, regarding Title VII, that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex."[90]

The *Hecox* court goes on to recognize that cisgender women athletes fear being ostracized from competition due to transgender athletes who "retain an insurmountable athletic advantage over cisgender women," which remains a prominent argument behind excluding transgender athletes specifically from protections under Title IX, as many view these protections as infringing on the rights which cisgender women have worked for.[91] However, the court does not decide on whether *any* restriction on transgender participation in sports violates equal protection or Title IX.[92]

Two prevalent issues regarding transgender discrimination in higher education include collegiate athletic bans and the use of facilities which remain designated by sex. The following cases outline the reasoning behind these bans well and illustrate how many jurisdictions view transgender access as a *hinderance* of Title IX, versus as a protection under the statute.

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[82] *See* Fairness in Women's Sports Act, Idaho Code §§ 33-6201–06 (2020).
[83] Hecox v. Little, 79 F.4th 1009, 1015 (9th Cir. 2023).
[84] *Id.* at 1016.
[85] *Id.*
[86] *Id.* at 1022; Idaho Code § 33-6202 (2020).
[87] *Hecox*, 79 F.4th at 1022 (alteration in original).
[88] *Id.* (alteration in original).
[89] *Id.* at 1021, 1026.
[90] *Id.* at 1026 (quoting Bostock v. Clayton Cnty., 590 U.S. 644, 660 (2020)).
[91] *Id.* at 1038–39.
[92] *Id.* at 1039.

Johnston v. Univ. of Pittsburgh,[93] held that Title IX does not prohibit discrimination based on gender identity or transgender status. Despite its subsequent rejection by *Evancho v. Pine-Richland Sch. Dist.*,[94] the court's reasoning remains essential to the current debate on transgender protections under Title IX. In *Johnston*, a transgender university student sued his university following expulsion, alleging discrimination on the basis of sex and of his transgender status, as he was prohibited from using locker rooms and restrooms which were designated for men.[95] Based upon the language of Title IX and applicable case law, the court ruled that the Plaintiff failed to state a cognizable claim for discrimination under Title IX.[96] Stating, "the University's policy of requiring students to use sex-segregated bathroom and locker room facilities based on students' natal or birth sex, rather than their gender identity, does not violate Title IX's prohibition of sex discrimination,"[97] the court cites to the language of Title IX to support its position.[98] For example, Title IX expressly calls for educational institutions to provide separate toilet, locker room and shower facilities on the basis of sex.[99] Additionally, citing 34 C.F.R. § 106.61, the regulations implementing Title IX state that nothing in the regulations "shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex."[100] Thus, this court illustrates another argument regarding how transgender protections would directly contradict Title IX rather than uphold it, which many jurisdictions utilize to justify these bans.

In a similar ruling to *Johnston, Texas v. United States*[101] held that Title IX does not prohibit discrimination based on gender identity or transgender status. Plaintiffs consisted of 13 states and agencies, as well as the Harrold Independent School District of Texas and the Heber-Overgaard Unified School District of Arizona.[102] The respective plaintiffs sued the United States Departments of Education, Justice and Labor, the Equal Employment Opportunity Commission and various agency officials, challenging the Defendants' claims that Title VII and Title IX afford all individuals a right of access to restrooms, locker rooms, showers, and other facilities which match their gender identity rather than their biological sex.[103] In May of 2016, the defendants wrote a Dear Colleague Letter on Transgender Students, instructing plaintiffs to "immediately allow students to use the bathrooms, locker rooms and showers of the student's choosing, or risk

[93] Johnston v. Univ. of Pittsburgh, 97 F. Supp. 3d 657, 674 (W.D. Pa. 2015).
[94] Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267 (W.D. Pa. 2017).
[95] *Johnston*, 97 F. Supp. 3d at 661, 663–64.
[96] *Id.* at 672.
[97] *Id.* at 672–73 (footnote omitted).
[98] *Id.* at 673.
[99] *Id.* at 678; 34 C.F.R § 106.33 (2024).
[100] *Johnston*, 97 F. Supp. 3d at 678.
[101] Texas v. United States, 201 F. Supp. 3d 810 (N.D. Tex. 2016).
[102] *Id.* at 815.
[103] *Id.* at 815–16.

losing Title IX-linked funding."[104] The Plaintiffs asserted that Defendants' definition of "sex" as applied to Title IX, in addition to Title VII, was an unlawful interpretation.[105] The Defendants alleged that the Guidelines consisted of valid interpretations, because although Title IX and § 106.33[106] provide that federal recipients may provide separate, comparable facilities, the regulation and statute "do not address how they apply when a transgender student seeks to use those facilities."[107] The court sided with the plaintiffs, concluding that § 106.33 is not ambiguous, and that "it cannot be disputed that the plain meaning of the term sex as used in § 106.33 when it was enacted by DOE following passage of Title IX meant the biological and anatomical differences between male and female students as determined at their birth."[108] Based on its interpretations of Title IX and § 106.33, the court granted the Plaintiff's application for a preliminary injunction.[109] Therefore, the defendants were enjoined from enforcing the Guidelines against the plaintiffs.[110]

Relevant case law regarding the inclusion of gender identity under Title IX consists of both positive and negative holdings, and both illustrate that gender identity protections remain a fiercely debated and important discussion. Additionally, these cases purport that, under the umbrella of transgender protections within Title IX, there are multiple, complicated avenues of protection which require attention. From intimate facility access to athletics to basic discrimination and harassment, transgender individuals are facing numerous attacks, all of which compel different protections and solutions. Due to the complications associated with protecting transgender students, a particularly vulnerable population, from discrimination within higher education, Title IX must be amended to read not only "gender identity" along with "sex" under the statute, but must also include steps and guidelines for instituting these specific protections.

4. *Why amend Title IX?*

Based upon cases such as *Bostock* and positive legislative or judicial efforts towards the inclusion of gender identity under Title IX, many may argue that Title IX need not be amended. However, based upon the complexities surrounding the protection of transgender individuals, especially those struggling through college or university, courts and higher educational institutions *require* specific definitions and guidelines outlining their responsibilities to these students within a concrete law. As we have

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[104] *Id.* at 816.

[105] *Id.*

[106] 34 C.F.R. § 106.33 (2024) ("A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.").

[107] *Texas*, 201 F. Supp. 3d at 824.

[108] *Id.* at 833–34.

[109] *Id.* at 836.

[110] *Id.*

seen through the relevant case law, in addition to recent legislative efforts, transgender students remain under attack, and, due to Title IX's ambiguity, challenging discriminatory practices of higher education institutions has proved difficult. Whether arguing against discrimination regarding intimate facilities, athletics or harassment based upon gender identity, the institutions hearing these challenges must have the ability to look to Title IX and see clearly an avenue for relief. Transgender students should not have to argue that their discrimination is covered under Title IX *in addition* to proving they were discriminated against based on their status. Therefore, Title IX must be amended to read "on the basis of sex, sexual orientation and gender identity, including transgender status." Additionally, further guidelines must be published to outline rules regarding intimate facilities, athletics and general discrimination within educational institutions.

Numerous prominent organizations, including the Women's Sports Foundation, have called for similar guidelines.[111] The Women's Sports Foundation, founded by Billie Jean King, acknowledges that the Equal Protection Clause and Title IX's prohibitions against sex discrimination have both been interpreted by state and federal courts to include discrimination based upon gender identity, encompassing transgender athletes.[112] The organization also acknowledges that, if transition occurs prior to puberty, the transitioning student should be "treated as any other competitor in girls' or women's sports."[113] Additionally, when a student transitions after puberty, "medical experts increasingly agree that the effects of taking female hormones negate any strength and muscular advantage that testosterone may have provided and places a male-to-female transgender athlete who has completed her transition in the same general range of strength and performance exhibited by non-transgender females who are competing."[114] Therefore, the Women's Sports Foundation calls for clear and reasonable criteria for determining a transgender student-athlete's eligibility to compete, which must be based on recent, expert legal and medical knowledge about the effects of gender transition on athletic performance.[115] This criterion serves as just one example of possible supplemental guidelines to Title IX regarding collegiate athletics, and other recent data also supports an amendment to Title IX under the issue of intimate facility access.

In a 2018 study, researchers responded to opponents of gender identity inclusive intimate facilities, who often cite "fear of safety and privacy

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[111] WOMEN'S SPORTS FOUND., PARTICIPATION OF TRANSGENDER ATHLETES IN WOMEN'S SPORTS 1, 4–5 (2023), https://www.womenssportsfoundation.org/wp-content/uploads/2016/08/participation-of-transgender-athletes-in-womens-sports-the-foundation-position.pdf.

[112] *Id.* at 2.

[113] *Id.* at 3.

[114] *Id.*

[115] *Id.* at 4.

violations" as arguments against inclusivity.[116] The study presents findings from matched pairs analyses of localities in Massachusetts, both with and without gender identity inclusive intimate facilities.[117] The utilized data emerges from public record requests of criminal incident reports related to assault, sex crimes, and voyeurism in public restrooms, locker rooms, and dressing rooms, which are used as measurements of safety and privacy violations.[118] Researchers found no relation between the passage of inclusive laws and the number or frequency of criminal incidents within these intimate spaces;[119] the inclusion of "gender identity inclusive public accommodations nondiscrimination ordinances" (GIPANDOs) had little relationship with victimization rates.[120] This study further supports the need for an amendment to Title IX, as a primary argument against inclusion of gender identity remains that opening intimate spaces to transgender individuals promotes victimization of women.[121] Not only are opposing arguments to inclusion unfounded, but courts and public policy debates have utilized and promoted these same arguments.[122] Therefore, Title IX must include specific guidelines on intimate facilities, which largely affect college students, in response to these unfounded accusations.

Finally, the most pressing and essential argument for an amendment to Title IX is that transgender higher education students remain particularly vulnerable to harassment. According to a survey on the relationship between transgender students' access to college bathrooms or housing and suicidality, researchers report that transgender and gender non-conforming people regularly face discrimination, harassment, and marginalization across college and university campuses.[123] Using the National Transgender Discrimination Survey (NTDS),[124] this 2016 study analyzed the correlation between denial of access to intimate facilities and lifetime suicide attempts, and findings indicated a significant, positive correlation.[125] Researchers reported that denial of access based upon gender identity remains a statistically significant predictor of lifetime suicide attempts, which suggests a relationship between the stress associated with discriminatory practices regarding access to intimate facilities and adverse effects on the mental

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[116] Amira Hasenbush, *Gender Identity Nondiscrimination Laws in Public Accommodations: A Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms*, 16 SEXUALITY RSCH. & SOC. POL'Y 70, 70 (2019).

[117] *Id.*

[118] *Id.*

[119] *Id.* at 80.

[120] *Id.* at 77.

[121] *See generally* David B. Cruz, *Making Sex Matter: Common Restrooms as "Intimate" Spaces?*, 40 MINN. J. L. & INEQ. 99 (2022).

[122] *Id.*

[123] Kristie L. Seelman, *Transgender Adults' Access to College Bathrooms and Housing and the Relationship to Suicidality*, 63 J. HOMOSEXUALITY 1378, 1378 (2016).

[124] *Id.* at 1390 ("The NTDS data indicate that a sizeable portion of trans* people continue to face a multitude of interpersonal stressors in college, as nearly one third of this sample had experienced harassment, bullying, or physical or sexual assault by other students, and 13.8% had experienced such victimization at the hands of teachers or staff in college or graduate school.").

[125] *Id.*

health of transgender college students.[126] Transgender college students have suffered enough under the current higher education regime, which must serve as a catalyst behind an amendment to Title IX to include both protections and guidelines affirming said protections regarding not only access to intimate facilities, but to general discrimination as well.

CONCLUSION

For the aforementioned reasons, judicial decisions and state legislation are not enough to provide transgender college students the protections that they desperately need considering the current public and political climate. Any action aside from an amendment to Title IX, along with corresponding guidelines, will likely fail to cover all of the necessary protections for transgender individuals, or will vary across states, which remains unfair to transgender individuals nationwide.

Absent judicial decisions or state legislation, Title IX does not expressly prohibit discrimination against transgender students.[127] This assertion means that, without an amendment to its language, the interpretation of Title IX remains subject to change and ongoing litigation. In order for Title IX to serve an effective purpose for transgender students, access to this defense against discrimination must not only be available to transgender students specifically but must be reasonably accessible. Transgender students should not have to argue, in addition to proving discrimination, that they are included under Title IX's protections every time these incidents reach litigation. Instead, Title IX should read as inclusive of transgender individuals at all levels of education, with a list of supplemental guidelines outlining rules regarding access to intimate facilities, participation in athletics and harassment, among other areas of concern. All of these reasons for protection require different arguments and different guidelines, which is why one Supreme Court ruling or one piece of state legislation cannot and will not cover every necessary protection. Title IX's protections must extend to transgender individuals based on gender identity at the *federal* level, through a nearly un-revocable and concrete source of law, which may be achieved simply by focusing our efforts on calling for an amendment to Title IX.

[126] *Id.* at 1386–87.
[127] Buzuvis, *supra* note 80, at 220.

A Public Health Law Response to Gender-Affirming Care Bans

JENNIFER LOGAN*

INTRODUCTION

Anti-LGBTQ+ legislation is surging across the United States, with over 500 bills introduced across 49 states this year targeting healthcare access, school sports, drag, and bathrooms.[1] This uptick reflects resistance to changing societal norms with respect to gender identity, along with scientific disinformation. Many of these bills ban access to gender-affirming care for minors, imposing harsh sanctions on medical professionals who comply with recognized standards of care. In September 2023, the Sixth Circuit Court of Appeals upheld Tennessee and Kentucky bans on gender-affirming care for minors.[2] The Sixth Circuit ruling in particular has created a split in decisions among circuit courts, making a future Supreme Court reckoning on the issue likely.[3] Such bans on gender-affirming care are likely to have disastrous effects on transgender youths' physical and mental health outcomes.[4] Transgender minors in the United States experience significant health disparities and are far more likely than their cis-gender counterparts to experience mental health challenges such as depression, anxiety, self-harm, and suicidality.[5] Gender-affirming care for minors serves as an evidence-based mental health intervention for individuals whose gender does not match their sex-assigned-at-birth.[6] This paper will describe the scope of the issue by drawing on public health disciplines and specifically a social determinants of health approach to exemplify health disparities among transgender adolescents. This paper will then analyze the Sixth Circuit Court of Appeals decision in *L.W. v. Skrmetti*, and frame both the equal protection and due process arguments. The paper will then propose short-term solutions to this public mental health crisis. This analysis will draw on public health principles for those on the ground in states that have upheld gender-

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[1] *Mapping Attacks on LGBTQ Rights in State Legislatures*, ACLU (Mar. 1, 2024), https://www.aclu.org/legislative-attacks-on-lgbtq-rights.

[2] L.W. v. Skrmetti, 83 F.4th 460, 491 (6th Cir. 2023).

[3] Mary Anne Pazanowski, *Gender-Affirming Care Ruling Could Force Supreme Court Reckoning*, BL, (Sept. 29, 2023, 2:54 PM), https://news.bloomberglaw.com/us-law-week/gender-affirming-care-ruling-could-force-supreme-court-reckoning?context=search&index=9.

[4] Susan Jaffe, *More US States Ban Teenagers' Gender-Affirming Care*, 402 LANCET 839 (2023).

[5] Jason Rafferty, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, 142 PEDIATRICS 1, 3 (2018) [hereinafter Rafferty].

[6] *Id.* at 4.

affirming care bans and will identify practical tools that could serve as guidance in the wake of a Supreme Court ruling that upholds the Sixth Circuit's decision. In the face of gender-affirming care bans, public health approaches are necessary to (1) reduce harm among the trans minor population in the short term, and (2) implement evidence-based policy for a long-term solution.

I. BACKGROUND

A. *Gender-Affirming Care as an Evidence-Based Intervention for Transgender and Nonbinary Youth*

Transgender and nonbinary children experience significant mental health disparities compared to cisgender children, including increased rates of depression, anxiety, and suicidality.[7] Youths who identify as transgender often also experience gender dysphoria, "a clinical symptom that is characterized by a sense of alienation to some or all of the physical characteristics or social roles of one's assigned gender."[8] Gender dysphoria is a psychiatric diagnosis in the DSM-5, which encompasses "distress that stems from the incongruence between one's expressed or experienced (affirmed) gender and the gender assigned at birth."[9] Such mental health challenges are multifaceted and compounded by other social determinants of health. Social determinants of health are defined by the World Health Organization as "the non-medical factors that influence health outcomes."[10] Transgender children's mental health outcomes are specifically compounded by stigma, discrimination, and social rejection.[11] Furthermore, this population also experiences disproportionately high rates of homelessness, physical violence, and substance use, which can result in a cycle of stigma, discrimination, and mental health inequities.[12]

Gender-affirming care is defined by the World Health Organization as "any single or combination of a number of social, psychological, behavioural or medical (including hormonal treatment or surgery) interventions designed to support and affirm an individual's gender identity."[13] Gender-affirming care includes gonadotropin-releasing hormone analogs ("puberty blockers") and gender-affirming hormone therapy

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[7] Diana M. Tordoff, Jonathon W. Wanta, Arin Collin, Cesalie Stepney, David J. Inwards-Breland, & Kym Ahrens, *Mental Health Outcomes in Transgender and Nonbinary Youths Receiving Gender-Affirming Care*, JAMA NETWORK OPEN, Feb. 25, 2022, at 2 [hereinafter Tordoff].

[8] Rafferty, *supra* note 5, at 2.

[9] *Id.*

[10] *Social Determinants of Health*, WORLD HEALTH ORG., https://www.who.int/health-topics/social-determinants-of-health#tab=tab_1 (last visited Mar. 6, 2024).

[11] Rafferty, *supra* note 5, at 3.

[12] *Id.*

[13] *Gender Incongruence and Transgender Health in the ICD*, WORLD HEALTH ORG., https://www.who.int/standards/classifications/frequently-asked-questions/gender-incongruence-and-transgender-health-in-the-icd (last visited Mar. 6, 2024).

(GAHT).[14] Puberty blockers postpone the body's physical changes as a result of puberty, and GAHT is used in order to align physical attributes with gender identity.[15] For transgender adolescents, this gender-affirming care often serves as life-saving mental healthcare. One study of transgender and nonbinary youths aged 13 to 20 years reported a 60% lower odds of depression and a 73% lower odds of suicidal ideation within the first year of receiving gender-affirming care.[16] The research demonstrates that gender-affirming care serves as an evidence-based means of reducing mental health disparities among transgender youth. Furthermore, access to gender-affirming care not only lowers the risk of depression and suicidality among trans adolescents, but drastically improves self-esteem and well-being.[17]

While access to gender-affirming care is correlated with decreased levels of depression and suicidality, the opposite is also true. The restriction of gender-affirming care can lead to worse mental health outcomes not only by limiting access to medication itself, but also by "increasing minority stress through negative public attention and harmful rhetoric debating the rights of transgender and nonbinary youth to live their lives authentically."[18]

The World Professional Association for Transgender Health (WPATH) produces Standards of Care (SOC) for the Health of Transgender and Gender Diverse People.[19] WPATH SOC are based on scientific and professional consensus and are designed to provide recommendations for health professionals in the care of transgender and gender diverse people.[20] The decision to obtain gender-affirming medical treatment is not one made lightly, and involves a variety of considerations. The guidelines note that

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[14] Amy E. Green, Jonah P. DeChants, Myeshia N. Price, & Carrie K. Davis, *Association of Gender-Affirming Hormone Therapy with Depression, Thoughts of Suicide, and Attempted Suicide Among Transgender and Nonbinary Youth*, 70 J. ADOLESCENT HEALTH 643, 644 (2022) [hereinafter Green].

[15] *Id.*

[16] Tordoff, *supra* note 7, at 7.

[17] Jay Lau, *Fighting for Gender-Affirming Care*, HARV. T.H. CHAN SCH. OF PUB. HEALTH (June 28, 2023), https://www.hsph.harvard.edu/news/features/fighting-for-gender-affirming-care/.

[18] Green, *supra* note 14, at 648.

[19] E. Coleman A. E. Radix, W. P. Bouman, G. R. Brown, A. L. C. de Vries, M. B. Deutsch, R. Ettner, L. Fraser, M. Goodman, J. Green, A. B. Hancock, T. W. Johnson, D. H. Karasic, G. A. Knudson, S. F. Leibowitz, H. F. L. Meyer-Bahlburg, S. J. Monstrey, J. Motmans, L. Nahata, T. O. Nieder, S. L. Reisner, C. Richards, L. S. Schechter, V. Tangpricha, A. C. Tishelman, M. A. A. Van Trotsenburg, S. Winter, K. Ducheny, N. J. Adams, T. M. Adrián, L. R. Allen, D. Azul, H. Bagga, K. Başar, D. S. Bathory, J. J. Belinky, D. R. Berg, J. U. Berli, R. O. Bluebond-Langner, M.B. Bouman, M. L. Bowers, P. J. Brassard, J. Byrne, L. Capitán, C. J. Cargill, J. M. Carswell, S. C. Chang, G. Chelvakumar, T. Corneil, K. B. Dalke, G. De Cuypere, E. de Vries, M. Den Heijer, A. H. Devor, C. Dhejne, A. D'Marco, E. K. Edmiston, L. Edwards-Leeper, R. Ehrbar, D. Ehrensaft, J. Eisfeld, E. Elaut, L. Erickson-Schroth, J. L. Feldman, A. D. Fisher, M. M. Garcia, L. Gijs, S. E. Green, B. P. Hall, T. L. D. Hardy, M. S. Irwig, L. A. Jacobs, A. C. Janssen, K. Johnson, D. T. Klink, B. P. C. Kreukels, L. E. Kuper, E. J. Kvach, M. A. Malouf, R. Massey, T. Mazur, C. McLachlan, S. D. Morrison, S. W. Mosser, P. M. Neira, U. Nygren, J. M. Oates, J. Obedin-Maliver, G. Pagkalos, J. Patton, N. Phanuphak, K. Rachlin, T. Reed, G. N. Rider, J. Ristori, S. Robbins-Cherry, S. A. Roberts, K. A. Rodriguez-Wallberg, S. M. Rosenthal, K. Sabir, J. D. Safer, A. I. Scheim, L. J. Seal, T. J. Sehoole, K. Spencer, C. St. Amand, T. D. Steensma, J. F. Strang, G. B. Taylor, K. Tilleman, G. G. T'Sjoen, L. N. Vala, N. M. Van Mello, J. F. Veale, J. A. Vencill, B. Vincent, L. M. Wesp, M. A. West & J. Arcelus, *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 INT'L J. TRANSGENDER HEALTH 1, 3 (2022) [hereinafter E. Coleman].

[20] *Id.* at 5.

adolescents seeking gender-affirming medical treatment benefit from a multi-disciplined team of healthcare providers, including pediatric primary care, endocrinology, psychology, and social work.[21] The guidelines note that healthcare professionals should only recommend gender-affirming medical treatment to those adolescent patients who meet specific criteria, including the diagnostic criteria of gender incongruence that is sustained over time.[22] The adolescent seeking medical gender-affirming care must also demonstrate emotional and cognitive maturity, and must be informed of the potential reproductive health effects.[23] The SOC for gender diverse children are more conservative compared to the SOC for adolescents, as prepubescent gender diverse children are ineligible for medical intervention.[24] Care for children in this context is typically limited to psychosocial support.

B. L.W. v. Skrmetti: *Lower Court Decisions*

1. *Tennessee ban on gender-affirming care*

In March 2023, Tennessee enacted the Prohibition on Medical Procedures Performed on Minors Related to Sexual Identity.[25] The Tennessee law is one of many anti-trans bills introduced by state legislatures targeting healthcare access, and prohibits:

> medical procedures from being administered to or performed on minors when the purpose of the medical procedure is to: (1) Enable a minor to identify with, or live as, a purported identity inconsistent with the minor's sex; or (2) Treat purported discomfort or distress from a discordance between the minor's sex and asserted identity.[26]

In banning gender-affirming care for minors, the law purports that Tennessee:

> [H]as a legitimate, substantial, and compelling interest in protecting minors from physical and emotional harm. This state has a legitimate, substantial, and compelling interest in promoting the dignity of minors. This state has a legitimate, substantial, and compelling interest in encouraging minors to appreciate their sex, particularly as they undergo puberty. This state has a legitimate, substantial, and compelling

[21] *Id.* at 56.
[22] *Id.* at 48 tbl.1, 6.12–6.12.g.
[23] *Id.* at 48 tbl.1, 6.12.c.
[24] *See id.* at 67.
[25] TENN. CODE ANN. § 68-33-101 (West 2023).
[26] *Id.* § 68-33-101(n)(1)–(2).

> interest in protecting the integrity of the medical profession, including by prohibiting medical procedures that are harmful, unethical, immoral, experimental, or unsupported by high-quality or long-term studies, or that might encourage minors to become disdainful of their sex.[27]

The law also creates both a private and state right of action against healthcare providers for violation of the statute:

> The attorney general and reporter may bring an action against a healthcare provider or any person that knowingly violates this chapter, within twenty (20) years of the violation, to enjoin further violations, to disgorge any profits received due to the medical procedure, and to recover a civil penalty of twenty-five thousand dollars ($25,000) per violation.[28]

Like other anti-LGBTQ+ laws across the country, the Tennessee law is rooted in the legislature's role "to protect the health and welfare of minors,"[29] indicating an intention to exert control over children in response to moral panic surrounding gender identity and changing youth norms.[30] Three transgender minors and their parents sued Tennessee to block the ban on gender-affirming care.[31] The District Court for the Middle District of Tennessee granted the plaintiffs' motion for a preliminary injunction, and found a strong likelihood of success on the merits with respect to the plaintiffs' due process and equal protection claims.[32]

2. *Kentucky ban on gender-affirming care*

In March 2023, the Kentucky General Assembly passed "An Act Relating to Children."[33] Like the Tennessee law, the Kentucky statute prohibits healthcare providers from "prescrib[ing] or administer[ing] any drug to delay or stop normal puberty."[34] Although such treatment comports with medical standards of care, if a healthcare provider violates the statute, respective regulatory agencies are directed to revoke that provider's

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[27] *Id.* § 68-33-101(m).
[28] *Id.* at § 68-33-106(b).
[29] *Id.* at § 68-33-101(a).
[30] *See* Chris Pepin-Neff, Opinion, *Anti-Trans Moral Panics Endanger All Young People*, SCI. AMERICAN (May 19, 2023), https://www.scientificamerican.com/article/anti-trans-moral-panics-endanger-all-young-people/.
[31] L.W. v. Skrmetti, 83 F.4th 460, 469 (6th Cir. 2023).
[32] L.W. v. Skrmetti, No. 3:23-CV-00376, 2023 WL 4232308, at *36 (M.D. Tenn. June 28, 2023), *rev'd*, 83 F.4th 460 (6th Cir. 2023).
[33] KY. REV. STAT. ANN. § 311.372 (LexisNexis 2023).
[34] *Id.* § 311.372(2)(a).

license.[35] Several transgender minors and their parents sued Kentucky state officials for the violation of their constitutional rights guaranteed by the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.[36] In June 2023, the District Court for the Western District of Kentucky granted the plaintiffs' motion for preliminary injunction, finding that "the treatments barred by SB150 are medically appropriate and necessary for some transgender children under the evidence-based standard of care accepted by all major medical organizations in the United States."[37] The district court applied a heightened level of scrutiny to the plaintiffs' equal protection claim, ruling that the discriminatory classifications embodied in the Kentucky law did not serve important government interests and were not substantially related to the government's objectives.[38] The court also found that the plaintiffs had a strong likelihood of success on their due-process claim because the bans likely violated parents' fundamental right to direct the medical care of their children.[39] The plaintiffs in both the Tennessee and Kentucky lawsuits sought preliminary injunctions on equal protection and due process grounds. Specifically, they argued that the laws discriminate on the basis of sex and transgender status in violation of the equal protection clause and deprive parents of their fundamental right to make medical decisions for their children in violation of the due process clause.[40] Following the district court decisions granting preliminary injunctions, Kentucky and Tennessee respectively appealed and moved for stays of the injunctions. The Sixth Circuit stayed the injunctions in both cases pending appeal.[41]

The Sixth Circuit consolidated the two appeals and ultimately reversed both district courts' preliminary injunctions, with a dissenting opinion filed by Judge White.[42] A majority of the appellate panel found no constitutional violation with respect to the plaintiffs' equal protection and due process claims. Instead, the court reasoned that the plaintiffs sought to extend constitutional guarantees to "new territory" that is better left to the discretion of state legislatures.[43] The court did not subject the Kentucky and Tennessee laws to heightened scrutiny, and instead applied rational basis review in upholding them.[44] In doing so, the Sixth Circuit disregarded long standing legal precedent and accepted medical standards of care.

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[35] *Id.* § 311.372(4).

[36] *L.W.*, 83 F.4th at 470.

[37] Doe v. Thornbury, No. 3:23-CV-230-DJH, 2023 WL 4230481, at *2 (W.D. Ky. June 28, 2023), *abrogated by* L.W. v. Skrmetti, 83 F.4th 460 (6th Cir. 2023).

[38] *Id.* at *5.

[39] *Id.* at *6.

[40] *L.W.*, 83 F.4th at 497 (White, J., dissenting).

[41] *Sixth Circuit Allows Tennessee's Ban on Care for Transgender Youth to Take Effect*, ACLU (July 8, 2023), https://www.aclu.org/press-releases/sixth-circuit-allows-tennessees-ban-on-care-for-transgender-youth-to-take-effect.

[42] *L.W.*, 83 F.4th at 470, 491.

[43] *Id.* at 471–72.

[44] *Id.* at 489 (holding that "[p]lenty of rational bases exist for these laws, with or without evidence").

II. EVALUATION OF THE SIXTH CIRCUIT'S DUE PROCESS AND EQUAL PROTECTION ANALYSIS

A. *Due Process*

The Due Process Clause of the Fourteenth Amendment provides that "No State shall . . . deprive any person of life, liberty, or property, without due process of law."[45] The Due Process Clause extends heightened constitutional protection "against government interference with certain fundamental rights and liberty interests."[46] Such fundamental rights include those that are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[47] The Supreme Court has long recognized a "private realm of family life which the State cannot enter."[48] Such parental autonomy is sacred in this nation's history, and is reflected in its jurisprudence.[49] The Supreme Court has included parents' rights "concerning the care, custody, and control of their children" among such fundamental rights requiring heightened protection from governmental interference.[50]

The Supreme Court in *Parham v. J.R.* held that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments."[51] The *Parham* Court recognized that parents are best equipped to recognize what is best for their children, noting that "[o]ur jurisprudence historically has reflected Western civilization concept of the family as a unit with broad parental authority over minor children."[52]

While courts have extended this fundamental right of parents to direct the upbringing of their children to the medical context[53] the Sixth Circuit holds that there is no deeply rooted tradition of "preventing governments from regulating the medical profession in general or certain treatments in

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[45] U.S. CONST. amend. XIV, § 1.

[46] Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

[47] *Id.* at 721 (quoting Palko v. Connecticut, 302 U.S. 319 (1969)).

[48] Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) (holding that there is a right to a zone of privacy and autonomy in family matters under the due process clause, requiring heightened scrutiny for government infringement).

[49] *See* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (holding that an Oregon law mandating every child to attend public school infringed on parental choice to make decisions regarding their children's education); *see also* Meyer v. Nebraska, 262 U.S. 390 (1923) (noting that a Nebraska law prohibiting the teaching of foreign languages to children before eighth grade implicated parental rights to control their children's education).

[50] Troxel v. Granville, 530 U.S. 57, 66 (2000).

[51] Parham v. J.R., 442 U.S. 584, 603 (1979).

[52] *Id.* at 602.

[53] *See id.* at 603 ("The same characterizations can be made for a tonsillectomy, appendectomy, or other medical procedure."); *see also* Kanuszewski v. Michigan Dep't of Health & Hum. Servs., 927 F.3d 396, 418 (6th Cir. 2019) (holding that the defendant's storage of children's blood without parental consent following disease screening violated parental fundamental rights, and that "[p]arents possess a fundamental right to make decisions concerning the medical care of their children.").

particular, whether for adults or their children."[54] In focusing the inquiry on states' rights to regulate medicine, the court justifies application of rational basis review. Yet the issue with these bans, which override parents' decisions about consenting for their children to healthcare that the medical profession supports, is more accurately a question of a parent's fundamental right to direct the upbringing of their children as opposed to the government's role in regulating medical treatments. When framed as the former, the analysis requires strict scrutiny. While the majority recognizes the essential role of parents in directing the upbringing of their children, the court nonetheless partakes in parental rights cherry-picking, asserting that the claimants "overstate the parental right by climbing up the ladder of generality to a perch—in which parents control all drug and other medical treatments for their children."[55]

To be sure, parental autonomy is not absolute and cannot prevail in all contexts. As the Supreme Court noted in *Prince v. Massachusetts*, parental rights are not beyond regulation in the name of public interest, and the state has a duty to protect minor children under the doctrine of parens patriae.[56] In certain circumstances, the doctrine allows the state to intervene and undertake parental responsibilities to promote the child's wellbeing, but there must be a compelling reason for such intervention.[57] If the state does not provide such a showing, then governmental interference constitutes a parental due process violation under the Fourteenth Amendment.[58] In other words, the right to parental autonomy can be infringed only when a more important state interest is being protected.[59] Typically, such state interventions into the parent-child relationship are reserved only for cases involving child neglect or abuse.[60]

Particularly in the context of medical decision making, "[t]he statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition."[61] The greater the infringement on parental autonomy, the greater the state justification needs to be. To pass constitutional muster, the law must be narrowly tailored to achieve a compelling government interest, and the government has the burden to prove this means-end fit.[62] The Tennessee and Kentucky laws do not comport with Supreme Court

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[54] L.W. v. Skrmetti, 83 F.4th 460, 473 (6th Cir. 2023).

[55] *Id.* at 475.

[56] Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (holding that Prince, a Jehovah's Witness, violated state child labor laws in allowing a child in her custody to pass out religious literature into the evening).

[57] Elchanan G. Stern, *Parens Patriae and Parental Rights: When Should the State Override Parental Medical Decisions?*, 33 J. L. & HEALTH 79, 91 (2019).

[58] *Id.* at 92.

[59] *Prince*, 321 U.S. at 165 ("To make accommodation between these freedoms and an exercise of state authority always is delicate.").

[60] Parham v. J.R., 442 U.S. 584, 604 (1979) (noting that parents retain a traditional interest and responsibility in the upbringing of their children "absent a finding of neglect or abuse").

[61] *Id.* at 603.

[62] Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

precedent on parental rights since they unreasonably allow state intervention into an unauthorized realm of parental decision making. The *L.W.* majority contends that while parents have a fundamental right to direct the upbringing of their children, "becoming a parent does not create a right to reject democratically enacted laws."[63] However, when such laws infringe on parental autonomy without a compelling government interest, parental rights should prevail.

It is important to note that in some situations, parental control of a child or adolescent's decision-making is not always in alignment with the minor's wishes or in the best interest of the minor. The *Parham* case illustrates this idea, as the plaintiffs were children voluntarily committed to a Georgia state mental hospital.[64] The commitment proceedings were initiated by the children's parents, and the children claimed that such procedures violated their due process rights.[65] In recognizing parental authority to make such decisions, the *Parham* Court stated: "Simply because the decision of a parent is not agreeable to a child or because it involves risk does not automatically transfer the power to make that decision from the parents to some . . . officer of the state."[66] In the context of voluntary commitments, the Court concluded that parents retain "a substantial, if not the dominant, role in the decision."[67]

The *Parham* decision illuminates the double-edged sword of near-absolute parental control over minor children. While parental rights may serve as one key constitutional basis for a minor's access to gender-affirming care, this same parental control can in other contexts dampen children's expressive freedom or limit exposure to ideas.[68] The *Parham* case operated under the idyllic presumption that parents always act in the best interest of their children.[69] Advocating for strong parental rights, particularly in the context of LGBTQ+ rights, is a somewhat fraught task. Gender-affirming care is unique in that parental consent is the only means for minors to receive the care they need. Frequently, however, LGBTQ+ minors face a lack of parental support, which can lead to high rates of homelessness and other negative health outcomes.[70]

Furthermore, judicial restraint in the area of parental decision-making and deference to parental rights can hinder other public health and health policy goals. This idea was reiterated during the Covid-19 pandemic,

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[63] L.W. v. Skrmetti, 83 F.4th 460, 475 (6th Cir. 2023).
[64] *Parham*, 442 U.S. at 587.
[65] *Id.* at 588.
[66] *Id.* at 603.
[67] *Id.* at 604.
[68] Anne C. Dailey, *In Loco Reipublicae*, 133 YALE L.J. 419, 442 (2023).
[69] *Id.* at 438 ("The most important constitutional doctrine affecting children is not children's right to liberty or procedural justice or any other right held by children themselves; the most important constitutional doctrine affecting children is the Constitution's broad protection for the rights of their *parents*.").
[70] *Homelessness and Housing Instability Among LGBTQ Youth*, THE TREVOR PROJECT, https://www.thetrevorproject.org/wp-content/uploads/2022/02/Trevor-Project-Homelessness-Report.pdf.

particularly with respect to mask mandates and vaccines. In this context, parental rights became a weapon to combat policies aimed at protecting the public's health. Such rhetoric is rampant: following a September 2023 Maryland elementary school mask mandate, Senator Ted Cruz tweeted, "[i]f you want to voluntarily wear a mask, fine, but leave our kids the hell alone."[71] This same pretext also exists in education, as House Republicans recently passed the "Parents Bill of Rights Act," which would give parents the right to inspect their children's school curricula, school budgets, and library books.[72] Importantly, the bill would also require elementary schools to obtain parental consent before altering any student's pronouns or preferred name.[73] In the context of gender-affirming care, this protection of parental rights falls away, making room for the furtherance of anti-LGBTQ+ legislation. While these bans are part of a culture-war directed at transgender youth, they are also about a larger-scale preservation of social norms, along with the exertion of power and control over children as a whole.[74]

While this paper argues against state bans on gender-affirming care, this is not to say there is no place for state experimentation in the area of parental rights and family law. The states' power to regulate in the areas of public health, education, and family law have long been respected.[75] There can (and should) be a place for this experimentation on the local level, as "state sovereignty over family law serves to diffuse governmental power over the formation of individual values and moral aspirations," protecting diversity among our citizenry.[76] But state legislatures cannot have unchecked discretion to violate constitutional principles with the purpose of undermining such expressions of individuality.

As Judge White reiterates in her *L.W.* dissent, the right of parents to control their children's medical choices is a right deeply rooted in our nation's history.[77] The purported rationales of the Tennessee and Kentucky laws, including the "compelling interest in encouraging minors to appreciate their sex, particularly as they undergo puberty,"[78] fly in the face of longstanding precedent that the state cannot standardize its children.[79] This ideal extends to education, religion, and the very most sacred and private aspects of family life. The court's willing departure from this principle is representative of rampant moral panic aimed at youth control under the guise of protection. The decision to undergo gender-affirming medical treatment

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[71] Hannah Natanson, Fenit Nirappil, & Maegan Vazquez, *A Few Schools Mandated Masks. Conservatives Hit Back Hard.*, WASH. POST https://www.washingtonpost.com/education/2023/09/06/school-mask-mandate-politics/ (last updated Sept. 7, 2023).

[72] Parents Bill of Rights Act, H.R. 5, 118th Cong. (2023).

[73] *Id.*

[74] Pepin-Neff, *supra* note 30.

[75] Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1791 (1995).

[76] *Id.* at 1872.

[77] L.W. v. Skrmetti, 83 F.4th 460 (6th Cir. 2023) (White, J., dissenting).

[78] TENN. CODE ANN. § 68-33-101(m) (West 2023).

[79] Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

should be encompassed in this realm of family autonomy. The majority claims that upholding the district court's decision would result in numerous line-drawing exercises that are better suited for the legislature. However, the court partakes in its own line-drawing exercise, trampling on established family and constitutional law doctrines requiring heightened scrutiny for infringement on parental autonomy.

B. *Equal Protection*

The Equal Protection Clause of the Fourteenth Amendment prohibits any state from denying "any person within its jurisdiction the equal protection of the laws."[80] A court's equal protection analysis is dependent on the type of classification at issue. Suspect classifications including race, religion, and national origin require the most stringent review.[81] In such cases a court would apply strict scrutiny, requiring that the law be narrowly tailored to achieve a compelling government interest.[82] For quasi-suspect classifications such as sex and gender, courts apply an intermediate scrutiny, requiring the law to be substantially related to an important government interest.[83] When there is no suspect or quasi-suspect classification at issue, a court applies rational basis review. This standard of review is extremely deferential to the legislature, requiring that the law only be rationally related to a legitimate government interest.[84]

The Sixth Circuit should have applied heightened scrutiny to the Tennessee and Kentucky laws since they discriminate on the basis of sex and gender. Laws that facially classify on the basis of sex or gender are subject to heightened scrutiny under the Equal Protection Clause.[85] The Tennessee and Kentucky laws at issue "reference a minor's sex and gender conformity . . . and use these factors to determine the legality of the procedures."[86] Since the laws facially classify on the basis of sex, the test then becomes a means-end fit as to whether the law is substantially related to an important government interest. While the majority recognizes that laws based on sex typically receive heightened review, the court nonetheless applies rational basis to its equal protection analysis.[87] In doing so, the court argues that since the laws limit access to gender-affirming care treatments for all minors, there are no "traditional equal-protection concerns."[88]

However, the court rejects the principle that all sex-based classifications warrant heightened scrutiny, even when applied to both sexes

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[80] U.S. CONST. amend. XIV, § 1.
[81] Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985).
[82] *Id.*
[83] Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723–24 (1982).
[84] Plyler v. Doe, 457 U.S. 202, 216 (1982).
[85] Reed v. Reed, 404 U.S. 71, 75 (1971).
[86] L.W. v. Skrmetti, 83 F.4th 460, 502 (6th Cir. 2023).
[87] *Id.* at 480 (stating that "[sex] classification, it is true, receives heightened scrutiny.").
[88] *Id.*

evenhandedly.[89] In arguing that the law applies equally to minors of both biological sexes, the court does not even attempt a means-end analysis. By the court's reasoning, the laws treat all minors alike, so there is "no reason to apply skeptical, rigorous, or any other form of heightened review to these laws."[90] This is the same reasoning that failed in *Loving v. Virginia*. Simply because the anti-miscegenation laws at issue in *Loving* applied equally to both Black and white individuals, equal application is not "enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations."[91] The same reasoning applies in this case, as the court attempts to circumvent a heightened equal protection standard by putting on blinders. Heightened equal protection analysis exists for the purpose of applying a rigorous review to laws that classify based on sex, gender, or race—particularly those laws that bury invidious discrimination beneath a guise of equal application.

While the Tennessee and Kentucky laws do not "prefer one sex over the other"[92] on their face, they formulate an exclusion from gender-affirming care based on transgender status. In this sense the classes at issue are not male versus female, but transgender versus cis-gender. Simply because the discrimination applies equally to transgender-girls and transgender-boys does not negate the discrimination felt by the transgender class as a whole.

The level of scrutiny applied to LGBTQ+ classifications varies between federal circuit courts, and the Supreme Court has provided little guidance on the issue.[93] While the Court in *Bostock v. Clayton County* applied heightened scrutiny to transgender status in the Title VII context, circuits are divided as to whether this extends to other areas, particularly equal protection claims.[94] However, the Sixth Circuit disregards the *Bostock* Court's assertion that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[95] This reasoning reaches beyond Title VII. The court should have applied *Bostock's* heightened scrutiny analysis to the equal protection context, since discrimination based on transgender status invariably turns on that individual's sex.[96]

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[89] *See id.* (White, J., dissenting) (noting that since sex and gender play an "unmistakable . . . role" with respect to the bans' applications, "these statutes should raise an open-and-shut case of facial classifications subject to intermediate scrutiny.").

[90] *Id.* at 481.

[91] Loving v. Virginia, 388 U.S. 1, 8 (1967).

[92] L.W. v. Skrmetti, 83 F.4th 460, 480 (6th Cir. 2023).

[93] Kaleb Byars, *Bostock: An Inevitable Guarantee of Heightened Scrutiny for Sexual Orientation and Transgender Classifications*, 89 TENN. L. REV. 483, 491 (2022).

[94] Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 613 (4th Cir. 2020) (extending *Bostock* to the equal protection context and held that a school board's restroom policy "constitute[d] sex-based discrimination and, independently, that transgender persons constitute a quasi-suspect class.").

[95] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741 (2020).

[96] Byars, *supra* note 93, at 513.

C. *Poor Means-End Fit*

While the court should have applied heightened scrutiny to the Tennessee and Kentucky laws, it does not even attempt a means-end analysis. The court instead notes that gender-affirming care treatments are "experimental in nature," and it is "difficult to gauge the risks to children."[97] The Tennessee law seeks to "[protect] minors from physical and emotional harm," claiming (with little scientific evidence) that gender-affirming treatments can cause sterility and an increased risk of disease and illness, including "adverse and sometimes fatal psychological consequences."[98] While the purported rationales of the Tennessee and Kentucky legislatures are rooted in the protection of minors from physical and psychological harms, the court neglects to meaningfully connect gender-affirming care bans to this end. Although rational basis review is an extremely low bar, it still "requires a legitimate government interest . . . Courts must investigate alleged government justifications to avoid rubber-stamping restrictions that do nothing but harm groups that already suffer disproportionately."[99] Public health and health policy decision-making must be rooted in sound data as opposed to politics and culture wars. It is nonetheless a court's job to provide a nonpartisan lens in evaluating the state's interest in advancing certain policies, and the means used to do so. Had the Sixth Circuit panel engaged in the correct due process and equal protection analyses, it would have found that the Tennessee and Kentucky laws could not stand.

III. INVOKING A PUBLIC HEALTH LAW RESPONSE

Given the available empirical evidence, there is no legitimate government interest being advanced by gender-affirming care bans. In actuality, these bans will harm the same children that the state is allegedly seeking to protect, deepening both physical and mental health inequities among the transgender minor population. While all major medical associations support gender-affirming care, including the American Academy of Pediatrics, the American Psychological Association, and the American Academy of Child and Adolescent Psychiatry, some courts disturbingly rely on scientific disinformation.[100] Scientific disinformation is separate from scientific misinformation, as it is "used by those who know, or have the resources to know, that [the information] is false or misleading."[101] Such scientific disinformation and scientific denialism are being used to perpetuate gender-affirming care bans nation-wide.

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[97] L.W. v. Skrmetti, 83 F.4th 460, 468, 477 (6th Cir. 2023).

[98] TENN. CODE ANN. § 68-33-101(b) (West 2023).

[99] Michael R. Ulrich, *303 Creative, Transgender Rights, and the Ongoing Culture Wars*, BILL OF HEALTH (July 27, 2023), https://blog.petrieflom.law.harvard.edu/2023/07/27/303-creative-transgender-rights-and-the-ongoing-culture-wars/.

[100] Meredithe McNamara, Hussein Abdul-Latif, Susan D. Boulware, Rebecca Kamody, Laura E. Kuper, Christy L. Olezeski, Nathalie Szilagyi, & Anne Alstott, *Combating Scientific Disinformation on Gender-Affirming Care*, 152 PEDIATRICS 1, 1 (2023).

[101] *Id.* at 2.

Gender-affirming care bans encompass four "themes" of scientific denialism, including "repudiation of the medical condition that is the target of treatment, misrepresentation of the standard of care, false claims about risks associated with treatment, and misuse of existing research."[102] It is critical to note, confront, and combat the use of these four themes within Kentucky and Tennessee's gender-affirming care bans.

Among the above reasons cited by the legislature for implementing gender-affirming care bans is the notion that transgender minors will come to regret their transition.[103] The Tennessee bill states that "minors lack the maturity to fully understand and appreciate the life-altering consequences of such procedures and that many individuals have expressed regret for medical procedures that were performed on or administered to them for such purposes when they were minors."[104] This paternalistic rhetoric is not only extremely harmful to the transgender population as a whole, but it is based in scientific disinformation and denialism. Drawing on the above themes, the Tennessee legislature made a false claim concerning the risks associated with gender-affirming care and misused existing research. In a systematic review of 27 studies that pooled 7,928 transgender patients who underwent gender-affirming surgery, the regret rate was only 1%.[105] Additionally, such regret is often not medical regret, but underpinned by outside psychosocial circumstances including community or social stigma and discrimination.[106]

The Tennessee Legislature also posits that such treatments can lead to harmful (and sometimes fatal) psychological outcomes for transgender minors.[107] In making this claim, the Legislature dismisses the gender dysphoria experienced by minors seeking gender-affirming care; it also perpetuates a logical fallacy. While 35% of transgender and nonbinary youth have reported attempting suicide, gender-affirming care has been shown to improve mental health outcomes and reduce rates of suicidality.[108] Transgender minors often undergo gender-affirming care to *treat* the negative mental health effects of their gender dysphoria. Furthermore, gender-affirming care treatment does not occur in a vacuum, and transgender minors' mental health can also be impacted by social stigma and discrimination.

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[102] Meredithe McNamara, Christina Lepore, & Anne Alstott, *Protecting Transgender Health and Challenging Science Denialism in Policy*, 387 NEW ENG. J. MED. 1919, 1919 (Nov. 2022).

[103] TENN. CODE ANN. § 68-33-101(h) (West 2023).

[104] *Id.*

[105] Valeria P. Bustos, Samyd S. Bustos, Andres Mascaro, Gabriel Del Corral, Antonio J. Forte, Pedro Ciudad, Esther A. Kim, Howard N. Langstein, & Oscar J. Manrique, *Regret After Gender-Affirming Surgery: A Systematic Review and Meta-Analysis of Prevalence*, PLASTIC RECONSTRUCTION SURGERY GLOB. OPEN (Mar. 2021).

[106] *New Study Shows Discrimination, Stigma, and Family Pressure Drive "Detransition" Among Transgender People*, FENWAY HEALTH (Apr. 7, 2021), https://fenwayhealth.org/new-study-shows-discrimination-stigma-and-family-pressure-drive-detransition-among-transgender-people/.

[107] TENN. CODE ANN. § 68-33-101(b) (2023).

[108] Christina Lepore, Anne Alstott, & Meredithe McNamara, *Scientific Misinformation is Criminalizing the Standard of Care for Transgender Youth*, 176 JAMA PEDIATRICS 965 (2022).

In the midst of legal analysis and political debates surrounding growing numbers of gender-affirming care bans, there are real and tangible repercussions affecting transgender youths, their families, and their providers. While medical gender-affirming care bans have harmful effects on youth, the extent of these harms also implicates the minor's family unit. In a qualitative study of parents' perspectives on laws banning gender-affirming care, researchers discovered common themes including fear of losing their child, fear of losing access to care, and fear of discrimination.[109] One mother reflected:

> [Proposed laws] mean I have to start fearing, again, that my son will try to take his life because his dysphoria is so bad, and he does not have his blocker to stop his body from betraying him. I asked him the other night how he thinks his life would look without them. Without needing to think about it, he said, 'I'd probably be dead.' He's 14.[110]

With respect to government intrusion on parental rights, another parent responded that "[t]he very existence of these laws, regardless that they are in other states, renders my child less safe. They encourage and legitimize hate. The idea that the government can raise children better than the parents is absurd."[111]

Nearly all the survey participants reported concern that the proposed legislation in their state would lead to worsening mental health outcomes for their children.[112] The survey also demonstrates how the law itself can negatively impact the mental health of transgender minors. Another parent stated, "[e]ven if [the laws] do not pass, just the news cycle letting him know that people hate him, despise him, and have no larger concerns than to dispose of his very existence is a very trying experience."[113] This data reflects the stark reality of anguish felt by transgender children and their families in the wake of gender-affirming care bans.

When safe and necessary medical care is withheld from an individual, that individual will do everything in their power to obtain that care. Public health is harmed when (in the best case) individuals obtain healthcare out of state, disrupting their work or schooling, or (in the worst case) individuals turn to illegal or backdoor ways to receive such care. The means do not fit the claimed ends of protecting children when the result in any case is harm to the child.

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[109] Kacie M. Kidd, Gina M. Sequeira, Taylor Paglisotti, Sabra L. Katz-Wise, Traci M. Kazmerski, Amy Hillier, Elizabeth Miller, & Nadie Downshen, *"This Could Mean Death for My Child": Parent Perspectives on Laws Banning Gender-Affirming Care for Transgender Adolescents*, 68 J. ADOLESCENT HEALTH 1082, 1082 (2021).

[110] *Id.* at 1084.

[111] *Id.* at 1085.

[112] *Id.* at 1084.

[113] *Id.* at 1085.

Both the Tennessee and Kentucky laws contain a private right of action and impose harsh penalties against healthcare providers in violation of the laws. In Tennessee, this includes a $25,000 civil penalty for each violation.[114] In Kentucky, this also encompasses loss of medical licensure for violations.[115] The pediatric health workforce in states with gender-affirming care bans face extreme risk in implementing their field's standards of care. Such bans force providers to violate key tenets of biomedical ethics, including their duties of beneficence and justice.[116] Furthermore, there is an existing limited workforce of pediatric endocrinologists.[117] As with abortion providers, competent pediatric providers may choose to practice out of state for fear of losing their license for following their ethical duties as healthcare providers. This fear will result in a loss of healthcare workforce in an area that needs it most, resulting in potential care deserts.

In a qualitative study of doctors, nurse practitioners, and physician assistants providing gender-affirming care to transgender minors, there was overwhelming opposition to gender-affirming care bans.[118] Their responses exemplified themes including politicization of care, worsening mental health outcomes for their patients, and adverse impacts on providers.[119] A Montana provider stated, "I have considered leaving my state to practice in a more tolerant area."[120] Other providers expressed concern for the safety of themselves and their families, citing increases in protesting, hate mail, and harassment.[121] The experiences of transgender minors, their parents, and providers reflect the consequences of gender-affirming care bans, along with the broader consequences of legislatures and courts relying on scientific disinformation.

A. *Short-Term Public Health Solutions*

On November 6, 2023, the appellees in the *L.W.* case petitioned for a writ of certiorari to review the Sixth Circuit's opinion. While it is unclear whether the Supreme Court will take on this issue in the near future, the impacts of the Tennessee and Kentucky bans are already being felt among transgender minors, their families, and their providers. As transgender minors across the country watch as their existence is "left to the legislature" for debate, mental health outcomes are likely to worsen, and minors are

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[114] TENN. CODE ANN. § 68-33-106(b) (2023).

[115] KY. REV. STAT. ANN. § 311.372(4) (LexisNexis 2023).

[116] Brief for Biomedical Ethics and Public Health Scholars as Amici Curiae Supporting Plaintiffs-Appellees at 2, L.W. v. Skrmetti, 83 F.4th 460 (6th Cir. 2023) (No. 23-5600).

[117] Pranav Gupta, Ellis Barrera, Elizabeth R. Boskey, Jessica Kremen, & Stephanie A. Roberts, *Exploring the Impact of Legislation Aiming to Ban Gender-Affirming Care on Pediatric Endocrine Providers: A Mixed-Methods Analysis*, 7 J. ENDOCRINE SOC'Y 1, 5 (2023).

[118] Landon D. Hughes, Kacie M. Kidd, Kristi E. Gamarel, Don Operario, & Nadia Dowshen, *"These Laws Will be Devastating": Provider Perspectives on Legislation Banning Gender-Affirming Care for Transgender Adolescents*, 69 J. ADOLESCENT HEALTH 976 (2021).

[119] *Id.* at 978–80.

[120] *Id.* at 980.

[121] *Id.*

likely to be at a higher risk of harm without access to gender-affirming care. Provisional, short-term public health solutions can reduce harm among the transgender minor population during a period of uncertainty in the legal landscape. This paper recognizes that gender-affirming care is medically necessary for those transgender minors experiencing gender dysphoria—nothing can replace this standard of care. However, amid rising anti-trans legislation, public health methods can be employed to mitigate further negative mental health outcomes among transgender minors.

1. *Medical-legal partnerships*

Medical-legal partnerships (MLPs) integrate legal services into healthcare settings to effectively address social determinants of health.[122] This holistic approach recognizes the influence of structural factors on health outcomes, and are essential in the face of gender-affirming care bans. In an ever-changing legal landscape, many providers are unsure of the status or extent of their state's gender-affirming care ban. Many providers are also wary of the legal risk associated with including medical gender-affirming care within their practices, and this combination of fear and misinformation has led many providers to halt care preemptively.[123] A MLP model among states with gender-affirming care bans would alleviate the burden felt by providers to continuously interpret vague laws in a shifting legal landscape. Lawyers in particular should translate these laws and encourage providers to know their legal risk. Importantly, providers should be encouraged and empowered to not completely halt care until legally required to do so. These partnerships would allow providers to more easily determine what care is and is not allowed, and to implement that care more quickly and effectively. By combining the expertise of lawyers and healthcare providers, the care authorized in states with bans can be stretched up to the legal boundary.

2. *Training in WPATH guidelines for pediatric providers*

In states that have upheld bans, minors will not have access to gender-affirming care until the age of eighteen. The pediatric and mental health workforce in these states should undergo extensive training in the WPATH guidelines, particularly the guidelines on social transition. Social transition "refers to a process by which a child is acknowledged by others and has the opportunity to live publicly . . . in the gender identity they affirm."[124] Such actions may include name changes, pronoun changes, changes in sex and/or gender markers such as identification documents, along with personal

[122] *Medical Legal Partnerships*, THE SOLOMON CENTER, https://law.yale.edu/solomon-center/projects-publications/medical-legal-partnerships (last visited Mar. 4, 2024).

[123] Jim Salter & Geoff Mulvihill, *Some Providers are Halting Gender-Affirming Care for Minors, Even Where it Remains Legal*, PBS NEWSHOUR (Sept. 22, 2023, 12:34 PM), https://www.pbs.org/newshour/nation/some-providers-are-halting-gender-affirming-care-for-minors-even-where-it-remains-legal.

[124] E. Coleman, *supra* note 19, at 75.

expression.[125] For prepubescent children in particular, social transition facilitates gender congruence, reduces gender dysphoria, and enhances psychosocial adjustment and wellbeing.[126] Research has also shown that social transition can improve the mental health of transgender individuals. Healthcare providers in particular can help children navigate the potential advantages and challenges of social transition.[127]

3. *Intersectional approaches*

It is important to note that access to gender-affirming care is inequitable, and individuals face many barriers to care apart from gender-affirming care bans. These barriers and inequities exist throughout the healthcare system, and such bans will likely widen these disparities. Access to gender-affirming care is also often dependent on financial resources, as many individuals cite financial and insurance issues as barriers to care.[128] In a study examining healthcare equity among transgender youth, researchers found that 28% of the participants were uninsured compared to the 5% national average for children under eighteen.[129] Furthermore, individuals and families with the most resources will likely be able to afford travel and other expenses associated with out-of-state treatment in places without gender-affirming care bans.

Public health strategies must be cognizant of inequities and barriers to gender-affirming care. Black, Latinx, and Indigenous minors are less likely to receive gender-affirming care than their white counterparts.[130] The pediatric and mental health workforce should also be aware of these inequities and provide care that takes into account experiences of racism, misogyny, and transphobia. Advocacy for systems-level change in conjunction with other initiatives is necessary to prevent worsening disparities.

4. *Mental Health Initiatives*

The consensus among experts remains that bans on gender-affirming care will worsen transgender youths' mental health outcomes. While these predictions are disheartening, there are available options for improving mental health outcomes among this population. Adolescent medical providers should involve mental health providers and social workers in the

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[125] *Id.* at 76.

[126] *Id.* at 77.

[127] *Id.*

[128] Jae A. Puckett, Peter Cleary, Kinton Rossman, Michael E. Newcomb, & Brian Mustanski, *Barriers to Gender-Affirming Care for Transgender and Gender Nonconforming Individuals*, 15 SEXUALITY RSCH. & SOC. POL'Y 48, 52–53 (2018).

[129] Jillian McKoy, *Gender Identity, Race Intersections "Really Matter for Access to Healthcare,"* B.U. SCH. OF PUB. HEALTH (June 2, 2023), https://www.bu.edu/sph/news/articles/2023/gender-identity-race-intersections-really-matter-for-access-to-healthcare.

[130] Meredithe McNamara, Gina M. Sequeira, Landon Hughes, Angela Kade Goepferd, & Kacie Kidd, *Bans on Gender-Affirming Healthcare: The Adolescent Medicine Provider's Dilemma*, 73 J. ADOLESCENT HEALTH 406, 407 (2023).

care of transgender and nonbinary youth from an early stage.[131] Since areas with bans in place will likely see a shortage of healthcare providers, existing facilities should train all providers on suicide risk assessment and mental health first aid. Such task-shifting will make optimum use of resources, and flag higher-risk individuals for further intervention. This same paradigm should be utilized in states without bans, as these clinics will likely see an influx of out-of-state patients.[132] These clinics should prepare for such an increase and prioritize treatment of individuals who are low on medication or are presenting with distress.[133] Additional mental health screening tools should be implemented in both school settings and pediatric primary care providers' offices to target those individuals who may not be receiving specialized care.

Increasing protective factors and mitigating risk factors can also serve as a valuable public mental health strategy. School belonging, family support, and peer support are all protective factors that promote interpersonal belonging and reduce suicide risk among transgender youth.[134] Importantly, transgender youth who reported feelings of school belonging were half as likely to have attempted suicide.[135] Increasing inclusive school policies and social support programs in the face of gender-affirming care bans may help mitigate negative mental health outcomes.

B. *A Call for Long-Term Solutions*

Increasing reliance on "band-aid" solutions in states with gender-affirming care bans reflects the failure of some state legislatures and courts to provide upstream protections for transgender youth, placing the burden on likely exhausted providers and families. While these short-term solutions can reduce harm among trans minors during a period of legal uncertainty, they are not the ideal. Longer-term solutions are required to allow minors equitable access to gender-affirming care in accordance with medical standards of care. Should the Supreme Court take on the *L.W.* case, it should comport with long-standing due process jurisprudence and reverse the Sixth Circuit's holding. Furthermore, in the drafting of health policies, both federal and state legislatures should defer to accepted medical standards of care. The federal government should continue denouncing restrictive state bans on gender-affirming care and implement policies that expand healthcare access for LGBTQ+ individuals.[136] Such policies should also

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[131] *Id.*

[132] *Id.* at 408.

[133] *Id.*

[134] Ashley Austin, Shelley L. Craig, Sandra D'Souza, & Lauren B. McInroy, *Suicidality Among Transgender Youth: Elucidating the Role of Interpersonal Risk Factors*, 37 J. INTERPERS. VIOLENCE 2696, 2696 (2022).

[135] *Id.* at 2710.

[136] Lindsey Dawson, Jennifer Kates & MaryBeth Musumeci, *Youth Access to Gender Affirming Care: The Federal and State Policy Landscape*, KFF (June 1, 2022), https://www.kff.org/other/issue-brief/youth-access-to-gender-affirming-care-the-federal-and-state-policy-landscape/.

target social determinants of health including insurance coverage, housing, stigma, and transphobia in the healthcare setting. While there have been efforts to recognize the federal government's duty to codify transgender people's rights, including Senator Edward J. Markey and Representative Pramila Jayapal's recent "Transgender Bill of Rights,"[137] such efforts are largely symbolic.[138] Transgender and nonbinary individuals require actual governmental protection when it comes to necessary healthcare, particularly in the face of rampant anti-LGBTQ+ legislation at the state level.

CONCLUSION

Legislation targeting transgender individuals continues to grow, and is increasingly infringing on medical decision-making, parental rights, and recognized standards of care. The Sixth Circuit Court of Appeals decision in *L.W. v. Skrmetti* exemplifies this trend, along with the limited constitutional protections afforded to transgender minors, their parents, and medical providers. The *L.W.* decision in particular sets aside long-standing due process jurisprudence and perpetuates scientific denialism, furthering the Kentucky and Tennessee legislatures' political goal of tethering shifting societal norms. The result in states with harsh bans is a public health crisis. Transgender minors disproportionately experience negative mental health outcomes, and the medical community expects these outcomes to worsen without access to medically necessary treatment. If the *L.W.* decision is at all predictive of the future of transgender rights to healthcare, we must be prepared to implement public health strategies to reduce harm among this population in conjunction with advocacy for long-term and systemic changes.

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[137] *Sen. Markey and Rep. Jayapal Introduce the Trans Bill of Rights Ahead of International Transgender Day of Visibility*, ED MARKEY (Mar. 30, 2023), https://www.markey.senate.gov/news/press-releases/sen-markey-and-rep-jayapal-introduce-the-trans-bill-of-rights-ahead-of-international-transgender-day-of-visibility.

[138] Samantha Riedel, *Democrats Reintroduce a "Trans Bill of Rights" in Congress*, THEM (Mar. 31, 2023), https://www.them.us/story/trans-bill-of-rights-congress.

They're Not Talking Your Language: The Need for Legislation Guaranteeing the Right to a Foreign Language Interpreter in Connecticut Civil Court

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INTRODUCTION

The American courts maintain that it is "inherent in the nature of justice . . . that those involved in litigation should understand and be understood."[1] This ultimately involves access to court-appointed foreign language interpreters for those involved in the judicial process and—although it is outside of the scope of this paper—the Fifth Amendment right to an interpreter implicated by a defendant's due process right to a fair trial.[2]

Despite our so-called American values, nearly twenty-five million people in the country have limited proficiency in English[3] and "one in five people in the United States speaks a language other than English at home."[4] Since 1990, that number has almost doubled.[5]

Currently, thirteen million of those individuals live in states that do not offer reliable access to interpreters in the court system.[6] "Without an interpreter, these individuals are unable to plead their case to a judge, communicate with court clerks, or even converse with their attorney."[7] Legally, they are determined to be "limited-English proficient,"[8] (commonly abbreviated as "LEP"). The term typically covers "individuals 'born in other countries, children of immigrants born in the United States, and other non-English or LEP persons born in the United States.'"[9]

"The minute an LEP person walks into a courthouse, he or she is at a disadvantage."[10] Every sign is typically in English, an additional hurdle over and above the "already . . . confusing" and "intimidating" experience of having to go to court.[11] Additionally, an LEP litigant is often cut off from some of the most impactful parts of the procedure–negotiations, settlements, and attorney-client communications[12] —which often occur without an

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[1] 75 AM. JUR. 2D *Trial* § 163 (2024) (citing Santana v. N.Y.C. Transit Auth., 505 N.Y.S.2d 775 (N.Y. Sup. Ct. 1986)).

[2] 75 AM. JUR. 2D *Trial* § 163 (2024).

[3] U.S. DEP'T JUST. C.R. DIV., LANGUAGE ACCESS IN STATE COURTS 2 (2016).

[4] Michael Mulé, *Language Access 101: The Rights of Limited-English-Proficient Individuals*, 44 CLEARINGHOUSE REV. 24, 24 (2010).

[5] Carolyn Harlamert, *"Meaningful Access" Demands Meaningful Efforts: The Need for Greater Access to Virginia State Courts for Limited English Proficient Litigants*, 23 WM. & MARY J. WOMEN AND LAW, 337, 338 (2017). This statistic is representative of LEPs in the United States in 2017. Realistically, the number has likely increased even more, especially given the impacts on immigration after the COVID-19 pandemic. For more information on those trends, *see* Sandy Dietrich & Erik Hernandez, *Language Use in the United States: 2019*, U.S. CENSUS BUREAU (2022), https://www.census.gov/content/dam/Census/library/publications/2022/acs/acs-50.pdf.

[6] LANGUAGE ACCESS IN STATE COURTS, *supra* note 3.

[7] Harlamert, *supra* note 5, at 338.

[8] Although the terminology equally applies in the language interpretation space, it was coined by the U.S. Department of Justice in the context of national origin discrimination. *See* Enforcement of Title VI of the Civil Rights Act of 1964–National Origin Discrimination Against Persons with Limited English Proficiency, 65 Fed. Reg. 50123 (Aug. 16, 2000).

[9] Mulé, *supra* note 4, at 24–25.

[10] *Interpreting Justice: Issues Affecting LEP Litigants*, LEGAL SERVS. NYC, https://www.legalservicesnyc.org/what-we-do/practice-areas-and-projects/civil-rights-initiative/interpreting-justice-language-access-in-the-new-york-courts/issues-facing-lep-litigants (last visited Dec. 7, 2023).

[11] *Id.*

[12] *Id.*

interpreter present, or tend not to occur at all due to the hassle of bringing in an interpreter.

According to the Brennan Center for Justice, reliable access to interpreters includes: (1) being offered at no charge to the litigants; (2) offering interpreters that have essential language and interpreting skills; (3) training judges and the court so that they know how to use interpreters; and (4) according LEP individuals the same treatment as others.[13] Unfortunately, this does not reflect the laws as written on the books.

The National Center for Access to Justice (NCAJ) identifies language access as one of the five key aspects used to measure access policies and practices in state court systems.[14] Among language access, the NCAJ also assesses (1) access to an attorney, (2) self-representation, (3) language access, (4) disability access, and (5) fines and fees.[15] Currently, Connecticut is ranked as the second best state in the country for language access based on conversations that NCAJ representatives had with government officials and its review of published policies.[16]

However, the access that Connecticut's LEP citizens have to justice in the state's courts is currently not a right—it is a privilege. Despite what some state policies may indicate, the state of Connecticut has no statutory right to a foreign language interpreter in any court proceedings, except for instances that deal with the loss of parental rights.[17]

Connecticut is certainly not the only state struggling with these issues. Currently, forty-six percent of states fail to require interpreters in all civil cases.[18] If a state does offer an interpreter, it may be one of the eighty percent of states that fail to guarantee that the court will pay for the interpreter.[19] Despite the fact that the lack of access to interpreters is a national—if not global—issue, this paper will be focusing exclusively on the needs of Connecticut persons.

This paper will begin in Part II by introducing the Federal Court Interpreters Act and explaining how Congress has tackled the problem. The paper will then shift to the current state of foreign language interpreter access in the Connecticut Court in Part III, namely the lack of a statutory guarantee of access to an interpreter in civil court. That will be contrasted against the statutes that exist in the other U.S. states in Part IV. Parts V and VI will discuss the problems with not codifying the right to a foreign language interpreter and argue that Connecticut must adopt a version of the

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[13] LAURA ABEL, LANGUAGE ACCESS IN STATE COURTS 9 (2009), https://www.brennancenter.org/our-work/research-reports/language-access-state-courts.

[14] LANGUAGE ACCESS IN STATE COURTS, *supra* note 3, at 15.

[15] *Methodology*, NAT'L CTR. ACCESS JUST., https://ncaj.org/methodology (last visited Dec. 7, 2023).

[16] *Language Access*, NAT'L CTR. ACCESS JUST., https://ncaj.org/state-rankings/justice-index/language-access (last visited Dec. 7, 2023). Connecticut is second only to New Mexico. *Id.*

[17] Conn. Practice Book § 32a-6 (2024) (requiring that an interpreter be provided by the judicial authority "as necessary to ensure [the parties'] understanding of, and participation in, the proceedings.").

[18] ABEL, *supra* note 13, at 1.

[19] *Id.*

Federal Court Interpreter Statute if it intends to push an access to justice agenda.

I. THE FEDERAL COURT INTERPRETERS ACT

On October 28, 1978, Congress passed Public Law 95-539, "to provide more effectively for the use of interpreters in courts of the United States."[20] After revisions, the modern federal courts operate under the Court Interpreters Act,[21] which,

> provides that the Director of the Administrative Office of the United States Courts shall prescribe, determine, and certify the qualifications of persons who may serve as certified interpreters . . . for . . . persons who speak only or primarily a language other than the English language, in judicial proceedings instituted by the United States.[22]

The federal court interpreter program, established by the Administrative Office of U.S. Courts (the "AO"),[23] requires the use of "certified interpreters" chosen from a list maintained by the District Courts.[24] A certified interpreter is an interpreter who has "successfully passed all the required components of the Federal Court Interpreter Certification Examination."[25] That list is then kept at each District Court and is made available to individual litigants or other court participants upon their request.[26] If a certified interpreter is not available, the court may deem another individual to be an "otherwise qualified interpreter"[27] who meets the standards of the AO.[28] In other instances, a party may choose to waive the right to a certified interpreter and use a non-certified interpreter of one's choice that "can demonstrate to the satisfaction of the court the ability to interpret court proceedings from English to a designated language" and vice versa.[29] This non-certified interpreter would be paid for in the same manner

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[20] Court Interpreters Act of 1978, Pub. L. No. 95-539, 92 Stat. 2040 (amended 1996).

[21] 28 U.S.C. § 1827.

[22] *Federal Court Interpreters*, U.S. CTS., https://www.uscourts.gov/services-forms/federal-court-interpreters (last visited Dec. 7, 2023).

[23] § 1827 (a).

[24] § 1827 (c)(1). To be considered a "certified interpreter," you must pass the certification examination put on by the AO. U.S. COURTS, *Court Interpreting Guidance*, *in* 5 Guide to Judiciary Policy § 110 (2021), https://www.uscourts.gov/file/22692/download. Currently, the certification examination involves a multiple choice and written exam and then those invited take an oral performance examination. Carlos A. Astiz, *A Comment on Judicial Interpretation of the Federal Court Interpreters Act*, 14 JUST. SYS. J. 103, 104 (1990). Currently, certification testing programs have only been developed for Spanish, Navajo, and Haitian Creole. *Guide to Judiciary Policy*, *supra* note 24, at 3.

[25] *Court Interpreting Guidance*, *supra* note 24, at § 140.

[26] § 1827 (c)(1).

[27] § 1827 (d)(1).

[28] *Court Interpreting Guidance*, *supra* note 24, at § 320.20.

[29] Officially, the federal courts refer to these types of interpreters as "Language Skilled/*Ad Hoc*" interpreters. *Interpreter Categories*, U.S. COURTS, https://www.uscourts.gov/services-forms/federal-court-interpreters/interpreter-categories#a3 (last visited Dec. 7, 2023).

as any other court-appointed interpreter.[30] If the party or witness who (A) speaks only or primarily a language other than English; or (B) suffers from a hearing impairment, chooses to pursue a court-appointed interpreter, the clerk of court is responsible for securing the interpreter for the litigant, but the U.S. Attorney must provide one for a witness.[31]

No matter how the individual receives an interpreter in the federal courts, the interpreter must be able to communicate *effectively* in the language of the courts. This would include understanding the "specialized and legal terminology, formal and informal registers, dialect and jargon, [and] varieties in language and nuances of meaning" used in the courtroom and everyday life.[32] If the appointed or chosen interpreter cannot communicate in a way that assists the matter, the court may dismiss and replace the interpreter.[33] Alternatively, the judge may decide on a motion whether to supplement the interpreter's services with the use of sound recording software.[34] In ruling on said motion, a judge considers three things: "the qualifications of the interpreter and prior experience in interpretation of court proceedings; whether the language to be interpreted is not one of the languages for which the Director has certified interpreters, and the complexity of length of the proceeding."[35]

A. *What is a "Judicial Proceeding"?*

Under § 1827, certified interpreters are appointed "in *judicial proceedings* instituted by the United States."[36] A judicial proceeding is defined in this section as "all proceedings, whether criminal or civil, including pretrial and grand jury proceedings . . . conducted in or pursuant to the lawful authority and jurisdiction of a United States district court."[37]

This definition is extremely broad; there are few exceptions to the types of proceedings that are included. Of the limited litigation that has ensued over the phrase "judicial proceeding," only transcripts of conversations outside of court[38] and meetings of creditors at a discharge hearing[39] have been excluded.

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[30] § 1827 (f)(2).
[31] § 1827 (c)(2)–(d)(1).
[32] *Federal Court Interpreters*, *supra* note 22.
[33] § 1827 (e)(1).
[34] § 1827 (d)(2).
[35] *Id.*
[36] § 1827 (d)(1) (emphasis added).
[37] § 1827 (j).
[38] U.S. v. Lira-Arredondo, 38 F.3d 531, 533–34 (10th Cir. 1994).
[39] *In re* Morrison, 22 B.R. 969, 970 (Bankr. N.D. Ohio 1982), *reconsideration denied*, 26 B.R. 57 (Bankr. N.D. Ohio 1982).

B. *Who Covers the Cost?*

Even under the best laid system, someone must bear the cost. Under the Federal Court Interpreters Act, the interpreters are all paid wages by the court.[40] The statute authorizes appropriate sums to be allocated to the Director of the AO to facilitate the use of the interpreters.[41]

To determine the amount owed to each individual interpreter, the master list controlled by the District Courts includes a fee schedule that predetermines the costs and wages due.[42] Thus, the entire court interpreter program is contingent on the Judiciary being appropriated sufficient funds to carry out said program.[43]

II. CURRENT STATE OF LANGUAGE INTERPRETATION IN CONNECTICUT COURTS

A. *Types of Language Interpretation*

The State of Connecticut Judicial Branch Superior Court Operations Division offers three types of interpreter services: simultaneous, consecutive, and sight.[44] "Simultaneous interpretation . . . is performed within seconds of the original speech . . . [and] requires that interpreters listen and speak almost concurrently with the primary speaker whose words are being translated."[45] The interpreters are ultimately performing "two tasks simultaneously in the field of language communication that otherwise are always practiced separately: speech and understanding."[46]

Consecutive interpretation, by contrast, operates in the "'question and answer' mode in which the speaker completes a statement and the interpreter begins to interpret after the statement is completed."[47] This mode is most often utilized when a witness is on the stand and can involve either a long or short method.[48] The short method is most often used, while the long method is "reserved for some forms of conference interpreting."[49]

The final mode of interpretation is sight interpretation. Here, "the interpreter is provided with a written document in the source language [and t]he interpreter must take sufficient time to read and review the document before rendering it aloud in the target language, while reading it silently in the source language."[50]

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[40] § 1827 (g)(1).
[41] *Id.*
[42] § 1827 (b)(3).
[43] § 1827 (g)(2).
[44] STATE CONN. JUD. BRANCH, ES-212, INTERPRETER AND TRANSLATOR SERVICES (rev. ed. 2009), https://www.jud.ct.gov/Publications/es212.pdf.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] INTERPRETER AND TRANSLATOR SERVICES, *supra* note 44.

B. *Operations*

According to publications from the Superior Court Operations Division, language interpretation is "a crucial component of 21st century justice."[51] Citing the *United States ex rel. Negrón v. State of New York*,[52] the Superior Court Division goes so far as to label it a right protected under our Constitution.[53] However, the legislature has not followed suit and has instead neglected to implement an official statutory guarantee to a language interpreter in all cases.

The Interpreter and Translator Services unit was "established to serve the judiciary in court-related proceedings at no cost to the . . . defendants, victims, witnesses, and family members in criminal cases."[54] The use of the term "in criminal cases" contrasts starkly from the Federal Court Interpreters Act which guarantees access to court interpreters in *all judicial proceedings.*[55] In fact, there is no statute or case law in the state of Connecticut whatsoever that guarantees the right to a foreign language interpreter in civil proceedings, with the sole exception being a requirement that an official interpreter be provided to the parties in proceedings for child abuse and the termination of parental rights.[56] Although the Judicial Branch documents imply that they are used in civil proceedings,[57] as of today, this is only a privilege—it is not a right enshrined by the Connecticut General Assembly. Notably, the documents do not indicate with any empirical evidence how frequently foreign language interpreters are utilized in the civil proceedings or hearings.

Because interpreters are not required to be appointed in these instances, the parties, regardless if they are pro-se or represented by counsel, must request the interpreters themselves.[58] It is highly unlikely that an indigent pro-se litigant will request such accommodations.[59] Adding to the confusion, if an individual requires the use of an interpreter, they are directed to the

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[51] *Id.*

[52] United States *ex rel*. Negrón v. State of New York, 434 F.2d 386 (2d Cir. 1970).

[53] INTERPRETER AND TRANSLATOR SERVICES, *supra* note 44.

[54] *Id.*

[55] *See supra*, Part I(A); § 1827 (j).

[56] Conn. Practice Book § 32a-6 (2003).

[57] *Id.* The Interpreter and Translator Services Department of the Superior Court Operations Division lists eighteen different types of proceedings that interpreters are involved in: Arrangements, Hearings for Probable Cause, Motions to Suppress Evidence, Victim Interviews, Pre-trial Interviews and Hearings, Criminal Jury and Non-Jury Trials, Pre-Sentence Investigations, Psychological Evaluations, Probation Intake Interviews and Hearings, Competency Interviews and Hearings, Generally Information and Clerk's Office, Motor Vehicle Infractions, Domestic Violence Proceedings, Attorney / Client Interviews, Juvenile Hearings and Trials, Support Enforcement and Family Matters, Restraining Orders Proceedings, and Housing Matters. *See also* CONN. GEN. STAT. § 52-257 (2006) (directing the Court to issue $20 per diem to the parties if an interpreter is used in a civil action).

[58] INTERPRETER AND TRANSLATOR SERVICES, *supra* note 44.

[59] *See* Abdulla Z. Khalil, *An Imperfect Solution: The Due Process Case for Providing Court-Appointed Interpreters for Pro Se Plaintiffs*, 10 Tex. A&M L. Rev. Arguendo 68, 70 (2023) (noting that "for indigent pro se plaintiffs who do not speak English, the [Federal Court Interpreters] Act and federal judiciary policies institute what is, in effect, a constructive denial of their access to a competent court interpreter. Without access to an interpreter, it is virtually impossible for these plaintiffs to vindicate, or attempt to vindicate, their private grievances.").

Clerk's Office, Court Service Center, or other Judicial Branch staff member.[60] In other words, there is no central location at the court to receive translation service requests. If one were to do independent research online instead, the Judicial Branch's website dedicated to the Interpreter and Translator Services Unit only translates into English, Polish, or Portuguese, despite its stated particular interest in hiring interpreters with language skills in Spanish, Portuguese, Polish, Albanian, Chinese Cantonese, Korean, Haitian Creole, Chinese Mandarin, Russian, or Vietnamese.[61] With hurdles such as these, it will be difficult for Connecticut to realize its goal of "ensur[ing] that every participant in a judicial process is able to communicate effectively."[62]

III. LANGUAGE INTERPRETER STATUTES ADOPTED BY OTHER STATES

Unlike Connecticut, almost all of the fifty U.S. states have enacted some figure of a language interpreter statute,[63] regardless of how substantial. There are, however, significant discrepancies in terms of who can receive a court-appointed interpreter and whether the court will pay for the interpreter once one has been appointed.

A. *State Differences in Whether to Offer an Interpreter*

In determining whether to provide an interpreter at all, states have taken different approaches. The key variations between the statutes are that some guarantee access to interpreters in any proceeding to anyone, and others require that the individual be indigent, or do not provide an interpreter at all. The selected states below exhibit these variations.

1. *States that guarantee access to anyone in any proceeding*

As an example, the state of Idaho has one of the broadest statutory guarantees to a foreign language interpreter in the country. The statute guarantees that "in any civil or criminal action in which any witness or a party does not understand or speak the English language . . . then the court shall appoint a qualified interpreter to interpret the proceedings to and the testimony of such witness or party."[64] Upon appointment, the court has the interpreter swear to accurately and fully interpret the testimony given to the

[60] INTERPRETER AND TRANSLATOR SERVICES, *supra* note 44.
[61] *Id.*
[62] *Id.*
[63] *State Statutes Requiring the Provision of Foreign Language Interpreters to Parties in Civil Proceedings*, AM. BAR ASS'N COMM. DOMESTIC VIOLENCE (Dec. 2008), https://www.rainn.org/pdf-files-and-other-documents/Public-Policy/Legal-resources/Foreign_Language_Interpreters_Chart_12_2008.pdf.
[64] IDAHO CODE § 9-205 (1975) (amended 2023).

best of his ability before assuming his duties.[65] All reasonable fees are then paid out of the district court fund.[66]

The District of Columbia (D.C.) takes a slightly different approach but comes to the same result. In D.C.,

> [w]henever a communication-impaired person is a party or witness, or whenever a juvenile whose parent or parents are communication impaired is brought before a court at any stage of a judicial or quasi-judicial proceeding, . . . the appointing authority may appoint a qualified interpreter to interpret the proceedings to the communication-impaired person and to interpret the communication-impaired person's testimony . . . *upon the request of the communication-impaired person*.[67]

Of course, the key difference between the D.C. and Idaho statute is that, in D.C., the party must physically request the appointment of an interpreter. If they fail to do so, it may be that the party forfeits that ability.

However, if they can submit their request in a timely manner, an interpreter is appointed in any judicial or quasi-judicial proceeding.[68] Some examples include "civil and criminal court proceedings, proceedings before a commissioner, juvenile proceedings, child support and paternity proceedings, and mental health commitment proceedings."[69]

2. *States that only guarantee access to indigent persons*

By contrast, some of the states only guarantee access to indigent persons. This can cause significant problems. Although providing interpreters at no cost for those that are indigent is a helpful starting point, it "is not a sufficient benchmark for providing meaningful access. Income guidelines are set for the extremely poor" and many . . . do not qualify for a free interpreter if they have any type of employment.[70]

Because of these drawbacks, Pennsylvania saves costs by requiring that individuals who are not parties or witnesses provide their own interpreter unless they are indigent. Regardless of cost, the court will provide interpreters for the "principal party in interest or a witness," but additional individuals must provide their own.[71]

In this author's opinion, this provision foreseeably has the most intense impact on parents of juveniles. Although the juvenile may be the "principal party in interest," a limited-English speaking parent or guardian would need

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[65] *Id.*
[66] *Id.*
[67] D.C. CODE § 2-1902(a) (2007) (emphasis added).
[68] *Id.*
[69] *Id.*
[70] Harlamert, *supra* note 5, at 349.
[71] 42 PA. CONS. STAT. § 4416 (2007).

an interpreter to understand the process to which their child is being subjected. In Pennsylvania, unless the parent is indigent, they would have to provide their own interpreter.

3. *States that do not provide interpreters to any party or witness*

Alaska lies at the opposite extreme of the spectrum. Alaska requires that "[p]arties who need an interpreter because they or a witness are LEP must provide their own interpreter."[72] Regardless of the financial strife of a party, the court is not required by statute to provide those services.

As of 2020, the Alaskan courts have promulgated a Language Access Plan which dictates the state of language services in the state.[73] The plan indicates that the Language Services Director and the Interpreter Services Coordinator develop and implement policies regarding interpreters[74] and train judicial officers and court staff "to recognize the needs of LEP individuals and to err on the side of caution in determining when to provide interpreting services."[75] Although there is no definition of what "erring on the side of caution" means, the state's interpreter program is supposed to "provide[] interpreting services when a person involved in a court proceeding, including defendants, victims, or witnesses, does not read, write, speak, or understand English sufficiently to participate in the proceedings . . . for all case types."[76]

Thus far, this program in Alaska appears the most similar to what we see here in Connecticut. The state has enacted procedures that allow access to interpreters, but statutes do not guarantee any such right. Under this sort of a regime, fluctuations in funding and geopolitics can influence the access that citizens have to their courts.

B. *Differences in Who Pays for the Interpreters*

"The DOJ has emphasized that, '[c]ourt systems that charge interpreter costs to LEP persons impose an impermissible surcharge on litigants based on their English language proficiency.'"[77] However, that has not stopped numerous U.S. states from imposing such hurdles. Below, this piece outlines the different approaches that states have taken to funding state court language interpreter programs. The approaches include fully funding the program at no cost to the parties, absorbing the cost of court interpreters for indigent parties, and requiring that all parties, regardless of financial hardship, pay for their own interpreters.

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[72] Alaska Admin. R. 6(b)(2), https://courts.alaska.gov/rules/docs/adm.pdf.

[73] ALASKA CT. SYS. LANGUAGE ACCESS PLAN (Jan. 2020), https://courts.alaska.gov/language/docs/language-access-plan.pdf.

[74] *Id.* at 4.

[75] *Id.* at 5.

[76] *Id.* at 5–6.

[77] Harlamert, *supra* note 5, at 348.

1. *States that provide interpreters at no cost to the parties*

As noted above, Idaho has one of the broadest statutory guarantees in America. In addition to guaranteeing the right to an interpreter for any witness or party, the Idaho courts "determine a reasonable fee for all such interpreter services" and promise that those fees will be paid out of the district court fund.[78] However, the statute still maintains a fourteen day notice requirement.[79] If the individual in need of an interpreter fails to notify the court at least fourteen days in advance without good cause *and* the court proceeding is postponed *as a result*, "the court may impose costs and expenses against the party or the party's attorney."[80] This ultimately implements a three prong test for expenses to be charged against a party: (1) the party must fail to notify the court, (2) the party must be unable to show good cause for failing to notify, and (3) the proceeding must have been effectively postponed. The odds of meeting all these requirements are quite low.

Kentucky similarly guarantees that the court will pay for all interpretation services. Enshrined in statute, Kentucky courts will appoint interpreters "in any matter, criminal or civil . . . to be paid out of the State Treasury, for . . . (b) Persons who cannot communicate in English."[81] For the sake of the statute, it does not matter if the person is a party, juror, or witness,[82] as long as they are actively involved in the judicial process. The LEP can either request the interpretation services or, if they do not make a request, the judge may "conduct a brief voir dire in order to evaluate the extent to which the individual reads, speaks, writes, and/or understands English and determine whether or not language access services are needed."[83] Regardless of the method of implementation, however, "the [Administrative Office of the Courts] will be responsible for payment, including ordinary and reasonable expenses . . ., for language access services."[84]

As recently as 2016, New York took this one step further by guaranteeing in a special Administrative Order that no party in any civil or criminal case would have to pay for foreign language interpreters, "as justice requires."[85] This seems to be a nod to the Department of Justice's indication that other states should follow suit.

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[78] IDAHO CODE § 9-205 (1975) (amended 2023).

[79] Idaho R. Civ. P. 43(c).

[80] *Id.*

[81] Ky. Rev. Stat. Ann. § 30A.410 (West 1994).

[82] *Id.*

[83] Order In Re: Amendments to the Administrative Procedures of the Court of Justice, Part IX, Kentucky Court of Justice Language Access Plan and Procedures 2017–15 (2017), https://www.kycourts.gov/Courts/Supreme-Court/Supreme%20Court%20Orders/201715.PDF.

[84] *Id.*

[85] Order Amending Title 22 Part 217.1 of New York Codes, Rules and Regulation (2016), https://www.nycourts.gov/LegacyPDFS/rules/trialcourts/Part%20217.pdf.

2. *States where payment is at the discretion of the court*

In Indiana, any person "who cannot speak or understand the English language . . . and who is a party to or a witness in a civil proceeding is entitled to an interpreter to assist the person throughout the proceeding."[86] Once an interpreter has been established, it is up to the court to determine the manner in which the interpreter is to be paid.[87]

Currently, there is no established method for the court to determine who should be paying. Instead, in *Arietta v. State*, the Indiana Supreme Court indicated that the public should pay for the interpreter when a litigant is found indigent.[88] Otherwise, the State recognizes that there is technically no requirement to appoint and provide an interpreter at the court's costs.[89]

Payment for court interpreters is also discretionary in Maryland. Any party, victim, or victim's representative may apply for an interpreter in the state, and, upon receipt of the application, the court must appoint an interpreter.[90] It is the court's decision, however, whether to assess the cost of said interpreter against the parties as a cost of court.[91]

3. *States that always require the parties to pay for interpreters*

Prior to 2021, Louisiana required that the costs of providing interpreters to its litigants be taxed out as costs of court to be reimbursed by the parties.[92] Thankfully, the 2021 version of the bill eliminated the reimbursement language and simply states that all costs will be borne by the courts.[93]

The statutes in Alaska, however, have not been changed. Instead, the Alaska Court Rules state that "the court system will provide and pay for the necessary services of an interpreter . . .: (1) for the parents or guardian of the juvenile in delinquency proceedings, and (2) for the tribal representatives, foster parents, out-of-home care providers, or grandparents in child-in-need-of-aid proceedings."[94] In any other proceeding, it is not the responsibility of the court to pay for the court interpreters. That instead falls on the parties. However, in the instances where the court does decide to pay, the rate is determined by the Interpreter Services Coordinator as dictated in Alaska Courts Administrative Bulletin No. 82.[95]

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[86] IND. CODE § 34-45-1-3 (2023).

[87] *Id.* § 34-45-1-4.

[88] IND. SUP. CT., LANGUAGE ACCESS PLAN FOR THE INDIANA JUDICIAL BRANCH 19 (2019), https://www.in.gov/courts/files/language-access-plan.pdf (last visited Dec. 7, 2023). *See* Arrieta v. State, 878 N.E.2d 1238, 1244 (Ind. 2008).

[89] IND. SUP. CT., *supra* note 84, at 19–20.

[90] MD. CODE ANN., CTS. & JUD. PROC. § 9-114(a) (2022).

[91] *Id.* § 9-114(b).

[92] LA. CODE CIV. PROC. ANN. art. 192.2 (2019) (amended 2021).

[93] *Id.*

[94] Alaska Admin. R. 6(b), https://courts.alaska.gov/rules/docs/adm.pdf.

[95] *Id.* at 6.1(b) (indicating that the reader should refer to STACEY MARZ, ADMINISTRATIVE BULLETIN NO. 82 (Apr. 18, 2022), https://courts.alaska.gov/adbulls/docs/ab82.pdf).

IV. PROBLEMS WITH NOT HAVING A STATUTE GUARANTEEING ACCESS TO FOREIGN LANGUAGE INTERPRETERS

"Without [proper interpretation in court] the trial is but a 'babble of voices'" and the LEP is nothing more than an "'insensible object' who passively observes in complete incomprehension. The appointment of an interpreter is, thus, crucial to safeguarding the fundamental fairness of the trial."[96] The stated goal of the Federal Interpreter statute is candidly "to give non-English speaking and hearing/speech-impaired [plaintiffs,] defendants and witnesses an equal chance to understand and participate in criminal and civil trials in federal courts."[97] The direct result of interpreter appointment is to enable a non-English speaker to understand the proceedings and permit others in the courtroom to understand any testimony that the speaker may give.[98] Without that opportunity, it would be as if the LEP was observing the proceeding from within "a soundproof booth . . ., being able to observe but not comprehend."[99]

For example, "Kimberly Iden, an attorney specializing in representation of immigrant survivors of violence," has retold this story:

> I think that clients who understand some English or speak some English tend to try to get by with what they know. I've seen this create various problems. As a specific example, I have had a couple of clients in domestic violence situations who have received phone calls from a prosecutor's office in regards to pending criminal cases and think that they are being told that charges have been lowered against an abuser when in reality they are being asked if they agree to the charges being lowered. They might not agree but do not understand that they can state their objection. I now consider it part of my job to try to ensure that clients know that they have the right to request an interpreter in this situation.[100]

Despite the impact that an interpreter can have, a survey detailed in the Harvard Latino Law Review found that 46% of the thirty-four states surveyed failed to implement interpreters in appropriate civil cases.[101]

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[96] Patricia Walther Griffin, *Beyond* State v. Diaz: *How to Interpret "Access to Justice" For Non-English Speaking Defendants?*, 5 Del. L. Rev. 131, 151 (2002).

[97] Astiz, *supra* note 24, at 103.

[98] Griffin, *supra* note 96, at 1.

[99] Maxwell Alan Miller, Lynn W. Davis, Adam Prestidge, William G. Eggington, *Finding Justice in Translation: American Jurisprudence Affecting Due Process for People with Limited English Proficiency Together with Practical Suggestions*, 14 HARV. LATINO L. REV. 117, 117 (quoting State v. Natividad, 526 P.2d 730, 733 (Ariz. 1974)) [hereinafter Miller].

[100] Gretchen Hunt, *Challenges Faced by Attorneys and Advocates Working on Behalf of Clients with Limited English Proficiency*, 76 BENCH & BAR 15, 15 (2012).

[101] Miller, *supra* note 99, at 130.

Although the numbers fair better in criminal cases,[102] the absence of a constitutional right to an interpreter for civil litigants leaves them entirely reliant on a statutory guarantee.[103] When no statutes exist, all that an LEP person has is reliance on a government that time and again prioritizes the majority over its minority members.[104]

Effectively, this will keep an entire portion of the population excluded from the judicial process. If an interpreter is not appointed in civil cases, litigants "can't protect their children, they can't protect their homes, they can't protect their safety, [and] Society suffers because its laws cannot be enforced."[105] Only through the assistance of an interpreter funded by the court's themselves can we "ensure meaningful access to open, fair, efficient, and unbiased courts."[106] If the costs are not covered by the court, "[t]here is a real concern that by imposing interpretation costs on LEP litigants they will 'abstain from requesting interpreters, and judges [will] abstain from appointing them.'"[107] This could directly result in LEP people deciding to struggle through the appearance of being able to communicate,[108] placing them at a significant disadvantage in a civil action.

This is most evident with low-income litigants. LEP persons that must pay for their own interpreters bear greater financial burdens in pursuing a case.[109] Ultimately, they may decide not to pursue any action whatsoever. Low-income individuals already pursue less civil legal claims than traditional litigants. In fact, three of every four low-income families have at least one legal problem each year, but they pursue claims for only one of every four problems they experience.[110] If that individual speaks a language other than English, the additional barriers to entry will inevitably decrease that percentage even further.

V. RECOMMENDATIONS FOR THE STATE OF CONNECTICUT

Even with states doing their best to offer the minimum protections for LEP speakers, language access must go beyond. This includes enacting expansive language access legislation for interpreters in civil court. Below are specific recommendations to be included in a newly enacted Connecticut bill guaranteeing the right to a foreign language interpreter in civil court.

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[102] *Id.* at 130–31.

[103] Compare with the constitutional right to language access services in the courtroom as established under the Fifth, Sixth, and Fourteenth Amendments. *See, e.g.*, Judge Lynn W. Davis & Scott A. Isaacson, *Ensuring Equal Access to Justice for Limited English Proficiency Individuals*, 56 JUDGES' J. 21, 22 (2017).

[104] *Id.* at 21 (highlighting that "[t]he majority of people living in the United States communicate in English. However, for many others, English is not their first or primary language.")

[105] *Id.* at 22 (quoting Chief Judge Eric T. Washington, D.C. Court of Appeals, Experts Speak on Language Access, Nat'l Ctr. for State Courts (2013), vimeo.com/66249113).

[106] Davis & Isaacson, *supra* note 99, at 22.

[107] Harlamert, *supra* note 6, at 349 (quoting ABEL, *supra* note 13, at 17).

[108] U.S. DEP'T JUST. C.R. DIV., *supra* note 3, at 7.

[109] *Id.*

[110] LEGAL SERV. CORP., THE JUSTICE GAP: THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 8 (2022), https://lsc-live.app.box.com/s/xl2v2uraiotbbzrhuwtjlgi0emp3myz1.

A. *The Court Must Appoint a Certified or Otherwise Approved Foreign Language Interpreter in All Stages of Every Proceeding, Including Both Criminal and Civil Matters, Where a Litigant, Witness, or Other Interested Party Communicates with Limited English Proficiency.*

The first step in ensuring that justice is accessible to all participants in Connecticut court is to ensure that a language interpreter is appointed at all stages of a proceeding where it becomes clear that an interested party cannot communicate with fluency in English. This seems like a baseline requirement, but it is still strikingly absent from the General Statutes. If Connecticut does not enact such a statute, the state risks losing the current practices that have received such praise from national organizations.[111] Its citizens have been lucky enough to have been provided with interpreters without a statutory guarantee. However, until the legislature passes a formal requirement, Connecticut citizens lack the right to fully understand the legal process, further disenfranchising largely low-income and immigrant communities.

B. *The Cost of Utilizing Foreign Language Interpreters in Relation to Either a Criminal or Civil Matter Should be Borne by the Court Based on a Predetermined Fee Schedule as Designated by the Judicial Branch.*

As an attempt to remedy the disenfranchisement of the poor, the new Connecticut statute should guarantee that the state will bear the cost of providing interpretation services, regardless of the income of the LEP person in need. If the court is concerned about officially bearing the additional costs, they could petition bar foundations to create alternative interpretation services to implement volunteer language speakers in court. It is also highly likely that the court already has a designated budget for providing interpreters given that they are supposedly being appointed with some regularity already. If anything, a statutory guarantee will ensure that the judicial budget will remain well-stocked for interpreter fees.

C. *If an Interpreter is Not Promptly Appointed or Requested at the Beginning of a Matter, the Judge Must Appoint a Certified Interpreter as Soon as it Becomes Reasonably Clear That a Litigant Understands English Less Than a Fluent Speaker.*

The third requirement for the new statute is a safeguard that an interpreter be appointed if it later becomes clear that an individual who seemed to understand the proceedings later indicates that they have become confused or is missing key points of the process. This should be an objectively reasonable standard. Many individuals speak at least some conversational English. However, the legal process is much more complex and includes significant terminology that is not well-understood by even

[111] *Language Access*, *supra* note 17.

prolific speakers. Once you introduce a language barrier, LEP people are further disadvantaged. Therefore, allowing the appointment of interpreters at later phases is necessary to ensure full and complete involvement in the legal process.

CONCLUSION

Currently, the state of Connecticut has an office dedicated to protecting the rights of limited English speakers in its courts.[112] However, the state has no established statutes for its citizens to actually reap the benefits of that program. Because of this, access to the courts is significantly hindered for over twenty percent of the Connecticut population.[113] If any of those individuals identifies a legal problem in their daily lives, the mere fact that they speak another language could bar them from ever pursuing a remedy. That can hardly be considered justice.

The author urges the state of Connecticut to consider enacting an official state interpreter statute that pulls inspiration from some of the best aspects of the Federal Court Interpreter Statute and fellow U.S. state statutes. It is important that the legislation gives the judge broad leeway in appointing interpreters as soon as a litigant, witness, or interested party indicates, directly or indirectly, that they require assistance. This should be at no cost to the LEP person and be flexible enough to allow the appointment of interpreters at later stages of the litigation if it becomes clear that someone who seemed to understand the proceeding in fact lacks understanding. Maybe then, our non-English speakers will start to experience the justice that our Constitution proposes to guarantee.

[112] For more information on Committee on Limited English Proficiency, *see* Public Service and Trust Commission: Committee on Limited English Proficiency, STATE OF CONNECTICUT: JUDICIAL BRANCH, https://www.jud.ct.gov/Committees/pst/lep/default.htm (last visited May 26, 2024).

[113] STATE CONN. JUD. BRANCH, LANGUAGE ACCESS PLAN (2023), https://www.jud.ct.gov/lep/LanguageAccessPlan.pdf.