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LETTER FROM THE EDITOR

Elizabeth A. Ritchie

Dear Readers,

On behalf of the *Richmond Public Interest Law Review*, it is my honor to present the final issue of Volume XXIII: the 2020 General Topics in the Public Interest Issue.

Our authors address a variety of topics focusing on how society is evolving. This issue explores whether Virginia's Gubernatorial "No Succession" Rule is a democratic pillar or a constitutional relic; examines the effects of Florida's nutrient policy on the Everglades' native ecosystem; discusses how an educational adequacy suit could remedy Virginia's educational inequities; considers how birth control sabotage is a rampant part of domestic violence and should be covered by domestic violence law; analyzes whether monetary exactions should be subject to heightened constitutional scrutiny under Fifth Amendment Takings Clause jurisprudence; and includes a transcription of an Equal Rights Amendment Conference hosted by the University of Richmond School of Law and organized by VARatifyERA.

The publication of this issue warrants a special thanks to our Lead Articles Editors, Kim Simmons and Caitlin Yuhas, for their hard work and dedication. Additionally, we are thankful to our authors: Philip O'Neill, Matlin Brown, Ashley Phillips, and Sahba Saravi. I am also grateful for the opportunity to publish my work in this issue. On behalf of the *Richmond Public Interest Law Review*, we sincerely hope this issue provides insight on these interesting topics.

Sincerely,

Elizabeth A. Ritchie

Editor in Chief

*VIRGINIA'S GUBERNATORIAL "NO SUCCESSION" RULE:
DEMOCRATIC PILLAR OR CONSTITUTIONAL RELIC?*

*Philip O'Neill**

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ABSTRACT

A 245-year old provision of the Virginia Constitution makes the Governor ineligible to seek reelection immediately following an initial term unless and until he or she rotates out of office for a specified period, now four years. In practice, this “No Succession” Rule has prevented all but a handful of Governors from serving multiple terms, the last being Mills Godwin in mid-century. The Rule was adopted as part of the State’s first Constitution, which embodied a “weak” executive model of government favored by many of the original colony-states. That model has long since been abandoned in Virginia in favor of the modern strong executive, the No Succession Rule being the last remaining vestige of that earlier scheme. During the 19th century, the General Assembly modified several aspects of the Executive’s tenure but left the Rule basically intact. The Rule’s unusual persistence is the result of several factors working in combination, including Virginia’s conservative political ethos; the prevalence of one-party rule in much of the State’s history; the redundant, multi-year process for amending the state constitution; and, most importantly, the age-old competition for power between the General Assembly and the governor. There have been notable attempts in recent decades to change the Rule. One such attempt occurred during the 1969-70 revision of the Constitution, when proposals to repeal it were debated in both houses of the General Assembly but ultimately voted down by large margins. These debates were recorded and published, and the same arguments made by the legislators then, pro and con, continue to be voiced today, mostly in articles and editorials in many of the State’s leading newspapers, virtually all of which favor repeal of the Rule. Taken together, one can distill from these sources the major themes that resonate whenever the Rule’s continued vitality is discussed. The State’s Democratic Party leadership has endorsed repeal of the Rule, and the Party’s ascendancy in the General Assembly makes it likely in the near term that Commonwealth voters will have the opportunity at long last to choose whether a Governor should be able to serve consecutive terms.

INTRODUCTION

Virginia has never seen fit to limit legislative or judicial members’ terms in office of. In contrast, since adoption of its original constitution in 1776, Virginia has prohibited the governor from serving consecutive terms, although a former governor has always been eligible to serve another term after having rotated out of office for a specified period, now four years.¹ Numerous states had limits of this kind in the past, but all except Virginia have repealed them,² most long ago and the last two, Mississippi and Kentucky, in 1986 and 1992 respectively.³ Remarkably, Virginia’s 244-year old ban on gubernatorial succession (the “No Succession Rule”) has never been the object of an up or down vote by its citizens—it has always been entirely the work of their representatives in the General Assembly.⁴ There are clear signs, however, that this may change in the not-too-distant future. A thorough reexamination of the Rule’s origin, history, and merits is well in order.

The No Succession Rule was enacted as part of Virginia’s original constitution and has remained essentially intact ever since.⁵ When it was conceived, American colonialists widely shared a belief that regular election and rotation of a governmental executive would limit his ability to amass and wield political power and, thereby, deter a repetition of the abuses practiced by British monarchy and its agents, the royal governors.⁶ The ban on successive terms was a key component of the “weak executive” scheme of government that proliferated in the early constitution-making by the several states.⁷ The Rule has persisted to this day despite Virginia’s abandonment of every other aspect of that scheme in favor of the powerful modern governorship that exists here and in many other states.⁸

¹ See VA. CONST. art. V, § 1 (“The chief executive power of the Commonwealth shall be vested in a Governor. He shall hold office for a term commencing upon his inauguration on the Saturday after the second Wednesday in January, next succeeding his election, and ending in the fourth year thereafter immediately upon the inauguration of his successor. He shall be ineligible to the same office for the term next succeeding that for which he was elected.”).

² *Term Limits on Governor*, U.S. TERM LIMITS, https://www.termlimits.com/governor_termlimits/ (last visited Feb. 6, 2020).

³ KY. CONST. of 1891, art. VII, § 71 (1992); MISS. CONST. of 1890, art. V, § 116 (1986).

⁴ Martin Austerhuhle, *Why Can Virginia Governors Only Serve One Term? And Should that Change?*, WAMU (Sept. 28, 2017), <https://wamu.org/story/17/09/28/single-virginia-governors-commonwealth-cant-stand-re-election-change/>.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

In practice, the No Succession Rule has made Virginia's governors one-term officeholders, with only a handful of exceptions.⁹ Of the seventy-three governors in the state's history, just four have served a second time after having rotated out of office.¹⁰ The first state governor, Patrick Henry, served three one-year terms in office (1776-79) (the maximum initial tenure at the time) and, after a five-year hiatus, served two additional years (1784-86).¹¹ James Monroe served three successive years (1799-1802) and was elected to another term a decade later (1811), but he resigned after several months to become President Madison's Secretary of State.¹² William "Extra Billy" Smith governed in the period before the Civil War and then again during its last year (1846-49, 1864-65).¹³ In the past century and a half, only Mills Godwin served a second term (1966-70, 1974-78), and he did so after having switched political parties.¹⁴ The reality is that once a Virginia governor is out of office, "the theoretical opportunity to run again at some future time is hardly . . . meaningful."¹⁵

Some scholars have claimed that the number of repeat Virginia governors would have been higher but for the fact that some of Virginia's one-term governors were subsequently elected or appointed to federal office, such as the U.S. Senate.¹⁶ That is undoubtedly so, but the data concerning the numbers of governor who held federal office before and after serving as governor point to a more basic explanation for the infrequency of two-term executives in the state's history. Of Virginia's sixty-nine governors who served one term or less, twenty-two were subsequently elected to Congress, the Presidency or a Cabinet position, or were appointed to a federal judgeship or as an

⁹ See *Governors of Virginia*, ENCYCLOPEDIA VA., https://www.encyclopediavirginia.org/Governors_of_Virginia (last modified Jan. 25, 2018).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *William "Extra Billy" Smith*, HOLLYWOOD CEMETERY, <https://www.hollywoodcemetery.org/william-smith> (last visited Feb. 9, 2020).

¹⁴ James R. Sweeney et al., *Mills E. Godwin (1914-1999)*, ENCYCLOPEDIA VA. (Dec. 19, 2016), https://www.encyclopediavirginia.org/Godwin_Mills_E_1914-1999#start_entry.

¹⁵ 2 A.E. DICK HOWARD, COMMENTARY ON THE CONSTITUTION OF VIRGINIA 590 n.18 (1974). Of course, the total number of ex-governors who, in theory, could have served twice is less than seventy-three. For example, the current and next most recent governors are not yet legally eligible to serve again; and another governor died in an 1811 fire while in office. *Gov. George William Smith*, NAT'L GOVERNORS ASS'N, <https://www.nga.org/governor/george-william-smith/> (last visited Feb. 9, 2020).

¹⁶ HOWARD, *supra* note 15 ("[A]nother reason for the infrequency of a second term . . . is that the governor often moves on to an intervening office."); Joseph E. Kallenbach, *Constitutional Limitations of Reeligibility of National and State Chief Executives*, 46 AM. POL. SCI. REV. 438, 453 (1952).

ambassador, and several others obtained other federal posts such as head of a department or member on an independent commission.¹⁷ Conversely, eleven individuals became governors of Virginia *after* having served in federal office, but all of them served only a single term as the state’s executive, too.¹⁸ For both groups, officeholder mobility was more pronounced in the nineteenth century than later.¹⁹ At least during the state’s early history, therefore, the prestige of being governor was great enough to entice a significant number of former federal officeholders to seek and obtain the Virginia governorship for the first time.²⁰ Yet—just like the one-term governors who then moved on to federal office—no one in this latter group was elected governor a second time either.²¹ Why? The answer is implicit in the Rule, namely, its forced period of ineligibility. Faced with the prospect of sitting out four long years, every ex-governor must make a new plan for his life and career going forward, be it securing higher office or working in the private sector, which, once put in place, he is naturally reticent to disrupt simply for the chance to be nominated and elected governor again.²² Likewise, a former governor’s popularity inevitably diminishes the longer he is out of the public’s eye.²³ In short, the reason why there have been so few two-term governors is the most obvious one: The ineligibility period depletes their motivation to seek the office twice.

To be sure, vast changes have occurred in Virginia since it declared its independence. The state’s population has grown eleven-fold;²⁴ its economy, modern and diversified, would rank in the top thirty-five in the world if Virginia were a nation by itself;²⁵ it has

¹⁷ *Governors of Virginia*, *supra* note 9.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² HOWARD, *Supra* note 15, at 590; Joseph E. Kallenbach, *Constitutional Limitations of Reeligibility of National and State Chief Executives*, 46 AM. POL. SCI. REV. 438, 453 (1952).

²³ Jessica Taylor, *5 Things You Should Know About Jim Gilmore*, NPR (July 8, 2015), <https://www.npr.org/sections/itsallpolitics/2015/07/08/421145703/5-things-you-should-know-about-jim-gilmore>.

²⁴ Virginia had the largest population of the 13 colonies in 1776 at approximately 747,000. Douglas A. McIntyre, *In July 1776, 2.5 Million People Lived in the 13 Colonies And ...*, 24/7 WALL ST. (July 4, 2019), <https://247wallst.com/economy/2019/07/04/in-july-1776-2-5-million-people-lived-in-the-thirteen-colonies-and/>. The Census Bureau estimated the state’s population in July 2019 to be 8,535,000. *Quick Facts: Virginia*, U.S. CENSUS BUREAU (July 1, 2019), <https://www.census.gov/quickfacts/VA>.

²⁵ *GDP by Country*, WORLDOMETER, <https://www.worldometers.info/gdp/gdp-by-country/> (last updated Feb. 16, 2020); *Gross Domestic Product (GDP) of the United States in 2018*, *by State*, STATISTA,

160,000 public employees;²⁶ and its annual governmental budget is nearly \$59 billion.²⁷ Unquestionably, the scope and complexity of the state's affairs today are enormous. The job of being governor of any state is daunting, but it is particularly so for a one-term Virginia governor who has a lot to do and little time to do it. Former Governor James Gilmore has called the No Succession Rule a "museum-piece of old politics that should not exist in the modern world today."²⁸ All but one of the last ten occupants of the same office share that view.²⁹

Of the half dozen generally recognized forms of direct democracy available to the people of the states, Virginia's citizens have access to only one: the power to vote to amend the constitution.³⁰ For such a measure to be put to a state-wide referendum, a majority of both houses of the General Assembly must first approve it, and then approve it again after an intervening House of Delegates election.³¹ Only after this two-stage legislative evaluation is complete can it go before the voters for their approval in a state-wide referendum.³² The people's right to vote on constitutional amendments is thus a qualified one, subject to the filter of a multi-year, redundant legislative referral process.

<https://www.statista.com/statistics/248023/us-gross-domestic-product-gdp-by-state/> (last updated May 2019).

²⁶ See *2018-19 Salaries of Virginia State Employees*, RICH. TIMES-DISPATCH, <https://data.richmond.com/salaries/2018/state> (last updated June 20, 2019).

²⁷ *Frequently Asked Questions*, VA. DEPT. PLAN. & BUDGET, <https://dpb.virginia.gov/budget/budget.cfm?biennium=2018-2020> (last updated July 16, 2018).

²⁸ Austermuhle, *supra* note 4.

²⁹ **FORMER GOVERNORS ROBB, BALILES, WILDER, GILMORE, WARNER, KAINE, MCDONNELL, AND MCAULIFFE FAVOR ALLOWING CONSECUTIVE TERMS, AS APPARENTLY DOES CURRENT GOVERNOR NORTHAM; ONLY FORMER GOV. GEORGE ALLEN WOULD RETAIN THE RULE. JOHN DINAN, THE VIRGINIA STATE CONSTITUTION: A REFERENCE GUIDE 117-18 (2006); TRAVIS FAIN, GENERAL ASSEMBLY: REDISTRICTING REFORM, TWO TERM GOVERNOR BILLS ADVANCE, DAILY PRESS (JAN. 3, 2015), [HTTPS://WWW.DAILYPRESS.COM/TIDEWATER-REVIEW/DP-NWS-GA-REDIST-TWO-TERMS-20150120-STORY.HTML](https://www.dailypress.com/tidewater-review/dp-nws-ga-redist-two-terms-20150120-story.html); SHELBY MERTENS, VIRGINIA'S SENATE OK'S LETTING GOVERNOR SERVE TWO TERMS, LOUDOUN TIMES-MIRROR (FEB. 2, 2013), [HTTPS://WWW.LOUDOUNTIMES.COM/NEWS/VIRGINIA-SENATE-OK-S-LETTING-GOVERNOR-SERVE-TWO-TERMS/ARTICLE_6CB101CA-A2C6-51BA-9AD1-C79F6AE11F2.HTML](https://www.loudountimes.com/news/virginia-senate-ok-s-letting-governor-serve-two-terms/article_6cb101ca-a2c6-51ba-9ad1-c79f6ae11f2.html); MICHAEL POPE, SHOULD VIRGINIA'S GOVERNORS BE ALLOWED TO RUN FOR REELECTION?, CONNECTION (JAN. 3, 2013), [HTTP://WWW.CONNECTIONNEWSPAPERS.COM/NEWS/2013/JAN/03/SHOULD-VIRGINIAS-GOVERNOR-BE-ABLE-RUN-REELECTION/](http://www.connectionnewspapers.com/news/2013/jan/03/should-virginias-governor-be-able-run-reelection/).**

³⁰ *Forms of Direct Democracy in the American States*, BALLOTPEDIA, http://ballotpedia.org/Forms_of_direct_democracy_in_the_American_states (last updated Sept. 7, 2013) ("The generally acknowledged forms of direct democracy are the legislatively referred constitutional amendment, the legislatively referred state statute, the initiated state statute (direct or indirect), the initiated constitutional amendment, the veto referendum (sometimes called the citizen referendum or the statute referendum), . . . and statewide recall.").

³¹ A.E. Dick Howard, *Constitutional Revision: Virginia and the Nation*, 9 U. RICH. L. REV. 1, 7 (1974).

³² VA. CONST. art. XII, § 1.

There have been near-annual but ultimately unsuccessful efforts in the General Assembly in recent decades to initiate the process of repealing the Rule. In 2013 and again in 2015, for example, the Republican-majority state Senate voted in favor of allowing the governor to serve two successive terms only to see the measures defeated in the House of Delegates.³³ Likewise, a Senate proposal in 2019 to change the Rule passed in committee but was defeated in a floor vote.³⁴ Despite these setbacks, there continues to be a strong body of support in the General Assembly for letting the voters decide whether to allow their governor to serve consecutive terms. The House Democrat caucus is on record as supporting a constitutional amendment to establish a two-term governorship,³⁵ and with Democrats having gained control of both houses of the General Assembly in the November 2019 elections, renewed efforts to pass reform legislation appear almost certain. As one long-term supporter of abandoning the Rule confidently claimed, “The greatest fear opponents [of repealing the Rule] have is it will get on the ballot,” he says, “because their fear is [that] it will pass overwhelmingly.”³⁶

I. The Rule as a Particular Form of Term Limit

A political term limit is a legal restriction, usually constitutional in nature, that limits how long an officeholder such as a governor or legislator may serve in a particular elected or appointed office.³⁷ There are no gubernatorial term limits of any kind in fourteen (14) U.S. states, including Iowa, New York, and Texas.³⁸ Five of those states are

³³ Jason Spencer, *Should Virginia Allow Governors to Serve Two Consecutive Terms? Senate Says Yes*, ARLINGTON PATCH (Feb. 3, 2013), <https://patch.com/virginia/arlington-va/should-virginia-allow-governors-to-serve-two-consecutive-terms>; Patrick Wilson, *Va. Senate OKs Measure Allowing 2-Term Governor*, VIRGINIAN-PILOT (Jan. 27, 2015), <https://www.pilotonline.com/government/virginia/>.

³⁴ S.J. 290 was introduced by Sen. Adam Ebbin, but was defeated by a vote of 22-18. S.J. Res. 250, 2019 Gen. Assemb., Reg. Sess. (Va. 2019); Rosemarie O’Connell, *Virginia’s One-Term Governor Policy May Change Soon*, DELMARVANOW.COM (Jan. 28, 2019), <https://www.delmarvanow.com/story/news/local/virginia/2019/01/28/virginias-one-term-governor-policy-may-change-soon/2698874002/>.

³⁵ Laura Vozzella, *Democrats Want Longer Terms for Virginia Governors*, WASH. POST (Dec. 12, 2011), https://www.washingtonpost.com/blogs/virginia-politics/post/democrats-want-longer-terms-for-va-governors/2011/12/12/gIQA6x5BqO_blog.html.

³⁶ Sarah Harney, *The Last One-Term Statehouse*, GOVERNING (Oct. 1, 2005), <https://www.governing.com/topics/politics/Last-One-Statehouse.html>.

³⁷ Michael Roberts, *Term Limits Defined*, BALANCE CAREERS (Jan. 4, 2020), <https://www.the-balancecareers.com/term-limits-1669489>.

³⁸ *States with Gubernatorial Term Limits*, BALLOTEDIA, https://ballotpedia.org/States_with_gubernatorial_term_limits (last visited Feb. 4, 2020).

among the original thirteen states but none of them had a Virginia-style no succession rule in the era of independence.³⁹ The remaining thirty-six (36) states have some type of term limit for their governors. All of these except Virginia allow gubernatorial succession.⁴⁰

The No Succession Rule does not control the number of terms a person may serve but instead limits his eligibility to serve. It is a less common form of term limit that, experience shows, indirectly restricts the number multi-term governors. It is therefore useful to distinguish between two types of gubernatorial term limits: (i) *fixed duration*, being those which specify the maximum number of terms or years that one may serve as governor;⁴¹ and (ii) *reelible-after-rotation*, in which a governor after having served a specified number of terms or years of initial service, must rotate out office for a specified period before becoming eligible for reelection.⁴² By the early 1950s, some twenty states, including Virginia, had constitutional provisions permitting a governor to be reelected but only after a period of rotation.⁴³ Within two decades, that number dwindled to fourteen, including Pennsylvania, Indiana and the entire South except for Arkansas.⁴⁴ One-by-one these states jettisoned their anti-succession rules. In 1970, for example, after having defeated similar proposals four previous times, West Virginia's voters approved a constitutional amendment to allow a governor to serve two successive terms followed by one term of ineligibility.⁴⁵ By the 1980s, only three states retained the ban in their constitutions: Mississippi, Kentucky, and Virginia.⁴⁶ Within a decade the first two of those states passed constitutional amendments allowing governors to serve consecutive terms, leaving Virginia the lone

³⁹ *Id.*

⁴⁰ *Id.* Eight states restrict their governors to a lifetime maximum of two terms, consecutive or not. Excluding Virginia, the governors of the remaining twenty-seven states that have term limits are eligible to serve consecutive terms but must then sit out for a specified rotation period.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Joseph E. Kallenbach, *Constitutional Limitations of Reeligibility of National and State Chief Executives*, 46 AM. POL. SCI. REV. 438, 443 nn.23–24 (1952).

⁴⁴ HOWARD, *supra* note 15, at 592.

⁴⁵ W. VA. CONST. art. VII, § 7-4; *id.* at 592 n.24; *West Virginia 1970 Ballot Measures*, BALLOTPEDIA, https://ballotpedia.org/West_Virginia_1970_ballot_measures (last visited Feb. 2, 2020).

⁴⁶ KY. CONST. § 71; MISS. CONST. art. 5, § 116; VA. CONST. art. 5, § 1; *Article V, Mississippi Constitution*, BALLOTPEDIA, https://ballotpedia.org/Article_V,_Mississippi_Constitution (last visited Feb. 6, 2020); *The Executive Department, Kentucky Constitution*, BALLOTPEDIA, https://ballotpedia.org/The_Executive_Department,_Kentucky_Constitution (last visited Feb. 6, 2020).

holdout.⁴⁷ Political term limits of all stripes have been controversial throughout American history. Arguments about term limits have often spilled over into litigation, and state anti-succession laws are no exception.⁴⁸ Seeking to overturn their state’s limit on consecutive terms, two state governors sought redress in the courts, predictably without success given the presumptive legitimacy of constitutional provisions. The leading case is *State ex rel. Maloney v. McCartney* (1976), where West Virginia’s highest court upheld the state’s law restricting eligibility for a third successive term.⁴⁹ When Archie Moore, the state’s first two-term governor, filed a certificate of candidacy for a third term, a rival candidate, Maloney, filed an action for a writ of mandamus against the Secretary of State to prevent Moore’s name from appearing on the ballot.⁵⁰ Moore claimed that the constitutional prohibition of a third term violated section 1 of the Fourteenth Amendment to the U.S. Constitution by denying equal protection of the laws to those persons who would wish to elect him to an immediate third term.⁵¹ The court rejected Moore’s claim and granted the writ.⁵²

In its opinion, the court relied in part upon a prior decision by the Georgia Supreme Court, *Maddox v. Fortson* (1970), rejecting Gov. Lester Maddox’s analogous suit to declare his state’s constitutional no succession rule invalid on grounds that it denied him his right to equal protection and denied voters their right to freedom of association under the First Amendment.⁵³ The *Maloney* court summarized the holdings in prior term limits cases, mostly involving legislative officeholders, this way: “The universal authority is that restriction upon succession of incumbents serves a rational public policy and that, while restrictions may deny qualified men an opportunity to serve, as a general rule the over-all health of the body politic is enhanced by limitations on continuous tenure.”⁵⁴ Finding that the public’s voting franchise would be affected only incidentally by the anti-succession rule, the

⁴⁷ KY. CONST. § 71; MISS. CONST. art. 5, § 116; VA. CONST. art. 5, § 1; *Article V, Mississippi Constitution*, BALLOTPEDIA, https://ballotpedia.org/Article_V,_Mississippi_Constitution (last visited Feb. 6, 2020); *The Executive Department, Kentucky Constitution*, BALLOTPEDIA, https://ballotpedia.org/The_Executive_Department,_Kentucky_Constitution (last visited Feb. 6, 2020).

⁴⁸ See *State ex rel. Maloney v. McCartney*, 223 S.E.2d 607, 610 (W. Va. 1976), *appeal dismissed sub nom.* Moore v. McCartney, 425 U.S. 946 (1976).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 617.

⁵³ *Id.* at 611 (citing *Maddox v. Foreston*, 172 S.E.2d 595, 599 (Ga. 1970)).

⁵⁴ *Id.* at 611.

court in *Maloney* held that when balancing its salutary purpose of assuring competitive elections, the rule was reasonable and, therefore, lawful.⁵⁵

One may disagree with that result, but these cases do seem to have been correctly decided.⁵⁶ If little else, they confirmed that the only avenue of relief for opponents of anti-succession laws is by political means—that is, by the process of constitutional amendment.⁵⁷

In Virginia, a proposal to allow two consecutive terms came before the full General Assembly a half century ago but the legislators overwhelmingly voted against it, accepting the recommendation of the 1969 Commission on Constitutional Revision (CCR) to retain the status quo.⁵⁸ Fifteen years later sentiment had shifted, albeit not enough to carry the day. In 1985, both houses of the General Assembly approved a constitutional amendment to rescind the ban on consecutive terms—the closest Virginia has ever come to repealing the Rule—only to reject the measure when it came up again for required second legislative vote under the State’s amendment procedures.⁵⁹

II. Rotation in Office at the Time of Virginia’s Founding

Term limitation is not a new idea. The concept of regular rotation in office originated in ancient Greece and Rome, and was revived by European intellectuals during the Renaissance, debated in numerous public writings before and during the American Revolutionary period, waxed and waned through the course of nineteenth century

⁵⁵ *Id.* at 612–13. The *Maloney* court described the purpose of anti-succession rules with a noticeably modern focus on the evils of political “patronage” and “machines”:

The reasons for limitations upon the right of incumbents to succeed themselves have their origin in the political structure of yesteryear when direct access by the candidates to voters was circumscribed by poor communications, illiteracy and indifference. The power of incumbent officeholders to develop networks of patronage and attendant capacities to deliver favorably disposed voters to the polls raised fears of an entrenched political machine which could effectively foreclose access to the political process. Consequently, . . . , it was thought that regular changes in the chief executive would stimulate criticism within political parties for the purpose of attracting attention among political parties by providing occasions on which entrenched machines would be so disrupted by internecine strife as to insure a meaningful, adversary and competitive election.

Id. (citing *Maddox v. Foreston*, 172 S.E.2d 595, 599 (Ga. 1970)).

⁵⁶ Hugh B. McNatt, *Constitutional Law – Incumbency Prohibition – Is Georgia In Step with the Times?*, 22 MERCER L. REV. 473, 476–77 (1971) (criticizing *Maddox* as infringing the people’s basic right to choose their elected officials).

⁵⁷ *Maloney*, 223 S.E.2d at 613.

⁵⁸ JOHN DINAN, THE VIRGINIA STATE CONSTITUTION: A REFERENCE GUIDE 117 (2006)

⁵⁹ *Id.* at 118.

politics, was codified in the Twenty-Second Amendment to the Constitution in 1951, and served to inspire the legislative term limit debates of the 1990s.⁶⁰ American political leaders in the Revolutionary era were keenly aware of earlier writings and practices involving rotation in office, and widely shared the belief that republican “government should be kept as near to the people as possible, chiefly through frequent elections and rotation-in-office.”⁶¹ Advocates of rotation chiefly cited concerns about the corrupting influence of political power and the fear of political dynasties.⁶² As one popular colonial publication claimed: “A rotation . . . in power and magistracy is essentially necessary to a free government.”⁶³ A few colonies actually already experimented with gubernatorial terms limits. For example, Connecticut’s charter, the Fundamental Orders of 1639—sometimes called the nation’s first constitution—barred the governor from serving consecutive terms, fixing a term of one year and providing that “no person be chosen Governor above once in two years.”⁶⁴ In Virginia, many important figures including Washington, Lee, Paine, Jefferson, Mason, Randolph and Monroe publicly supported the idea of rotation in office.⁶⁵

In May 1776, the Continental Congress issued resolutions advising the colonies to adopt new governments “under the authority of the people.”⁶⁶ The goal of the early constitution-makers was to “prevent power, which they identified with rulers or governors, from encroaching upon liberty, which they identified with the people or their representatives.”⁶⁷ For them, the best way to ensure this result was to strip power from the new executive and surround him with structures (e.g., a Council) whose members would be elected by the legislature,

⁶⁰ Mark P. Petracca, *Rotation in Office: The History of an Idea*, in *LIMITING LEGISLATIVE TERMS* 19–20 (Gerald Benjamin & Michael J. Malbin eds., 1992).

⁶¹ CLINTON ROSSITER, *SEEDTIME OF THE REPUBLIC* 418 (Harcourt, Brace & World, Inc. 1953).

⁶² *Id.*

⁶³ John Trenchard, *Cato’s Letters*, No. 61, U. CHI. (Jan. 13, 1721), <http://press-pubs.uchicago.edu/founders/documents/v1ch17s7.html>. Cato was the joint pseudonym of two London essayists writing in the early 18th century, whose Letters were “the most popular, quotable, esteemed source of political ideas in the colonial period.” ROSSITER, *supra* note 61, at 141.

⁶⁴ FUNDAMENTAL ORDERS OF 1639, order 4; WILLI P. ADAMS, *THE FIRST AMERICAN CONSTITUTIONS* 250–51 (2001).

⁶⁵ CHARLES RAMSDELL LINGLEY, *THE TRANSITION IN VIRGINIA FROM COLONY TO COMMONWEALTH* 172–73 (Faculty of Pol. Sci. of Colum. U. eds., 1910) (support for Mason); Mark P. Petracca, *Rotation in Office: The History of an Idea*, in *LIMITING LEGISLATIVE TERMS*, *supra* note 60, at 19–20 (support for Washington, Lee, Paine, Jefferson, Randolph, and Monroe).

⁶⁶ WILLI P. ADAMS, *THE FIRST AMERICAN CONSTITUTIONS* 60 (2001).

⁶⁷ GORDON S. WOOD, *THE AMERICAN REVOLUTION: A HISTORY* 67 (2003).

thus rendering him a weak and inferior officer.⁶⁸ The effect was to transfer nearly all political authority from a single ruler to the people's representatives—truly, a “radical” change in governing rarely seen in human history.⁶⁹

In 1776-1777, ten states adopted written constitutions, while two others (Connecticut and Rhode Island) retained their preexisting charters, which were already republican in nature.⁷⁰ Notably, when the thirteenth state, Massachusetts, passed its own constitution in 1780, it deviated from most of the others by adopting a British-style bicameral legislature balanced by a strong executive able to veto laws and appoint local officials, a precursor of the modern separation of powers model of government.⁷¹ Many of these new constitutions were accompanied by a declaration of rights, which articulate a panoply of individual liberties that resemble those established in the first ten amendments to the U.S. Constitution.⁷²

On May 15, 1777, the Fifth Revolutionary Virginia Convention adopted its famous resolution calling for independence and appointed a committee to draft a declaration of human rights and a plan of government.⁷³ The Declaration of Rights was adopted by the Convention less than a month later.⁷⁴ It was drafted by George Mason, an erudite Potomac planter “so liberal he could not swallow the [later U.S.] Constitution and so aristocratic he regarded Washington as an upstart.”⁷⁵ The Declaration presages the rotation principle embodied in the later-approved Constitution,⁷⁶ which is not surprising given Mason's pivotal role in drafting both instruments. Section 5 of the Declaration proclaims that freedom from oppression and enhanced quality of representation would be secured by reducing “at fixed periods” the members of the executive and legislature “to a private station . . . from which

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ ALAN TAYLOR, AMERICAN REVOLUTIONS: A CONTINENTAL HISTORY, 1750-1804, at 356 (2016).

⁷¹ *Id.* at 360–61.

⁷² *Id.* at 357.

⁷³ Continental Cong. Preamble & Res. of the Va. Convention, May 15, 1776 (Va. 1776).

⁷⁴ *The Virginia Declaration of Rights*, NAT'L ARCHIVES, <https://www.archives.gov/founding-docs/virginia-declaration-of-rights> (last visited Feb. 9, 2020).

⁷⁵ 1 SAMUEL ELIOT MORISON, AMERICAN REPUBLIC 235 (3rd ed. 1942).

⁷⁶ *The Virginia Declaration of Rights*, *supra* note 74.

they were originally taken” by means of “frequent, certain and regular elections.”⁷⁷

Mason’s was only one of a half-dozen drafts and outlines of a new constitution, which “makes the question of authorship of the Virginia Constitution a complex and difficult one.”⁷⁸ Nonetheless, it is widely accepted that Mason’s drafts were the most influential to the final form of the document.⁷⁹ It is clear that Mason’s original draft contained almost the exact form of the prohibition on gubernatorial succession that was adopted by the Convention.⁸⁰ On June 29, 1776, Virginia became the third state to adopt a constitution,⁸¹ and its provisions relating to the governor reflected the idea of frequent elections and rotation in the new constitutional order.⁸² The new Constitution had two basic features. First, and more pertinently, it declared that the future form of the government of Virginia would include an executive annually elected by the legislature who could serve no more than three years out of any seven.⁸³ The No Succession Rule thus read: “A Governor, or chief magistrate, shall be chosen annually by joint ballot of both Houses . . . who shall not continue in that office longer than three years successively, nor be eligible, until the expiration of four years after he shall have been out of that office.”⁸⁴

⁷⁷ *Id.*

⁷⁸ Editorial Note: *The Virginia Constitution*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-01-02-0161-0001> (last visited Feb. 9, 2020).

⁷⁹ *Id.*

⁸⁰ CHARLES RAMSDELL LINGLEY, *THE TRANSITION IN VIRGINIA FROM COLONY TO COMMONWEALTH* 172–73 (Faculty of Pol. Sci. of Colum. U. eds., 1910) (“The Constitution followed almost completely the Mason Plan which called for a governor to be chosen annually by the assembly, to be eligible for three years and then be ineligible for four years.”); see also Robert L. Hilldrup, *The Virginia Convention of 1776: A Study in Revolutionary Politics* 253–55 (May 1, 1935) (unpublished Ph.D. dissertation, University of Virginia) (on file with author); Letter from Edmund Pendleton to Thomas Jefferson (May 24, 1776), in 1 *THE LETTERS AND PAPERS OF EDMUND PENDLETON 1734-1803*, at 180 (David John Mays ed., 1967) (“The Political Cooks are busy preparing the dish, and . . . Colonel Mason seems to have the Ascendancy in the great work . . .”); JEFF BROADWATER, *GEORGE MASON: FORGOTTEN FOUNDER* 93 (2006). The Committee on the Constitution slightly revised Mason’s proposal to require a four-year period of rotation instead of three. See Robert L. Hilldrup, *The Virginia Convention of 1776: A Study in Revolutionary Politics* 264 (May 1, 1935) (unpublished Ph.D. dissertation, University of Virginia) (on file with author).

⁸¹ Mark A. Graber, *Contribution: State Constitutions as National Constitutions*, 69 *ARK. L. REV.* 371, 378 (2016).

New Hampshire was first and South Carolina second to adopt constitutions. *Id.*

⁸² Robert Struble, Jr., *House Turnover and the Principle of Rotation*, 94 *POL. SCI. Q.* 649, 650, 652 (1979-1980).

⁸³ Robert L. Hilldrup, *The Virginia Convention of 1776: A Study in Revolutionary Politics* 253–55 (May 1, 1935) (unpublished Ph.D. dissertation, University of Virginia) (on file with author).

⁸⁴ *The Constitution as Adopted by the Convention*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-01-02-0161-0008> (last visited Feb. 7, 2020) (presenting the language used in the

Second, the Constitution redistributed the powers previously exercised by royal governors, lodging judicial power in a separate court system; executive power in a new eight-member Council of State that the legislature elected that would approve the governor's acts, and legislative power in a bicameral general assembly.⁸⁵ The Governor had no veto or other power over legislation or to call or prorogue the legislature.⁸⁶ His function was to execute the laws and make appointments with the advice and consent of the Council, and to supervise the militia. Succinctly put, "[t]he executive apparatus that emerged from the Convention was weak in constitutional status, confused in lines of authority, and wholly . . . subservient to the legislative will."⁸⁷

With Virginia taking the lead, six other states adopted gubernatorial rotation provisions in their original constitutions of 1776-1777.⁸⁸ Maryland adopted a provision that in relevant part was identical in wording to Virginia's, prohibiting a governor to serve no more than three years out of any seven.⁸⁹ Except for Pennsylvania, which adopted the same limitation as Virginia's for the members of its plural executive, the period of ineligibility in the remaining states were less, either two or three years:

State & Date of Adoption	Term & Rotation Period
Delaware 10 September 1776	3-year term; ineligible for 3 years ⁹⁰
North Carolina 18 December 1776	3- one-year terms; ineligible for 3 years ⁹¹
Georgia 5 February 1777	1-year term; ineligible for 2 years ⁹²

text of the Virginia Constitution of 1776 as it was adopted by the Virginia Convention on June 29, 1776).

⁸⁵ BRENT TARTER, *THE GRANDEES OF GOVERNMENT* 108 (2013); *id.*

⁸⁶ *First Virginia Constitution, June 29, 1776*, LIBR. VA., https://edu.lva.virginia.gov/online_class-room/shaping_the_constitution/doc/va_constitution (last visited Feb. 12, 2020).

⁸⁷ Rowland Egger, *The Governorship of Virginia, 1776 and 1976*, 52 UNIV. VA. NEWSL. (The Univ. of Va., Va.), Aug. 1976, at 45-46.

⁸⁸ *First Virginia Constitution, June 29, 1776*, *supra* note 86.

⁸⁹ MD. CONST. of 1776, art. XXXI ("That the governor shall not continue in that office longer than three years successively, nor be eligible as Governor, until the expiration of four years after he shall have been out of that office."); PENN. CONST. of 1776, § 19 (plural executive composed of twelve citizens; 3 one-year terms; ineligible for 4 years).

⁹⁰ DEL. CONST. of 1776, art. VII.

⁹¹ N.C. CONST. of 1776, art. XV.

⁹² GA. CONST. of 1777, art. XXIII.

In 1778 South Carolina revised its two-year old constitution and like the others limited the number of years that the executive could successively hold office:

State & Date of Adoption	Term & Rotation Period
South Carolina 17 March 1778	2-year term; ineligible for 2 years ⁹³

To be sure, there were Virginians who opposed the possibility of a governor serving even three years before rotation as being too long.⁹⁴ Charles Lee, a general and hero of the Revolutionary War, feared that three years would allow a man to court “favor and popularity at the expense of his duties.”⁹⁵ Two centuries later proponents of retaining the ban on successive terms raise precisely the same argument.⁹⁶

Nonetheless, there were strong opponents of rotation outside of Virginia, and within just a couple of years of the initial wave of state constitutions, the pendulum favoring mandatory rotation in office began to swing in the opposite direction.⁹⁷ The second wave of constitution making (New York in 1777, Massachusetts in 1780, and New Hampshire in 1792 as its second constitution) saw the creation of a more powerful role for the executive so as to counterbalance the power of the legislature.⁹⁸ For example, the chief architect of Massachusetts’ Constitution, John Adams, had long argued that “the people’s rights and liberties, and the democratic mixture in a constitution, can never be preserved without a strong executive” endowed with powers to veto laws and appoint local officials.⁹⁹ None of these states limited the length or times of a governor’s tenure in office.¹⁰⁰

⁹³ S.C. CONST. of 1778, art. VI.

⁹⁴ See, e.g., GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 140 (1998) (arguing three years is too long because the governor will favor popularity over duty).

⁹⁵ *Id.*

⁹⁶ Harney, *supra* note 36 (showing modern proponents of the ban arguing frequent turnover is good to keep the governor focused on governing rather than re-election).

⁹⁷ Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania’s Radical 1776 Constitution and its Influences on American Constitutionalism*, 62 TEMP. L. REV. 541, 546–47 (1989).

⁹⁸ *Id.* at 547.

⁹⁹ WOOD, *supra* note 94 (quoting John Adams).

¹⁰⁰ Kallenbach, *supra* note 43, at 439 n.5.

The states' individual preferences for a weak or strong executive thus exhibited a noticeable sectional bias, with states from Pennsylvania southward favoring the former, and northern states in New England and New York the latter.¹⁰¹ The same sectional alignment also existed over the manner of choosing a governor. In northern states, which allowed popular elections, there were no constitutional provisions barring reelection of a governor, and many early governors of those states were repeatedly reelected.¹⁰² Conversely, all of the southern states, where the governor was chosen by the legislature, prohibited their governors from succeeding themselves once the initial term had expired.¹⁰³

III. The Rule in Virginia from the Founding to the Present

Twice during the nineteenth century, Virginia made minor changes to the No Succession Rule. When the state adopted a new constitution in 1830, it provided that the governor would henceforth be elected to a full three-year term, and the period of ineligibility was decreased from four to three years.¹⁰⁴ He still could not be re-elected, however, immediately after completing a term.¹⁰⁵ The members of the 1829-1830 Constitutional Convention extensively debated the merits of a stronger executive but they did not consider allowing a governor to serve consecutive terms.¹⁰⁶ There was an attempt to change the way the governor was elected—to that of a popular vote of the electorate—but it went nowhere.¹⁰⁷

In that matter, the reformers succeeded two decades later. Virginia's third constitution, adopted in 1851, provided for election by popular vote and altered the term of the governor's office from three to four years.¹⁰⁸ A study committee of the 1850-1851 Constitutional Convention considered the possibility of allowing the governor to be

¹⁰¹ *Id.* at 438–39.

¹⁰² *Id.*

¹⁰³ *Id.* at 438–40.

¹⁰⁴ VA. CONST. of 1830, art. IV, § 1.

¹⁰⁵ *Id.*

¹⁰⁶ WOOD, *supra* note 94 (noting that early Virginians were concerned over a three-year term, much less consecutive terms).

¹⁰⁷ ROBERT P. SUTTON, REVOLUTION TO SECESSION: CONSTITUTION MAKING IN THE OLD DOMINION 78, 98–99 (1989); A.E. Dick Howard, "For the Common Benefit": *Constitutional History of Virginia as a Casebook for the Modern Constitution-Maker*, 54 VA. L. REV. 816, 888 (1968).

¹⁰⁸ VA. CONST. of 1851, art. V, § 1.

elected for a second term and be ineligible thereafter, but this measure, too, fell short.¹⁰⁹ There was a strong east-west divide generally during the Convention and specifically over this matter. In the main, eastern members were suspicious of increased gubernatorial tenure, while westerners thought it would strengthen the dignity and effectiveness of the office.¹¹⁰ Said one supporter, “if you allow an Executive Officer to be reelected, you at once put him on his good behavior, instead of making him a corrupt officer to prostitute the public place.”¹¹¹

With those ancillary adjustments in place, the No Succession Rule would go undebated by the General Assembly for well more than a century. The subject of the governor’s term limitation was at last taken up in earnest during the 1969-1970 revision of the Virginia Constitution.¹¹² Following a period of study, which included receiving written comments and holding public hearings, the CCR established by the Assembly recommended retaining the prohibition against consecutive gubernatorial terms.¹¹³ Observing that the issue had aroused “considerable interest” in the state, the CCR reasoned that no material change was needed to the Executive article because the governor had “sufficient powers” to carry out his responsibilities effectively.¹¹⁴

When the CCR’s Report came before the General Assembly for action, both the House and Senate General Laws Committees proposed an amendment that the governor shall be ineligible for the same office for more than two terms in succession and as much as two years of a previous governor, or ten possible years in total.¹¹⁵ The accompanying floor speeches were relatively “lively”¹¹⁶ but also short (less than one hour in each chamber) and unfocused. Speakers who favored keeping the Rule, especially in the House of Delegates, dominated the

¹⁰⁹ ROBERT P. SUTTON, *REVOLUTION TO SECESSION: CONSTITUTION MAKING IN THE OLD DOMINION* 78, 124 (1989).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² REPORT OF THE COMM’N ON CONSTITUTIONAL REVISION, *THE CONSTITUTION OF VIRGINIA* 18, 161 (1969).

¹¹³ *Id.* at 161–62.

¹¹⁴ *Id.* at 161.

¹¹⁵ PROCEEDINGS AND DEBATES OF THE SENATE OF VIRGINIA PERTAINING TO AMENDMENT OF THE CONSTITUTION: EXTRA SESSION 1969, at 710–11 (Charles Woltz ed., 1970); PROCEEDINGS AND DEBATES OF THE VIRGINIA HOUSE OF DELEGATES PERTAINING TO AMENDMENT OF THE CONSTITUTION: EXTRA SESSION 1969, at 28, 835 (Charles Woltz ed., 1970).

¹¹⁶ HOWARD, *supra* note 15, at 591.

debates.¹¹⁷ The Assembly soundly rejected the proposal by votes of 21-14 (3:2) in the Senate and 61-31(2:1) in the House.¹¹⁸

In the years since, attempts to repeal the Rule have been a recurring feature of Virginia politics. Between 1972 and 2004, legislators introduced some 250 constitutional proposals to modify the election, terms and powers of the governor and General Assembly.¹¹⁹ Two early attempts enjoyed partial success.¹²⁰ The full General Assembly approved a new two term limit during its 1985 session but voted it down when it came before them again after the 1986 election.¹²¹ A decade later, in 1995, the Senate approved a similar measure only to see the House narrowly disapprove it.¹²² Later, in 2004, the Assembly established a special joint subcommittee to consider the existing balance of power between the executive and legislature.¹²³ In its 2005 report, the subcommittee recommended allowing Virginia governors to serve consecutive terms if also accompanied by measures to increase the powers of the Assembly.¹²⁴

IV. What Explains the Persistence of the Rule?

Today, the condition of the governor in Virginia compares favorably with the strongest state executives in the country in terms of actual authority, tools of leadership, and public esteem.¹²⁵ Every feature of the weak executive scheme adopted by the state's founders in 1776 has long since been eliminated through a series of constitutional amendments and statutory enactments, save one: the No Succession

¹¹⁷ PROCEEDINGS AND DEBATES OF THE VIRGINIA HOUSE OF DELEGATES PERTAINING TO AMENDMENT OF THE CONSTITUTION: EXTRA SESSION 1969, at 31–35 (Charles Woltz ed., 1970).

¹¹⁸ PROCEEDINGS AND DEBATES OF THE SENATE OF VIRGINIA PERTAINING TO AMENDMENT OF THE CONSTITUTION: EXTRA SESSION 1969, at 128, 132 (Charles Woltz ed., 1970); *id.* at 31, 35.

¹¹⁹ Michael Pope, Should Virginia's Governors Be Allowed to Run for Reelection?, CONNECTION (Jan. 3, 2013), <http://www.connectionnewspapers.com/news/2013/jan/03/should-virginias-governor-be-able-run-reelection/>.

¹²⁰ DINAN, *supra* note 58, at 118.

¹²¹ *Id.*

¹²² The proposed amendment passed the Senate by a vote of 22-18 and was narrowly defeated in the House by a vote of 49-47. 1995 Session: *SJ 282 Constitutional Amendment*, VA. LEGIS. INFO. SYS., <http://lis.virginia.gov/cgi-bin/legp604.exe?951+sum+SJ282> (last visited Feb. 9, 2020) (legislative summary of S.J. 282, 1995 session).

¹²³ Pope, *supra* note 119.

¹²⁴ *Id.*

¹²⁵ DINAN, *supra* note 58 (“Although the 1776 Constitution created a weak executive, . . . each of the subsequent Virginia state constitutions has taken important steps toward empowering the executive.”); THOMAS R. MORRIS & LARRY J. SABATO, VIRGINIA GOVERNMENT AND POLITICS 207 (4th ed. 1990).

Rule. It has survived for the entirety of the state’s history of self-government, and with remarkably little controversy. The question is, what explains its uncanny persistence? Although historical causation is often difficult to assess, the answer here almost surely involves a combination of several factors.

One must first acknowledge that resistance to change is a basic human characteristic. Psychologists employ the term “status quo bias” to describe the instinctual preference for one’s environment and situation to remain as they already are.¹²⁶ When human make decisions, they tend to prefer the more familiar choice over the less familiar, even if a new course might entail greater benefits.¹²⁷ The popular aphorism, “if it ain’t broke don’t fix it,” reflects this attitude. As one legislator who opposes changing the Rule says, “I don’t know why we’re getting all bent out of shape about this, . . . what’s broken about Virginia that needs to be fixed?”¹²⁸ It is likewise often observed that Virginia seems to have elevated conservatism in politics to the status of a cultural imperative. “Virginia’s political culture has almost always exhibited an inhospitality to change.”¹²⁹ That Virginia is the only state to retain the ban on gubernatorial succession seems to matter little to most and may even be a source of pride to some. “In Virginia, nothing ever happens for the first time. So the fact that we have this system in place has a force of its own . . . The power of inertia is a hugely powerful force in area code 804.”¹³⁰

An even more decisive factor in the Rule’s persistence is the prevalence of one-party rule for a significant portion of Virginia’s history.¹³¹ Leaders of the dominant party control the process for amending the state’s constitution.¹³² An incidental effect of sustained one-party

¹²⁶ William Samuelson & Richard Zweckhauser, *Status Quo Bias in Decision-Making*, 1 J. RISK & UNCERTAINTY 7, 8 (1988).

¹²⁷ Cynthia Vinney, *Status Quo Bias: What it Means and How it Affects Your Behavior*, THOUGHTCO. (Feb. 9, 2020), <https://www.thoughtco.com/status-quo-bias-4172981>.

¹²⁸ Pope, *supra* note 119.

¹²⁹ BRENT TARTER, *THE GRANDEES OF GOVERNMENT* 392 (2013)

¹³⁰ Pope, *supra* note 119.

¹³¹ Democrats controlled all levels of Virginia government from the readmission of Virginia into the Union after the Civil War up to the 1960s, when party members migrated en masse to the Republican Party. Not until 1982 did the opposition party win the governorship, signifying a new era of competitive elections for that office. See James R. Sweeny, *Bridge to the New Dominion: Virginia’s 1965 Gubernatorial Election*, 125 VA. MAG. HIST. & BIOGRAPHY 246, 248, 272 (2017); see also *Virginia*, BRITANNICA (Feb. 9, 2020), <https://www.britannica.com/place/Virginia-state/Government-and-society>.

¹³² See VA. CONST. art. XII, § 1 (describing the amendment process, a multi-step process requiring majoritarian approval in each house of the state legislature).

rule is to diminish the incentives of legislators to upset the constitutional status quo, particularly when there are clear benefits to inaction.¹³³ The No Succession Rule means more turnover in the office of governor—which legislators aspiring to higher office and particularly those who are members of the dominant party would agree is desirable.¹³⁴ Continued operation of the Rule also assures the dominant party that even if the personality of the officeholder turns over every four years, he would still broadly share the same basic political views of the majority of legislators and voters.¹³⁵ In the calculus of party leaders, the best and safest course is to do nothing. The only saving grace for the minority party is that regular turnover at least offers a chance for redemption, although a slim one at best.

Another reason why the Rule has persisted is that a potential constitutional amendment faces significant procedural hurdles to becoming law.¹³⁶ Once an amendment secures a majority vote in both houses of the General Assembly, itself problematic, it must be voted on again—after the next election for the House Delegates.¹³⁷ In effect, the legislature gets a do-over, only this time the voting is by a House (and possibly also the Senate if elections in both chambers occur the same year) that has been newly-constituted by an intervening election.¹³⁸ During reconsideration by the Assembly incumbent legislators may change their minds and new members will weigh in, perhaps negatively. That is what happened in the mid-1980s when the Rule came the closest it ever has to being repealed; it failed on the mandatory second vote.¹³⁹

Assuming a measure is twice approved by the General Assembly, the voting public must be then persuaded to concur,¹⁴⁰ no simple matter because proponents must wage an energetic and expensive campaign to marshal public support. Success is far from assured. For

¹³³ See Michael D. Gilbert, *Entrenchment, Incrementalism, and Constitutional Collapse*, 103 VA. L. REV. 631, 632–33 (2017) (discussing the legal stability that entrenchment promotes as well as the difficulties and consequences of changing constitutions and other laws).

¹³⁴ *Governors of Virginia*, *supra* note 9 (illustrating the relative continuity of party control over the governorship despite the turnover in individual governors).

¹³⁵ *Id.*

¹³⁶ VA. CONST. art. XII, § 1.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Harney, *supra* note 36.

¹⁴⁰ Howard, *supra* note 31, at 9.

example, when, the six constitutional amendments approved by the General Assembly in 1969 came up in 1970 for vote, two of them failed.¹⁴¹ In short, unless a proposed amendment is embraced by a clear and committed majority of both houses, and is aggressively promoted, the likelihood of ultimate success at the ballot box is far from certain.¹⁴²

Protection of institutional power is another reason for the persistence of the Rule. This, in fact, may be the most important factor in explaining contemporary resistance to its repeal. Separation of powers makes the governor and the legislature competitors for authority and prestige. The General Assembly is jealous of its primacy in state policymaking, and its leaders and members are predisposed to disapprove of anything that would diminish the body’s power and status.¹⁴³ As Virginia government has increased in size and reach, so too has the authority and prestige of the governorship.¹⁴⁴ Allowing a popular governor to serve for one or more additional terms would to a degree affect the uneasy balance of power between the two branches in favor of the executive, something that historically the General Assembly has resisted.¹⁴⁵ Current proponents of the Rule cite balance of power considerations as often or more as any other reason for keeping the status quo.¹⁴⁶

A corollary theme heard repeatedly in opposition to the Rule is that if the power of the governor were to be enhanced by allowing consecutive terms, he must give some power back to the legislature in return.¹⁴⁷ When the legislative logjam preventing constitutional reform ultimately breaks in the future, it may well be due to some sort of grand bargain which joins repeal of the Rule with transfer of some of the governor’s authority to the Assembly. Legislators who consistently

¹⁴¹ *Id.*

¹⁴² *Id.* at 10 (describing campaign to win voter approval of the 1970 referendum).

¹⁴³ Jeff E. Schapiro, *Opinion/Commentary: Virginia’s Alone In Banning Two-Term Governors*, DAILY PROGRESS (Jan. 27, 2019), https://www.dailyprogress.com/opinion/opinion-commentary-virginia-s-alone-in-banning-two-term-governors/article_0563cef8-2033-11e9-8797-7b7ee80c5208.html.

¹⁴⁴ Howard, *supra* note 31, at 23.

¹⁴⁵ Schapiro, *supra* note 143.

¹⁴⁶ *Id.* (“Preserving [legislative] primacy, for reasons of policy, politics or personality—or all of the above—was foremost among senators who recently killed a [2019 Senate] proposal to eliminate the only-in-Virginia prohibition on a governor serving consecutive terms.”).

¹⁴⁷ Travis Fain, *General Assembly: Redistricting Reform, Two Term Governor Bills Advance*, DAILY PRESS (Jan. 3, 2015), <https://www.dailypress.com/tidewater-review/dp-nws-ga-redist-two-terms-20150120-story.html>.

vote to retain the Rule contend that its removal would have to be accompanied by a reduction in the gubernatorial appointment power, if not also of other powers.¹⁴⁸ The governor's authority to make administrative and other appointments is considered a ripe subject for a deal, inasmuch as by one estimate he makes some 4,000 appointments during one term and many such appointees serve longer than the governor who appointed them.¹⁴⁹

The question before legislators is likely to be what kind of offset package will be acceptable. For legislators who are already suspicious of the idea [of a trade off] in the first place, coming up with a set of recommendations might be tricky. How many appointments should the General Assembly get to make [in any given area]?¹⁵⁰

V. Arguments For and Against Retaining the Rule

Inevitably, perhaps sooner than later, a new full-fledged debate will occur in the General Assembly over the future of the Rule, and a majority may decide to replace it. When they do, what arguments for or against the Rule will likely be most persuasive? The answer comes into focus by analyzing the public statements of commission members, legislators, governors, business groups and the press.

A. *Those who favor retaining the Rule make three basic claims:*

¹⁴⁸ DINAN, *supra* note 58, at 118.

¹⁴⁹ Interview with Douglas Wilder, former Governor of Va., in Washington, D.C. (Sept. 28, 2017).

¹⁵⁰ Pope, *supra* note 119; *see also* Fain, *supra* note 147 (stating that the governor "will need to negotiate away some of the executive branch's powers"); Tyler Whitley & Jim Nolan, *Two-Term Governor is Sought*, RICH. TIMES-DISPATCH (Dec. 15, 2008), <https://www.richmond.com/archive/> ("Traditionally, legislators who have been willing to contemplate a two-term governor have said the governor ought to give up a lot of appointed powers if there is going to be a two-term governor.").

1. It Deters Corruption.

Sub-theme	Commentary
As power of governors has grown, it is more important than ever to limit term guard against their pursuit of self-interest.	“The greater the powers of the Governor’s office, the more reason to want some safeguards against self-perpetuation in office.” ¹⁵¹
The need to campaign for re-election distract the governor from pursuit of the public good.	Affairs of the state would be “better managed if the Governor is not facing the prospect of an election campaign.” ¹⁵² Governor would concern himself with “political considerations” related to reelection. ¹⁵³
Governor might misuse his powers to achieve election.	Such as his power over political appointments. ¹⁵⁴ Or his power to propose a budget. Do not give him “four shots” at the budget. ¹⁵⁵ Governor’s already large powers over expenditures “would tempt any Governor to use them to perpetuate himself in office.” ¹⁵⁶
Regular rotation means fresh ideas.	“I don’t know whether being a Methodist has anything to do with the position I am taking, but very often we are very happy to get rid of our preacher at the end of our years.” ¹⁵⁷

¹⁵¹ REPORT OF THE COMM’N ON CONSTITUTIONAL REVISION, *supra* note 112, at 162.

¹⁵² *Id.* at 161–62.

¹⁵³ PROCEEDINGS AND DEBATES OF THE VIRGINIA HOUSE OF DELEGATES PERTAINING TO AMENDMENT OF THE CONSTITUTION: EXTRA SESSION 1969, *supra* note 117, at 28 (statement of Del. McMath).

¹⁵⁴ *Id.* at 32–33 (statement of Del. Rawls).

¹⁵⁵ *Id.* at 33 (statement of Del. Pendleton).

¹⁵⁶ *Id.* (statement of Del. Dudley).

¹⁵⁷ *Id.* at 35 (statement of Del. Pope).

2. It Is a Key Element of the Existing Balance of Power.

Sub-theme	Commentary
Allowing consecutive terms would alter the existing balance of power in favor of legislative branch, which reflect public opinion.	<p>Balance already favors governors; allowing consecutive terms would “diminish the already powerful executive.”¹⁵⁸</p> <p>“I don’t have a problem with a second term, but I do have a problem with a king, and that’s what you’d have.”¹⁵⁹</p> <p>One term restriction balances a Virginia governor’s far-reaching powers.¹⁶⁰</p> <p>“We have governors that come in for four years. They have a large amount of control: they can appoint members of boards of commissions; they have a line-item veto, they can refuse or decide to spend money; they can name their own executives agencies. They have a tremendous amount of control as an executive, and the way we temper that is that we limit them to one term.”¹⁶¹</p>

¹⁵⁸ *Id.* at 33–34 (statement of Del. Dudley).

¹⁵⁹ Alicia Petska, *Push for Two-Term Governor Expected to Fail Again*, NEWS & ADVANCE (Feb. 16, 2015), https://www.newsadvance.com/news/local/push-for-two-term-governor-expected-to-fail-again/article_02d1f9b4-b63b-11e4-b693-9fea3a70dc0a.html.

¹⁶⁰ Bob Brown, *Should Va. Let Governors Serve Two Terms? No, Says Norment*, RICH. TIMES-DISPATCH (Jan. 16, 2019), https://www.richmond.com/news/local/government-politics/should-va-let-governors-serve-two-terms-no-says-norment/article_ddf7e026-20d7-5a11-8a1c-0a950e2c873a.html.

¹⁶¹ Austermuhle, *supra* note 4.

3. State Government has Been Good Under The Rule.¹⁶²

Sub-theme	Commentary
Repeal of the Rule would not necessarily produce better government than Virginia has actually experienced.	“The Commission concludes that the one-term limit has worked to the advantage of the Commonwealth.” ¹⁶³

B. Proponents of allowing consecutive terms principally claim that:

1. Rule Is Outmoded.

Sub-theme	Commentary
The Revolutionary era model of a weak executive has been discredited.	“The reason for this prohibition is as a dodo bird.” ¹⁶⁴

2. Repeal Would Allow Better Administration.

Sub-theme	Commentary
Policy continuity needed in budget matters.	“It’s been the same for every previous governor—they come into office, inherit their predecessor’s already-crafted budget, operate under their own budget for only two years and present a second budget that likely will be completely reworked by their successor.” ¹⁶⁵

¹⁶² Harney, *supra* note 36 (“Virginia ranks among the best-administered states in the nation.”). Of course, the argument that the State has been well governed while the Rule has been in place, is a straw man. The counterfactual—what would have happened if Virginia’s governors had been allowed to succeed themselves during all or part of the past 244 years—cannot be proved. It is therefore equally possible that without the Rule the State’s governance would have been better than it has been.

¹⁶³ REPORT OF THE COMM’N ON CONSTITUTIONAL REVISION, *supra* note 112, at 162.

¹⁶⁴ PROCEEDINGS AND DEBATES OF THE SENATE OF VIRGINIA PERTAINING TO AMENDMENT OF THE CONSTITUTION: EXTRA SESSION 1969, at 131 (Charles Woltz ed., 1970) (statement of Sen. Howell).

¹⁶⁵ Editorial Board, *The Case for a Two-Term Governor*, NEWS & ADVANCE (Mar. 10, 2017), https://www.newsadvance.com/opinion/editorials/the-case-for-a-two-term-governor/article_fa6dc81e-050e-11e7-b262-17421ffab750.html.

One term encourage complacency.	It leads governors to “kick the can down the road” on tough problems that require long-term planning, such as transportation. ¹⁶⁶
Two terms would incentivize building a good record to run for reelection.	CCR Report ¹⁶⁷
Limits governor’s ability to see his long-term initiative to fruition.	“A two-term governor would enable Virginia’s ability to resolve numerous challenges, which simply require longer than four years to address.” ¹⁶⁸ Northern Va. Chamber of Commerce. ¹⁶⁹
Second-term governors would have more experience and need less on-the-job training.	The Virginian-Pilot ¹⁷⁰

3. Repeal Would Enhance Democracy and Accountability.

Sub-theme	Commentary
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¹⁶⁶ Vozzella, *supra* note 35. One expert in Virginia politics, Larry Sabato, has expressed a different view of the risk/reward trade-off. He suggests that the Rule promotes efficient government by incentivizing chief executives to be focused on day one and use their time well in order to be effective. *Is One Term in Office Better than Two?*, WBUR (May 3, 2017), <https://www.wbur.org/hereandnow/2017/05/03/virginia-governors-consecutive-terms>.

¹⁶⁷ REPORT OF THE COMM’N ON CONSTITUTIONAL REVISION, *supra* note 112, at 162; HOWARD, *supra* note 15, at 591.

¹⁶⁸ Bob Purkey, *The Governorship of Virginia, 1776 and 1976*, 52 UNIV. VA. NEWSL. (The Univ. of Va., Va.), Mar. 2005, at 1.

¹⁶⁹ NORTHERN VA. CHAMBER OF COM., 2019 LEGISLATIVE AGENDA 9 (2019) (“The current economic situation and ever-increasing global competition demands long-term strategic thinking and planning, which is not available under the limits of a one-term governorship.”). Business leaders in the State have regularly weighed in on the subject. For example, former Governor Mark Warner established an independent commission composed of business representatives and others to study and make recommendations for improving the efficiency of state government. In its 2002 Report, the Commission on Efficiency and Effectiveness supported removal of the one-term limit for governors, claiming that allowing popular election to consecutive terms would improve “long-term planning and [executive] accountability.” GOVERNOR’S COMM’N ON EFFICIENCY & EFFECTIVENESS, FINAL REPORT 24 (2002).

¹⁷⁰ *Give Governors Chance for Re-Election*, VIRGINIAN-PILOT (Jan. 22, 2019), https://www.pilotonline.com/opinion/article_ad4f67e4-4edb-529e-badd-cbe6f4976bfb.html (“[T]he power shift wouldn’t be extreme, and it would hardly diminish the legislature’s strong hand on state government. It would, however, create a more effective executive branch.”).

Consecutive terms would allow voters to decide whether to reelect a governor.	<p>“We ought to give the voters the opportunity to decide whether a governor should keep his job and be reelected.”¹⁷¹</p> <p>A two-term governorship “creates accountability, demanding an executive keep his or her promises or risk getting kicked out by voters.”¹⁷²</p>
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4. Prior Officeholders Favor Repeal.

Sub-theme	Commentary
Recent Governors support consecutive terms.	Public statements. ¹⁷³
Views of these former officeholders are persuasive.	Views of former governors “should be enough reason” to decide the matter. ¹⁷⁴

VI. What Should Replace the Rule?

If the General Assembly were to decide to change the Rule, the question would be, what should replace it? Forty-nine states allow their governors to serve successive terms.¹⁷⁵ Of these, a minority permit a governor to serve as long as the public elects him,¹⁷⁶ and a majority allow a governor to serve successive terms followed by mandatory rotation out of office, sometimes for life but usually for a fixed number of terms or years.¹⁷⁷ If Virginia were to repeal its Rule, the choice for a substitute would be between those two positions.

¹⁷¹ Jason Spencer, *Should Virginia Allow Governors to Serve Two Consecutive Terms? Senate Says Yes*, ARLINGTON PATCH (Feb. 3, 2013), <https://patch.com/virginia/arlington-va/should-virginia-allow-governors-to-serve-two-consecut04b7e0840b>.

¹⁷² Schapiro, *supra* note 143.

¹⁷³ This argument was a key element in the CCR’s decision to recommend retention of the Rule and it figured in the 1969 Debates. At the time, the living former Governors agreed with the Rule. REPORT OF THE COMM’N ON CONSTITUTIONAL REVISION, *supra* note 112, at 162. Now the same shoe is on the other foot. See Kallenbach, *supra* note 43, at 453.

¹⁷⁴ PROCEEDINGS AND DEBATES OF THE SENATE OF VIRGINIA PERTAINING TO AMENDMENT OF THE CONSTITUTION: EXTRA SESSION 1969, *supra* note 164, at 130 (statement of Sen. Stone).

¹⁷⁵ See *States with Gubernatorial Term Limits*, *supra* note 38.

¹⁷⁶ See *id.*

¹⁷⁷ See *id.*

Allow succession with no term limits. The General Assembly could decide to repeal the Rule without more. With that act and voter approval, Virginia would join the fourteen states that have no limitations on the number of terms a governor may serve. If so, Virginia would go from one extreme (no succession) to the other (unlimited succession). Apart from the merits of doing so, that would seem to be an uncharacteristically bold step for the state's politicians and voters to take.

Allow succession with some form of term limit. Alternatively, the General Assembly could decide to permit gubernatorial succession but impose a limit on the maximum number of terms; or allow successive terms followed by rotation period before becoming eligible again for one or more terms.

If the General Assembly were to vote to repeal the prohibition upon gubernatorial succession, it would likely propose to establish a term limit rather than permit a governor to serve as long as the people will elect him or her. A two-term limit (eight total years) similar to that imposed by the Twenty-second Amendment upon the U.S. President seems most likely. Such a limit would operate as an effective check upon prolonged power while allowing voters to reelect popular governors. Editorialists and journalists who have weighed in on the subject regularly support a two-term limit.¹⁷⁸

Regardless of which term option a majority of Virginia's legislators may select, it is almost assured that the incumbent governor would be ineligible for successive terms.¹⁷⁹ When Kentucky repealed its rule in 1992, the then sitting governor agreed not to seek reelection, no doubt to satisfy the opposing political party that he would not

¹⁷⁸ See, e.g., Roger Chesley, *It's Time for Virginia to Allow Two Terms for Governors*, VIRGINIAN-PILOT (Feb. 19, 2015), https://www.pilotonline.com/news/columns/article_d9bc15ef-c611-5bcb-a924-b9b61ac556ff.html ("Change would do Virginia good. Governors here are lame ducks from the time they take the oath of office. Governors in a second term would have more experience and need less on-the-job training."); Harney, *supra* note 36 ("If Virginia governors could serve two terms, they'd get a lot more done."); Norman Leahy, *A Two-Term Virginia Governor?*, WASH. POST (Dec. 14, 2011), https://www.washingtonpost.com/blogs/all-opinions-are-local/post/a-two-term-virginia-governor/2011/03/10/gIQAhKo9tO_blog.html; *Re-electing Governors Is Good For Virginia*, DAILY PROGRESS (Jan. 31, 2019), https://www.dailyprogress.com/opinion/opinion-editorial-re-electing-governor-is-good-for-va/article_41f8286c-24d9-11e9-ae04-17c5e3b683bf.html (advocating two terms).

¹⁷⁹ For example, H.J. 608, 2019 Sess. (Va. 2019) would not have allowed the sitting governor (Northam) to succeed himself in office but would have permitted a Governor elected in 2021 and thereafter to do so. See S.J. 282, 1995 Sess. (Va. 1995); see also PROCEEDINGS AND DEBATES OF THE SENATE OF VIRGINIA PERTAINING TO AMENDMENT OF THE CONSTITUTION: EXTRA SESSION 1969, *supra* note 164, at 128, 130–31; Harney, *supra* note 36.

exploit his incumbency advantage.¹⁸⁰ Prior bills in the Virginia Assembly have contained this feature.¹⁸¹

CONCLUSION

In Virginia, old habits die hard. Nearly two and a half centuries after adopting its first constitution, and more than a quarter of a century as the sole state to ban gubernatorial succession, Virginia is the last state to adhere to this constitutional anachronism.¹⁸² Virginia’s governor today enjoys all of the powers that modern state chief executives possess, save one: He cannot ask the voters to reelect him unless he first sits out for four years—sufficient time to see his popularity and achievements erode from public view.¹⁸³ Practically speaking, no succession means no reelection. The alternative is to join ranks with all other U.S. states by allowing Virginia’s governor to serve two (or more) consecutive terms. That the position espoused by nearly all living former Virginia governors, a sizeable group of legislators in both houses of the Assembly, and many leading newspapers in the state. According to a recent statewide poll, that is also what Virginia voters want.¹⁸⁴ “[I]n the final analysis [the Rule] is an expression of lack of faith in the electorate’s ability to make an intelligent decision” about whether to retain a governor in office.¹⁸⁵ At long last, its viability

¹⁸⁰ KY. CONST. § 71; 1992 KY. ACTS ch. 168, § 19; *The Executive Department, Kentucky Constitution*, BALLOTPEdia, https://ballotpedia.org/The_Executive_Department,_Kentucky_Constitution (last visited Feb. 6, 2020).

¹⁸¹ Harney, *supra* note 36. Delegate Dawn Adams introduced a constitutional amendment to repeal the Rule, H.J. 608, offered January 9, 2019, but it died in subcommittee. H.J. 608, 2019 Sess. (Va. 2019). The amendment would not have allowed the sitting governor (Northam) to succeed himself in office but would have permitted a Governor elected in 2021 and thereafter to do so. *Id.* Senator Andrews made effectively the same proposal during the 1969 debates over constitutional revision. PROCEEDINGS AND DEBATES OF THE SENATE OF VIRGINIA PERTAINING TO AMENDMENT OF THE CONSTITUTION: EXTRA SESSION 1969, *supra* note 164, at 128, 130–31. The 1995 constitutional amendment proposed by Sen. Mayre, S.J. 282, 1995 Sess. (Va. 1995), would have barred both the existing governor and his immediate successor from reelection.

¹⁸² Harney, *supra* note 36.

¹⁸³ *Id.*

¹⁸⁴ CHRISTOPHER NEWPORT UNIV.’S JUDY FORD WASON CTR. FOR PUB. POLICY, VIRGINIANS THINK McDONNELL PRISON SENTENCE FAIR; BACK GIFT BAN, REDISTRICTING REFORM, REPORTING CAMPUS RAPE TO POLICE, LOOSER MARIJUANA LAWS 2 (2014) (on file with author) (64 percent of voters favor allowing Virginia’s governors to run for reelection at least once). The analysis accompanying the Poll results observes: “While majority support exists across all demographic categories, support is higher in Hampton Roads, and among voters under 45, liberals, and Democrats, and lower in Richmond and central Virginia, and among men, conservatives, and Republicans.” *Id.*

¹⁸⁵ Kallenbach, *supra* note 43, at 448.

deserves to be tested through a statewide ballot measure, so that the people may themselves set the rule for their governor's tenure in office.

*SWAMP FEUD: FLORIDAS NEVER-ENDING POLICY BATTLE
OVER THE EVERGLADES*

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ABSTRACT

The Florida Everglades is one of the most unique ecosystems in the world, yet for over a century, it has been under assault by federal engineers and Florida developers seeking to redirect water and pave the way for suburban sprawl. The consequences of such a battle are felt by all Floridians in the form of frequent algae blooms, polluted waterways, increased taxes, and a wounded tourism industry. More directly, there has been a widespread catastrophic shift in both the biology and hydrology of Florida's Everglades. By providing historical background on the Everglades and the development of South Florida, this article discusses the rise of nutrient pollution issues in Florida and the legal measures taken to alleviate them. Further analysis of key water policy legislation at both the federal and state levels, in conjunction with their respective regulatory schemes, reveals glaring threats to what remains of native Florida. Finally, this article discusses the lack of accountability to such threats and presents potential solutions to Florida's nutrient pollution problems.

INTRODUCTION

Florida is a vulnerable state. With rising sea levels already claiming low-lying coastal areas, hurricanes constantly threatening to obliterate life as we know it, and sinkholes regularly consuming entire houses,¹ it is no wonder the Everglades is facing a major ecological crisis. However, this crisis is unique in that it is almost entirely manmade, rooted in decisions dating back to the 19th century.² One might think having centuries to solve such a crisis may make it an easier task, but this is not so because Florida's water quality and nutrient policies are just as perplexing and enigmatic as the Everglades itself.

This article will first discuss the Florida Everglades and its unique ecosystem composition and function. Next, this article will briefly describe the Everglades' history of development and

¹ Laura Parker, *Why Obama Went to the Everglades for Earth Day*, NAT'L GEOGRAPHIC (Apr. 22, 2015), <https://news.nationalgeographic.com/2015/04/150422-everglades-obama-climate-change-florida-environment/>.

² *The Everglades*, NAT'L WILDLIFE FED'N, <https://www.nwf.org/Educational-Resources/Wildlife-Guide/Wild-Places/Everglades> (last visited Feb. 24, 2019).

restoration as it relates to South Florida’s ever-growing population and expansion. This article will then transition into a discussion about the Clean Water Act and how it has shaped both the state and federal responses to Florida’s water quality issues. Finally, this article will present possible solutions to the problems discussed, as well as what it might mean for Florida’s future.

I. The Everglades

A. History

Florida has the fourth highest rate of biodiversity in the United States and is home to a substantial number of endemic species—nearly 670—not found anywhere else in the world.³ Florida possesses “highly unique and nationally-valued ecosystems that include coral reefs, fresh and saltwater marshes, swamps, and mangroves.”⁴ The Everglades alone includes four of these five highly unique and specialized ecosystems.⁵ Given their high biodiversity and specialized nature, these ecosystems are particularly sensitive to the introduction of excess nutrients⁶—a problem that has plagued the South Florida region since its initial settlement.⁷

The Everglades is a subtropical wetland ecosystem encompassing one-and-a-half-million acres across South Florida.⁸ In fact, the Everglades is the only subtropical wilderness in North America and is the largest wilderness east of the Rockies.⁹ With Lake Okeechobee to the north and Florida Bay to the south, the Everglades is a unique ecosystem in both composition and function.¹⁰ Historically, Lake Okeechobee would overflow in the rainy summer months and

³ Fla. Wildlife Fed’n, Inc. v. Jackson, 853 F. Supp. 2d 1138, 1149 (N.D. Fla. 2012).

⁴ *Id.*

⁵ *Habitats*, FRIENDS EVERGLADES, <https://www.everglades.org/habitats> (last visited Feb. 24, 2019).

⁶ *The Everglades Still Threatened By Excess Nutrients*, AM. GEOPHYSICAL UNION (Aug. 31, 2012), <https://phys.org/news/2012-08-everglades-threatened-excess-nutrients.html>.

⁷ *Jackson*, 853 F. Supp. 2d at 1149–50 (“This biological diversity relies on sufficient quality habitat and other natural resources, including clear, transparent waters low in phosphate and nitrogen nutrients. Effectively managing nutrients in Florida lakes, flowing waters, estuaries, and coastal waters is important to maintaining ecosystems.”).

⁸ *The Everglades*, *supra* note 2.

⁹ *Parker*, *supra* note 1.

¹⁰ *Development In The Everglades*, NAT’L PARK SERV., <https://www.nps.gov/ever/learn/historyculture/develop-everglades.htm> (last updated Apr. 14, 2015).

the water would slowly flow south on its way to Florida Bay.¹¹ Unlike today, the “land south of the lake was part of the Everglades, the ecologically precious ‘river of grass’ that moved water south from Lake Okeechobee to the coasts.”¹² As the water flowed south, sawgrass, inhabiting much of the Everglades, filtered small amounts of phosphorus, nitrogen, and other nutrients out of the nutrient-rich lake water, while serving several other critical ecological functions.¹³ However, human development has played a significant role in disrupting the natural flow of water, contributing to the gradual and tragic collapse of the Everglades’ fragile ecosystem.¹⁴

Currently, sugar and cattle farms within a wide swath of land south of Lake Okeechobee called the Everglades Agricultural Area use phosphorus-based fertilizer in the growth of sugar cane and pasture grass.¹⁵ Stormwater runoff carries excess phosphorus from the farms, through drainage canals cooperatively managed by the Southwest and South Florida Water Management Districts (SFWMD) and into the protected Everglades region.¹⁶ While phosphorus is an essential nutrient for many plants and animals, it has had a detrimental impact on the historically nutrient-poor Everglades,¹⁷ causing imbalances in the native vegetation and destroying the natural landscape.¹⁸

While population growth, urban development, restructuring natural rivers, constructing highways, constructing drainage canals, and implementing flood-control mechanisms have significantly contributed to the degradation and need for restoration of the Everglades, this article focuses on excess nutrient pollution and its devastating effects on native sawgrass prairies.¹⁹ Excess nutrients are one of the

¹¹ *The Everglades*, *supra* note 2.

¹² Christopher Flavelle & Anna Edgerton, *Florida’s Algae Blame Sticks to ‘Red-Tide Rick’ in Senate Race*, BLOOMBERG (Oct. 29, 2018), <https://www.bloomberg.com/news/articles/2018-10-29/florida-s-algae-blame-sticks-to-red-tide-rick-in-senate-race>.

¹³ *Id.*

¹⁴ *See generally Development In The Everglades*, *supra* note 10 (describing the history of human development of the Everglades and the effects therein).

¹⁵ *See* Andy Reid, *Sugar-Cane Growing on State Land Misses Pollution-Cleanup Goal, Records Show*, SUN SENTINEL (Dec. 18, 2016), <https://www.sun-sentinel.com/local/palm-beach/fl-everglades-pollution-from-state-land-20161211-story.html>.

¹⁶ *Why is it Important to Restore the Everglades?*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/everglades/why-it-important-restore-everglades> (last visited Feb. 18, 2020).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Kristin Schade-Poole & Gregory Möller, *Impact and Mitigation of Nutrient Pollution and Overland Water Flow Change on the Florida Everglades*, 8 SUSTAINABILITY 940, 940 (2016).

greatest challenges for Everglades restoration, as it is no secret that Florida’s flat topography, warm and humid climate, nutrient-rich soils, and vulnerability to natural disasters make controlling nutrient pollution a particularly difficult task.²⁰

B. *Native Sawgrass*

Native sawgrass plays a critical role in the Everglades ecosystem but it is ruthlessly outcompeted by invasive cattails which have detrimental effects on biodiversity.²¹ It is important to note that while cattails are native to Florida, they are considered to be invasive in the Everglades because the ecosystem has been “disturbed” by construction and altered flow, allowing cattails to fall out of natural balance and become invasive.²² Botanists and conservationists are in agreement that nutrient enrichment of the Everglades has contributed to the invasion of sawgrass by cattail.²³ While sawgrass thrives in conditions of limited nutrient supply, cattail gained the competitive advantage when the altered flow of water through the Everglades resulted in a high nutrient habitat.²⁴ In other words, sawgrass and cattail have an inverse relationship and compete with each other for control of the Everglades ecosystem.²⁵

Sawgrass communities support the growth of a ground-growing algal mat called periphyton, which becomes the basis for the entire wetland food chain.²⁶ Small fish and insects feed on the periphyton and become the prey of larger fish and several species of endangered birds.²⁷ While sawgrass is very efficient at utilizing nutrients in low levels, cattails proliferate under high-nutrient regimes.²⁸ Cattails grow in dense strands that starve the water of oxygen,

²⁰ *The Everglades Still Threatened By Excess Nutrients*, *supra* note 6.

²¹ Neil Santaniello, *War on Cattails May Help Wildlife in Everglades*, SUN SENTINEL (Jan. 9, 1999), <https://www.sun-sentinel.com/news/fl-xpm-1999-01-09-9901080515-story.html>.

²² *Everglades: Why Manage Exotic Vegetation?*, NAT’L PARK SERV., <https://www.nps.gov/ever/learn/nature/whymanageplants.htm> (last visited June 6, 2019).

²³ STEVEN M. DAVIS, SOUTH FLA. WATER MGMT. DISTRICT, TECHNICAL PUB. 90-03: GROWTH, DECOMPOSITION AND NUTRIENT RETENTION OF SAWGRASS AND CATTAIL IN THE EVERGLADES iii (1990).

²⁴ *Id.*

²⁵ *Id.* at 20.

²⁶ Drew Fulton, *Sawgrass Prairie*, EVERGLADES IMAGERY, <http://www.evergladesimagery.com/everglades/communities/communities-sawgrass.html> (last visited Feb. 20, 2020).

²⁷ *Id.*

²⁸ *Id.*

inhibiting periphyton growth and disrupting aquatic food chain development.²⁹ This restructuring also diminishes the Everglades' role as a habitat and foraging ground for native wildlife.

Cattail communities often grow so thick that "alligators, turtles, wading birds, and other native wildlife can't move through it."³⁰ This makes it difficult, and often impossible, for these species to hunt and mate. Cattails also disrupt important fire regimes that are essential to controlling plant growth, nutrient dispersal, and diversity of habitats for native plants and wildlife.³¹ Cattails burn poorly compared to sawgrass and do not form intermittent dense strands to protect the ground layer from intense fire.³² Because of the cattail invasion, fires are now consuming larger, more uniform areas of landscape and causing widespread destruction rather than their traditional role of ecosystem maintenance.³³

C. Development

So, what set all of this in motion? The short answer is human greed and the desire to develop Florida's coasts. The long answer is much more complicated.

By the 1870s, Florida was gaining national attention for its year-round mild climate and northerners flocked to what was flaunted as a tropical paradise.³⁴ Developers descended upon South Florida to seize exotic real estate opportunities and expand farming operations.³⁵ Wetlands were drained to make the land suitable for farming

²⁹ *Id.*

³⁰ Madeline Fisher, *Restoring the Greater Everglades Ecosystem*, CSA NEWS (Feb. 3, 2014), <https://dl.sciencesocieties.org/publications/csa/articles/59/2/4>.

³¹ Yegang Wu et al., *Impacts of Fire and Phosphorus on Sawgrass in an Altered Landscape of the Florida Everglades*, 1 ECOLOGICAL PROCESSES 1, 3 (2012). Historically, the Everglades would experience periodic fires caused by lightning strikes. The dense nature of sawgrass communities and the underlying periphyton deprived fires of oxygen and prevented high-intensity burns. Cattails, on the other hand, burn quickly and do not support periphyton growth, meaning fires that were once low-intensity now have the fuel load and oxygen to burn longer and encompass larger swaths of land. These bigger, high-intensity fires slow new plant growth and create a more uniform ecosystem, which diminishes biodiversity.

³² *Id.* at 11.

³³ *Id.* at 2.

³⁴ *Florida Development*, FLA. DEP'T ST., <https://dos.myflorida.com/florida-facts/florida-history/a-brief-history/florida-development/> (last visited Apr. 16, 2019).

³⁵ *Id.*

and swamps were filled to make way for subdivisions and cities.³⁶ To combat the soggy, inhospitable marshland, the Kissimmee River was straightened to move water more quickly and a dike was built around Lake Okeechobee to prevent its natural spillovers and spare southern residents and farmlands of flooding.³⁷ Further, a series of drainage canals allowed efficient farming of the land, giving rise to the state’s massive sugar industry.³⁸ As a result, very little water was able to travel its natural southward path and instead accumulated in the lake, along with farm runoff and sewage effluent.³⁹ Essentially, Florida allowed three million acres that drain into Lake Okeechobee to become overdrained and overdeveloped.⁴⁰ Nevertheless, Florida real estate continued to boom along with its population.

The end of World War II saw even greater growth with the construction of Disneyworld, shuttle launches at Cape Canaveral, and the development of Miami as a military hub.⁴¹ To accommodate a rapidly growing population, roads were paved over the Everglades and along the coasts, subdivisions were built alongside and on top of historic wetlands, and farmlands overtook the State’s interior.⁴² The result? Seventy seven percent of Florida’s 21.3 million population now lives in coastal counties, with 46 percent living on the Atlantic Coast and 31 percent on the Gulf Coast.⁴³

Unfortunately, Florida’s aging infrastructure has simply not been able to keep up with the growing population, exacerbating demands for land and water resources. As a result, the dike around Lake Okeechobee has become strained under its normal water capacity, prompting the Army Corps of Engineers to release lake water into the Caloosahatchee River to the west and the St. Lucie River to the east

³⁶ See Tim L. Setter et al., *Agricultural Use of Wetlands: Opportunities and Limitations*, 105 ANNALS BOTANY 155, 155 (2010); Alexander Heilner, *The Boomtown That Shouldn’t Exist*, POLITICO (Oct. 10, 2017), <https://www.politico.com/magazine/story/2017/10/20/fastest-growing-city-america-florida-cape-coral-215724>.

³⁷ Fisher, *supra* note 30.

³⁸ Flavelle & Edgerton, *supra* note 12.

³⁹ Fisher, *supra* note 30.

⁴⁰ David Fleshler, *Algae Problem Stems From Decades of Lake Okeechobee Pollution*, SUN SENTINEL (July 8, 2016), <https://www.sun-sentinel.com/local/broward/fl-lake-pollution-20160708-story.html>.

⁴¹ *World War II and Post-War Boom*, FLA. DEP’T ST., <https://dos.myflorida.com/florida-facts/florida-history/a-brief-history/world-war-ii-and-post-war-boom/> (last visited Apr. 16, 2019).

⁴² *Id.*

⁴³ JUDITH KILDOW, NAT’L OCEAN ECON. PROGRAM, PHASE 1: FACTS AND FIGURES, FLORIDA’S OCEAN AND COASTAL ECONOMIES 1, 4 (2006).

to prevent flooding of nearby sugar farms.⁴⁴ This nutrient-rich lake water flows out to the Gulf and the Atlantic, but some also makes its way south through the Everglades, bringing with it harmful levels of phosphorus and nitrogen.⁴⁵ These water releases, combined with the increased agricultural runoff from farmlands, have had detrimental effects on Florida's existing nutrient pollution problems.

In addition to degradation of the Everglades, nutrient pollution “fuels the proliferation of harmful algae outbreaks . . . that grow so quickly that ecosystems are overwhelmed by them.”⁴⁶ Florida algal outbreaks or “blooms” affect both inshore and coastal waterways and are caused primarily by two types of algae: blue-green algae (cyanobacteria) and red tide (*Karenia brevis*).⁴⁷ The two types of blooms vary in origin, but it is now widely accepted by the scientific community that both types of algal blooms are exacerbated by the presence of excess nutrients, particularly phosphorus and nitrogen.⁴⁸ According to Karl Havens, a local biologist specializing in water pollution, algae blooms follow a basic recipe: pollution, sunlight, and warm water.⁴⁹ In other words, Florida.

In their *Valuing Florida's Clean Waters* report, Earthjustice claimed the prevalence of harmful algae outbreaks throughout Florida was the impetus for filing suit against then Environmental Protection Agency (EPA) administrator, Lisa Jackson.⁵⁰ While the report notes that both types of algae are naturally-occurring and manageable in low concentrations, the combined effects of increased rain, agricultural runoff, and water releases, had created the perfect storm for extended and highly devastating algae blooms in Florida.⁵¹ Experts also note that the State has always “focused on tracking red tides once

⁴⁴ David Guest, *South Florida's Tourist Season from Hell*, EARTHJUSTICE (Mar. 2, 2016), <https://earthjustice.org/blog/2016-february/south-florida-s-tourist-season-from-hell>.

⁴⁵ See Katrina Elsken, *Phosphorus – It's Everyone's Legacy*, LAKE OKEECHOBEE NEWS (Dec. 26, 2018), <https://lakeokeecheenews.com/lake-okeechobee/phosphorus-its-everyones-legacy/>.

⁴⁶ Elizabeth A. Stanton & Matthew Taylor, *Valuing Florida's Clean Waters*, STOCKHOLM ENVTL. INST. – U.S. CTR. 1, 3 (Nov. 13, 2012), <http://earthjustice.org/sites/default/files/ValuingFloridasClean-Waters.pdf>.

⁴⁷ *Id.* at 8.

⁴⁸ *Id.*

⁴⁹ Karl Havens, *What is Causing Florida's Algae Crisis?*, GAINESVILLE SUN (Aug. 15, 2018), <https://www.gainesville.com/opinion/20180815/karl-havens-what-is-causing-floridas-algae-crisis>.

⁵⁰ Stanton & Taylor, *supra* note 46, at 8.

⁵¹ *Id.*

they arrive, not on the pollution that’s driving them.”⁵² Over the last eight years, the State, under the guidance of Governor Rick Scott, drastically reduced funding for water quality monitoring programs and agencies that focus on red tide research.⁵³ Without hard limits on how much phosphorus and nitrogen are allowed into the ecosystem, these best-management practices essentially became voluntary measures.⁵⁴ For example, the target phosphorus level for Lake Okeechobee is 105 metric tons a year, but last year the lake received a mammoth 450 metric tons.⁵⁵ Perhaps an unsurprising outcome: In the summer of 2018, 90 percent of Lake Okeechobee’s 730-square mile surface was covered in blue-green slime.⁵⁶ It cannot be ignored that just after the lake exploded with blue-green algae and water managers started flushing its water to the coasts, the Gulf’s existing red tide deepened, resulting in widespread fish kills and a toxic coastline with its epicenter being the Caloosahatchee River—Lake Okeechobee’s western relief outlet.⁵⁷

A decades-old federal study concluded that man-made pollution worsens red tide, making the lake and its high levels of phosphorus and nitrogen an undeniable contributor.⁵⁸ How can this unchecked pollution be managed? Adopting numeric nutrient limits would force major polluters to be held responsible through enforcement by the Florida Department of Environmental Protection (FDEP) and the U.S. EPA. Further, hard limits would lead to the adoption of better overall best-management practices to reduce nitrogen and phosphorus loads entering Lake Okeechobee, the Everglades, and Florida’s coastal and inland waterways.

D. Restorative Measures

⁵² Jenny Staletovich, *Red Tide May Be ‘Natural’ But Scientists Believe Coastal Pollution Is Making It Worse*, MIAMI HERALD (Sept. 3, 2018), <https://phys.org/news/2018-09-red-tide-natural-scientists-coastal.html>.

⁵³ *Id.*

⁵⁴ Fleshler, *supra* note 40.

⁵⁵ *Id.*

⁵⁶ Jenny Staletovich, *What’s An Algae Bloom and How Did It Wind Up Sliming Florida’s Biggest Lake?*, MIAMI HERALD (July 10, 2018), <https://www.miamiherald.com/news/local/environment/article214620390.html>.

⁵⁷ Staletovich, *supra* note 52.

⁵⁸ *Id.*

Despite the overwhelmingly negative circumstances surrounding the historic treatment of the Everglades, there have been several positive strides in recent decades towards restoring the natural flow. Two positive measures are of substantial importance: the Kissimmee River Restoration Act and the Everglades Forever Act.

1. The Kissimmee River Restoration Act

In order to combat the over-draining of water as a result of the 1960s' transformation of the meandering Kissimmee River into one hyper-streamlined canal, water managers have undertaken a 20-year restoration effort to recurve the river.⁵⁹ In a massive, expensive, and seemingly endless undertaking, the U.S. Army Corps of Engineers has been acquiring land, backfilling canals, and restoring wetlands all in an effort to undo damage inflicted just a few years earlier.⁶⁰

Once the Kissimmee River's channelization was completed in 1971 and the river had effectively been transformed into a series of impoundments, the ecological devastation was immediately apparent.⁶¹ While the goal was flood control, the ultimate result was substantial loss of wetland habitat, elimination of historic water level fluctuations, increased nutrient loads, and greatly modified flow characteristics.⁶² Downstream ecosystems and economies were suffering greatly and pressure mounted on the State to correct its blunders.⁶³ 1976 saw the passage of the Kissimmee River Restoration Act, which was designed to restore the historic flow, reestablish the natural floodplain and wetland habitat, and recreate conditions favorable to increasing production of native flora and fauna.⁶⁴ In other words, the overarching goal was to improve water quality and restore native populations.

⁵⁹ Amy Green, *The Kissimmee: A River Re-Curved*, NPR (Oct. 19, 2014), <https://www.npr.org/2014/10/19/356647396/the-kissimmee-a-river-recurved>.

⁶⁰ *Kissimmee River Restoration Project*, U.S. ARMY CORPS ENGINEERS (Jan. 2019), <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll11/id/3340>.

⁶¹ Joseph W. Koebel, *An Historical Perspective on the Kissimmee River Restoration Project*, 3 RESTORATION ECOLOGY 149, 149 (Sept. 1995).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

With the project finally nearing completion decades later, the ecological benefits have been overwhelming.⁶⁵ Since the project’s commencement, native birds have returned to the riverbed and surrounding wetlands, dissolved oxygen has increased to healthy levels, organic deposits in the riverbed have decreased substantially, fish communities have repopulated, and native wetland plants have taken hold of the floodplain.⁶⁶ This significant cooperative effort between the Army Corps of Engineers and Florida’s Water Management Districts to restore historic flow patterns represents the consensus that Florida’s water resources are imperiled and require drastic measures for improvement. Restoring the upstream components of the Everglades ecosystem is a remarkable starting point, but much is still to be done to repair the damage to downstream systems. Fortunately, downstream systems are the focus of the Everglades Forever Act.

2. The Everglades Forever Act

In 1948, the Florida Legislature designated a large swath of land south of Lake Okeechobee for agricultural use.⁶⁷ Named the Everglades Agricultural Area (EAA), it encompassed nearly 700,000 acres of the original Everglades and was primarily used for sugarcane farming.⁶⁸ While the EAA’s designation was helpful in ensuring only a relatively small part of the Everglades would be converted into farming operations, the EAA quickly became a hotspot for intensive use of fertilizer and water, and thus, harmful agricultural runoff.⁶⁹ Following the unprecedented levels of phosphorus-rich runoff, the entire “Everglades ecosystem [became] endangered as a result of adverse changes in water quality, and the quantity, distribution, and timing of flows.”⁷⁰ This finding by the legislature was codified in the 1994 passage of the Everglades Forever Act, a long-term plan employed to restore and protect the Everglades by reducing excess phosphorus levels.⁷¹ The Act further authorized the Everglades Construction Project, a monumental restoration effort involving construction

⁶⁵ *Kissimmee River Restoration Project*, *supra* note 60.

⁶⁶ *Id.*

⁶⁷ *Everglades Agricultural Area*, DUKE U. WETLAND CTR., <https://nicholas.duke.edu/wetland/ea.htm> (last visited Feb. 20, 2019).

⁶⁸ *Everglades Agricultural Area*, CONSERVANCY SOUTHWEST FLA., <https://www.conservancy.org/our-work/policy/everglades/EAA> (last visited Feb. 21, 2019).

⁶⁹ *Id.*

⁷⁰ Everglades Forever Act of 1994, FLA. STAT. § 373.4592(1)(a) (2019).

⁷¹ *Id.* § 373.4592(17) (2017).

of 57,000 acres of wetlands known as stormwater treatment areas (STAs).⁷²

STAs are living wetlands designed to capture excess runoff and hold nutrient-rich water for treatment before it is permitted to flow through the Everglades. STAs encourage phosphorus removal via sedimentation and utilize native wetland plants to filter and treat phosphorus organically before the water makes its way south.⁷³ The STAs have proven highly effective at reducing the amount of excess phosphorus entering the Everglades and additional STA projects are at the forefront of the SFWMD's long-term plan.⁷⁴ However, while water quality and quantity monitoring are vital components of STA operations, one critical piece is missing: a numeric phosphorus criterion. Without criteria to define the maximum allowable limit of phosphorus entering the ecosystem, water managers are essentially implementing "best management practices" for farms and STAs.⁷⁵ While best management practices are helpful to making strides towards restorative goals, they do not provide concrete commitments to reduce nutrient loads.⁷⁶ Further, best management practices are simply vague guidelines for accomplishing a goal, not specific standards that can be enforced pursuant to the Clean Water Act.⁷⁷

II. Water Policy

A. *The Clean Water Act of 1972*

The 1972 Clean Water Act ("CWA") is the principal federal law governing water pollution and regulation in the United States.⁷⁸ Polluted water was posing a serious threat not only to the health of the nation's waters, but also to people who were drinking, living near,

⁷² Fisher, *supra* note 30.

⁷³ *Everglades Stormwater Treatment Areas*, S. FLA. WATER MGMT. DISTRICT, https://www.sfwmd.gov/sites/default/files/documents/bts_sta.pdf (last visited Feb. 21, 2019).

⁷⁴ *Id.*

⁷⁵ S. H. Daroub et al., *Best Management Practices in the Everglades Agricultural Area: Controlling Particulate Phosphorus and Canal Sediments*, IFAS EXTENSION (U. Fla. Institute Food Agricultural Sci., Gainesville, Fla.), 2005, at 1.

⁷⁶ See Press Release, Randy Smith, S. Fla. Water Mgmt. Dist., Phosphorus Reductions Continue to Improve Everglades Water Quality (Aug. 14, 2014), https://www.sfwmd.gov/sites/default/files/documents/nr_2014_0814_phosphorus_reduction.pdf.

⁷⁷ See *United States v. S. Fla. Water Mgmt. Dist.*, No. 88-1886-CIV-MORENO, 2011 U.S. Dist. LEXIS 114510, at *14 (S.D. Fla. Jan. 4, 2011).

⁷⁸ 33 U.S.C. § 1251(a) (2020).

and using water for recreation.⁷⁹ The CWA’s primary objective was the “restoration and maintenance of chemical, physical, and biological integrity of the Nation’s waters.”⁸⁰ Further, it defined the national goal as, where attainable, “water quality [should] provide for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water...”⁸¹ In other words, the CWA called for fishable, swimmable, and drinkable waters for all Americans.

The CWA preserves the rights of the States to establish and regulate their own standards for water pollution with the goal of restoring, preserving, and enhancing water resources.⁸² It is the responsibility and the right of the States “to prevent, reduce, and eliminate pollution, to plan the development and use of land and water resources, and to consult with the [EPA] Administrator (the “Administrator”) in the exercise of his authority under this chapter.”⁸³ States are to consult with the Administrator to manage pollution standards and federal agencies are to aid the states in the development of comprehensive management solutions.⁸⁴ In other words, states are permitted to adopt their own water-quality standards under the guidance of the Administrator and the Administrator is required to approve a state’s changes to its water-quality standards. However, if a state fails to adopt timely or adequate water-quality standards, the Administrator has the authority to do so on the State’s behalf.⁸⁵ In that case, the Administrator may wait no longer than 190 days to intervene and promulgate new standards.⁸⁶

B. Florida’s Nutrient Policy

⁷⁹ *The Challenge of the Environment: A Primer on EPA’s Statutory Authority*, U.S. ENV’T’L PROTECTION AGENCY, <https://archive.epa.gov/epa/aboutepa/epa-history-water-challenge-environment-primer-epas-statutory-authority.html> (last visited Feb. 23, 2020).

⁸⁰ 33 U.S.C. § 1251(a) (2020).

⁸¹ *Id.*

⁸² *Id.* § 1251(b).

⁸³ *Id.*

⁸⁴ *Id.* §§ 1251(e), 1251(g).

⁸⁵ *Id.* § 1313(b).

⁸⁶ *Id.*

In 1977, the CWA was amended and agricultural stormwater became exempt from regulation.⁸⁷ The impetus then fell to the State of Florida “to regulate phosphorus in stormwater leaving the sugar farms, [otherwise] the population of flora and fauna in the Everglades remained at risk from stormwater laden with phosphorus.”⁸⁸ Under the CWA, “Florida had to categorize its surface waters and establish water quality standards for each water body to preserve the water body for its designated uses and protect the water body from degradation.”⁸⁹

1. The 2001 Consent Decree

In 1988, the United States initiated litigation against both the SFWMD and the Florida Department of Environmental Protection (FDEP) under the CWA for “failing to regulate polluted waters from entering the Everglades Agricultural Area [EAA] . . . that contain harmful nutrients.”⁹⁰ This litigation continued for three years before the parties entered into a settlement agreement where they agreed that nutrient discharges into the EAA were an immediate threat to the ecosystem’s health.⁹¹

At the time of the settlement agreement’s inception, the standard for protection against excess nutrients was a narrative standard.⁹² Nonnumeric “narrative” standards describe the desired conditions of a water body.⁹³ For example, the pre-settlement narrative standard read: “[i]n no case shall nutrient concentrations of a body of water be altered so as to cause an imbalance in natural populations of aquatic flora or fauna.”⁹⁴ Narrative standards are vastly disfavored for two major reasons: First, applying such vague standards is resource-

⁸⁷ See Memorandum: Clean Water Act Section 404 Regulatory Program and Agricultural Activities, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/cwa-404/memorandum-clean-water-act-section-404-regulatory-program-and-agricultural-activities> (last visited Feb. 17, 2020).

⁸⁸ *United States v. S. Fla. Water Mgmt. Dist.*, No. 88-1886-CIV, 2011 WL 4595016, at *1, *3 (S.D. Fla. Jan. 4, 2011).

⁸⁹ *Id.* at *18–19.

⁹⁰ *Id.* at *13.

⁹¹ *United States v. S. Fla. Water Mgmt. Dist.*, 847 F. Supp. 1567 (S.D. Fla. 1992).

⁹² *South Fla. Water Mgmt. Dist.*, 2011 WL 4595016, at *20–21.

⁹³ See ENVTL. PROT. AGENCY, WATER QUALITY STANDARDS HANDBOOK CHAPTER 3: WATER QUALITY CRITERIA 5 (2017), <https://www.epa.gov/sites/production/files/2014-10/documents/handbook-chapter3.pdf>.

⁹⁴ *South Fla. Water Mgmt. Dist.*, 2011 WL 4595016, at *21–22.

intensive and time consuming,⁹⁵ and second, narrative standards do little by way of facilitating effective implementation of water quality protection programs to prevent nutrient impairment.⁹⁶ For example, a natural consequence of the State’s narrative standard was that by the time the water had reached problematic nutrient concentrations, “it would be too late for Everglades protection to wait for cattail to appear.”⁹⁷ Perhaps ironically, at the time the narrative standard was established, the scientific community posited that an imbalance had already occurred in the natural flora and fauna due to nutrient pollution.⁹⁸ So, the settlement agreement’s drafters outlined a process for developing numeric criteria to substitute for the inadequate narrative standard.⁹⁹ The settlement agreement was subsequently converted into a consent decree (the “2001 Consent Decree”), which “imposed a process rather than a result, in effect recognizing an administrative framework while preserving [the] Court’s ultimate jurisdiction.”¹⁰⁰ Following the decision, there was widespread agreement that narrative standards were ineffective and needed to be replaced by consistent numeric standards.¹⁰¹

While sound in theory, the 2001 Consent Decree’s framework caused a series of circular litigation and blame-shifting among federal and state agencies.¹⁰² Essentially, the decree compelled the water management districts to propose regulations and methods to protect the Everglades from excess nutrient pollution.¹⁰³ However, state agency authority was restricted by obligations under state law and Florida’s administrative procedure.¹⁰⁴ According to the CWA and Florida procedure, nutrient pollution standards were the responsibility of FDEP, and if FDEP failed to develop adequate standards, the burden was then shifted to the EPA.¹⁰⁵ It was quickly realized that nutrient criterion development required substantial resources and time, and FDEP ultimately allowed the deadlines to pass, automatically

⁹⁵ ENVTL. PROT. AGENCY, *supra* note 93, at 5–6.

⁹⁶ MARK R. POIRIER, ENVTL. LAW PRACTICE GUIDE § 18(1)(iii) (2019).

⁹⁷ *South Fla. Water Mgmt. Dist.*, 2011 WL 4595016, at *5.

⁹⁸ Stanton & Taylor, *supra* note 46.

⁹⁹ *South Fla. Water Mgmt. Dist.*, 2011 WL 4595016, at *5.

¹⁰⁰ *Id.* at *7.

¹⁰¹ *Florida Wildlife Fed’n, Inc. v. Jackson*, 853 F. Supp. 2d 1138, 1150 (N.D. Fla. 2012).

¹⁰² *Id.* at 1142.

¹⁰³ *Id.* at 1146–47.

¹⁰⁴ *South Fla. Water Mgmt. Dist.*, 2011 WL 4595016, at *7.

¹⁰⁵ 33 U.S.C. § 1313(b) (2020).

shifting the responsibility to the EPA pursuant to the CWA.¹⁰⁶ When the EPA failed to timely act, state and federal agencies battled back and forth over who held responsibility for the promulgation of adequate nutrient standards, all while Florida's nutrient pollution problems worsened and the State suffered substantial economic loss as a result of ongoing harmful algal blooms.¹⁰⁷ Because the original settlement agreement and the subsequent 2001 Consent Decree did not prescribe any remedies for dispute resolution, all disagreements pertaining to the creation, adoption, and regulation of nutrient standards in the Everglades found their way back into court.¹⁰⁸ The results have been disheartening. Following the 2001 Consent Decree, several ongoing series of cases litigated issues relating to nutrient standards in the Everglades.¹⁰⁹ Two of those cases, specifically addressing the nutrient standards, are analyzed below. Despite this ongoing litigation, nutrient standards either remain in narrative form or have been rendered inadequate to protect the economy and the interests of millions of Floridians whose livelihoods are currently tied up in this litigation.

2. The 2009 Consent Decree

In July 2008, Florida Wildlife Federation, alongside several major conservation groups, sued the U.S. EPA and its Administrator, Lisa Jackson, in the Northern District of Florida for failing to comply with the 1998 Clean Water Action Plan (the "Action Plan") developed by the EPA Administrator and Secretary of the U.S. Department of Agriculture.¹¹⁰ The 1998 Action Plan acknowledged that nearly 40 percent of state waters did not meet the CWA's water-quality goals and outlined a new strategy to alleviate pressing water-quality problems.¹¹¹ This case represented 20 years of back-and-forth debate between conservation groups, the EPA, the FDEP, and various industry

¹⁰⁶ *Jackson*, 853 F. Supp. 2d at 1147.

¹⁰⁷ *Florida Wildlife Fed'n, Inc. v. Jackson*, No. 4:08cv324-RH/WCS, 2009 WL 5217062, at *2 (N.D. Fla. Dec. 30, 2009).

¹⁰⁸ *South Fla. Water Mgmt. Dist.*, 2011 WL 4595016, at *7.

¹⁰⁹ See generally, *Jackson*, 2009 WL 5217062, at *2 ("[T]he state did not adopt or even propose numeric standards – not by December 31, 2003, and not by today, as 2009 draws to a close.").

¹¹⁰ *Id.* at *1. The 1998 Clean Water Action Plan was developed by the EPA in order to overhaul its enforcement of clean water laws and promote meaningful action to improve the nation's water quality. The action plan acknowledged that the EPA had changed its focus from enforcing point source pollution (ex: discharge pipes) to nonpoint source pollution (ex: agricultural runoff) without developing the proper framework to do so. In response, the action plan outlined expectations for enforcement, plans to improve dialogue with state water quality agencies, and methods for improved data collection.

¹¹¹ *Id.*

interests within the Everglades Agricultural Area. The primary disputes were over the FDEP’s failure to set adequate nutrient standards, the EPA’s failure to assume responsibilities in the wake of FDEP’s shortcomings, and the continual discharge of nutrient-rich stormwater runoff into the protected Everglades region.¹¹²

The Action Plan focused on the regulation of two nutrients that are excessively present in the nation’s—and particularly in Florida’s—water supply: phosphorus and nitrogen.¹¹³ Most states currently utilize both numeric and nonnumeric criteria to outline pollution standards.¹¹⁴ But, “many states, including Florida, had [only] nonnumeric or ‘narrative’ standards governing the introduction of nitrogen and phosphorus into water bodies.”¹¹⁵ In its Action Plan and in light of the fact that vague and undefined narrative standards had been unsuccessful in adequately protecting the nation’s waters, the EPA required “all states . . . adopt and implement *numerical* nutrient criteria by December 31, 2003.”¹¹⁶

In accordance with the Action Plan and the 2001 Consent Decree, FDEP, with guidance from the State’s water management districts, conducted extensive research, produced detailed studies, and held public meetings in an effort to develop numeric nutrient criteria.¹¹⁷ However, the State missed its 2003 deadline and “retained its narrative standard: the concentration of nutrients in a water body must not be altered ‘so as to cause an imbalance in natural populations of aquatic flora or fauna.’”¹¹⁸ Unsurprisingly, this standard continued to be inadequate and damaging algae blooms continued to plague Lake Okeechobee and surrounding Florida waterways into 2009.¹¹⁹

Pursuant to the CWA, FDEP’s missed deadline triggered a nondiscretionary duty for the Administrator to “promptly prepare and publish proposed regulations setting forth a revised or new water

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See *Nutrient Pollution: An Overview of Nutrient Reduction Approaches: Hearing Before the S. Comm. on Envir. & Pub. Works*, 112th Cong. 74–75 (2011).

¹¹⁵ *Jackson*, 2009 WL 5217062, at *1.

¹¹⁶ *Id.* at *2.

¹¹⁷ *Id.* at *1–2.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

quality standard.”¹²⁰ Because the Administrator took no action to timely intervene after FDEP failed to develop their own nutrient standards, plaintiff environmental groups filed suit under the CWA’s citizen suit provision¹²¹ “to compel her to perform a duty that the Act makes nondiscretionary.”¹²² Prior to the issue being resolved, the EPA sent a letter on January 14, 2009 to FDEP notifying them that the narrative standards were still insufficient.¹²³

Subsequently, the plaintiffs and the EPA entered into an agreement (the “2009 Consent Decree”) in 2009.¹²⁴ The 2009 Consent Decree was the result of a court-accepted settlement between parties that required the Administrator to approve new numeric nutrient criteria for Florida water bodies by January 14, 2010 and to adopt these standards by October 15, 2010.¹²⁵ The 2009 Consent Decree further provided that the requirements imposed on the Administrator would no longer apply if the State ultimately generated its own numeric nutrient criteria subject to the Administrator’s approval.¹²⁶ Because it was shown that both parties made a reasonable, good-faith compromise, the court entered the 2009 Consent Decree.¹²⁷ The 2009 Consent Decree essentially enforced the CWA, deemed Florida’s narrative nutrient standards inadequate, and bound the EPA to good-faith efforts to propose new or revise current nutrient standards.

3. Subsequent Litigation

After the time provided for the Administrator’s action had elapsed, the plaintiff conservation groups once again intervened in the Northern District of Florida in 2012. Pursuant to the 2010 deadlines that the 2009 Consent Decree established, in 2011, the Administrator finally released new numeric nutrient criteria for FDEP to codify.¹²⁸ Litigation in this case represents the series of back-and-forth

¹²⁰ 33 U.S.C. § 1313(c)(4) (2020).

¹²¹ *Id.* § 1365(a)(2).

¹²² *Jackson*, 2009 WL 5217062, at *2.

¹²³ *Id.*

¹²⁴ *Id.* at *3.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at *7.

¹²⁸ *Florida Wildlife Fed’n, Inc. v. Jackson*, 853 F. Supp. 2d 1138, 1142–43 (N.D. Fla. 2012).

debates between environmental groups and the EPA for failure to establish adequate *numeric* water-quality standards for Florida’s water bodies. The plaintiff groups challenged the Administrator’s numeric nutrient criteria, claiming the stream and downstream-protection criteria were arbitrary and capricious.¹²⁹ The court conducted a lengthy analysis of the data collection methods and findings at each type of aquatic location (lake, spring, and stream) that led the Administrator to adopt a certain standard.¹³⁰

After the 2009 ruling in *Florida Wildlife Federation v. Jackson*, the Administrator got to work developing adequate lake, spring, and stream nutrient criteria in compliance with the numeric standards requirement that the 2009 Consent Decree imposed.¹³¹ However, the Administrator was unable to do so based on modeling and field studies, and failed to identify a standard which caused a *harmful* change in flora and fauna.¹³² In other words, the Administrator’s new approach for development of nutrient criterion was designed to identify *any* change in nutrient level rather than a *harmful* change.¹³³ While it is true that any increase in nutrient concentrations was likely to change the composition of flora and fauna, it is not necessarily true that an increase in nutrient concentrations would have constituted a *harmful* change.¹³⁴ Additionally, the Administrator’s numeric standards were based on the nutrient levels in an unimpaired lake¹³⁵—quite the opposite of the seasonably toxic Lake Okeechobee.¹³⁶ The court ruled that some of the Administrator’s standards (specifically the standards applying to stream criteria and unimpaired lakes) were not based on sound science and were therefore arbitrary and capricious.¹³⁷ According to the Administrative Procedures Act, agency actions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law must be set aside by a court.¹³⁸ In

¹²⁹ *Id.* at 1143.

¹³⁰ *Id.* at 1142–43.

¹³¹ Water Quality Standards for the State of Florida’s Streams and Downstream Protection Values for Lakes: Remanded Provisions, 77 Fed. Reg. 74,985 (proposed Dec. 18, 2012) (to be codified at 40 C.F.R. pt. 131).

¹³² *Jackson*, 853 F. Supp. 2d at 1142–43.

¹³³ *Id.* at 1160–61.

¹³⁴ *Id.* at 1168.

¹³⁵ *Id.* at 1146.

¹³⁶ Manuel Bojoquez, *Toxic Algae a Slimy Mess for Florida’s Lake Okeechobee*, CBS (July 6, 2018), [cbsnews.com/news/florida-lake-okeechobee-toxic-algae-problem-2018-07-06/](https://www.cbsnews.com/news/florida-lake-okeechobee-toxic-algae-problem-2018-07-06/).

¹³⁷ *Jackson*, 853 F. Supp. 2d at 1176–77.

¹³⁸ 5 U.S.C. § 706(2)(A) (2020).

accordance with federal procedure, the court determined that all remaining valid provisions of the rule would go into effect in March 2012.¹³⁹ The court also called for all invalid provisions to be modified and corrected by May 2012 and scheduling extensions were only to be provided if done so in accordance with the 2009 Consent Decree.¹⁴⁰

Clearly frustrated with the perpetual inaction, the court sympathized with the plaintiff conservation groups and expressed its frustration with the persistent nutrient pollution and increasing magnitude of harmful algae blooms.¹⁴¹ Quoting the FDEP's own water quality assessment report, the court explained that nearly 25 percent of all of Florida's waterbodies were suffering from nutrient impairment with little being done to mitigate the problem.¹⁴² The court further emphasized the threat harmful algal blooms pose to surface drinking water resources and recreation, while explaining that they are increasing in frequency, duration, and magnitude.¹⁴³ The court then proceeded to detail FDEP's long history of missing deadlines and modifying completion schedules, the EPA's history of acknowledging FDEP's shortcomings but failing to intervene, and the constant blame-shifting between the FDEP and Florida's Environmental Regulation Commission—the body charged with approving water quality standards.¹⁴⁴

Unsurprisingly, conservation groups again deemed the criteria unacceptable and they appealed the 2012 decision to the Eleventh Circuit in 2013.¹⁴⁵ The Eleventh Circuit dismissed the appeal, holding that it lacked appellate jurisdiction because the Northern District of Florida remanded the case to the EPA for modification of the stream and lake criteria.¹⁴⁶ Another case, *Florida Wildlife*

¹³⁹ *Jackson*, 853 F. Supp. 2d at 1151.

¹⁴⁰ *Id.* at 1177.

¹⁴¹ *Id.* at 1145.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1146, 1148 (discussing FDEP's submission of numeric nutrient criteria plans to the Environmental Regulation Commission to promulgate rulemaking and lack of control over ERC's schedule and the resulting effect of rule creation taking over fifteen years—from the EPA's initial input—to be put into place).

¹⁴⁵ Mohammad O. Jazil & David W. Childs, *Numeric Nutrient Criteria in Florida: The Road to Cooperative Federalism*, AM. BAR ASS'N (Feb. 23, 2020), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2015-2016/november-december-2015/numeric_nutrient_criteria_in_florida_the_road_to_cooperative_federalism/.

¹⁴⁶ *Id.*

Federation, Inc. v. McCarthy, was filed in the Northern District of Florida in 2014 on the basis that the 2009 Consent Decree affected substantial rights and put the parties in a worse position than they were in before.¹⁴⁷ The conservation groups then appealed that unfavorable decision to the Eleventh Circuit in 2015¹⁴⁸ and the result was again unfavorable, with the court denying an evidentiary hearing to test the EPA’s approval of the FDEP’s newly modified criteria.¹⁴⁹

While these losses are setbacks for protection and restoration of the Everglades and its valuable water resources, this is certainly not the end of the fight. The EPA and FDEP are required to reevaluate nutrient standards every three years so the plaintiffs may be able to challenge the modification of standards based on their current effectiveness in reducing the prevalence of harmful algal blooms and controlling nutrient pollution.¹⁵⁰ Unfortunately, nutrient criteria quickly becomes outdated given our changing climate and substantial human influence on nutrient introduction. Further, the current procedural framework surrounding the development and modification of nutrient criteria makes it nearly impossible to get adequate standards approved while they are still relevant. The length and scope of this essentially unresolved litigation make considerations of the Florida’s future nutrient pollution issues disheartening.

However, it seems as though the South Florida judiciary may have taken on a role as the last line of defense in this legal battle. In February 2019, Judge Moreno of the Southern District of Florida rejected a SFWMD petition to be discharged from its duties under the 2009 Consent Decree.¹⁵¹ The District complained that three levels of enforcement (the EPA, FDEP, and SFWMD) hampered its efforts to meet standards over time, but environmental groups argued that leaving the consent decree in place would ensure that the District’s work would end only once the water was clean.¹⁵² The judge agreed, noting

¹⁴⁷ *Florida Wildlife Fed’n, Inc. v. McCarthy*, No. 4:08cv324-RH/CAS, 2014 U.S. Dist. LEXIS 1343, at *28 (N.D. Fla. Jan. 7, 2014).

¹⁴⁸ Jazil & Childs, *supra* note 145.

¹⁴⁹ *Id.*

¹⁵⁰ 33 U.S.C. § 1313(c) (2020).

¹⁵¹ Jenny Staletovich, *Federal Judge Rejects Move by South Florida Water Managers to End Everglades Oversight*, MIAMI HERALD (Feb. 11, 2019), <https://www.miamiherald.com/news/local/environment/article226117900.html>.

¹⁵² *Id.*

that the District provided no evidence to support its claims for termination of the 2009 Consent Decree.¹⁵³

III. Solutions

A. Cooperative Federalism

The first step in confronting such a widespread and multi-layered problem is to carefully delegate tasks to the appropriate parties in an act of cooperative federalism. Cooperative federalism essentially involves federal, state, and local governments working together to attack specific layers of a problem rather than one level of government taking full responsibility.¹⁵⁴ Cooperative federalism relies on the commonly accepted theory that the state is the most capable party in handling issues pertaining to that state specifically.¹⁵⁵

In the nutrient limit litigation, there were clear negative effects of federalism; for example, when the EPA took over the duties of FDEP, the EPA failed to timely develop adequate nutrient standards, and was ultimately sued by Florida to take back FDEP's duties.¹⁵⁶ In response, Florida passed a law to keep the EPA out of its nutrient standard development process, but later argued in court to allow the EPA back in to certain aspects of the process.¹⁵⁷ Removing the responsibility from the state placed all responsibility on the EPA, despite the fact that the state already began the development process and was in the best position to accomplish the task on an extended timeline. Further, it can be argued that because the State is also charged with implementing and monitoring best-management practices on private farms, the State is in a better position to develop a framework for implementation and enforcement of nutrient standards. According to Richard Grosso, a professor at Shepard Broad College of Law at Nova Southeastern University, "agricultural runoff is chiefly the responsibility of the State, not the federal government [because it is] the State [that] enforces, and requires, best management

¹⁵³ *Id.*

¹⁵⁴ *Cooperative Federalism at EPA*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/home/cooperative-federalism-epa> (last visited Feb. 17, 2020).

¹⁵⁵ *Id.*

¹⁵⁶ *Florida Wildlife Fed'n, Inc. v. Jackson*, 853 F. Supp. 2d 1138, 1142–44 (N.D. Fla. 2012).

¹⁵⁷ Jazil & Childs, *supra* note 145.

practices on farms.¹⁵⁸ Incorporating principles of cooperative federalism would have allowed the EPA and FDEP to work together to pool resources and promulgate adequate nutrient standards in a timely manner as both the settlement agreement and the CWA require.

Engaging in cooperative federalism also relieves some pressure on the court system that blame-shifting between governments and agencies exacerbates.¹⁵⁹ Given the sheer number of organizations involved in or represented by the litigation, jurisdictional issues are unavoidable and complaint filings are often cyclical, with frequent dismissals and appeals.¹⁶⁰ The court system’s role is also limited by resource and time constraints; after all, thirty years of litigation history requires extensive background research. Even if the court was able to entertain all challenges in the nutrient standard litigation, its intervening role is limited. For example, the court can compel an agency to act in compliance with a law, but each agency is still restricted by its own lack of resources and its obligations under federal law (like the CWA).¹⁶¹ Incorporating principles of cooperative federalism into federal laws would likely promote inter-agency cooperation and result in less stress on the judicial system.

B. Reducing Political Influence

A second solution involves the reduction of political influence in the process of adopting nutrient criteria. Stricter campaign funding regulations would prevent private interests from influencing state and federal officials’ decision-making;¹⁶² former Governor Scott’s relationship with Big Sugar serves as a cautionary tale. Lobbied by U.S. Sugar, a major campaign contributor, Scott and his appointees at the SFWMD rejected a deal to buy U.S. Sugar land south of the lake for water storage.¹⁶³ Further, Scott infamously spared Florida’s sugar and cattle farming industries from nutrient regulations by requesting that

¹⁵⁸ Flavelle & Edgerton, *supra* note 12.

¹⁵⁹ Ruhl et. al, *Agencies Running From Agency Discretion*, 58 WM. & MARY L. REV. 97, 147 (2016).

¹⁶⁰ *FOIA Guide, 2004 Edition: Litigation Considerations*, U.S. DEP’T JUST., <https://www.justice.gov/oip/foia-guide-2004-edition-litigation-considerations> (last visited Feb. 23, 2020).

¹⁶¹ Ruhl et. al, *supra* note 159, at 146.

¹⁶² Ciara Torres-Spelliscy, *How Corporate Law Can Help Democracy Post-Citizens United*, BRENNAN CTR. FOR JUST. (Jan. 21, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/how-corporate-law-can-help-democracy-post-citizens-united>.

¹⁶³ Fleshler, *supra* note 40.

the EPA delegate all nutrient regulatory duties to the state in 2011, a move that essentially allowed him to decide how the state would manage agricultural runoff.¹⁶⁴ While this decision would make sense under the principles of cooperative federalism, the undue influence of campaign funding provides a complicating factor that has led to a windfall for the farming industry at the detriment to those who rely on Florida's waters for recreation and their income.¹⁶⁵ However, Scott's subsequent moves to push for narrative rather than numeric standards and cancel a 2015 deadline limiting nutrient flow into Lake Okeechobee were without logical explanation.¹⁶⁶

While removing politics from the enforcement of environmental regulations is a critical step in ensuring healthier waterways, political candidates should place a greater emphasis on funding research and finding solutions for Florida's water quality problems. If candidates placed a stronger emphasis on initiatives to regulate nutrient runoff and protect the sensitive Everglades ecosystem, the long-term rewards would be undeniable. Nutrient pollution and the resultant algae blooms and ecosystem restructuring affect every aspect of Florida's economy, and the State therefore expends significant resources in mitigation and recovery efforts.¹⁶⁷ Last summer, Governor Scott declared a state of emergency and ordered that six million dollars be spent to help with cleanup and tourism.¹⁶⁸ Even then, many people believed those efforts were to further Scott's senate campaign rather than to prove any real dedication to addressing the underlying issues.¹⁶⁹ Oddly, Florida's nutrient pollution problems have seemingly become partisan issues, with politicians (like the mayor of Clewiston, a South Florida farming town) lashing out at environmentalists for misplaced blame and a misunderstanding of facts.¹⁷⁰ However, the facts overwhelmingly support the contention that the Everglades is being overloaded and degraded by the same nutrients from

¹⁶⁴ Flavelle & Edgerton, *supra* note 12.

¹⁶⁵ Fleshler, *supra* note 40.

¹⁶⁶ Flavelle & Edgerton, *supra* note 12.

¹⁶⁷ *Governor Ron DeSantis Recommends \$625 Million for Everglades Restoration and Protection of Water Resources*, FLA. GOV. (Jan. 29, 2019), <https://www.flgov.com/2019/01/29/governor-ron-desantis-recommends-625-million-for-everglades-restoration-and-protection-of-water-resources/>.

¹⁶⁸ Flavelle & Edgerton, *supra* note 12.

¹⁶⁹ Victoria Ballard, *Gov. Scott Declares State of Emergency Over Algae Bloom*, SUN SENTINEL (July 9, 2018), <https://www.sun-sentinel.com/news/florida/fl-reg-scott-algae-emergency-20180709-story.html>.

¹⁷⁰ Phillip Roland, *Environmental Activist's Claims About Everglades Water and Farmers Don't Square with Facts*, FLAPOL (Feb. 24, 2016), <http://floridapolitics.com/archives/202642-phillip-roland-environmental-activists-claims-about-everglades-water-and-farmers-dont-square-with-facts>.

farming operations and urban septic tanks, all of which are found in excess in South Florida’s waterways.

An encouraging development for Florida water policy happened in 2018 when Floridians elected Republican gubernatorial candidate Ron DeSantis as the State’s forty-sixth governor.¹⁷¹ To the surprise of many, Governor DeSantis immediately got to work overhauling Florida’s neglected water policy.¹⁷² A mere two months after taking office, he issued an Executive Order, “Achieving More Now for Florida’s Environment,” which implemented reforms to ensure ongoing protection of Florida’s natural environment and water quality.¹⁷³ Recognizing that Florida’s waterways and natural resources form the foundation of “our economy and our way of life,” DeSantis pledged 2.5 billion dollars over the next four years for Everglades restoration, established a blue-green algae taskforce, ordered the immediate construction on the Everglades Agricultural Area Storage Reservoir project, created the Office of Environmental Accountability and Transparency, and appointed a Chief Science Officer.¹⁷⁴ DeSantis’ immediate action came as a surprise to many skeptical of politicians’ commitments to clean water, but has invigorated an old fight with new optimism and promising initiatives.¹⁷⁵ While more work is still left for his administration to accomplish, the Governor’s emphasis on nutrient pollution issues bridges historical gaps between political parties and unites Floridians under a common goal: protect Florida’s precious aquatic resources.¹⁷⁶

C. Infrastructure Improvements

A third solution involves improving and expanding existing infrastructure to prevent seasonal overflow discharges into the Caloosahatchee and St. Lucie Rivers. With the current infrastructure,

¹⁷¹ *Id.*

¹⁷² *Governor Ron DeSantis Announces Major Water Policy Reforms*, FLA. GOV. (Jan. 10, 2019), <https://www.flgov.com/2019/01/10/governor-ron-desantis-announces-major-water-policy-reforms/>.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ See Jenny Staletoich, *Ron DeSantis Unveils Sweeping Environmental Plan to Fix Florida’s Water Woes*, TAMPA BAY TIMES (Jan. 10, 2019), <https://www.tampabay.com/florida-politics/buzz/2019/01/10/ron-desantis-unveils-sweeping-environmental-plan-to-fix-floridas-water-woes/>.

¹⁷⁶ See Jackie Flynn Mogensen, *The New Governor of Florida Is Not the Environmental Disaster Everyone Thought He’d Be*, MOTHER JONES (Apr. 8, 2019), <https://www.motherjones.com/politics/2019/04/ron-desantis-florida-governor-environmental-record-red-tide>.

summer discharges average anywhere between 300 to 700 million gallons of lake water per day depending on rainfall.¹⁷⁷ This solution, while costly, is arguably the most feasible because the infrastructure is already in place. The Army Corps of Engineers manages the Herbert Hoover dike surrounding Lake Okeechobee, which was built following a 1928 hurricane that caused lake water to spill over and flood nearby towns and farmland.¹⁷⁸ In its current state, the dike experiences constant maintenance to the tune of 870 million dollars every ten years and has not been majorly renovated in decades.¹⁷⁹ Making the overdue repairs to the dike—which is upwards of an 800 million dollar project—would alleviate the pressure to release water into the rivers and drastically reduce the magnitude and frequency of algal blooms.¹⁸⁰ While the nutrient pollution battle would rage on and phosphorus-rich water would continue to accumulate in the “toxic tank” that has become Lake Okeechobee, the dike repairs would prevent polluted water from flowing to both coasts during periods of heavy rainfall.

D. Infrastructure Construction

Finally, there has been a decades-long political fight over beginning the construction of a 60,000-acre reservoir near Lake Okeechobee that would hold contaminated water for treatment prior to sending it south through the Everglades.¹⁸¹ Without the reservoir, that nutrient-laden water continues to be pumped directly into the rivers and sent east towards the Atlantic and west towards the Gulf of Mexico.¹⁸² While Rick Scott cancelled the project shortly after being elected governor, Congress later authorized the project in its 2018 Water Infrastructure Act.¹⁸³ As of now, the SFWMD has broken

¹⁷⁷ Andy Reid, *Recent Rains Still Leave South Florida Facing Groundwater Shortage*, SUN SENTINEL (June 20, 2011), <https://www.sun-sentinel.com/news/sfl-south-florida-groundwater-shortage-20110620-story.html>.

¹⁷⁸ *Ten Things to Know About the Herbert Hoover Dike and Why Trump is Weighing In*, PALM BEACH TIMES (Apr. 28, 2017), <https://www.palmbeachpost.com/2017/04/28/ten-things-to-know-about-the-herbert-hoover-dike-and-why-trump-is-weighing-in/>.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Everglades Agricultural Area Storage Reservoir*, S. FLA. WATER MGMT. DISTRICT, <https://www.sfwmd.gov/our-work/cefp-project-planning/eea-reservoir> (last visited Feb. 23, 2020).

¹⁸² *Id.*

¹⁸³ *See Trump Signs Water Projects Bill with Aims in Flint, Florida*, CHI. SUN TIMES (Oct. 23, 2018), <https://chicago.suntimes.com/news/donald-trump-signs-water-projects-bill-americas-water-infrastructure-act-of-2018-flint-florida/>.

ground and Governor DeSantis granted approval to move forward, but the State awaits appropriation of guaranteed federal funds for the project.¹⁸⁴ While construction of the reservoir seems to be the best solution for the time being, the entire project detracts from the underlying need to better manage nutrient pollution and hold polluters accountable.

CONCLUSION

The Everglades is currently the epicenter of a controversial battle over nutrient pollution. With nutrient pollution to blame for decimating fisheries, contaminating drinking water, and sending tourists north in droves, now is the time for policy action. Unfortunately, administrative roadblocks and lengthy court proceedings have mired meaningful progress in a political swamp, leaving Florida’s water policy and the livelihood of its residents in limbo. The development and adoption of proper nutrient standards is the first step in ensuring agencies can effectively regulate farming operations, manage storm-water treatment areas, and ultimately restore the Everglades to its more natural state. Once standards are adopted, the next priority should be drastically reducing phosphorus flow to encourage the recolonization of sawgrass, which will in turn promote healthy fire regimes, the reestablishment of native species, and improvements to water quality. Proper nutrient management is essential to reducing nutrient loads entering the Everglades, restoring the Everglades’ natural biodiversity, and preserving the Sunshine State’s reputation as America’s paradise.

¹⁸⁴ *Everglades Agricultural Area Storage Reservoir*, *supra* note 181.

*FOR THE COMMON WEALTH: HOW AN ADEQUACY SUIT
COULD REMEDY VIRGINIA'S GROWING EDUCATIONAL
INEQUITIES*

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* J.D. Candidate, 2020, University of Richmond School of Law; B.A., 2017, Washington & Jefferson College. I would like to extend my sincerest gratitude to Professor Kevin Woodson for sharing his depth of knowledge on the history of the United States' educational policy with me over the course of Fall 2018. As Editor-in-Chief of the *University of Richmond Law Review*, I must thank my colleagues for their continued passion for scholarship, and specifically, Matthew Pangle for supporting this Comment during a very tumultuous time. Of course, this Comment would be subpar if not for the helpful insight of my parents—Allen and Theresa Phillips. I am forever indebted to you both for spending so much time discussing legal scholarship with me. Finally, I would like to thank the staff of the *University of Richmond Public Interest Law Review* for their time spent poring over not only this Comment but many other articles, editing them into exceptional pieces of publishable quality. May we all cherish the memories we shared, the lessons we learned, and the people we grew so close to during our time as members of the University of Richmond's journal community.

ABSTRACT

In 1994, the state of Virginia successfully defended what was, even then, an outdated and insufficient educational finance formula. Because this formula remains untouched by the General Assembly, educational equity continues to worsen across the state. This Comment argues that while the 1994 case of *Scott v. Commonwealth* may seem to validate the current system, the Supreme Court of Virginia may have implied that a remedy for such disparities could become vital for educational *adequacy* in the state. Today, figures used by the court show a widening gap in educational spending that shocks the conscience. This Comment explains how an adequacy suit, emphasizing educational inequality over differences in spending alone, could remedy Virginia's growing educational inequities.

INTRODUCTION

"The *diffusion of information* and the arraignment of all abuses at the bar of public reason, [is] deem[ed] [one of] the essential principles of our government, and consequently . . . ought to shape its administration."¹ Yet, despite America's deeply rooted value of education, Virginia's public education system is riddled with gross inequities and disparities such that some students within the state do not receive an adequate education.

Motivated by such disparity, eleven public school districts and seven local school boards filed a suit against the state—*Scott v. Commonwealth*—in the 1990s.² Although the Supreme Court of Virginia recognized a fundamental right to education, it denied extending the plain meaning of the State Constitution to require funding be equal, or substantially equal, between localities.³ Still, the language of the *Scott* case could lend itself to a modern, plaintiff-friendly adequacy lawsuit. The court considered a number of factors, expressing concern as to the growing inequities and possibly highlighting the issue for a legislative remedy.⁴ Since then, the Virginia General Assembly failed to provide

¹ President Thomas Jefferson, First Inaugural Address (Mar. 4, 1801) (emphasis added).

² *Scott v. Commonwealth*, 443 S.E.2d 138, 139 (Va. 1994).

³ *Id.* at 142.

⁴ *Id.* at 142–43.

any sort of relief or modification to the state-mandated Standards of Quality (“SOQ”). Instead, the *Scott* court’s concerns have become Virginia’s reality.

As evidenced by mass inequality in the state’s education system, the SOQ and its finance formula are fundamentally flawed. The General Assembly weighs local ability-to-pay to calculate mandated local contributions and the additional state funds to meet the projected cost, but caps local contribution at eighty percent, moving funds away from inherently at-risk districts.⁵ Meanwhile, after the local SOQ contribution is made, each school district is allowed to spend exponential amounts of local funds on public education within the district, creating significant disparities throughout the state.⁶ Notably, the SOQ do not include costs for educational facilities despite the inherent role of a sound structure in administering an adequate education.⁷ Given these shortcomings, the *Scott* factors have worsened considerably.

Virginia’s stifling educational disparities call for a statewide remedy and would likely require a court order to address such a problem. Virginia’s geographic divides create differentiating interests, especially between the state’s northern and southwestern regions. Inequities are most apparent in available programs and educational facilities.

This Comment will address Virginia’s educational disparities and analyze the relationship between the *Scott* holding, Virginia’s current finance formula, and localities’ ability to meet the SOQ and provide an adequate education. Part I details the SOQ requirements and how the state provides funding to localities to enable them to meet these standards. Part II reviews the *Scott* case and how the once unfriendly holding could now serve to support an adequacy suit. Here, this section will present the case in a new light, considering how the language of the opinion could potentially be plaintiff friendly today. Part III analyzes the adequacy litigation movement and details how such a suit could potentially remedy Virginia’s growing educational

⁵ See Ashley McDonald Delja, *Across Four Aprils: School Finance Litigation in Virginia*, BYU EDUC. & L.J. 191, 197 (2004).

⁶ *Id.* 197–98.

⁷ KENT DICKEY & BRIAN LOGWOOD, COMMONWEALTH OF VA. DEP’T OF EDUC., PUBLIC SCHOOL FINANCE PROGRAMS OF THE UNITED STATES AND CANADA: 1998–99, at 21–22 (2000).

disparity. In conclusion, Part IV discusses possible remedies for creating a more equitable education finance formula.

Over twenty years has passed since the Supreme Court of Virginia held for the State in *Scott v. Commonwealth*. Since then, the idea of an “adequate” education has deteriorated exponentially in a number of Virginia’s school districts. It is time to address growing inequalities in the Commonwealth of Virginia.

I. The State-Mandated SOQ: Minimum Education in Virginia

The Virginia Constitution imposes a duty on the General Assembly to establish an efficient system of public education guided by the SOQ.⁸ Still, the SOQ acts as Virginia’s educational floor. These standards are determined by the General Assembly, and each locality has the responsibility to meet these standards.⁹ The statutes detail what the General Assembly presents as the foundations of education including educational objectives, student-teacher ratios, and accreditation processes.¹⁰

A. The Value of Education: Virginia’s Constitutional Requirements for an Effective Education System

The value of education is one inherent to the American ideals of a free society. The Virginia Constitution is not an exception to this traditional emphasis on the importance of education nor is it silent on the State’s role in facilitating it. Article I, section 15 describes the qualities necessary to maintain a free government:

⁸ VA. CONST. art. VIII, § 2.

⁹ VA. CODE §§ 22.1-253.13:1–13:10 (2020).

¹⁰ *Id.* Some believe Virginia’s SOQ cost projections have been inadequate since the General Assembly originally crafted the SOQ system. See ROBLEY S. JONES ET AL., VA. EDUC. ASS’N, FUNDING K-12 EDUCATION IN THE COMMONWEALTH: SCHOOL FINANCE 101 (2009). The General Assembly’s assumptions as to the average number of personnel within a school, the impact of inflation, and the lifespan of buses are only some of a number of compelling concerns. See Chris Duncombe & Michael Cassidy, *Virginia’s Eroding Standards of Quality*, COMMONWEALTH INST. (Jan. 6, 2016), <https://www.thecommonwealthinstitute.org/2016/01/06/virginias-eroding-standards-of-quality/>. For additional analyses of the inconsistencies in Virginia’s formula that are beyond the purview of this Comment, see sources noted *supra*, along with WILLIAM A. OWINGS & LESLIE S. KAPLAN, VA. ASS’N FOR SUPERVISION & CURRICULUM DEV. BD. OF DIRS., FUNDING PUBLIC EDUCATION IN VIRGINIA (2001).

That free government rests, as does all progress, upon the broadest possible diffusion of knowledge, and that the Commonwealth should avail itself of those talents which nature has sown so liberally among its people by assuring the opportunity for their fullest development by an *effective* system of education throughout the Commonwealth.¹¹

Article VIII, section 1 further provides that “[t]he General Assembly shall provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth.”¹² To institute an “effective” system of public education, the state “shall seek to ensure that an educational program of high quality is established and continually maintained.”¹³

Article VIII, section 2 establishes Virginia’s minimum standards of education—the Standards of Quality.¹⁴ The constitution delegates the legislative power to determine these standards to the Virginia Board of Education.¹⁵ Such authority is only subject to revision by the General Assembly.¹⁶ The constitution details the legislative process for establishing appropriate funding for localities to meet the SOQ:

The General Assembly shall determine the manner in which funds are to be provided for the cost of maintaining an educational program meeting the prescribed standards of quality, and shall provide for the apportionment of the cost of such program between the Commonwealth and the local units of government comprising such school divisions. Each unit of local government shall provide its portion of such cost by local taxes or from other available funds.¹⁷

¹¹ VA. CONST. art I, § 15 (emphasis added).

¹² *Id.* art VIII, § 1.

¹³ *Id.*

¹⁴ *Id.* § 2.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

B. A Bare Minimum Standard

The Virginia Constitution acts as the educational floor, detailing a number of mandates and standards which localities *must* meet or surpass with state and local funding.¹⁸

Section 22.1-253.13:1 of the Virginia Code prescribes the standards for instructional programs that support the Standards of Learning and other education objectives.¹⁹ Within the section, the General Assembly announces its stance on the importance of a *quality* education: “The General Assembly and the Board of Education believe that the fundamental goal of the public schools of the Commonwealth must be to enable each student to develop the skills that are necessary for success in school, preparation for life, and reaching their full potential.”²⁰ The General Assembly deems the following as essential to a quality education:

(i) the appropriate working environment, benefits, and salaries necessary to ensure the availability of high-quality instructional personnel; (ii) the appropriate learning environment designed to promote student achievement; (iii) quality instruction that enables each student to become a productive and educated citizen of Virginia and the United States of America; and (iv) the adequate commitment of other resources.²¹

Section 22.1-253.13:2 of the Virginia Code details important requirements for student-teacher ratios within each classroom.²² Schools are required to keep student-teacher ratios to around 25-to-1 in classrooms of all ages, with a mandatory duty to notify parents of children if, after the school year begins, the ratio exceeds state-mandated limits.²³

¹⁸ *Id.*

¹⁹ VA. CODE § 22.1-253.13:1 (2020).

²⁰ *Id.*

²¹ *Id.*

²² *Id.* § 22.1-253.13:2 (2020).

²³ *Id.*

Section 22.1-253.13:3 of the Virginia Code lays out the school accreditation process.²⁴ Here, the Board of Education is charged with the duty to promulgate accreditation guidelines that emphasize particularly important factors such as student outcome measures, requirements and guidelines for instructional programs, and auxiliary education programs such as library and media services.²⁵ The accreditation standards must announce and support “the philosophy, goals, and objectives of public education in Virginia.”²⁶

The Virginia Code demands local schools comply with the SOQ. Section § 22.1-253.13:8 of the Virginia Code requires that every school provide—with state and local funds—an education that satisfies the SOQ at minimum.²⁷ The state public education finance formula determines how much of the cost is supplied by the state or apportioned to the locality.²⁸

C. Funding the SOQ: Calculating Cost and Local Ability-To-Pay

On average, educational funds amount for one-third of the State’s general budget.²⁹ The SOQ cost is one of six categories in the state public education funding scheme but accounts for a majority of educational funding from the state to local level.³⁰

The General Assembly is responsible for apportioning funds between the state and local levels to meet the SOQ.³¹ The legislature therefore crafted and implemented a formula to project the total amount of funds necessary for each locality to meet the SOQ.³² Costs are determined by three components: (1) required number of

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* § 22.1-253.13:8 (2020). Here, the Constitution implies local districts will be able to meet the SOQ with state and local funds. *See id.*

²⁸ CARY LOU ET AL., THE URB. INST., SCHOOL DISTRICT FUNDING IN VIRGINIA 2 (2018).

²⁹ KENT C. DICKEY, VA. DEP’T OF EDUC., OVERVIEW OF K-12 EDUCATION FUNDING IN VIRGINIA 2 (July 2013), <https://www.nvic.org/cmstemplates/nvic/pdf/state-legislature/soq-funding-presentation-3.pdf>.

³⁰ *Id.* at 1. In 2014, the SOQ funding amounted to 88.5% of all direct state education funding for school divisions at \$5.3 billion. *Id.* at 6. The SOQ formula will be the particular focus of the financial analysis in this Comment given the standards substantial weight on funding, their close relationship with existing inadequacies, and the *Scott* court’s implicit holding that the state must provide sufficient funds for each locality to meet the SOQ.

³¹ *Id.* at 13.

³² *Id.* at 13–14.

instructional positions based on the state staffing standards, (2) recognized support positions, and (3) recognized nonpersonal support costs.³³ The formula weighs these SOQ costs against local revenue and population indicators.³⁴

After calculating the projected cost of meeting the SOQ, the State considers each district's local ability-to-pay through the Local Composite Index ("LCI").³⁵ The LCI weighs three factors to determine a local school district's ability to meet SOQ cost requirements: true value of real property, adjusted gross income, and taxable retail sales.³⁶ The formula additionally accounts for varying locality populations by weighing each of the previous indicators against two measures of population: local population and student enrollment.³⁷

From this calculation, an index value is quantified that represents the local share of cost, ranging from zero to one.³⁸ An LCI of zero means a locality has absolutely no ability to fund SOQ costs.³⁹ An LCI of one shows that a locality has the full ability to meet SOQ costs with local funds alone.⁴⁰ The State makes up the difference for SOQ funding after each district's LCI.⁴¹ Therefore, the "state share" of funding is the State's estimate of funding required to meet the SOQ's minus a locality's LCI.⁴² As a result, wealthier districts with a higher LCI have higher local contribution requirements.⁴³ In contrast, socioeconomically disadvantaged districts receive more state funds than their wealthier counterparts.⁴⁴

³³ *Id.* at 8.

³⁴ *Id.* at 14.

³⁵ *Id.* at 13.

³⁶ *Id.* at 14.

³⁷ *Id.*

³⁸ See WILLIAM A. OWINGS & LESLIE S. KAPLAN, VA. ASS'N FOR SUPERVISION & CURRICULUM DEV. BD. OF DIRS., FUNDING PUBLIC EDUCATION IN VIRGINIA (Sept. 2001), http://ww2.odu.edu/~wowing/funding_public_education_in_virginia.ppt.

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ Delja, *supra* note 5.

⁴² *Id.*

⁴³ See *id.* Most notably, higher paying districts have an LCI cap of .8; therefore, no district pays more than eighty percent of the costs for funding the SOQ, despite actual ability to fund the SOQ entirely through local funding. *Id.* The cap ensures that the State shares SOQ costs (as a state-mandated requirement) with all localities. *Id.*

⁴⁴ *Id.* at 198.

Prior to finalizing the mandatory state and local shares, each district receives a flat grant based on state sales tax.⁴⁵ Of the State’s 4.3 percent sales tax, one cent is earmarked for education.⁴⁶ Here, “[e]ach district’s share of the sales tax revenue is subtracted from the cost of funding the SOQ in that district before computing the mandatory state and local shares.”⁴⁷

II. Closing the Door on Equity Suits in Virginia: *Scott v. Commonwealth*

Debates concerning Virginia’s educational inequity date back to integration in the 1950’s.⁴⁸ The Virginia Supreme Court last visited the constitutionality of the State’s public education finance system in 1994.⁴⁹ By the 1990’s, a coalition (the Coalition for Equity) formed to address levels of inequity that had garnered public concern.⁵⁰ “The group was formed ‘out of desperation’ because ‘the disparities were getting worse and worse . . . People were discouraged.’”⁵¹ When the General Assembly eventually failed to address these increasing disparities, the Coalition for Equity filed a complaint, naming seventh grader Reid Scott—a student from Buchanan County, Virginia—as the plaintiff.⁵² The Bill of Complaint listed an additional eleven public schools and seven local school boards.⁵³

The plaintiffs contended that the State Constitution established education as a fundamental right.⁵⁴ Relying on proof of financial inequities alone, the complainants alleged that the State violated their rights based on gross inequities within the state public education system.⁵⁵

⁴⁵ *Id.* at 196.

⁴⁶ VA. CODE § 58.1-603 (2020); Delja, *supra* note 5, at 196.

⁴⁷ *Id.* at 197.

⁴⁸ *See id.* The issue has continued to escalate, with certain education commissions claiming that disparity greatly hinders the success of Virginia’s public education system. *Id.* at 199.

⁴⁹ *See Scott v. Commonwealth*, 443 S.E.2d 138 (Va. 1994).

⁵⁰ Delja, *supra* note 5.

⁵¹ *Id.* at 200–01 (citing Telephone Interview with Ralph Shotwell, Dir. of Div. of Fin., Research, Retirement, and Spec. Serv., Va. Educ. Assoc. (Mar. 31, 2003)).

⁵² *See Delja, supra* note 5, at 207. Buchanan is notably still one of the State’s poorest counties today. The Ctr. Square, *By the Numbers: Buchanan Ranks the Poorest of Virginia Counties*, CTR. SQUARE: VA. (June 14, 2019), https://www.thecentersquare.com/virginia/by-the-numbers-buchanan-ranks-the-poorest-of-virginia-counties/article_fae62300-8cba-11e9-8675-8b50e508044b.html.

⁵³ *See Delja, supra* note 5, at 207.

⁵⁴ *Scott*, 443 S.E.2d at 141.

⁵⁵ *Id.* By relying on disparities in spending and resources alone, the plaintiffs were making a standard equity-based argument. For a comparison of equity to adequacy lawsuits, see note 49 and accompanying text.

Specifically, the plaintiffs claimed the State was “denying the student complaints and other children ‘an educational opportunity substantially equal to that of children who attend public school in wealthier divisions.’”⁵⁶ Their arguments relied on a comparison of Virginia’s educational inequities under the current finance formula with language from the State Constitution that allegedly established a duty to provide an *efficient* education system.⁵⁷

A. Growing Discrepancies: Plaintiffs’ Argument Reveals Significant Educational Inequities

The court recognized the fundamental right to education under the Virginia Constitution.⁵⁸ Therefore, the court applied strict scrutiny to review the alleged violation.⁵⁹ To make this determination, the *Scott* court considered in part the financial landscape of the State through four spending factors: total spending per pupil, average teacher salary, instructional personnel-to-pupil ratio, and spending on instructional materials in comparison to the explicit language and requirements of the constitution.⁶⁰

The court recognized a number of substantial inequities within the State’s public education system. The court found significant differences in total spending per pupil, noting that “the Commonwealth and its subdivisions” spent 2.5 times more on some school children than others.⁶¹ Secondly, the court recognized that wealthier districts paid teachers thirty-nine percent higher salaries on average than poorer districts.⁶² Thirdly, the court dwelled on a “great disparity” in the personnel-to-student ratios between the districts, detailing an average ratio twenty-four percent higher in wealthier districts than in the State’s ten poorest districts.⁶³ Finally, the court noted that wealthier districts spent nearly twelve times more on instructional materials than their poorer

⁵⁶ *Id.* at 139.

⁵⁷ *Id.* at 141.

⁵⁸ *Id.* at 142.

⁵⁹ *Id.*

⁶⁰ *Id.* at 140.

⁶¹ *Id.* At the time, the Virginia districts ranged from \$2895 to \$7268 in total funds spent per student. *Id.*

⁶² *Id.* The court average salary between localities ranged from \$27,471 in the ten poorest school divisions to \$38,095 in the ten wealthiest. *Id.*

⁶³ *Id.* “The ten wealthiest divisions had an average instructional personnel/pupil ratio of 81.8/1,000, and the ten poorest divisions had an average instructional personnel/pupil ratio of 66.2/1,000.” *Id.*

counterparts, a range of \$17.52 to \$208 per pupil.⁶⁴ Although the court recognized substantial inequality, the court held that Virginia’s Constitution did not mandate “equal, or substantially equal” education funding.⁶⁵

B. The Scott Court’s Interpretation: Equal Spending Is Not Mandated by the State Constitution

In holding for the State, the court reasoned that the Virginia Constitution simply requires each school division to “provide an educational program [that meets the] standards of quality as determined and prescribed by the General Assembly.”⁶⁶ During its analysis of article VIII, sections 1 and 2, the court divided the language into either compulsory or aspirational language.⁶⁷ Within section 1, the court recognized a legislative duty to establish and maintain a system of schools throughout the Commonwealth.⁶⁸ But, the court held the second clause of section 1—that the State “shall seek to ensure that an educational program of high quality is established and continually maintained”—to be simply aspirational.⁶⁹ The court regarded section 2 as merely empowering the General Assembly “to make the final decision about both standards of quality and funding.”⁷⁰

The court supported its interpretation with the language of article I, section 15: “the Commonwealth should . . .”⁷¹ Here, the court indicated that, while article I, section 15 encourages the importance of education, its language is unambiguously aspirational.⁷² As a result, the court upheld the state education finance formula, closing the door on future equity lawsuits in the state of Virginia.⁷³

⁶⁴ *Id.* Specifically, spending per library materials was twenty-two times greater in some divisions, ranging from \$2.22 to some \$50 per pupil. *Id.*

⁶⁵ *Id.* at 142–43.

⁶⁶ *Id.* at 142.

⁶⁷ *Id.* at 141–42.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 142.

⁷¹ *Id.* (quoting VA. CONST. art. I, § 15).

⁷² *Id.* The court reasoned that “[u]nquestionably, the language in § 15 cannot be read to impose a requirement of uniformity in spending and programs among and within the Commonwealth’s school divisions.” *Id.*

⁷³ *Id.*

C. Scott's Second Holding: Funding Must Be Sufficient to Meet the SOQ

Although *Scott* held for the defendant and validated the state educational finance system, the case laid the foundation for a future adequacy suit by outlining a rule that requires funding to sufficiently enable a locality to fulfill the SOQ.⁷⁴ In its analysis, the court distinguished voluntary spending, which supports a modified education finance formula that accounts for higher voluntary local spending.⁷⁵ Additionally, the language goes beyond what may have been necessary to record funding disparities. Here, the court emphasized a legislative remedy⁷⁶—one that notably has not come.

While the Supreme Court of Virginia did not mandate equal spending under the State Constitution, it seems the court set out a rule that state funding must be sufficient to meet the required standards.⁷⁷ In its reasoning, the *Scott* court mentioned not once but twice, that the plaintiffs did not contend that “that the manner of funding prevent[ed] their schools from meeting the standards of quality.”⁷⁸ Here, an adequacy suit would be more compelling as the premise emphasizes quality of education instead of financial differences alone.⁷⁹ Presumably, if a school district were to show that funding was inhibiting them from meeting the SOQ, the court may be compelled to hold for the complainant.⁸⁰

The court also made important distinctions between what spending is controlled by the State. Here, the court separated the “two major components the funding system for the Commonwealth’s public elementary and secondary schools” as funds that either are or are not

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See *id.*; Editorial: Did the Virginia Supreme Court Show School Districts How To Sue over Disparities?, ROANOKE TIMES (Oct. 20, 2018) [hereinafter *How To Sue over Disparities*], https://www.roanoke.com/opinion/editorials/editorial-did-the-virginia-supreme-court-show-school-districts-how/article_f3e07697-879d-50d1-9ac9-573b741856c7.html.

⁷⁸ *Scott*, 443 S.E.2d at 142.

⁷⁹ See Michael Heise, *State Constitutions, School Finance Litigation, and the Third Wave: From Equity to Adequacy*, 68 TEMPLE L. REV. 1151, 1153 (1995). Equity suits (such as *Scott*) “sought to reduce spending disparities and focused on traditional input measures such as per-pupil and overall educational spending. In contrast, the more recent adequacy decisions concentrate on the underlying sufficiency of school funding . . .” *Id.*

⁸⁰ *How To Sue over Disparities*, *supra* note 77.

“mandated by the Commonwealth.”⁸¹ Mandatory funds included those “state and local funds mandated by the state aid system.”⁸² Voluntary funds encompassed those local funds that are not mandated.⁸³ This distinction could lend the court to accept a potential remedy—changing the required proportions between state and local funding to divert state funds to struggling school districts.⁸⁴

Interestingly, the court may have been signaling the issue to the General Assembly’s attention as one to address in the near future. The court concluded the *Scott* opinion by stating, “Therefore, while the elimination of substantial disparity between school divisions may be a worthy goal, it simply is not required by the constitution. Consequently, any relief to which the Students may be entitled must come from the General Assembly.”⁸⁵ While considering educational funding inequities, the court conveniently identified the arbiters of state funding and also the SOQ.⁸⁶ Specifically, the court explained the responsibility of the Virginia Board of Education to “determine[] and prescribe[] the standards of quality. . . ,”⁸⁷ a responsibility delegated from the General Assembly.⁸⁸ The case language also highlights the General Assembly’s power to review the Board of Education’s decisions regarding standards of quality.⁸⁹ Although the court plainly detailed the then funding crisis, the General Assembly has yet to provide relief to these struggling localities. Instead, the state funding formula has continued to exacerbate Virginia’s public education inequities.⁹⁰

While discussing the indicators of state spending, the court pointed to statistics that lay the foundation for a modern remedy. For example, under the total-per-pupil funding analysis, the court went beyond the range of spending to highlight cases where spending more

⁸¹ Scott, 443 S.E.2d at 140.

⁸² *Id.* (describing most mandatory costs as instructional and support costs required by the SOQ).

⁸³ *Id.*

⁸⁴ *Id.* at 141.

⁸⁵ *Id.* at 142–43.

⁸⁶ *Id.* at 142 (noting that “the General Assembly is empowered to make the final decision about both standards of quality and funding”) (citing VA. CONST. art. VIII, § 2).

⁸⁷ *Id.* at 140.

⁸⁸ *Id.*

⁸⁹ *Id.* (noting that the Board’s standards of quality are “subject to revision by the General Assembly”) (citing VA. CONST. art. VIII, § 2).

⁹⁰ See *infra* Part IV.

than doubled for some students in the state.⁹¹ In concluding its analysis of inequities resulting from the State's education funding structure, the court expressed concern in the growing disparity between the highest-funded and lowest-funded schools.⁹² Should a plaintiff claim that funding is insufficient to meet the SOQ, based on strong evidence of educational inequities, the court may be compelled to order the legislature to reconsider the state education finance formula.⁹³

III. School Finance Litigation: A Viable Remedy for Institutionalized Educational Inequality

Currently, in the United States, a majority of states derive most of their public education funding through local property and sales taxes.⁹⁴ This localized funding system allows wealthier districts to raise revenues that far surpass that of poorer districts in the same state.⁹⁵ School finance litigants recognize that, in reality, academic success is more easily attainable to advantaged students in wealthier districts and thus challenge systems that encourage these discrepancies.⁹⁶

⁹¹ See *Scott*, 443 S.E.2d at 140. The court went on to note other substantial inequalities such as local spending on library materials. *Id.* Here, the court provided that spending for these supplies was more than 22 times greater in wealthier divisions, ranging from a mere \$2.22 per student to a total of \$50 per student. *Id.*

⁹² *Id.* The court emphasized the growing gap in funding by pointing to the fourteen percent increase in the funding disparity from the 1987–88 to 1988–89 school year, when the disparity increased from \$3844 per pupil to \$4372 in just one academic year. *Id.* Given today's data, this problem is even more prevalent and could therefore expound upon *Scott*'s sympathetic reasoning.

⁹³ *How To Sue over Disparities*, *supra* note 77.

⁹⁴ See William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1647 (1989).

⁹⁵ See *id.* at 1647–48 (describing educational funding as being predominantly determined by wealth). “Almost every school district enrolling large numbers of low-income students has an average academic performance significantly below the national grade-level average, . . .” Jonathan Rabinovitz, *Local Education Inequities Across U.S. Revealed in New Stanford Data Set*, STAN. NEWS (Apr. 26, 2016), <https://news.stanford.edu/2016/04/29/local-education-inequities-across-u-s-revealed-new-stanford-data-set/> (detailing empirical findings that on average the most and least socioeconomically advantaged districts have average performance levels that are more than four levels apart).

⁹⁶ Thro, *supra* note 94, at 1649–50. “Overall, they must close the gap between the best and the worst financed system in the state, and give to the many what has been reserved for the fortunate few: equal opportunities for excellence in education.” Deborah A. Verstegen & Robert C. Knoepfel, *Equal Education Under the Law: School Finance Reform and the Courts*, 14 J.L. & POL. 555, 575 (1998).

A. *Rich or Poor: Equal Opportunity for Educational Success*

The goal of plaintiffs in school finance litigation is to provide equal opportunity for educational success to all students, no matter the school district they live in.⁹⁷ In general, proponents of educational equity seek “to mitigate the outside factors that hinder students’ academic success.”⁹⁸ Notably, advocates do not claim that increased funds will address intrinsic societal problems that inherently impact academic performance.⁹⁹

Although equalizing school funding may not get at the roots of inequality, it may be the best alternative available. Poor student performance has many root causes. The 1966 *Coleman Report* found that schools are only one of the inputs that predict academic success.¹⁰⁰ The report emphasized the impact of soft variables like family, friends, and students’ innate ability.¹⁰¹ In this sense, some argue that policies that target the socioeconomic status, the home, or the environment of disadvantaged students may be a more effective way to create a more just society.¹⁰²

This assumption misstates the goal of adequacy suits.¹⁰³ School finance litigation does not aim to remedy all of society’s injustices.¹⁰⁴ Instead, the goal is to mitigate them by providing equal opportunity for educational success.¹⁰⁵ Policy and legislation are generally not prime to interfere in the home to impact future success in areas such as education.¹⁰⁶ Changes to school finance may prove to be an essential

⁹⁷ See Thomas A. Downes, *The Effect of Serrano v. Priest on the Quality of American Education: What Do We Know? What Do We Not Know?*, 89 NAT’L TAX ASS’N 336, 336 (1996).

⁹⁸ Barry Gabay, Comment, *Socioeconomic Integration and the Greater Richmond School District: The Feasibility of Interdistrict Consolidation*, 50 U. RICH. L. REV. 397, 415 (2015).

⁹⁹ See Eric A. Hanushek, *When School Finance “Reform” May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423, 449 (1991).

¹⁰⁰ See generally NAT’L CTR. FOR EDUC. STATISTICS, OE-38001, EQUALITY OF EDUCATIONAL OPPORTUNITY iii-iv (1966) (listing a number of inputs as having a potential effect on educational success with some being in the control of the legislature, such as characteristics of schools, teachers, and curricula).

¹⁰¹ See *id.* at 292–93, 466.

¹⁰² Frederick M. Hess, *Courting Backlash: The Risks of Emphasizing Input Equity over School Performance*, 6 VA. J. SOC. POL’Y & L. 11, 12 (1998).

¹⁰³ *Id.* at 13 (describing the efforts of school finance litigation as attempting an all-purpose social remedy).

¹⁰⁴ See, e.g., Downes, *supra* note 97.

¹⁰⁵ See *id.*

¹⁰⁶ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 486–93 (1965) (Goldberg, J., concurring) (describing the right to privacy in the home as being fundamental and deeply rooted in American tradition).

alternative to overstepping boundaries between private and public aspects of students' lives because financial resources are tangible, measurable, and accessible for change.¹⁰⁷

B. Foundational Beliefs: Why School Finance Litigation May Be the Most Attainable Remedy

School finance litigation relies on a number of societal conventions. In general, support is grounded in one main conclusion: increased funds will equal an increase in educational opportunity and student performance.¹⁰⁸ Within this idea lies the belief that schools will use the additional funds efficiently.¹⁰⁹ Additionally, advocates assume that courts are both qualified and empowered to solve these issues and that court order will eventually lead to more equitable results.¹¹⁰ Although critics argue against these foundational beliefs, studies show that generally school finance litigation is a viable, if not the most attainable, remedy for educational opportunity.¹¹¹

Supporters of school finance litigation generally assume that increased or equalized funding will positively impact student performance in poorer districts.¹¹² Yet, while the United States has steadily increased education funding in the past half a century, student-performance indicators have not improved as expected.¹¹³ Critics hold that

¹⁰⁷ See JOHN E. COONS, PRIVATE WEALTH AND PUBLIC EDUCATION 26 (1972); Hess, *supra* note 102. Due to the difficulty of possible alternatives, school finance litigation provides "a standard appropriate to the rigors of judicial proof, and the only convincingly quantifiable item in the spectrum is money available for the general task of education in each district." JOHN E. COONS, PRIVATE WEALTH AND PUBLIC EDUCATION 26 (1972). Additionally, education is an area relatively susceptible to government intervention. See Hess, *supra* note 102, at 13.

¹⁰⁸ JOHN E. COONS, PRIVATE WEALTH AND PUBLIC EDUCATION 27 (1972)

¹⁰⁹ Carmel Martin, et al., *A Quality Approach to School Funding*, CTR. AM. PROGRESS (Nov. 13, 2018), <https://www.americanprogress.org/issues/education-k-12/reports/2018/11/13/460397/quality-approach-school-funding/>.

¹¹⁰ See Paul A. Minorini & Stephen D. Sugarman, *School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE 34 (Helen F. Ladd, Rosemary Chalk, & Janet S. Hansen eds., Nat'l Acad. Press 1999).

¹¹¹ See C. Kirabo Jackson et al., *The Effects of School Spending on Educational and Economic Outcomes: Evidence from School Finance Reforms* 39 (Nat'l Bureau of Econ. Research, Working Paper No. 20847, 2015); see also Versteegen & Knoepfel, *supra* note 96, at 559 (showing school finance litigation is viable nationally and effective).

¹¹² Heise, *supra* note 79, at 1166.

¹¹³ See Hanushek, *supra* note 99, at 428 (noting that while national spending on education has increased, SAT scores fell overall); Hess, *supra* note 102, at 17–18; Martin R. West & Paul E. Peterson, *The Adequacy Lawsuit: A Critical Appraisal*, in SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY 1 (Martin R. West & Paul E. Peterson eds., 2007) (pointing to stagnant high school graduation rates and test scores).

therefore the relationship between spending and performance is questionable at best.¹¹⁴ Others argue that the data is simply missing as to the cause and effect of the two.¹¹⁵ Yet, recent studies have shown that increased spending does in fact have a positive impact on student performance.¹¹⁶ Specifically, researchers have noted to the profound statistically significant impact of increased spending on economically disadvantaged students in particular.¹¹⁷

With assumptions about increased spending comes the belief that schools will use these excess funds efficiently. Critics emphasize that some systemic issues could be solved with new accountability measures for efficiency.¹¹⁸ Unfortunately, increased performance measures could have the exact opposite effect on school efficiency by imposing additional hurdles on funding.¹¹⁹ Moreover, inefficiencies do not explain the shocking disparities within Virginia specifically. Within the State, lacking performance and disparity generally line up with local levels of wealth.¹²⁰ In fact, much of the State’s struggling areas are not arbitrarily located but fall in the rural, less affluent Appalachian Region along Virginia’s southwest border.¹²¹

By supporting school finance litigation, advocates assume that courts have the political authority and expertise to hear issues on educational equity and spending. Litigants base claims on the plain language of state constitutions, which generally call for school systems of

¹¹⁴ See Jackson et al., *supra* note 111 (detailing the limitations of studies on the effects of spending on student performance); see, e.g., Rabinovitz, *supra* note 95 (comparing data that revealed the most and least socioeconomically advantaged districts have average student performance levels of four grades apart with the finding that the size of this gap has little to no association with a district’s per capita student spending).

¹¹⁵ See Rabinovitz, *supra* note 95 (emphasizing that the findings do not prove cause and effect, but point to promising areas of further study).

¹¹⁶ See Jackson et al., *supra* note 111.

¹¹⁷ See *id.* Research shows that “[f]or children from low-income families, increasing per-pupil spending yields large improvements in educational attainment, wages, family income, and reductions in the annual incidence of adult poverty.” *Id.*

¹¹⁸ See Hanushek, *supra* note 99, at 424–25; Hess, *supra* note 102, at 11–12.

¹¹⁹ See Hess, *supra* note 102, at 46 (arguing for increased efficiency while simultaneously warning that efficiency could lead to more restrictions on teachers and administrators and do more harm than good).

¹²⁰ See Amy Friedenberger, *Teachers, School Leaders Push General Assembly for More Education Funding*, ROANOKE TIMES (Jan. 27, 2020), https://www.roanoke.com/news/local/teachers-school-leaders-push-general-assembly-for-more-education-funding/article_2dbfd5f9-5f24-5d14-97e4-212a73b7cc63.html; see also *infra* Section III.B. for a full discussion of Virginia’s poorest counties and the impact of low funding on educational quality.

¹²¹ See Friedenberger, *supra* note 120.

high quality.¹²² Despite these legal theories, opponents argue that the courts do not have the authority to hear such “political questions.”¹²³ Even if such questions were justiciable, critics argue the judiciary should still decline to hear them as the court would lack “judicially discoverable and manageable standards” to resolve the issue.¹²⁴

Still, the judiciary is charged with the duty to protect fundamental rights.¹²⁵ Recent trends show a willingness by courts to hold education as a fundamental right under state constitutions.¹²⁶ Specifically, the *Scott* court recognized this right as well.¹²⁷ Generally, to address concerns of democratic input and judicial adequacy, courts will simply charge the legislature with a duty to appropriately disperse education funds to provide for an adequate system of education.¹²⁸

¹²² See, e.g., *Scott v. Commonwealth*, 443 S.E.2d 138 (Va. 1994) (describing plaintiffs rationale based on three sections of the Virginia Constitution).

¹²³ See Michael Heise, *Adequacy Litigation in an Era of Accountability*, in *SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY* 262, 269 (Martin R. West & Paul E. Peterson eds., 2007) (citing Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002)) (noting that questions of school finance have already been committed to another political branch and therefore are off limits to the judiciary under the political question doctrine).

¹²⁴ See *id.* at 270 (citing *Committee for Educational Rights v. Edgar*, 174 Ill.2d 1, 28 (1996)).

¹²⁵ See *Marbury v. Madison*, 5 U.S. 137, 167 (1803) (“The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority.”).

¹²⁶ See *Verstegen & Knoepfel*, *supra* note 96, at 584 n.208.

¹²⁷ See *Scott v. Commonwealth*, 443 S.E.2d 138, 142 (Va. 1994).

¹²⁸ See, e.g., *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 216 (Ky. 1989) (noting that “[t]he [Kentucky] General Assembly must provide adequate funding for the system. How they do this is their decision.”)

IV. Virginia’s Gross Disparities Present Cause to Bring an Adequacy Suit

Adequacy suits are recent to the realm of school finance litigation. In the last of what scholars call the “Waves of Litigation,” adequacy suits have worked to redefine the constitutionally required level of education within a state.¹²⁹ In particular, litigants focus on what dollars can buy, in addition to the difference in spending between school districts.¹³⁰ The complainants in these cases rely on the plain meaning of a state’s constitutional education requirements, such that all students must receive a *quality* education.¹³¹ Significant disparities exist in areas previously considered by the *Scott* court. Generally, almost every factor considered by the *Scott* court has worsened since 1994.

A. The Scott Factors Today

Virginia is home to a number of the richest counties in the United States.¹³² The State’s top ten wealthiest counties include Falls Church City, Loudon, Fairfax, Arlington, Stafford, Prince William, Fairfax City, Poquoson City, Fauquier, and Goochland County.¹³³ In contrast, Virginia’s top ten poorest counties include Martinsville City, Danville City, Lee, Bristol City, Northampton, Emporia City, Grayson, Carroll, Buchanan, and Charlotte County.¹³⁴ These counties are analyzed in comparison to the *Scott* court’s 1994 data. When considered today, the previous *Scott* factors reveal gross educational disparities across the state.

1. Total per Pupil Funding

¹²⁹ See Verstegen & Knoepfel, *supra* note 96, at 559. Nationally, studies show that numerous states have and are reconsidering state public education finance formulas. Lauren Camera, *In Most States, Poorest School Districts Get Less Funding*, U.S. NEWS (Feb. 27, 2018), <https://www.usnews.com/news/best-states/articles/2018-02-27/in-most-states-poorest-school-districts-get-less-funding>.

¹³⁰ See Verstegen & Knoepfel, *supra* note 96, at 559.

¹³¹ VA. CONST. art VIII, § 2; see Verstegen & Knoepfel, *supra* note 96, at 559.

¹³² See Rebecca Lerner, *The 10 Richest Counties in America 2017*, FORBES (July 13, 2017), <https://www.forbes.com/sites/rebeccalerner/2017/07/13/top-10-richest-counties-in-america-2017/>; see also *Median Household Income in Virginia*, CTY. HEALTH RANKINGS & ROADMAPS, <http://www.countyhealthrankings.org/app/virginia/2014/measure/factors/63/data?sort=desc-2> (last visited Jan. 31, 2020) (detailing a median household income range of \$29,550 to \$121,250 in the state). Notably, Virginia ranks poorly on a national scale for its state support of public education, despite being the eighth wealthiest state in the country. See OWINGS & KAPLAN, *supra* note 38.

¹³³ See *Median Household Income in Virginia*, *supra* note 132. Some Virginia counties, like Falls Church City, have a median household income over \$100,000. See *id.*

¹³⁴ See *id.*

Virginia's total spending per pupil has increased greatly since the *Scott* case in 1994.¹³⁵ The current gap seems to have improved compared to the *Scott* case, in which the State spent 2.5 times more on some students than others.¹³⁶ Virginia's highest spending county, Arlington County, spent an average of \$19,323 per child in the 2015–16 fiscal year.¹³⁷ Meanwhile, the lowest spending county in the state spent only \$8962 per child.¹³⁸ This disparity creates only a 2.15 times difference on its face.¹³⁹

Still, the *Scott* case focused on more than the ratio of spending per child, emphasizing the disparity between the levels of spending in the State's highest and lowest-funded divisions.¹⁴⁰ Whereas in *Scott*, when the funding difference was \$4372, the current disparity sits at a looming \$10,361.¹⁴¹ Today's disparity reveals a thirty percent increase from *Scott*'s 1989–90 value, doubling the court's then-recorded fourteen percent change.¹⁴²

2. Teacher Salaries

¹³⁵ Compare VA. DEP'T OF EDUC., FISCAL YEAR 2015 SUPERINTENDENT'S ANNUAL REPORT FOR VA., TABLE 15, http://www.doe.virginia.gov/statistics_reports/supts_annual_report/2014_15/table15.pdf (last visited Feb. 2, 2020) [hereinafter TABLE 15] (showing most cities and counties in Virginia spending over \$8000 per pupil in 2015), with *Scott v. Commonwealth*, 443 S.E.2d 138, 140 (Va. 1994) (discussing spending values from \$2895 to \$7268).

¹³⁶ *Scott*, 443 S.E.2d at 140.

¹³⁷ See TABLE 15., *supra* note 135 (using "Total Per Pupil Expenditure").

¹³⁸ *Id.* (reflecting spending per student in King George County, Virginia). King George County is not one of the states ten poorest districts and is used here to create an accurate range of spending per pupil in Virginia today.

¹³⁹ Often, the data itself does not explicitly provide conclusions as to range, disparity, or percent increase. Data points such as these were calculated by the author based on the data from the 2015–16 Superintendent's Annual Report.

¹⁴⁰ *Scott*, 443 S.E.2d at 140 (noting that the disparity "between the highest-funded and the lowest-funded school divisions continues to increase").

¹⁴¹ *Id.*; TABLE 15, *supra* note 135. The disparity in spending reflects the difference between the highest-funded and the lowest-funded school divisions for the 2015–16 fiscal year: Arlington versus King George.

¹⁴² See *Scott*, 443 S.E.2d at 140. Here, the percent increase reflects the change from the 1989–90 to the 2015–16 spending gap amount. The percent change was calculated including inflation. Here, the 1989–90 amount of \$4372 would be equivalent to \$7954 in 2016, assuming both numbers were taken at the end of their fiscal years. See *CPI Inflation Calculator*, BUREAU LAB. & STAT., https://www.bls.gov/data/inflation_calculator.htm (last visited Feb. 2, 2020). Without calculating for inflation, the 1989–90 value of \$4372 increased 139% by 2016.

Despite its rank as the 8th wealthiest state in the country, Virginia ranked 29th in the country for average teacher salary.¹⁴³ The State also fell well below the national average salary of \$56,610 in 2016, with an average of \$49,826.¹⁴⁴ Many of Virginia’s wealthiest counties provide teachers a salary of over \$70,000.¹⁴⁵ Meanwhile, teachers in a number of Virginia’s least affluent counties are not as well off. In Virginia’s poorest counties such as Lee and Buchanan County, teachers receive a salary of around \$40,000, while other more rural counties fall near an average salary of \$30,000.¹⁴⁶ In sum, some teachers within the state are paid 116% more than others.¹⁴⁷ The current data dwarfs the thirty-nine percent difference that the *Scott* court noted in 1994.¹⁴⁸ Further, the range of highest to lowest-paying locality creates a disparity of \$40,618, quadrupling the \$10,624 difference in 1994.¹⁴⁹

3. Student-Teacher Ratios

Despite other indicators of increasing inequity, Virginia’s counties have relatively consistent student-teacher ratios. The Superintendent’s Annual Report measures ratios for Kindergarten through seventh grade (“K–7”) and eighth grade through twelfth grade (“8–12”) separately.¹⁵⁰ The State’s ten wealthiest counties average K–7 student-teacher ratios of 12.77 and 8–12 ratios of 12.40.¹⁵¹ Notably, the ten poorest counties averaged ratios lower than those of the most affluent counties, with averages of 12.33 in K–7 and 10.64 in 8–12.¹⁵²

¹⁴³ VA. DEP’T OF EDUC., DLAS DOCUMENT SUMMARY, 2015 Sess., at 4 (2016); Becca Mitchell, *Virginia Listed as 8th “Richest State in America”*, WTKR (Sep. 19, 2017), <https://wtkr.com/2017/09/19/virginia-listed-as-8th-richest-state-in-america/>.

¹⁴⁴ VA. DEP’T OF EDUC., DLAS DOCUMENT SUMMARY, 2015 Sess., at 4 (2016).

¹⁴⁵ *Median Household Income in Virginia*, *supra* note 132. Falls Church City, the State’s wealthiest county, provides a salary of \$75,564. VA. DEP’T OF EDUC., *supra* note 144, at 6. Although not one of the top ten wealthiest counties in the state, Alexandria City provides a notable salary of \$75,604. *Id.*

¹⁴⁶ VA. DEP’T OF EDUC., *supra* note 144, at 5–7. In 2016, Lee County provided an average teacher salary of \$42,325. *Id.* at 5. Buchanan County came in lower at an average of \$35,834. *Id.* at 5–7. Although not listed in Virginia’s top ten poorest counties, rural counties like Craig and Tazewell County provided shockingly low salaries of \$37,974 and \$34,986. *See id.* at 5–6.

¹⁴⁷ *See generally id.* at 4 (using the highest paying county, Alexandria City (\$75,604), and the lowest paying county, Tazewell County (\$34,986) to calculate percent change).

¹⁴⁸ *Scott v. Commonwealth*, 443 S.E.2d 138, 140 (Va. 1994).

¹⁴⁹ *Id.*

¹⁵⁰ VA. DEP’T OF EDUC., FISCAL YEAR 2015 SUPERINTENDENT’S ANNUAL REPORT FOR VA., TABLE 17A, http://www.doe.virginia.gov/statistics_reports/supts_annual_report/2014_15/table17.pdf (last visited Feb. 2, 2020).

¹⁵¹ *Id.* Averages were calculated using the ten wealthiest and poorest counties per median household income.

¹⁵² *Id.* No data was provided for one of Virginia’s poorest counties as listed previously: Emporia City. Therefore, the average consisted of the other nine counties previously discussed.

Overall, the nature of student-teacher ratios may not be as impactful as other indicators, such as per pupil spending. Firstly, because student-teacher ratios are capped by the State, it is also possible that the lack of variation is due to state-mandated standards.¹⁵³ Further, given the close correlation between Virginia's highly populated areas and higher median household income, it is highly likely that the State's poorest counties have less students to serve.¹⁵⁴ Lastly, student-teacher ratios may not reflect the quality of personnel within a school.¹⁵⁵

4. Spending for Instructional Materials

Given its ranking as one of the nation's wealthiest states, it is not surprising some of Virginia's wealthier counties are able to spend large sums of money on instructional materials. For the 2015–2016 academic year, Virginia spent over \$391 million on instructional materials.¹⁵⁶ Notably, Fairfax County made the list of counties with spending over \$50 million for the same year.¹⁵⁷ Here, Fairfax was in the company of notably larger and wealthier counties, such as Los Angeles, California and New York, New York.¹⁵⁸

MDR recently analyzed the spending power of each state by county, including Virginia.¹⁵⁹ As Figure 1 shows, Virginia's

¹⁵³ See VA. CODE § 22.1-253.13:2 (2020).

¹⁵⁴ See, e.g., Hamilton Lombard, *Population Growth in Virginia Is Reversing Decades-Old Trend, Estimates Show*, STATCHAT (Jan. 27, 2016), <http://statchatva.org/2016/01/27/population-growth-in-virginia-is-reversing-decades-old-trend-estimates-show/> (describing the increased population in northern Virginia areas, such as Loudoun County and Alexandria); see also Nathan Vardi, *America's Richest Counties*, FORBES (Apr. 11, 2011), <https://www.forbes.com/2011/04/11/americas-richest-counties-business-washington.html#378f55ea6653> (describing northern Virginia's current economic layout). “Boasting a strong school system and positioned about six miles from the nation's capital, Falls Church has for years enticed rich families, making it the nation's richest county . . . In recent decades northern Virginia has become an economic dynamo, driven by a private sector that feasts on government contracting.” *Id.*

¹⁵⁵ See Cynthia D. Prince, *Attracting Well-Qualified Teachers to Struggling Schools*, AM. FED’N TEACHERS, <https://www.aft.org/periodical/american-educator/winter-2002/attracting-well-qualified-teachers-struggling> (last visited Nov. 14, 2018) (noting that “[s]tudents who attend schools with concentrated poverty have vastly unequal opportunities to develop literacy and other academic skills”) (citing GARY ORFIELD, *SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION* (Harv. Civil Rights Project, July 2001)). High-poverty schools struggle with fewer applications for vacancies, higher absenteeism among teachers and staff, and higher rates of teacher and administrator turnover. *Id.*

¹⁵⁶ MDREDUCATION, *PUBLIC SCHOOL BUYING POWER MAPS 2* (2018).

¹⁵⁷ *Id.* at 3.

¹⁵⁸ *Id.*

¹⁵⁹ See generally *id.* (surveying how much public schools spent on supplies and materials used for instructional purposes, such as textbooks and library sources, in the 2015–16 academic year).

educational spending power is concentrated in wealthy areas, such as the suburbs of both northern Virginia and Richmond.¹⁶⁰

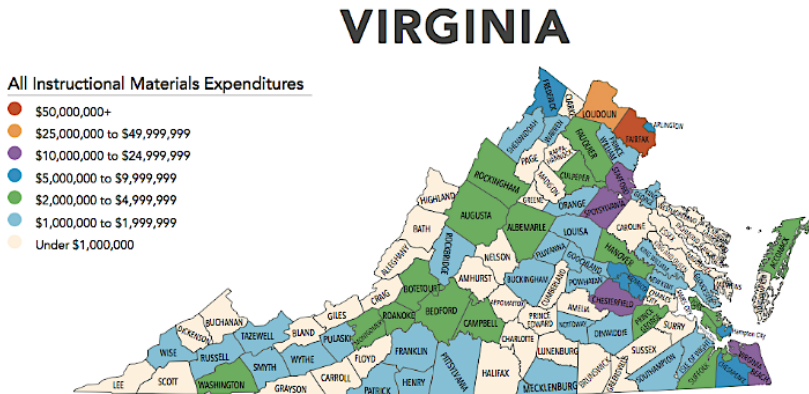


Figure 1 – MDR Public School Buying Power Maps¹⁶¹

Notably, most of Virginia’s poorest counties, including Lee, Buchanan, and others, fall below the lowest spending category of under \$1,000,000.¹⁶² Therefore, a majority of Virginia’s poorest counties fall several million dollars (if not \$49 million or more) behind their highest spending counterparts.¹⁶³ This discrepancy reflects the *Scott* court’s concerns with growing inequality in the state.¹⁶⁴ In 1994, some districts spent more than twelve times more than others on instructional materials.¹⁶⁵ Now, it is likely the data reflects a potential difference of fifty times higher spending per district.

¹⁶⁰ *Id.* at 50. Compare Lombard, *supra* note 154 (describing the booming northern Virginia economy and therefore wealth), and Vardi, *supra* note 154 (same), and Gabay, *supra* note 98, at 397–98 (discussing the affluent Richmond suburbs in comparison to Richmond City urban schools), with Andria Caruthers, *Mapping Poverty in the Appalachian Region*, COMMUNITY COMMONS (Aug. 9, 2016), <https://stories.communitycommons.org/2016/08/09/mapping-poverty-in-the-appalachian-region/> (describing poverty levels in the East Coast’s Appalachian Region).

¹⁶¹ MDREDCATION, *supra* note 156, at 50.

¹⁶² *Id.* Notably, almost all of Virginia’s poorest counties, including Lee, Buchanan, Carroll, Charlotte, and Grayson County, rank in the lowest spending categories, despite state and federal funding. See *id.*

¹⁶³ *Id.* (comparing counties such as Lee to high spending counties like Falls Church City).

¹⁶⁴ *Scott v. Commonwealth*, 443 S.E.2d 138, 141 (Va. 1994) (reporting twenty-two times greater spending per pupil in some districts).

¹⁶⁵ *Id.*

B. Additional Adequacy Issues: Inequities in Programs and Facilities

In Virginia, the growing disparity surpasses financial statistics. Because more affluent counties have the ability to put more local money towards education, the quality of education in the State varies greatly.¹⁶⁶ The differences are most visible in available programs and the quality of facilities.¹⁶⁷ For example, Loudoun County now offers computer science courses in elementary school.¹⁶⁸ Meanwhile, in Pulaski County, located in the southwestern Appalachian Region,¹⁶⁹ some middle school classrooms have only one electrical outlet.¹⁷⁰ Fairfax County provides all elementary school children with weekly art and music classes; Dickenson County cut both.¹⁷¹ Arlington County elementary schools have choruses; Dickenson County has none at any level.¹⁷² Tragically, Flatwood Elementary of Lee County (the state's poorest county) sets out trash cans to catch rain when it pours in through the leaky roof.¹⁷³ At the same time, the wealthier Prince William County considers spending hundreds of millions to advance its own educational facilities.¹⁷⁴ Unfortunately, there is a limit as to how much money Virginia's poorer counties can raise on their own to put towards education.¹⁷⁵ Here, the courts would be an effective avenue for necessary change.

¹⁶⁶ Thro, *supra* note 94.

¹⁶⁷ See generally Lauren Camera, *In Most States, Poorest School Districts Get Less Funding*, U.S. NEWS (Feb. 27, 2018), <https://www.usnews.com/news/best-states/articles/2018-02-27/in-most-states-poorest-school-districts-get-less-funding> (describing school districts that serve large proportions of poor students as being "historically . . . shortchanged when it comes to things like access to high-quality teachers, advanced course offerings, early education programs and school counselors – resources that are directly linked to the amount of funding available").

¹⁶⁸ See *Does the Rest of Virginia Care How Unequal Rural Schools Are?*, ROANOKE TIMES (Jan. 29, 2018), https://www.roanoke.com/opinion/editorials/editorial-does-the-rest-of-virginia-care-how-unequal-rural/article_8b2ccf52-d776-53dd-814f-931fe58557a3.html.

¹⁶⁹ See *Counties in Appalachia*, APPALACHIAN REGIONAL COMMISSION, https://www.arc.gov/appalachian_region/CountiesinAppalachia.asp (last visited Feb. 24, 2020).

¹⁷⁰ See *Does the Rest of Virginia Care How Unequal Rural Schools Are?*, *supra* note 168 (noting that Pulaski County "can't even run some technology, much less teach it").

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* Advocates for change, including newspapers like the Roanoke Times, ask whether "anyone [can] insist . . . that water cascading through the schoolhouse roof constitutes 'an education program of high quality'." *Id.*

¹⁷⁴ Emily Sides, *Trailers No More? Prince William To Weigh \$143 Million Plan To Eliminate 'Portable Classrooms'*, INSIDENOVA (Nov. 23, 2018), https://www.insidenova.com/news/education/prince-william/trailers-no-more-prince-william-to-weigh-million-plan-to/article_5ef4c42c-ec26-11e8-b06e-9f4fa2cdee92.html.

¹⁷⁵ *Does the Rest of Virginia Care How Unequal Rural Schools Are?*, *supra* note 168.

C. Why Virginia’s 2018 Accreditation Standards Should Not Be Considered as Reflecting Educational Equality

Opponents of a finance litigation case in Virginia would likely rely on the State’s recently improved and updated accreditation standards. The Board of Education recently rolled out new accreditation standards revised to shift away from test scores and towards an emphasis on growth and progress.¹⁷⁶ Out of the schools across the state, ninety-two percent were accredited under the new system, up six percentage points from 2017.¹⁷⁷ The Board did not deny a single Virginia school some type of accreditation.¹⁷⁸ In comparison, the Board denied eighty seven schools (including nineteen of Richmond’s public schools) under the old standards.¹⁷⁹ The outlook of the State is represented well by Superintendent of Public Instruction James Lane’s recent statement, “These ratings show that – in the vast majority of our schools – most students are either meeting or exceeding Virginia’s high standards, . . .”¹⁸⁰ Here, the State relies on these lower standards to show that increased accreditation is a result of increased quality and performance.¹⁸¹

This argument fails to consider the deceptive nature of low standards as a measure of educational equity specifically. As George W. Bush famously mentioned, an implicit form of bias in education policy is “the soft bigotry of low expectations.”¹⁸² Under Virginia’s system, schools will only be denied accreditation when they fail to implement a corrective-action plan.¹⁸³ This is a stark contrast to the previous standard that required the Board to deny accreditation if a school had four consecutive years of poor performance.¹⁸⁴ Supporters of the new plan point to improved factors, which consider disadvantaged

¹⁷⁶ Justin Mattingly, *Schools Across Virginia Fare Better Under New Accreditation Standards*, RICH. TIMES-DISPATCH (Sept. 27, 2018), https://www.richmond.com/news/local/education/schools-across-virginia-richmond-region-fare-better-under-%20new-accreditation/article_ecaddfed-9a08-534d-960f-9ab5266fc3cb.html.

¹⁷⁷ *Id.* In 2017, only eighty-six percent of Virginia schools were fully accredited. *Id.*

¹⁷⁸ *Id.* The state ranges accreditation to various types of “modified” accreditation. *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² President George W. Bush, Address at the NAACP’s 91st Annual Convention (July 2006).

¹⁸³ Jane Hammond, *Over 90 Percent of Virginia Schools Accredited Under New System*, DAILY PRESS (Sept. 27, 2018), <https://www.dailypress.com/news/education/dp-nws-accreditation-results-2018-story.html>.

¹⁸⁴ Mattingly, *supra* note 176.

students more than Virginia's previous plan.¹⁸⁵ Still, new ratings cannot cover up the fact that while accreditation numbers improved, student test scores fell.¹⁸⁶ Like Virginia's old standards, the new plan does not put enough weight on achievement disparities by socioeconomic class or race.¹⁸⁷ As many scholars warn, low standards of quality simply hide educational disparities instead of remedying them.¹⁸⁸

V. Remedying Insufficient Funding for Virginia's Localities

An adequacy suit would work to remedy the unsatisfactory educational situations in Virginia's poorest localities. Still, changing the Virginia public education finance formula would likely require a court order. While the General Assembly of Virginia has changed its formula in the past, it has failed to do so in a way that addresses the State's apparent performance and financial disparities.¹⁸⁹ Legislators are driven by their own local interests.¹⁹⁰ Plus, school finance litigation

¹⁸⁵ Compare Hillary Holladay, *Passing Grade*, DAILY PROGRESS (Nov. 16, 2018), https://www.dailyprogress.com/orangenews/school_news/passing-grades/article_4bda2f26-e843-11e8-a204-f3938b248efc.html (explaining how Virginia's new standards consider disadvantaged students), with Andrew Rotherham, *Virginia's 'Together and Unequal' School Standards*, WASH. POST (Aug. 24, 2012), https://www.washingtonpost.com/opinions/virginias-together-and-unequal-school-standards/2012/08/24/ad0d3e06-ed4e-11e1-b09d-07d971dee30a_story.html (describing how Virginia's accreditation standards at the time only considered percent pass rates by school, which put issues regarding disadvantaged students to the side as long as a certain number of total students passed state-issued exams).

¹⁸⁶ Hammond, *supra* note 183; Debbie Truong, *Fewer Virginia Students Passed Statewide Tests Last Year*, WASH. POST (Aug. 22, 2018), https://www.washingtonpost.com/local/education/fewer-virginia-students-passed-statewide-tests-last-year/2018/08/22/06adfa80-a61d-11e8-a656-943ee-fab5daf_story.html.

¹⁸⁷ Truong, *supra* note 186 (noting that "students from economically disadvantaged families . . . had pass rates that fell below the state average"). Interestingly, test results showed that while other areas of the state declined, northern Virginia's "largest school systems mostly outperformed or remained on par with state averages." *Id.*

¹⁸⁸ See, e.g., James E. Ryan, *Standards, Testing, and School Finance Litigation*, 89 TEX. L. REV. 1223, 1247–50 (2008) (warning that using standards as a measure of adequacy would incentive legislatures to lower standards, funding requirements, and test difficulty).

¹⁸⁹ See Moriah Balingit, *Report Says Virginia Is Shortchanging Public Schools \$800 Million Each Year*, WASH. POST (Jan. 24, 2016), https://www.washingtonpost.com/local/education/report-says-virginia-is-shortchanging-public-schools-800-million-a-year/2016/01/24/11bcda42-c126-11e5-9443-7074c3645405_story.html (describing Virginia's cuts to the public education budget in the face of a recession by readjusting the State's finance formula); see also Delja, *supra* note 5, at 199–200 (describing a new formula adopted by the State in 1986 that "had as many problems as the old one").

¹⁹⁰ See, e.g., Cory Turner, *Is There a Better Way To Pay for America's Schools?*, NPR (May 1, 2016), <https://www.npr.org/2016/05/01/476224759/is-there-a-better-way-to-pay-for-americas-schools> (urging that "[h]elping low-wealth schools requires buy-in from voters who live beyond those districts' borders. And it requires lawmakers to look past their local interests").

risks voter backlash as it works to equalize public funds.¹⁹¹ Here, courts are a prime avenue for change given their greater political autonomy.¹⁹²

Virginia’s finance formula creates gross inequities in a number of ways. First, the formula caps local contributions to the SOQ cost at eighty percent.¹⁹³ This cap results in districts with a high ability-to-pay receiving significant state funding when these funds could be redirected to poorer districts with a higher dependency on state support.¹⁹⁴ Additionally, while the State’s SOQ provides funding for some facilitating costs (such as teacher and personnel salary), the SOQ does not reference actual facilities.¹⁹⁵ Constructing and maintaining school buildings is extremely financially burdensome. Some argue that a number of Virginia’s poorest localities cannot provide an adequate education given their considerably inadequate facilities.¹⁹⁶

1. Redistribution

As previously discussed, the LCI reflects a district’s ability to pay the projected SOQ amount.¹⁹⁷ Throughout the state, districts with a high ability-to-pay receive 20% of state funds despite their ability to pay the potential full cost of the SOQ.¹⁹⁸ This includes counties with significant cost, such as Arlington County.¹⁹⁹ If the cap was increased

¹⁹¹ Hess, *supra* note 102, at 14. Still, authors that spotlight voter and taxpayer backlash as a serious issue concede that the threat of backlash could be mitigated if there is convincing evidence that resources are adding value, being put to good use, and providing real social benefits. *Id.* at 46.

¹⁹² See William E. Camp & David C. Thompson, *School Finance Litigation: Legal Issues and Politics of Reform*, 14 J. EDUC. FIN. 221, 237 (1988) (describing the courts as “a powerful force in stimulating change”); Delja, *supra* note 5, at 199 (noting that Virginia’s process of nominating judges who never “face the voters” in retention elections is unique). Still, recent studies show that appointed judges uphold state education finance schemes more often than elected judges. Delja, *supra* note 5, at 215 (citing Karen Swenson, *School Finance Reform Litigation: Why Are Some State Supreme Courts Activist and Other Restrained?*, 63 ALB. L. REV. 1147, 1174 (2000)). This may hold true in Virginia especially as “critics and reformers have long contended that the [Virginia] justices are selected on a partisan basis, rather than on a professional and quality basis.” *Id.* at 216.

¹⁹³ DICKEY, *supra* note 29, at 15.

¹⁹⁴ Notably, poorer localities receive more state funding than their wealthier counterparts. See *Does the Rest of Virginia Care How Unequal Rural Schools Are?*, *supra* note 168. Still, dependency on state funding is not equal between the two extremes. See *id.*

¹⁹⁵ See VA. CODE § 22.1-253.13:1 (2020).

¹⁹⁶ *Does the Rest of Virginia Care How Unequal Rural Schools Are?*, *supra* note 168.

¹⁹⁷ See *supra* Section I.C.

¹⁹⁸ DICKEY, *supra* note 29, at 15–16.

¹⁹⁹ VA. DEP’T OF EDUC., COMPOSITE INDEX OF LOCAL-ABILITY-TO-PAY (2017) [hereinafter COMPOSITE INDEX]. The Virginia Department of Education documents the Average Daily Membership (“ADM”) of each locality. The ADM, documented March 31, is the sum of the total daily enrollment for the previous seven months divided by the number of school days in that period. DICKEY & LOGWOOD, *supra* note 7,

by even a few percentage points, excess funds could be diverted to poorer localities appropriately.²⁰⁰ By changing the local contribution cap, the State could make education funding more equitable without increasing the overall education budget.²⁰¹

Wealthier districts would likely contest this remedy, arguing that the SOQ are a state requirement and demand state funding. Article VIII, section 2 supports this notion, requiring the State to “provide for the apportionment of the cost of [the SOQ] between the Commonwealth and the local units of government comprising such school divisions.”²⁰² Therefore, critics would argue that mandating localities to fully fund the SOQ cost is unconstitutional. In the past, when redistribution was recommended, senators in the General Assembly worried that such a plan would be difficult for the northern Virginia legislators to support.²⁰³ Given today’s increased inequities and disparities, this remedy is more appropriate and critical than it may have been in 1991, prior to the *Scott* case.²⁰⁴

Additionally, this remedy offers a narrow modification to the State’s finance formula. An assumption that all affluent districts would be adversely affected would be incorrect. The remedy would only apply to districts able to meet more than eighty percent of the SOQ cost. Although this does apply to some of Virginia’s wealthiest districts (such as Arlington and Falls Church City), not all of the State’s high-median-income districts fall in this category. Notably, Fairfax County is more than .1 beneath the state-imposed cap.²⁰⁵ The cap would impact

at 5. With this in mind, Arlington County has an ADM of 24,210. See COMPOSITE INDEX, *supra* note 199.

²⁰⁰ Delja, *supra* note 5, at 203. Notably, when the *Scott* case was filed in the early 1990’s, “budgeted local expenditures exceeded the mandatory local expenditures by an average of 118 percent.” *Id.* at 198 (citing Bill of Compl. at 2, *Scott v. Commonwealth*, CH92C00577 (Va. Cir. Ct. Richmond filed June 11, 1992)). Some localities exceeded their mandatory local expenditure amount by 242 percent. *Id.*

²⁰¹ *Id.* at 203. Some scholars argue that poorer localities are even further disadvantaged because it takes more educate students in poverty than those not. Camera, *supra* note 167 (noting that the disparity between high-median-income and low-median-income school districts is exacerbated by a “federally defined assumption that it takes forty percent more to educate a student in poverty than a student not”).

²⁰² VA. CONST. art VIII, § 2.

²⁰³ See *id.* (describing a 1991 recommendation by the “Disparity Commission” to remediate Virginia’s public education inequities); see also Delja, *supra* note 5, at 203.

²⁰⁴ For example, Buchanan County spent \$4,945 per student in the early 1990’s; now, the county pays only \$3,776 per student. *Does the Rest of Virginia Care How Unequal Rural Schools Are?*, *supra* note 168. “Meanwhile, in the early 1990s, Falls Church was paying \$9,139 per student — not quite twice as much as Buchanan. Today, it’s paying \$16,619, more than quadruple what Buchanan does.” *Id.*

²⁰⁵ COMPOSITE INDEX, *supra* note 199; Delja, *supra* note 5, at 239 (noting that [d]uring the *Scott* litigation, . . . Fairfax complained that they must educate more free-lunch kids and more kids for whom English is a second language, making their costs higher and justifying the greater expenditure on their schools.”).

all of the counties with a higher ability-to-pay, as well as those with ability-to-pay due to relatively low student populations.²⁰⁶

2. Redefine Adequacy: Changing the SOQ

Advocates have a convincing argument that the current SOQ do not provide an adequate education.²⁰⁷ The SOQ focus on both intrinsic and tangible requirements including student skills, student-teacher-ratios, and requirements for diplomas and certificates.²⁰⁸ Still, evidence suggests that Virginia’s SOQ may be “too minimal to provide a quality foundation program.”²⁰⁹ Notably, Virginia’s SOQ does not have any specific requirements for educational facilities.²¹⁰ In fact, localities are responsible for constructing, equipping, and maintaining all public educational facilities.²¹¹

Due to this local financial burden, some would argue that the most visible signs of Virginia’s funding inequities are the age and condition of school buildings.²¹² In the Commonwealth, a new elementary school costs nearly \$20 million.²¹³ Middle schools and high schools cost significantly more—at \$40 to \$60 million.²¹⁴ Should a district choose not to update their facilities, the cost to maintain an older building is still significant.²¹⁵

The SOQ does not represent any baseline for an adequate school building. Still, inadequate facilities have the potential to be problematic enough to disrupt the educational process, especially in an

²⁰⁶ COMPOSITE INDEX, *supra* note 199 (capping Bath County, Virginia at .8000 and comparing the county’s revenue indicators with its population of only 4727).

²⁰⁷ Delja, *supra* note 5, at 243–44.

²⁰⁸ *Id.* at 196.

²⁰⁹ See *id.* at 202 (citing Suzette Denslow, *Education Finance: Implications for Disparity* (U. OF VA. NEWSLETTER 1, 2 (Nov./Dec. 1995)).

²¹⁰ See VA. CODE § 22.1-253.13:1–13:10 (2020).

²¹¹ See DICKEY & LOGWOOD, *supra* note 7.

²¹² See *Time To Address State’s Aging School Buildings*, NEWS ADVANCE (Sept. 2, 2018), https://www.newsadvance.com/opinion/editorials/time-to-address-state-s-aging-school-buildings/article_3362cf64-ad5d-11e8-8282-abce717bca22.html; see also Duncombe & Cassidy, *supra* note 10 (noting that one of the effects of Virginia’s lack of sufficient funding is deteriorating facilities, along with fewer teachers and increased class sizes).

²¹³ *Time To Address State’s Aging School Buildings*, NEWS ADVANCE (Sept. 2, 2018), https://www.newsadvance.com/opinion/editorials/time-to-address-state-s-aging-school-buildings/article_3362cf64-ad5d-11e8-8282-abce717bca22.html.

²¹⁴ *Id.*

²¹⁵ *Id.*

increasingly technological world.²¹⁶ If a court is not convinced of redistribution, advocates should argue for a change in the SOQ that would require more state support for the realities of funding an adequate education.

Attempting to change the SOQ would impose a greater burden on plaintiffs. Instead of proving that state funding is insufficient to meet the SOQ, the court would require complainants to show that the SOQ violate plaintiffs' fundamental right to education.²¹⁷ The argument would rest on the same evidence as the previous remedy of redistribution but with a lower chance of convincing the court.²¹⁸ Still, a court may be more compelled to order this remedy as it would simply require a finding of a violation of a right while leaving the formula revisions to the legislature to decide.²¹⁹

CONCLUSION

Throughout history, the value of a quality education has remained prevalent and deeply rooted in American society. In Virginia, the state Constitution explicitly provides minimum standards for the General Assembly to ensure are met in each locality with state-funding support. While Virginia's education funding formula remains the same, gross inequities between districts escalate throughout the state. Although researchers detail a number of inherent issues in the State's educational funding formula, the most prevailing discrepancies arise when analyzing the SOQ finance structure. The General Assembly apportions funds to each locality to meet the SOQ, which are inherently

²¹⁶ Verstegen & Knoepfel, *supra* note 96, at 575–77. Advocates argue against this rationale, noting that the definition of an “adequate” education is constantly changing, and a minimum education is insufficient to provide the tools for success in the changing landscape of education in a new global economy. *Id.* at 577. Other courts have supported the idea of increased standards, explaining that “[y]esterday’s bare essentials are no longer sufficient to prepare a student to live in today’s global marketplace.” *Id.* (citing *Brigham v. State*, 692 A.2d 384, 396–97 (1997)).

²¹⁷ See *Scott v. Commonwealth*, 443 S.E.2d 138 (Va. 1994).

²¹⁸ The Supreme Court of Virginia’s precedent shows only a willingness to hear cases in which a district alleges funding is insufficient to meet the SOQ. See, e.g., *id.*

²¹⁹ Here, this may be only the beginning of remediating Virginia’s educational inequities. See James E. Ryan & Thomas Saunders, *Foreword to Symposium on School Finance Litigation: Emerging Trends or New Dead Ends?*, 22 YALE L. & POL’Y REV. 463, 464 (2004) (noting that after holding a finance formula unconstitutional, numerous states have gone through multiple rounds of litigation). Some critics note that “school finance litigation neither begins nor ends in the courthouse.” *Id.* at 465. Still, this Comment articulates why a remedy is necessary given Virginia’s increasing educational inequities despite the threat of continued litigation.

vague and marginal requirements. While some districts depend strictly on state financing, other districts receive twenty percent of their projected SOQ cost because of a relatively arbitrary state cap on local contribution. Additionally, the SOQ are silent as to any requirement of an adequate facility for the purposes of instilling a quality education in students across the state.

Because of these shortcomings, Virginia is prime for a modern adequacy lawsuit. The Supreme Court of Virginia’s precedent in *Scott v. Commonwealth* provides a basis for such a case, ruling implicitly that state funding must be sufficient for each locality to meet the SOQ. Although critics may object, courts are qualified and powerful avenues for change in the realm of educational equity. Further, when analyzed today, the *Scott* factors reveal shocking disparities across the state in spending per pupil, teacher salaries, and spending on instructional materials.

Given Virginia’s growing disparities, it is time for the Supreme Court of Virginia to reconsider whether the State’s finance formula is not only sufficient, but also whether it enables every locality to facilitate an adequate and quality public education.

*ADDRESSING ABUSERS ATTACK ON WOMEN'S RIGHT TO
REPRODUCTIVE AUTONOMY: BIRTH CONTROL SABOTAGE*

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ABSTRACT

This comment will explore the concept and prevalence of Birth Control Sabotage in the realm of domestic violence. This comment argues that Birth Control Sabotage is a rampant part of domestic violence and therefore should be covered by domestic violence law. Seeking to highlight the importance of recognizing Birth Control Sabotage as a form of domestic violence, this comment will explore current intimate partner abuse statutes and propose avenues for which Birth Control Sabotage can be included within those statutes. Lastly, this comment will examine and present the possibility of a stand-alone criminal statute to combat Reproductive Coercion.

INTRODUCTION

Almost two decades ago, when Dr. Liz Miller was working in a medical clinic in California, she encountered a young woman who came in and requested a pregnancy test.¹ When the test came out negative, Dr. Miller asked the patient if she wanted to be pregnant, to which the patient responded, “no.”² Dr. Miller then asked the patient if she was using birth control; again, the answer was “no.”³ She then asked the patient whether she felt safe in her relationship, to which the patient shrugged and replied “yeah.”⁴ Dr. Miller handed the patient a brown bag full of condoms and encouraged the patient to return when she decided what birth control method would work best for her.⁵ Two weeks later, Dr. Miller encountered that patient again, but this time in her hospital’s emergency room.⁶ The young woman had been rushed in with a severe head injury, having been pushed down the stairs by her boyfriend.⁷ Dr. Miller realized she had completely missed that this patient was in an abusive relationship, one in which the patient’s boyfriend forced her to have sex, refused to wear a condom, and prevented

¹ Dr. Liz Miller, *Abuse by Birth Control Sabotage*, BEDSIDER (Dec. 19, 2012), <https://www.bedsider.org/features/252-abuse-by-birth-control-sabotage>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

her from taking birth control.⁸ Since that encounter, Dr. Miller has focused her work on protecting victims of domestic violence from a very unrecognized, yet extremely harmful mode of abuse: reproductive coercion and birth control sabotage.⁹

Stories such as the one of Dr. Miller's patient are much more common than one would expect. Common narratives include:

He would throw away my birth control pills. I then, with help from my doctor, managed to secretly get an IUD which was fine for a while until he discovered it in which he then forcefully ripped it out of me. Once I fell pregnant, he then refused to let me have an abortion.¹⁰

I gave a friend of mine some condoms. Then the next night or something, I had her call me saying, "look, I've just found pin holes in the condoms."¹¹

Destroying (burning) my whole prescription for contraceptive pills and physically preventing me from seeing a doctor or chemist (or anyone).¹²

I tried the pill but when he found them, he got mad and put them down the sink. The time I put my foot down with condoms, he poked a needle through some

⁸ *Id.*

⁹ *Id.*; see also Elizabeth Miller et al., *Pregnancy Coercion, Intimate Partner Violence and Unintended Pregnancy*, 81 *CONTRACEPTION* 316, 316 (2010); Elizabeth Miller et al., *Reproductive Coercion: Connecting the Dots Between Partner Violence and Unintended Pregnancy*, 81 *CONTRACEPTION* 457, 457 (2010); Ann M. Moore et al., *Male Reproductive Control of Women Who Have Experienced Intimate Partner Violence in the United States*, 70 *SOC. SCI. & MED.* 1737, 1738 (2010).

¹⁰ NAT'L COLLECTIVE OF INDEP. WOMEN'S REFUGE, INC., *REPRODUCTIVE COERCION IN AOTEAROA NEW ZEALAND* 16 (2018), https://img.scoop.co.nz/media/pdfs/1810/Reproductive_Coercion_Study.pdf.

¹¹ *Id.* at 11.

¹² *Id.*

and mixed them all up. Told me “good luck.”¹³

Then, there was another time I started using the Ring...and he pulled it out of me¹⁴

While the medical community has recognized reproductive coercion as a prevalent and dangerous form of intimate partner violence, the legal community has given this issue very little attention. The limitation of a women’s control over her reproductive health has been increasingly recognized as a critical tool employed by abusers to maintain power and control over their victims.¹⁵

Reproductive coercion is defined as a “male partner[’s] attempts to promote pregnancy in their female partners through verbal pressure and threats to become pregnant (pregnancy coercion), direct interference with contraception (birth control sabotage), and threats and coercion related to pregnancy continuation or termination (control of pregnancy outcomes).”¹⁶ Common characteristic behaviors of reproductive coercion include: attempts to impregnate a female partner against her wishes by methods of verbal threats to become pregnant, coercing a partner to have unprotected sex, sabotaging a partner’s attempts to use birth control, and controlling the outcomes of a pregnancy.¹⁷ There are three major periods when reproductive coercion takes place: (1) pre-intercourse, in the form of pregnancy coercion, where the male partner uses verbal demands, threats and physical violence to put pressure on his partner to become pregnant; (2) during intercourse, in the form of birth control sabotage, where the male partner uses direct acts to ensure a woman cannot use contraception or to render the contraception ineffective; and (3) post-intercourse, in the form of controlling pregnancy outcomes, where the male partner uses

¹³ *Id.*

¹⁴ Ann M. Moore et al., *Male Reproductive Control of Women Who Have Experienced Intimate Partner Violence in the United States*, 70 SOC. SCI. & MED. 1737, 1741 (2010).

¹⁵ Elizabeth Miller et al., *Pregnancy Coercion, Intimate Partner Violence and Unintended Pregnancy*, 81 CONTRACEPTION 316, 316 (2010).

¹⁶ Sara A. McGirr et al., *An Examination of Domestic Violence Advocates’ Responses to Reproductive Coercion*, J. INTERPERSONAL VIOLENCE 1, 2 (2017).

¹⁷ *Id.* at 3.

threats or acts of violence to ensure a woman complies with his wishes regarding the decision to continue or terminate a pregnancy.¹⁸

This article will focus on the second period of reproductive coercion, birth control sabotage. Birth control sabotage is defined as an “active interference with a partner’s contraceptive methods in an attempt to promote pregnancy.”¹⁹ Such active interference may include behaviors such as “hiding, withholding, destroying, or removing female-controlled contraceptives (e.g. oral contraceptives, intrauterine devices, contraceptive patches), deliberately breaking or removing a condom during sex, or failing to withdraw in an attempt to promote pregnancy despite a female partner’s wishes to prevent pregnancy.”²⁰

Throughout this article, the perpetrator/abuser is intentionally identified as male, and the victim/survivor as female. This choice is not intended to ignore experiences of men who have been misled or tricked into unwanted parenthood. Traditional cultural stereotypes have long recognized the tale of the “deranged” woman who pokes holes in her partner’s condoms, or misleads her partner into having unprotected sex on the basis that she was on the pill when she was not, in an attempt to trap her partner in the relationship.²¹ Reality, however, offers a different view: it is more often the male partner who attempts to trap his partner by tampering with her birth control methods.²²

¹⁸ AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, COMMITTEE OPINION No. 554: REPRODUCTIVE AND SEXUAL COERCION 1 (2013); *id.* at 2; Miller et al., *supra* note 16, at 316; Moore et al., *supra* note 14, at 1738.

¹⁹ AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, COMMITTEE OPINION No. 554: REPRODUCTIVE AND SEXUAL COERCION 1 (2013).

²⁰ McGirr et al., *supra* note 16, at 3.

²¹ Rachel Camp, *Coercing Pregnancy*, 21 WM. & MARY J. WOMEN & L. 275, 289 n.93 (2015); Nickeitta Leung, *Education Not Handcuffs: A Response to Proposals for the Criminalization of Birth Control Sabotage*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 146, 146 (2015).

²² Nickeitta Leung, *Education Not Handcuffs: A Response to Proposals for the Criminalization of Birth Control Sabotage*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 146, 146 (2015); Press Release, Nat’l Domestic Violence Hotline, 1 in 4 Callers to the National Domestic Violence Hotline Reported Birth Control Sabotage and Pregnancy Coercion (Feb. 15, 2011) (“While there is a cultural assumption that some women use pregnancy as a way to trap their partner in a relationship, this survey shows that men who are abusive will sabotage their partner’s birth control and pressure them to become pregnancy as a way to trap or control their partner.”). This has also been depicted in pop culture and on television shows. In the first season of “Desperate Housewives,” Carlos and Gabby cannot agree on whether or not to have a child. Carlos, wanting to be a father, replaces Gabby’s birth control pills with sugar pills, causing Gabby to become pregnant and eventually lose the baby. *Desperate Housewives: Fear No More* (ABC television broadcast May 1, 2005). Five seasons later, Carlos tricked Gabby into getting pregnant again when he lied about having a vasectomy. *Desperate Housewives: Mirror Mirror* (ABC television

Additionally, the prevalence of reproductive coercion and the resulting harms are particularly unique to women. It is the woman, not the man, who ultimately becomes pregnant and has to bear the child as a result of birth control sabotage. The impact on a woman’s physical health, financial position, dignity, reproductive autonomy, safety, and long-term stability compels identifying birth control sabotage as primarily a female experience.²³

This article hopes to foster recognition of birth control sabotage as a form of domestic violence, and argues that all states have the responsibility to take the initial step to combat birth control sabotage in the realm of domestic violence by codifying birth control sabotage as a form of domestic violence within their domestic violence statutes. Further, this article argues that states should take an additional step to criminalize birth control sabotage as its own stand-alone statute.

Part I of this article will explore the connection between birth control sabotage and intimate partner violence. This section will argue that birth control sabotage is a major part of intimate partner violence and will review the various studies linking birth control sabotage and intimate partner violence. The data will show just how rampant birth control sabotage is within the dynamics of an abusive relationship. This section will also discuss why such methods of birth control sabotage are employed by abusers, and the lasting effects and harms it befalls on female victims.

Part II of this article will argue the importance of states’ statutory recognition of birth control sabotage as a form of domestic violence. It will analyze the domestic violence statutes of all fifty states to determine whether birth control sabotage falls within current domestic violence statutes or whether new language needs be incorporated within these statutes to include birth control sabotage as a form

broadcast Oct. 26, 2008). In the second season of “Weeds,” Silas and Megan’s relationship is threatened when Megan gets accepted into Princeton and anticipates moving across the country. In an attempt to prevent Megan from leaving for college, Silas pokes holes in their condoms. *Weeds: Last Tango in Agrestic* (Showtime television broadcast Aug. 28, 2006).

²³ Rachel Camp, *Coercing Pregnancy*, 21 WM. & MARY J. WOMEN & L. 275, 290 (2015); Shane M. Trawick, *Birth Control Sabotage as Domestic Violence: A Legal Response*, 100 CALIF. L. REV. 721, 724 (2012).

of domestic violence. This section will advocate that birth control sabotage need be incorporated within the domestic violence statutes of all states, as it does not explicitly fit into the crimes currently included in domestic violence statutes.

Part III of this article advocates for the enactment of a separate criminal statute to combat birth control sabotage. This section will consider the need for states to adopt a standalone criminal statute for birth control sabotage. This section will offer a critique of two proposed model statutes and assess the feasibility of their adoption to protect victims of intimate partner violence.

I. The Link Between Intimate Partner Violence and Birth Control Sabotage

A. Prevalence of Birth Control Sabotage in Violent Intimate Partner Relationships

One in four women in the United States has experienced or will experience some form of intimate partner violence in their lifetime.²⁴ Intimate partner violence is defined as “physical violence, sexual violence, stalking, and psychological aggression (including coercive acts) by a current or former intimate partner.”²⁵ Numerous studies have found serious adverse effects of intimate partner violence on women’s reproductive health, including unwanted pregnancy, rapid repeat pregnancy, contraction of sexually transmitted diseases, miscarriages, and abortion.²⁶ Reproductive coercion, particularly birth control sabotage, is a concept that helps explain the link between intimate partner violence and negative reproductive health outcomes of victims.²⁷ Studies have shown a correlation between reproductive coercion and intimate

²⁴ U.S. DEP’T OF HEALTH & HUMAN SERV. CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2016 SUMMARY REPORT INFOGRAPHIC (2017), <https://www.cdc.gov/violenceprevention/pdf/NISVS-infographic-2016.pdf>.

²⁵ U.S. DEP’T OF HEALTH & HUMAN SERV. CTRS. FOR DISEASE CONTROL & PREVENTION, INTIMATE PARTNER VIOLENCE SURVEILLANCE: UNIFORM DEFINITIONS AND RECOMMENDED DATA ELEMENTS (2015), <https://www.cdc.gov/violenceprevention/pdf/ipv/intimatepartnerviolence.pdf>.

²⁶ McGirr et al., *supra* note 16, at 1–2; Miller et al., *supra* note 15; Moore et al., *supra* note 14, at 1737.

²⁷ Miller, *supra* note 1.

partner violence.²⁸ Women who experience reproductive coercion have increased odds of experiencing intimate partner violence; and women who experience intimate partner violence are more likely to also experience reproductive coercion.²⁹

The prevalence of birth control sabotage within the context of intimate partner violence is a topic which has garnered great attention from the medical community for some time. In one of many studies conducted by Dr. Miller, a sample of sixty one adolescent females, between the ages of fourteen and twenty years old, with known histories intimate partner violence, were interviewed.³⁰ Of the sixty-one female adolescents interviewed, fourteen females reported their abusive male partners tried to get them pregnant through interference with their contraceptive methods.³¹ In another study by Dr. Miller involving 1319 family planning clinic patients, 53.4% of the sample reported having experienced intimate partner violence, and 15% of the sample experienced birth control sabotage.³² Out of the 191 women who reported birth control sabotage, 151 (79%) women also reported intimate partner violence.³³ In another study conducted by Jody Raphael, using surveys completed by 474 teen mothers who experienced intimate partner violence, 66% of the sample reported experiencing birth control sabotage by their partner.³⁴

A study conducted by Heike Theil de Bocanegra showed that over half of the fifty three women at four domestic violence shelters in the San Francisco area reported reproductive coercion and birth control sabotage.³⁵ Twenty-one of these women reported being told not to use birth control, while in half of those cases, their partners prevented them from obtaining birth control prescriptions or refilling their

²⁸ Karen Trister Grace & Jocelyn C. Anderson, *Reproductive Coercion: A Systematic Review*, 19 TRAUMA, VIOLENCE, & ABUSE 371, 371 (2018).

²⁹ *Id.*; see Miller et al., *supra* note 15, at 382.

³⁰ Elizabeth Miller et al., *Male Partner Pregnancy-Promoting Behaviors and Adolescent Partner Violence: Findings from a Qualitative Study with Adolescent Females*, 7 AMBULATORY PEDIATRICS 360, 361 (2007).

³¹ *Id.* at 362–63.

³² Miller et al., *supra* note 15, at 318.

³³ *Id.* at 319.

³⁴ Jody Raphael, *Teens Having Babies: The Unexplored Role of Domestic Violence*, 12 PREVENTION RESEARCHER 15, 17 (2005).

³⁵ Heike Thiel de Bocanegra et al., *Birth Control Sabotage and Forced Sex: Experiences Reported by Women in Domestic Violence Shelters*, 16 VIOLENCE AGAINST WOMEN 601, 605–06 (2010).

existing prescriptions.³⁶ In addition, eleven women reported having to conceal their birth control use from their partner.³⁷ Lastly, in a survey of 3,000 callers to the National Domestic Violence Hotline, 25% of callers reported having experienced reproductive coercion: their partners would either prohibit them from using birth control or sabotage their birth control methods.³⁸

B. Aims of Abusers Employing Birth Control Sabotage Methods

Based on all of these findings, it is apparent that birth control sabotage has become a common tool of intimate partner violence. In combatting this action, it is important to understand the reasons abusers choose to employ this method of abuse. The underlying dynamic in the intimate partner violence relationship is often the abuser utilizing a number of tactics in an attempt to create vulnerabilities in his victim, as well as to achieve power and coercive control over his victim.³⁹ In short, birth control sabotage is just another variation of an abuser's exercise of domination and control over his victim.⁴⁰

A woman's use of birth control and contraception is linked to her right to own her physical self and be free from bodily control, mastery, or possession by another.⁴¹ As domestic violence is about ownership and control, birth control sabotage directly allows a perpetrator to eliminate a victim's self-ownership, thereby exercising his ownership and control over the victim.⁴² While birth control sabotage can be done without the direct use of violence, it falls within the broad categories of behaviors that are defined as coercive control.⁴³ Coercive control includes acts that "create or exploit conditions that leave the woman vulnerable to control; undermine the woman's resistance by depleting

³⁶ *Id.* at 605.

³⁷ *Id.*

³⁸ Press Release, Nat'l Domestic Violence Hotline, 1 in 4 Callers to the National Domestic Violence Hotline Reported Birth Control Sabotage and Pregnancy Coercion (Feb. 15, 2011).

³⁹ Grace & Anderson, *supra* note 28.

⁴⁰ Shane M. Trawick, *Birth Control Sabotage as Domestic Violence: A Legal Response*, 100 CALIF. L. REV. 721, 732 (2012).

⁴¹ Leah A. Plunkett, *Contraceptive Sabotage*, 28 COLUM. J. GENDER & L. 97, 112–13 (2014).

⁴² *Id.* at 112.

⁴³ Rachel Camp, *Coercing Pregnancy*, 21 WM. & MARY J. WOMEN & L. 275, 286–87 (2015).

her tangible, social, or personal resources; and establish and exploit her emotional dependency.”⁴⁴

Birth control sabotage falls within the category of exploitive and dependency-making behaviors that constitute coercive control. Abusers use the possibility of pregnancy as a means of control in order to dominate their victims and prevent them from not only leaving, but also from engaging in other romantic relationships, led by the belief that their pregnant female partners would be viewed as less desirable to other men.⁴⁵ The abuser is “marking” a victim as his, believing that the visual of a pregnant stomach is an obvious indication that the woman is involved in an intimate relationship.⁴⁶

Additionally, abusers use birth control sabotage and pregnancy as a means to confine or “trap” their partners in the relationship and claim ownership over them.⁴⁷ Studies show that, once pregnant, the victim is more vulnerable to violence as pregnant women experience abuse more frequently and more severely than women who experience abuse before pregnancy.⁴⁸ Pregnant women may also experience increased financial, emotional, and physical dependence, which may be exploited by her abuser in an effort to more easily and effectively dominate and control his partner.⁴⁹ In sum, regardless of the means of birth control sabotage, an abuser’s aim in employing birth control sabotage is the same as employing any other means of intimate partner violence: to maintain power and control over his victim.

C. Effects of Birth Control Sabotage on Women

The obvious harm on a woman victimized by birth control violence is an unwanted pregnancy and child, but this is just a drop in the bucket in regard to harms women face when experiencing birth

⁴⁴ *Id.* at 287.

⁴⁵ Trawick, *supra* note 40, at 730; *see also* Moore et al., *supra* note 14, at 1740 (“In a number of situations, the abusive partner was being sent to prison and his stated reason for wanted to make his partner pregnant was if she were pregnant, he saw less chance of her leaving him while he was imprisoned because she would be seen as less desirable by other men and invested in maintaining a relationship with the father of the child.”).

⁴⁶ Camp, *supra* note 43, at 287–88.

⁴⁷ *Id.* at 287.

⁴⁸ *Id.* at 291–92.

⁴⁹ *Id.* at 287.

control sabotage. As stated above, women who experience abuse in their relationships are vulnerable to intensified abuse during pregnancy.⁵⁰ Such increased abuse can have significant harms on both the mother and her child.⁵¹ These harms include low birth weight, anemia, infections as well as psychological consequences including depression and anxiety.⁵²

Further, birth control sabotage is a direct attack on a woman's right to self-ownership and female autonomy and disrupts her self-identity.⁵³ This autonomy involves not only the choice of partners with whom to engage in sexual conduct, but also the right to control the circumstances and character of that sexual contact.⁵⁴ When a woman experiences pregnancy under conditions imposed on her rather than chosen by her, a woman's authority to construct pregnancy and motherhood for herself is stolen.⁵⁵ Such theft can be extremely damaging to a woman's basic sense of self, "for this denial of decision making divides women from their wombs and uses their wombs for purposes unrelated to women's own aspiration."⁵⁶ This theft limits or eliminates a victim's ability to make informed choices regarding her physical and reproductive health, as well as the choices regarding the future she envisioned for herself.⁵⁷ This detrimental attack not only impacts a survivor's dignity, but her mental and physical health, her financial stability, and further entangles her and her child into a violent relationship.⁵⁸

II. Recognition of Birth Control Sabotage as Domestic Violence

The frequency of birth control sabotage within the dynamics of violent intimate partner relationships calls for statutory recognition of the act as a form of domestic violence. In order to create an adequate

⁵⁰ *Id.* at 291–92.

⁵¹ *Id.* at 294.

⁵² *Id.*

⁵³ Trawick, *supra* note 40, at 724.

⁵⁴ Athena Katsampes, *A Rape by Any Other Name? The Problem of Defining Acts of Protection Deception and the University Solution*, 24 VA. J. SOC. POL'Y & L. 157, 173 (2017).

⁵⁵ Camp, *supra* note 43, at 298.

⁵⁶ *Id.* at 299.

⁵⁷ See Katsampes, *supra* note 54, at 172.

⁵⁸ Trawick, *supra* note 40, at 724.

legal response, lawmakers need to recognize the interplay between domestic violence and birth control sabotage. By incorporating birth control sabotage into domestic violence statutes, lawmakers can create avenues for domestic violence survivors to get needed legal relief for themselves and their children.⁵⁹ This section will explore current domestic violence statutes and how birth control sabotage might fit within those laws. This analysis will show that birth control sabotage is not readily prosecutable under current laws and will emphasize the need for states to incorporate language specific to birth control sabotage as a crime with unique characteristics and harms.

A. *Survey of State Domestic Violence Definitions and Statutes.*

While the data shows that birth control sabotage is a prevalent tool of domestic violence, to date no state law has addressed reproductive coercion or birth control sabotage.⁶⁰ Through examination of the domestic violence/domestic abuse statutes of every state, I found that the statutes fall into one of two categories. The first category of domestic violence statutes focuses on injury/acts of violence by generally defining domestic violence through acts of assault, endangerment, coercion, placing the victim in reasonable apprehension of serious bodily injury, kidnapping, and harassment.⁶¹ The second category of domestic violence is more of an umbrella provision which offers broader definitions of domestic violence to include acts outside of force and violence.⁶² These statutes include acts of violence, as well as trespassing, menacing behavior, destruction or theft of property, unauthorized dissemination of private images, and interference with freedom.⁶³ Within

⁵⁹ See Jane K. Stoever, *Access to Safety and Justice: Service of Process in Domestic Violence Cases*, 94 WASH. L. REV. 333, 346–47 (2019). While this article focuses on criminal remedies, the incorporation of birth control sabotage within domestic violence statutes will allow victims of domestic violence to receive both criminal and civil legal remedies. Namely, such incorporation will be especially helpful for victim’s seeking protective orders under the civil system. See Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1503–04 (2008) (noting that civil protective orders are the “most effective legal remedy against domestic violence”).

⁶⁰ *Domestic Violence/Domestic Abuse Definitions and Relationships*, NAT’L CONF. OF STATE LEGIS. (June 13, 2019), <http://www.ncsl.org/research/human-services/domestic-violence-domestic-abuse-definitions-and-relationships.aspx#1>.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

these categories some statutes include provisions covering theft or destruction of personal property as well as sexual assault or offences.⁶⁴

⁶⁴ *Id.* In Figure 1 below, I have created a chart from my survey of state domestic violence statutes.

Figure 1:

State	Statute	Injury/Violence Focus	Umbrella Provision	Covers Personal Property	Covers Sexual Assault
Alabama	ALA. CODE § 30-5-2		x	x	x
Alaska	ALASKA STAT. § 18.66.990		x	x	
Arizona	ARIZ. REV. STAT. ANN. § 13-3601		x	x	x
Arkansas	ARK. CODE ANN. § 5-26-302 - § 5-26-309	x			
California	CAL. FAM. CODE § 6203	x	x		x
Colorado	COLO. REV. STAT. § 13-14-101		x	x	x
Connecticut	CONN. GEN. STAT. § 46b-38a	x			
Delaware	DEL. CODE ANN. TIT. 10 § 1041		x	x	x
District of Columbia	D.C. CODE § 16-1001		x	x	
Florida	FLA. STAT. § 741.28	x			x
Georgia	GA. CODE ANN. § 19-13-10	x			
Hawaii	HAW. REV. STAT. § 586-1	x	x		x
Idaho	IDAHO CODE § 18-918	x			
Illinois	750 ILL. COMP. STAT. 60 § 103	x			
Indiana	IND. CODE § 35-42-2-1.3	x			
Iowa	IOWA STAT. § 236.2	x			
Kansas	KAN. STAT. ANN. § 60-3102	x			
Kentucky	KY. REV. STAT. ANN. § 403.720	x			x
Louisiana	LA. STAT. ANN. § 46:2132		x		x
Maine	ME. STAT. TIT. 19-A § 4002		x		x
Maryland	MD. FAMILY CODE § 4-501	x			x
Massachusetts	MASS. GEN. LAWS 209A § 1	x			
Michigan	MICH. COMP. LAWS § 750.81	x			
Minnesota	MINN. STAT. § 518				x
Mississippi	MISS. CODE ANN. § 93-21-3	x			x
Missouri	MO. REV. STAT. § 455.010	x			
Montana	MONT. CODE ANN. § 45-5-206	x			
Nebraska	NEB. REV. STAT. § 28-323	x			
Nevada	NEV. REV. STAT. § 33.018	x		x	x
New Hampshire	N.H. REV. STAT. ANN. § 173-B:1		x	x	x
New Jersey	N.J. STAT. ANN. § 2C:25-19	x			x
New Mexico	N.M. STAT. ANN. § 40-13-2	x		x	x
New York	N.Y. FAM. CT. ACT § 812	x		x	
North Carolina	N.C. GEN. STAT. § 50B-1	x			x
North Dakota	N.D. CENT. CODE § 14-07.1-01	x			x
Ohio	OHIO REV. CODE ANN. § 3113.31	x			x
Oklahoma	OKLA. STAT. TIT. 22 § 60.1	x			
Oregon	OR. REV. STAT. § 107.705	x			x
Pennsylvania	23 PENN. CONS. STAT. § 6102	x			x
Rhode Island	15 R.I. GEN. LAWS § 15-1	x			x
South Carolina	S.C. CODE ANN. § 20-4-20	x			x
South Dakota	S.D. CODIFIED LAWS § 25-10-1	x			
Tennessee	TENN. CODE ANN. § 36-3-601	x		x	
Texas	TEX. FAM. CODE ANN. § 71.004	x			x
Utah	UTAH CODE ANN. § 78B-7-102	x			

A significant majority of states fall within the first category, focusing their domestic violence statutes on acts of violence and acts causing injury.⁶⁵ Some states such as California and Hawaii also incorporate some kind of *catch-all* language.⁶⁶ A small minority of states fall within the second category, creating a larger umbrella of domestic violence. Within both categories, some states define coercion, within their definitions of domestic violence, as compelling a person through force, threat of force, or intimidation to engage in conduct which the person has the right or privilege to abstain from.⁶⁷ A little more than half of states, falling within either category, include sexual assault within their domestic violence definitions;⁶⁸ while a small minority of states also cover destruction or theft of personal property.⁶⁹ These variances bring about the possibility of fitting birth control sabotage within the current domestic framework. As will be shown, any attempt to do so is ultimately unavailing.

B. Birth Control Sabotage as Sexual Assault

While there have been no cases in the United States recognizing birth control sabotage as sexual assault, Canada has addressed this topic, namely the action of condom removal during intercourse.⁷⁰ In *R v. Hutchinson*, the defendant, Hutchinson, was found guilty of

Vermont	VT. STAT. ANN. TIT. 15 § 1101	x		x
Virginia	VA. CODE ANN. § 16.1-228	x		x
Washington	WASH. REV. CODE § 10.99.020	x	x	x
West Virginia	W.VA. CODE § 48-27-202	x		x
Wisconsin	WIS. STAT. § 968-075	x		x
Wyoming	WYO. STAT. ANN. 35-21-103	x		x

⁶⁵ *Id.*

⁶⁶ CAL. FAM. CODE § 6203(b) (2019) (“Abuse is not limited to the actual infliction of physical injury or assault”); HAW. REV. STAT. § 586-1(2) (2019) (“Any act which would constitute an offense under section 709-906”).

⁶⁷ COLO. REV. STAT. § 13-14-101(2) (2019) (“[C]oercion’ includes compelling a person by force, threat of force, or intimidation to engage in conduct from which the person has the right or privilege to abstain, or to abstain from conduct in which the person has a right or privilege to engage.”); ME. STAT. tit. 19-A § 4002(C) (2019) (“Compelling a person by force, threat of force or intimidation to engage in conduct from which the person has a right or privilege to abstain or to abstain from conduct in which the person has a right to engage[.]”); MO. REV. STAT. § 455.010(1)(c) (2019) (“‘Coercion’, compelling another by force or threat of force to engage in conduct from which the latter has a right to abstain or to abstain from conduct in which the person has a right to engage.”).

⁶⁸ See *Domestic Violence/Domestic Abuse Definitions and Relationships*, *supra* note 60.

⁶⁹ See *id.*

⁷⁰ *R. v. Hutchinson*, [2010], 286 N.S.R. 2d 331, para. 1 (Can. N.S.C.A.).

aggravated sexual assault for pricking holes in condoms prior to intercourse.⁷¹ The defendant confessed to the victim that he “wanted a baby with [her] so bad [that he] sabotaged the condoms.”⁷² As a result of the sabotaged condoms, the victim became pregnant, chose to terminate the pregnancy, and experienced infection, extreme bleeding, and severe pain as a result.⁷³ The trial court granted the defendant’s motion for a directed verdict of acquittal, but the Nova Scotia Court of Appeals reversed, holding that the facts presented justified the defendant’s conviction for aggravated sexual assault.⁷⁴

The court outlined the three elements for *actus reus* of sexual assault: (1) touching, (2) sexual nature of the touching, and (3) absence of consent.⁷⁵ The Court then examined two key statutes regarding consent: the first applying to assaults generally,⁷⁶ and the second applying only to sexual assaults.⁷⁷ The Court found that the words “voluntary agreement . . . to engage the in sexual activity in question” in § 273.1, meant more than consent to the use of force under § 265.⁷⁸ By sabotaging the condoms, the defendant altered the nature of the sexual activity in question and, as a result, the victim’s consent could not have been reasonably informed and freely exercised.⁷⁹ Based on this interpretation, the Court concluded that a reasonable jury could find that the victim in this case consented to the application of force, while simultaneously finding an absence of consent to the actual sexual activity which took place: unprotected sexual intercourse.⁸⁰ Accordingly, this lack of consent led to a finding of aggravated sexual assault as the pregnancy created grave bodily harm for the victim.⁸¹

⁷¹ *Id.* at para. 25.

⁷² *Id.* at para. 6.

⁷³ *Id.* at para. 8–9.

⁷⁴ *Id.* at para. 16, 38–40.

⁷⁵ *Id.* at para. 21; Trawick, *supra* note 40 at 724.

⁷⁶ Criminal Code, R.S.C. 1985, c C-46 § 265(3) (Can.) (“(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of (a) the application of force to the complainant or to a person other than the complainant; (b) threats or fear of the application of force to the complainant or to a person other than the complainant; (c) fraud; or (d) the exercise of authority.”).

⁷⁷ *Id.* § 273.1 (“(1) Subject to subsection (2) and subsection 265(3), consent means . . . the voluntary agreement of the complainant to engage in the sexual activity in question.”).

⁷⁸ Hutchinson, [2010], 286 N.S.R. 2d at para. 34.

⁷⁹ *Id.* at para. 38.

⁸⁰ *Id.* at para. 37–38.

⁸¹ *Id.* at para. 1.

Here, in the United States, some have called for birth control sabotage, specifically the acts of condom removal during intercourse without the partner’s permission or knowledge and pricking holes in condoms, to be charged as sexual assault under existing statutory frameworks.⁸² Advocates argue that such actions vitiate consent as the victim has only consented to intercourse when a condom is used.⁸³ While this call is appropriate, issues arise when trying to categorize birth control sabotage as sexual assault. First, and most importantly, a majority of state statutes either do not define consent, or, those that do, limit the notion of consent to the use of force.⁸⁴ Additionally, prosecuting birth control sabotage as sexual assault only covers one form of birth control sabotage and ignores the actions of tampering with, destroying, hiding, or stealing a women’s birth control methods.

The *Hutchinson* interpretation of birth control sabotage would be an unworkable framework if adopted by the United States. In reaching its finding, the *Hutchinson* Court broadened its interpretation of consent beyond strictly applying to sexual intercourse.⁸⁵ In doing so, it extended consent to apply to the specific type of sexual intercourse, therefore a sexual partner could consent to intercourse but not consent to unprotected intercourse.⁸⁶ Unfortunately, such interpretation does not fit within United States jurisprudence as many states do not define consent in their statutes, and a majority of those that do rely on the idea that consent only applies to the sexual act itself.⁸⁷ Without this broadening of the definition of consent beyond the use of force, charging birth control sabotage as sexual assault is ultimately unworkable.

C. Birth Control Sabotage and Destruction or Theft of Personal Property

Another approach may be attempting to fit birth control sabotage, specifically the actions of stealing, destroying, or hiding birth

⁸² See Alexandra Brodsky, “Rape-Adjacent”: Imagining Legal Responses to Nonconsensual Condom Removal, 32 COLUM. J. GENDER & L. 183, 183–84 (2017).

⁸³ *Id.* at 190.

⁸⁴ Trawick, *supra* note 40, at 748.

⁸⁵ *Id.* at 750.

⁸⁶ *Id.*

⁸⁷ *Id.* at 746–47 (2012); see also Note, *Acquaintance Rape and Degrees of Consent: “No” Means “No,” but What Does “Yes” Mean?*, 117 HARV. L. REV. 2341, 2346 (2004).

control methods, within the crimes of destruction or theft of personal property. Unfortunately, despite some domestic violence statutes including such causes of action, this is a nonviable route. First, many of these statutes have specific requirements of what types of personal property are considered to equate to theft and it is unlikely that birth control methods would not be covered.⁸⁸ Additionally, prosecuting birth control sabotage through destruction or theft of personal property only covers a subset of birth control sabotage actions which leaves other actions, such as condom removal and poking holes in condoms, unactionable.

While a few state statutes do include theft or destruction of property within their domestic violence definitions, such statutes have monetary value thresholds that must be met to be considered personal property.⁸⁹ Within Washington's domestic violence statute,⁹⁰ malicious mischief in the first, second, and third degrees offer redress for destruction of property in conjunction with domestic violence.⁹¹ Within each degree of malicious mischief, the statutes criminalize the knowing and malicious destruction of property of another in the amount of five thousand dollars (first degree)⁹² or seven hundred and fifty dollars (second degree).⁹³ The third degree of malicious mischief is a *catch-all*, including knowing and malicious destruction of property of another, "under circumstances not amounting to malicious mischief in the first or second degree."⁹⁴ Similarly, New York's domestic violence statute includes grand larceny in the third and fourth degrees.⁹⁵ New York's grand larceny statutes require values of property that exceed one thousand (fourth degree)⁹⁶ and three thousand (third degree)⁹⁷ dollars. Further, other statutes, such as New Mexico's, limit such

⁸⁸ See, e.g., N.M. STAT. ANN. § 40-13-2(2)(f) (2019) (defining domestic abuse as including criminal damage to property); see also N.M. STAT. ANN. § 30-15-1 (2019) (allowing damage to property to fall within the domestic violence statute but only as a petty misdemeanor unless the value of the damaged property exceeds one thousand dollars).

⁸⁹ 25 AM. JUR. 2D *Domestic Abuse and Violence* § 2 (2019).

⁹⁰ WASH. REV. CODE § 10.99.020 (2019).

⁹¹ *Id.* §§ 9A.48.070–48.090.

⁹² *Id.* § 9A.48.070(1)(a).

⁹³ *Id.* § 9A.48.080(1)(a).

⁹⁴ *Id.* § 9A.48.090(1)(a).

⁹⁵ N.Y. FAM. CT. ACT § 812 (2019).

⁹⁶ N.Y. PENAL LAW § 155.30(1) (2019).

⁹⁷ *Id.* § 155.35(1).

actions to *criminal* damage to property.⁹⁸ Criminal damage to property “consists of intentionally damaging any real or personal property of another without the consent of the owner” and is only a petty misdemeanor unless the value of the damaged property exceeds one thousand dollars.⁹⁹

Based on these cost limitations, it is unlikely that the destruction or theft of birth control methods could not be prosecuted under these laws. While the costs of birth control methods vary based on type, brand, and insurance, it is inconceivable that they would meet the amounts required under these statutes. According to the U.S. News and World Report and the American Pregnancy Association, the yearly costs of birth control methods include: \$360 to \$420 for the NuvaRing, \$20 to \$800 for birth control pills, \$0 to \$1,300 for an intrauterine device, and \$360 to \$420 for the birth control patch.¹⁰⁰ Based on these estimates, it is obvious that, besides the intrauterine device,¹⁰¹ theft or destruction of a partner’s birth control methods could not be prosecuted under existing domestic violence laws.

D. Need to Recognize Birth Control Sabotage as an Independent Form of Domestic Violence

Based on the above analysis, it is clear that birth control sabotage does not fit within current domestic violence statutes. Therefore, all states need to take the first step of incorporating additional language in their domestic violence statutes to include birth control sabotage as its own cause of action. States should do this by including birth control sabotage within their list of crimes that count as domestic violence and also include a definitional component of birth control sabotage to accompany the statute.¹⁰² I suggest states use two sources in creating this

⁹⁸ N.M. STAT. ANN. § 40-13-2(2)(f) (2019).

⁹⁹ *Id.* § 30-15-1.

¹⁰⁰ Susannah Snider, *The Cost of Birth Control*, U.S. NEWS: MONEY (May 2, 2019), <https://money.usnews.com/money/personal-finance/family-finance/articles/the-cost-of-birth-control>.

¹⁰¹ If an intrauterine device was torn out of the female partner, there would be more severe criminal statutes available, such as assault, rendering the need to prosecute under theft and destruction obsolete. *See* VA. CODE. § 16.1-228 (2019).

¹⁰² An example of such an inclusion would be as follows, pulling from VA. CODE ANN. § 16.1-228 (2019):

“Family abuse” means any act involving violence, force, or threat that results in bodily injury or places one in reasonable apprehension of death, sexual assault, or bodily injury and that is committed by a person against such person’s family or

definition of birth control sabotage. The first source is the American College of Obstetricians and Gynecologist's (ACOG) definition of birth control sabotage. The second source is Shawn Trawick's proposed model statute to accompany the ACOG's definition and provide guidance of what acts of birth control sabotage would include. Below is an example of this definitional component:

"Birth Control Sabotage" means an "active interference with a partner's contraceptive methods in an attempt to promote pregnancy."¹⁰³ Acts of Birth Control Sabotage include:

a) knowingly or recklessly tampers with a chemical or barrier contraceptive device, against his or her sexual partners will, with the specific intent of inducing pregnancy; or,

b) knowingly or recklessly fails to withdraw, or cooperate with withdrawal, before ejaculation with the specific intent of inducing pregnancy. Subsection (1)(b) shall apply only if both parties have agreed in advance that the male shall withdraw prior to ejaculation and the female has agreed in advance to cooperate with withdrawal.¹⁰⁴

This definition is recommended because it includes a definition of the act created by the ACOG, and also provides guidance as to what an "active interference" includes.¹⁰⁵ Following the ACOG's definition of birth control sabotage is preferable because it categorizes birth control sabotage as a subset within the larger category of reproductive

household member. Such act includes, but is not limited to, any forceful detention, stalking, criminal sexual assault in violation of Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2, [*birth control sabotage in violation of Article x (§ 18.2-x)*], or any criminal offense that results in bodily injury or places one in reasonable apprehension of death, sexual assault, or bodily injury.

¹⁰³ Plunkett, *supra* note 41, at 141-43.

¹⁰⁴ Trawick, *supra* note 40, at 755.

¹⁰⁵ Plunkett, *supra* note 41, at 104.

coercion and assists in developing a principled legal response that promotes consistency between medical and legal professionals.¹⁰⁶ This consistency is best because professionals in the medical field have been exploring this phenomenon for some time and can assist the legal community in gaining insight and understanding of the prevalence of and harms created by birth control sabotage. Additionally, this proposed statute covers the acts that would fit within the definition and the mental states required for acts of birth control sabotage to be an “active interference.”¹⁰⁷ Subsection (1)(a) encompasses acts such as poking holes in condoms, stealing or hiding birth control pills, rings, intrauterine devices, and patches, and replacing birth control pills with placebo or sugar pills.¹⁰⁸ Though this subsection does not explicitly state these actions, it allows just enough room for interpretation regarding other acts not mentioned without creating an all-encompassing definition. Subsection (1)(b) specifically covers the act of failure to withdraw before ejaculation when withdrawal is the agreed upon method of birth control.¹⁰⁹ Both of these sections require the acts to be committed knowingly or recklessly and with the intention of inducing pregnancy.¹¹⁰ These requirements fall squarely within the meaning of active interference and support the definition created by the ACOG.

III. Birth Control Sabotage as a Stand-Alone Crime

While birth control sabotage is a much more a common occurrence in the context of violent intimate partner relationships, it also exists in non-violent sexual relationships.¹¹¹ Recognition of birth control as a widespread but widely ignored problem has led some scholars to advocate for a stand-alone criminal statute to address birth control

¹⁰⁶ *Id.* at 105.

¹⁰⁷ *Id.* at 104.

¹⁰⁸ See Trawick, *supra* note 40, at 755. Subsection (1)(a) states, “1. A person is guilty of the crime of reproductive coercion if he or she: a) knowingly or recklessly tampers with a chemical or barrier contraceptive device, against his or her sexual partner’s will, with the specific intent of inducing pregnancy[.]”

¹⁰⁹ *Id.* Subsection (1)(b) states the following:

2. knowingly or recklessly fails to withdraw, or cooperate with withdrawal, before ejaculation with the specific intent of inducing pregnancy. Subsection (1)(b) shall apply only if both parties have agreed in advance that the male shall withdraw prior to ejaculation and the female has agreed in advance to cooperate with withdrawal.

¹¹⁰ *Id.*

¹¹¹ Miller et al., *supra* note 15, at 320.

sabotage.¹¹² This approach of criminalization of birth control sabotage would be beneficial to both victims and society as a whole.

A. *Arguments for Criminalization*

The additional criminalization of birth control sabotage will help protect the victim from further abuse as bringing birth control sabotage into the criminal law realm would allow convictions to result in incarceration.¹¹³ The incarceration of an abuser would secure the protection of a victim and her potential child from her abuser.¹¹⁴ The forced separation of a victim and abuser, caused by incarceration, would give the victim time to make arrangements to leave or further escape her abuser, without the worry of her abuser showing up or taking actions to further restrict her from leaving.¹¹⁵ Further, putting a stop to an abuser's actions of birth control sabotage will help the victim regain her reproductive autonomy and repair the dignity violations she has suffered as result of her abuser's actions.¹¹⁶

Additionally, as the central purpose of "criminal law is to regulate human behavior to reflect society's condemnation of certain actions," criminalizing birth control sabotage signals to society that these actions are morally reprehensible and intolerable.¹¹⁷ This symbolic function would send the message that the act of birth control sabotage violates acceptable societal norms.¹¹⁸ Further, such criminalization emphasizes that birth control sabotage and violence are public and societal problems, instead of private, individual problems.¹¹⁹ Moreover, this signaling will clarify acts for victims. While many women feel some kind of violation or harm as a result of birth control sabotage, many do not know what to call the harm, nor do they have a name for the practice.¹²⁰ Criminalizing birth control sabotage would assist victims in identifying the practice and validate the harm they experience.

¹¹² Plunkett, *supra* note 41, at 98; Trawick, *supra* note 40, at 746.

¹¹³ Trawick, *supra* note 40, at 745–46.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 745.

¹¹⁷ *Id.* at 746.

¹¹⁸ Katsampes, *supra* note 54, at 180–81.

¹¹⁹ Trawick, *supra* note 41, at 754.

¹²⁰ Brodsky, *supra* note 82 ("Their stories often start the same way: 'I'm not sure this is rape, but...'").

Finally, distinguishing birth control sabotage as its own crime would avoid the confusion of trying to fit the act within an already established crime, such as theft or sexual assault, which as discussed above, is unworkable.

B. Leah Plunkett's Proposed Model Statute

In one of few calls on the legal community to address the problem of birth control sabotage, Professor Leah Plunkett offers a proposed addition to the Model Penal Code which could serve as a model for states to adopt for the offense of birth control sabotage:

It is unlawful for an individual:

- (1) with the purpose of inducing pregnancy in a sexual partner who he or she knows uses or plans to use a contraceptive device or medication to decrease the risk of pregnancy resulting from sexual intercourse
- (2) with the knowledge that his or her actions are practically certain to induce pregnancy in a sexual partner who he or she knows uses or plans to use a contraceptive device or medication to decrease the risk of pregnancy resulting from sexual intercourse
- (3) who is aware of and ignores a substantial and unjustifiable risk that his or her actions will induce pregnancy in a sexual partner whose use or planned use of a contraceptive device or medication to decrease the risk

of pregnancy resulting from sexual intercourse he or she is aware of and ignores

(4) who should have been aware of a substantial and unjustifiable risk that his or her actions will induce pregnancy in a sexual partner whose use or planned use of a contraceptive device or medication to decrease the risk of pregnancy resulting from sexual intercourse he or she should have been aware of

[. . .] to engage in conduct that creates a substantial and unjustifiable risk of damaging, destroying, or otherwise rendering ineffective the contraceptive device or medication resulting in a sexual partner becoming pregnant from sexual intercourse with that individual.

‘Creates’ applies only to the degree of risk that sexual intercourse would result in pregnancy in a sexual partner that the defendant ‘knows/recklessly disregards a risk/should have known’ exceeds the degree the sexual partner established or planned to establish through use or planned use of contraception. That the sexual partner consented to the physical act of sexual intercourse itself is not a defense to the crime of contraceptive sabotage.¹²¹

¹²¹ Plunkett, *supra* note 41, at 129–31.

Plunkett’s proposed statute allows each state adopting the provision to decide which mental state is requisite to establish culpability for birth control sabotage.¹²² As birth control sabotage is an abuser’s attempt to possess control over his partner’s autonomy (through her reproductive capacity), Plunkett suggests that out of the four mental states provided in the Model Penal Code, the first three: purposely, knowingly, and recklessly, adequately cover such intent.¹²³ However, the fourth mental state, negligence, would not be sufficient to establish culpability as it does not reflect the abuser’s intent to control and possess his victim.¹²⁴ In addition to the requisite mental states, Plunkett’s proposed statute requires multiple elements to be satisfied in order for a court to find birth control sabotage has taken place. The statute requires the perpetrator: (1) knowingly or intentionally disregard knowledge of their partner’s contraceptive use or planned use; (2) engage in purposeful, knowing, or reckless conduct to damage, destroy, or render contraception ineffective; (3) have purposeful, knowing, or reckless intent to induce pregnancy; and (4) such acts result in the victim’s pregnancy.¹²⁵

While Plunkett’s statute thoroughly reflects the mental states

¹²² *Id.* at 131.

¹²³ *Id.* at 129–31 (2014); see MODE PENAL CODE § 2.02(2), stating, in part:

(a) **Purposely.** A person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist. (b) **Knowingly.** A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result. (c) **Recklessly.** A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.

¹²⁴ Plunkett, *supra* note 41, at 131; see MODE PENAL CODE § 2.02(2)(d), stating:

(d) **Negligently.** A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.

¹²⁵ Plunkett, *supra* note 41, at 133–36.

and actions required to establish culpability, states will be unlikely to adopt such a statute. First, Plunkett's statute requires that a perpetrator's actions actually result in a pregnancy.¹²⁶ As women, not men, are the only ones that can get pregnant, this statute only protects women from such actions of birth control sabotage.¹²⁷ It is true that birth control sabotage is very unique to women as women are the main victims of the act and the pregnancy they suffer is a harm that only women can bear. However, the adoption of a statute that categorizes men as the perpetrators and women as the victims, will give rise to Equal Protection claims, which will likely dissuade states from adopting the statute.¹²⁸ Additionally, Plunkett's statute is too broad, as it does not define or provide examples of acts that would count as disregard of a partner's contraceptive use or render birth control as ineffective.¹²⁹ As a result, Plunkett's terminology could include acts besides those involving birth control sabotage.

C. Shane Trawick's Proposed Model Statute for Criminalization of Birth Control Sabotage

Shane Trawick's article *Birth Control Sabotage as Domestic Violence: A Legal Response*, was the first call to the legal community to act on this egregious conduct.¹³⁰ In his call to action, Trawick proposed a model statute for criminalization of birth control sabotage:

1. A person is guilty of the crime of reproductive coercion if he or she:

a) knowingly or recklessly tampers with a chemical or barrier contraceptive device, against his or her sexual partners will, with

¹²⁶ *Id.* at 129–30.

¹²⁷ *Id.* at 138.

¹²⁸ *But see M. v. Superior Court*, 450 U.S. 464 (1981) (a statutory rape law that punished only males for sleeping with underage women was not void on equal protection grounds, as the state had a strong interest in preventing underage pregnancies).

¹²⁹ *See generally* Plunkett, *supra* note 41.

¹³⁰ *See generally* Trawick, *supra* note 40.

the specific intent of inducing pregnancy; or,

b) knowingly or recklessly fails to withdraw, or cooperate with withdrawal, before ejaculation with the specific intent of inducing pregnancy. Subsection (1)(b) shall apply only if both parties have agreed in advance that the male shall withdraw prior to ejaculation and the female has agreed in advance to cooperate with withdrawal.

2.Consent to protected sexual intercourse shall not be construed as consent to unprotected sexual intercourse.

3.Past consent to unprotected sexual intercourse, unprotected anal intercourse, unprotected oral sex, or other unprotected sexual touching shall not constitute current consent to unprotected sexual intercourse.

4.Consent to unprotected anal intercourse, unprotected oral sex, or other unprotected sexual touching during the current or previous sexual transaction shall not constitute consent to unprotected sexual intercourse.

5.Attempted use of chemical contraceptives or a barrier method of birth control shall serve as evidence that the victim did not consent to unprotected sexual intercourse.

6.A court shall consider all relevant evidence, including evidence related to prior or simultaneous acts of domestic violence, in determining the occurrence of reproductive coercion.¹³¹

This article argues that Trawick's proposed statute is the favorable option and could (and should) be implemented by states. First, similar to Plunkett's statute, Trawick's proposed statute incorporates the mental states of knowingly or recklessly which sufficiently capture an abuser's intent to possess or control a victim's autonomy.¹³² This statute also requires the specific intent of inducing pregnancy, which goes right to the heart of the ACOG's definition of birth control sabotage.¹³³

Trawick's statute narrowly defines and limits acts that could be deemed birth control sabotage to tampering with chemical or barrier contraceptives and failure to withdraw as agreed between partners, before ejaculation.¹³⁴ The former would include stealing, hiding, or flushing birth control pills; removing intrauterine devices, rings or patches; poking holes in condoms, and removing condoms during intercourse; as acts that would constitute contraceptive tampering.¹³⁵ This narrow definition allows states to address conduct at the heart of birth control sabotage epidemic without overreaching into the private decisions of individuals.

Under the proposed statute, both men and women can also be perpetrators and victims of birth control sabotage which effectively eliminates the risk of Equal Protection claims. Again, though birth control sabotage is primarily an act against women, including both men and women as perpetrators and victims, Trawick's statute shields states from potential Equal Protection actions. This shield provides an

¹³¹ *Id.* at 755.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 730.

incentive for states to adopt such birth control sabotage criminalization statutes.

Further, the statute addresses specialized issues of consent that most state sexual assault statutes lack. As discussed above, many states do not address consent in their sexual assault or rape statutes, outside consent to the use of force. This proposal, similar to the Canadian court's finding in *R. v. Hutchinson*, allows courts to expand the notion of consent to include both consent to the sexual act itself, and consent to the manner of the sexual act.¹³⁶

Lastly, the statute puts birth control sabotage within the context of domestic violence. Subsection 6 allows consideration of all relevant evidence related to prior or simultaneous acts of domestic violence when determining the occurrence of birth control sabotage.¹³⁷ As this article argues, it is tremendously important to recognize birth control sabotage as a form of domestic violence. This subsection accomplishes this goal by effectively bringing birth control sabotage within the realm of domestic violence.¹³⁸ States that adopt this statute can simply list birth control sabotage in their domestic violence statutes and reference this statute. Besides providing relief to women and men who are in violent intimate relationships experiencing birth control sabotage, this statute also offers relief to men and women who are not.

CONCLUSION

For over a decade medical professionals and domestic violence advocates have been researching the prevalence of birth control sabotage as well as brainstorming and implementing responses in the healthcare field.¹³⁹ To date, the legal community has failed to act on this harmful phenomenon in any manner. Within the last decade, there

¹³⁶ *R. v. Hutchinson*, [2010], 286 N.S.R. 2d 331, para. 37–38 (Can. N.S.C.A.); *id.* at 755.

¹³⁷ Trawick, *supra* note 40, at 755.

¹³⁸ *Id.*

¹³⁹ AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, *supra* note 19.

have only been a handful of articles by legal professionals calling on the legal community to act, and the response has been minimal to non-existent.¹⁴⁰ The high frequency of birth control sabotage, documented by medical professions, exhibits the dire need for a legal response. As shown, birth control sabotage is not a concept that can fit within any of the crimes currently on the books. Birth control sabotage is the theft and deprivation of a women’s autonomy and has unique and dire harms. As such, birth control sabotage needs to be treated differently; it needs to be treated as its own crime, simply because it is so distinct. This article calls on states to recognize the prevalence of this abhorrent act and to enact a legal remedy. As no state currently offers any viable route of redress, all states need to modify their domestic violence statutes to include protections against birth control sabotage. Further, states should strongly consider criminalizing birth control sabotage in a stand-alone statute, namely Shane Trawick’s proposed statute. Whether including birth control sabotage in their domestic violence statutes or adopting a standalone statute, it is incumbent of all states to take the first step to address this growing problem. In doing so, states will not only give domestic violence victims a route to seek assistance but also will signal to society that this act is reprehensible and will not be tolerated. Most importantly, such actions will allow us to move closer to ending domestic violence.

¹⁴⁰ See Brodsky, *supra* note 82, at 210; Camp, *supra* note 43, at 318; Katsampes, *supra* note 54, at 184; Nickeitta Leung, *Education Not Handcuffs: A Response to Proposals for the Criminalization of Birth Control Sabotage*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 146, 169 (2015); Plunkett, *supra* note 41, at 141–43; Trawick, *supra* note 40, at 760.

*KOONTZ V. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT
& JUSTICE KAGAN'S DISSENTING OPINION: MONETARY
EXACTIONS & FIFTH AMENDMENT TAKINGS*

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ABSTRACT

The Fifth Amendment Takings Clause of the United States Constitution prohibits the government from taking private property for public use, without paying the property owner just compensation. In 2013, the Supreme Court of the United States held in *Koontz v. St. Johns River Water Management District* that monetary exactions are subject to heightened scrutiny under the *Nollan/Dolan* “essential nexus” and “rough proportionality” test. This comment argues that time will reveal that Justice Kagan’s dissenting opinion in *Koontz* was correct: monetary exactions are not unconstitutional conditions, subjecting monetary exactions to the *Nollan/Dolan* test is ultimately ineffective, and the *Penn Central* test should instead govern monetary exaction takings claims.

INTRODUCTION

The Fifth Amendment Takings Clause of the United States Constitution prohibits the government from taking private property for public use, without paying the property owner just compensation.¹ So long as the government pays just compensation, it is authorized to exercise its eminent domain power pursuant to the public health, safety, morals, or welfare.² In addition to physical takings, the Supreme Court of the United States has articulated several regulatory takings tests to determine when takings that demand just compensation occur.³ Unlike ordinary regulatory takings, which are subject to the three-part *Penn Central* balancing test,⁴ the Court held that land exactions are subject to heightened scrutiny under the *Nollan/Dolan* two-part “rough proportionality” test in order to prevent the government from attaching

¹ U.S. CONST. amend. V.

² *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

³ See, e.g., *Lucas v. S.C. Coastal Comm’n*, 505 U.S. 1003, 1027 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982); *Penn. Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 124 (1978).

⁴ *Penn. Cent. Transp. Co.*, 438 U.S. 104.

unconstitutional conditions to land-use permits.⁵ In *Koontz v. St. Johns River Water Management District*, the Court extended the *Nollan/Dolan* framework to monetary exactions.⁶

Today, the *Nollan/Dolan* “rough proportionality” test governs cases where monetary exactions serve as the basis of takings claims.⁷ In application, however, Fifth Amendment takings are rarely found when the government demands monetary payment in exchange for development-permit approval. A review of the post-*Koontz* cases reveals that takings claims based on a monetary exactions are almost always unsuccessful under the *Nollan/Dolan* test.⁸ This imparts the lesson that, no matter how “heightened” the level of scrutiny, the regulatory takings framework for monetary exactions still tilts heavily in the government’s favor, and that subjecting monetary exactions to the “rough proportionality” standard is ultimately ineffective.

The thesis of this comment is that time will reveal that Supreme Court Justice Elena Kagan’s dissenting opinion in *Koontz*, where she argued that monetary exactions should not be subject to the *Nollan/Dolan* “rough proportionality” test, was correct.⁹ Specifically, this comment supports Justice Kagan’s argument that monetary exactions are not conditions requiring property owners to forfeit their constitutional right to just compensation, and thus do not violate the unconstitutional conditions doctrine.¹⁰

Part I of this comment discusses the *Koontz* decision, including Justice Kagan’s dissenting opinion. It then dissects the *Nollan/Dolan* two-part “rough proportionality” test and the alternative regulatory takings tests. Next, Part II describes relevant distinctions between real and personal property, explains the unconstitutional conditions doctrine in the land-use context, and identifies the different perspectives on monetary exactions. Part III then analyzes lower court applications

⁵ *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 622 (2013) (Kagan, J., dissenting) (explaining tests set forth in *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994)).

⁶ *Id.* at 612 (majority opinion).

⁷ *Id.* at 599.

⁸ *Levin v. City & Cty. of San Francisco*, 71 F. Supp. 3d 1072 (N.D. Cal. 2014).

⁹ See *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 483 (1987) (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (Brandeis, J., dissenting)) (illustrating how dissenting opinions are sometimes adopted as the majority opinion in later Supreme Court cases).

¹⁰ *Koontz*, 570 U.S. at 625–26 (Kagan, J., dissenting).

of the Supreme Court's *Koontz* holding. Finally, Part IV concludes with reiterating that time will reveal that Justice Kagan's dissenting opinion in *Koontz*—arguing that monetary exactions should not be subject to the “rough proportionality” test—was correct.

I. Understanding *Koontz* & Alternative Regulatory Takings Tests

A. *Koontz v. St. Johns River Water Management District*

1. Statement of Facts and Procedural History

In *Koontz v. St. Johns*, the Supreme Court extended the application of heightened scrutiny under the *Nollan/Dolan* two-part test to monetary exactions.¹¹

A Florida resident named Coy Koontz (“Koontz”) purchased 14.9 acres of undeveloped land, in an area mostly classified as wetlands, the same year that the Florida legislature enacted the Water Resources Act.¹² The Act divided Florida into five Water Management Districts, and authorized the Districts to regulate construction that would impact the “waters in the state.”¹³ The Act required landowners to obtain a construction permit from their district, which was authorized to impose “reasonable conditions” to construction permits to ensure that construction would not damage the district's water resources.¹⁴ The Florida state legislature then passed the Henderson Wetlands Protection Act, which made it illegal to “dredge or fill in, on, or over the surface waters” without a Wetlands Resource Management Permit.¹⁵ St. Johns River Water Management District (“St. Johns”) required permit applicants seeking to construct on wetlands to offset environmental damage by creating, enhancing, or preserving wetlands elsewhere.¹⁶

¹¹ *Id.* at 612 (majority opinion).

¹² *Id.* at 599–600.

¹³ *Id.* at 600.

¹⁴ *Id.*

¹⁵ *Id.* at 600–01.

¹⁶ *Id.* at 601.

St. Johns had jurisdiction over Koontz’s land.¹⁷ Koontz wanted to develop his property and sought a permit to dredge and fill about three acres of his parcel.¹⁸ To comply with Florida law, Koontz offered to give a conservation easement on another part of his land.¹⁹ St. Johns determined that Koontz’s proposal was insufficient to offset the environmental impact of construction and instead demanded that Koontz either (1) reduce development on his property to one acre, deed a conservation easement on the remaining 13.9 acres of his property, and eliminate a dry-bed pond from his proposal and install a more expensive subsurface storm-water system; or, (2) develop 3.7 acres of his land and hire a contractor to improve wetlands several miles away.²⁰ The latter option was a requirement to spend money rather than a requirement to relinquish his property rights. Koontz rejected the counteroffer and sued St. Johns, arguing that St. Johns’ mitigation demands failed the *Nollan/Dolan* “rough proportionality” test on the basis that St. Johns’ counteroffer was excessive compared to the potential environmental impacts that his construction proposal would cause.²¹

The Florida Circuit Court held that requiring Koontz to mitigate the impacts of his construction project lacked both an “essential nexus” and “rough proportionality.”²² The Florida District Court of Appeal affirmed, and the Florida Supreme Court reversed.²³

2. Justice Alito’s Majority Opinion

Justice Alito, writing for the majority, held that the *Nollan/Dolan* framework must apply to monetary exactions—even when the government denies a land-use permit, and when the government demands money instead of a real property interest.²⁴ The Court remanded the case.²⁵

Justice Alito found that monetary exactions were the functional equivalent of other land exactions, and to hold otherwise would allow local governments to “evade the takings clause by charging a fee”

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 601–02.

²¹ *Id.* at 602.

²² *Id.* at 603.

²³ *Id.*

²⁴ *Id.* at 612–13.

²⁵ *Id.* at 619.

instead of “demanding a property right.”²⁶ Further, the Court reasoned that the unconstitutional conditions doctrine is violated when the government conditions permit-approval on a monetary payment that simply “burdens” a property owner’s use of his property (e.g., developing a portion of his property).²⁷ In this case, the Court found that because the money at issue operated upon a specific property interest, the payment burdened Koontz’s land ownership.²⁸ In an attempt to prevent the government from wielding its “substantial power and discretion” in the land use permitting process, the Court applied the *Nollan/Dolan* framework to monetary exactions.²⁹

3. Justice Kagan’s Dissenting Opinion

In contrast to the majority’s reasoning that a condition “burdening” an individual’s land ownership is sufficient to trigger the *Nollan/Dolan* framework, Justice Kagan would have held that the constitutional right to just compensation is only violated when the government conditions a land use permit on an actual transfer of a real property interest.³⁰

Justice Kagan agreed with the majority’s conclusion that a property owner may challenge the government’s denial of his land use permit conditioned on the conveyance of a property interest if the condition fails the *Nollan/Dolan* “essential nexus” and “rough proportionality” requirements.³¹ She agreed that in this scenario, the property owner is entitled to removal of the improper condition, and is possibly entitled to monetary compensation, if created by state law, for such an improper condition.³² However, Justice Kagan disagreed with the Court’s conclusion that the government’s demand for a payment or expenditure of money (i.e., a monetary exaction) that an applicant rejects triggers the *Nollan/Dolan* framework.³³

²⁶ *Id.* at 612.

²⁷ *Id.* at 606.

²⁸ *Id.* at 613 (citing *E. Enterprises v. Apfel*, 524 U.S. 498 (1998)).

²⁹ *Id.* at 614.

³⁰ *Id.* at 619–20 (Kagan, J., dissenting).

³¹ *Id.* at 620–22.

³² *Id.* at 620.

³³ *Id.*

Justice Kagan argues several points in her dissenting opinion. First, she argues that the majority failed to distinguish between permissible taxes and monetary exactions.³⁴ She also argues that the *Koontz* case could have been decided under the *Penn Central* three-part balancing test for regulatory takings.³⁵ Additionally, she contends that the Court’s decision to require analyzing monetary exactions under *Nollan/Dolan* heightened scrutiny deprives state and local governments of the “necessary predictability” of local land use regulation.³⁶

However, the most important aspect of Justice Kagan’s dissenting opinion for purposes of this comment is that requiring *Koontz* to fund repairs of public wetlands was not a taking because it did not affect a “specific and identified property right,” but instead “simply impose[d] an obligation to perform an act”—i.e., to pay money.³⁷ Justice Kagan reasons that the monetary exaction was not an unconstitutional condition because St. Johns merely informed *Koontz* that his permit application did not meet the legal requirements for approval, offered him several suggestions to bring his application into compliance with Florida law, and even solicited additional proposals from *Koontz* to approve his application.³⁸ Because Justice Kagan found that the monetary exaction was not a condition, it thus would not have constituted a taking outside of the land use permitting process, and did not even implicate the *Nollan/Dolan* test.³⁹

In short, Justice Kagan argues that because government demands for monetary payments during the land use permitting process arise from that process rather than a specific property interest, the *Nollan/Dolan* “rough proportionality” test does not apply to monetary exactions.⁴⁰

B. Exactions Jurisprudence: The Nollan/Dolan Rough Proportionality Test

³⁴ *Id.* at 627.

³⁵ *Id.* at 632.

³⁶ *Id.*

³⁷ *Id.* at 624.

³⁸ *Id.* at 635.

³⁹ *Id.* at 626.

⁴⁰ *Id.*

To understand the implications of the Supreme Court's decision in *Koontz*, it is also helpful to understand the application of the two-part test that the Court established in deciding *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*.

1. *Nollan v. California Coastal Commission*: The "Essential Nexus" Requirement

In *Nollan*, the Supreme Court held that a taking occurs when the government demands an exaction (i.e., when the government demands a property right by attaching a condition to a land-use permit application) that lacks an "essential nexus" with a police power objective.⁴¹ In other words, the Court found that there must be a sufficient connection between the exaction as the means, and the state interest as the end.⁴²

The Nollans owned a beachfront lot in California, part of which a dilapidated house covered, and the rest of which consisted of a beach.⁴³ California law required that the Nollans obtain a special coastal development permit in order to build a new home on the lot.⁴⁴ The state coastal commission granted the Nollans' permit application subject to the condition that the Nollans dedicate or grant an easement allowing the public to cross their lot so people have full access to the public beach because such a public access easement would allow the public to cross the dry sand part of the Nollans' lot during high tide.⁴⁵ The Nollans argued that the public access easement condition was a taking, while the Commission argued that three state interests supported the easement: (1) protecting the public's ability to see the beach, (2) helping the public overcome a psychological barrier to using the beach, and (3) avoiding beach congestion.⁴⁶

The Court reasoned that the easement had no relationship with the state's argued interests, and although the Nollans' new house might adversely affect these state interests, the easement condition did not

⁴¹ *Nollan v. Cal. Coastal Com.*, 483 U.S. 825, 837 (1987).

⁴² *Id.*

⁴³ *Id.* at 827.

⁴⁴ *Id.* at 828.

⁴⁵ *Id.*

⁴⁶ *Id.* at 829, 835.

prevent or mitigate this problem.⁴⁷ The Court found that the easement condition had no logical connection to the “view from the street” or “psychological impact” interests, and thus decided this was an unconstitutional taking.⁴⁸ Absent this connection, the government needed to pay the Nollans just compensation for the easement; otherwise, the easement would be an unconstitutional condition that violated the Nollans’ right to just compensation.

2. *Dolan v. City of Tigard*: The “Rough Proportionality” Requirement

Moreover, in *Dolan*, the Supreme Court built upon the “essential nexus” requirement when it held that a government demand that lacks “rough proportionality” to the impacts of the proposed project is an unconstitutional taking.⁴⁹ Dolan owned a store and planned to double its size, pave a gravel parking lot, and construct an additional retail building on her land, all of which was consistent with the city’s zoning scheme.⁵⁰ The city granted Dolan’s application for a building permit, but imposed two conditions: (1) because her project would increase the amount of impervious surface on the land—thus increasing storm-water runoff into the adjacent creek—Dolan was required to dedicate to the city the part of her land lying within the creek’s 100-year floodplain; and (2) because the expanded store would attract additional customers—thus increasing traffic congestion on local streets—the city insisted that Dolan also dedicate an easement for a pedestrian/bicycle pathway over a fifteen-foot strip of her land.⁵¹ These conditions effectively required her to dedicate about ten percent of her land to the city.⁵² The Supreme Court reasoned that the dedications the city demanded lacked the required degree of connection with the impacts of the project.⁵³ The Court found that a less intrusive condition, allowing Dolan to retain title to the floodplain land, could satisfy the city’s interest in flood control while prohibiting future development.⁵⁴ Further, there was no evidence that the pathway easement was adequately related to

⁴⁷ *Id.* at 838–39.

⁴⁸ *Id.*

⁴⁹ *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

⁵⁰ *Id.* at 379.

⁵¹ *Id.* at 379–80.

⁵² *Id.* at 380.

⁵³ *Id.* at 394–95.

⁵⁴ *Id.* at 393–94.

the increased traffic that the project would cause.⁵⁵ The Court thus held that this was an unconstitutional taking.⁵⁶

In turn, the Supreme Court created the two-part *Nollan/Dolan* “rough proportionality” test, to apply to land exactions: (1) when the government demands an exaction, it must have an “essential nexus” with a police power objective;⁵⁷ and (2) the government demand must be “rough[ly] proportional[.]” to the proposed project.⁵⁸ In *Koontz*, Justice Alito noted that *Nollan* and *Dolan* involved a “special application” of the unconstitutional conditions doctrine to the Fifth Amendment right to just compensation because land use permit applicants are “especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits.”⁵⁹ He reasoned that the government often has broad discretion to deny a land use permit if an owner does not “voluntarily giv[e] up property for which the Fifth Amendment would otherwise require just compensation,” and that “many proposed land uses threaten to impose costs on the public that dedication of property can offset.”⁶⁰

This is a higher level of scrutiny compared to the level of scrutiny to which ordinary regulatory takings are subject under alternative regulatory takings tests, such as the three-part *Penn Central* balancing test, and the categorical exception established in *Lucas v. South Carolina Coastal Council*.

C. Alternative Regulatory Takings Tests

1. *Penn Central Transportation Co. v. New York City*: The Three-Part Balancing Test

In *Penn Central Transportation Co. v. New York City*, the Supreme Court adopted a less stringent regulatory takings test, prior to its *Nollan* and *Dolan* decisions, that tilts more in the government’s favor.⁶¹

⁵⁵ *Id.* at 395.

⁵⁶ *Id.* at 396.

⁵⁷ *Nollan v. Cal. Coastal Com.*, 483 U.S. 825, 837 (1987).

⁵⁸ *Dolan*, 512 U.S. at 391.

⁵⁹ *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604–05 (2013).

⁶⁰ *Id.* at 605.

⁶¹ *Penn. Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 124 (1978).

In *Penn Central*, the eight-story Grand Central Terminal was considered historically significant and was designated a landmark under the city landmarks preservation law.⁶² Under this law, any change in the exterior architectural features of a landmark, or construction of any exterior improvement on a site, required advance approval from a city commission.⁶³ However, the city ordinance also allowed the owner of a landmark to transfer unused development rights from the landmark parcel to other nearby parcels.⁶⁴ In this case, the owners of the Penn Central terminal property leased the airspace above the terminal to UGP Properties for a fifty-year term.⁶⁵ Without the lease, the existing terminal provided Penn Central with a reasonable return on its investment, but the lease would provide millions of dollars of additional income each year.⁶⁶ UGP's plan to construct a fifty-five-story office building in the airspace above the terminal required approval from the landmarks commission, which rejected both the initial design and the fifty-three-story alternative proposal, based mainly on aesthetic considerations.⁶⁷ Penn Central filed suit, alleging that the application of the landmarks law to the property was an unconstitutional taking.⁶⁸

The Supreme Court held that a three-part balancing test applies to determine when a regulation constitutes a taking.⁶⁹ The three factors under this ad hoc approach include: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation interferes with the property owner's distinct investment-backed expectations; and (3) the character of the government action.⁷⁰ The Court reasoned that under the first prong, even without the office building, Penn Central could derive a reasonable return on investment operating as usual.⁷¹ Additionally, Penn Central could still seek to construct a smaller office building in the airspace or transfer the valuable development rights to another parcel.⁷² Under the second prong, the Court

⁶² *Id.*

⁶³ *Id.* at 115–16.

⁶⁴ *Id.* at 113–14.

⁶⁵ *Id.* at 116.

⁶⁶ *Id.*

⁶⁷ *Id.* at 116–18.

⁶⁸ *Id.* at 119.

⁶⁹ *Id.* at 124.

⁷⁰ *Id.*

⁷¹ *Id.* at 136.

⁷² *Id.* at 137.

reasoned that the law did not interfere with Penn Central's primary investment-backed expectation concerning use of the parcel (i.e., operating the terminal as it was already used for the last sixty-five years).⁷³ Finally, under the third prong, the Court found that the landmarks law was a regulation reasonably related to the promotion of the general welfare rather than a physical invasion by the government.⁷⁴

In contrast to the *Nollan/Dolan* approach, the *Penn Central* test imports a lesser level of scrutiny for reviewing ordinary regulatory takings because generally applicable statutes trigger the test, and such statutes tend to serve a broad purpose for the public welfare (e.g., ensuring sufficient affordable housing, mitigating environmental impacts).⁷⁵ The *Nollan/Dolan* approach considers the means used to achieve the government's end, which is a higher level of scrutiny because it considers specific impacts that certain conditions have on property owners' rights.⁷⁶ However, lower court cases have demonstrated that local governments tend to legislatively enact monetary demands for development approval to bypass heightened scrutiny.⁷⁷ As a result, regulatory takings claims are typically resolved in the government's favor.⁷⁸

2. *Lucas v. South Carolina Coastal Council*: The Total Economic Wipeout Exception to *Penn Central*

Furthermore, the Supreme Court described a categorical exception to the *Penn Central* standard in *Lucas*: the ad hoc, case-specific inquiry that *Penn Central* requires is not necessary where the government "denies all economically beneficial or productive use of land."⁷⁹

In *Lucas*, a real estate developer paid Lucas 975 thousand dollars for two beachfront lots in a residential development located on Isle of Palms in South Carolina.⁸⁰ At the time, a state statute required that owners of certain coastal lands—including beaches and areas adjacent

⁷³ *Id.* at 136.

⁷⁴ *Id.* at 138.

⁷⁵ *Id.* at 124–25.

⁷⁶ *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 615 (2013).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

⁸⁰ *Id.* at 1006.

to sand dunes—obtain a permit before developing their property.⁸¹ Because Lucas’s lots were 300 feet away from the beach when he purchased them, the statute did not apply.⁸² However, for years, the lots were either part of the beach or flooded regularly by the ebb and flow of the tide.⁸³ Two years after Lucas’s purchase, South Carolina adopted a more comprehensive statute to preserve its shoreline and beaches, and the state legislature explained that by preserving the beach/dune system as a barrier to hurricanes and other storms, the statute would protect life and property from serious injury.⁸⁴ The statute thus prohibited all construction along a long stretch of shoreline, including both of Lucas’s lots.⁸⁵ The trial court found that a regulatory taking occurred since the value of Lucas’s lots were reduced to zero and awarded more than \$1.2 million in compensatory damages.⁸⁶ The South Carolina Supreme Court reversed, finding that the statute was a valid exercise of police power to prevent nuisance-like activities.⁸⁷ The Supreme Court then carved out a special exception to the *Penn Central* standard: if regulation causes loss of all economically beneficial or productive use of land, unless justified by background principles of property or nuisance law, a taking will be found.⁸⁸ The Court reasoned that the statute clearly eliminated all economically beneficial or productive use of Lucas’s land and remanded the case to determine if the statute could otherwise be justified under background principles of South Carolina law, although the Court expressed that this seemed unlikely.⁸⁹

The Court noted that if the only economically productive use of personal property is to sell it or to manufacture it for sale, then the property owner ought to be aware of the possibility that government regulation may render his personal property worthless without triggering a taking, since the government retains a high degree of control over commercial dealings.⁹⁰ Relying on the historical value of land, the Court then reasoned that there was an implied limitation on the government’s ability to eliminate all economically valuable use of land

⁸¹ *Id.* at 1007–08.

⁸² *Id.* at 1008.

⁸³ *Id.* at 1038.

⁸⁴ *Id.* at 1037.

⁸⁵ *Id.* at 1009.

⁸⁶ *Id.*

⁸⁷ *Id.* at 1009–10.

⁸⁸ *Id.* at 1019 n.8.

⁸⁹ *Id.* at 1027.

⁹⁰ *Id.* at 1027–28.

because doing so is inconsistent with the Takings Clause and “constitutional culture.”⁹¹ Thus, the Court in *Lucas* distinguished between the constitutional value of real and personal property due to the distinct historical value of each.⁹² Since money is personal property, the Court’s distinction in *Lucas* is important for considering monetary exactions under the *Nollan/Dolan* regulatory takings framework.

D. Important Background Concepts for Understanding Application of the Koontz Decision

Before analyzing lower federal and state court applications of the Supreme Court’s *Koontz* decision, it is helpful to understand how the Supreme Court has historically given greater value to real property than to personal property. It is also useful to know how the unconstitutional conditions doctrine fits within the land use context and to be aware of the differing perspectives on monetary exactions.

1. The Value of Real vs. Personal Property

Historically, the Supreme Court has distinguished between the value of real and personal property⁹³ because of the uniqueness and immobility of land.⁹⁴ For instance, the Court has held that the government’s permanent physical occupation on *real* property constitutes a taking,⁹⁵ and regulatory takings that deprive a landowner of his *real* property trigger a takings violation.⁹⁶ As mentioned above, the Court in *Lucas* distinguished between the historical constitutional value of real and personal property, reasoning the government’s authority to regulate commerce potentially allows it to render personal property that is only sold (or is only manufactured to sell) valueless, without violating the Takings Clause.⁹⁷

However, in *Horne v. Department of Agriculture*, where the government required raisin farmers to relinquish a portion of their

⁹¹ *Id.* at 1028.

⁹² *Id.* at 1027–28.

⁹³ William S. Macdaniel, *No Appropriation Without Compensation: How Per Se Takings of Personal Property Check the Power to Regulate Commerce*, 48 ST. MARY’S L.J. 509, 524 (2017).

⁹⁴ Craig A. Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 307 (2002).

⁹⁵ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

⁹⁶ *Lucas*, 505 U.S. at 1027–28.

⁹⁷ *Id.*

raisins as a condition for approval to engage in interstate commerce, the Court held that actually taking possession and control of tangible personal property gives rise to a *per se* physical taking in violation of the Fifth Amendment.⁹⁸ The property owners in *Horne* relied on the narrow, categorical framework established in *Loretto v. Teleprompter Manhattan CATV*—that a “permanent physical occupation” destroying every strand in the bundle of property rights is an unconstitutional taking.⁹⁹ Justice Sotomayor vehemently dissented, arguing that retention of even one property right (i.e., the rest of the raisins) defeats a *per se* physical takings claim.¹⁰⁰ She instead maintained that the *Penn Central* regulatory takings test should govern Horne’s claim against capping production of tangible personal property sold in interstate commerce.¹⁰¹ Because the government was not “storming raisin farms in the dark of night to load raisins into trucks,” and was instead simply requiring the Hornes to set aside a portion to limit the number sold on the market and to arrange “the orderly disposition” of raisins that would otherwise exceed the cap, Justice Sotomayor found that these regulatory purposes should have been analyzed under *Penn Central*.¹⁰² This emphasizes a point that the Court construed in the earlier *Andrus v. Allard* case, where Justice Brennan reasoned, “where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety.”¹⁰³ Justice Sotomayor cited *Andrus* in her dissent to highlight that reducing property value is not necessarily equated with a taking.¹⁰⁴

The Court’s discussion in both *Horne* and *Andrus* is relevant to monetary exactions and the *Koontz* decision because property owners whose land use permits are denied as a result of failing to—or rejecting the government’s demand to—pay money to mitigate the impacts of their development proposals still retain the rights to their land. The demand for money is an independent personal property interest not tied to the actual development of real property. Such a demand merely

⁹⁸ *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2428, 2430 (2015).

⁹⁹ *Id.* at 2437 (Sotomayor, J., dissenting) (citing *Loretto*, 458 U.S. at 426).

¹⁰⁰ *Id.* at 2437–38.

¹⁰¹ *Id.*

¹⁰² *Id.* at 2438, 2442 (Sotomayor, J., dissenting).

¹⁰³ *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979) (holding that no unconstitutional taking occurred where the Secretary of the Interior prosecuted appellee artifact owner for selling artifacts composed of feathers from birds statutorily protected, prior to the enactment of the protective statutes).

¹⁰⁴ *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2439–40 (2015) (Sotomayor, J., dissenting) (citing *Andrus*, 444 U.S. at 66–67).

arises from the land use permitting process, which Justice Kagan argued is not a sufficient basis upon which to claim an unconstitutional taking.¹⁰⁵ This is in line with the idea that reducing property value, such as not approving a development permit, is not necessarily a taking.¹⁰⁶

Moreover, in *Eastern Enterprises v. Apfel*, the Court held that the retroactive application of a federal statute that required a former mining company (Eastern Enterprises) to pay large sums of money for retired employees' health benefits was a taking that did not pass constitutional muster under the *Penn Central* balancing test.¹⁰⁷ Most notably, Justice Kennedy argued in his *Eastern Enterprises* opinion (concurring in part and dissenting in part), that no taking occurred because the law did not "operate upon or alter" a "specific and identified property or property right," and that the law "simply impose[d] an obligation to perform an act, the payment of benefits."¹⁰⁸ He further noted that the law did not "appropriate, transfer, or encumber an estate in land, a valuable interest in intangible property, or even a bank account or accrued interest."¹⁰⁹ This case is significant because it emphasizes that a government demand for a monetary payment cannot be equated to an encumbrance or an actual transfer of property rights.¹¹⁰ Justice Kagan relies on this point in her *Koontz* dissent to underscore that ordinary government-imposed financial obligations are permissible and do not trigger Takings Clause protections.¹¹¹

After considering the value of real versus personal property, it is helpful to understand how the unconstitutional conditions doctrine is applied in the land use context.

2. The Unconstitutional Conditions Doctrine in the Land Use Context

Speaking broadly, when the government withholds a benefit because an individual exercises a constitutional right, or because an individual refuses to forfeit his constitutional right, the government violates the unconstitutional conditions doctrine.¹¹²

¹⁰⁵ *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 613 (2013).

¹⁰⁶ *Andrus*, 444 U.S. at 66–67.

¹⁰⁷ *E. Enterprises v. Apfel*, 524 U.S. 498, 503, 538 (1998).

¹⁰⁸ *Id.* at 540 (1998) (Kennedy, J., concurring in judgment and dissenting in part).

¹⁰⁹ *Id.* at 503, 540 (1998).

¹¹⁰ *Id.*

¹¹¹ *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 620 (2013) (Kagan, J., dissenting).

¹¹² *Id.* at 604–05 (2013) (majority opinion).

Land use permits are benefits issued at local governments’ discretion.¹¹³ Thus, in the land use context, when local governments attach conditions to land use permits, they implicate the unconstitutional conditions doctrine because such conditions may require a property owner to forfeit his right to just compensation.¹¹⁴ It does not matter whether a local government denies a permit because it rejects conditions that the permit applicant proposed, or whether the government denies a permit because an applicant refused to accept conditions that the government imposed.¹¹⁵ Regardless, the government cannot leverage a property owner’s development permit approval against his right to just compensation without violating the unconstitutional conditions doctrine.

3. Differing Perspectives on Monetary Exactions

From the property owner’s perspective, the Supreme Court’s decision in *Koontz* was a victory because it eliminated the distinction between a government demand for real property or money, thus requiring any condition attached to a land use permit to pass constitutional muster under *Nollan/Dolan* heightened scrutiny.¹¹⁶ *Koontz* limited the government’s ability to use permitting processes and other land use restrictions as leverage to force property owners to perform various public services.¹¹⁷ Without the Court’s *Koontz* decision, the government could practically wipe out property owners’ rights by refusing to allow them to develop their land unless they meet the state’s demands.¹¹⁸

From the local community’s perspective, if redevelopment projects are successful, there might not be sufficient affordable housing

¹¹³ Brandon L. Bowen, *An Overview of Local Government Land Use Regulation*, JENKINS, BOWEN AND WALKER, P.C., jbwpc.com/Articles/Zoning-and-Land-Use-The-Basics/AN-OVERVIEW-OF-LOCAL-GOVERNMENT-LAND-USE-REGULATION.shtml (last visited Feb. 20, 2020).

¹¹⁴ Peter A. Clodfelter & Edward J. Sullivan, *Substantive Due Process: Through the Just Compensation Clause: Understanding Koontz’s “Special Application” of the Doctrine of Unconstitutional Conditions by Tracing the Doctrine’s History*, 46 URB. LAW. 569, 596 (2014).

¹¹⁵ *Id.*

¹¹⁶ Aaron McKean, *Local Government Legislation: Community Benefits, Land Banks, and Politically Engaged Community Economic Development*, 24 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 133, 149 (2015).

¹¹⁷ Ilya Somin, *Two Steps Forward for the “Poor Relation” of Constitutional Law: Koontz, Arkansas Game & Fish, and the Future of the Takings Clause*, in CATO SUPREME COURT REVIEW 2012-2013, at 216 (Ilya Shapiro ed., 2013).

¹¹⁸ *Id.* at 217.

infrastructure to offset the economic forces that push low-income residents out of their neighborhoods in the wake of *Koontz*.¹¹⁹ Thus, the *Koontz* holding—that the government must satisfy heightened scrutiny under *Nollan* and *Dolan* when it imposes monetary exactions on construction permits—raised residents’ concerns about development project impacts on, e.g., affordable housing and environmental impacts.¹²⁰

From the local government’s perspective, *Koontz* restricted municipalities’ ability to fund infrastructural maintenance and improvements.¹²¹ Revenues that local governments collected from monetary exactions financed the necessary improvements that new development created, such as managing growth as more residents utilized public transportation and maintaining public parks.¹²² Infrastructure and buildings form a city’s character for years to come, and requiring developers to finance infrastructural maintenance or improvements to offset development impacts can significantly improve cities.¹²³ Local and municipal governments have tight budgets and must be able to fund public improvements.¹²⁴ Thus, both property owners and developers should share the publicly generated costs to help local governments pay for bridges, transit systems, parks, affordable housing, and other improvements.¹²⁵

II. Lower Court Applications of *Koontz*

On remand, the Florida District Court of Appeal held consistent with the U.S. Supreme Court’s decision in *Koontz* after applying the *Nollan/Dolan* “essential nexus” and “rough proportionality” test.¹²⁶ However, one of the judges dissented, heavily echoing Justice Kagan’s dissenting opinion in *Koontz*.¹²⁷

Other than *Koontz* on remand, nearly all of the post-*Koontz* cases involving monetary exactions and the “rough proportionality”

¹¹⁹ McKean, *supra* note 115, at 161–62.

¹²⁰ *Id.*

¹²¹ *Id.* at 148.

¹²² Lourdes Germán & Allyison E. Bernstein, *Land Value Capture: Tools to Finance Our Urban Future*, LINCOLN INST. LAND & POL’Y (2018).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *St. Johns River Water Mgmt. Dist. v. Koontz*, 183 So. 3d 396, 398 (Fla. Dist. Ct. App. 2014).

¹²⁷ *Id.* at 399–403 (Griffin, J., dissenting).

test were unsuccessful.¹²⁸ This reveals that even under *Nollan/Dolan* heightened scrutiny, a takings claim based on a monetary exaction is highly unlikely to prevail as courts still usually decide in the government’s favor. Further, this magnifies Justice Kagan’s dissenting point that monetary exactions should not be subject to the “rough proportionality” test in the first place since they are not unconstitutional conditions that violate the Takings Clause.

After analyzing the one successful post-*Koontz* case, several unsuccessful cases are also analyzed to help understand that time will continue to reveal that Justice Kagan’s dissent was correct: monetary exactions are not unconstitutional conditions, subjecting monetary exactions to the *Nollan/Dolan* test is ultimately ineffective, and the *Penn Central* test should instead govern monetary exaction takings claims.¹²⁹

A. A Successful post-Koontz Case: Key Takeaway

In *Levin v. City & County of San Francisco*, the court held that imposing monetary exactions on a property owner for withdrawing its apartment units from the rental market did not satisfy the *Nollan/Dolan* two-part test and was thus an unconstitutional taking.¹³⁰

The city and county of San Francisco enacted an ordinance requiring property owners who wished to withdraw their rent-controlled property from the rental market to pay a monetary sum to tenants evicted as a result of their withdrawal, which essentially cost the property owners hundreds of thousands of dollars per unit.¹³¹ The city government’s rental control plan restricted rent increases to a rate lower than inflation, which decreased property owners’ return on investment.¹³² The plan also required landlords to pay relocation expenses for tenants undergoing no-fault eviction.¹³³ In addition to the problematic aspect of the ordinance that required landlords to pay such large amounts to no-fault evicted tenants, the ordinance required property owners wishing to withdraw from the rental market to apply to the city

¹²⁸ See, e.g., *Edwards CDS, LLC v. City of Delray Beach*, No. 9:15CV81405(DMM), 2016 U.S. Dist. LEXIS 188544, at *16–17 (S.D. Fla. July 25, 2016).

¹²⁹ *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604–05 (2013).

¹³⁰ *Levin v. City & Cty. of San Francisco*, 71 F. Supp. 3d 1072, 1082–84 (N.D. Cal. 2014).

¹³¹ *Id.* at 1074.

¹³² *Id.* at 1075.

¹³³ *Id.* at 1075–76.

for a permit authorizing them to do so.¹³⁴ As a condition of permit approval, the ordinance required property owners to pay tenants who were evicted from the withdrawn unit the lump-sum amount.¹³⁵ Failure to pay allowed tenants to continue occupying their apartment units.¹³⁶

In applying the *Nollan/Dolan* “rough proportionality” test, the court held that the statute was an unconstitutional taking because it conditioned property owners’ right to withdraw their property from the rental market on a monetary exaction not sufficiently related to the impact of the withdrawal.¹³⁷ The court reasoned that San Francisco’s payout requirement lacked an essential nexus and was not roughly proportional to withdrawing from the rental market, because the requirement to pay money in order to receive permit approval was “directly linked to the property owner’s . . . use of a specific, identifiable unit of property” (i.e., an exaction).¹³⁸ Further, the court found that property owners should not have to pay for a broad rental-market problem they did not create.¹³⁹

However, the court’s reasoning is flawed. For instance, in *Andrus*, the Supreme Court held that the retention of even one property right defeats a takings claim.¹⁴⁰ In *Levin*, because the property owners retained the rights to their apartment units—whether they fulfilled their monetary obligation to withdraw from the rental market, or not—a requirement to pay evicted tenants as a condition of the owners’ withdrawal should not be considered an unconstitutional condition under the *Nollan/Dolan* framework.¹⁴¹ As Justice Kennedy persuasively mentioned in his *Eastern Enterprises* opinion, monetary payment cannot be viewed the same as an encumbrance or a transfer of property rights.¹⁴² For instance, in *Levin*, the statute required payment to exit the rental market, rather than payment to offset development impacts.¹⁴³ This is beyond the scope of the *Nollan/Dolan* test because a statutory

¹³⁴ *Id.* at 1081.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 1074.

¹³⁸ *Id.* at 1083.

¹³⁹ *Id.* at 1086.

¹⁴⁰ *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979).

¹⁴¹ *Levin*, 71 F. Supp. 3d at 1076.

¹⁴² *E. Enterprises v. Apfel*, 524 U.S. 498, 503, 568 (1998) (Kennedy, J., concurring in part and dissenting in part).

¹⁴³ *Id.*

use restriction requiring monetary payment is outside of the land use permitting process, and is thus distinct from deeding over a property right or conditioning individual permit approval on financial obligations.¹⁴⁴ Such a requirement should instead be evaluated under the *Penn Central* regulatory takings framework because a statutorily imposed monetary obligation broadly applies to benefit the public and is not equal to an individualized municipal board demand for money in exchange for permit approval.¹⁴⁵

Therefore, application of the *Nollan/Dolan* “rough proportionality” test is not necessary in a case like *Levin* because the fee was legislatively imposed in an attempt to control the housing rental market. Justice Kagan stated in her *Koontz* dissent that the *Penn Central* test balances the government’s need to pass laws that may adversely affect economic values with the longstanding recognition that some regulation goes too far.¹⁴⁶ In *Levin*, the city’s regulation of the rental control market should have thus been analyzed under the *Penn Central* approach since it ultimately diminished the property owners’ return on investment without encumbering ownership of their apartment units.

B. Unsuccessful Post-Koontz Takings Claims: Key Takeaways

In addition to *Levin*, there are several lower court cases illustrating that Justice Kagan’s *Koontz* dissent was correct in concluding that demands for monetary exactions in exchange for development permit approval are not unconstitutional conditions. The unsuccessful monetary exactions cases shed further light on the idea that takings claims based on monetary exactions should be resolved under the *Penn Central* test.¹⁴⁷

For example, in *Home Builder’s Ass’n of Greater Chicago v. the City of Chicago*, the city demanded a real estate developer to either pay a 200,000 dollar fee or to dedicate two housing units for rent or

¹⁴⁴ *Levin*, 71 F. Supp. 3d at 1085.

¹⁴⁵ *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 630–32 (2013) (Kagan, J., dissenting).

¹⁴⁶ *Id.* at 621.

¹⁴⁷ *Id.* at 632; see, e.g., *Bldg. Indus. Ass’n – Bay Area v. City of Oakland*, 289 F. Supp. 3d 1056, 1058–59 (N.D. Cal. 2018); *Home Builders Ass’n of Greater Chicago v. City of Chicago*, 213 F. Supp. 3d 1019, 1024, 1026 (N.D. Ill. 2016); *Cal. Bldg. Indus. Ass’n v. City of San Jose*, 351 P.3d 974, 992–94 (Cal. 2015).

sale to low-income residents in order to comply with a city ordinance after the developer purchased commercial property and sought rezoning to obtain a building permit.¹⁴⁸ The court held that the monetary fee in lieu of setting aside two of the housing units under the ordinance did not violate the unconstitutional conditions doctrine, reasoning that a property use restriction does not require just compensation unless it is a regulatory taking under the *Penn Central* test.¹⁴⁹ The court found that a permissible use restriction that does not violate the Takings Clause under the regulatory takings framework could not possibly be an unconstitutional condition and thus would not even require consideration under the *Nollan/Dolan* test.¹⁵⁰ Therefore, the court did not apply the “rough proportionality” test to the Chicago ordinance at all because the property owners just assumed that the “rough proportionality” test applied without first alleging that the ordinance was a regulatory taking.¹⁵¹

Additionally, in *California Building Industry Association v. City of San Jose*, the city enacted an inclusionary housing ordinance that required new residential development projects of twenty or more units to sell at least fifteen percent of the for-sale units at an affordable housing price for low- and middle-income households.¹⁵² As an alternative, the developer could instead:

- (1) construct off-site for-sale affordable housing units,
- (2) pay an in lieu fee based on the median sales price of a housing unit affordable to a moderate-income family,
- (3) dedicate land equal in value to the applicable in lieu fee, or (4) acquire and rehabilitate a comparable number of inclusionary units that are affordable to low- or very low-income households.¹⁵³

CBIA filed suit, claiming that the inclusionary housing ordinance was an unconstitutional condition in violation of the Takings Clause.¹⁵⁴ The California Supreme Court held that the ordinance was

¹⁴⁸ *Home Builders Ass’n of Greater Chicago*, 213 F. Supp. 3d at 1021.

¹⁴⁹ *Id.* at 1024, 1026.

¹⁵⁰ *Id.* at 1026.

¹⁵¹ *Id.* at 1025.

¹⁵² *Cal. Bldg. Indus. Ass’n*, 351 P.3d at 978.

¹⁵³ *Id.* at 982–83.

¹⁵⁴ *Id.* at 996.

not an unconstitutional condition and was also not a taking.¹⁵⁵ The court reasoned that the unconstitutional conditions doctrine is not implicated unless the government requires a property owner to convey an identifiable property interest—i.e., an exaction—to the government.¹⁵⁶ Here, the court held that the price control restriction was not an exaction, finding that if a restriction on property use does not constitute a taking outside of the permit process, then the permit applicant is not forced to give up its right to just compensation.¹⁵⁷ The court reasoned that validity of the inclusionary housing ordinance in this case did not depend on whether the price controls were reasonably related to the developmental impact on affordable housing (i.e., heightened scrutiny), but rather depended on whether the ordinance was “reasonably related to the broad general welfare purposes for which the ordinance was enacted” as a regulatory taking.¹⁵⁸ Here, the court decided that price controls could be impermissible if they constitute a regulatory taking under *Penn Central* (although not so in this case), but price controls are not exactions subject to heightened scrutiny.¹⁵⁹

Moreover, in *Building Industry Association – Bay Area v. City of Oakland*, the city ordinance required developers to display or fund art as a condition of project approval.¹⁶⁰ However, if an affordable housing developer could show that compliance costs would make its project economically infeasible, it did not need to comply with the ordinance.¹⁶¹ The property owners brought a takings claim alleging that the ordinance was an exaction that violated the *Nollan/Dolan* test.¹⁶² The court held that the *Penn Central* framework applies to broad regulations like this one, reasoning that the exactions doctrine only applies to individual, adjudicative decisions rather than to generally applicable land use regulations.¹⁶³

The unsuccessful post-*Koontz* cases teach us that legislatively enacting an ordinance requiring property owners to pay money to develop their property, instead of delegating that authority to land use

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 990.

¹⁵⁷ *Id.* at 991–92.

¹⁵⁸ *Id.* at 1000–01.

¹⁵⁹ *Id.* at 991–94.

¹⁶⁰ *Bldg. Indus. Ass’n – Bay Area v. City of Oakland*, 289 F. Supp. 3d 1056, 1057 (2018).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 1058.

officials who condition individual permits on monetary payment, allows local governments to essentially bypass the *Nollan/Dolan* “rough proportionality” standard.¹⁶⁴ Overall, these cases also demonstrate judicial reluctance to subject monetary obligations regarding property regulation to heightened scrutiny under *Nollan* and *Dolan*.

In conclusion, both the successful and unsuccessful lower court applications of *Koontz* illustrate that Justice Kagan’s dissenting opinion was correct. Monetary exactions are not unconstitutional conditions that should be subject to the *Nollan/Dolan* “rough proportionality” two-part test and can rather be decided under the *Penn Central* three-part balancing test to determine whether statutorily-imposed monetary obligations violate the Fifth Amendment Takings Clause.¹⁶⁵ With respect to the facts of the *Koontz* case, this is true because the court could have evaluated the Florida state law, which authorized the St. Johns Water Management Board to condition permit approval on monetary payment to mitigate environmental impacts of development on public wetlands, under the *Penn Central* balancing test for regulatory takings.¹⁶⁶

CONCLUSION

After understanding *Koontz* and the alternative regulatory takings tests, it is apparent that Justice Kagan’s dissenting opinion in *Koontz* was correct.¹⁶⁷ Most notable are Justice Kagan’s propositions that monetary exactions are not unconstitutional conditions and thus can be decided under the *Penn Central* three-part balancing test.¹⁶⁸ Additionally, greater regulation of personal property than real property is historically justified. Finally, the different perspectives on monetary exactions clarify that the government has a serious interest in offsetting certain development impacts.¹⁶⁹ From a public policy standpoint, this supports Justice Kagan’s conclusion that monetary exactions should be subject to ordinary scrutiny under the *Penn Central* framework which is applicable to regulatory takings.

¹⁶⁴ See, e.g., *id.* at 1056.

¹⁶⁵ *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 632 (2013) (Kagan, J., dissenting).

¹⁶⁶ *Id.* at 601 (majority opinion).

¹⁶⁷ *Id.* at 630 (Kagan, J., dissenting).

¹⁶⁸ *Id.* at 632.

¹⁶⁹ Germán & Bernstein, *supra* note 121.

EQUAL RIGHTS AMENDMENT CONFERENCE TRANSCRIPTION

MaryAnn Grover: Good morning everyone. We're just about to get started. Um . . . So, I'd like to welcome you to "A New Era for the Equal Rights Amendment." My name is MaryAnn Grover, and I'm a member of the planning committee for this event. I have the distinct pleasure of welcoming you all to my alma mater, the University of Richmond School of Law. Thank you all for joining us to . . . today to explore the legal implications of the Equal Rights Amendment. It is our hope that Virginia becomes the final state required to enact the Equal Rights Amendment. The passage of the ERA in Virginia, though, raises the questions we'll examine throughout the day today, like "what legal challenges is the ERA likely to face?" and "what effect will the ERA have once it is passed?" The brilliant speakers and panelists we have with us today have and continue to contribute to the larger equality movement. They have so much to teach us and we are honored to have them with us. So, we thank them, and you, for being here and being willing to engage in this dialogue. I'd be remiss if I also didn't take a moment to thank a few women who were integral in the planning of this event. Particularly, I'd like to thank Michelle Callhan, our fearless leader, who has been running around all morning and helping plan this event, Katie Hornock and the whole VA Ratify ERA Team, who provided us with the institutional support we really needed to put on this event, as well as Brittany Jones Record and Chris Shwallace who were indispensable in the planning of this event and the coordinating of all of our panelists. Finally, I'm thrilled to thank our keynote sponsors: the ERA Coalition, Feminist Majority Foundation, the McIntosh Foundation, Paul Weiss, Rethinking Eve, and Winston & Strong, as well as our Community Sponsors.

Moderating our first panel is Jessica Mary Samuels. Jessie recently joined Virginia's Office of the Attorney General, where she works as an assistant Solicitor General litigating on behalf of the Commonwealth. Jessie grew up here in Richmond and then attended Dartmouth College and Yale Law School. After graduating law school, she clerked on the District Court of Connecticut and the 2nd Circuit

Court of Appeals. Jessie also spent two years litigating class actions and financial services cases at Covington & Burling in D.C. before moving to Richmond this fall.

Without further ado, Jessie.

Jessica Mary Samuels: Thank you. Good morning everybody. Thank you for being here.

We're so glad you're here, um, and we're really excited for this event, um, so thanks for coming out on a Saturday morning. Um, it is my great honor to moderate this first panel that we have up for you which, um, I want to reiterate . . . reiterate is some amazing expertise that we're excited to share with you. Um, this morning we're going to be covering, um, some basic background on the ERA, um, the ratification process, um, the fight for the ERA here in Virginia, um, and just kind of going over some background basics to set the stage for the rest of the day. Um, so, I will introduce our panelists and then get us started. Um, our first panelist is Toby Heytens, um, who is the, uh, sixth Solicitor General here in Virginia. He previously spent eight years as a professor at the University of Virginia School of Law where he served as co-director of the Supreme Court Litigation Clinic, coached the three-time national champion undergraduate trial advocacy team, and received an "All University" teaching award in 2016. Toby previously spent three years at the Office of the Solicitor General in the United States Department of Justice where he argued six cases before the U.S. Supreme Court. A former law clerk to Justice Ruth Bader Ginsburg and Chief Judge Edward R. Becker, Toby is a graduate of McAllister College and the University of Virginia School of Law, and I'll also add that he's a great boss.

[Audience laughter]

Um, our next panelist this morning is Kate Kelly. Um, Kate is a zealous advocate and passionate activist. She has a J.D. from American University Washington College of Law, the only law school in the world founded by, and for, women. She is a vocal women's rights champion in the U.S. and around the world. In her legal career, she has worked in several incredible positions, including as an Ella Barker fellow at the Center for Constitutional Rights, a law clerk at the Inter-American Court of Human Rights, a post-grad fellow at the Women's Refugee Commission, an attorney at the RFK Center for

Justice and Human Rights, and she’s currently a human rights attorney at Equality Now. Kate has been actively engaged in the movement to ratify the Equal Rights Amendment since 2012, and she’s been engaged in multiple unratified states, including Virginia. She has written on the ERA in *Teen Vogue*, “Why the United States Constitution Needs an Equal Rights Amendment,” and in *The Advocate*, “The ERA is Queer, and We Are Here for It.” She recently appeared in the MSNBC documentary “The Happened,” about the original fight for the ERA and is creating a podcast about the ERA called “Ordinary Equality” to be released in January 2020.

Um, our final panelist this morning is Representative Abigail Spanberger. Um, U.S. Representative Abigail Spanberger represents Virginia’s 7th Congressional District, which is comprised of ten counties throughout central Virginia. She began her career in public service, first serving as a federal agent with the U.S. Postal Inspection Service, investigating money laundering and narcotics cases, and then serving as a case officer with the Central Intelligence Agency. In the private sector, Representative Spanberger worked with colleges and universities to help them diversify their student bodies and increase graduation rates. Representative Spanberger serves on the U.S. House Committee on Agriculture and the U.S. House Committee on Foreign Affairs. Representative Spanberger grew up in Henrico County, uh, with the ERA in her DNA. Um, her mother was, and still is, a leader for the cause in Virginia and throughout the nation. She earned her B.A. at the University of Virginia and her M.B.A. at a dual degree program between Purdue University’s Krannert School and the G.I.S.M.A. Business School in Hanover, Germany. Representative Spanberger resides in Glen Allen, Henrico County, Virginia, with her husband, Adam, and their three children.

So, thank you again, all, for being with us this morning. We’re pleased to have you. Um, I thought I would start us off with a question to Toby. Um, could you tell us what the ERA is and what it is intended to accomplish?

Toby Heytens: Well, thanks. Um, that’s both a big question, and a question that I suspect many people in this room know far more about than I. Um, but, in . . . in the hopes that it is less familiar to some of you, because I think this is an outreach event, and we’re hoping to

bring in people, so in . . . in the hope that it's less familiar to some people in the room, I'll give some basic background, uh, just to make sure that we're all on the same page for the rest of the day. Uh, the Equal Rights Amendment is a proposed amendment to the United States Constitution. It's quite short. It's quite simple. I'll just read it. Uh, Section One says, "The quality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." Section Two said that, "Congress would have the authority to enforce, by appropriate legislation, the provisions of this article." And then, Section Three said that it would take effect two years after the date of the ratification. Um, so, I mean, it's pretty short. It's pretty straightforward. The text is pretty clearly modeled on a number of amendments that are already in the United States Constitution, uh, and that is not an accident, that was by design. The drafters of the ERA very deliberately modified it after some existing, uh, quality extending amendments that are already part of the Constitution. Um, and this is sort of a really interesting on-going constitutional story because the ERA was proposed by Congress, uh, in 1971, uh, in 1972, and there was an active ratification period between 1972 and 1979, uh, in which thirty-five states ratified the ERA. Uh, thirty-Five is unfortunately less than thirty-eight, which is the number needed to ratify a constitutional amendment. Um, there was originally a deadline, that deadline was extended, uh, at least once, possibly more, but then the deadline eventually . . . the most recent deadline expired, uh, in 1982. Since then, though, there have been efforts, uh, to get additional states to ratify. In terms of the question of what, um, the amendment was intended to accomplish, uh, I . . . I think it's pretty straightforward. Uh, it's in the text of section one. It is intended . . . because the sur— . . . it's surprising to at least a number of people, and it was surprising to me when I first learned it, that with the exception of the guarantee of the right to vote, there is no express textual commitment to sex equality in the U.S. Constitution outside the 19th Amendment, which after all wasn't ratified until the 20th century, so I think the first and foremost goal, I think in the words of my former boss Justice Ginsberg, is simply to recognize the principle of sex and gender equality expressly in the text of the United States Constitution. Um, and even if you didn't think it would change any legal doctrine whatsoever, I think you could take the view that that is an important thing to do in and of itself. Um, but there are of course other goals. The goals, of course, once it's in the Constitution, it's in

the Constitution, and it's not subject to being interpreted out of the Constitution. Um, and there's a lot of other questions, but I think that's . . . that's the basic big picture idea, and I'll kick it back to Jessie.

Samuels: Great. All right. Thank you. We've got another background one for you.

Heytens: Great.

Samuels: Um, [laughter] could you, again, just maybe bring some of us up to speed about, generally, how is the Constitution amended?

Heytens: Sure. Uh, fairly straightforward. I've talked about it a little bit. So, there are actually two ways, although in practice one of them is only ever used. So, there's essentially two parts to creating a Constitutional Amendment. There's the proposal, and there's the ratification, and actually the Constitution in Article V sets out two different options for both proposing and ratifying, but in practice we tend to only use one of them. Um, so, at the proposal, it says that either, uh, Congress can propose it by a two-thirds vote in both houses. This doesn't go to the President, it's not legislation. So, the President, unlike legislation, has no role in the Constitutional ratification process. So, it needs two-thirds vote of both houses of Congress. Alternatively, the States can petition Congress to establish a Constitutional Convention to propose Amendments. That has never actually happened. Um, and not just hasn't happened with regards to the ERA, to the best of my knowledge it has never happened. Um, but one story. A former student of mine wrote a paper about this when he was an undergrad at UVA, and it was basically, the sense is that both the States and Congress are afraid of what a Constitutional Convention might do. If anybody ever empowered a Constitutional Convention to propose Amendments, I think the fear is, God only knows what those people would propose, so let's just not let them do that. Um, so then the process after that is ratification by the states, and this is the place where the ERA has been stopped for a while. Um, the Constitution requires three-quarters of all States to ratify. Obviously, as the number of States increased, the number of States to ratify required. So, in our fifty State, uh, world, it's thirty-eight states you need to ratify. And again, there's an interesting thing, um, the Constitution says you

can do that in one of two ways, uh, and this is actually at the election of Congress, you can either have ratification by state legislatures, which is the route Congress chose for the ERA, or you can have ratified by conventions within the States. Um, I don't know how often that option's been used, that wasn't the option selected for the ERA. Um, so, basically two steps: proposal, ratification. The ERA is currently stuck in the ratification, uh, part of that.

Samuels: Excellent. Thank you, um, for giving us some goo—. . . helpful background with that. Um, Kate we are going to turn it over to you, if you could tell us kind of more specifically about the history of the ERA itself, um, and the three-state strategy.

Kelly: Yeah. Good morning, everyone. [Throat clearing] Sorry about that. Um, so, . . . first a tiny bit of background, um, about the, just the Constitution in general. Um, the constitution, uh, as originally written and as Toby pointed out, excluded women, but this was actually an intentional choice not just, uh, sort of happened because of the times and blah blah blah. Um, the original Constitution, as pointed out in the book *Equal Means Equal*, which if you are very interested in the Equal Rights Amendment, you should read. It's by Jessica Neuwirth and talks about the history of the ERA as long . . . as well as, uh, the many ways in which, uh, it could potentially, uh, help women. And, in the book, it talks about the original Constitution was in part modeled after what the Iroquois Confederacy, and that tribe, uh, included women as full participants. Uh, they were equals in all council and tribal matters, uh, and so, essentially what the founders . . . or the framers of the Constitution did was copy and paste that idea but strip out women. Uh, in fact Benjamin Franklin brought two representatives from this tribe to the original Constitutional Convention, and they asked where women were. Um, they were concerned or interested that there would be any sort of a gathering with only men. Uh, and in addition to that, Abigail Adams, uh, wrote famously letter to her husband about the Constitution, and she said, "Where are the ladies?" Uh, in fact, if you read that letter, it's much much much more, uh, power—. . . powerful and assertive. It goes on to say that women will not beholden . . . be beholden to a Constitution in which they are not represented. Uh, and, so, there were women advocating at the time to be included in the Constitution, and those cries for, uh, full inclusion were ignored. So, women were intentionally left of the

Constitution upon its framing. This was not an oversight. Um, I think that’s important to understand because what we’re doing is not only fixing, you know, this accidental oversight. What we are doing is the . . . uh, fixing this intentional exclusion, and this foundational mistake of leaving women out. Um, and, so, uh, the Equal Rights Amendment was written and envisioned before the 19th Amendment as part of this ongoing, uh, . . . ongoing crusade to include women in our most foundational document. So, Alice Paul, who was a big, uh, part of the suffrage movement and a large reason as to why we have the 19th Amendment, why we can vote in this country, uh, she followed Susan B. Anthony and Elizabeth Cady-Staunton and all the other women, uh, who fought to get the original 19th Amendment with a more powerful tactic and some really extreme . . . or they viewed as extreme . . . uh, ways of doing and being an activist that she learned in the U.K., she came back and then really ramped up the fight for suffrage here.

So, Alice Paul went to law school, um, at American University Washington College of Law, um, my alma mater. She went to law school specifically to learn about the Constitution and to learn how to write the Equal Rights Amendment. So, she wrote the Equal Rights Amendment and, uh, . . . with other people in the movement at the time, she wrote the Equal Rights Amendment and then they proposed it publicly for the first time in 1923 in Seneca Falls. Seneca Falls is where the very first Women’s Rights Convention, uh, and so, this was the anniversary of Seneca Falls, they proposed the Equal Rights Amendment. The Equal Rights Amendment was introduced in every Congress until 1972 and for all of that time, for most of that time, was on both political parties’ platforms. So, it was not seen as a partisan issue until 1972, it was on the Republican Party platform, and, so, it was supported . . . it had wide support in the women’s movement, really it picked up in the 1960s and ‘70s, so did the support for the Equal Rights Amendment, and it was passed in 1972 in Congress. Um, as we have learned, uh, there . . . they fell three states short. So, the deadline, uh, was extended in 1978 before it expired in 1979, and they . . . they extended to 1982. The reason they extended it to 1982, which seems like kind of a weird period of time, like, we’re just going to do it from ‘79 to ‘82, like, why that period of time? Um, and as I’ve been going through on my podcast, I’ve been interviewing a lot of folks who fought for the original, um, Equal Rights Amendment,

and the reason that they did that, it was sort of a concession because the state senates would go longer than that period, so they knew that they could extend that deadline, but it wouldn't threaten the people in the seats in the state senates that were blocking ratification. So, essentially, like, it's a concession because there were hundred of thousands . . . literally one hundred thousand people marching on Washington, demanding a deadline extension, but then they knew [snaps] the state senates would not be in danger, those seats would not be in danger, and they wouldn't actually ratify. So, it was actually a . . . sort of a dastardly deed in order to extend but not get it ratified. And all of these political decisions, that seem sort of random, are actually very intentional to leave women out, and I think its really important to under— . . . understand that context.

So, we fell 3 states short, um, or we were intentionally, uh, . . . the . . . the . . . the anti-ERA movement really ramped up and it . . . that was the same time when all of these culture war arguments were really reaching this crescendo, and, so, there were anti-ERA movements, um, in all the unratified states that just picked up a huge amount of momentum, led by many, uh . . . by many groups including, uh, Phyllis Schlafly's Stop ERA. So, we fell 3 states short. Fast forward a long time . . . essentially the movement, for all intents and purposes, saw a lull. There were many people who never gave up, um, but they . . . the huge, massive movement for the ERA . . . if you're born after 1982 . . . you probably don't know about the ERA, and that's not your fault, it's just that the movement really, uh, hit this lull, or died. Um, and so in, uh, fast forward . . . I'll skip along . . . and I could talk about this for a long time but listen to the podcast. Um, but, uh, fast forward, uh, the Madison Amendment. A lot of folks have heard about the Madison Amendment. So, the Madison Amendment was originally posed . . . proposed by James Madison, uh, and, he, uh, . . . it was about congressional pay and when, uh, Congress can extend their own pay. Uh, that . . . it actually owes, law . . . this is a fascinating story . . . a law student did a paper about the Madison Amendment and got a "C," was outraged, um, that this law professor said that, you know, it was this totally outlandish idea, blah blah blah, so started a campaign to ratify the Madison Amendment, which worked. Uh, and, so, additional states . . . the Madison Amendment was originally written 203 years later, uh, in the early 1990's, the Madison Amendment was amended, and, and . . .

successfully amended and added to the U.S. Constitution. So, this sort of re-sparked the imagination and, um, drive between . . . behind the ERA folks, which had originally said, “Oh so much time has passed,” and, you know, “It’s been since 1982, and its been a decade,” and “It’s too late.” Um, and then an Amendment that has existed for over 200 years gets ratified, and ERA are like, no, ok, if 200 years is not too much, ten is not too much, neither is twenty, neither is thirty. Um, so that really re-sparked what’s called the three state solution discussions

Um, so the three-state solution . . . the idea behind the three state solution is to get those additional three states that we were lacking in the original ratification process . . . and we can talk more about um, you know, the deadline issue and the rescissions issue, and there are, you know, euphemistically, some outstanding legal issues. [Laughter] Um, that’s what I tell people. I’m like, if you want to know more, I’ll tell you more, but there are some outstanding legal issues. [Laughter] Um, so the idea to get the additional three states to ratify and then put the sucker in the Constitution. Um, Nevada ratified . . . Pat Spearman, who is here and going to be speaking later, is a senator, uh, a queer, black, incredible senator from Nevada. She, uh, ramped up the effort to get the ERA ratified in 2017, kind of out of nowhere, like, uh, you know . . . 8I was in Utah at the time, and I wrote the ratification bill. We also had one in Utah in 2017, didn’t get out of committee. Um, so they were successful, but out of nowhere, a new state ratifies, and everyone is like the three state solution is . . . maybe real? Like, uh. Then, in 2018 . . . and we have Linda Coberly and other folks here from Illinois . . . Um, in 2018 Illinois ratified, and all of a sudden, we’re one state away from ratification. There are 13 states left. Um, our . . . I’ve . . . I have worked in many of the states, um, including Arizona and Utah and Georgia and North Carolina and let me tell you, Virginia is our best bet. Um. [Applause] Uh, I applaud the efforts in all of the states, and all of them are vitally important, and even after we get the 38th state, we need people to continue to ratify, um, but the most realistic, most vibrant, most, uh, possible state is definitely Virginia.

Samuels: Great, thank you. On that note, um, you . . . can you fill us in on where are we in Virginia, what’s the history in Virginia?

Kelly: Yes!

Samuels: Um, why . . . why are we in this, uh, important position that we are in?

Kelly: Sure. I'll be brief because I'm not from Virginia, um, so although I did live here for five years, uh, during law school but I, uh, so . . . interestingly enough, Virginia has an interesting history with, um, ratifications in general. Relevant is that the 19th Amendment, uh, which gave women the right to vote, was not ratified in Virginia until February of 1952. Um, so that's after 1920, uh, when everyone else ratified it. Uh, so, uh, so the Virginia legislature decided that women, uh, deserved the right the vote in 1952 uh, it is, uh, nev— . . . better late than never, I guess, um, when it comes to ratification, and I think it's a really great, important, uh, historical movement, to be this 38th state, to be really key, um. So, the ratification, uh, in Virginia . . . correct me if I'm wrong, Eileen Davis and other people know much more about this, um, but has already passed six times in the Virginia senate, uh, so . . . and that's with a Republican, um, majority in the Senate and uh, uh, Sturtevant was the Senate GOP sponsor last year, so again not a partisan issue. Republicans support this issue in Illinois. It also had, um, a Republican, uh, co-sponsor, Steve Anderson, who will be speaking later . . . so, uh, it's passed six times in the Virginia Senate but never been voted on by the House of Delegates. Um, we came very, very, very, heartbreakingly close last year. Um, and, uh, because of this one-seat majority and because of the leadership in the specific . . . not the party, but the leadership of the house, uh, the Virginia House of Delegates did not actually vote, uh, last year, so there's an exciting possibility with, um, upcoming elections, again, I will say, not always on party lines. Um, pro-equality candidates in Virginia are going to put this across the line, um, and that includes, uh, people of both parties. Um, I'm not just saying that because I work at a non-profit that's a nonpartisan organization. I think it's really important for the larger national fight, for us to acknowledge that people, um, across party lines can support equality and should support equality because we have to get . . . as Abigail will speak about . . . we have to get these deadline elimination bills across the finish line, um, and that will include, uh, people of both parties as well.

Samuels: Okay, thank you. Um, so, Congresswoman Spanberger, I was wondering if you could tell us, um, what it was like kind of here on the ground, um, growing up in a home fighting for the ERA in Virginia [laughter] and if you have any stories you might want to share with us [laughter].

Spanberger: [laughter] Uh, so I am so pleased to be here, the panel has been amazing so far. I could listen to you both speak for quite some time, so, um, thank you. Thank you for putting this event on. You know, it’s interesting, uh, and and . . . your question is a clear reference to the fact that my mother is Eileen Davis, who has been, um, involved in the ERA ratification here in Virginia for a very, very long time. So, thank you. [Applause] But the interesting this is, um, I’m the oldest of three daughters, and when I was growing up, uh, my mother was involved in a variety of different forms of advocacy, always with a pretty clear feminist orientation, um, and that’s her background, that’s her pivot, the fact that she has three daughters probably was part of that motivation. Um, but, it was actually when I went off to school that she got really heavily, heavily involved, and so from a story telling standpoint, I would remember coming home to visit, and there’s these buttons everywhere, and there’s these fake dollars everywhere, and I’m thinking isn’t that counterfeiting money, are you sure you can you do that? Um, and then I would hear from all of these different people about, you know, seeing my mother lug her suitcase around on the roll-y cart. Um, but I think that the example that she set, and that so many women who have been working on this for a really long time set, is that when there’s tenacity involved in a fight for basic equality, um, you’ll always be on the right side of history, and it may take a while, decades, perhaps, um, but . . . but I think what I have witnessed in Virginia first as, as a, as a . . . as an observer, then as someone getting involved in politics, and then now as an elected official, there’s been a tremendous shift in Virginia, and I remember a time where it was a couple women, uh, kind of moving into retirement, carrying around . . . you know who you are . . . [laughter] carrying around their papers and their pins, like knocking on doors about the Equal Rights Amendment. And people saying, the what? And, and I think from a legislative perspective, and certainly now having had the experience of running for office and now being in office, there seems to be this idea that we have equality, right? Cause we have women in Congress, less than a quarter of us are

women, but we have women in congress, we have women doctors, and women attorneys, and you have women sort of everywhere, so people think we're at this place, but we're at this place in part because we have put this patchwork of laws together, both at the state level and at the federal level, to try and protect women in a meaningful way, to try and ensure equality in a meaningful way, but at our most basic level, which is the Constitution as the foundation of every law written in the United States of America, we do not have constitutional equality. And, so, it's been interesting to watch the shift that's occurred here in Virginia when it was for a time, uh, . . . and you mention anyone born after a certain year of time just never really heard about it . . . when there, there was this, uh, this group of women, predominately women, who continued this fight, and then you hear, uh, different members and I've heard them in, in the Virginia state legislature, getting involved, saying I remember, uh, when, uh, when my mother . . . I remember as a child going with my mother to rallies in the '70s, and I've heard Virginia state legislators say these things. And, so, at . . . over time, the conversations changed. And, what's been interesting, politically speaking, is now we have reached a point where it's a conversation topic that people in the Commonwealth lead with. Uh, I was just at an event recently on behalf of some state candidates, and I was talking about the, the value of getting good legislation out of committee, and I was talking, you know, in the federal level, because we saw change in leadership in the House of Representatives, we've gotten good bills out of committee, and once you get them out of committee, you can vote. And the reason that the Equal Rights Amendment has not passed is because it hasn't gotten a vote, because in the House of Delegates, if it got a vote, it would pass. And so, it's . . . it's understanding even the rules of how things work in our legislative bodies, and, so, you have a bill that has bipartisan support, bipartisan support, that literally cannot get a vote on the floor of the House of Delegates, because it never gets out of committee . . . and, so, I was at this event, and I was talking at the federal level, we've gotten great bills out of committee: gun violence prevention bills, the equality act, uh, variety of bills that are really important, that have bipartisan support but have previously been killed in committee in prior congresses, and, so, I said, uh, the value of making a real change in the House of Delegates and in the state senate is we'll be able to get these good bills out of committee, and I start saying, you know, related to healthcare, related to gun violence

prevention, and related to the environment, and somebody pretty much heckled me from the back, and said “and the ERA” as though I was remiss because it was not the first thing I had mentioned [laughter]. Um, so I’m admitting that to you cause you’ll probably get a phone call, mom, [laughter] just want to make sure you’re aware. Um, but this is a super shift because I remember when it was a lonely endeavor for people who were committed to equality where they were starting in the basement, pretty much, saying this is what the Equal Rights Amendment is, so it’s this thing that happened in the ‘70s, but it never really got over the line, and it’s this thing that people should really care about. Um, and, so, now we’ve gotten to a point where you can be in a room full of Virginians, pretty much anywhere, and you will hear people talk about the Equal Rights Amendment, and so this shift, and, and, and this movement, has been tremendous, um, and I . . . I think it is amazing what a bipartisan issue it is, and it is really amazing how people are now recognizing that some of our rights are fragile, and, and much of what we’re seeing in our country and in our world, we . . . we want to make sure that, as Americans, our most basic rights are in the Constitution and that we can put a patchwork of protections in place but when they expire, and when congress doesn’t vote on reauthorizations, or when there’s a change in leadership, be it with our legislative bodies or within our White House, all of that becomes far more tenuous. And, so, I think it’s been really amazing to watch this shift, right here in the Commonwealth of Virginia, and knowing that we can, and will be, the 38th state to ratify, is really powerful.

Samuels: Excellent. Thank you. Um, and on that note, um, you’ve explained that we’re in a hopeful moment now and, um, that there may be some procedural issues we need to, you know, work through, but, um, do you see any other kind of issues or challenges on the horizon that we should be focused on between now and February?

Spanberger: Um, well, so, um, I’ll speak as a Virginian, as a legislator who represents folks in Virginia, and then I’ll also speak on the federal side. I think it’s important that we continue to make this an issue. Uh, I think your point was excellent, that this is a bipartisan issue. This is, uh . . . this is a legislative priority that we should make it known that we as voters are voting on, that we, as constituents of our state delegates and state senators, recognize and that we make it clear

that this is a vitally important issue to the people of Virginia. Um, because, while I do think there will be a substantial shift in who is representing the Commonwealth of Virginia come January of 2020, it is important that every person who is in the state legislature understands that this is a priority issue, regardless of party, regardless of their historical support, or lack thereof, that they recognize that the will of the people is one of equality, and the will of the people is that we, as Virginians, demonstrate what is important and what we want to see.

Now, at the federal level, we're seeing a shift on this. And, and . . . I guess that shift is perhaps not the right word, but an increased, uh . . . an increased acknowledgement of where we are. Um, and, and that . . . we have two bills in the House of Representatives, one is, uh, an ERA amendment . . . so it's basically a start over . . . is one of the bills. We also have a ratification deadline elimination. Um, and that is . . . it has tremendous support in the House. Even this year we've done a number of press conferences and events around it, uh, Congresswoman Speer, uh, is the one who is leading that because there is some of this . . . and I'll let the attorneys speak to it a bit more . . . but there is an excuse that you see so frequently at the state levels, "Oh, well there's a deadline, and we missed the deadline, so why . . . we just can't. Sorry, guys, we can't." Um, and, so, at the federal level there's a movement among us, uh, to remove that ratification deadline and to make it clear that we . . . we won't let that be the excuse, um, that equality really has no deadline, that equality should've been done decades ago, but that if it hasn't, that we'll still move forward on that. And, so, I'm proud as a federal legislator to be part of that effort. Um, but I . . . I think that to really make the change, we need to be vocal in the fact that this is an issue that is of the utmost priority, that anyone [laughter] who knows a woman really should care about the fact that there's equality, uh, within the world, um, and, and certainly within the United States Constitution, as an American, that's a priority. Um, yep.

Samuels: Great, thank you. Um, Kate, I have a question for you. So, um, say we happen to be, or you charge forward successfully, what changes? Um, are, are there changes to the law, or are we, um, is it a basic kind of statement or are there technical changes that are on the horizon?

Kelly: Um, so this is actually one of the hardest. Folks have been on the ground working on the ERA . . . this has actually one of the hardest things to talk about because, um . . . especially as a lawyer because I’m like, well on one hand, it could do this, on the other hand, it could do this . . .

Um, because it’s a constitutional amendment, it’s not a concrete piece of legislation, so when you think about other amendments and what they mean, it took many, many years, if not hundreds of years, um, in order for them to become what they are today. The First Amendment, the Second Amendment, you think about the amendments that people know about, this take . . . took years of legislation and litigation, um, to make them what they are. So, um, what will change from day to night in the equal rights, uh . . . with the Equal Rights Amendment, I think are two things, one thing is that, we, . . . in the United States Constitution, when a kid picks it up, in school and reads it, um, gender equality will be clearly reflected as an American value to every American. Um, and that is a huge, monumental, very, very key change. Um, when I ask people, you know, uh, is gender equality an American value, the vast majority of people say yes, that they value equality, that that is re—, re— . . . reflected in our values as an American people, so that will change from day to night. I think the second thing that will, and that lawyers like to talk about a lot, uh, is the level of scrutiny. So, um, a lot of you are in law school, um, or lawyers, uh, and even if you are, you might not have even understood scrutiny because it’s very intentionally opaque, um, and difficult . . . difficult to understand. Uh, and, so, essentially though, what that means is that the cat . . . the only category that exists now for what’s called intermediate scrutiny, uh, is, is gender, um, and every other category that’s protected under the fourteenth amendment, um, either re . . . receives this lower rational basis or this higher strict scrutiny, so that’s . . . strict scrutiny is race, religion, national origin, these other categories, it gets harder to keep those laws on the books. For intermediate scrutiny, um, essentially, it’s just easier to pass and keep sexist laws on the books, um, so that will change, uh. For all intents and purposes, the hope is that will, the equal, . . . the passage, ratification, and full integration into the Constitution of the Equal Rights Amendment will put gender into this, uh, strict scrutiny category. I think, um, and I argue in the piece that I wrote, um, called “The ERA is Queer,” that the ERA will protect, uh, not only women, but people of all marginalized genders, uh, and that is something that we can aspire

to, um, for the future. But, uh, I think those are the two things that will change immediately, and then, um, I think the . . . we'll have to spend the time, and effort, and build an infrastructure . . . I call the ERA, a foundation, um, the ERA is a foundation upon which we can build the scaffolding and the structure of permanent protections . . . permanent, robust protections for women and people of all marginalized genders in the future. So, we can litigate, and, the second clause of the Equal Rights Amendment doesn't quite get as much airtime, um, but I think it's like the special surprise of the Equal Rights Amendment, um, which is that Congress can pass laws to enforce the Equal Rights Amendment. Right now, Congress . . . our Congress members are bound by a pretty limited restriction of what they can pass laws on. For example, I work on many issues and one of them is female genital mutilation in the United States. Um, it's a much wider problem than most people recognize, and there is a federal law that was passed in the '90s to ban female genital mutilation. It was recently struck down by a district court judge, um, who said that not that FGM is okay, or that it's permissible, or any of those things, but that the law was unconstitutional because it has nothing to do . . . or, not enough to do with interstate commerce. So, there are only certain things that the federal government can do, and according to this judge, banning female genital mutilation is not one of them. And, so, the Equal Rights Amendment will give incredible, new, energetic legislators with great ideas, a hook, a base, from which to pass an entirely new slate of robust laws to protect women, and that doesn't exist now. So, this is like, opening a huge door, violence against women, you know, Title IX, Title VII, all of these things that are under attack, or being reduced, or limited, are kind of these temporary protections, and not, uh . . . not as, as comprehensive as we would like. The Equal Rights Amendment will give these new, young, incredible, female legislators an opportunity and, um, the possibility of passing more robust legislation to protect us all. That will take time, um, but without the ERA, it's not possible.

Samuels: Great. Um, on that note, let's stay kind of on the forward-looking logistics front. Um, Toby, a practical question for you. Say we call a special session and ratify tomorrow, um, what happens? What happens the next day?

Heytens: So, I think this is a place where it’s important to sort of recognize that, uh, fights for rights, for advancing equality, are never over, one makes progress, but they’re never done. Uh, and I really mean this not as a downer, but as a . . . as a call to action. Um, it’s not going to be over the day after this happens. I hope very much that it does happen at the beginning part of next year, but it is important to realize this will not be over, uh, in January of 2020, or in February of 2020. Uh, Virginia would be the 38th state to ratify, uh, but then there would be, shall we say, a number of unresolved legal issues. Um, but . . . but this is a place where there is an interaction between the legal and political issues because it’s also true that continued action and continued activism could take some of these issues off the table. So, one of the issues: Virginia would be the 38th state to ratify. Um, there are five states that have purported to rescind their ratifications. Now, there’s, uh, . . . so during the process, the lengthy process of the ERA, the ratification process and the fight for it and the fight against it, during that period of time, five states that had ratified purported to un-ratify, and there’s some difficult and interesting legal issues about the legal effectiveness of rescission, but that could be mooted, because if we just have six more states ratified that issue drops off the table. Um, so, I mean, there’s two routes: there’s defending the argument that the existing ratifications are invalid, and there’s the political route of just ratifying five more states, and that issue drops off the table.

Similarly, there’s been this discussion about the deadline. There is a question about the validity of the deadline in the first instance, and we can try to argue that the deadline is itself invalid, but if the deadline extends . . . if congress were to pass a re— . . . resolution extending the deadline, the question about the validity of the expiration would drop off the table and no longer be an issue. Now, there would still be another issue about whether the continued expansion would be valid or not but then there’s the other solution, which is to start back at the beginning and ratify again because that would eliminate . . . Now, there’s tradeoffs to all of these things. Some of these things take longer, some of these things are more in the policy realm, some of them more in the legal realm, but I, I think the bottom line is, um, it’s not going to be over, over, over until it’s over, over, over, [laughter], and until it’s over, over, over . . . I mean, it’s over, over, over when it’s in people’s pocket Constitutions, and I guess my

advice there would be, until it is over, over, over, the answer is which strategy should we pursue? I would say: all of them. Pursue all of them until it's over, over, over, because you don't really know.

[Applause]

Samuels: Excellent, thank you. Um, we will maybe wrap up this morning with, um, hearing from all three of you on, um, lessons from the history of the ERA movement that you want to share, um, . . . in particular, if you have, um, I guess Toby . . . maybe another message for, um, young lawyers or professionals that . . . to take away, kind of, from our chat this morning. So, uh, why don't we start with the Congresswoman?

Spanberger: Sure, thank you. I think the . . . the thoughts that I would want to leave you with today are to continue what you are doing, to ensure that people in your community recognize that this is an issue that motivates you as a voter, that this, as a constituent, is an issue that you want your legislators to prioritize and find as important as you do. And, and, that should be done in advocacy, in letter writing, in phone calls. Uh, as a member of congress, I can tell you that those letters, those phone calls, they matter. Understanding what it is that people I represent care about matters. And, so, while this issue has come to the forefront in discussions throughout the Commonwealth of Virginia, you cannot over state how important this issue is, and, so, I recommend that anyone as an engaged constituent, as a citizen, as a voter, make this a priority issue, and make sure that people understand why it's important. I think that much of the, the female genital mutilation, uh, aspect, or, example, is a really good one. So, anytime we were putting forth legislation, we have to get a report that it's constitutionally valid, right? That any legislation we are proposing has a constitutional nexus, and this is a tricky one, because you end up looking at interstate commerce as a reason why you're trying to protect children and women from mutilation, right? Where it could be much simpler, it could be more basic than that, it could be really that you shouldn't . . . that on the basis of sex, someone should not be treated differently. Um, and, so, it's a very basic issue. Voices matter on this issue. Um, this is a place where we have seen a large shift in the conversation, to Toby's point, we need to continue, because even if . . . or, even when the General Assembly votes and this gets out of

committee, and the House of Delegates, it isn't over. At that point, now, we are opening the conversation far beyond the boundaries of the Commonwealth of Virginia, and it becomes a national issue again. Um, because once Virginia ratifies, it will be a national discussion, and so it's going to matter in 2020. It matters what our senators think of this. It matters what our members of Congress . . . well if you live in the seventh district, you're good, I promise, um . . . but beyond that, it matters that our members of the House recognize that while this may not have been an issue, um, in their state for decades, either because they ratified, or because they killed it and didn't talk about it for decades, that in fact, it is now a national issue, it's an important one, and it's an important one because Virginia led the way. And I'll end with a little story. Um, in the . . . I have a dear colleague from New Jersey, and we sometimes talk a lot about what's happening in each other's states, and I said that, uh, the 2019 elections are so, so very important because as goes Virginia, so goes the nation. I said, you know, as people say. And she says, no one says that. [Laughter] And I said, well, in Virginia we say that. [Laughter] Uh, so . . . so when we're thinking about this, you know, as goes Virginia, so goes the nation, this is our chance to really be an example, to stand up for equality, um, to stand up for gender equality and, and, and to stand up to make sure that our voices are heard on this issue. But it is just the very, very beginning of the discussion that will continue because, you know, the discussions related to . . . to equality do not stop and end with constitutional equality regardless of sex. It continues on beyond that, and it's a long-term conversation that we need to continue having. Um, and we're getting it started in Virginia, and it will be a national issue once the ERA is ratified in early 2020 . . . er, excuse me, passes in the state legislature in early 2020. Uh, but at that point we need to continue, uh, because that's when the conversation pivots nationwide, and, so, be prepared for that longer conversation. It's going to be an exciting one, and it's valuable, and it's valuable to everyone in this room, and it's valuable to the next generation because the basic point of when we're . . . the next time I visit a middle school and I have 7th graders . . . and this is true . . . pull out their Constitutions because they're studying civics in the 7th grade and 8th grade. The idea that there would be a room full of kids, boys and girls, that see that there's Constitutional equality for women, that is powerful, that is important, and that . . . that will change and improve upon the

culture of this country and the recognition that anyone can be anything and can do anything.

[Applause]

Kelly: I would say two things. One is, uh, the Equal Rights Amendment is the only chance, uh, any of us are probably going to have to change the U.S. Constitution. Um, it's unlikely there'll be a Constitutional Convention anytime soon, despite how many people in Virginia like talking about that, um, uh, and in other states. Uh, this is it. This is the chance that we have to change the Constitution. This is the most consequential vote any legislature will have in their lifetime. Uh, this is a chance we have to put our self in the most foundational document in our country. I think a lesson that we can learn from the past, and it is vitally important going forward, is, um, the concept of intersectionality. I think we need to be open and inclusive when we talk about who will be protected from the Equal Rights Amendment, and we have to make that a reality. Um, the reality on the ground is the . . . the Equal Rights Amendment does not include the word "women." It says on the "basis of sex," and, so, that, I think, is sort of this interesting legacy that we adopted from Alice Paul, our problematic fave, um, who did many wonderful things but was also, uh, not very inclusive and racist and did things that were, um, troubling and set back the movement. And, so, I think we need to think about the history of the Equal Rights Amendment and how we can use, um, what happened in the past and make it different going forward. So, uh one thing is that the . . . the language of the Amendment is on the "basis of sex." I think we need to advocate for that to include all people of marginalized genders, including, but not limited to women. Um, if you . . . there was a hearing, the first hearing in thirty-six years in Congress, um, in the Subcommittee on the Constitution and in the Judiciary Committee, and all three of the witnesses for the Equal Rights Amendment explicitly acknowledged multiple times that, uh, . . . for example, the they, uh, . . . aspire that the Equal Rights Amendment will include transgendered people. I was very proud of all the people because they were really being grilled, um, by Republican opposition on that Committee about that issue, but they stood firm, and I think we need to stand firm because what we say in Committee, what we say in the movement will, uh, contribute to how the Equal Rights Amendment is in . . . interpreted in the future. So, it's

important to keep in mind a more expansive future. And then, secondly, I will also say, um, that in every state where I work on the Equal Rights Amendment . . . in fact, every state where there is a bill now, black women are the women who are, uh, the chief sponsors of all the legislation. So, that includes North Carolina, that includes Virginia, that includes Georgia, that includes, um, . . . in Utah, it’s an Asian-American woman. In Arizona, it a native woman. So, women of color are really leading the way. I feel like the Equal Rights Amendment gets, um, uh, . . . all of the media images about the Equal Rights Amendment are largely historical and mostly white women, um, but that’s actually not reflective of the people who are paying the price and who are really taking this forward, so I think we need to be more expansive both about what “on the basis of sex” means and also about who is paying the price, who is taking this forward, and whose leadership we need to follow into the future.

[Applause]

Samuels: Great, Toby, you have any last words for us?

Heytens: Nope. That was great.

Samuels: Excellent. I think—do we have some questions?

MaryAnn Grover: One question in the audience.

Samuels: Excellent. Thank you. Alright, this is for Representative Spanberger. “Do you anticipate that the Resolution eliminating the deadline will pass? If so, when? And will it pass in the Senate?”

[Laughter]

Spanberger: Who can predict what the Senate will do? Um, so I think this is a which comes first, the chicken or the egg? The House of Representatives has been very, very active on a variety of issues. Issues of equality are incredibly important to the current, uh . . . the current members of the House of Representatives. We passed the Equal . . . the Equality Act this spring, which is the largest, most substantial Civil Rights legislation that we have seen in decades. Um, and, so, I do believe that it would absolutely pass the House of

Representatives. Um, some urgency might be pushed our way, uh, when Virginia passes it. So, at this point we've been rocking and rolling on a variety of different focuses. You may not know that if you watch the news, but everything from prescription drugs, to, I mean, broader healthcare issues, to election security, to gun violence prevention, to environment, to protecting animals. I mean, we . . . the gamut of it is our focus, um, but I, I, . . . I do think that the elimination of the deadline, uh, will be of the utmost importance when Virginia kind of forces our hands to move on that. It will absolutely pass in the House of Representatives. Um, this Senate is one that leaves me, uh, questioning whether or not that is in fact the case, but this is where we can start now. As constituents, as people who demand that our Representatives understand the issues that important, it is never too soon to make sure that our Senators recognize that this is an issue that's important to us. It is never soon for your friends in other states to let their Senators and their House members know that this is an issue, and very clearly, call out, this is a bill I want you to support, this is a bill that is about the equality of people across this country, um, and the Constitutional equality of people across this country. Uh, so, I, . . . I feel as though it is never good to wage bets on what the United States Senate will do in its current . . . it its current, uh, state, but I know what we can do, which is we can advocate, advocate, advocate and make it a real, real issue. Because we've seen that. In Virginia, in 2019, this is one of the number one issues that is driving people to the polls, and there's a lot of issues that are driving people to the polls in 2020, but this can certainly be one of them as well.

Samuels: Alright.

Kelly: Um I just want to say . . .

Samuels: Sure, absolutely

Kelly: Um, very quickly. Um, but, uh, so, the, uh, the House Joint Resolution 38 is the Resolution to extend the deadline and . . . er, eliminate the deadline. Sorry, I always say extend, and I get in trouble. Eliminate the deadline. Um, and then our Senate Joint Resolution 9 in the Senate is sponsored by Senator Cardon, and he has a bipartisan sponsorship approach, so the . . . your resolution has, I think, 208 sponsors, co-sponsors at this point, and the Senate resolution only has

four sponsors because he will only add an additional Democrat when there is an additional Republican, and there are two Republican co-sponsors right now, so Markowski and Collins have both signed on, but they are desperately looking for additional senators, republican senators, to sign on to the bill. And, actually, it won't take that many. I think it's two, like they need two more, um, and so it's . . . it's important as the issue ramps up, as the House passes it, as the pressure extends, um, that folks reach out to republican senators or people who are middle of the road or people who support equality or whose seats are in danger, or whatever. Uh, it . . . whatever it takes, uh, in order to get those additional . . . because you really don't know what's going to happen in the Senate, especially leading up to 2020, and its going to become a, oh, you know, hopefully it's going to become a presidential issue in the presidential election, so we can push Senators on the, um, on the deadline elimination bill, um, and hopefully, you know, cross our fingers.

Spanberger: And this speaks to Toby's point earlier, which is, you know, we should be doing everything. Um, this is something that we can be doing now. We don't have to wait for Virginia to pass the Equal Rights Amendment in the state legislature to then turn to the federal, uh, side of things for resolution on this kind of outstanding question related to the deadline.

Samuels: Great. Well, thank you. I know I learned a lot. I'm sure that our attendees did, too. So thank you to our panelists. Please join me, uh, in thanking [inaudible] [applause].

MaryAnn Grover: Thank you. We'll now invite our panelists for our next panel to come up. While they are getting settled if you want to run to the restroom really quickly. We're going to pull up a Power-Point, get them settled, and then we'll get started on our next panel.

Mary Ann Grover: Hello everybody. Welcome back. I hope you all enjoyed your lunch as well as our breakout sessions. Um, I know I enjoyed my breakout session with Delegate Jay Jones. It was interesting learning about women in prisons and women incarceration a little bit more. Our next panel focuses on equality from the perspective of those who have been in the trenches in the equality movement. Moderating this panel will be Michelle Kallen. It's my distinct pleasure to

introduce Michelle, as one of my former bosses and one of my current mentors. Michelle is the Deputy Solicitor General for the Commonwealth of Virginia. As such, she's represented the Commonwealth before the Supreme Court of the United States, the Virginia Supreme Court, the Fourth Circuit, and other courts. She is a zealous advocate for the Equal Rights Amendment and has been the fearless leader in planning the event for this team. Please help me in welcoming Michelle, who will introduce our panelists. [Applause]

Michelle Kallen: Thank you. Um, so I'm excited to introduce our panel, um, that will talk about the Equality Today and Tomorrow. Um, so starting from . . . from closest to me, we have Carol Jenkins. Carol is the co-president and CEO of the ERA Coalition and the Fund for Women's Equality. Um, she is a writer, a media analyst, commentator, and speaker on media issues. She was the founding president of the Women's Vegan Center and was on the board of the African, um, Medical Research Foundation. Um, Ms. Jenkins enjoys a thirty-year award-winning tenure with several New York City news departments, including twenty-three years at WNYW-TV, where she co-anchored the pivotal six p.m. newscast. She's also hosted her own daily talk show, um, a . . . Carol Jenkins Live on WNYW-TV. Um . . . anything you wanted to add?

Carol Jenkins: I think that's plenty. Thank you. [laughter]

Kallen: Um, next to her we have Andrea Miller. Uh, she is the co-executive director and IT Director at People Commanding Action. Uh, and she was the democratic nominee in 2008 for the House of Representatives in Virginia's Fourth District. Um, she was part of Congressman, uh, Dennis Kucinich's presidential campaign, and, uh, she currently co-hosts and organizes, um, and programs PDA's Blog Talk Radio Show. Um, so join us in welcoming Andrea Miller [applause]. Next to her we have Emilia Couture. She is the outreach director at Generation Ratify, which is a youth run group that empowers young people to take political action and, they've been very active on the, um, Equal Rights Amendment. She's a first-year student at the University of Virginia, and she is, um, a field organizing intern for Parisa for Justice. Join us in welcoming Emilia [applause]. And . . . and then finally next to her we have Ellie Smeal. Um, she is the, um, uh, President of the National Organization for Women, and she led the cry to

ratify the Equal Rights Amendment. Um, she’s also an author, she wrote “How and Why Women Will Elect the Next President.” She’s been at the forefront of almost every major women’s rights victory from the integration of Little League, newspaper help wanted ads, and police department, uh, . . . to the passage of landmark legislation such as the Pregnancy Discrimination Act, Equal Credit Act, Civil Rights Restoration Act, Violence Against Women Act, just to name a few. So, join me in welcoming Ellie [applause].

So, we’re hoping after having these, um, these very, you know, substantive conversations to just have a panel that tells a little bit of stories . . . you know, stories, um, of where we were, uh, in terms of working on the ERA, um, back in the 1970s and before that and bring us to today and see what’s motivating young advocates today, and how we can then . . . can help empower and motivate the next generation of ERA advocates. Um, so to start us off, um, I would just like to get a sense from, from . . . from the group how you became interested and involved, uh, in the ERA, so, uh, Carol, if you don’t mind starting us off.

Jenkins: Sure, sure. Um, well this is a long story [laughter]. Uh, I was born, uh, on a farm in Lowndes County, Alabama in the early, uh, . . . in the mid 1940s . . . I’ll say the late 1940s, anyway you get the point, the ‘40s. So, imagine rural, poor in Alabama. Uh, uh, I was born into a farming family. My grandfather and my grandmother, especially, actually had fifteen children, uh, one of whom was, uh, my mother. Uh, and, uh, we always talked about my feminist grandfather because he had nine girls and six boys and from this rural farm in Lowndes County, Alabama, he sent all nine girls to college, uh, and all six boys stayed, uh, on the farm. And so my, uh, experience, uh, in . . . in being in a feminist family like that, where everybody . . . all the women went to college, all of the women were expected to work, all of the women became the heads of their families, and the next, uh, . . . were in charge of the next generations. I saw first hand, uh, what, uh, was possible if women were given the same opportunities that generally men are given, uh, to be educated, to go into the workforce, uh, and to be powerful and persuasive, and all of the women in my family were . . . you know, were extremely, uh, persuasive including our, uh, . . . the one of the oldest sisters, the aunt, who, uh, for those next generations, uh, helped raise her younger siblings,

helped sent . . . I had forty first cousins . . . helped send all of us to college. And that could be anything from a savings bond to zipping up skirts, you know, half-way. I can't tell you how many skirts I had when I went to my freshman year of college that my aunt had sewn up on her sewing machine. Um, so, uh, I . . . so that's the story of . . . of seeing what the difference, uh, makes. And then, uh, I spent so much time as a reporter, and I saw and covered the stories of inequality, and it's, uh, sometimes tragic ends. Uh, so that's my experience with feminism and therefore perceiving the ERA, the Equal Rights Amendment, to be the only solution, really, to the remaining problems that we have. So, you know, I would expect from the 1940s in rural Lowndes County, Alabama that we would be farther along now, but here we are. So, that's what I'm working for.

Andrew Miller: Uh, well I didn't grow up in rural Alabama. I grew up in suburban Chicago, and my mother was one of those wild, crazy leftist people. Um, she identified as a socialist, but there weren't any socialists in our immediate area. So, I grew up, um, with the communists because that's who my mother chose to hang out with, and I can remember being twelve years old, and my mother shuttling me to another very, very affluent white suburb so that we could attend a meeting on the Equal Rights Amendment. And, so, um, I remember literally for years, we would be the only black faces there. So, one day, I asked my mother, "Why do we have to keep going to all these places?" And, she said, "well" . . . she said, "We have to keep going because as women, we really are superior, but we're going to have to settle for equality." [Laughter]

Emilia Couture: Um, hi, I'm Emilia. Uh, I'm 18. And, so, my feminist awakening was actually rather recently, um, in 2017 in the wake of Donald Trump being elected, unfortunately. Uh, I recall one time I was running in my neighborhood, which is fairly affluent, fairly liberal in Atlanta, where I grew up, and after the election . . . before the election there had been nothing but printed signs . . . and then after the election I saw a Donald Trump sign, and I was running, and I was thinking like, what are these people teaching their children and like what rhetoric are they kind of employing to them? Because I had been living in somewhat of a bubble, that I had this kind of illusion of equality, and I thought that all of the people around me thought the same as I did and thought that I was equal and thought I was equal as

a woman and deserved the same rights, uh, but that made me realize that I did not and then attending the Women’s March made me kind of realize the extent, that this is like a collective pain that people have been experiencing for a very long time, and I’m just now coming into it. And then when I moved to Virginia, two years ago, I got, um, aware of the ERA and the struggle to ratify the ERA in Virginia. And then this past summer, my sister founded Generation Ratify, and I came on as the Outreach Director. And, so, I’d also like to take this moment to thank, um, everyone . . . all the people in this room for being here, but, specifically, Katie Harnow, uh, Michelle Kallen for inviting me to speak on this panel. Eileen Davis, I’m not sure if she’s in here, but she’s been an amazing support, and also, um, Kate Kelly as well because I am very young, and I so appreciate the support of everyone and the work of everyone who has come before me because that is so very important. Thank you.

Jenkins: And I told her, and I said, you know, you’re the reason we’re doing all of this, and you know, she’s proving that it’s worth it, right. [laughter]

Kallen: Ellie, do you want chime in about what . . . what initially motivated you to get involved?

Ellie Smeal: Well, um, it’s a long time so, um. I’m trying to do a . . . do a thing, do it short. Um, I probably would’ve been a lawyer if I had been a man, but I was talked out of law school and I ended up, um, . . . because they said that, uh, women would only be able to do research or, um, teach or be a law librarian. I didn’t like any of those options, so I ended up going to graduate school, uh, in political science and, um, . . . and basically I studied the women’s movement before, um, I had, uh, my chief, uh, doctoral committee person, who wanted me to do the women’s studies. I was convinced . . . I wasn’t convinced if I should do women’s . . . the women’s movement or do environmental, uh, problems because I was living in Pittsburgh by this time, and, um, it was a mess, environmentally. Gas was one of the names of the group you couldn’t breathe, uh, etc. So, anyway, and I . . . but I was looking for the women’s movement, and I couldn’t find any. [laughter] So, I went to environmental . . . uh, I can’t . . . I think it was Environmental Action, some name like that . . . no, it was Environment Pittsburgh, and they wanted something done routine

and . . . which isn't what I wanted to do exactly, but they said, could I bring this piece of . . . a document and get it copied . . . and in those days you couldn't get things copied so easily . . . I go there and this woman says to me . . . it was supposed to be KNOW which I didn't know what it was . . . and she says to me, "Uh, what's a good woman, nice woman like you doing something like this? We need you for the women's movement." And I said, "Well, I can't find it in Pittsburgh." [laughter] And, uh, anyway, it was, . . . uh, her name is . . . was Dr. Joanna Vinsgarner, and once you meet Joanne, you became involved in the National Organization for Women. Um, so this was 1970, um, and I . . . I joined on the spot. I . . . I found the woman's movement. God knows what exactly what it was right that time, um, but anyway, it was a hot chapter. We were doing everything. We were litigating. Uh, we were suing, we were demonstrating, we were picketing. Um, everything from GC Murphy's, which was a five and dime type store, they don't even have them anymore . . . uh, and, uh, to little league, uh, domestic violence, uh, you name it, um, and the Equal Rights Amendment. And, as a matter of fact, the national coordinator for the ERA, uh, was living, at that time, in Pittsburgh. And, so, uh, invariably, we got involved in all of it. Uh, and it was Pittsburgh's chapter . . . I wasn't there that day, I was a member but I don't know where I was . . . is that they, uh, disrupted . . . about eleven, twelve women . . . disrupted the Birch Bayh hearings to, uh, . . . on the 18 year old vote and said, how can you do this, and you haven't even heard the Equal Rights movement. It was that disruption, uh, Bayh didn't want to throw these women out, so he came out of the room and promised to have a hearing on the ERA. But, anyway, I've been involved on the campaign, if you want to add it . . . it's 50 years. Uh, so . . . [applause]. It's good . . . so I . . . I've been very lucky to be on NOW's board since 1973, uh, and President of it. I'm not president of NOW, I'm chair . . . co-chair of its advisory board, but president and founder . . . co-founder of the Feminist Majority, and the Feminist Majority Foundation. We have always had . . . NOW's always had, and the feminist majority since it was formed, has always had an ERA program. We believe that it's absolutely essential for full equality for women. And, why we were so drivem . . . and I think this is important, and this whole discussion on what gets you . . . what gets you going, is we, for whatever reason, who knows exactly why, this particular chapter and now at the time in the '70s, we were suing almost everybody. I remember when we were doing . . . we were sitting

in, in, uh, in a room in Illinois and said, “Why do they hate us so much?” We were trying . . . we were working on the ERA, and we, we actually sat down and said, “Wait a minute, who are we suing in this city?” And we went down all the places we were suing and . . . in Chicago, it was the police, it was Harris Bank, it was, uh, you know, different television, radio stations, it was State Farm, which was located in Illinois, it goes on, the list goes on. And then we said, “Oh. It’s a wonder they don’t hate us more.” Uh, so, anyway, but . . . it was the cases, it was the litigation, it was the action that drove us to be so militant on the ERA because what you learn is what we won, but we were also losing, and sometimes we felt like the pied pipers because the laws were not strong enough, and we had to have more strength. That’s it. I see you leaning forward.

Kallen: Well, and . . . and Ellie you, you, you knew Alice Paul, the kind of original drafter of the Equal Rights Amendment, what . . . what was it like to know her and do you have any interesting tidbits to share?

Smeal: Yeah. Yeah, I can’t say I knew her intimately or anything like that, but, definitely, I knew her as the Alice . . . Alice Cohen is in this in the audience. Um, what happened is that . . . [sighs] I’m trying to say it short. But we were now out of the House of Representatives . . . and by the way we were working on two levels here . . . we were trying to pass state ERAs at the same time we were trying to ratify, or to get, uh, . . . remember, at this time, when I start in this area, it hadn’t come out of Congress yet. Ok. But we . . . so anyway, uh, . . . and there’s a couple names that I don’t think get any credit and everybody in the world should, and in the United States, certainly should know them and in the women’s movement. Martha Griffiths figures out how to do a discharge petition, uh, eventually to get the ERA out, and the reason why all this is important is, um, the ERA gets out of House first and then out of the Senate, okay. Once it got the discharge petition, Emmanuel Sellers, who was a Democrat, uh, in the, uh, Judiciary Committee was sitting on it and wouldn’t allow it to have hearings. And she gets to discharge petition, gets majority of the House to sign it, and she is also the woman who put Title VII, the sex discrimination, uh, . . . no discrimination employment into, uh, the Civil Rights Act. It . . . she’s a congresswoman from, uh, Michigan. But anyway, is that now it’s in, uh, . . . trying to get on the Senate floor,

and, so, the Pittsburgh chapter . . . and so did a lot of others . . . decided to . . . okay, we would do direct action, and we would do a, uh, 24 hour picket, but silent picket, you couldn't talk. Don't ever do that. That . . . that's torture. [Laughter] Uh, uh, but we . . . we were taking eight hour shifts standing on these steps to the Senate, um, and we, the, the, . . . one of the bonuses, if you could live through this, is that you could stay at Alice Paul's house, which was the National Woman's Party, which is right next to the Hart building, and, so, you do your shift and then you go over to the house. And our shift, for whatever reason, was the night shift, and, so, we were going to sleep there, which was an even bigger bonus. And, so, we . . . we didn't know what we were getting into, and this is the story . . . is that you get done with the shift, um, and we go to this house . . . and I kept worrying because it was really late, and I said, "What? You know, they're older people do you think we should go there this late?" "Oh, no, this is all arranged, all arranged." So, we get to the door, and if you've ever seen . . . if you haven't been to the Belmont Zoo, Belmont House, you should go. Um, it was all dark and I said, and I said well there's . . . "It's okay, it's okay. It's a big house and there's . . . they're waiting for us." I didn't want . . . I wanted to go to a hotel by now. I was terrified that we were going to wake up people. It's crazy, I don't know what we're doing here, but, anyway . . . after this crazy silent visual. Anyway, we knock . . . knock on the door . . . I didn't do it, one of the . . . Anne Pride, who was at that time the editor of NOW Time, she's knocking on the door, and I'm saying "Anne, stop it, would you already, yeah, they're not there or they're asleep or whatever." Finally, the door opens just a little bit, and, um, it's a . . . very . . . I used to say a little old lady, but now that I am getting in this age group, I don't like that description [laughing] . . . I really resent anybody saying that, so I've changed the script . . . a woman opens the door [laughter] and is . . . you could tell, honestly, that she was elderly . . . but, anyway, and . . . and she had night clothes on and, uh, a nightgown in fact, and I said, "See Anne, Anne just say we'll come back in the morning." I was now just absolutely terrified. I . . . I just thought that it was very upsetting, or embarrassing, or why are we doing this? Anyway, she says, "Are you the NOW woman?" And we said, "Yes," and she swings the door open and she says, "Come in, come in," and we go in a little bit, and she takes from the wall a bell, and she's ringing the bell and, and I'm saying to Anne all the time, "See what you've done, what are you doing, they're waking

everybody up,” and she’s running up the stairs . . . there’s a winding stairs, and we not . . . none of us have ever been in this building, and it was all dark, and there was these busts of women on either side of this hallway as . . . so we are saying what in the hell, why are we here? And then she’s running up the stairs, and you can see these, um, you know . . . what would you call them . . . placards, no not placards . . . um, banners that say “Votes For Women,” and all this stuff from the suffragists movement. Um, and by the way there are busts of Susan B. Anthony, Elizabeth Cady Stanton, and at the end of the hall . . . the one that really got me . . . was there was a statue of Joan of Arc. Okay [laughter]. Anyway, and while all this is happening, I am saying, “We’ve got to make our apologies and leave . . . nicely.” Um, Anne turns to me and says, “Ellie, you’d be excited too if you’d been waiting fifty years for reinforcements.” [Audience “aws”]. And, so, anyway we had breakfast there, they came all down, we had . . . we ate with them, we stayed there that night, and it started a relationship between our organization and the women’s party,

Audience member: Alice Paul was the ringer of the bell.

Smeal: Oh yeah, oh yeah. I forgot the punch line . . . it was Alice Paul [laughter].

Audience member: Thanks, Alice!

Smeal: She’s stealing the punch line, yeah, she’s heard it a million times . . . and, um, anyway, she was . . . uh, Alice Paul was very generous with us, of her time, and I want you to know she was very, very active . . . she’s in her eighties at that time, uh, . . . with this fight to get it through the House and the Senate, and, um, I could tell you some other stories about her, but her heart and her soul was in this movement

Jenkins: And could I just help, have you tell the, the story about her crying, uh, [inaudible] . . . yeah.

Smeal: yeah, well, the . . . we now we get to the time that it’s the vote in the Senate, and, um, we filled the galleries, and, um, and all . . . but . . . she wasn’t there, and we . . . we thought that was odd, but we also thought maybe she wasn’t feeling good, we had all kinds

of excuses why she wasn't there, but we . . . when we left, having won, we obviously win the vote . . . and, by the way, if you haven't heard Marlo Cooke's or any of that discussion, it was, its instructi— . . . it's very instructive. Um, and then, we all went back to the house because there was to be this big party, and, um, she . . . Alice Paul is nowhere to be seen. And, um, one of our colleagues, Phyllis Weatherby, also from Pittsburgh chapter, says, "I'm finding her," and we say, "You can't do that Weatherby, you know, it's a house, right?" Anyways she goes, and she's sitting in the back room at a desk . . . and we found out later, it was Susan B. Anthony's desk . . . that desk is still in that building . . . Anyway, sitting at the desk, and she's crying, and we thought well, you know, she's . . . she's been working on this since 1923, you'd be crying too, I mean, you know, emotional, the whole thing. No, she was very upset about its passage, and we couldn't talk her out of it. But she said that Martha Griffiths and the chief sponsor in the Senate, . . . who just died recently, Senator Birch Bayh, and both of them democrats, . . . and, um, she said that Birch, uh, Bayh and Martha Griffiths were fooled by Sam Ervin . . . Sam Ervin, who became very famous during the impeachment trials, um, was, um, the leading voice against the Equal Rights Amendment. He was a segregationist . . . we know him as a good guy because his for impeaching Nixon, but he wasn't. Um, he was, uh, in the impeachment, uh, he was, um, . . . he was a leading segregationist. And, um, anyway, um, she said he tricked her by putting in two things. Uh, one is, if you will look at the, the, the clause, the second clause, the Enforcement Clause, says that Con— . . . Congress has the power to enforce. She said that he put that in there so that they could stop this in the South on states' rights argument, that was not originally in there. And secondly, . . . because originally, the way she wanted it, it was given to Congress and the states rights . . . uh, and then the second thing was that in the preamble, there was a time limit, and she said that was never there, it was never supposed to be there, and they let that sneak in there because, oh, it doesn't matter, we're going to pass it right away. She said, "They will stall, and stall, and stall, until we lose our momentum, "and, in many ways, she right on both.

Kallen: So, so, so one . . . we'll move into kind of speaking about losing the momentum from here, but just to put in a pitch, the, um, Belmont Paul House in D.C., if folks haven't been there, I highly

recommend going there, it's actually uh, uh, a formally a monument, and it has, um, political cartoons all the way from, you know, the, the ratification of the 19th Amendment, um, through, uh, these efforts to ratify the ERA. Um, the busts are still there, and the desk is still there, so I highly, highly recommend going to check it out if you have the opportunity. Um, but speaking about momentum, um, Andrea, can, can you chip in, in terms of momentum and then, and then momentum losing steam, Um, do you have any thoughts about that or any personal experience, uh, involving that?

Miller: I was gone from the ERA for a long time when I started my career, got married with children, and then I got involved again in Virginia in 2009, and, so, then I was looking at, we passed in the Senate, failed in the House, and some people that I didn't know contacted me about wanting to remove the ratification deadline, and they had a petition. So, this would be about 2009, they were trying to get President Obama's attention, and that was when . . . after they had launched whitehouse.gov. Any petition that got 30,000 signatures, the President would take a look at it, and I thought, ok, how many signatures do these people have? Um, they had about seven thousand signatures, so I thought, alright, um, we're going to need a lot of signatures to get to thirty thousand, so I called some other folks I knew at other organizations. Would you be willing to do a mailing to try to get this thing up to 30,000 signatures? So, we did it, we eventually got to about 31,000 signatures, and then the waiting game began. So, I looked at the legislation that we had, and Congressman Rob Andrews of New Jersey had a bill, remove the ratification deadline from the Equal Rights Amendment. And that bill . . . actually, this is probably closer to 2011 by now . . . that bill historically had never had more than 47 co-sponsors, it wasn't a real mover. And again, because the deadline had passed, we also had legislation from Congresswoman Maloney about starting the process all over again. So, that meant we had two federal bills, start over and remove the ratification deadline. So, when I look at the bills, we have a lot of support on start over, didn't really have very much support on remove the deadline. I looked at the states that we had already, our 35 states, and I was like, the odds of us getting them again on start over, and the number of states that wanted to rescind, we're better off just trying to get three more states, and we'll fight it out in court and see where we end up. So, I was like, alright, this is really what we are going to do. So,

when Rob Andrews left the House, I had the opportunity, when people were saying who should be the new co-sponsor, um, I had spoken to Jackie Speier, and I suggested Jackie. And the main reason that I suggested Jackie was that Jackie fought for her bills. We had worked up to a 104 co-sponsors on the Andrews Bill and, because it was a constitutional amendment in the House, that meant that when he left Congress, we were going to be back at zero, and we were going to have to start all over again. So, when I was talking to Congresswoman Speier, I said, we will help you get the 104 co-sponsors back, and she said, "Not necessary." She said, "I can get the original 104 co-sponsors." She said, "The new market that you have, keep on working with those." So, we were doing a briefing, Senator Cardon had the Senate version of the bill . . . we were doing a briefing, and Representative Speier was coming, and Molly Fishman came over with a note, "We're at 110." [Laughter] So we did better. Today, we are at 213, so the momentum on removing the deadline is very, very strong. Really, really buoyed by the fact that Nevada, in 2017, ratified. Thank you Senator Spearman. [Applause]. I watched you live. I watched you. And then Illinois turned around and did us the same favor the following year, and, Virginia, we had really hoped that in 2019 [applause]. Steve, uh Steve where are you? Where are you? Oh, oh, you're hiding behind Eileen, Steve. So yes . . . so yes, Illinois. And then we had really hoped to be, um, the ones to ratify in 2019. That didn't work. Uh, we are going to need to throw a few members of the House out, replace them with real human beings, [laughter], and so Virginia will ratify in 2020. It is ours. [Applause].

Jenkins: Well, I want to say I have been on the phone with this woman, uh, hearing about her work and getting, getting out the vote. Are we on? Getting out the vote. Uh, and, uh, what you've done is truly extraordinary. Um, uh, the ERA coalition is fortunate enough to have most everybody in this room, yeah, no . . . a few people in this room as, uh, as members because the way we describe the Coalition is that we have a staff of three people, but we have a Coalition of over 100 organizations, and I always say, uh, if you want to talk about power, talk about these organizations, like, you know, uh, the Feminist Majority and NOW, and you know, uh E— . . . Equality Now. I mean all of the organizations that have some part of their work . . . they may be doing international work or other work . . . but they are working for the, uh, ratification of the Equal Rights

Amendment. So, with those, uh, 100 organizations, we are . . . have been keeping up on the work in the House and in the Senate. Uh, Betina and her interns in D.C., you know, emailing and going up to the Hill and, you know, making sure we just had somebody else today, right? Who, uh.

Audience member: John Lewis.

Jenkins: Right, John Lewis . . . [laughter]. So, so that . . . that is our work as well. Uh, you know, we want Virginia to work, and we are trying to do everything that we can. Uh, we want the, uh, Bill in the House to pass, and we . . . we were on the phone, uh, just last week, and we were given . . . we can't go, if, you know, Capitol Hill, you know you can't talk about promises, but we were given the indication that this would happen hopefully before the year ends, uh, the actual mark up and vote. Uh, so we are looking forward to that. The Senate is another matter, as you know. Uh, Senators Cardon and Ratajowski, uh, working on that bill to also eliminate the deadline . . . eliminate, not just extend, but eliminate it . . . uh, the feedback that we just gotten recently is that, uh, the, uh, Republicans, um, have, uh, uh . . . dug in some, so there needs to be a little more persuasion, so we are still continuing to, uh, to work on, on that. But, um, I, I also wanted to pick up on a comment that, uh, that, that Ellie was talking about, the . . . when Elizabeth Holtzman, you'll remember, that she was the one who replaced the . . .

Smeal: [inaudible]

Jenkins: Yeah, or, the Congressman who was holding up the . . .

Smeal: Manny Cellars.

Jenkins: Manny Cellars. It was Elizabeth Holtzman who replaced him, Elizabeth Holtzman who got us the first extension. Uh, in the, uh, deadline, so that's the way, you know, the world works. But, uh, you know, uh, we are very, very, very optimistic. One of our, uh, new board members has an 11 year old daughter, speaking of this, and she's . . . this new board member had successfully fought a case in the Supreme Court, a death row case, and her daughter used to be proud about that, and now she goes around telling everybody, “My

mother is working to get the ERA ratified.” You know, that’s her bragging . . . that’s her bragging point now, so we think that this will happen, and it will happen soon.

Couture: Yeah, um, yeah, I can definitely speak to the momentum that is starting to be gained. Uh, it makes me very happy to hear you talk about that story where you were saying that Alice Paul, how she was kind of waiting for, uh, reinforcements, and they are still coming [laughter and applause]. So, they continue to come, and, um, they will be continuing to come. So, as I said, uh I am an outreach director for Generation Ratify, so basically I am kind of building on a lot of the work that you all have already been doing for so many years, um, and very similar to VA Ratify ERA, but we are doing it with a youth-based focus, really trying to get in with mobilizing young people, uh, to support pro-ERA candidates, uh, lobby legislatures, and also honor the intersectionality within the movement. So, those are kind of the three pillars that are at our focus. Um, and I just want to say if anyone would like to come up to me afterwards about how they can get youth kind of more engaged in their movement, specifically in any of your particular organizations, I would so happy to talk because we are all working towards the same thing. As I said, Generation Ratify is just coming specifically from a youth angle, um, but really it’s just kind of been incredible for me to see it blossom and bloom because I’m the oldest member, actually, at 18, of the organization, [laughter] so it’s interesting to be in this room, um, but, um, . . . and really like, our original goal was very Arlington based because that’s where I’m from, but through our use of social media, through our outreach, uh, we have actually now have ten chapters developing in four different states, mostly in Virginia, but we also have a chapter developing in Maryland, Florida, and Georgia as well, and I think one of the main reasons that the momentum has been lagging a little bit is because people, young people, are just not as educated. I think that once they become aware of the issue, they can get riled about it, they want to get motivated, they want to take action, but it’s just something that they even know is a problem, and so I think that as Generation Ratify grows and as we are promoting all of your work and joining together, more and more people are finding out about it, and more and more people are getting motivated. So, I look forward to continue working with all of you because we want to help, and we want to take action.

Jenkins: We’re signing you up right away.

Couture: Yes, I’m so happy.

Jenkins: Campus ERA day that the ERA Coalition does, and we hook up colleges around the country for virtual discussion. Jerry Nadler actually came to our last Campus ERA day and announced a hearing that the Coalition, uh, helped put together, the first one in 36 years, so, uh, we need you.

Couture: Yes!

Jenkins: It’s a date in April. Uh, we will be in touch [laughter].

Smeal: One thing I want to say about the deadline, though, is that, remember the preamble . . . the deadline is in the preamble. What does that mean? The states didn’t vote on it. So, a lot of people we’re definitely working to remove it. Why not? But they also think we don’t have to. And we’ve had high . . . lots of Constitutional scholars feel that way because the states . . . it’s not what was ratified. What was ratified was the 52 words that . . . none of them have anything . . . says a thing about the deadline. And, by the way, it’s the reason . . . and I wanted to say this at this law school and, and, uh, with young people . . . is that the people who got the idea to remove the, uh, deadline the idea were two young, uh, first years, law school students, from Whittier College, uh, Law school, who went to the president of NOW in New Yo— . . . whatchya call it, in LA with the idea and because they got this idea because they were studying, and they said, you know, it’s just in the preamble, and you don’t need it anyway, and, anyway, it was that. And then we went to Liz Holtzman, who’s another name that really should be remembered, and, and she is still active in this, uh, um, she, uh, is . . . knows the importance of this, of this amendment. And, um, and then Liz put everything she had into it, and, and it got through it. But I don’t want us to get discouraged, and Virginia is key, and we are going to go for ratification with or without this damn deadline [laughter]. Hopefully we remove it, it’s a good organizing tool, but we don’t think we have to.

Kallen: So, Emilia, you talked about, um, about how you think part of, part of the, uh, growing momentum comes about from people

becoming more and more educated about the ERA. Uh, both you, and, and other folks, do you find that a lot of the . . . you know, to the extent that you encounter any apathy, does that arise from lack of, of knowledge about the ERA, it's history, and, and, um, . . . I heard an interesting study that, you know, that an overwhelming percentage of Americans already think that we have an ERA in our Constitution . . .

Miller: That's our research [laughter].

Jenkins: And, and, and in fact the Coalition did, did . . . this extraordinary . . . First of all, the people who did the polling were shocked because they said we can't get this kind of agreement on anything, and there was over 94% of everyone, and no matter what the political party, the age, the ethnicity, 94% of the people believed that . . . in constitutional equality. You know, it takes a really strange person . . . I want to know who those other 6% are, you know, who would actually say, "No, I don't think there should be equality." Uh, but 94%, uh, believe in it, but 80% think that it exists already, you know, that, of course women have the same rights as men. And, so, that's our obstacle. You know, the sort of making people aware, you know, that, no, there is an underlying reason why you see the discrepancy in rights and privileges between women and men, and that is they were not included in the Constitution . . . along with other groups, as well, not thought of then, or imagined then. Um, so, that I think that that is one of our main obstacles is that people, especially . . . many, often, I will say this, young women, you know, who, uh, are coming through the ranks, and they think that they do have the rights, you know, and people, uh, always say . . . ask me, well, what do you say to those women? I said, I really hate to tell them that, no you do not. At some point you are going to reach a barrier, and you'll be standing around wondering, what happened to you, and it will be, uh, this lack of equality. And, you know, what we think at the Coalition is that, we have been through . . . and I'm of the generation where we used to talk about the Pipeline, oh this is fantastic, women are in the Pipeline, and the year so and so, things will be all equal. Well, that year is now fifty or sixty years beyond us sitting here tonight. So, the, the only real change for that . . . I don't want to go through these yearly, you know, uh, pay equity, oh, it's black women, it's Latino women, it's, uh, almost a year later, they've been, uh . . . we've been doing that too long now. I'm almost for . . . don't even talk about it anymore,

it's so upsetting. Uh, just pass the Equal Rights Amendment, and in that statement of equality, it will change everything. I'm not saying that, automatically, you know, everybody . . . everything will be changed, but it will change . . . we are used to thinking of women as second class citizens, and that being engrained in the psyche of girls and boys and women and men, you know, makes for this reality of, uh, of, uh, discrimination, uh . . . of out-right discrimination, and that really just has to stop.

Couture: Yeah, I think, um, it's definitely important to discuss the past when talking about the ERA because it helps you realize what it's rooted in and kind of the issues that it's led to, but I also think it's very important, in order to engage young people, to talk about the future, and the implications that it will have on their future. And, so, I feel like often a lot of conversations that I hear happening about the ERA, in both activism circles and just in general, are about the history, which is awesome because that educates people, but to really get them motivated and engaged, it's how this is going to affect them in the future. So, like, really having solid concrete examples and just kind of, like, explanations on why this should matter to you, not just that Alice Paul was this amazing person, and this is the foundation that she laid, and this is why it didn't get passed, but, like, here's how we're going to pass it now, and once it's passed, this is what will be more available to you when it isn't already.

Kallen: And, Emelia, what have you found as you, kind of, become pass— . . . as you've become knowledgeable and passionate about the issue, what were the tidbits along those lines that you found was persuasive and have helped inspire you?

Couture: Well, I think just hearing about different, uh, women's, like, personal experiences and hearing about specific court cases where it's come up and even just hearing about the Lilly Ledbetter Act in more depth and realizing it's kind of, like . . . thank you, Eileen Davis, um, we had a wonderful lunch over the summer where she educated me about that . . . it's like a band-aid over a big gaping wound, you know, it really doesn't actually fix anything, so it's easy to point to these things and be like, oh, things are better for women, but actually, fundamentally, foundationally, and constitutionally, they are not. And, so, once you realize that, you can help other people

realize that, and I think that's really empowering, and I think also, an important thing when trying to inform the youth about things is accessibility. For example, this conference, was so amazing, incredible, I'm not sure where that video is going, but I hope it's going to get posted online because that's a great way to reach young people. Um, and one of the things that Generation Ratify really tries to do is, we have, as I said, our chapters, which are spread out throughout the state, because it's important that we don't just have one canvassing event, we need to go to where people are because young people, not only can we not vote, but often we can't drive, you know, so it's, like, we just don't have access to get to these events where these wonderful people are speaking. Kate Kelly, we hosted a collaborative webinar, um, which was really awesome on Instagram, so I suggest people doing things like that to be educational, uh, to young people in a more accessible way.

Kallen: Awesome. Do other folks on the panel, if you've had, kind of, exper . . .

Smeal: We have actually also, uh, a lot of organizations now are, because of the power of the student folk, yeah, um, you all can put it over the top for sure, I mean, uh, I, uh, there's now campus groups . . . literally, we have campus groups in forty-seven states. NOW has campus groups in a lot of states. Uh, we should get a coalition of all the groups, Generation, uh, Action would be working . . . uh, uh, the, um . . . the group that is just registering everybody here . . . I, uh . . . Generation . . . Environment, I don't know what it is.

Couture: Next Gen.

Smeal: Next Gen, I knew it was Generation! Yeah, Next Gen is registering. In other words, I think that a coalition of all these groups would be fantastic, and, um, I also feel that we have a weapon this time we didn't have, and, and . . . before. Before, they said, you have equality, and they would refer to Title IX and Title VII, particularly. But what happened when the ERA went down . . . we didn't go down, we're going to pass it . . . but one, uh, we reached that deadline of 1982, um, by 1984, they eviscerated Title IX. Everybody . . . no one believed they would ever do that, and, then, of course, they

eviscerated. The reason we needed the, uh, the Lilly Ledbetter Act is the Robert’s court, that’s now, eviscerated, uh, Title VII, so we know that these statutes can be changed if a right-wing person comes in and takes over both houses of Congress, and we start all over again because we’ve lost several years of our lives, uh, uh, trying to put Title IX back on the books. Uh, I was one of the . . . lucky enough to be one of the people who led that campaign, but it took another whole energy of several years, and, by the way, in just those four years it was off the books, the, the registration of women in, in law schools went down because discrimination went up. Uh, and I . . . we only did that on law schools, I’m sure it was in all schools. And then on Title VII and the Lilly Ledbetter, it took us even longer to restore. And so, basically, we now can say, oh come on, these are just acts, for example, we got into the Affordable Care Act, a clause that says, “You cannot discriminate in pricing, or in ch – . . . or in, benefits of health insurance on the basis of sex,” but they have been trying to repeal that act—nine times, ah, nine times . . . sixty-nine times. That affects every girl, every young person, and every person, every woman. Uh, now you have access to birth control, you have access to maternity, you could lose that in a minute, maternity coverage.

Kallen: Well, and that’s, you know one of the interesting differences between, you know, legislation, um, and a constitutional amendment. I mean, how, how often do we see the Constitution, you know, really being changed? And particularly, removal of a constitutional amendment, and so, when people think about, you know, acts . . . various forms of legislation, state and federal, that we have that protect people, um, there is a, a real difference between that and having a constitutional amendment. And even, you know, to the extent that, that, the Fourteenth Amendment has been, um, has been understood to protect against, um, sex-based discrimination, there’s also a difference between kind of ex – . . . you know expanding on an existing amendment, or understand an, uh, existing amendment in one way versus another and having a dedicated amendment, um, and so, so, it’s these sorts of nuances, though, that I don’t know that, that, we teach, you know, our, our middle-schoolers and high-schoolers about these sorts of differences, and, so, that’s why it’s so exciting and inspiring to see, you know, Generation Ratify and, uh, folks who are starting out their college careers, who are still in high school, becoming

knowledgeable and interested. Um, so we have a couple minutes left, I wanted to open the door for, for questions. Yeah?

Audience member: I just want to remind everybody about the Violence Against Women Act. That sunsetted Friday before Christmas. This is a room full of people that are . . . know enough to be here and probably half of you don't even know that, it just sunsetted. And since then, Congress voted it back in, but guess what it's doing in the Senate? Nothing. So, guess what? The Violence Against Women Act has not been re-authorized.

Smeal: That's right.

Audience member: So, we're sitting here thinking, oh, they've got the Violence Against Women Act. Nope, gone. We have Title IX. Nope, gutted. We've got Title VII. Nope, gutted. All of these intermediate laws . . . alright, it's a showing. Without the Constitution, it's a showing. That's all I have to say.

Smeal: Absolutely.

Kallen: Do we have any, do we have any, any questions? Sure.

Audience member: Um, Amelia, I want to hear from you. Um, you said that people can approach you, which is great, but also can you just tell us a little bit about how, you talked about this earlier, but how best to reach young folks, and how we can include younger people in the movement. I worry about this a lot. Sometimes in ERA meetings, I bring the median age down, [**Audience laughter**] um, by a lot [inaudible]. Um, and so I feel like . . . I feel a lot of, uh, anxiety and panic about including younger people, getting younger people involved, uh, bringing younger people to the table, um, and so, yeah. Give us all the answers.

Kallen: Were folks able to hear the question, in the, in the back? No? Um, so, so the question was how do we get younger people to the table, how do we get them motivated?

Couture: Yeah, ok, well that's an excellent question. Thank you, Kate, and I will say that that is something that Generation Ratify is

also still working on because, like, it can definitely be difficult to get young people motivated, interested, and coming, but the interest is definitely there, so don't give up, please, even if you find it kind of difficult. Um, as I said, accessibility is a big thing because young people often may be interested, but they may not be able to drive to an event, um, so just making it in a centralized location that's as easy to get to as possible, make sure the information gets out widely, provide transportation, even, if you can, um, doing something online is important. Also, something that is very much at the front of young people's minds right now is intersectionality and also inclusivity. Another thing that we can all always be working on, um, and that we're working on as a Generation Ratify Board ourselves, but it's so important to be queer inclusive, racially inclusive, something that I definitely work on more and become more aware of, as we all can. Um, like, I have my pronouns on my thing, I wrote that in, I use she/her pronouns. Um, but that's just like people, queer people, for example, trans people might not even know how the ERA could affect them because it's all . . . we phrase it all about women empowerment but just using language like gender empowerment, you know, or emphasizing that sex means all sexes, you know, this applies to everyone, um, is a way to get people engaged. And also, I'd say, um, yeah . . . just promoting awareness over things like social media, which is a platform that a lot of young people use and going into spaces like schools and contenting clubs where young people actually are in order to get them involved.

Jenkins: You say social media, which is the most affective? I, I, I'm interested in . . .

Couture: I would say Instagram is probably the most effective for young people, but also the amount of engagement that you get as far as likes and stuff may not actually be reflective of how many people are seeing your material. So, for example, like, my personal Instagram gets many more likes than my Generation Ratify Instagram, but, still, a lot of people are seeing . . . those posts, and even if they don't see it and come to an event, they see it, they're getting curious about it, they might tell their friends, they might ask their mom about it. You know, you just want to promote the buzz . . . [

Kallen: I don't know where that's coming from.

Couture: Like even just getting the word out there in any way is so helpful.

Kallen: Great.

Smeal: Uh, we have some other students here, uh, too, uh, one of 'em . . . from VCU, represented pretty strongly in the back.

Carol Jenkins: Yeah, why don't you stand up back there so we can see . . . they've been . . . they're working on the colleges. Great, great, great [applause].

Kallen: Okay, one, one, one last . . .

Audience member: I just have a follow-up question [inaudible] is, is that, um, I'm interested to hear that [inaudible]. One of the things, I think, a lot of times people who are not your generation, you guys are just a little bit older, um, understand are the issues that you as a person have faced, because in their mind your lives are so much easier than theirs. I'm sorry, I'm trying to [inaudible] and so, so they don't understand, um . . . they don't understand that there's this idea that younger women are, um, [inaudible]. There's a lack of understanding of the issues that you face, so, so talking to people who may not understand what it is that will get your needle to move into acting, what are those things that you experienced, that in your daily life would make our conversations with the other women resonate?

Couture: That's a very good question, and I think it varies kind of from community to community, which is why it's important to contact a lot of different young women. Um, but, I think just understanding the legal implications of it for all women makes it helpful because I think, in general, most people, even though while they only experience their own experiences, have a great capacity for empathy and compassion, so when they hear about this issue is going to be impacting many other women and many other women in the future, I think that gets their compass moving, kind of, but I mean I'd suggest that, if you're planning on hosting an event at a specific location, like reach out to youth organizers in that area to kind of understand what issues are important to people in that area.

Kallen: Well, awesome, we . . . our panelists, um, hopefully folks are comfortable . . .

Smeal: Can, can we call on VCU people too because they’ve kind of . . .

Kallen: So, we’re actually out of time, but what, what we can do is we can kind of step out and be available to answer individualized questions afterwards so long as folks are comfortable with that . . . [inaudible].

Smeal: We can take a few more minutes

Kallen: Well we have our folks from our, from our next panel are already here.

Miller: The Attorney General’s here [laughter].

Audience Member: Quick question from the audience [inaudible] . . . how are you soliciting more men to the fight [inaudible].

Couture: I think, I think, um, that’s really valid question. I’d also like to answer the question from VCU if I can because I know they’ve been patiently waiting back there, so I’d like to hear them speak, also . . . No, don’t be nervous, I’m a college student, too. We’re all in here together.

Audience member: This wasn’t necessarily a question, it’s more of a comment [inaudible].

Smeal: Stand up, stand up.

Audience member: I just want to stress the importance of, you know, kind of targeting the college students because, I don’t know, I’m a . . . student of color, and I go to a school, a predominately white school, and a lot of the time it seems like the, ERA . . . ERA people don’t understand how that it’s inclusive and that [inaudible], especially young people [inaudible] don’t have to single it out. So, I think it’s really important to target them and chase them down if you have

to, to let them know, this is for you, this is for the next college generation, because I think this is my third event, but for someone who has never been to any events like this, I think it would be great to see more young people at events like this because a lot of them are uneducated and haven't gotten to know what the Equal Rights Amendment is about [inaudible]. I want to see them at the polls, I want to see them at events, I want to see them marching, canvassing, and everything else [applause].

Kallen: Well, thank you so much to our panel, we really appreciate you guys all being here.

[Applause].

MaryAnn Grover: So, I'd like to go . . .

Audience member: We have a week and a half left until the elections. Make a difference. Volunteer. Volunteer on campus. Volunteer with the feminists who are already in here now. Volunteer with Virginia Ratify. Vote [inaudible]. Volunteer for a particular candidate. We can make a difference . . . [applause].

MaryAnn Grover: So, I'd like to go ahead and invite down our next set of panelists, we'll go ahead and get them started, um, in just a few moments once they get seated.

Hello everyone, I am going to ask you all to take your seats, please, so we can begin our next panel. So, now that we've heard about the ongoing fight for equality, we'll turn specifically to the fight for the ERA in kind of the last three years as it has played out in Nevada, Illinois, and Virginia. Moderating our panel on the success of recent ratifiers in the ERA is Virginia Attorney General Mark Herring. Attorney General Herring became the 48th Attorney General for Virginia in 2014. Throughout his terms, he has worked to keep Virginia families safe in their communities and neighborhoods, promote justice, equality and opportunity for all Virginians, and provide legal services to the people of Virginia and their government. Prior to serving as Attorney General, General Herring served for eight years in the senate of Virginia doing invaluable work to provide technology based economic development to the northern Virginia region, secure

transportation funding for needed projects, and make both state and local governments more accountable to the citizens of Virginia. Please help me in welcoming Attorney General Herring.

[Applause].

Attorney General Mark Herring: Good afternoon everyone. Thank you for the warm welcome. Um, it feels great to be back in my alma mater. It was . . . I was fortunate and privileged to go to law school here, um, and it was a great experience, uh, mostly [laughter] and uh, um . . . I am really glad to be, uh, moderating this panel because it's a . . . it's . . . learning from the experiences of some, uh, recent, uh, states that have, uh, passed the ERA, and, of course, we're all hoping that Virginia is going to be number thirty so . . . um, I'd like to first take a moment and introduce, uh, our two panelists, first Senator Pat Spearman. She's got an incredible, uh, resume [applause] and in . . . and, incidentally, a very important connection to Virginia. She holds a degree from Norfolk State University, so, uh, we're . . . we're glad to welcome her back to Virginia, and she also, uh, is an ordained minister, she's a retired lieutenant colonel, she holds a Doctorate in Business Administration, so she's incredibly smart, um, and she's also a state senator from Nevada. And, uh, and I'm also glad to be joined, uh, with, uh, Representative Steve Anderson. He is a retired member of the Illinois House of Representatives, and he was appointed, uh, floor leader for the House of Representatives' republican caucus, and oversaw all of the, uh, floor debate on the House floor. They also share a few, uh, uh, similarities . . . uh, obviously they both have experience in their state's legislature, they are both advocates of ERA, and they also hail from states that have great Attorneys General, uh . . . Aaron Ford from Nevada, and Quami Rahul from Illinois . . . both of whom also served in their states', uh, legislatures before becoming attorney general, so, uh, please give them both my best, they're doing a great job. [Applause]. And in a, in a minute, I'm going to ask, uh, each of you just to sort of walk us through the path of, uh, you know, ratification in your state, how you all were personally involved in that, you know, what the big challenges were, but I'll just say, for me personally, I, I grew up in the '70s, probably before most of you were born, and, uh . . . and my parents divorced when I was young, I was raised by a single mom, I had an older sister, so you bet in the 1970s, I also was a huge advocate for the ERA, as they

were, and I saw firsthand how, uh, their opportunities had been limited, how my mom had been discriminated against, opportunities, uh, had been, you know, closed to her, and so for me, I could see at a young age, why it was important that equal rights for women was constitutionally guaranteed. So before we talk about, you know, your states path to ratification, I was wondering if you could each just say, concisely, personally, why ratification of the ERA is important to you.

Senator Pat Spearman: So, um . . . the Equal Rights Amendment, for me, is another step towards becoming a more perfected union, as president Barack Obama said on one occasion. Uh, I'm a woman, all my life I have always had to fight, uh, for what I knew, um, I was entitled to, and I'm African American, and right here in Virginia, in 197 . . . 6 . . . 1976 in Petersburg right out, uh, side Fort Lee, um, I was chased by a group of young white men in a pickup truck, uh, who saw me, went back and forth, and I am convinced that if I had not found a ditch, uh, to jump into, and I literally belly crawled for, uh, about a half a mile, and, uh, I heard them come back, and I heard them call me several names and tell me what they were going do to me, and, uh, they kept looking for me and looking for me, I was in the fetal position in a ditch, probably about ten yards away from them. So, I understand what it means to be Black in a America that still does not believe in full equality. Also, as a member of the LGBTQ community, I understand what that means because there are people who will use the Bible and religion, uh, to try to denigrate us, and, so, when I bring all of me to the table, all of me has had to fight, all of my life. And so, the ERA is one more step that I believe we have got to take . . . we've got to take . . . in order to become a more perfected union. [Applause].

Representative Steven Anderson: Thank you, that's powerful. I don't even know how to follow that, um, because it's such a powerful story, well . . .

Herring: . . . I think we rest our case, right? . . . [laughter].

Anderson: . . . I agree, right. I concede the point, we win. Um, for me it's obviously very different then. I grew up a life of privilege in every demographic you can imagine, um, and yet this has always

been a part of my life, probably because of the way that I was raised, and the way I was raised was that self-interest isn't what drove me. Self-interest isn't what drove my family. Justice was. And the idea that, that things are set up on an even keel, that people have the same opportunities in life, was more important than motivated self-interest. So, why does an old white guy want this? Well, because I honestly believe, and I, I, . . . I won't even say believe . . . I know that when more people are brought to the table, in an equal fashion, the universe of options, the universe of ideas that come out of that dialogue, is better. Picture twelve white guys at a table who all have similar upbringing, right? What are you going to get out of that? Pretty similar answers. Now, intersperse that with women, people of color, the LGBTQ community. The universe of options just expanded exponentially. So, it's not just about women, it's about everybody, the solutions that we're making. And I'll tell you one other thing. This is just personal experience. Dealt with a lot of people over in my life. I find women to be very reasonable, so I'd like them to be at the table, [laughter] but, thank you.

Herring: Well, thank you, Representative. [Applause]. Thank you, Representative, and also Senator. And, maybe, uh, Senator, uh, if we could start with you. If you could walk us through, uh, the path to ratification in Nevada, uh, how you personally were involved in that effort, and what some of the big challenges were that you faced, and, and, and the advocates faced in that effort.

Spearman: So, thank you. Um, in about, I guess it's nine days or something like that in Virginia, we've got an election coming up. Ten days? Ten days, um, that matters, because I first brought the bill in, um, 2015, and, um, my party was not in charge, and so, they heard, uh, the bill in the committee, and on the very last day, um, the very last hour that bills had to come out of committee before they died, I was told by the then majority leader, "It's just a symbol, so we decided we're not going to engage with it. We're not going hear it," and so the bill died. I was up for re-election in 2016, and that's what I campaigned on. I campaigned on ratifying the ERA. I said, "Get me back, and I promise you we can perform." [Applause]. And, and I promised that it would be among the first that I would sponsor, and it was the only, uh, bill that was in front of mine, the SJR, Senate Joint Resolution, was in front of mine was a bill by the governor, so our

resolution was SJR 2. Uh, got it done and, uh, coincidentally, our now Attorney General said . . . then he was the majority leader . . . said on opening day of the session, he said this session, we will ratify the ERA, and we will have an Equal Pay Bill, and he just went right down the line, and we, we, we managed to do both of those, and we did them, uh, in a manner that I think is befitting of the honor of the people who came before us, and so I am . . . I am mindful that, that this . . . at this moment in history, we are actually standing on the shoulders of people who came before us, who, some of them even put their lives on the line, so that, that . . . that's what motivates me, that . . . that's what really inspires me and gives me the passion that I have because there's so many people before me that lived to see this day. And, and if I have anything to do with it, I'm going to do all I can to help Virginia make it, and, uh, if you all do what I think you're going to do on November the 5th, it will be, and, so, we were able to pass it because those who fought against bringing it to the floor, getting it out of committee . . . we defeated them, we defeated them and, and when we ratified in 2017, in the election of 2018, we elected the first female majority legislature in the country. [Applause]. That's what happens . . . that's what happens when women are engaged, and we understand what's at stake.

Anderson: Uh, so our path was probably a little different. Um, for me, it started when I was eight. Uh, that was, uh, when the ERA was supposed to have passed. Uh, there was two things I was promised when I was in grammar school. One was the ERA was going to pass, and, two, the metric system was going to take over the United States. [Laughter]. Turn . . . Turns out, neither of them were true. So, fast forward about 47 years, and, uh, I was sitting in my office, a brand-new legislature . . . legislator, and a, uh, lobbyist came to my office from what we call the [inaudible] Family Institute . . . you probably have an equivalent group here . . . and understand who I am, I'm a pro-life Republican. I make no apologies for that, that's what I am, but I'm also the most ardent supporter of the ERA you're going to find. Um, so this person comes and says we've got this horrible bill, you're a new legislator, we want to make sure you're aware of it because its going to come up again, and I said, "Okay, what is it," and they said, "the ERA." I said, "Hm, you know, I wouldn't guess that that would be such a problem, but I'll listen to you." He, uh, gave me a sheet, which, uh, was a little three-fold sheet, was called "Stop the

ERA” by the Eagle Forum, you may have heard of them. And, uh, so, I took the time to read it, and it said uh, some pretty incredible things about the ERA, like, I bet you didn’t know that it would legalize marriage at the age of thirteen. Did you know that? I was shocked. Uh, that . . . according to this pamphlet. Uh, it also said that women would lose all their social security benefits. Uh, and it went on and on, but the thing about it was, these claims were so incredulous, I had to look them up, you know. I had to figure out where they got this stuff. They got it from then-attorney Ruth Bader Ginsburg when she worked for the Justice Department and did a, a, a study called, uh, “Sex Bias in the U.S. Code.” So, I was able to look up chapter and verse of what they were claiming. And what I discovered was, these were not mischaracterizations. These were not arguments about what these statutes said or might do. These were lies, these were outright lies, so, this group . . . you couldn’t mistake this, you couldn’t read it any other way, they were lying to people, and that pissed me off, really pissed me off. I don’t like when people lie. So I did my own research about it and discovered that there’s absolutely no connection between their claim of abortion um, and, uh, and, uh, the Equal Rights Amendment. So, inadvertently, they created their worst enemy, which was me. [Applause]. Thank you. And Illinois’s path had been, like I said very, very long and what, what we needed to do, though, was, even though we were a democratically controlled House and Senate, there’s not enough votes because we have a lot of southern Democrats who are very pro-life and were afraid of that abortion issue. So, my job became to convince enough legislators on the Republican side, who were pro-life, uh, that this was a false narrative. It was fake, and that’s exactly what I did. It took me about four years, uh, of constant arguing and talking and trying to figure out different ways to explain it, uh, and then fortunately or unfortunately . . . I’m going say fortunately . . . the #MeToo movement happened. It’s unfortunate that it had to happen, but its fortunate that it has happened, and that was a strong motivator for people to take a look at their voting record and see, are they voting on women’s issues? Are they voting correctly? Well, I gave them an opportunity now. I said, this is your chance. This is your chance to show that you actually like women. Um, and, uh, fortunately, uh, after much fight, right up to the last second, it was the last day of our session . . . last evening . . . we did it about at eleven o’clock at night . . . we were exhausted after hours and hours of debate. Uh, we managed to get it done, and it

passed with exactly one extra vote, but . . . and I could tell that story too . . . but it was a wonderful experience.

Herring: So, Senator, it sounds like, um, the . . . some of the biggest challenges in Nevada, uh, getting into ratification might have been political at a partisan level. Uh, what do you think? Push that over. And, then, uh, Representative, for you, as you were coming down trying to dispel myths and, and so forth . . . what do you think, uh, pushed that effort over the edge as you were coming down toward the end of the session. Senator?

Spearman: So um, I, I want to pick up on something that Representative Anderson just said. I, I learned from carrying this bill . . . I learned that, once I introduce the bill, I need to sit some place where the camera can't see me. Because I heard . . . um, a lady came to the witness table and said with a straight face, um, "If we pass the ERA, that will allow women to marry the Eiffel tower." [Laughter]. Um, and the camera was right on me and I was like . . . [laughter]. And someone else came to the table and said if we . . . if we ratify the ERA then that means that women will be in combat, and I was like . . . If we ratify the ERA then women will lose their husbands' social security, and I'm like mmmm. And there were all these things that people said, and I was really prepared for everything except the Eiffel tower [laughter], and I was like, "Okay, boy, this is a brand new one," okay?

Herring: How'd you answer that? [Laughter].

Spearman: Um, I said, um, I have it on general information that the Eiffel tower is probably not available, so we can just eliminate that one so. [Laughter]. I said, of course, you know if you want to go and prove me wrong, you know, have at it but . . . Um, and, so, since I was in high school, I remember them talking about this, and these were the same arguments they had over and over and over . . . there were really no new arguments except the Eiffel tower, no new arguments. Um, and people who know me, know this about me, once I say I'm going to do something, rarely does it not happen because I will stay there and stay there and stay there until it happens, especially when it comes to equality, so it was a matter of dispelling all of those myths, um, the first time . . . and the second time, when we

came back in 2017, uh, some people still came to the table and tried to say some of those same things, but, um, uh, as I walked into the hearing room I, I looked at them, and I smiled and I said, “I’m still here.” So, um, they weren’t as forceful as they were in ’15, um, but those arguments . . . there’s nothing new about that . . . those are those arguments . . . and I always tell people, someone who’s drowning will reach for a straw, and, and people know, they know that this will happen. They know that it will happen but, but they continue to argue facetiously that this is the reason why it shouldn’t happen, and, and sometimes I just want to stand up and say, Do your children know that you’re standing up making them look like fools in public? Do you, do you . . . do they know you’re talking like this? And, and, and do people really understand that we’re at a moment in history that rarely comes around. I, I . . . there . . . there are very few things in the history books where we can look back and say, oh I wish I had been there then, and, and, and I looked at the, the, uh, arguments, uh, in 1969, uh, when there . . . the vote came, uh, whether or not to fund NASA, and there were people who voted for NASA and then there were people who did not, and I said this, I said, “You know those people who voted to fund NASA when we landed on the moon could say ‘I was on the right side of history.’” But forever, forever those who did not, all people have to do is look at the history books, and they can see who was on the wrong side of history, and, so, ratifying really came down to asking this question after all of the other arguments had been presented . . . it really came . . . Are you going to be on the right side of history? Or are you going to be standing on the sidelines? It’s your choice. It, it . . . it’s your choice because this will happen, this will happen, and we will get it done.

Herring: Representative, what do you think, uh, in the end, what pushed it over . . . over the finish line?

Anderson: So, it took a lot of different strategies. That was one of them, quite honestly, the . . . the being on the right side of history is a very powerful thing. Uh, it is rare that a legislature gets to vote on something as important as amending the United States Constitution. I’m pretty sure I’m only ever going to do it once. And, uh, so, that really did compel some people, but that wasn’t enough, and . . . and as much as I would like to say that good policy will drive things, generally, it’s a great starting point, but that doesn’t get you votes if . . . if

it's a scary proposition. So, it depended on the person that I was, I was trying to whip or . . . or lobby, so to speak . . . um, some people were driven purely by the demographics of getting reelected. So, at that point, like I said, the #MeToo movement was heavily engaged and, uh, . . . and I said, the only way you're going to survive the next . . . the next cycle is if you . . . if you get on this, in other words, if you co-sponsor it. That worked with a lot of republican suburbanites, uh, more moderate in nature. So, that would work. Um, others, I had to spend hours going through the legal analysis of, of why abortion had nothing to do with the ERA, and these were not lawyers that I was talking to, but they wanted to understand it. So, we did, and some of them I went over it multiple times with. The . . . the difficulty with explaining it is that in . . . in my experience in the legislature, uh, if you have to explain something, you lose. Um, that is typically, you know, . . . if you get into a long-winded explanation, people stop listening, uh, so, you have to be able to shorten it up, so I tried to give them some of the arguments in essence as well as in detail, uh, to try to . . . to try to deal with that. So, uh, there was that. There was, uh, another strategy that worked was outright pressure at the last moment. Uh, one of the, uh, . . . one of the things I didn't expect was we were . . . we were finishing the bill, we were voting on it, you know . . . in our chamber, uh, the chair has to say, "Have all voted who wish?" three times before he can lock out the button that registers everybody's vote. Until that time, you can toggle: yes, no. So, there were two gentlemen down in the front who hadn't voted at all, and we had gotten to 69 votes, and we needed two, we needed 71 votes. So, we got down to these last two, and these two gentlemen had not voted at all, and, so, one of my colleagues down in the front . . . a guy named Marty, Marty is very loud . . . uh, Marty just got up and started berating them and yelling at them and said, "Are you kidding? You want to run for judge, and you want to get reelected, and you think all the women in your district are going to vote for you after you remained silent on this?" He just screamed at them. Uh, and, you know what, sometimes that works, because they both quietly voted green. They . . . they quietly voted green. And then . . . and then, so, like I told you, 71 was the magic number. Well, we hit 71, and then the speaker locked out the vote. Everybody screams and shouts and is excited, and I look up at the board, and it says 72 votes. I'm like, wait a moment, what happened? Who did . . . who'd I miss? And, so, I look, and it's my leader, the Republican

Leader of the House, a guy named Jim Durkin, a great man by the way, and I went to Jim afterwards, and I’m not telling the schools . . . the tails out of the school . . . he’s talked about this publicly, I said, “What happened? I thought you weren’t going to vote for this because of the caucus?” He goes, “Couldn’t do it to my daughter. Could not do that to my daughter.” So, every different reason, every different strategy, I used them all to . . . to try to get this thing done. And in the end, we did it.

Herring: Uh, Representative, you know you had, um . . . were talking about how some of the arguments were . . . you talked about, uh, some representatives thinking, well, for my daughter I’m doing this, uh, equal rights for women . . . you talked about how important it was to have that . . . constitutionally guaranteed. Uh, is this just for women or can men benefit from this, too?

Anderson: No, I, I it . . . it’s for everyone. Um, it doesn’t distinguish. It doesn’t say equal rights for women. It’s, uh, non-discrimination based on sex. Um, and, in fact, if you go back in the history books, in . . . in Fourteenth Amendment case law, you will find that, uh, then-attorney Ginsburg, who, again is, in my mind, just brilliant, brought most of the cases that she tried to get, uh, women’s rights through the Fourteenth Amendment, in which she partially succeeded. Um, most of those were based on male circumstances where men were being discriminated against, so I have no difficulty believing that this can also benefit men in a direct way. Give you an example that I ran into last week . . . I was talking with, uh, uh, city of Chicago, um, uh, Police Superintendent and something about hair styles came up, and he said, well, we have a hairstyle requirement for men and for women. I said, why aren’t they the same? And, he said, well, because we let women grow their hair longer because they like that, and I said well ok, that’s fine, but that’s not right. Think about it though. Hairstyles, textures, all those sorts of things are in play right now. Maybe men would like to wear their hair a little longer. That could advantage them in the future under the ERA. That’s just a very small example, but I think it’s a . . . it’s a personal expression item that’s important to a lot of people. That’s an area that . . . where you can . . . you can see that potential.

Herring: Well, what about on the flip side. Could it be detrimental? Do you think in . . . to women?

Anderson: To women? I would argue, theoretically yes, but practically no. Uh, and the way I would say that is, you know, things that could arguably be threatened are, uh, set asides, right? Priority cont . . . in . . . priorities in contracts. There's women in minority owned business enterprise legislation in most states, at, at least that I'm aware of, where there are priorities given to make sure that we are being inclusive. Could those be set aside? Could those be declared unconstitutional under the ERA? If everything is equal, if we actually get to equality someday, which we aren't anywhere near with any protective classification, yeah, I suppose it could, but we aren't there, and we've seen that the Fourteenth Amendment itself sustains and allows minority set aside programs. So, I see no difference in the analysis here, that it would allow the same things to compete. But, I will say this . . . and, and I'm quoting to a friend of mine, her name is Representative Kathleen Willis, a strong advocate for the ERA . . . she said, "you know what, if I lose a couple of things to gain overall equality, I'll take that, I'll take that. Because I'd rather be equal than be put on a pedestal, so to speak."

Herring: So, Illinois was the 37th state, Nevada was 36, and there were a lot of years before where, uh, there hadn't been ratification. Uh, Senator, what . . . what do you think, um, got Nevada going, uh, after such a long period of time? Because people are asking that, you know, here in Virginia, too.

Spearman: So, um, when Janette Dean, who was then in Nevada, and she now is in Minnesota, um, she had partnered with a number of people, and I think, Eileen, you were one of those. There were several people around the country, and, um, they were doing the three-state strategy, and Janette came to me and asked me if I would carry the bill, and I will tell you I thought it was dead. I was like oh my, I, I . . . it didn't get ratified in time. And she said, well, it didn't get ratified, but there's not . . . time is not the problem, it's the problem getting it introduced, and so . . . Once I . . . once I learned that it had not been ratified and that we had an opportunity in Nevada, um, to make this historic step, it was a no brainer. Um, I mean it was . . . like I said, you know, I . . . any place I go, I bring my whole self to it, and my

whole self has been discriminated in some form or fashion all of my life. Uh, I was discriminated, um, when I was first was, uh, commissioned in the military because I was a woman. Uh, they didn't want women in there. They certainly didn't want black women in the Military Police Corps. Uh, so discrimination is one of those things that I've . . . I fought for, um . . . fought against all of my life. Um, the other thing that I'll say is we had to . . . we also had to get over the hump of symbolism, and I don't think I heard that when I was in Illinois when it was being, uh . . . when we testified before the Assembly . . . but symbolism. So, we had people who said, well, this is symbolic, and, you know, why are we wasting the people's time on symbolic things and . . . and it doesn't mean anything. So, what? We ratify it, it won't mean anything, and so I . . . everybody goes around, and they say what they need to say, and, um, I noticed that, um, all with exception of one of my Republican colleagues were going to dwell on the symbolism and talk about how silly it was that we were wasting time with this symbolic action, um, and, so, when it was my turn to get up and, and close it out I said this . . . I said, “Listen, you all can denigrate symbolism all you want to, but every day we come into this chamber, before we get started, we have a prayer and then we have the pledge of allegiance. I pledge allegiance to the flag of the United States of America and to the Republic for which it stands. Short version: symbol. That's what it is, the flag is a symbol. Christians wear crosses, members of the Jewish faith, you know, wear Stars of David, you know, Muslims wear, uh, uh, the moon. They . . . anybody who is walking around and who understands the value of what they believe in, they believe in those symbols, and symbols actually point to something stronger and bigger than we are, but that symbol animates and tells the world what our belief is. So, don't talk to me about symbols being unimportant.” I said, “Every one of you that stood and gave that facetious argument about it's a symbol, and it doesn't mean anything, I need you need you need to look at your left hand . . . because on your left hand your spouses are sitting on your hand. You have a ring on your hand, and anyone who sees that ring on your hand, that is a symbol that this person is married, so if symbols don't mean anything, then we should not say the pledge of allegiance. If symbols don't mean anything, then take your ring off and, and go explain to your wife why you did that.” [Laughter]. So, symbols are important. They, they, they are important, but, you know, we . . . we were able to get it done in Nevada because we just

stuck with it. We just . . . we would not give up, and, like I said, you know, they didn't hear it . . . they heard it in the '15 but wouldn't vote it out of committee, and we were bound and determined, we're going to get this done. We're going to get this done, and the thing that I have said to people in Virginia . . . and I have said the same thing to people in Arizona, I've said the same thing to people in North Carolina, and in Georgia, wherever people have asked me to come and speak about this . . . listen, if you have people in your legislature that do not understand the importance of your equality, if you can't change their minds, change them. [Applause]. If you can't their minds then change them because . . . because it be . . . it becomes painfully obvious that either, number one, they don't understand the job they have been elected to do, or, number two, they understand it, and they simply choose to be derelict in their duty, and so for anybody who did not support us getting the ERA out of committee, all of those people were defeated. All of 'em were defeated. [Applause].

Herring: If I am ever in a legislature fight again, I want you . . . in the chamber. [Laughter]. And for the historians out there who are thinking about time, uh, I would note that the, uh, 27th Amendment governing congressional pay raises was ratified in 1992 after first being proposed in 1789. So, um, but, uh, this year or next year is going to be the year in Virginia. Um, so, uh, any other particular arguments that you felt, uh, that . . . that we in Virginia might be hearing that you can help us, uh, counter like . . . like the symbol argument, or, uh, the abortion issue . . . any other, uh, issues that you remember being especially prevalent that you had to work extra hard to combat?

Spearman: Sure. So, um, what Representative Anderson said, the piece about someone voting for this for their daughter, um, and that was also something I said in my closing arguments, you know, you have daughters, um, you have mothers, there are women in your life who are important. And if they are that important to you, isn't it important that their rights, their equal rights, are codified in the Constitution? And whenever you ask that question, it's like . . . the silence is deafening because you cannot say that you want to have a better world for your daughter, your granddaughter, or you want one day want to be able to honor the sacrifices of your mother, your grandmother . . . you can't say that and then vote against the Equal Rights

Amendment. You just cannot do it. They’re incompatible. Incompatible.

Anderson: We had, uh . . . we had a couple of other arguments that we had to get past and it’s important to know . . . know about them, and I think you probably heard them. Uh, but one is that this will open up everything, uh . . . unisex bathrooms, unisex shower rooms, you know, just absolute equality, no distinctions between men and women whatsoever. Uh, we all must dress alike, we all must look alike, you name it. Uh, that was one, you know, that we actually had to deal with, and, fortunately, I have always said to the people that have raised that, I said take comfort in history, and that history is that in about, uh . . . I think we talked about in one of the earlier sessions . . . about 26 states have ERAs or ERA-like statutes, including Illinois, and we’ve had it for 40 years. Guess what? We have separate bathrooms, uh, our children don’t have to shower together, um, they . . . they definitely do not dress alike. Um, so history is our guide. It hasn’t happened. It’s not going to happen because it hasn’t happened. Those . . . that’s just fearmongering, um, and it’s nothing more than that. So, that one I felt pretty good about getting past. One of the harder ones, and I, I . . . I think it’s . . . it’s a legit question that you have to address, is, for example, all of them are . . . like I said we have an ERA, we have about the most robust protections for all protective classifications in the country, us, New York, and California . . . um, so people say, “Why do we even need this? We don’t need it. Illinois already has all this. So, we don’t have to go with this.” And that’s . . . I mean, that’s something that you have to confront. You . . . I don’t think you have to confront it because you’re not quite as robust as our protections, but, um . . . [laughter].

Herring: Not yet.

Anderson: Not yet, not yet. But, it’s still a question, and . . . and I think the answer is really this, is, do women in the state of Virginia like to travel? Do you like to go to other states? ‘Cause if you do, you lose those protections. Women in Illinois, if they move to Virginia, I guess, right now, don’t have the same protections. Do we really want to, um, live our lives on the basis of where . . . where women are equal and where they aren’t? I think the answer is no, and, also, even in the state of Illinois, those, those laws, our Constitution, does not

extend to federal laws. So, if there are federal laws that discriminate, then we have nothing to say about that with our state constitutions, so even within our state there's a problem. But that was something that was a question that did come up often, was, tell me why we need this. We don't need it, we already have it. So, I . . . you know, an answer to answer your question, those are two that were very common that we had to confront.

Herring: As I look out around the room, I see a lot of young people. Uh, do either of you have anything that you would like to . . . like the young people in particular, uh, to know about the Equal Rights Amendment or the experiences in your states?

Anderson: Um, sure. So, yes. Um, uh, uh, Amelia who spoke earlier, uh, talked quite a bit about what motivates young people, and I really listened and, uh, appreciated the comments, and I also understand that every generation has a different culture and a different attitude towards life. In fact, there's a great book that I would commend to any of you to read called The Big Sort by a gentleman by the name of Bill Bishop, and it talks about how we all self-sort, and what that means is that we tend to want to live with people who think like we do. It doesn't mean look like we do but think like we do. More liberal, more progressive, more conservative, we tend to self-sort ourselves. Well, what we experience is that, in Illinois, we attract a young demographic. Now, we are actually losing population, just by a very small amount, but we are, um, but, where we are growing is in highly compensated young people. Young professionals want to live in Illinois, particularly in the Chicago area, because it is a place that reflects their values, and so what I try to argue is that, for young people in particular, you want to come to a state that has adopted this. It sends a message, a symbol, that says we are open for business for young people. We want you here. We are not some old curmudgeonly state that . . . that, uh, doesn't . . . doesn't care about equal rights. So, I think, I think that message is critical for young people so that, you know, you want to come to a place that passes laws like this.

Spearman: So, um, and we heard the piece about you know start dressing alike. Well, that ship sailed a long time ago, okay? Because it . . . it really depends upon how people feel on that day. Uh, I

remember a few years back, maybe twenty years back, if you had Hilfiger, uh, jeans on, you had a Hilfiger t-shirt. You had Gloria Vanderbilt something, you had Gloria Vanderbilt, so people didn't mix, you know, the names. You had . . . you had one name, that name was on you head to toe. Now, you know, it's like Walmart jeans and, you know, you know, Hilfiger, or Polo, or whatever, so it really doesn't matter, and . . . and there are more styles now, um, for unisex, and, so, young people today they don't care about that stuff. They, they, they don't . . . they really don't, and they don't care about that stuff. And . . . and, and when you stop and you think about the fact that . . . and here's what I said, too, to get, uh, a lot of our, uh, younger people on board, there once was a time when you could not get credit if you were married unless your husband signed, and you couldn't have a bank account unless your husband signed, and, and there were places that you could not really go, and even shop, unless your husband . . . and they looked, and they were like, really? I said yes, yes, and people fought to make sure that those crazy things went away, and what I am asking you all to do today is to fight to make sure the craziness of discrimination based on sex, based on gender, make sure that goes away. The . . . this, this . . . we cannot allow this generation to go away without getting this done. We just can't. It has lingered too long, and . . . and, you know, when you, when you vote on the fifth of November, you know, take, take everybody and la de da de, take everybody, okay. Take everybody. Your friends, your enemies, whoever it is. Take them to the polls and make sure that they vote and help them to understand that state laws can be overturned, so, there's nothing, there's nothing really guaranteed just because we have a state law. The state law can be overturned depending upon who's in charge, and, and, and, and sometimes even federal law can be overturned, as we have come to see. There's some things we have tool for granted that said oh, well that will never go away, and we're seeing right now that they're under attack, and so, we must get that done in this generation. We have to. It is a moral imperative. We must get it done. And if my generation alone is not willing to step up to the plate, then I am asking you all: join us, join us, young people join us because we have to get it done, and we need you. We have to get it done. It's a moral imperative.

Herring: Well, Senator, you are, um, getting to where I would kind of like to, uh, conclude this part, and in Virginia, we have been

working on this for a long time. Uh, we thought we were going to get it passed this past January or February, and it ended up not making it across the finish line. So, we are all redoubling our efforts. Uh, any lessons that you have for us in Virginia as to what we can do to finally become the thirty-eighth state to ratify the ERA and get it passed, uh, in the upcoming session?

Spearman: I'll just . . . I'll just say this. Look at the people who voted against it and if they're on the ballot, do what . . . do for them what they did for the ERA. Got it? [Laughter and applause].

Herring: Any, any, uh? [Laughter].

Anderson: Oh, yeah, sure. You were . . . asked the senator so I . . . I listened. [Laughter].

Herring: Sorry. I would like to ask both of you. Any lessons for us in Virginia so that we can follow, uh, your lead?

Anderson: So, uh, one of the things that I . . . I advise on this a lot, and in the next ten days, it's not going to matter, but, um, but depending on how this goes, is the concept of positive pressure for legislators, um, is . . . it is one thing to do what the Senator said, which is vote people out of office and you can . . . and if you can do it, awesome, but you might not always be able to do that. Uh, there are districts that are drawn so that it's almost impossible. So, what you need to do for those districts and those senators or representatives is apply positive pressure. And what I mean by that is the idea of saying to that person, "Senator, ah, you know, I want you to vote for this bill. I know it's a tough bill for you, but I think you know it's the right thing to do. But I also know you're worried about what it's going to do for you, you know, in your next primary. You know, I tell you, I'm going to be there for you. So, in other words, I'm not just going to push you to vote on my bill and then I'll . . . you'll never see me again. No, I'll walk for you. I'll knock on doors. I'll collect petitions. Um, I'll support you financially. I'll walk in your parades, and I've got a bunch of people who will do it with me." In other words, there's got to be a commitment on your part to support those people who might do it but are wavering. 'Cause if . . . if the answer is you just come to their door and say, "I want you to vote for this thing." First

thing the Republicans are going to say is, “Well, are you a Democrat or a Republican? Because if you’re a Democrat, you’re not voting for me anyway, so that doesn’t matter, and if you’re a Republican, what are you going to do for me?” And I don’t mean that in a quid pro quo kind of . . . kind of way, I just mean it in a very legitimate type of way. If you’re asking them to do something difficult, and they can . . . these are difficult votes, make no mistake, for any legislature, these are difficult things to, to decide about . . . if you’re asking them to do something difficult, you need to be prepared to do something difficult for them, which is to go out and help and commit to them for the future because . . . and if you can do it beforehand that’s great too, by the way, if, you know, they win . . . now hopefully this won’t take too long, but, uh, but if you have to go another cycle then you got to get out in front of that and say, “I’ll walk for you now. I’ll work for you now.” And, so, I think the idea of positive pressure for those districts that are, that are swinging, uh, and that are held by Republicans in particular, uh, that’s an important, uh, important for them to think about.

Herring: Well, Representative, that’s, uh, uh, good segue. We have time for one question, uh, and, and then we’ll need to conclude. How can the ERA remain bipartisan? And I . . . that’s to both of you.

Anderson: Okay, uh, so I don’t think it’s very difficult for it to remain bipartisan, especially in this day and age, but what has to be done is the pressure has to be kept on the focus on women’s rights. Okay. Uh, you’re half the population. Um, Republicans know that. Um, you . . . you exert pressure like nobody’s seen in the last, uh, two years, maybe four years. Uh, uh, the women’s movement is . . . has been quiet in the past, but that is no longer the case. You are . . . you are loud as can be, and I don’t believe it’s going to go away, and I hope it’s not ever going to go away, so if you keep doing that . . . if you keep positive pressure, but you also keep your voice . . . don’t ever lose the powerful voice that you have gained. You force it to be bipartisan issue. They have to . . . they have to listen to you, or they’re toast.

Spearman: And, and I would say this, and I look at this through the same lens that I see, um, some of the contemporary arguments about whether our democracy has been put at risk . . . when people talk

about things as important as that, and they say that, well, Democrats support this and Republicans support that . . . this is not a partisan issue. It is not a partisan issue and, and, and . . . and you cheapen the labor of those that have gone before us when you reduce it to that, and, so, I still try to remind people, it's not a partisan issue. It just so happens that there are more Republicans who stand against this than there are Democrats . . . and we did have, uh, one Republican woman who voted with us, and, um, I said to her, I said, "Every place that I've been all over the country I've been going," I said, "Every place that I've been, people know your name. They do not know the names of those who did not vote with us." And so, continue to remind people, the media may want to reduce arguments about our democracy being under attack or not, to Democrat versus Republican, that's not what this is. This is about equality. Period. It's about equality. Period. It's about . . . it's about not just my rights, but it's about two and three generations after me. What . . . what are we going to do? What kind of world are we going to leave them? Are we going to have them come into the world fighting as hard as we did? So, it's not a partisan issue. It's about equality. Period.

Herring: Please join me in thanking our great panel.

[Applause].

MaryAnn Grover: We are now going to take a fifteen-minute break. We have fresh coffee. Some pastries out in the atrium. Feel free to grab some snacks, freshen up and we'll be back here at 4:15.

Cory Amron: Good afternoon, good afternoon. Is everybody awake? Everybody needs to, you know, we need to stand up and . . . just do a little calisthenics here. First of all, thank you all for the stalwarts, for sticking it out and for being here. You know there's one more panel, so you can't go home yet. And, um, there's so much more interesting things to talk about and to . . . to hear about. So, thank you again for being here. My name is Cory Amron, and I am the president of Women Lawyers on Guard. Um, we were asked to put on a panel about equal pay and how it relates to the Equal Rights Amendment. Uh, Women Lawyers on Guard is a national network of men and women, uh, lawyers and non-lawyers. Um, we are working for a social justice, we're working . . . or, are a network, uh, using the law to,

um . . . to further social justice, to further equal opportunity. Um, and some of the things that we do are we match our volunteers with the legal needs of other non-profits. We, uh, work on amicus briefs. We send comments in to, uh, . . . on regulations, we send letters to Congressmen, and, um, uh, . . . on incredibly important issues, not only to women, but specifically also women lawyers, and we are really focusing on sexual harassment in the legal profession. We just closed out a survey, a nationwide survey. Guess what? There’s sexual harassment in the legal profession. Who knew? Amazing, right? Um, so watch for our report. It’s going to come out, uh, at the beginning of the year. And we’re also working on equal pay, so, . . . again, in the legal profession. Um, so this . . . this afternoon, we have, um, a great panel that Courtney is going to introduce to you. Courtney Toomath is, um, a litigation attorney, and she has represented many companies that you would recognize in valuation disputes, um, recovering millions of dollars. But even more important than that, Courtney is on our board. And, um, she is the chair of our amicus committee, so that’s . . . uh, we are . . . we are so pleased to have her . . . to have her here, and have her, uh, moderating this panel. Um, so as I mentioned, we’ve been asked to put on this panel. We’re going to talk about the substance of, uh, the equal pay, uh, issues. We’re going to talk about practicalities. We’re going to talk about legislative litigation, uh, issues and solutions, and, of course, we’re going to tie it into the ERA. Um, you have at your tables a couple of things, one is, um, a little flier about our organization. We have a C3 and a C4. We have, um, some . . . an index card. If you have any questions, uh, somebody’s going to come around and, um, pass them to me. And, um, Jeff will talk about this compensation survey that should also be at your desk. So, um, without any further ado, Courtney.

Courtney Toomath: Hi, everyone, Um, so, uh, just before I get started, um, I wanted to, uh, especially tell some of the younger, uh, feminists that there’s something that my professor, uh, Constance Backhouse, who wrote, uh, . . . wrote “Petticoats and Prejudice,” has told me, and that is feminism is fun. And one of the wonderful things I hope you take away from this conference is that you make, um, incredible connections with other women and men who all support, uh, equality because that’s really what we’re here to do.

Um, our first speaker today, um, on another illustrious panel is Jeffrey Lowe. Jeffrey is the Global Practice Leader of Major, Lindsey & Africa's Law Firm Practice Group, the leader of the firm's Washington D.C. Partner Practice Group, and the Managing Partner of the D.C. Office. Jeffrey regularly handles the most significant partner placements in Washington D.C. and is widely regarded as one of the leading partner recruiters and advisors in the United States. He was named to Law Dragon's 100 Leading Legal Consultants and Strategists in 2016 and 2017. Jeffrey is regularly quoted by The American Lawyer, The Wall Street Journal, and Law 360, and his articles have been published in the D.C. Legal Times, the New York Law Journal, the National Law Journal, the Law Firm Partnerships and Benefits Report, and The Texas Lawyer. Today Jeffrey will be speaking about, ah, uh, the Major, Lindsey & Africa Partnership Compensation Survey, which you should have, um, a copy of that you can browse through. Jeffrey is both the creator and the author of the survey, which was first published in 2010 and continues to be, uh, produced, uh, by the MLA. The survey is one of the most comprehensive efforts ever undertaken to identify ranges of partner compensation and the criteria that law firms use in determining partner compensation. Since its inception, the survey has found male partners consistently report substantially higher average compensation than female partners. As a result, Jeffrey expanded the survey to take a more in-depth look into the gender-pay gap, to better understand what factors were contributing to that difference.

Our second panelist is Anne Weisburg, and she is the co-author of the book "Mass Career Customization: Aligning The Workplace with Today's Nontraditional Workforce," which was hailed by the New York Times as the most important life, work . . . workbook that year. She's also the author of some other books and reports as well, that are highly recognized. Anne is recognized as a thought leader and subject-matter expert in the innovation and design of practices for building effective and inclusive work environments. As the Director of the Woman's Initiative at Paul, Weiss, Rifkind, Wharton & Garrison, LLP, Anne is responsible for designing and implementing a gender strategy that fosters a high performing, inclusive work environment for all at the firm. She is also an adjunct professor of management at the NYU Stern School of Business, where she teaches a course on inclusive leadership. Anne has practiced law and written extensively on

the topic of women and the workforce. Today, Anne will be explaining some of the reasons we continue to see the gender-pay gap, and she will share some practical strategies for interpreting gender bias in the workplace and hopefully overcoming it.

Our third panelist is Andrea Johnson, Director of State Policy, Workplace Justice, and Crosscutting Initiatives at the National Woman’s Law Center. Andrea coordinates efforts to advance state policies across NWLC’s workplace justice, income security, education, and reproductive rights and health teams. Andrea has been traveling all over the country, helping state legislatures deal with sexual harassment issues in the wake of the #MeToo movement, and she works directly on legislation and litigation and outreach to break down the main discriminatory barriers to women’s full and equal workforce participation, including sexual harassment, pregnancy, and care . . . care . . . caregiver discrimination, and pay inequity. Andrea will be sharing her knowledge of current policy and litigation to discuss initiatives aimed at achieving equal pay through the courts and legislatures, and she will touch on how the ERA could help move us towards equal pay. So, Jeffery, we’ll start with you, a question for you.

Jeffrey Lowe: Thank you.

Toomath: Can you tell us about the recent survey that Major, Lindsey & Africa did on the compensation for partners at the largest law firms in the U.S., and what that survey revealed about the compensation gap between women and men law firm partners?

Lowe: Sure. So, we undertook the survey beginning in 2010 because in my business . . . I’m a headhunter, so, like, it sounds very fancy what I do, but I’m a, I’m a headhunter, and I’m also living proof that you can be something else with your law degree. I was a partner at Hogan & Hartson for a long time before, um, opening up my firm’s D.C. office in 2003. Um, and as Andy can tell you, there’s very little information out there on compensation about what partners make. You probably are familiar with the Am. Law 100, and it’ll list, you know, profits per partner, and things like that, but it doesn’t really get into any detail. And, so, we undertook the survey beginning in 2010 to try to understand, um, you know, what is the average partner making? How do things split out among cities and among genders and

things like that? And from the very beginning, I . . . I noticed that, not surprisingly, as my wife, who I met in law school is . . . uh, in the back there, will tell you, . . . that men are, on average, making substantially more than women . . . and, um, year in and year out, we did it in 2010, '12, '14, '16, and '18, and by our 2018 survey, I thought it was very important for our firm, as thought leaders in the industry, to do some real in-depth analysis, so we hired, um, a research firm called Acritas, which is well-known around the world, to undertake this analysis for us, and, um, we asked a number of questions and sorted the data specifically about pay gap issues, and so, um, over the five surveys that we've done over ten years, the average pay has differed between thirty-two to, I think, fifty-three percent between male and female partners, which is very substantial. Um, and so this year we asked them, for 2018, we asked them questions, what do you perceive the gender pay gap to be? And you'll see if . . . if you look at page 50 of the, uh, Partner Compensation Survey in front of you, the average perceived gap, for those who even thought there was a gap, was 6%. So, you can see there's . . . you know, there, there's very different, um, thoughts out there between what's happening and, and, and what's being reported. Um, and not surprisingly, uh, 67% of female partners thought there was a gender pay gap, and 11% of male partners thought that there was a pay gap. So, uh, you know, again, it . . . it's not really surprising, but it's still stark when you see the numbers here. And, so, what we asked Acritas to do is do a, a real statistical regression analysis. Um, this is . . . writing this report is part of what I do, but I'm not, um, I'm not a statistician. I'm not a, a research economist or anything like that. It was really out of our depth, and I thought it was important for us to have someone look into it. And, so, Acritas goes out there, they look at all the factors that can contribute to compensation, and guess what? They come back and to see this . . . and we included their whole report in there . . . they come back, and they call me up six weeks, eight weeks later, after we have all the data, and they said, um, "The regression analysis indicates that there is no influence, um, by gender on compensation." And, I said, "Wow. I really don't want to be the person to tell that to the world, so let's talk about that a little bit further." Um, and as you'll see, they'll . . . they would say, um, it's not gender that's causing the gap, but rather originations and what you charge an hour for your work. And, really, all this analysis did was just kick it back one step further . . . that becomes very germane to, to women of all ages,

particularly those entering the workforce, because what you will find . . . and, again, this is a conversation I had with my wife going back nearly 30 years as we started our careers together as associates . . . um, women are ending up in roles at law firms that are traditionally, um, lower billing roles. It might be things like the education practice, or the health care practice, certain regulatory practices, and things like that, and they generate lower rates, and if you generate lower rates, and you multiply it by a certain number of hours, you’re going to be generating less work on your own time. But, more significantly, um, women on average are reporting, si . . . um, men, men have 75% higher originations, and that’s . . . if you’ve ever heard the term “book of business,” their . . . their book of business is 75% higher, meaning they’ve got the client relationships, and, in the law firm world, that’s what really matters, and there are no shortage of articles and discussions about why this is the case, and, if you, um, take a situation where law firm partners are predominately male, and they might be handing down clients, for example, to young male partners, or grooming young male associates, and things like that, you end up in a situation where you’re being steered, in some fashion, perhaps, to lower, um, billing-rate practice areas, and you’re not inheriting, or being taught to develop any of these client skills that will ultimately lead and be the two primary factors to your compensation. And, so, we were really very proud to be able to, um, publish this report in 2018, and, as we note in the report, um, these are important issues, and, and we want to be part of that conversation and it, it . . . it’s been very pleasing for us to see how much, um, how . . . how often it’s been picked up around the country, across a wide variety of industries, that the survey has often cited, um, in the gender pay gap issues. So, that’s one of the reasons why we did it.

Toomath: So, um, the survey, I recall, it asked questions, um, of the participants, whether firms were actively addressing the gender pay gap, or at least people, um, perceived that there was some kind of address . . .

Lowe: Right

Toomath: . . . addressing of the issue. Uh, could you speak to us about that bit?

Lowe: Sure, um, you know, we wanted to know what is your firm doing about it? And, um, the reality is that, um, only 23% said that their firm is doing anything to even address the gender pay gap. Um, many people . . . again, if you think that there isn't one, you're not going to be terribly inclined to take any action to address it. Um, of the 23%, again, just 23% . . . just 60% of those have said that the issues been discussed in partnership meetings, 52% in working groups, and 28%, um, in internal memoranda. And, of that 23%, um, 50% of the female partners did not believe their firm had done anything to discuss it, and, um, 40% of males did. So, again, another huge disconnect in perception as to what . . . whether there is one and whether the firm is doing anything about it. And, then, once a firm has identified a gender pay gap, what . . . what are the firms doing to address it? Um, and the three principal things are, um, adding more female members to the management committees. Um, again, those . . . think of those as the Executive Board of a law firm, typically the most powerful board that a law firm will have. Um, 51%, um, said their firms are adding more, uh, women to their compensation committee, which is typically the second most important, um, board that you'll have at a law firm, and 40%, um, indicated that the firms are raising female partners' compensation. So, as, as you can see, as the data shows, there's just tremendous . . . there's still tremendous disparity out there. There's still confusion out there, and, um, at least now, I think it's getting much more recognition, um, across a wide variety of sectors, and I think firms are becoming even more sensitive to the issue, and I know when I represent female partners, um, I'm very quick to make sure that the firm's I'm dealing with on their behalf know that my client is very concerned about the gender pay gap issue, so as you're formulating that offer, we're going to expect that you do your real best here, like you would with a male partner, and, so, we think it's helpful for the female partners to be very forward about this concern when they engage in compensation discussions with firms.

Toomath: And, uh, just following up on that, does compensation, um, transparency have, uh, a large impact, and does it produce greater job satisfaction?

Lowe: Yeah, it can, and we found, um, . . . forgetting genders for just a second . . . um, there are three main ways that firms can compensate their partners. One's an open compensation system where everybody

knows what everybody's makin. You know, it's published, you can get access to it. Great. Um, then there's a partially open system where you know ranges of compensation, you don't know exactly what people are getting or how it was computed, but you have some sense. And then there are closed compensation systems, and, not surprisingly to us because it's been this way for all five surveys, people in closed compensation systems are making on average, um, I think about 45% less than partners in open compensation systems. So, you know, we would think you'd want to be in an open compensation system because you'll have . . . you'll be able to benchmark yourself against other people and figure out whether or not you're being treated fairly.

Toomath: And, uh, and one last question, which would be a lead-in to the video that Anne, uh, has offered to share with us . . . uh, have there been any, um, changes or trends, uh, with respect to the gender compensation gap since you first released the study in 2010?

Lowe: Um, there really haven't been any changes, and, and as I said initially, the gap has ranged I think from anywhere from 32 to 53%. Some years it goes up, some years it goes down, so there . . . there's not a discernible trend, other than, um, it still seems huge no matter when you're mea . . . measuring it, I suppose.

Toomath: So, with that, Anne has offered to share, um, uh, a brief clip that her one of her clients produced, uh, for us.

Anne Weisburg: Right, so, uh. Yes, sorry. Uh, this . . . this is a, uh, a representation of how many of us in this room have felt for a long time, uh, but, it . . . I'll leave it at that.

Toomath: Okay. Thanks, Jeff, and thank you Anne.

MaryAnn Grover: Give me just one second, sorry.

[Video clip is played].

Weisburg: So, thank you. Citi, um, debuted this campaign called “The Moment,” the moment that girls find out that, um, women are paid less than men, in Times Square last week, and it's part of their

campaign, um, and all the stuff they're doing internally at the bank to close the pay gap. Um, and, so, my role on this panel is really to, um, sort of explain that, or at least, um, posit the argument that, even though laws are important, they're necessary, um, no question, I don't think they're really sufficient to get us to where . . . to gender equity in the workplace. Um, and the reason I say that is that the, uh, . . . the pay gaps that like Jeff is talking about, they are the outcome of hundreds, if not thousands, of decisions that are made every day about, um, you know, who we're going to hire, who we're going to promote, um, how people's performance is, is evaluated. I mean, just hundreds of decisions, and all of those decisions are subject to, you know, gender bias. Um, so, and before I get into kind of how that works, I just . . . to dispel the notion that, you know, it's only sort of in the senior ranks that we see these large discrepancies in, um, in pay, or maybe because law firm partner comp is so subjective and, um, partnerships, you know there's, 9there's a lot of different factors, maybe that's why. I just wanted to share a few other statistics with you. First of all, um, in in-house legal departments, it's also true. Um, women general counsel are making about 19%, less than male general counsels, and that number has been going up, has, uh . . . the gap has been widening over the last five years. Um, and it's not just in the legal profession. So, I went and looked at some of the, um, professions that are, you know, traditionally female to see if, like, maybe there's no gap, maybe that's the issue is that, you know, that there's gender gaps in professions that . . . or, industries, that are traditionally male, but actually it turns out that male nurses, on average, make \$5,000 more than female nurses, um, and that number hasn't changed, basically, since 1988, according to, um, uh, the UCSF Medical School, which has been tracking those numbers. Even female secretaries and administrative assistants make 83% of what men make in those jobs. And it's not just sort of at the top, um . . . the American Association of University Women found that women are making \$7,600 less their first year out of college than men even . . . even holding for, you know, uh, grades, um, uh, industry, you know, uh, organizations where they go into, women are making \$7,600 less than one year out of college. So, it's extremely . . . this is systemic. And, again, it's, it's systemic, and it influences, you know . . . it, it's because of the systems that, um . . . that affect the way men and women move through an organization. So, how we think about the implicit associations we make about men and women's abilities,

about their ambitions, about their potential, and how that, in turn, gets reflected in how, you know . . . who we hire, um, the assignments we give people, you know, the opportunities we give people, the way we, um, review their performance, and who gets promoted, and on and on. So, um, just to give you an example. There was a study done of performance reviews, of 18,000 performance reviews, the language and performance reviews of men and women in the military. And, you would think that the military, it's, you know, they . . . there's a lot of objective criteria, right, around performance in the military. And, um, they found, uh, that the most common, um, positive word used to describe men's performance was analytical. And the most common positive word to describe women's performance was? Anybody want to guess?

Audience member: Attractiveness.

Audience member: Compassionate.

Weisberg: Attractiveness. [Laughter]. Did you say compassionate? [Gasp and laughs]. You're the first person who's guessed that. Compassionate. Okay. So, you're a high ranking, you know, officer in the military, and you're going to promote . . . you have two people in front of you, and their records the same, except that one person is described as analytical, and the other is described as compassionate. Who are you going to promote into a leadership role? I mean, so, you know, it's just everywhere, Um, uh . . . and, actually, it, . . . I think what we're really learning . . . people who do the work that I do, gender in the workplace within the context of any, you know . . . the private sector especially, is that this all starts with very early. Um, so McKinsey, which is a management consulting firm, hopefully you've heard of them. Um, they have been, for the last five years, doing an annual survey of women in the workplace, um, in partnership with Lean In, and their most recent report, which came out like two weeks ago, um, basically focused on that entry level and what they . . . what they have now coined a new metaphor, glass ceiling is for what's happening at the senior levels, and they're now calling what's going on at the junior levels “the broken rung” because it turns out that, um, the big issue around how women are moving through, uh, the . . . any organization is that there are significantly fewer women, and especially women of color, who are promoted into that first, uh, manager

position role. Significantly fewer. And, so, women are getting left behind from the very beginning, and they never catch up. So, they estimated that if we didn't have that broken rung, there would be a million more women in senior management roles today because of the cumulative impact of this, so, um . . . So, you know, the . . . we've got a kind of look at how these systems operate and how gender bias affects how these . . . systems operate, really from day one.

Toomath: So, um, what can employers do, including law firms, [laughter] to interrupt gender bias in the workplace?

Weisberg: Right. So, you know, I think, um, as, as you, as you can probably tell by now, I think this is a systemic issue. Um, I think, also, in this sort of lean-in world that we've been in since, um, Sheryl Sandberg published her book, um, a lot of organizations have kind of, um, you know, put the burden, frankly, on the women to fix this problem, right? Women need to do this, women need to do that, women need to lean in. I . . . I mean, I think that women should sort of learn how to navigate the workplace given all of what I just shared with you, that no question, women have . . . it's in their interest to, to understand what's going on. But, really, it's up to employers, and this is what I love about what Citi is doing, and that's why I wanted to show you the video, partly because it's so cool, but partly because I want you to see that there are . . . there are, um, employers who are really taking this seriously and when Citi says, like, this, you know . . . nobody should be, um . . . should, you know, be faced with such disparate, um, opportunities, um, and they're committed to closing the gap, what they mean by that is that they are really trying to move women into, you know, . . . off that sort of entry level, into that first line of management, and they're holding everybody accountable every step of the way. Um, and, actually, Acratas who did, um, the research for, uh, Jeff's firm has . . . does a lot of research in . . . in terms of the benefits of, um, diversity, including gender diversity, and what they have found is that in the legal profession, in particular, um, . . . clients rate gender diverse teams, more . . . more highly. Gender diverse teams are . . . actually perform better, and we know that. So, I think the first thing, like, and, and again, like, . . . this is what, you know, we're doing at Paul Weiss, and a lot of places that are really, are really trying to get this right . . . the first thing is just understanding what's in it for the business. Um, and just like, you

know, the, the Senate . . . or the representative from Illinois said, you know, we want to make . . . we want to make Illinois a state that's welcoming for, you know, young people, like, for . . . in . . . for people in companies with, with progressive leadership, frankly, want to make their companies a talent magnet for women, um, given, you know, the percentage of women coming out of law school and, and other professional schools, so it's part of a talent strategy, they . . . it's got to be strategic, though. You have to have a reason to go back and sort of really look at all of these systems and then, I think, you have . . . once you have that at the leadership level, um, you need to really understand where you have gender gaps in your system and then you have to hold people accountable for closing them at every level.

Toomath: And just, um, . . . for women who are out there maybe looking for their first law job, or a job in general, uh, do you have any tips or skills? Understanding that they're . . . they're dealing with systemic discrimination, are there any tips that they can use to overcome gender bias?

Weisberg: Yeah, so, I mean, as I said, I think, yeah, we can't wait until, um, the, you know, these systems get . . . we take bias out of the systems for women to act. I mean, women need to own their own careers and, and, um, . . . and learn how to navigate the workplace. Um, I think that women should do, or, you know, I would, um, encourage women to do three things. First of all, get educated and really take advantage of the resources that are out there. So, one of the best resources is the American Association of University Women, has free workshops on salary negotiations. They're all over the country. They're on college campuses. Has anybody heard about these? Yeah. Okay. So, you should definitely, um, . . . I wrote down the website because I wanted to make sure I told people, um. Yeah. Okay. So, it's, um, www.salary.aauw.org. So, they're free workshops. I mean, some of them are in person, some of them are, I mean, you can do it also online, I . . . from what I understand. And, um, like, for example, the city of Boston has made a commitment to putting 5,000 women through salary negotiation workshops that are run by the, um, AAUW every year as a way to try to close the gap. So, you know, get educated and, and take advantage of the resources that are out, that are out there, including, um, you know, a ton of resources on the

leanin.org website. Um, I . . . another great resource is called, um, biasinterrupters.org that was built by a professor of law, um, named Joan Williams, and she's got tools for both individuals and organizations. I mean, it's extremely comprehensive. It looks at everything from hiring decisions to assignment decisions to promotion and performance review decisions. So, I would recommend that. Um, the second thing I think women need to do is, um, stick together and support each other, um, and really, you know, sort of, um, raise each other up. Um, if you're in a meeting with one other woman, the other thing that the McKinsey report showed was that, um, women are still the only, in an . . . in a meeting on a very regular basis. This is not something like of the past, um. You know, stick up for each other. Um, make sure that you give credit where credit is due, that you, that you . . . that women's accomplishments are recognized. And the third thing, I would say, I would, um, uh, advise or recommend or encourage women to do is involve men in the conversation because we're not going . . . we're not going to do it by ourselves, and, um, there's lots of ways to do that, too, but . . . which I have run out of time to talk about, but I'll come back to, or you can ask me.

Toomath: So, Andrea, um, we've been, um, armed with, um, the, uh, evidence from the survey that Jeff has given us in terms of, uh, compensation transparency and how that is helpful, um. One of the ways, um, uh, that we've looked at, or that's being looked at right now, is banning prior salary history as a way of helping, uh, deal with gender bias in pay. Can you give us a brief overview of what's currently happening in state legislatures and in litigation, uh, with respect to prior history, uh, . . . prior salary history bans?

Andrea Johnson: Yeah, so I'll say as a legislative lawyer and as somebody who works at the National Women's Law Center, I'm definitely a law person, um, public policy person, and I agree that the laws are not sufficient, um, to close the wage gap, but it . . . they are really important to incentivizing, uh, good employer behavior, good employer practices, and changing culture norms, um, . . . cultural norms. And the study that you were talking about, Jeff, is so exciting, and it would be so great to see so many more employers doing that. And that's . . . that kind of transparency, incentivizing that, putting . . . requiring it, even better, um, in law is something that we're really looking at that. Uh, a number of countries across the pond have

been working on this. The U.K. now has a requirement that employers need to report about their pay gaps. Um, it's a pretty crude number that's reported of just kind of like women versus men overall, not looking at job categories or anything, but re . . . that transparency, requiring that analysis that you all did of looking at your books and figuring out what the gaps are and trying to then, once they have to put out that number, they really want to justify it, because oftentimes the numbers aren't good. So, there's incentives to justify it, which means doing the hard work and figuring out what . . . where these gaps are coming from, and that is something we want to see all employers doing because that is so important to actually closing the gap. So, the Law Center, um . . . I'll get to salary history in a second . . . but we're doing a lot of work around transparency, um, both at the state level and at the federal level. Uh, we have litigation, um, around the EEO1 pay data, uh, reporting requirement that President Obama had put in place and then Trump rolled back, um, and this would require employers with 100 employees or more employees to report pay data, um, to the government and just a really important step in getting more of this transparency and really incentivizing employers to do what it sounds like good employers are doing, um, by having more employers across the board to do this analysis, this pay data analysis. That is going to be so important to, to closing the wage gap. And then it's simple things, like, um, making sure employers aren't asking for salary history in the job application process, then relying on that to set pay, or to weed out application . . . uh, applicants. Um, Massachusetts was the first state to pass that kind of legislation in 2016, which was very exciting. We've really seen, you know, people since then wake up to the fact that this is not just a neutral objective factor in which to set pay, that it is often reflective of a past employer discriminating against you, reflective of biases in the market, um, against women, against people of color. And when . . . when an employer's relying on that information, that's going to, that . . . those pay gaps are going to follow that person throughout their career, and that is a deeply unfair practice, so since Massachusetts passed their law, thirteen states now in just the last three years, um, have passed salary history bans. New York, to Illinois just recently, woohoo, um, Illinois is having a good day here at this conference [laughter] . . . uh, to Oregon, and actually six of those states, uh, including Illinois, enacted legislation just this past year. So, I mean this is really a moment of culture change, um, around this issue, which is very exciting. We're

seeing bipartisan support for this type of legislation. A number of cities in, in more conservative places have also passed ordinances like Louisville, Kentucky, Columbia, South Carolina, Toledo, Ohio, um, just to name a few. So, um, yeah, this is an exciting . . . exciting area of reform, uh, and we were talking earlier about how, it's not just about saying, you know, employers can't ask for the salary history. It's also important to have transparency around salary ranges. Um, so, you know, we're . . . the concern is that if employers are no longer asking for salary history, they might ask, "What are your . . . What is your desired Salary? What is your salary expectations?" And research shows that women tend to ask less than equally qualified male counterparts in negotiation, but when they have more information about the context of a negotiation, that helps narrow the gender wage gaps that, that arise. So, seeing legislation that not only, um, bans a reliance on salary history but also, uh, encourages transparency around salary ranges, they kind of work really well together to help level the negotiating playing field.

Weisberg: Can I just say something about that? I mean, this is something that, again, Joan Williams has found, that if you put salary negotiable on a job description, literally those two words, have closed the gap between what men and women who are applying for that job ask for. So, I mean this is, right, uh, . . . there's of lots of things that can be done, um, recognizing that . . .

Johnson: Yeah, Iris Bohnet has a really interesting book that I'm blanking on the name of right now, but it looking at . . .

Weisberg: Called, uh, "What Works: Gender Equality by Design."

Johnson: Yes, so the "By Design" part, and it's all about de-biasing processes, recognizes how hard it is to de-bias minds. But, what can we do? How can we look at our practices, uh, that we kind of just take for granted, and just assume are fine and neutral? What can we do to change those? How are they . . . and that's what I just love so much about the study, is that the initial reaction is like, "Oh no, gender's not influencing this," and you say, "No, no, let's look deeper." And, you found things that maybe could on their front, I mean . . . origination, that doesn't have the word sex in it, [laughter] but, but, like, you knew that, that, that, that sex was, um, you know, there was,

there was a gender dynamic to all of that. And, I think that’s so important for all of us to do that deeper analysis, um, and once we find that, and we find something like salary history that is, you know, shown to have this discriminatory, um, effect, then we need . . . we have a responsibility to, uh, change our public policies to stop those practices. I know you wanted me to touch briefly on litigation, but I could . . .

Toomath: Um, well let’s . . . it, it, since we’re running out on time, if, if the . . . enacted, uh, what are ways that the ERA would help us achieve equal pay? I think we want to see how, um, in practical applications it could work.

Johnson: Yeah, so the fight for the ERA is definitely incredibly important to the fight for equal pay, the fight for a whole host of gender, uh, justice issues. And it’s, you know, this push for equality and the cultural conversation and the conversations we’re having today, uh, that result from that fight. Um, you know, it really helps to break down what gender equality means, uh, and, um, it also helps to educate . . . it plays an educational function to judges, to lawmakers, to understand, you know, what equality means, what does gender discrimination look like . . . so, putting it out there the fact that salary history is not this just this neutral thing, but, um, is part of gender discrimination, and what are the ways we need to address it? So, um, that’s incredibly important. Then, maybe one thing I do, uh, want to emphasize is that, um, it isn’t the case that we need the ERA to pass equal pay laws, we can do that already, um, we can do that right now, and there are strong . . . there are equal pay laws on the books, and we can be strengthening them. Um, and it’s also isn’t the case that if we have the ERA, we don’t need these equal pay laws. Um, you know the ERA, uh, most directly impacts public or state action, as was discussed this morning, and, so, it’s unlikely to eliminate the wage gap for women in the private sector. To have that kind of direct impact, we still need to be doing the, the hard work of, um, passing equal pay laws, passing salary history laws, to encourage employers to do the, the right thing. So you know, it all needed, we need . . . I feel like we do all the things, um, and, but, you know, as women, we’re good at doing all the things, um, uh, but what’s really exciting is that all this momentum that we’re seeing around the Equal Rights Amendments, um, all this organizing that you’re all doing is, and,

and, and the, the sort of explanation of like, what does gender discrimination look like today? And calling that out and naming that is so incredibly important, setting the stage for these other laws, um, and making sure that they are, um . . . that they stand and are . . . and are strengthened over the years.

Toomath: Um, just to touch, if you could touch briefly on one of those laws, um, that's sitting around, the Paycheck Fairness Act, and, um, and let everyone know how that, how progress is going on that.

Johnson: Yeah, uh, so the Paycheck Fairness Act is, uh, a bill that would strengthen the Equal Pay Act, which was in . . . introduced . . . which was passed in 1963. Um, and the Paycheck Fairness would build on that and close some loopholes that have been arisen in that law and then add some additional protections. Um, and you know as Director of State Policy, in a way it's like, "Oh, it's all about the States! That's where, um, most of the advances are, because things often get stalled in Congress." But, like, it, it . . . you need these protections regardless to where you live, um, it's you know, it's . . . Congress really needs to be looking at the energy we're seeing at the state level, and the fact that six states last year, or, actually, this year alone, passed salary history bans. I think in total eleven states passed laws strengthening their equal pay laws, um, just this year alone, and every year in state legislatures, almost every state is passing . . . is introducing some equal pay law. There is a lot of momentum at the state level, I think state legislators get that like their constituents literally cannot afford to wait any longer for the wage gap to close. We need to see that momentum, you know, trickle up to Congress, to move things like the Paycheck Fairness Act, so that bill did pass the House, um, which was very exciting, and it had, let me see, I have my data here, um, . . . it passed the House in April, with the support of every Democrat and seven House Republicans, so it got bipartisan support, which is very exciting. Um, it would, uh, promote pay transparency by ensuring that workers are protected from retaliation for discussing their wages, so an important step towards, um, more transparency. You can discuss your wages and not be in a situation like Lilly Ledbetter, who, for nearly two decades, was discriminated against in her pay and had no idea until somebody slipped her an anonymous note because her company had a pay secrecy policy. Um, it would require report . . . uh . . . require employers to report pay data to the

EEOC, so, um, putting into law that, that requirement that we’ve been working on. Um, and it would also do things like guarantee that women receive the same remedies for sex-based pay discrimination as are available for race and ethnicity-based discrimination. So, things like comp . . . compensatory and punitive damages, um, which, usually I’m like, “Oh, that’s wonky lawyer stuff,” but, hey, that’s where we are today. Um, I mean, those are really important, um, to getting full relief for the, the harm that you’ve suffered . . . that you have, um, experienced. Um, and it would prohibit employers from relying on salary history to set pay, uh, when hiring. So, some really important provisions. Um, it’s stalled presently in the Senate unfortunately, um, but, again, I’m hoping that the drumbeat in the states and continuing to talk about this at the state level will then trickle up, um, that message, uh, to Congress.

Toomath: And, so, because we’re all here looking for things we can do, um, to work toward gender pay equity, um, is there any way the audience, um, can engage in this fight?

Johnson: Yes. So I know we’re all kind of just waiting to see what happens in the next ten days, but I am, like, ready for next session and like . . . things are going to be introduced, as they have, um, in the years passed in Virginia that are so incredibly important that we need to be working on, you know, regardless. Um, because a lot of these things do get bi-partisan support, um, I think somebody mentioned, or, uh, . . . Professor Siegel mentioned during one of the breakouts, about pregnancy accommodations and making sure that, uh, pregnant workers have reasonable accommodations in the workplace. That . . . the bias, um, that we see against caregivers, and mothers in particular, that plays a large role in the pay gap, and the fact that women are still being forced out of work instead of provided . . . being provided a bottle of water, or allowed to have a bottled water at their workstation, or sit down on occasion while pregnant, or take . . . or frequent bathroom breaks, that they’re being forced out of work. Um, that is, you know, playing a role in wage gaps. And, so, providing reasonable accommodations, um, for pregnant workers is an important piece of legislation, um, that I believe has been introduced in Virginia before, and it has been passed in places like South Carolina with strong bi-partisan support. Um, so, you know, that’s a thing that I’m hopeful about. Uh, there’s been

equal pay legislation, uh, introduced in, in Virginia, and I'm look at Tricia from AUW in the back, and I know they've been involved with that. Um, that would do a lot of things that we see in the Paycheck Fairness Act. It would ban reliance in salary history, protect employees, um, who discuss their wages from retaliation, would include some back transparency around salary ranges we discussed, um, and, uh, and I think it would also extend the Virginia Equal Pay Law to more employers, um, which is really important because you should not be discriminated against in your pay regardless of the size of your employer or the type of employer. Um, so, I think we've made . . . I don't need to tell you all that what happens at the state level is important because this whole day is about Virginia acting to, to pass the ERA, but um, it is, yeah, so incredibly important to be talking to your legislators, sharing your own stories, and, yeah, I know so many of us have been there and been asked the salary history question and, like, feel in our gut and know how it is going to impact us, and sharing those stories, um, writing Op-eds, testifying. It's all incredibly important and, and makes a difference.

Toomath: And I think, um, around the question of, um, salary history, um, there has been legislation passed that, um, says, uh, an employee does not have to answer the question to a potential employer, but the problem is, once the question is asked, um, leaving it in the air, that's putting the burden on the potential employee, rather than, um, telling the employer that they can't ask it. So, um, we do have to watch exactly, um, how the legislation is being phrased.

Johnson: Can I . . . I would be remiss if I didn't mention one other thing that is a major factor in the wage gap. So, raising the minimum wage . . . women are very much clustered in the low-wage work force, and I think nationally make up two-thirds of low wage workers, so raising the minimum wage means very much so raising the wages of women. Um, and, uh, that sort of occupational segregation, seeing women in, in these lower paying jobs is . . . plays a large role in the wage gap, so, um, the opportunity Virginia, or is being considered in Virginia, to raise the minimum wage would be incredibly important as well.

Toomath: Um, so at this point, I would like to open, um . . .

Weisberg: You have some questions.

Toomath: Oh! Our panelist, answer questions from the floor. Wonderful . . . Okay, so, um, perhaps, Anne, I’ll start with you on this one, um, because it was, uh, your third, uh, strategy that you proposed. How do we make men our allies in our fight for equal pay, and what are those strategies?

Toomath: Thank you! Whoever asked that question. Um, so, I do think, I mean, we, . . . I don’t think we’re going to win, um, the sort of battle for equality without the men that, you know . . . it just won’t happen without the men. Um, I think there’s, like, small ways and big ways, um, you know, you can ask your, uh, male counterparts, um, your colleagues, like, how much do they make? Like, would they like be willing to share their salary with you? Uh, and I’ll tell you a story . . . like, um I, I know this young woman who is an architect . . . she’s an architect, and she graduated, um, uh, at the same time as two of her male colleagues, and they went to this small firm in San Francisco. Um, and she had won this award that my family, um, uh, started because my mother was an architect, and, um, and so she had sort of this award and she had, um, more work experience than these two guys, and they were sitting around talking and she asked them how much they made, and they told her, and they . . . she was making \$10,000 less than they were making at the same firm, they, they had started on the same day, and she had more qualifications, and they . . . how would she have known that but for the fact that they told her? So, then she went to the firm’s leadership and said, like, uh, this, . . . something is not right, and the finally, you know, and they did something about it, but, so, you know, you . . . it, something as small as asking your mentor, “Can you please share with me, like, what you make?” And then asking them to advocate and asking them, you know, to also be aware of when the gender bias shows up in everyday workplace interactions. Ask them, you know, um, how . . . how are they getting assignments. Ask them, you know, what do, . . . what, how, . . . what happened when they went into their performance review. Like, what was important in their performance review? I mean, just getting them to share with you what you’re experiencing, what they are experiencing so that you can get some kind of level setting. I mean, you know, um, to Andrea’s point, like, it’s really hard to know what . . . if you’re not being treated fairly if you

have no idea how other people are being treated. Um, you know, I think it's also, uh, there, there's a growing movement among, um, men to kind of become more involved. They really do want to become more involved in the gender equity conversation. It's in, um, business schools, in law schools. Um, if you are part of a women's network in your workplace, invite the men to things, bring men to things like this. Like, I tell . . . every time, like, we do something at Paul Weiss that's a women's network event, like I ask . . . I say to the women, bring a male colleague. Like, we've got to educate men. They don't really see that, you know . . . I like to say that because men are insiders, they're in the system that's been designed and built for them by them, they don't see, like, the, the inequality in the system. Only the people outside see that. So, you've got to make them aware of it. That's, that's what I would do.

Lowe: Can . . . Can I just add something to that?

Toomath: Absolutely.

Lowe: Um, I just read "White Fragility" about two weeks ago and it . . . I mean, it's really exactly that issue, just as applied to genders . . .

Weisberg: Right.

Lowe: . . . rather than race. I mean, I think men, as a man, you just take for granted everything's fine, everything's . . .

Weisberg: Right.

Lowe: . . . great, either willfully, or, um, subconsciously, you are just taking advantage of it and you're not doing anything to change it . . .

Weisberg: Right.

Lowe: . . . or maybe even recognizing that it exists and . . .

Weisberg: Yeah.

Lowe: . . . so I think that that's great advice . . .

Weisberg: I mean, the, the, the gender gap, and the perception of whether there is a pay gap . . .

Lowe: Right.

Weisberg: . . . that you found in your study. That’s everywhere. Every single study I’ve ever read, if you ask men, like, “Is there a problem?” Most of them will say, “No.” If you ask women, most of them will say, “Yes.” Because to men, there isn’t a problem, they don’t see it because they don’t live it. It’s not their lived experience. So, you need to help them see what . . . how . . . what you’re experiencing. I don’t . . . I, I personally don’t think there’s, it’s malicious, um, I, you know, or intentional, it’s just um . . . you know, unconscious. And I will say this, like, all the research shows that men and women equally hold biases about men and women, about gender. So, have, have any of you heard about the Implicit Association Test? Anybody? Yeah, okay. So, um . . . so, that’s a test that developed by psychologists, ones at Harvard and ones at the University of Washington. It’s been taken by millions of people around the world. I highly recommend doing it. IAT.org. Um, Implicit Association Test. And, um, . . . and when you, you know, when you look at the results for, um, the test around the implicit associates, those sort of split-second associations you’re making about women and men, the . . . the results, um, from that study, in terms of, when you break down by gender, like, whether women have the same implicit associations about men . . . women as men do, there’s really not that much difference because we’ve all grown up in the same society, I mean, that’s . . . that’s what that’s reflecting.

Lowe: Mhm.

Toomath: Um, this is . . . this is a question, um, probably for Andrea, but, again, I open up to the panel. Uh, how might, um, the ERA help close the gender pay gap?

Johnson: Um, so, I mean, so, I’ll emphasize again that I think the, the . . . sort of organizing, immobilizing, um, around the ERA and the, the education about what gender discrimination looks like, like, all of that and getting that sort of political, um, will and, and capacity

around this issue, uh, is really important to . . . to a whole host of issues and making sure that we then also put strong laws in the books. So, um, yeah, I mean, having the Equal Rights Amendment on, on the books . . . I think there were some interesting points made this morning, on, on one of the panels about how that can maybe give a stronger foundation for some of the, uh, the laws . . . I guess I want to be clear that I think, you know, there is . . . we have strong . . . we have equal pay laws now, and, um, and we can continue to pass strong equal pay laws, and that it's something we can do right now, um, we don't need ERA necessarily to do that. I think the ERA can help provide an even stronger foundation going forward, um, for those laws, um, and I . . . it was interesting to kind of hear how similar Amendments have worked in other countries, um. I sometimes . . . uh, yeah, uh. I think Julia was mentioning that, um. But, definitely, you know, the . . . the organizing and discussion about sort of what is discrimination, um, and, you know, that all provides a sound foundation for, you know, the legislative interest in passing these laws, um, that could really, I think, have a good foundation for the laws.

Toomath: Um, so we're running out of time. I just want to thank the panel. Um, Jeff, um. Oh! Sorry! Yeah, one more question.

Audience member: . . . when we talk about pay gap when we talk about minimum wage in the industries where minimum wage does not apply?

Johnson: Okay I didn't . . . what was the beginning of the question?

Audience member: You were talking about pay gap, and you mentioned with reference to minimum wage, but there are several large industries where minimum . . . minimum wage laws do not apply where I think gender would be a big . . . I think even bigger factor and I was wondering about some of those industries where there's . . .

Johnson: Hospitality . . .

Audience member: where there's [inaudible] to apply the minimum wage to adjudicate or adjust this, uh, pay gap . . .

Johnson: Yeah, I mean . . .

Audience member: Like a restaurant business.

Johnson: Well, so, I mean, restaurants, they have the tip minimum wage, which is \$2.13 an hour at the federal level, um, and then . . . which is just abysmal, and the expectation is that you make up the rest, uh, based . . . of your income based on tips, and that makes situations where you’re very vulnerable to harassment, um, and yeah, so what’s really important in raising the minimum wage is insuring we also are raising the minimum wage, uh, for restaurant workers so that we have one fair wage so that everybody is making the, the same minimum wage, um, and that we don’t have . . . there are a number of carve outs for minimum wage for restaurant workers, um, for workers with disabilities, for youth workers, um, and, and those are deeply concerning carveouts, and we need to have this one fair wage, and, so, that’s definitely the work that we are doing and that . . . I mean a lot of restaurant workers are women, um, and will deeply, um, have an effect on the, on the wage gap, and we have some good research showing of how equal pay laws and, and one fair wage laws and how what . . . how the wage gap, um, looks in states with one fair wage laws that would . . . was on our website, um, but I think, yeah, that’s a really important point.

Toomath: Okay, so, I will wrap it up then, um, as we’re, um, out of time. I want to thank everyone. Jeff, you’ve armed us with evidence, which we did not have, um, and so this survey is hope, uh, . . . hopefully the beginning of many that, that, that reveal, um, the pay gap and so that we, we can go forward and have information to back up what we’re saying, um, when we argue for a fair wage, um, and I thank Anne for giving us the strategies that we need and the tools to look at gender bias, um, and also to argue for ourselves, um, when we’re . . . when we’re, um, uh, in our, uh, . . . when we’re seeking employment. And, again, Andrea, thank you for giving us all of the information that you have on state policy and on legislation, and hopefully, um, now that you have all of this information, um, you will go out and continue the fight towards equal pay. So, thank you so much.

[Applause].

MaryAnn Grover: As someone who has been a lawyer for all of one week, thank you. I really enjoyed this. This was very helpful, um, and something I definitely want to focus on as I progress into my legal career. Um, we're about to move straight into our next panel, so I'd like to go ahead and invite those panelists up and then swap 'em out, and we'll get started.

[Switching panels].

Grover: I don't know if you guys heard me, but this is the party panel. I can report I had dinner with them last night. They're a blast [laughter]. Um, so, before we begin our final panel, though, I'd like to invite you all to join us for a little wine and cheese reception in the atrium immediately following this panel. Um, this final panel is really intended to be a roadmap, um, an exploration of the potential paths forward, the paths towards equality and how we get there, um, specifically with the ERA and what it means when we enact it, where do we go from there, what are the legal challenges, et cetera. Um, this panel is moderated by Trish Wallace. Um, Trish has been an integral part in planning this conference, this event, and has been absolutely wonderful and a hoot to work with. Um, so I'm honored to be able to introduce her now. Um, she is a civil rights activist, writer, and litigator. Trish's . . . Trish's interests include the ERA, technology and the practice of law, the use of oral history as evidence of the First Nations Litigation and the rhetorical sophistication of eighth century nuns, which makes sense because she has a PhD in Medieval Studies from Cornell, as well as a J.D. from the University of Miami. Now, please help me in welcoming Trish, who will introduce our panelists.

[Applause].

Wallace: Okay, this is the party panel, but it's also the brain-trust panel. There are some very interesting talent on this panel. Um, and one of our . . . our panelists has . . . I think you're getting close to how many degrees I have but, um, spent more time in, in formal education than most people. Um, that's Danaya Wright, who is the first one on my right [gestures] . . . which is actually, yeah, right here. Wave! [laughter] Um, Danaya, comes from, uh, . . . well, she wouldn't say she comes from Florida. Um [laughter]. She is a, a professor of law at the University of Florida. In fact, she's, you know,

this [inaudible] professor of law, uh, but she holds bachelors from Cornell, one of my alma maters, uh, and lots of other degrees, including a J.D. from Cornell, my alma mater, and, uh, . . . but she also has a PhD in Political Science, so one of the things that, um, is attractive about Danaya on this panel is that she, you know . . . at least on paper . . . looks like a real strong thinker, um, sort of big picture as well as being able to assemble facts to push a, a bigger agenda and bring in more people than just litigators, um, or, you know, law students, that kind of thing. Right next to her is one of my favorite people, as Eileen Davis would say, uh, but the first thing that comes to my mind . . . oh, well let me tell you her name first, Linda Coberly. Did I pronounce that right?

Coberly: You did!

Wallace: Excellent. Okay. Linda, to me, is the ERA lawyer’s lawyer. Okay? Not all of the lawyers that are working on the Equal Rights Amendment are equal. Um, but [laughter] . . .

Sweeney: Some are men. [Laughter].

Wallace: Yeah. But, I mean Linda is a litigator and an appellate attorney, and that means to me that she’s a . . . a strategist, okay? Because it’s kind of sneaky how you’re sitting there at trial and you’re thinking, “Ah, these are the things that I’m going to do because I know I’m going to lose this trial, but I’ve got to go to appeal.” Um, so it’s a very sneaky brain. Uh. Oh! I’m sorry, a very strategic brain [laughter].

Coberly: I’m totally stealing that. That is awesome.

Wallace: Sneaky? Okay.

Coberly: Sneaky

Wallace: Alright, but anyway, so, so she is, like, what I think of as, like, this, this . . . she can see lots of different strategies and sort of see, okay, if this shifts a little bit, we can move to this strategy, and as a litigator and an appellate attorney, you know that you’re just like

throwing all kinds of stuff at the wall. So, um, . . . but some of it is better than others, but, you know, hey, it doesn't really matter what sticks, it's what does stick that matters at the end of the day. Um, and there are lots of more accolades I could, could describe for both of these ladies. Uh, but then there's Jean . . . uh, I'm sorry, no, uh, but you can read about that, um. And then I want to introduce, on my far right, your far left, is Jean Sweeney, um, who comes to us . . . um, I, I view her as an activist, as well as somebody who's actually been probably more in the real world than an appellate attorney trial litigator, and, uh, certainly a professor with a PhD. [Laughter]. Um, but Jean worked on Wall Street for fifteen years, mutual funds in the finance industry, so she probably has lots of horror stories that she could share with us, um, but also some good stories. And Jean's been very involved in, um, uh, activism, and she's . . . one of the things that, that she brings to the table is sort of, you know, what are . . . what is going on in the activists, how do we get started with the three-state strategy, and all those good things. Um, I have kind of a, a, a, um, . . . I used to be a teacher. Um, and I'd go into my class first day, and I'd say, "There are two reasons I teach: one is to increase your ability to have pleasure, and the other one is to increase your ability to participate in democracy." So, I figure there are maybe a couple students here still. Um, I hope that this panel can help you increase your ability to take pleasure in the world and also to participate in democracy, and we are extremely privileged to be in the legal profession, um, to be educated, to be able to see, you know . . . I mean, I learn something new every day, and I would imagine that you guys would say this too. Um, I mean there are just all kinds of different people, and, and . . . everything. So, put on your pleasure hats for the party session, the wisdom here, um, and we're going to, this panel's going to be a little bit different than some of the other panels because we're going to open it up to sort of an oral question and answer. It's going to be more of a work session. Um, partly because a lot of the topics we were going to talk about have already been addressed today, and we don't want to put anybody to sleep before they've had a chance to get some wine. Um, and partly because we've been through this a lot, too. Um, but you can ask any of these people anything related to the Equal Rights Amendment, the Constitution, maybe, because we've got a, you know . . . but, anything you want. You know, "What should we do? What can we do? How can I enjoy working on the ERA more?" Um, you know, "How can I enjoy

working with my legislators more?” Uh, I’ve got it wide open for you. But, before we . . . we start in on the, the question and answer, I just want, um, each person to kind of give you a brief spiel. You can either supplement because I left out so much of your biographies, if that’s what you want to do. Uh, by the way, my . . . my thesis was “Religious Women and Their men” So . . .

Sweeney: [Laughter].

Wallace: So, I’ve got a long history of trying to get male allies. Um, but anyway, I
Want to start with, with Jean, if that’s alright, and we’ll just kind of work down the line. Do you want to think a minute?

Sweeney: So, um I, I just thought I’d chat with you about how I got to becoming an ERA activist. Um, I have always been very involved with the ERA and with, with, um, women’s equality. Um, I was the third class at College of the Holy Cross, so when I entered the College, there were 1,800 men and 600 women. Um, John Roberts’s wife is . . . of the Supreme Court . . . graduated in the class ahead of me. Um, and so I’ve always kind of moved along with it. It was really when Justice Scalia . . . and I, and I’m an attorney, I was on Wall Street and all that . . . but it really was, um, when Justice Scalia gave the interview to California Legal . . . um, Lawyer Magazine in 2011, that I realized that the complacency that we had kind of gotten ourselves to because we felt that Justice Ginsburg and Justice O’Connor on the Supreme Court were kind of working really hard with the 14th Amendment and that women, we really were progressing to the place that it was kind of like, I knew we didn’t have the Equal Rights Amendment, but we were putting in a legal framework that would kind of get us where the Equal Rights Amendment would have gotten us. And when Justice Scalia was . . . did this, this, uh interview, and what he said, and I have to say he’s not one of my favorite people . . .

[Audience laughter]

Sweeney: . . . and I’ve had a very . . . I’ve had a very, um, uh, give and take relationship with him over the years. Um, and so he said, “Certainly the Constitution does not require discrimination on the basis of sex, the only issue is whether it prohibits it, and it does not.” He

did us an unbelievable favor. I'm kissing this man's feet because he woke up the sleeping dragon, and he said to us, when I . . . when he first said it, I was like, "What is he talking about?" And then I went back and did my research and realized, he's right. That, um, the 13th, 14th, and 15th Amendments when they were placed in the Constitution, the women, actually, who are the Abolitionists and had created the, um, Seneca Fall Conference in 1848, they had all wanted the Amendments to go into the Constitution on a gender equal basis, but the political backroom deal put the word "male" into the 14th Amendment. So, Justice Scalia made us wake up and see, really, you know, that we need . . . that we definitely . . . we needed the Equal Rights Amendment. So, um, with my time, I have two children, and the minute the, uh, last one went away to school in 2014, I became an activist on the ERA, and it's so fascinating because it was 2014 when there was this coalescing of Equal Rights Amendment activists. So, Camila Lopez was working on her movie. Jessica Neuwirth was writing her book was "Equal" . . . was, "Equal Means Equal." The ERA Coalition was begun. It was like . . . it was like a moment in time where we came from different places to, um, understand that we really needed to get boots on the ground on this.

Wallace: Professor Wright, can you follow that?

Wright: Oh, goodness, sure. Should I turn the button on? Um, so, I've only been involved in this for a year and a half, maybe two years. Um, a colleague of mine at Florida was asked to develop some litigation strategy, use some law students . . . we have two of our Florida law students who are here, um, who've been doing, uh, amazing job of helping us research this . . . um, and I saw him one day, you know, a couple years ago, and I think he looked at me and said, "Oh, Danaya, you're a woman." [Laughter].

"Do you want to join us on this ERA project?" And of course, my, my first thought was, "What? What . . . the ERA? Eh, that, well, that's dead. What're the . . . uh, okay, sure, some, some person wants to fund research on this, yeah, I'll do it, okay." So, I got involved in it. Started looking at, at some of the legal issues, and I did what law professors do, which is we go surround ourselves with a bunch of books, uh, and lock ourselves in our offices, and if, you know, six months later, I came out with an article, and I was . . . I was really

interested in the legal issues, right? Because, as the first panel said, many of these legal issues are unresolved. Uh, as soon as Virginia votes, it's all the “you know what” is going to hit the fan, okay. It's going to go all over the place. It's going to go national. It's . . . there's going to be litigation. There's going to be, uh, political efforts. Everything is going to sort of explode, and my thinking was, well as . . . as an academic, I got to get a law review article out there. Get the law review article out there. Get the theory, um, uh, . . . get ahead of the theory, right? So, when the lawyers, like Linda, are writing the briefs, they can say, “Oh, well, oh, so experts say blah blah blah.” Not that I am even remotely an expert, but I'll pretend. Um, so, I started looking in particular at, uh, both the deadlines and the rescission issue, right? And we've all heard about that. Is this deadline . . . we've got a seven-year deadline. Where did it come from? What does it mean? Why . . . is this thing constitutional at all? And I teach constitutional law and I . . . pff, I've never really thought about it, right? In fact, I asked my, um, . . . my last class last year, on their exam, I gave them the question of the ERA, and the deadline, and I said, there is no case law on this subject. None. How would you figure it out? How would you figure out an answer to whether Congress overstepped it's, it's authority in imposing a deadline under Article 5? Um, and I actually . . . I got some really good answers, I was quite pleased with them. Um, but I did, basically, what I told had them to do. I . . . in fact, I followed Justice Scalia's approach in the Heller case, and I said, “Okay, well let's look at, um . . . lets look at the text.” Start with the text of the Constitution. Of course, it's silent, which it's silent on everything. Um, just about everything important. So, the text was silent, then I said, well, lets . . . well, there's always the, the assumption . . . or, not the assumption, the statement over and over and over and over and over again, that the federal government is a government of limited powers. So, unless it's expressly stated in the Constitution, the federal government doesn't have this power. So, we're on this . . . we're on the side that maybe, maybe Congress overstepped it's bounds when it put this Amendment . . . or put the deadline into this proposal. And then I said, well, okay, so, what about, um, you know, when . . . when did this happen? So, and it started in with the 18th Amendment, uh, in 1917, the Prohibition Amendment, the first deadline . . . So, no . . . no deadline had been in an amendment prior to that point . . . a proposal, prior to that point. And the, um . . . the 18th Amendment, Senator Warren Harding of

Ohio, put that deadline in, proposed the deadline in the discussion of the Prohibition Amendment, with a clear intention of torpedoing the Amendment. It was like he figured it's going to be unconstitutional, and we're going to get rid of this Amendment and make it go away by having this unconstitutional deadline in the Amendment. And Senators went berserk, right? "Oh, you can't do this. This is unconstitutional, et cetera, et cetera." Um, and there was some . . . there were a number of arguments . . . you know, arguments multiple different ways. One was: well, if you want a constitutional amendment . . . or, if you want a deadline, lets have a constitutional amendment that creates a deadline, right? "All future Constitutional amendment proposals have to pass within X number of years." And if the states ratify that, then that's fine, but you can't just put it in the amendment, the text of the amendment itself. So, I'm reading that, and I'm like, ooh, ooh, oh, I kind of agree. I don't, I don't . . . I think this is a bad idea. And then, of course, you've got the Tenth Amendment. The Tenth Amendment says, um, powers not reserved . . . not expressly granted to the Federal Government are reserved to the states and the people." Well, there's nothing express in Article Five that gives Congress the ability to impose a deadline, so we would assume that under Tenth Amendment, broad Tenth Amendment readings, which is what the Court's doing right now, that in fact, um, the deadline is not . . . it's reserved . . . the power is reserved to, um, to the states. And, of course, you look at the process itself, right. It's a process about, you know, it . . . there's both a national and a state component, but all of the framers' history at the time suggests that, um, they were most . . . they . . . that the framers were most concerned with the states being able to control the amendment process. This was not about Congress. In fact, Congress didn't even have the ability to propose amendments in some of the first drafts. It was added after the fact. Um, so, the states are necessary and sufficient. The federal government technically isn't even necessary at all. Although of course, um, as Hamilton noted, most likely we need, um, this, the national government to have some power because they're on the front lines. They're going to know when we need an amendment. Um, so you've got all that kind of history, um, and you kind of think about it, and it's like, well, it doesn't really make sense to have a deadline in . . . in a proposal that is, um, that's going to, you know, that, that, the . . . if the states don't ratify it, the proposal . . . the deadline has no meaning. If the states ratify it in time, it's inoperative. So, so what's the point of this

deadline, other than simply to kill the Amendment? Um, so, fast forward, unfortunately, it gets put in, and it gets litigated. Uh, and, unfortunate . . . and the Supreme Court, it’s one of the only . . . you know, you look to precedent, right. So, to cases. The Supreme Court looks at it and says . . . looked at the Eighteenth Amendment, that had in fact been fully ratified within the requisite period of time, and the Supreme Court says, “Well, the fact that there’s a deadline in there, that’s not enough to kill the Amendment.” But this says nothing about, uh, an amendment that’s fully ratified after the deadline, where the deadline operates to void the will of the people. Um, and, so, you know, I just . . . looking at all of these legal issues, I thought, this is . . . this is crazy. Of course, the deadline’s unconstitutional, and scholars have said that, and, and the 27th Amendment, the Madison Amendment, after two hundred years also supports that. So, I . . . I’m, I’m optimistic that when we go to court, we have some pretty good legal arguments, and the best part is, we have five conservative justices on that Supreme Court who have all said, state’s rights. We value the rights of the states. Congress, you can’t overstep.

Coberly: Except in *Bush v. Gore*.

Wright: Well, okay . . .

[Laughter].

Danaya Wright: . . . so, a few minor details. Um, but it only takes one, right. ‘Cause the four liberals are going to go on this, um, so I think we only need one. I don’t know, I don’t know that we can do it. Um, then that gets us to the rescission issue. The rescission issue, again, is another, . . . is probably going to be the next piece of litigation. So, if we win the deadline issue, then we have to deal with these rescissions. The rescissions are funky. So, South Dakota, um, they just put a sunset on theirs, they didn’t actually rescind. Kentucky, there’s a big debate over the, um, the . . . the governor vetoed the rescission. So, there’s some funkiness that maybe we may end up having to litigate those. Um, but good scholarly questions as to whether or not the rescissions, you know . . . it’s a one-way street. Ratification is a one-way street. Can people rescind after . . . can states rescind after they’ve ratified? Eh, you know, again, sitting there in my office, not talking to anybody, reading . . . reading the U.S. Reporter, the, you know, the Federal Register and all the, the legislative history, I

don't think the rescissions are valid, but, I guess I'm kind of biased, too. So, I'm going to stop there, um, 'cause I think Linda might have some different . . . different views on that.

Linda Coberly: I do [laughter]. But not on that last one. So, um, first of all, how many law students do we have actually left. We have two. A couple, ok. So, um, in my day job, um, I am a lawyer in big law. And, uh, I, I work at a . . . one of the largest law firms around. I, I run our Chicago office, which has hundreds of lawyers in it, and I'm an appellate lawyer. And, so, my job is about persuading people. Because also, when you run a big office of a big law firm, like, nobody's . . . I'm not the boss of anybody, I'm just, it's . . . it's purely management by consensus building. So, what I do literally all day is try to persuade people of things. I persuade judges. I persuade my partners. I persuade my kids to do what they need to do. I'm all about persuasion. And, um . . . and when I got involved in the Equal Rights Amendment, uh, fight, it was quite recent. Um, I got involved actually for, uh, kind of a funny reason, um, uh. The chairman of our firm heard a story on NPR on the way into . . . to the office one day, uh, about the state of Nevada, ratifying . . . ratifying the Equal Rights Amendment, and he summoned me to his office, and he said, we . . . I have something really important to talk about with you right away. And it could be twenty things, right? Because this actually happens quite often, that I get summoned to his office for very important things, and I sat down, and he said we need to talk about the Equal Rights Amendment [laughter]. And I, I was a little surprised. Um, also, he's . . . he's a Republican. He, he's what we love in Illinois, uh, and the representative will know, he's someone we love to call a Double Domer, which means he went to Notre Dame both undergrad and law school. Um, so he's a Republican, and . . . but he told me, he listened to this story, and he thought, um . . . first of all I don't think he realized before hearing that story that the Equal Rights Amendment wasn't already in the Constitution because an awful lot of people, including lawyers, think that the Equal Rights Amendment is something that actually happened in the 1970s and '80s. Right? Um, but also, he knew that it was something that we as a firm should get involved in, because, um, we care about equity. Um, we are a traditional defense firm in a lot of respects. So, we've been on all sides of . . . all kinds of sides of issues, um, but we care about equity. We care about diversity. Um, and we do that work as well. We're

actually also representing the women’s soccer team right now in its equal pay suit.

So, um, uh, so, it was consistent with the values that we held, and he said we should get involved in that, especially in the state of Illinois, which the NPR story informed him had not ratified. And, so, I said absolutely, let’s do that. So, we, um, . . . I did what [laughter] . . . the professor did what academics do, which is surround herself with books, and, uh, research. I surrounded myself with associates, and, uh, we put together some research because I knew that so many people, including many of the people you’ve heard from today, have been working on this issue for years, and I know better than anyone to listen to the people who have been doing this for a while first before I start talking. So, uh, we wanted to understand what the status of things was, and we did a lot of research. It’s a pro bono matter for our firm. We don’t have a client. We are just doing it because it’s the right thing to do. And . . . so we got involved in the Illinois efforts. Um, we wrote, we organized, we brought people together in our offices to organize the activists. Um, we worked with lobbyists. We wrote talking points. We did a webinar for legislators. I testified at the, uh, committee hearing on the subject. Um, we wrote talking points that were used in the final, uh, approval hearing, um, on that historic day, and it was the most, uh, satisfying and rewarding thing I’ve been involved in in my legal career. But one of the things it told me is that there’s a lot of work for lawyers to do, and this is an important lesson because I think for many years, you know, lawyers were getting a bad rap there, right? Um, and there’s a . . . it’s kind of a tradition to make fun of lawyers and demonize them, um, but there have been some really notable situations, especially in the last couple of years, where, I don’t know about you, but I have felt proud and reassured that the lawyers are showing up. Right? Like after the travel ban passed and lawyers went to O’Hare. And, as an immigration pro bono lawyer, which is what I also . . . I do with the rest of my pro bono time, is immigration cases . . . I was a little worried about that because I know that immigration law is hard and if we have a bunch of civil litigators like myself showing up at O’Hare, we could muck it up pretty well, uh, unless we have expert help. So, fortunately, there are lots of expert agencies who do that work and really know what they’re doing and can help lawyers like me do good immigration pro bono work. For this, we needed to do some more work. We needed to

do the research and really understand what was going on, but there was really something to contribute, I felt, because of these important issues. When I heard about the deadline, I was actually not inclined to get involved in the ERA until I figured out and thought for myself, what is the persuasive argument for why the deadline is not going to stop, uh, the Equal Rights Amendment. Um, there is a case, and, . . . that, uh, the professor mentioned, that there is a case that says that Congress has the power to do this kind of thing. That . . . but the effectiveness of a deadline has never been tested. We've never had, in our history, a situation where a deadline has actually stood in the way of a duly ratified amendment that has been passed by three quarters of the states. Um, we also have never had a, uh, uh, uh, a uh, deadline tested that was not in the body of the amendment itself, in the stuff that the states voted on, right? The amendment, uh, . . . the Equal Rights Amendment deadline is contained in the introductory clause, which, you know, one way to characterize that is Congress reserved for itself the power to change the deadline, because there's a principle in our constitutional system that one Congress cannot bind future Congresses. So, there are good arguments for why that deadline can be removed. There are arguments for why it is not effective, and we should be pursuing all of them. You know, there's been a lot of debate within the, uh, ERA community about these different strategies. Should we just litigate? Is it a bad idea to ask Congress to pass, uh, these, uh, deadline removal bills, and there's a lot of kind of disagreement about the best strategy. My view is, it's all, it's all fair game, let's pursue it all. There's no damage to our litigation position if we have gone to Congress and failed. Um, we can still do these things in what . . . in lawyer speak, in the alternative. Right? So, one of the . . . I loved what I heard this morning that the deadline for some, uh, legislators, or, uh, opponents of the ERA, has just become an excuse. Right? Oh, the deadline just makes the whole thing symbolic. Well, first of all, as Senator Spearman talked about, I don't understand why that's a reason to vote no. Um, it's a really darn good symbol, right? Like, shouldn't we have . . . if it's not going to have any impact that why not . . . why not pass it, for heaven's sakes. Right? [Laughter]. Um, so there's that argument. But, you know, let's remove the barrier, let's moot the issue. There will still be arguments about whether you can remove the deadline retroactively, but there's no case law on any of this, folks. None. It's all unprecedented. We didn't have deadlines until the 20th century. No deadline has ever actually come close

to standing in the way of the effectiveness of an amendment. So, there's no clear-cut answer to any of it. I personally, uh, understand and agree with the, the, the logic that tells us that Congress has brought power when it's exercising its power to propose an amendment. So, I think it kind of makes sense that Congress would have power to attach a deadline if it chooses to, but if it puts that deadline in the preamble of the amendment, it also has the power to change it, and there's also a case, a, a subsequent case in the Supreme Court, called *Coleman*, uh, which some of you may be aware of that says something else really important, which is that when Congress, uh, . . . which is that the issues relating to the amendment process are fundamentally political issues that . . . and, and to some extent, those issues are not even justiciable, which means they can't even be raised in court. So, if . . . I believe . . . that if Congress were to remove the deadline, we would be able to argue in litigation after that, that a challenge to the deadline removable is non-justiciable, that, uh, . . . that whatever Congress decided to do with respect to the deadline after the fact is within Congress's power, uh, it . . . because it's a political question. So, I think some of these . . . but the, the big picture is that none of this is clearly established by the case law. It is all open to debate and discussion and argument, and lawyers have a really important role to play in all of that.

The one issue I would have to say that is most clearly established in my view is actually the rescission issue, and it's not established because there's a legal precedent on it, there's a historical precedent . . . precedent on it. And that is that when the 14th Amendment was ratified, I . . . it was declared to be effective at a time when more than one of the necessary ratifying states had, uh, attempted to rescind a prior ratification, and yet, all three branches of government treated that Amendment as fully ratified as part of the Constitution, and here we are today. So, I, I think that the . . . there is a powerful historical precedent for the idea that a rescission is not some . . . a ratification is not something that can be taken back, there's no Mulligan on a ratification, okay? And, and, to me, the way you get there, in terms of a logical argument, is that ratification is something that happens at a moment in time, it's a moment in history. Under Article V, the only job of the states is to look at what Congress has sent them and to vote on whether to ratify that amendment, and, so, the question for those rescinding states is, “Did that happen?” And the answer is: yes. There

was a moment in time where that that Amendment was ratified by the legislatures of those states, period. The state is done, and they can't take it back later. So, I think that's a, a, a, a good reading, the best reading, of, of what the state's role is under Article V, and, so, on that issue, actually . . . that issue's the one I feel the, uh . . . the most . . . that, that law's most settled on because of that historical precedent. I think the rest of them are open to, uh, discussion and debate, and there's going to be a lot of work to do, no matter what happens.

Wallace: So, it sounds like there's going to be a lot of fun for lawyers and . . .

Sweeney: Fun for lawyers!

Wallace: Yup, fun for lawyers! You know they're, they're couple law students I know who are here, Kate and Allie, um, if they are, um, the only ones who ask questions, they're going to be feeling like they're on the spot. So, I'm going to open up the floor, they don't even know they're going to be asking a question. See, look at that [laughter]. Yeah. So, um, let's turn it open and uh, get . . . you know, if you've had burning questions all day. Do you want to start, Tina?

Audience member (Tina): I'd love to!

Wallace: Okay!

Audience member (Tina): So, I can remember when um . . .

Wallace: Hold on, let me interrupt you. Could you just say who you are and where you're from, so we could . . . you know, what organization or school?

Audience member (Tina): I'm Bettina Hager, and I'm the D.C. director and CO of the ERA Coalition. Um, so glad to be here at the University of Richmond and to ask this question of you all! Um, so when the three-state strategy was first kind of . . . I work on this, uh, in many different respects including on [inaudible]. When we were first doing this Bill, people were kind of like, "Oh, well, lawyers are not going to not support it. They're not going to want to take this case if this does get in front of the Supreme . . . the Supreme Court." This

does not seem to be the case at all, which is real . . . and now looking at it, these lawyers are having, as Trish said, so much fun. So, is that true? Do you think that this is kind of like, you know, like, this is a moment where you, if you did this in front of the Supreme Court, you could set a precedent? And do you think that you . . . okay, Linda, say you wind up at the Supreme Court, do you think you could win?

Coberly: Um, yes. I mean, I think it's hard . . . look the courts are not . . . the court, the court, today, is not a pro-equality court, I have to say. So, I think you'd have to make the right arguments, and I think a states' rights argument is one of them. There's a plain language argument, um, there's a . . . you have to know the audience and make the arguments . . . uh, focus on the arguments that are going to be more . . . most persuasive. Um, I do think lawyers have been a little slow to this table because, um, they need to be convinced. Right? I had to be convinced. One of my very good friends is a constitutional law professor at a, at a law school in Chicago, and I said, "I'm working on Equal Rights Amendment." She's like, "Isn't that done?" And, I had to explain it. When I explained it to her, she was like, "Oh, okay. I get it, I'm inUm, but lawyers are coming to the table and what I'll tell you, I'm . . . I'm going to be speaking in November to the National Association of Women Lawyers General Counsel Institute, um, doing a program, actually, with my partner who's representing the women's soccer team on equality issues, and it's going to be a, a big presentation. I'm also giving a keynote speech at the, um, uh, ABA Women Advocate Committee Conference in Chicago, um, about the Equal Rights Amendment. Lawyers are . . . and I've spoken at other National Association for Women Lawyer events before . . . It's a really important, um, constituency, um, of people who have something really to contribute and would love to work for, uh, equity in the community at large. You know, we spend a lot of time, um, as you heard in the last panel, working on equity in the legal profession. I just was at a conference earlier this week on equal pay in the legal profession, there was a whole conference just on that topic, it was the same study that was presented. Um, but it's really rewarding to be able to feel like we're making, uh, some kind of difference and can contribute with our skills to equity in the broader world.

Wright: Let me just add I think it's . . . I think it's just a hoot [laughter]. I am so excited. Um, no, because, I . . . this is a historic moment.

How many people are going to be able to argue these cases before the Supreme Court to have a constitutional amendment, an equality amendment of this importance, um, in our lifetimes? This is a once in a lifetime opportunity, so I've jumped on it. But, what . . . one of the things that I just find just delightful, right, is that Justice Scalia, okay, our poster boy of originalism, in the Heller decision, said, right, that the preamble to the Second Amendment is unimportant, that it's only the operative language of the second half of the, of the Second Amendment that is important. So, to be able to go to the Supreme Court and cite their very own favorite originalist for the idea of the . . . that the language of the preamble can be justifiably ignored. It's just one of those moments that just makes it all worthwhile [laughter]. So, that's why I think it's . . . I think it's just great.

Wallace: [to audience member] Yeah, um, introduce yourself and please ask your question.

Audience member (Gabrielle): I'm [inaudible] Gabrielle, I'm an undergraduate student here, and I'm also the campus coordinator for the Feminist Majority, and I'm wondering, do you have any suggestions as to what undergraduate students specifically can do to help the ERA?

Wallace: Vote.

Sweeney: Um yeah, I mean, um . . . the challenge with the students is they're living, usually, in a state that there's not their principal residence. So, um, they would do absentee voting at their . . . in their home state. Um there's . . . I think there's a lot of movement to block students from voting, so the most important thing is voting. But the other thing, I think, is really educating, um, the college students about the fact that we're . . . we are in a, um . . . in a country that is not in a true democracy. If you think about this . . . um, when Virginia ratifies, and we go forward, and we get an Equal Rights Amendment placed, if we were to get a woman president, that would be the first President of the United States of America that would be presiding over a country that's fully democratic, where every single person is in fact equal under the Constitution, and I think that's important for those college students to, um, be educated about and understand it. No, it kind of . . . somebody said it to me, and I, I was like wow, if

you think about it, the next president could actually be, as a woman, could be actually equal under the Constitution. So, it's just, it's just kind of playing with the concepts and, and getting people to understand . . . getting the college students to understand because they haven't lived through it. You know, it was, it was in the '70s, we lived through it in the 70s where everybody was talking about the ERA, I was in high school. And then it, it . . . I graduated from law school in 1982, and that's when the ERA, basically the deadline dropped, so it's part of my lifetime, my history and all that, but for the young people, it's history that's not there. So, it's much harder to understand it because you haven't lived it, so it's just this whole, kind of, education, and, and constantly bringing it up so people see it from that perspective. That's my view.

Coberly: I also . . . I also think that, um, your generation can play a really big role in educating us. Um, I have found that working with my kids. So, I have a daughter who is almost twenty, and a daughter who is almost seventeen, and, um, when I brought my twenty . . . almost-twenty-year-old to her first ERA event, we did a screening of *Equal Means Equal*, uh, Kamala came, and we hosted a screening in Chicago at a theater of the film, uh, as part of the Illinois ratification effort. We had a number of activists and, and, um, representatives there to speak about it, and she asked the question right off the bat of Kamala, um, of, “How is this going to impact trans women?” And that was the first time that was mentioned, in the whole conversation, and she was really struck by some of the language that we all tend to use, we who were, you know . . . those of us of my generation, those who have been part of the debate for the last . . . which is very woman-focused and sometimes uterus focused, right? And my daughter hears that language and says, “Hang on, that's exclusive,” which is something that, when I first hear that, it doesn't make sense to me, and I, and I push back on it a little, but then I try to listen, and I try to learn. And, so, what she has taught me, what my . . . what both of my daughters have taught me, is how to think about this from a more inclusive perspective. How to think about the impact on trans women, for example. I mean, it's always been clear to me that if you're . . . that if a trans woman is discriminated against because the law treats her as a woman, she can challenge that, right? She should be able to challenge that discriminatory law that, that discriminates against women. I also think it's true that if that trans woman is

discriminated against because she was born with male genitalia, the Equal Rights Amendment should be able to help her, uh, fight against that discrimination. Um, all of these are open issues. All of these are issues that haven't . . . certainly haven't been decided under the Equal Rights Amendment, they are actually being decided for purposes of Title VII and Title IX this year in some respects by the Supreme Court. Um, but these are really important topics, and it's very easy for . . . for those of us who have been in the conversation for a long time to, um, talk about this just the same way that it's been talked about for decades, and we need to be educated, too. So, your voice is very important, and I encourage you to share it, including with those who have been working on the issue for a long time.

Wright: I . . . I just want to make one more comment, which is that, you know, it took a hundred and fifty years, or a hundred . . . or more than a hundred fifty years where post, um, the Fourteenth Amendment . . . or I guess we're barely, yeah, a hundred and fifty years since the Fourteenth Amendment . . . and we are still trying to, to develop the jurisprudence and reach the levels of equality that we had hoped to achieve, so the ERA is not going to, uh, bring change overnight. Hopefully, some change will come quickly, but this is a battle that is, that is . . . we're in for the long haul, and it's going to take many generations, I think, to develop the legal issues, develop the strategies, to bring society along, and that's where every generation needs to participate.

Wallace: And I just want to add, even though I'm the moderator and should keep my gob shut, um, this . . . the Constitution was set up as you know a male-centric structure, okay. Um, one of the things I like to talk about, um, . . . it's, it's not pleasant, but, uh, women in jails and prisons, and you think of a prison situation, it's designed by men, for men, you know, everything in that environment is male-centric. It's kind of easy to see that looking outside. We're living in a legal structure that's male-centric, a social environment that's male-centric, economic situation that's male-centric, but we're inside it, so it's really hard to see, so this kind of goes to what, what Linda is saying, is we need the next generation to say, "Hey, wait a minute, we don't like . . . you know, you've got to think about this more broadly," and the, the Equal Rights Amendment, in my mind, has potential of, of a tectonic shift in the way our legal world is shaped, and the way our

social world is shaped, um, and I think that that’s what’s exciting for young people. You can be writing about, maybe not the Equal Rights Amendment, but if you’re writing about, you know, a Thomas Hardy novel, and you’ve got this, this work of art there that you’re writing about, but it’s what you’re bringing to interpreting that work of art, that gives, you know . . . gives the whole project meaning, and, so, whenever . . . whatever subject you’re working on or whatever, you know, paper you’re writing, just think about, you know . . . listen to, well, what perspective am I bringing to this project, and, you know, should I change that perspective? And, so, in some ways you can live the Equal Rights Amendment and the tectonic shift, you know, on a daily basis, in whatever class you’re taking. Alright, Kate, you ready?

Audience Member (Kate): Um, okay, uh, so my name is Kate [inaudible]. I’m a student at the University of Florida Law School, and I want to pose this question to you, Linda, and sort of ask you to speculate, which I’m sure you’ve probably already been doing around in your head. Um, let’s say Virginia passes, and you have the National [inaudible], he needs to publish it, kind of, where do you see . . . how do you see legislation . . . or litigation playing out, who do you think is like the best Plaintiff? Do you see a Virginia legislator coming forward? If you could get a little bit into the weeds?

Coberly: Sure, the last panel talked about wonky lawyer stuff, I think it’s time . . . that was your line, time for wonky lawyer stuff. Um, I . . . so I think there’s lots of different ways this could go. Um, and lots of different things that could happen. I do think that the, um, Archivist could just certify the Amendment. Um, I think it’s maybe not likely, um, if I were the Archivist, I might want to ask somebody else about that but, um, but, you know, so I think it depends on how the Archivist sees, uh, his role, and, uh, whether the Archivist would just certify, whether the Archivist would ask the Justice Department or seek other kinds of decision-making, or what have you. Um, I think there is likely to be litigation, I think the shape of that litigation may depend on whether the deadline removal bills have already been passed. Um, I don’t personally think it makes a huge difference whether, uh, the deadline removal bills are passed before or after the last ratification. I think, either way, Congress has the power to, uh, remove the deadline. Um, so uh, I’m not sure it makes a huge difference. I can imagine arguments both ways. And again, I . . . that’s all

we're doing right now is imagining arguments, right? Because there isn't a clear-cut answer in the law. Um, in the first two years after the enactment of the . . . if the Equal Rights Amendment becomes a part of the Constitution, it will not be enforceable for the first two years. That's because of a, uh, frequently ignored, uh, clause in the Equal Rights Amendment, the third clause, that basically gives states two years to get their act together after the Equal Rights Amendment becomes part of the Constitution. So, I, I think it would be . . . that two-year window would present a barrier for a lawsuit by a Plaintiff who's trying to sue to enforce the Equal Rights Amendment in the first two years, right? Um, because I think . . . you would . . . let's just play that out, if I, if I tried to sue under the Equal Rights Amendment the day after it becomes part of the Constitution, whoever I'm suing is going to move to dismiss and say that it's not right because it's not even enforceable, okay. Um . . .

Wright: . . . So that knocks out the Women's Soccer Team . . .

Coberly: . . . yeah, well, there's also a state action problem with the Women's Soccer Team, but. Um, so then you'd have to find . . . and I think it's an interesting question to think about who the right Plaintiff would be in that lawsuit when the Equal Rights Amendment becomes enforceable right? Because you're going to want to find someone, unlike the Women's Soccer Team, who um, is being affected by state action, um, even if, as I, as I heard this morning, you know, there are arguments for you know why should we import the same kinds of state action limitation into the Equal Rights Amendment that, that, then . . . as those that appear in the jurisprudence under the Fourteenth Amendment, I think that's an interesting question. Certainly, if you were trying to file the first lawsuit, you want to do what litigation . . . in impact litigation, what we try to do is find the best Plaintiff, which means, let's find someone who doesn't have these other barriers, someone who can just bring the straight-forward lawsuit that raises the issue we really care about, which in the first set of lawsuits is going to be, is it effective, right? That's going to be the first set of lawsuits. So, it seems to me, it's probably not going to be best to tee up a Plaintiff who also has a state-action problem, or who also has some other problem. You're going to want to find a Plaintiff who is really affected by state action, and I think it's interesting and kind of tricky to figure out who the best Plaintiff would be, but a lot of good

people are thinking about that topic. Um, another possibility, even before the two years though, would be a State Legislator or a State Solicitor General, or, um, or, or some . . . some sort of Legislator who is able to say, um, look, I actually need to know if this is effective because we’re going to have to start changing the laws, um, because we have two years to comply with the Equal Rights Amendment. Um, there might also be a challenge on the other side, um, the . . . someone, uh, from one of the rescinded states, for example. One of those state legislatures, um, could try to sue. There could be lots of different kinds of litigation, and it could all happen at the same time. I think it’s important that that litigation be coordinated and that people be talking to each other, because you, you want, in any impact litigation, you want to, um, make sure that, uh, you’re shaping the arguments across the board and developing good precedents. I’ve been involved in impact litigation in the immigration context for, you know, for, uh, a pro-immigrant right . . . rights organization who’s in very close contact with ACLU who’s doing similar kinds of litigation in other courts, and, so, you know, you’re constantly coordinating what you’re arguments are, um, but there, there could be a litigation across, across all these fronts. There are difficult issues about standing, ripeness, um, political question, you know. All of these things are likely to be issues that are briefed in the litigation. Um, my view is, if we can get the, the, um, uh, the deadline removal bills passed, what that does is it begins to clear the way. I think that the best possible scenario would be pass the deadline removal bills and then the litigation will be about whether the deadline can be, can be, um, can be removed. Um, I think that’s a, you know . . . I’d rather litigate that case than litigate the . . . the deadline isn’t effective to stop the ratification. Um, there isn’t precedent on any of them, but just, you know, in terms of thinking about what, what case to argue and what order, yeah, but we’ll, we’ll cover all these basis, pursue all of them at the same time: political solutions, legal solutions, et cetera.

Wallace: And just so you know, I’ve designed a fourteen-week law school class on the Equal Rights Amendment and only the Equal Rights Amendment, so that’s just fun, fun, fun for everybody for weeks on end. Um, Allie do you have a question that you want to?

Audience member: Where do I sign up? [Laughter].

Coberly: But you know Trish, that is actually . . . can I say that's just a totally genius idea, actually, because if you think about it, I mean what do you want for a law school class, is, um, a situation that will tee up all those issues. You would get into issues about how do you amend the Constitution, you would get into issues about what is the protection of the Fourteenth Amendment and what does it mean, and it's . . . it's brilliant. I would take the class.

Wallace: And, and is it fun? Would it be fun?

Coberly: It would be fun, Trish.
[Inaudible from audience].

Yeah . . . [laughter]. Yeah, yeah, yeah, yeah, yeah.

Wallace: Well, I'd guess would have to retire to bars and whatnot, too. So, um, I don't know. Um, are there any more questions that you guys want to ask or some . . . ? You do! Excellent! Alright. You've got to . . . and, and please identify yourself and say where you're from.

Audience member: My name's Allie [inaudible]. I'm a 2L at the University of Florida College of Law um, and my question was coming back to Linda again. Was that, since you mentioned immigrants, immigrants' rights, um, how, if at all, would the ERA impact undocumented populations?

Coberly: Um, well I think, uh, equality of rights, there's nothing in the text of the Equal Rights Amendment that talks about citizens or talks about people lawfully, um, required to be here, or lawfully permitted to be here. So, I mean, I think . . . on its plain language, if there were a law that treated, uh, . . . or a state action of some kind, that treated, um, female undocumented, um, people differently than male undocumented people, I think it could be challenged under the Equal Rights Amendment. Um, also, you know, based on, you know, other kinds of discrimination on the basis of sex whether it is . . . has to do with pregnancy status or, um, or, um, child . . . other kinds of child bearing type issues, et cetera, so, yes, I think . . . I don't see any reason why it would apply less directly to an undocumented person, or undocumented populations, and, um, I think the challenge is that

case is never going to be litigated because, um, because of, I mean . . . for the same reasons that, um, domestic violence against undocumented, um, women is so rarely reported to the authorities . . . at least under this current environment.

Wright: But you would have your state action.

Coberly: Yeah, you would definitely have your state action, you just, you just might have to have a, a, an anonymous plaintiff who doesn't come to court, uh, out of fear that she would be um deported for exercising her rights, which is a whole other set of issues.

Wallace: So, that gives you a law review topic perhaps. Um, do we have other questions, uh . . . okay, there's, um, refreshments . . . yes! And . . .

Audience Member: It's not a question, it's another idea that I had [inaudible] about students . . . [inaudible] . . . this is something done in the equal pay space, but I think students . . . so, I know in Virginia, the legislators are really proud of the business environment here, and I think that when the students speak up as the future talent in the state [inaudible] about talents, and I think that, um, made the point of, like, you want to be in a state that believes in these principles and that would ratify something like this and if not, then we'll take our talent elsewhere. I think that could be kind of a powerful message, and, um, I mean, yeah, students testify and speak up as the future of, um, the [inaudible].

Wallace: Excellent way to end, but I do have one more point, a very important point, okay. Michelle Kallan has organized this thing. Um, she was like chief organizer, or chief-ette organizer, chief-ist, um, but, anyway, she's like slam busy at work, and, yet she, um, put together, you know, this, this great program, um, and before you start clapping for her, I, I also want to recognize MaryAnn Grover, um, who recently, um, passed the Virginia Bar. Yay. [Applause]. So, once we've celebrated that fact then we can get back to, um, you know . . . and I don't know if you guys have other people that you . . . but these two have just done a phenomenal job under horrendous circumstances in some situations, and they've handled it with grace and humor and enthusiasm, and, you know, no matter what kind of job you

do or whatever you do, if you're handling it with grace and enthusiasm and professionalism, you know, it's, it's going to be much more pleasant and pleasurable to everybody around you. So, personally, I want to thank them, and then I think, um, everybody here can give them a big thanks for all the work they're done. [Applause]. And I was going to thank the panel too, but, uh, they don't want to be thanked, they want to drink, so bravo.