INTRODUCTION: A SYMPOSIUM ON ENHANCING CIVIL AND CONSTITUTIONAL RIGHTS THROUGH STATE AND LOCAL ACTION

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INTRODUCTION

This essay describes and analyzes the Nevada Law Journal symposium for its 2022 volume, a symposium entitled, Enhancing Civil and Constitutional Rights Through State and Local Action. While many of the examples of legislation in this Introduction and in the symposium papers themselves specifically relate to Nevada legislation, others either highlight other jurisdictions’ efforts to pass rights-affirming legislation or propose substantive legal changes that would benefit individuals in all or most jurisdictions throughout the country.

Part I of this Introduction briefly establishes the need to reconsider our nearly exclusive reliance on federal laws and the U.S. Constitution to protect the civil and constitutional rights of individuals in the U.S. It argues that the federal system, from the courts to the Congress, are not adequately protecting individual rights. Part II demonstrates that there is strong public support for various constitutional and civil rights that are currently in the balance and proposes state and local laws as means of protecting and enhancing rights. It also briefly discusses the substantive topics appearing in the essays and articles in this symposium and analyzes both the strengths and limitations of relying on state law to protect our rights. Part III evaluates various themes, both substantive and strategic, that appear in the works in the symposium that are relevant to enhancing rights through state and local action. Part IV describes and evaluates the authors’ contributions in their essays and articles.

Finally, this essay concludes that state and local legislation are a means of protecting and enhancing civil and constitutional rights, especially at a time when both the federal courts and the U.S. Congress fail to robustly protect the rights the public desires. Ordinarily, however, enhancing rights results from a multi-directional effort that requires not only state and local legislation but also litigation at the state and federal levels, governors’ executive orders, and even private action of corporations, depending on the right sought. With these combined efforts, Congress and the federal courts should eventually recognize new rights and protect those that are already established in many states and local jurisdictions.

1. THE CURRENT STATE OF FEDERAL CIVIL AND CONSTITUTIONAL RIGHTS

Federal civil rights may be in danger. Although there have been occasional and important expansive interpretations of statutory and constitutional rights by
the U.S. Supreme Court, the Court has also contracted important civil rights. Moreover, the Trump administration openly nominated three Supreme Court Justices largely due to their conservative judicial philosophies, resulting in a 6-3 majority on the Court. Consequently, it is reasonable to conclude that the Supreme Court is likely to further narrow interpretations of constitutional and federal statutory rights.

The Supreme Court, however, is only part of the story. The lower federal courts, too, have played a role in contracting rights. For example, in employment discrimination cases under Title VII and the ADA, the courts have favored defendants by creating substantive doctrines that do not appear in the text of the statutes and by aggressively granting defense motions to dismiss and for summary judgment. Most of these cases do not reach the Supreme Court; the lower courts, thus, often make the law. While these decisions cannot be attributed merely to the judges’ political party affiliation, these already existing pro-

1 See, e.g., Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (holding that the U.S. constitution guarantees the right to marry a person of the same sex); Bostock v. Clayton County, 140 S.Ct. 1731, 1737 (2020) (holding that illegal discrimination based on sex under Title VII includes discrimination based on sexual orientation and gender identity).


3 By “conservative” in this context, I do not refer to economic conservatism but rather I use the term as ordinarily applied to the Supreme Court, as well as the rating system of political scientists Andrew Martin and Kevin Quinn. According to their rating system, Justice Thomas is the most conservative member of the Supreme Court, followed by Justices Samuel Alito, Neil Gorsuch, Amy Coney Barrett, Brett Kavanaugh, and John Roberts. Justice Sonia Sotomayor is the most liberal member of the Court, followed by Justices Stephen Breyer and Elena Kagan. See Oriana Gonzalez & Danielle Alberti, The Political Leansings of the Supreme Court Justices, AXIOS (Jan. 26, 2022), https://www.axios.com/supreme-court-justices-ideology-52ed3cd-ffft-4467-a336-88c2ce636d4.html. Although arguments can be made that certain positions and decisions of the “conservative” justices are not really conservative, it is safe to say that the conservative justices are less supportive of civil rights than are the liberal justices.


5 See Ann C. McGinley, Laboratories of Democracy: State Law as Partial Solution to Workplace Harassment, 30 AM. UNIV. J. GENDER, SOC. POL’Y & LAW 245, 249 (2022); see Nancy Gertner, Losers’ Rules, 122 YALE L.J. ONLINE 109, 109–110, 118–23 (2012), http://yalelawjournal.org/2012/10/16/gertner.html (arguing that the federal courts are responsible for “[c]hanges in substantive discrimination law since the passage of the Civil Rights Act of 1964 [that] were tantamount to a virtual repeal.”).

6 See McGinley, supra note 5 at 250.

7 See Gertner, supra note 5, at 112–13 (concluding in 2012 that courts deciding employment discrimination cases invent rights-limiting substantive doctrines and use procedural means aggressively to dismiss cases).
defendant practices, combined with the newer, more conservative face of the federal judiciary, create increased risk for civil rights in employment.\textsuperscript{8}

But the issue is not only civil rights in employment. There is little hope that the current judiciary will expand or even maintain many of our civil and constitutional rights. Consider, for example, abortion rights. Recently, the U.S. Supreme Court abolished the constitutional right to an abortion.\textsuperscript{9}

Moreover, Congress no longer acts as a check on the federal courts’ rights-narrowing interpretations. In years past, a bipartisan group of U.S. senators and representatives overturned Supreme Court cases that narrowed the scope of federal civil rights laws, but, today, extreme partisanship in Congress has led to gridlock.\textsuperscript{10}

An example is the Senate’s failure to pass new voting rights legislation after the U.S. Supreme Court gutted protection of the 1965 Voting Rights Act in \textit{Shelby County v. Holder,}\textsuperscript{11} and in response to new state laws restricting access to voting.\textsuperscript{12} \textit{Shelby County} held that Section 4(b) of the Act was unconstitutional.\textsuperscript{13} Section 4(b) identified jurisdictions that had historically discriminated based on race and, consequently, would be subject to preclearance of any new

\textsuperscript{8} President Trump appointed 54 federal court of appeals’ judges, “flipping the balance” of several circuits from a majority of Democratic appointees to a majority of Republican appointees; he also appointed 174 federal district court judges, and three Supreme Court justices who were selected because of their conservative credentials. The Biden Administration, too, had success in appointing forty-two progressive judges of diverse races, gender, and legal backgrounds in President’s first year in office. Russell Wheeler, \textit{Biden’s First-Year Judicial Appointments—Prospects for 2022 and Beyond}, BROOKINGS (Feb. 2, 2022), https://www.brookings.edu/blog/fixgov/2022/02/02/bidens-first-year-judicial-appointments-prospects-for-2022-and-beyond/. Time will tell whether this pace continues throughout Biden’s presidency. See John Gramlich, \textit{How Trump Compares with Other Recent Presidents in Appointing Federal Judges}, PEW RESEARCH CENTER, (Jan. 13, 2021), https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/.


\textsuperscript{10} See McGinley, supra note 5, at 251.


\textsuperscript{12} See \textit{Voting Laws Roundup: December 2021}, BRENNAN CENTER FOR JUSTICE, https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021 (Jan. 12, 2022) (noting that in 2021 nineteen states passed thirty-four laws restricting voting access, more laws restricting access in one year than the organization had ever recorded since it began recording the bills in 2011).

\textsuperscript{13} \textit{Holder}, 570 U.S. at 557.
voting laws under Section 5 of the Act. Under Section 5, the jurisdictions identified in Section 4(b) were required to apply to the U.S. Justice Department for preclearance of proposed new voting measures or bring suit before a panel of federal judges to assure the changes were legal. The Court did not strike down Section 5, but as a practical matter, because the Court struck down Section 4, Shelby County abolished the preclearance requirement and gave free reign to Southern states with a history of race discrimination to enact changes to their voting laws that limit access to voting. Only an Act of Congress establishing a new formula identifying which jurisdictions need preclearance could save Section 5. No subsequent law has been enacted. With Shelby County’s implicit permission, and in response to the 2020 Presidential election and the false rumors that former President Trump won the election, many states have aggressively rewritten their voting procedures, much to the disadvantage of state residents who are poor and of color.

But some other states have enacted voting legislation that increases access to voting. The partisan split in the country is stark, leaving citizens of some states with good protection and those in others with limited voting rights. Recent federal efforts by the Democrats in Congress to limit partisanship in voting procedures and to improve access to voting—The Freedom to Vote Act—failed to garner sufficient support among Republicans in the Senate. Subsequently, The John Lewis Voting Rights Advancement Act, combined with discrete portions of the Freedom to Vote Act, passed the House of Representatives. The combined bill overturned Shelby County and granted greater federal protections to

14 Id. at 534-35.
15 Id.
16 See Voting Rights Roundup, supra, note 12.
17 See Benjamin Swasey, Map: See Which States Have Restricted Voter Access and Which Have Expanded It, https://www.npr.org/2021/08/13/1026588142/map-see-which-states-have-restricted-voter-access-and-which-states-have-expanded (Sept. 7, 2021) (noting that Nevada AB 321 establishes mail-in voting and makes it easier to vote by mail by expanding drop-boxes and making registration easier).
19 “The John Lewis Voting Rights Advancement Act would prevent discriminatory practices and rules in voting from being implemented in states and localities where discrimination is persistent and pervasive, protecting access to the vote for all eligible voters, regardless of race, color, or membership in language minority groups. And it would restore voters’ ability to challenge discriminatory laws nationwide.” See Voting Rights Roundup, supra, note 12.
voting rights but was defeated in the Senate because two Democratic Senators failed to agree to alter the filibuster, which requires sixty votes to pass a bill.

The failure of the Senate to reenact voting rights legislation after Shelby illustrates how different the atmosphere is today, compared to 2006, when the Voting Rights Act was last reauthorized. The 2006 reauthorization of Section 5, the preclearance provision, passed the House with an overwhelming majority, and passed the Senate on a unanimous vote. This year’s voting rights measures did not get a single Republican vote.

II. THIS SYMPOSIUM: AN ALTERNATIVE SOURCE OF RIGHTS: STATE AND LOCAL LAW AND CONSTITUTIONS

The good news is that despite the failure of the federal courts and the U.S. Congress to protect our individual constitutional and civil rights, there is solid support among the public for protection of many of the rights that the courts and U.S. Congress have failed to guarantee (or may fail to do so in the future). These rights include but are not limited to abortion, a limitation on excessive police power, employer liability for sex-based harassment in employment, restoration of felons’ voting rights, and pregnancy fairness at work. Popular support for these rights means that at least in blue states and municipalities, and even in purple and red ones, there is an opportunity to guarantee rights that have been

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21 Id.
27 See id.
neglected or limited by the federal courts and not subsequently fortified by the U.S. Congress.\textsuperscript{28}

Given the federal courts’ and Congress’s failure to protect rights that have significant popular support, the editorial board of the Nevada Law Journal ("NLJ") hosts this symposium entitled, \textit{Enhancing Civil and Constitutional Rights through State and Local Action}. The idea was to analyze state legislation that can be used to reinforce civil rights of individuals that have been weakened by neglect or direct action by the federal courts or Congress or both. The NLJ invited authors to participate with analyses of rights-enhancing legislation. The response was robust, and the NLJ selected the nine articles that follow.\textsuperscript{29}

\textbf{A. Substantive Topics Covered by Symposium Essays and Articles}

This collection represents a broad range of substantive topics concerning rights that can be guaranteed by state or local legislation or both; the articles are authored by an equally broad range of individuals, including law professors, lobbyists, law students, attorneys, heads of non-profit advocacy organizations, and legislators from Nevada and other states. The topic is so vast that it would be impossible to address all of the possibilities of using state and local law to guarantee greater rights. But the range of topics in the essays and articles in this symposium include legislation regarding hate crimes for anti-Asian bias, health insurance coverage for transgender employees, HIV modernization, collection of key data about the LGBTQ+ community, abolition of the death penalty, immigrant rights, enhanced protection for students and employees against race discrimination, right of pregnant persons to reasonable accommodations at work, restoration of felons’ voting rights, and abolition of qualified immunity for police officers who violate individual rights. Besides the substantive importance of each of these topics, several of the articles also discuss the authors’ experiences and strategies used in working to enact protective legislation in blue, purple, and even red jurisdictions.

While the symposium focuses on state and local legislation, some of the essays or articles could have discussed the use of state constitutions to enhance

\textsuperscript{28} See, e.g., Steven Andrew Smith & Adam Hansen, \textit{Federalism’s False Hope: How State Civil Rights Laws Are Systematically Under-Enforced in Federal Forums (and What Can Be Done About It)}, 26 Hofstra Lab. & Emp. L.J. 63, 92–93, 96–97 (2008) (using Minnesota as an example and advocating for use and enforcement of more protective state civil rights laws to afford greater rights to employees).

\textsuperscript{29} There are many rights that are not covered by the symposium, mostly because of space limitations, but the symposium is directed at those rights that are under siege, and for this reason we have, in our editorial judgment, not included certain rights that are at this point strongly supported by the U.S. Supreme Court’s interpretation of the Constitution, such as the gun rights that the Supreme Court has recently concluded are bestowed on individuals by the Second Amendment to the U.S. Constitution. \textit{See} D.C. v. Heller, 554 U.S. 570, 592, 595, 635 (2008).
rights. State constitutions can provide an important source of rights that are neglected both by federal legislation and by the U.S. constitution. Some states, especially those in the Western part of the United States, have populist methods of amending their constitutions that are relatively easy to accomplish, compared to the process of amending the federal constitution. Nevada provides a good example. While it is not easy to amend the Nevada constitution, there are three methods to do so, and there have been at least 107 amendments to Nevada’s constitution, which was originally enacted in 1864. The Nevada constitution can be amended by legislative process, constitutional convention, or citizens’ legislative initiative.

B. Creation of Rights in Anticipation of Federal Failures

Moreover, several states, including Nevada, have created either statutory or constitutional rights in anticipation of an abolition or weakening of federal statutory or constitutional rights. Thus, states have ensured their residents’ rights to access to abortion now that the Supreme Court has concluded that there is no federal constitutional right to abortion. And, in 2020, Nevada was the first state to revise its constitution to repeal a constitutional amendment that limits marriage to a man and a woman and to guarantee the right to marry regardless of the

30 See, e.g., Randolph M. Fiedler, No Path Forward: Nevada’s Death Penalty, 22 NEV. L.J. 1005 (2022) (discussing the failure of legislation in Nevada to abolish the death penalty).
31 States with Initiative or Referendum, BALLOTpedia, https://ballotpedia.org/States_with_initiative_or_referendum (last visited Apr. 20, 2022).
33 Id. To amend by legislative process, legislators must pass the amendment by majority vote in both houses twice (in two different legislative sessions) and, subsequently, a majority of the voters must approve the amendment in a general election. Id. To amend by constitutional convention, two-thirds of the Nevada State legislature must vote for a constitutional convention and the question goes to a public vote in a general election. Id. A majority of the voters must approve the convention (not merely a simple majority of those voting on the question). Id. To amend by citizen initiative, signatures that equal 10% of the voters at the previous general election and subject to a distribution requirement must be collected to put the issue on the ballot. Id. The voting public must vote for the initiative twice, initially, and again in the next general election in an even-numbered year for it to become part of the constitution. See id. For an example of how often these processes take place and the type of amendments that pass, consider 2020. In 2020, four constitutional amendments were approved, three of which were adopted through the legislative process and one through a citizens’ initiative. Nevada 2020 Ballot Measures, BALLOTpedia, https://ballotpedia.org/Nevada_2020_ballot_measures (last visited Apr. 20, 2022). The new amendments include: the right to marry a person regardless of gender, a revision of duties of the State Board of Pardons Commissioners, the right to certain voting procedures and policies, and a requirement that utilities acquire at least 50% of their electricity from renewable resources by 2030. Id.
34 See Elyssa Spitzer & Nora Ellumm, State Abortion Legislation in 2021, CTR. AM. PROGRESS (Sept. 21, 2021), https://www.americanprogress.org/article/state-abortion-legislation-2021/ (listing states that have improved access such as New Mexico, California, Hawaii, Washington (state), Virginia, Colorado, and Connecticut).
individuals’ genders.\textsuperscript{35} This repeal occurred in anticipation that the current Supreme Court may overturn \textit{Obergefell v. Hodges},\textsuperscript{36} which held that there is a federal constitutional right to marry a person of the same gender.

\textbf{C. State Constitutions to Protect Rights}

Even absent constitutional amendment, some state Supreme Courts interpret their state constitutions to grant more protection to individual rights than the U.S. Supreme Court has given the federal constitution. This is particularly appropriate when the textual language of the state constitution differs from that of the federal constitution. But, even when the language of state constitutional provisions is identical to that of the U.S. Constitution, state supreme courts have interpreted the language in a more protective way, and such interpretation is appropriate.\textsuperscript{37}

This is not a new idea. As early as 1977, U.S. Supreme Court Justice William Brennan published \textit{State Constitutions and the Protection of Individual Rights}, in which he argues that state constitutions provide alternative means of granting greater rights to individuals in those states than the federal constitution does.\textsuperscript{38} He explained that even where the state constitutional language is identical to that of the federal constitution the state supreme court may interpret the state constitutional right in a broader manner, and he gives numerous examples of state supreme courts that have done so.\textsuperscript{39} A few years after Justice Brennan’s article was published, during the administration of President Ronald Reagan, there were calls to enact protective state legislation that would supplement the rights that were weakened by the Reagan Administration, by federal legislation, or by U.S. Supreme Court interpretation, or all three.\textsuperscript{40}

\textsuperscript{35} \textit{Nevada Question 2, Marriage Regardless of Gender Amendment (2020), Balloptpedia,} https://balloptpedia.org/Nevada_Question_2_Marriage_Regardless_of_Gender_Amendment_ (2020) (last visited Apr. 9, 2022); \textit{see also Julie Moreau, States Across U.S. Still Cling to Outdated Gay Marriage Bans, NBC News} (Feb. 18, 2020, 7:44 AM), https://www.nbcnews.com/feature/nbc-out/states-across-u-s-still-cling-outdated-gay-marriage-bans-n1137936 (explaining that many states have not repealed their bans on same sex marriage, some because it would be too time-consuming, but others in possible anticipation that the Supreme Court may overturn Obergefell v. Hodges, 576 U.S. 644 (2015)).

\textsuperscript{36} \textit{Obergefell v. Hodges, 576 U.S. 644 (2015).}

\textsuperscript{37} \textit{See infra,} Brennan, note 38, at 499–500.


\textsuperscript{39} \textit{See id. at 499–500. \textit{See also Jeffrey S. Sutton, 51 Imperfect Solutions: States and The Making of American Constitutional Law} 1–2 (2018) (arguing that the state constitutions should play an important role in defining individual rights).}

\textsuperscript{40} \textit{See,} e.g., Drew S. Days, \textit{Turning Back the Clock: The Reagan Administration and Civil Rights,} 19 HARV. C.R.-C.L. L. REV. 309, 313 (1984) (detailing how the Reagan Administration broke with all previous administrations of both parties by attempting to cut back on civil rights); Robert Pear, \textit{States Are Found More Responsive on Social Issues,} N.Y. TIMES (May 19, 1985), https://www.nytimes.com/1985/05/19/us/states-are-found-more-responsive-on-social-issues.html (explaining how states had stepped up to fill in the gaps left by the Reagan administration); Deborah Jones Merritt, \textit{The Guarantee Clause and State Autonomy: Federalism for A Third Century,} 88 COLUM. L. REV. 1, 6–7 (1988) (**In addition, state and local
D. States as “Laboratories of Democracy”

Moreover, years earlier, in 1932, U.S. Supreme Court Justice Louis Brandeis stated in New State Ice Co. v. Liebmann, that the states are the “laboratories of democracy.”41 This means that much progressive legislation that stalls in Congress can be enacted in the states to protect those within their borders.42 If successful at the state level, a future Congress that is less interested in partisan squabbling may enact the legislation on the federal level as well. As Keeling Baker explains, California is an example of a state that has used state law to enhance the rights and health of its residents.43 For example, California has enacted pro-employee civil rights legislation that goes beyond the protections of Title VII and the ADA,44 has announced an intent to phase out the sale of automobiles with combustible engines by 2035, and has enacted legislation to study the possibility of granting reparations to descendants of enslaved individuals.45

Of course, not all states are California, and a number of essays in this symposium discuss legislative strategies and measures that have been passed not only in blue California, but also in purple, and even red, states. This symposium demonstrates that the concept of “laboratories of democracy”46 is still vital to our national recognition of rights, but the influence is not necessarily a straight path from state legislation to federal legislation. Instead of following the simple path from state to federal law, enhanced rights emerge from a complicated mix of state legislation, executive action, litigation, federal legislation, and even voluntary action of private citizens. This is not to say that the efforts of all actors along this erratic path are not well-planned and intentional. But it is to say that all of governments check federal authority by regulating areas that the federal government chooses to ignore . . . . Thus, state governments check federal power by balancing the content of regulatory programs. With two levels of government, the political pendulum is less likely to swing too far towards either conservative or liberal ideas.”); Paul Weiler, The Wages of Sex: The Uses and Limits of Comparable Worth, 99 HARV. L. REV. 1728, 1754 (1986) (“Although that proposal was killed shortly after President Reagan took office, the same proposal remains open to a future administration with a different orientation. At present, all the positive action is taking place at the state and local level.”); Akhil Reed Amar, Of Sovereignty and Federalism, 96 YALE L.J. 1425, 1519 (1987) (“Even if states have not always taken seriously their role in protecting individual constitutional rights against the federal government, they should do so. All those who wield the power of government—Court and Congress, state judge and state legislator—should take seriously the obligation to use that power to promote the ultimate sovereignty of the People as embodied in the Constitution.”).

43 See Baker, supra note 42.
45 See Baker, supra note 42.
those working towards improving rights in these different fora have an important role to play in affirming rights.

E. Limitations of Relying on State Strategies

However, relying on state legislation and constitutional amendments to expand civil rights has its limits. As progressive states enact legislation that guarantees civil rights, conservative state legislatures can limit rights guaranteed by the U.S. constitution and laws, as they have done repeatedly in the area of abortion rights, challenging the federal courts to strike down their laws or at least limit the federal right.47

Furthermore, while conservative states cannot eliminate clearly established federal rights, when federal rights are unclear or may potentially change in the future, conservative states have enacted or have failed to retract state laws or constitutional provisions (such as bans on same sex marriage), known as “trigger laws” that would be legal and effective if a conservative U.S. Supreme Court eventually overturns earlier rights-granting opinions such as Obergefell.48

Even absent legislation that is waiting in the wings to limit rights following a U.S. Supreme Court decision, once the Supreme Court has reduced or eliminated federal statutory or constitutional rights, states can react quickly by enacting legislation that further limits those rights. For example, many states have enacted statutes that burden voting rights in the name of voting security.49

Assuming that conservative states engage in these rights-limiting behaviors while progressive states enact rights-affirming legislation, a concern arises that variety among states in the rights conferred upon those within the states’ borders may lead to even more polarization in the U.S. than is currently occurring, with residents of different states having access to vastly different rights; this situation could threaten unity and free travel in the U.S. and even place pressure on the rights-affirming states.50 While this might be true, the essays and articles included in this symposium demonstrate that many of the measures passed in the states are not necessarily characterized as appealing exclusively to blue (or red) states; at least some state legislation may be a means of granting improved rights to residents of blue and red states on a bipartisan basis.

47 See, e.g., Whole Women’s Health v. Jackson, 142 S. Ct. 522 (2021) (Texas statute granting private civil actions against physicians performing abortions after heartbeat is detected).
The ideal, of course, would be for the U.S. Congress to step up to enact rights-affirming legislation, especially the legislation that has been most successful and effective in the state “laboratories.”\(^{51}\) While this may not occur in the political environment in which we live, enacting state legislation and even state constitutional provisions should in the meantime at least protect the rights of residents of those states that enact rights-affirming provisions. Moreover, as the collection of essays and articles in this symposium demonstrates, even when Congress fails to act or individual state legislatures do not protect rights there are other rights-enhancing moves that advocates, lobbyists, litigators, and governors can take.

### III. Themes Arising in Symposium Essays and Articles

While the essays and articles in this symposium speak for themselves, various common themes arise. First, when we talk about state law, we should define state law broadly, considering state legislation, administrative regulations, governors’ executive actions, and constitutional amendments, as well as municipal and other local laws that can be employed to increase rights of state and local residents.

Second, although we talk about the possibility of enhancing rights through the law of more progressive states, many of the laws address issues common to residents of purple or red states, and it is important to try to find common ground on the state and local levels. As Professor Widiss notes in her essay on pregnant workers’ fairness acts, these acts protect the interests of all state residents and are not partisan in nature.\(^{52}\) Widiss demonstrates that even in a red state like Indiana, legislation can move the bar toward greater fairness at work.

Moreover, Professor Kagan and his co-authors’ essay on immigration reform\(^{53}\) and Randolph Fiedler’s essay on anti-death penalty legislation\(^{54}\) both demonstrate that even in blue (or purple) states like Nevada, there might be discomfort or resistance to certain progressive legislation. Especially in states that are most recently blue like Nevada, legislators may fear that the state is one election away from turning red. In this environment, legislators and lobbyists must recognize that flexibility, nimbleness, and a willingness to compromise may be necessary. In fact, the essays demonstrate that something accomplished is better than nothing. Organizing in the states even when it results in failure in one legislative session can result in success in subsequent legislative sessions.

\(^{51}\) See supra notes 41–42.


\(^{54}\) Fiedler, supra note 38. For a description and analysis of Fiedler’s essay, see infra notes 87–98 and accompanying text.
Third, the essays reveal the importance of not only grass roots lobbying but also of national non-profit lobbying organizations that have expertise in working with state legislators to propose legislation that enhances civil rights. These organizations, such as the National Women’s Law Center and A Better Balance, are experienced in supporting state legislators, can write legislation quickly, and can testify before legislative committees about the effects of the legislation. Because these organizations have national expertise and have worked in many states, they often have empirical research on the proposed legislation that has been most effective in other states, and they can quickly respond to questions raised by legislators with proposed textual language and explanations of the effects of the proposed amendments to the legislation in other jurisdictions. Even if the organization fails at the individual state level, these national organizations will be stronger and more able to successfully lobby Congress in the future based on their experience and knowledge gained from their lobbying efforts in the state legislatures.

Fourth, as Professor Widiss’s essay demonstrates, at least in the area of employee rights and perhaps in other areas affecting multi-state corporations, if one state passes progressive legislation applying to companies in the state, some of those companies will adopt more progressive policies to apply nationwide, even in states where those policies are not required by law. This fact is important for national lobbyists to understand in determining where they should place their efforts.

Fifth, as Professor Mate demonstrates, state legislators should not be the only state or local focus for enhancing civil rights. He demonstrates that even in purple and red states, the role of governors is important in the restoration of felon voting rights. Thus, he argues, we need to work to elect moderate or progressive governors in those states where work with the legislature may not be fruitful. He gives examples of Iowa, Kentucky, and Virginia, states in which the governors have the power to restore voting rights by executive action. In all three of these states, governors have exercised their power to grant restoration of voting rights to at least some felons who have completed their sentences and fulfilled other requirements.

Sixth, because a patchwork of rights is not the ideal, Mate suggests that we should also work to elect more progressive candidates to the presidency and the Senate, in particular. Progressive presidents, with the affirmation of the Senate,

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55 I had experience during the 2021 Nevada Legislative Session of working with lawyers from the National Women’s Law Center and Equal Rights Advocates. These lawyers were smart, nimble, and extremely knowledgeable. As a result, and with excellent work by Nevada legislators, SB 293 passed, which guarantees a job applicant’s right not to be asked about her salary, a provision that has proved to successfully reduce the gap between salaries of women and men in other states.

56 Manoj Mate, Felony Disenfranchisement and Voting Rights Restoration in the States, 22 Nev. L.J. 967 (2022). For a description and analysis of Mate’s essay, see infra notes 83–86 and accompanying text.
appoint more reasonable judges to the federal bench, who, many expect, will influence federal civil rights law in a more protective way.

Seventh, Widiss’s essay demonstrates how co-dependent many of the efforts to improve civil rights law are. As she explains, in the area of pregnancy accommodations, the U.S. Supreme Court’s opinion in *Young v. United Parcel Services, Inc.* was a win but not a home run for the plaintiff. The case created a complicated balancing test to determine whether there was intent to discriminate in failing to accommodate, but it did not apply the balancing test to Young’s case. Given that Young was the appellant who lost below, this was a win for Young. But, as Widiss explains, the opinion is so confusing and the results so fact-intensive that many employers decided to grant pregnancy accommodations as a matter of policy. Moreover, even where employers did not move voluntarily, state legislators passed legislation that clarified the rights of pregnant workers to accommodations, which, in most cases means that pregnant mothers have a right to reasonable accommodations unless the employer can prove that giving such accommodations would impose an undue burden on the employer. This demonstrates that even a U.S. Supreme Court opinion that weakly favors the plaintiff’s rights can result in significant, improved rights in many areas of the country.

Finally, the essays and articles demonstrate that not only should we work on using all possible avenues to enhance civil rights—federal legislation, litigation, state and local legislation, federal and state executive orders and administrative regulation, and a combination of all of these—but we also need to understand that incremental change adds up to protect people’s rights. A good example of incrementalism as a successful strategy is workers’ rights law in Nevada. While I will not discuss all of worker’s rights legislation in the state, and it cannot compare to the comprehensive law in the much bluer state of California, over the years, Nevada has enacted many laws that exceed the protections provided by federal law.

For example, Nevada’s anti-discrimination statute added sexual orientation as a protected category in 1999, and it added gender identity and expression as protected categories in 2011. At the time, the courts have not yet held that Title VII of the 1964 Civil Rights Act prohibited discrimination based on sexual orientation and gender identity. In fact, it was not until 2020 when the U.S. Supreme Court held in *Bostock v. Clayton County, Georgia,* that it was illegal to discriminate based on sexual orientation and gender identity.

Although Nevada law granted protection to gay and transgender employees at a time when Title VII did not, the Nevada anti-discrimination act was problematic because it did not provide for damages, and plaintiffs had to wait for the

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58 *Id.* at 228–32.
59 *Id.* at 232.
Nevada Equal Rights Commission (NERC) to finish its investigation to seek a remedy. In 2019, Nevada legislators added damages as a remedy equal to those in Title VII, and the right of claimants to bring their claims in court 6 months after filing the claim, even before NERC finishes its investigation. Because the U.S. Supreme Court had not yet interpreted Title VII to prohibit employment discrimination based on sexual orientation and gender identity, these remedial and procedural changes in Nevada law meant that individuals suing under Nevada law for discrimination based on sexual orientation or gender identity could finally receive the same remedies and procedures in state or federal court as others who sued under Title VII for sex discrimination.

Moreover, after the amendments, Nevadans suing for sex discrimination can sue using only Nevada law so that their cases can be brought in state court and not removed to federal court. Because federal courts grant dispositive motions more aggressively than state courts do, and federal courts require jury verdicts to be unanimous, many plaintiffs’ lawyers consider the possibility of bringing a discrimination case based on gender or sex discrimination in Nevada state courts beneficial.

Nevada has enacted other legislation that exceeds the protections for workers afforded by federal law. For example, in 2017 the Nevada legislature passed the Nevada Pregnant Workers’ Fairness Act, which grants reasonable

64 Punitive and compensatory damages have been available under Title VII since the 1991 Civil Rights Act was passed. At the time, however, damages were capped depending on the size of the employer, and those caps have not been raised. Although adding those damages to Nevada law at least equalized the remedies under federal and state sex discrimination laws, the damages are not adequate. Moreover, because 42 U.S.C. Section 1981 prohibits discrimination based on race in contract formation and execution, and uncapped damages are available under Section 1981, individuals suing for race discrimination in employment under Section 1981 can collect damages that have no statutory limits, whereas individuals suing for sex discrimination may collect only limited, capped damages. To avoid this discrepancy, states should provide uncapped damages as a remedy under their state anti-discrimination laws.
accommodations to pregnant workers, (SB 253\textsuperscript{65}) and a bill that reinforced the rights of breastfeeding mothers to express milk at work. (AB 113\textsuperscript{66}). In 2019, Nevada lawmakers prohibited the use of non-disclosure agreements in settlement of cases involving sexual assault, sex discrimination, or retaliation for claiming sex discrimination (AB 248). In 2021, the Nevada legislature passed: equal pay legislation that prohibits employers from asking salaries of applicants (SB 293); legislation granting employees’ right to use part of their paid or unpaid sick leaves to care for a family member (AB 190); legislation prohibiting employers from enforcing non-compete agreements against some former employees (AB 47), and legislation, discussed below, that expands the definition of illegal race discrimination to include discrimination based on natural hairstyles such as locs, braids, etc. (SB 327).

IV. ARTICLES AND ESSAYS IN THIS SYMPOSIUM

Below I summarize the articles and essays appearing in this symposium with short commentaries, where appropriate.

A. Anti-Asian Hate Crime Legislation

Professor Stewart Chang discusses the dilemma of hatred of and discrimination toward Asians and Pacific Islanders (API) in Stopping Anti-Asian Hate: Local Solutions to a National Problem.\textsuperscript{67} He begins with the Atlanta spa shootings in which Robert Aaron Long murdered six Asian women who worked at massage parlors in the Atlanta area and then denied that he engaged in hate crimes based on the victims’ race: Asian. Long told police that he was a sex addict who visited the massage parlors and blamed the murders on the victims’ allure. Many commentators expressed outrage that Long (and, apparently, some police officers) excused race-based attacks by stating that he was a sex addict.\textsuperscript{68} It seems apparent that these were intersectional hate crimes, based on both the sex and the race of the six Asian female victims.\textsuperscript{69}


\textsuperscript{67} Stewart Chang, Stopping Anti-Asian Hate: Local Solutions to a National Problem, 22 Nev. L.J. 933 (2022).

\textsuperscript{68} See, e.g., Li Zhou, The Atlanta Shootings Can’t Be Divorced from Racism and Misogyny, Vox (Mar. 18, 2021), https://www.vox.com/22336317/atlanta-georgia-shootings-racism-misogyny-targeting-asian-women; Nancy Wang Yuen, Atlanta Spa Shooting Suspect’s ‘Bad Day’ Defense, and America’s Sexualized Racism Problem, NBC News (Mar. 18, 2021), https://www.nbcnews.com/think/opinion/atlanta-spa-shooting-suspect-s-bad-day-defense-america-s-noma1261362. I personally found the police officers’ normalization of murder due to a sex addiction as racist and sexist. In fact, where Long admitted that sex or gender was a cause of the murders, many argued these were not hate crimes based on race or sex, or both. See Ann C. McGinley, Misogyny and Murder, 45 Harv. J. L. & Gender 177 (2022).

\textsuperscript{69} See McGinley, supra note 68 at 225–27.
Chang notes that anti-Asian hate incidents have grown significantly since the beginning of the pandemic. While there is no proof of causation, this rise correlates to former President Trump’s insistence upon identifying the virus as linked to China. Trump repeatedly called the virus the “China virus,” the “Wuhan virus,” the “China plague,” and “kung flu.” Moreover, President Trump restricted the entry of graduate students and postdoctoral researchers from China, due to China’s violation of U.S. intellectual property interests, a rule still in effect today. Even before the pandemic, Chang demonstrates, then presidential candidate Trump attacked China for “currency manipulation” and for “raping our country.” After Trump’s election, Chang notes, Trump blamed China for stealing U.S. intellectual property.

These claims, both linking the virus to China and the accusations of unfair competition created significant responses from Trump acolytes at his rallies. Although there is no direct evidence of causation, there was a significant rise of attacks on Asian people in the U.S. during the Trump era. In fact, Chang demonstrates, anti-Asian hate crimes rose by 145 percent in 16 of the largest U.S. cities in 2020 and by 164 percent over the first quarter of 2021, even though hate crimes in general dropped during this period due to social distancing because of Covid.

While this anti-Asian sentiment seems to have been sparked by the Covid-19 pandemic and is likely related to the former President’s open disdain for China, Chang demonstrates that anti-Asian sentiment is not new in the U.S. In fact, Chang establishes that throughout U.S. history, Asians have suffered systemic race- and ethnicity-based discrimination that was explicitly protected and promoted by U.S. (and state) law. Chang documents that California enacted some of the earliest legislation that would lead to exclusion of Chinese immigrants. Although these laws were ultimately struck down, the U.S. Congress passed the Page Act of 1875, which barred immigration of Chinese women unless they proved that they were not prostitutes, effectively halting immigration of all Chinese women. Chang’s history of anti-Asian legislation, which goes significantly beyond what I mention here, demonstrates that economic competition, under the pretext of protecting morals, largely drove the discriminatory treatment and laws prohibiting Asian immigration.

Given this significant history of discrimination against Asians and the rise in crime rates perpetrated against Asians in the U.S., Chang evaluates whether charging perpetrators like Robert Aaron Long with hate crimes against Asians would be effective. He agrees that increased use of hate crime legislation might prove useful, and he lauds the Congressional passage of the bi-partisan Covid-19 Hate Crimes Act, which President Biden signed into law in May 2021. This law instructs the Department of Justice to issue guidance and to facilitate reporting and reviews of hate crimes with a particular emphasis on education concerning hate crimes during the pandemic.70

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Chang also details new state law hate crime provisions, some symbolic, others that are more substantive, with a focus on information gathering and record keeping, a crucial first step due to the severe underreporting of hate crimes by states to the federal government. But Chang notes that there are still significant barriers to usefulness of hate crime legislation to support Asian Americans and Pacific Islanders. The most important of these barriers are limited English proficiency of Asian immigrants in the U.S., immigration status of many Asian Americans, and a distrust by Asian immigrants of law enforcement.

As Chang explains, a large percentage of Asian Americans are not comfortable with English, many live in households where no members speak English, and an effort to educate translators has proved difficult because of the many different languages that API individuals speak. Second, one seventh of API individuals are undocumented, and federal and local authorities have agreements that delegate powers of federal immigration authorities to local jurisdictions, thus hindering the willingness of undocumented immigrants to report hate crimes they suffer. Chang recommends that state and local governments adopt sanctuary policies that direct local law enforcement to limit inquiries about an individual’s immigration status, restrict arrests exclusively due to violations of immigration laws, and prohibit reporting of an individual’s immigration status to the federal authorities. Third, the API community is hesitant to report hate crimes because of the community’s distrust of law enforcement.

This third reason requires more discussion, and in some measure, applies to all hate crime legislation. A serious concern is that hate crime legislation not only encourages even more policing but also enhances sentences, some of which are already too long, especially for perpetrators of color. Opponents of hate crime legislation fear that hate crimes will be prosecuted unevenly, with great percentages of hate crime prosecutions against people of color. As Chang notes, while some distrust of police comes from distrust of API communities’ native countries, many are distrustful because of police brutality in the U.S. that focuses on API youths. Moreover, because media attention has focused on the victimization of API individuals by Black perpetrators, leaders of the API community are concerned about stereotypes that Black individuals hate API individuals, thus opening fissures in relationships between the Black and API communities. Concerns exist among leaders of the API community that hate crime legislation will pit one minority group against another due to over policing of minority groups. Their solution would be more social programs and less emphasis on policing.

Chang concludes that structural reform is needed, and much of the reform, he argues, should be accomplished at the state and local levels. State and local governments, he argues, should institute sanctuary policies to protect immigrants against the federal government’s deportation. Moreover, resources should be

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anti-asian-american-attacks-rise.

71 See McGinley, supra note 68, at 242.
directed to meeting needs of immigrants. Such programs can focus on training
translators and otherwise improving language access. Finally, Chang argues, all
levels of government must commit to eliminating white supremacy, which is the
underlying cause of anti-API hate crimes.

B. Immigration Reform Legislation

In *Nevada as Example: State Immigration Reform in a Swing State,* Kagan of Boyd School of Law, Nevada Assemblywoman Selena Torres, and Boyd law student Jorge “Coco” Padilla discuss the successes and failures of immigration reform legislation in a “purple” state—Nevada. The authors explain the efforts that Nevada legislators expended over three legislative sessions from 2017 to 2021 to improve the civil rights protections of documented and undocumented immigrants in Nevada, who, combined, represent a quarter of the Nevada workforce.

The first efforts, they explain, focused on limiting the 287(g) program. The 287(g) program refers to Section 287(g) of the Immigration and Nationality Act, and allows the federal Department of Homeland Security (DHS) to enter into formal Memoranda of Agreement (MOAs) to train and authorize state and local officers to perform functions of federal immigration agents, such as interviewing detainees about their immigration status, accessing the DHS database for information on the individual interviewees, issuing immigration detainers, and transferring undocumented detainees to U.S. Immigration and Customs Enforcement (ICE) custody.

In Nevada, the 287(g) program was initiated in 2008 in Las Vegas with an MOA between the Las Vegas Metropolitan Police Department (LVMPD) and ICE and DHS. Initially, pursuant to the MOA, officers in Las Vegas questioned and detained those who were charged with a crime and held them until ICE came to pick them up, even though there was no longer probable cause to retain the individuals. Subsequently, in 2019, LVMPD significantly changed its policies in response to a federal court decision in California that enjoined local California officials from detaining prisoners for ICE absent a state civil statute authorizing doing so. Because Nevada has no such statute, LVMPD suspended the MOA with ICE and DHS, but announced that it hoped to revisit the situation.

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72 Kagan et al., *supra* note 53.
74 See [The 287(g) Program: An Overview, Am. Immigr. Council](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_287g_program_an_overview.pdf) (last visited Apr. 9, 2022).
In the meantime, as Kagan and his co-authors detail, Nevada legislators introduced a variety of bills making it against state policy to participate in the 287(g) program. At each effort, however, the proposed legislation failed. The authors explain that Nevada as a “purple” swing state is in a different political position from that of either California, a deeply “blue” state where it is not politically dangerous for legislators to support progressive immigration legislation, or Texas, a “red” state that has a significant immigrant population but whose Republican leadership often is openly hostile to immigrant rights. Nevada falls somewhere in between. Currently, Nevada has a Democratic Governor and two Democratic U.S. Senators, as well as Democratic majorities in both the state assembly and the state senate. But the races have been very close. According to Kagan, et al. “In Nevada, Democrats win relatively consistently. However, there are still concerns that supporting an unpopular immigration policy could change the outcome of elections.”

This political posture explains the attitude of even some Democratic state legislators to the varying efforts to limit the 287(g) program. In response to proposed legislation, often the bills were deemed by opponents to be “sanctuary city” bills, a label that led to inevitable defeat. In response to this dynamic, Assemblywoman Selena Torres followed the lead of Washington state and introduced the Keep Nevada Working Act, which focused on bolstering economic and career opportunities for Nevada’s immigrant workers and businesses. Although it ultimately was sidelined by the Assembly Committee on Ways and Means, Kagan and his co-authors explain that this bill made it further than any of the bills limiting the 287(g) program.

There is a silver lining. The Keep Nevada Working Act was revived by the Majority Leader of the Assembly who worked on amending the bill once more. The amended bill dropped the provision that limited the detainer program, but it instead allocated $500,000 to the Immigration Clinic at the William S. Boyd School of Law at the University of Nevada, Las Vegas, to provide pro bono legal services to immigrants. Instead of limiting detainer services, the bill now

77 Kagan et al., supra note 53 at 958.
78 Id.
79 “Sanctuary city” is a term, often used disapprovingly to indicate that the city has decided not to cooperate with federal authorities in the treatment of undocumented immigrants. In fact, advocates prefer the term “safe cities” and explain that while a safe city does cooperate with the federal authorities when the city has arrested an undocumented person who has committed serious crimes, it refuses to hand over to federal authorities (ICE) undocumented persons arrested for minor crimes, especially those who have been cleared of committing a crime, have made bail, or have finished serving jail time for a crime for which he has been arrested. Advocates for safe cities take the position that because an immigration violation is a civil violation, not a criminal offense, police cannot hand over to federal authorities those individuals who have not committed crimes or who are arrested for committing minor crimes. See Immigration 101: What is a Sanctuary City? AMERICA’S VOICE, https://americasvoice.org/blog/what-is-a-sanctuary-city/ (updated Oct. 9, 2019).
provides legal counsel to immigrants in deportation proceedings who otherwise would not have the right to counsel or the ability to afford private counsel.\textsuperscript{80} Furthermore, in response to the bill’s passage, the Clark County Commission matched the funding, which now totals $1 million appropriated to the Immigration Clinic over a two-year period.\textsuperscript{81} This result is truly remarkable, given the economic impact of COVID-19 on Nevada, which resulted in budget cuts for state agencies\textsuperscript{82}.

So, what are the lessons learned from this experience? The authors conclude that often measures enacted in blue states are more difficult politically in swing states. Nonetheless, the Nevada case shows that advocates on behalf of immigrants must be flexible and at the same time, relentless in their pursuit of more protective legislation, even if it is not exactly the same as the legislation that is originally proposed.

C. Voting Rights: Restoration of Felons’ Rights

In Felony Disenfranchisement and Voting Rights Restoration in the States, Manoj Mate, Canada Research Chair and Assistant Professor of Law at the University of Windsor Faculty of Law, discusses the barriers to restoration of felons’ voting rights and suggests approaches for overcoming those barriers.\textsuperscript{83} As Professor Mate explains, because the voting rights of felons are largely governed by the states, there are both problems and opportunities.

Mate explores the history of limitations on felons’ voting rights and demonstrates that the limitations stem from the post-Civil War and Reconstruction eras when states sought to ban African American former slaves from voting. They disenfranchised those convicted of crimes of moral turpitude for long periods even after their release from prison. Second, states changed their criminal codes to criminalize behaviors thought to be committed more frequently by Black individuals, and law enforcement disproportionately targeted Black individuals for violating these laws. According to Mate, “states utilized the combination of criminal disenfranchisement and targeted criminalization to evade the Fifteenth Amendment and deny African Americans voting rights.”\textsuperscript{84}

This history still haunts us in that a much higher percentage of African Americans than of white citizens have lost the vote because of the deprivation of


\textsuperscript{81} Id.

\textsuperscript{82} Michelle Rindels et al., Lawmakers Finish Special Session by Passing Major Budget Cut Bill with Deep Cuts to Education, State Services, NEV. INDEP. (July 19, 2020, 6:32 PM), https://thenevadaindependent.com/article/lawmakers-finish-special-session-by-passing-major-budget-cut-bill-with-deep-cuts-to-education-state-services.\textsuperscript{83}

\textsuperscript{83} See generally Mate, supra note 56.

\textsuperscript{84} Id. at 975.
felons’ rights to vote even after they have been released, and, in some cases, even after they have finished serving their probation.

These limitations would appear to be unconstitutional, but in 1974, in Richardson v. Ramirez, the U.S. Supreme Court upheld the constitutionality of felon disenfranchisement laws. Since then, both federal and state courts have consistently upheld voting restrictions on former felons. There has, however, been a movement among progressive states (and some not so progressive) to permit felons who have finished their prison sentences to vote. Mata also discusses in detail the means that different states use to restore voting rights, including state legislation, executive orders of the governor, and amendments to state constitutions.

Mata divides voting restoration schemes into five categories: 1. Jurisdictions that do not bar felons from voting even while they are in prison (Maine, Vermont, and Washington, D.C.); 2. States that restore voting rights upon release from prison (22 states, including Nevada); 3. Louisiana, which alone restores felon voting rights upon release from prison and completion of parole; 4. States that restore felon voting rights after release, and completion of parole and probation; and 5. States that either permanently disenfranchise some felons but restore voting rights to some other felons but only after they complete requirements including paying off legal and financial obligations (referred to as “LFO’s”).

Unfortunately, as Mata notes, the courts have provided little protection for felons who seek to overturn their state laws. As Mata explains, plaintiffs have challenged state disenfranchisement laws as illegal poll taxes, based on Eighth Amendment cruel and unusual punishment grounds, based on the Fourteenth Amendment as racially motivated, and on wealth classifications and as violative of the Voting Rights Act of 1965. Although in a few cases courts either invalidated the restriction or did not decide the issue, the vast majority of court opinions have upheld the state disenfranchisement provisions.

One of the most remarkable stories is that of Florida, where until 2018 felons were disenfranchised permanently unless clemency was granted. A huge number of Florida citizens have consequently been disenfranchised. In fact, in 2016, more than 20 percent of Black voters in Florida were disenfranchised. In 2018, Florida voters approved a constitutional amendment that would have allowed those with felony convictions to vote upon completion of their sentences, and parole or probation. The following year, however, the state legislature enacted a law that prohibited restoration for more than 1.5 million Floridians who had been released from prison until they had paid off all legal financial obligations imposed by the courts as part of their felony convictions even if they could not afford to pay. Various challenges to the law took place. Ultimately, the Eleventh Circuit upheld the law as constitutional. One of the most problematic results of

this decision is that many of the released felons do not even know what their LFO’s arc, and it is therefore impossible for them to make amends.

After a critique of the federal courts’ deference to state legislatures on this issue, Mate suggests a path forward and long-term multi-pronged strategies for improving the restoration of felons’ voting rights. He argues that there is, in essence, a two-tiered landscape for restoration of voting rights: 1. Progressive states where legislatures rewrite the laws to permit restoration upon completion of sentence. These have occurred in the “blue” states. 2. Red states with Republican majorities where it is difficult to challenge the disenfranchisement of felons, even those who have already paid their debt to society. In between these two tiers are purple states where the governor is a Democrat and has the power through executive orders to restore voting rights.

Progressive states need to continue to rewrite their legislation to restore voting rights, and Democratic governors in purple states should follow the examples of states like Iowa and Kentucky where the governors’ executive orders restored felon voting rights.

On the federal level, given that the Democrats were unable to muster the 60 votes needed to overcome a filibuster of the Freedom to Vote Act, a bill that included provisions restoring the franchise to prisoners who had completed their sentences, Mate argues that we need to mobilize to elect Democratic presidents who appoint progressive judges who may adopt heightened scrutiny to felon disenfranchisement laws and would be more receptive to the challenges under the Voting Rights Act. Although not likely to happen soon, Mate considers the ideal solution to be an amendment to the U.S. constitution that would establish voting as a fundamental right for all adult Americans.

D. Anti-Death Penalty Legislation

In No Path Forward: Nevada’s Death Penalty, Randolph M. Fiedler, a Las Vegas public defender, describes the failure of the 2021 Nevada legislature to eliminate the death penalty.87 He explains there was majority support for abolition of the death penalty in the Assembly and, apparently in the Senate, but Democratic Governor Steve Sisolak, on the eve of a key deadline in the Senate, issued a statement saying that he opposed abolition because, in some severe situations, he believed that death is warranted.88 When the governor expressed his opposition, important legislators announced their support of the governor’s position, and stated that they no longer supported abolishing capital punishment in Nevada.89

87 Fiedler, supra note 30.
89 See DeHaven, supra note 88.
Fiedler argues that the death penalty should be abolished in Nevada. He concludes that Nevada’s death penalty regime is more arbitrary today than it was even before the U.S. Supreme Court struck down the Georgia death penalty in Furman v. Georgia.\textsuperscript{90} In Furman, the Court found Georgia’s death penalty unconstitutional in large part, because of the randomness in its application and the excessive discretion given to state actors to impose it. As Fiedler explains, after Furman was struck down, the Nevada legislature amended our death penalty legislation to conform with the Furman decision.

Only four years later, the U.S. Supreme Court reviewed death penalty laws of five different jurisdictions in Gregg v. Georgia,\textsuperscript{91} upholding three of the five laws, and finding the other two, which required the death sentence if a defendant was found guilty of a capital offense, unconstitutional, in part because they did not allow the sentencing body to consider the individual situation of the defendant before imposing the death sentence.\textsuperscript{92} In response to Gregg, the Nevada Supreme Court struck down the new Nevada law as unconstitutional.\textsuperscript{93} Consequently, the Nevada legislature once again amended the Nevada death penalty.\textsuperscript{94}

Ironically, however, Fiedler asserts, Nevada’s current death penalty legislation suffers from two of the faults that the Furman court found unconstitutional in the Georgia law: randomness and undue discretion. The difference is that the post-Gregg Nevada law, as amended throughout the years, gives, according to Fiedler, undue discretion to prosecutors rather than the sentencing authorities, and prosecutors’ exercise of that discretion is standardless. Through a careful history of Nevada’s death penalty legislation before and after Furman and Gregg, Fiedler demonstrates that although the U.S. Supreme Court struck down the Georgia death penalty law and Nevada enacted new death penalty laws that were intended to be in compliance with Furman and Gregg, amendments made to Nevada law and the Supreme Court’s “back[ing] away from its narrowing jurisprudence” have resulted in a Nevada law that has expanded the number and breadth of aggravating circumstances, thereby resulting in greater prosecutorial discretion and increasing numbers of death-eligible cases.

The result, according to Fiedler, is that enhanced prosecutorial discretion in determining whether to charge a crime as death eligible encourages guilty pleas. Ironically, these changes do not mean that Nevada has executed more prisoners. Nevada has never executed many prisoners under any of its laws. In fact, there are currently only 68 people on Nevada’s death row. But, Fiedler argues, these small numbers make his point: such a broad law allows for increased prosecutor

\textsuperscript{90} Furman v. Georgia, 408 U.S. 238, 238 (1972).
\textsuperscript{93} Smith v. State, 93 Nev. 82, 560 P.2d 158, 159 (1977).
power in decision-making about who will live and who will die. And, when prosecutors are given significant discretion, those who are condemned to death are disproportionately of color. The problem is not that there are few executions, but that broad prosecutorial discretion gives prosecutors the power to decide in many instances who will live and who will die with virtually no standards and no oversight. Fiedler demonstrates this well in his article and establishes that, like in other jurisdictions, increased discretion leads to discriminatory results in Nevada.

Fiedler is not arguing for more capital convictions but demonstrating the arbitrariness and discriminatory results of the current system. Prosecutors in different counties apply different standards, and even no standards—charging with death penalty crimes those cases that are the most heinous, a non-standard that Fiedler argues the Supreme Court has already rejected when discussing the sentencer’s discretion.

Fiedler’s article ends with an ironic touch: he notes that technically Governor Sisolak opposition to the bill to abolish the death penalty did not kill the bill. The Senate Judiciary Committee had to hear and approve the bill by May 14, 2021, and whether to do so is at the discretion of the committee chair. The date passed without a hearing and approval. Noting that the Senate Judiciary committee chair was a deputy district attorney, Fiedler states, “It was the act of a prosecutor, exercising her discretion, that kept the death penalty in Nevada.”

Because the death penalty is largely a product of state law, unlike other civil rights issues, the state legislatures apparently have the power to assure that the death penalty is applied equitably, if at all. But, as Fiedler’s article demonstrates, it is nearly impossible to enact a death penalty statute that assures a death penalty law that is randomless and non-discriminatory. Moreover, because the death penalty is often at the center of partisan politics during elections, it may be dangerous politically, especially in a purple state like Nevada, for state politicians to oppose the death penalty.

Consequently, despite a plethora of data demonstrating that the death penalty is discriminatory in application, there is little incentive for state legislatures, even those that are majority Democratic, to abolish the death penalty. This appears to contradict the premise of this symposium whose argument is to further civil rights through state legislation, given the inability of the U.S. Congress to pass much legislation and the leaning, especially of the U.S. Supreme Court toward an ultra-conservative orthodoxy.

Depending on a state’s constitution and amendment process, one solution potentially could be to amend the state constitution to abolish the death penalty,

95 Fiedler, supra note 30.
or, in the very minimum, to limit the number of aggravating circumstances available to justify imposition of the death penalty. If we take Nevada as an example, a possible alternative to a legislature-instigated constitutional amendment is a citizen’s initiative. A constitutional amendment by citizens’ initiative could be accomplished by acquiring signatures, placing the initiative on the ballot, and passage of the ballot initiative by a majority of the voters in two even-numbered elections.97

Given that restricting or abolishing the death penalty appears to be politically unpopular, however, potential success of a citizen’s initiative is questionable. As Nevada demonstrates, even state legislatures that are majority Democratic in a state with a Democratic governor may avoid enacting legislation (or supporting constitutional provisions) that guarantee rights that are not strongly supported by the populace. On the other hand, Nevada might not be representative of other states, and may be out of step with the abolition movement as it crosses the country. For example, abolition in Utah, our conservative neighbor, may encourage Nevadans to rethink the death penalty.98

E. Qualified Immunity of Police Officers Under the State Constitution and Laws

In Tackling the Qualified Immunity Problem with State Law, Professor Addie Rohlick of the William S. Boyd School of Law, UNLV, and her coauthors attorneys Anona Su and Andréa Vieira discuss the problems caused by the judicially-created qualified immunity doctrine, which establishes a defense in civil cases brought under 42 U.S.C. § 1983 that allege federal constitutional or law violations by the state officers.99 42 U.S.C. § 1983 creates a civil remedy for constitutional or law violations that occur “under color of state law,” and, absent qualified immunity, could potentially result in high damage awards to those injured by unconstitutional police behaviors.

The article demonstrates that beginning in 1967, the Supreme Court has not only recognized the qualified immunity defense to § 1983 claims but has also strengthened and broadened the defense over the ensuing years. Qualified immunity means that police officers cannot be held individually liable for civil rights violations when sued under § 1983 unless the facts of the case would constitute a violation of a constitutional right that was “clearly established” at the time the officer allegedly engaged in the behavior.100 As many have observed, the courts interpret a constitutional right to be “clearly established” in very

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97 Supra note 32; see also supra note 33 and accompanying text.
99 Andréa Vieira et al., Tackling the Qualified Immunity Problem with State Law, 22 NEV. L.J. 1029 (2022).
limited circumstances, and this narrow interpretation has resulted in denying li-

The qualified immunity defense has become the subject of public debate over the past few years because of the increasing attention paid to officer abuse and killings of individuals, particularly Black individuals. Perhaps the most fa-
mous police abuse case was the George Floyd murder by police in Minneapolis, which resulted in officer Derek Chauvin’s guilty verdict of two counts of murder and one of manslaughter and Chauvin’s subsequent guilty plea to violating George Floyd’s federal civil rights.\footnote{Erik Levenson and Aaron Cooper, *Derek Chauvin Found Guilty of All Three Charges for Killing George Floyd*, CNN (Apr. 21, 2021, 12:13 PM), https://www.cnn.com/2021/04/20/us/derek-chauvin-trial-george-floyd-deliberations/index.html; Nicholas Bogel-Burroughs, *Derek Chauvin Pleads Guilty to Violating George Floyd’s Rights*, N.Y. Times (Dec. 15, 2021), https://www.nytimes.com/2021/12/15/us/derek-chauvin-civil-rights-guilty-plea.html.} Many scholars have argued that abolishing or limiting qualified immunity as a defense to civil suits alleging constitutional violations by police would deter aggressive behavior of police toward the citi-
zen.\footnote{See McGinley, *supra* note 101 (discussing scholars’ arguments).} The abolition or limitation of qualified immunity for police officers sued for constitutional violations is seen as at least a first step to incentivizing police to act more reasonably and carefully, especially given that until the conviction of Chauvin, many attempts to either indict or convict police officers of crimes for harming the citizenry have failed.\footnote{See id. at 1093–94 nn. 94–97.}

Amidst numerous calls for police reform, one measure proposed is a federal law that would abolish or limit the judicial doctrine of qualified immunity.\footnote{Ending Qualified Immunity Act, H.R. 1470, 117th Cong. (2021); Ending Qualified Immunity Act, S. 492, 117th Cong. (2021).} Bills have been introduced into the House and Senate, but there appears to be little chance that these bills will be enacted into the federal law.\footnote{See note 105 (discussing scholars’ arguments).}

Given that it is unlikely that the U.S. Congress will enact a law limiting or extinguishing qualified immunity as a defense in § 1983 cases, the authors propose a new Nevada law that would create a civil action based on the officer’s violation of the Nevada constitution that would explicitly ban a qualified immunity defense. The proposed statute also “addresses several other barriers to recovery and expands available state remedies” for police misconduct by authorizing state Attorney General investigations of entire departments.\footnote{Vieira et al., *supra* note 99, at 1032.}
similar to § 1983, with an explicit prohibition of the qualified immunity defense. The concern that some have with these statutes is that they have no limit on liability and, presumably (for Colorado) and definitely (for New Mexico), the state would indemnify the police officers, potentially leading to significant costs to state citizens. On the other hand, these laws may create the best deterrent for police officers and police departments from engaging in constitutional violations. The other two statutes—enacted in Massachusetts and Connecticut—were passed in states where there already had been judicially-created liability for violations of state constitutional rights by government actors. In both cases, the proof requirements have been eased, but some loopholes remain, as explained by Rolnick and her coauthors.

Ultimately, the authors propose statutory language for a Nevada bill that most closely resembles that of New Mexico. The proposed language creates a civil cause of action for violations under color of the Nevada and U.S. constitutions and laws, allows for reasonable attorneys’ fees and costs to the victim, and in limited circumstances, to the defendant, eliminates the possibility of statutory or other immunities to liability or attorneys’ fees, explicitly prohibits qualified immunity and good faith as defenses, and allows for no cap on damages. It requires indemnification of police officers for damages unless the officer refuses in good faith to participate in the defense.

While I agree with the proposed law, I have a concern that some plaintiffs’ attorneys may bring federal and state claims together in Nevada courts without considering the possible consequences. The reason for including violations of federal law in the proposed Nevada statute is evidently to allow the plaintiff to bring the entire suit in state court, but plaintiffs’ lawyers who consider adding a federal claim to the Nevada claim should do so with caution. Even if brought in state court, federal substantive law that includes qualified immunity would apply to the federal claim. Moreover, adding the federal claim would likely lead the defense counsel to remove the entire case to federal court, where defense motions to dismiss and for summary judgments are more frequently granted than in Nevada courts. Moreover, the federal courts’ requirement that the jury’s verdict be unanimous, unlike the rule in Nevada courts, may weigh against the plaintiff’s case.

F. LGBTQ+ Rights in Nevada

In Legislating a Pathway to Improved Outcomes for People Living with HIV and LGBTQ+ Nevadans, Nevada Senator Dallas Harris and André Wade, the State Director for Silver State Equality, describe two bills that passed the 2021 Nevada legislative session that will significantly improve the lives of lesbian, gay, bisexual, transgender, and queer (LGBTQ+) individuals as well as individuals living with HIV.108

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108 Dallas Harris and André Wade, Legislating a Pathway to Improved Outcomes for People Living with HIV and LGBTQ+ Nevadans, 22 Nev. L.J. 1065 (2022).
These laws are Senate Bill 275, which “modernizes outdated and ineffective laws that criminalize HIV,” and Senate Bill 109, which requires government units to collect demographic information regarding the sexual orientation, gender identity and expression of Nevadans.

1. HIV Criminalization

Harris and Wade explain that in the 1980’s and 1990’s numerous bills were passed nationwide that criminalized various behaviors of HIV positive individuals. For example, Nevada had enacted three statutes that criminalized possible transmission of HIV. Two of the laws criminalized activities related to sex work, whether licensed or not, while the third law criminalized engaging in “conduct in a manner that is intended or likely to transmit [HIV] to another person.” All three of these crimes were felonies with sentences up to ten years in prison. None of these crimes required either an intent to expose another to HIV transmission or actual transmission.

During the 2019 legislative session, Nevada Senator David Parks sponsored Senate Bill 284, that created an Advisory Task Force on HIV Exposure Modification, (Task Force) which, with the aid of researchers at The Williams Institute at the University of California, Los Angeles, Law School, examined Nevada criminal legislation relating to HIV that needed updating and studied the disparate effect of applying HIV criminalization laws to different populations with HIV.

The Williams Institute found that African Americans experienced a significant disparate effect of the HIV criminalization laws. Although African Americans represent only 10 percent of Nevada’s population and 28 percent of people living with HIV (PLHIV) in Nevada, 40 percent of those arrested for HIV-related crimes were African American. Moreover, 45 percent of all convictions for HIV crimes were African American. When isolating the crimes related to sex work, African Americans represented 66 percent of the totals charged and 67 percent of the convictions.

SB 275 resulted from the work of the Task Force, and significantly changes the Nevada law. It replaces the prior law that penalized conduct likely to transmit HIV with a misdemeanor that applies not only to HIV but also to all

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112 Cisneros & Sears, supra note 111, at 2.
113 Id.
114 Id. at 4.
115 Id.
communicable diseases.\textsuperscript{116} Harris and Wade describe the details of the new laws, and also explain that two new affirmative defenses have been created. They also explain other changes in the law, including a statement of public policy that the spread of communicable diseases is better dealt with through the public health system than through criminalization. Importantly, the new law also reestablishes the Advisory Task force on HIV Modernization to assure that the new law actually provides the protection that is anticipated.

2. Collection of Sexual Orientation and Gender Identity Data

Harris and Wade also describe a new Nevada law, SB 109, sponsored by Senator Pat Spearman, that requires government agencies to collect data on sexual orientation and gender identity when other demographic information (such as race or age) is being collected. Importantly, individuals are not required to provide this information to the government agency, and those who fail to provide such information cannot be denied government assistance for their failure to report. Harris and Wade conclude that the information collected through SB 109 is important because “data will be more readily available to make informed decisions that will benefit LGBTQ+ people in Nevada.”\textsuperscript{117}

G. Health Insurance Coverage for Transgender Individuals

In \textit{Laws Affecting Health Plan Coverage for Gender-Affirming Care: Continued Shortcomings at the Federal Level and a Role for Progressive States},\footnote{\textit{Richard Luedeman, Health Plan Coverage for Gender-Affirming Care: Continued Shortcomings at the Federal Level and a Role for Progressive States}, 22 \textit{Nev. L.J.} 1071 (2022).} Professor Richard Luedeman of the University of Connecticut School of Law provides a detailed analysis of the problems that transgender individuals face in getting insurance coverage for gender-affirming care. He explains that despite the Affordable Care Act and the broad anti-discrimination federal mandate under Title VII of the 1964 Civil Rights Act that was reinforced by the Supreme Court recently in \textit{Bostock v. Clayton County},\footnote{\textit{Bostock v. Clayton Cnty.}, 140 S. Ct. 1731 (2020).} there remain significant barriers to coverage for gender-affirming care for transgender individuals.

Luedeman walks the reader through the complicated federal structure applicable to health insurance and health plans. He explains that the law ostensibly protects transgender individuals, but he demonstrates that many of these protections may be illusory. Luedeman explains that although \textit{Bostock} held that it was illegal under Title VII for employers to discriminate based on sexual orientation and gender-identity, it is unclear how this prohibition will be applied in the health insurance context.

The health insurance context is extremely complicated, and Luedeman explains how federal law continues to create problems for transgender individuals.

\textsuperscript{116} S.B. 275 § 6, 81st Sess. (Nev. 2021).
\textsuperscript{117} Harris & Wade, supra note 108, at 1070.
Specifically, despite improvements in federal law, many current health plans now cover only a limited list of gender-affirming treatments and exclude others, often invoking an exclusion of “medically unnecessary” for denying coverage. As a result, denials of gender-affirming care continue to occur frequently.

Moreover, even though the federal anti-discrimination mandate is broad, Luedeman argues, a broad anti-discrimination mandate may not be sufficient because of the special needs of transgender individuals to health care. For example, a hysterectomy might be easier to justify as “medically necessary” for a cisgender woman than a transgender woman.

Finally, Luedeman does a deep dive into the federal system of enforcement of health care rights, explaining the complicated procedures for making claims, internal and external appeals, and how they apply differently to different types of plans. He examines three types of plans:

1. Self-insured private plans that are governed by ERISA, and that allow no role for state regulation; 2. Fully-insured private plans in which federal law sets a floor of procedural requirements, with room for state regulation as well; and 3. Appeals of Medicaid recipients subject to a federal floor with room for state regulation. Luedeman then analyzes the vague “neutral” anti-discrimination laws and demonstrates that non-uniform application of vague standards of “medical necessity” undermines neutrality of these laws; he argues further that under the federal Religious Freedom Restoration Act (RFRA)\(^{120}\) private health plans linked to religious employers have successfully argued that there is an exception to gender-affirming care for employers with religious objection to gender affirmation.

More generally, Luedeman argues that there are universal problems with coverage that may have disparate effects on transgender individuals. These include: inaccessibility and underutilization of review of coverage denials and, for private plans, an anti-coverage bias caused by financial conflicts of interest that are apparent in complicated processes and coverage denials.

Notwithstanding this discouraging situation regarding both specific problems for transgender individuals and general problems that disparately affect transgender individuals, in Part III of his article, Luedeman articulates an important role for progressive states to expand gender-affirming coverage through state regulation or legislation, or both. In some areas of healthcare such as self-insured private plans and Medicare or private Medicare Advantage plans, and plans for federal government employees, states have no power to regulate health plans. However, states are free to regulate health plans in other parts of the system, Luedeman explains. As Luedeman states:

Jointly with federal law, state laws govern individual (“non-group”) plans, private employer-sponsored plans that are “fully insured”—i.e. underwritten by an insurance company—as well as Medicaid plans and plans for state and municipal

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employees. Together, enrollees in those plans constitute an estimated 45 to 50 percent of the population.\footnote{121}

Part III of Luedeman’s article gives specific examples of how states can improve coverage for gender-affirming care, with illustrations of how specific states have done so. While I do not want to repeat this Part of the article, it contains important information for legislators and regulators to consider how to improve the lives of transgender individuals in their states.

An outline of Luedeman’s excellent advice includes: 1. Strengthening the state’s substantive rights for transgender claimants; 2. Defining gender-affirming care as “medically necessary;” 3. Limiting or avoiding expansion of religious liberty laws; 4. Minimizing the decision makers’ conflicts of interest, and making independent reviews more accessible; 5. Prohibiting “discretionary clauses;” 6. Creating external appeals procedures that allow state agencies rather than health plans to select the Independent Review Organizations (IROs); and 7. Eliminating the requirement to exhaust internal appeals.

Luedeman concludes that the ideal would be for federal law to change, but he acknowledges the remote possibility of amending federal law currently, and the problem of the changeability of federal rules or regulations with different presidential administrations. Given this situation, he argues that nearly 50 percent of persons in the U.S. are covered by health plans over which states have power to regulate through improved regulations or statutes. Luedeman concludes that progressive states should do what they can to assure that transgender individuals receive gender-affirming health care.

\subsection*{H. Expanding the Definition of “Race” Discrimination in Employment and Education: The C.R.O.W. N. Acts}

Professor D. Wendy Greene of Drexel University, Thomas R. Kline School of Law, discusses historic race discrimination based on hair texture and hair styles in \#FreethHair: How Black Hair Is Transforming State and Local Civil Rights Legislation.\footnote{122} Greene explains that although the federal 1964 Civil Rights Act prohibited racial discrimination in employment, public accommodations, and education, the federal courts swiftly narrowed the protections of the Act with reference to Black individuals by establishing the “mutability doctrine.” This doctrine, which is absent from the text of the Act, limits the definition of race to “immutable characteristics.” Thus, according to the courts, discrimination based on racialized traits or characteristics is not discrimination based on race. Greene explains that the courts defined race as “immutable” only where the traits ascribed to race cannot be changed, are shared by all members of the race, or are limited exclusively to members of a particular race.

\footnote{121} Luedeman, supra note 118, at 1100–01 (footnotes omitted).
A recent example of the court’s immutability doctrine is *EEOC v. Catastrophe Management Solutions, Inc.*, in which the Eleventh Circuit Court of Appeals drew the line between discriminating against an individual for wearing an Afro and discriminating against her for wearing other natural hair styles such as locs and braids. In *Catastrophe Management Solutions*, the plaintiff alleged that the employer had rescinded her job offer because she refused to cut her locs to obtain the job. The lower court dismissed the case, and the court of appeals affirmed the dismissal, holding that the employer did not violate Title VII when it conditioned a Black woman’s employment on removing her locs. The court of appeals characterized an Afro as hair texture and immutable but natural hair, such as locs and braids, as hairstyles that are mutable, and not equal to race. Consequently, employers may discriminate against Black individuals who wear natural hairstyles such as twists, locs, and braids but may not discriminate against those wearing their hair in an “Afro.” Moreover, as Greene notes, the courts have also refused to recognize a cause of action for retaliation against an employee for protesting differential treatment based on their natural hair.

Well before *Catastrophe Management* was decided, Greene argued and continues to argue that the immutability doctrine is based on factual inaccuracy and a legal fiction. Moreover, she has argued that the courts have permitted employers to regulate Black employees’ bodies by scrutinizing them more closely than the bodies of most white employees.

Because the federal courts’ narrow interpretation of the word “race,” which is not defined in the statute, and the U.S. Congress’s failure to amend Title VII in light of the narrow construction of “race” by the U.S. courts of appeals, state legislatures and local jurisdictions have enacted legislation that broadens the definition of “race” to include all “protective hairstyles.” “Protective hairstyles” tuck away the ends of the hair, leaving the ends unexposed to manipulation. These hairstyles protect the hair from splitting and other damage caused by weather and external factors. Examples of protective hairstyles include twists, braids, locs,
and bantu knots. Greene has been at the forefront of these legislative enactments, writing law review articles, testifying before legislative bodies both in the U.S. and abroad, and drafting language for state and municipal bills.

As a result of this work, since 2019 nearly forty-five states and municipalities have adopted C.R.O.W.N. Acts, or similar legislation. C.R.O.W.N. stands for “Creating a Respectful and Open World for Natural Hair.” The new laws clarify that discrimination on the basis of natural and protective hairstyles that African descendants commonly wear, such as Afros, braids, twists, and bantu knots, constitutes race discrimination.

Greene consulted with Nevada legislators, including Senators Dina Neal and Dallas Harris in the 2021 legislative session, who then proposed SB 327, which passed both houses and was enacted into law. The law applies to both employment and education and defines “race” more broadly than do the federal laws. While it is based in the experiences of Black individuals, the law protects all persons of all races in its broad definition of race; this coverage is important because people who identify as indigenous and Latinx or Hispanic have also suffered discrimination based on their hair. The law also prohibits retaliation for an individual’s opposition to an employer’s or educational institution’s discrimination based on this broader definition of race.

SB 327 is an excellent example of how state legislatures can make a difference by increasing the civil rights of people living in the state. Moreover, the process of debating and enacting the law serves an educational function. As Greene notes, testimony by Senators Neal and Harris, who were both counseled not to wear natural hair during legislative sessions, and by Naïka Belazaire, a Nevada high school student who was sent to the principal twice for wearing natural hairstyles, informs the public of the indignities suffered and the opportunities lost by those encountering discrimination based on their natural hair.

I. Pregnant Workers Fairness Acts

Professor Deborah Widiss of Indiana University Maurer School of Law discusses legislation that creates fairer conditions for pregnant persons in Pregnant Workers Fairness Acts: Advancing a Progressive Policy in Both Red and Blue America. Ordinarily, pregnancy fairness laws require employers to grant reasonable accommodations to pregnant workers unless the accommodations would place an undue hardship on the employer’s business. As Widiss notes, pregnancy fairness is not a red or blue policy, but rather one that benefits all families.

Widiss explains that pregnancy discrimination law has aspects of both sex discrimination and disability discrimination law, but often protecting pregnant workers falls into the cracks in between the two laws. She explains that even after the Americans with Disabilities Amendments Act of 2008 (“ADAAA”), which amended the Americans with Disabilities Act of 1990 (“ADA”) to broaden

109 Widiss, supra note 52.
the definition of disability, pregnancy alone is not ordinarily considered a disab-
ility under federal law, although many conditions that accompany pregnancy
may be characterized as disabilities under the ADAAA. Without coverage by the
ADAAA, many pregnant workers have no rights to accommodations.

Generally, under Title VII of the 1964 Civil Rights Act, pregnancy discrimi-
nation is illegal sex discrimination, but Title VII does not require accommoda-
tions to pregnant women unless other similarly situated employees are accom-
modated. 131 Moreover, Widiss identifies another problem that may be even more
damaging to pregnant women. She notes that once an employee asks for an ac-
commodation (absent legal requirement that the employer provide one) many
employers deny the accommodation and dismiss the employee or put her on un-
paid leave, using the request to argue that the work is dangerous to the woman
or her unborn child. That response effectively deters women from asking for ac-
commodations, even if the accommodations sought would be easy for an em-
ployer to grant.

As Widiss explains, the lower federal courts regularly interpreted many re-
usals to grant accommodations based on pregnancy to be intent neutral, and
therefore, not violative of Title VII. The confusion comes from the language of
Title VII, which requires employers to treat pregnant employees who seek ac-
commodations the “same” as other employees with comparable limitations. That
means that if the employer accommodated other employees, it would be required
to accommodate pregnant employees. But the lower courts have been confused
about which other employees the law refers to. In Young v. United Parcel Ser-
dices, the Court created a new test that applies exclusively to pregnancy discrimi-
nation cases, combining the McDonnell Douglas method of proof with a balanc-
ing test, in an attempt to clarify when an employer must accommodate a pregnant
employee. 132 There is, however, even more confusion in light of the Supreme
Court’s adoption of a fact-based balancing test to decide whether a violation oc-
curred. As Widiss explains, some employers, concerned about the fact-based test
and lack of clear answers in Young, and in fear that they would be in violation of
Title VII after Young, changed their policies to grant accommodations to preg-
nant workers more liberally than they had done so before.

This situation led to increased efforts in states and municipalities to enact
their own statutes and regulations that provided more and clearer protection to
pregnant workers. As Widiss notes, often a small accommodation can make the
difference between thriving as a pregnant worker and being out of work. In fact,
simple things like allowing a pregnant employee to use a stool to sit during work
or to drink water at her workstation can make the difference between having and
losing a job. Moreover, because accommodations are more likely to be necessary
in workplaces that require physical exertion or standing for long periods of time,

132 Id. at 228–30.
lower income workers, often workers of color, are disproportionately affected by an employer’s failure to accommodate their pregnancies.

Consequently, states have enacted pregnancy fairness laws that require employers to grant reasonable accommodations to pregnant workers unless the employer can prove that the requested accommodation would pose an undue hardship to the employer. Nevada is one of those states. In the 2017 legislative session, the Nevada Pregnancy Workers’ Fairness Act was enacted into law in Nevada. Under the Act, employers:

- Must provide reasonable accommodations unless the employer meets its burden of proving accommodation would be an undue hardship;
- May not take an adverse employment action against an individual based on need for an accommodation;
- May not deny employment based on need for an accommodation;
- May not require that a pregnant employee accept an unwanted accommodation; and
- May not force a pregnant employee to take a work leave if an accommodation is available.\textsuperscript{133}

Widiss’s article is particularly important because it draws both on her background in writing theoretical and doctrinal articles about pregnancy fairness and on her involvement in the political process in attempting to enact a pregnancy fairness law in Indiana, a red state. Although the law that was ultimately enacted in Indiana does not go as far as those of many other states, it does protect an employee’s right to request an accommodation and makes it illegal for an employer to retaliate against the employee because she asked for it. Widiss details the negotiations (only partially successful) that led to the passage of the Indiana law, discusses more broadly how the interaction of work done by the United States Equal Employment Opportunity Commission before \textit{Young} was filed, the \textit{Young} decision, and state and municipal laws have spurred on new state legislative efforts and successes in both red and blue states. Today, twenty-five states and the District of Columbia require employers to grant accommodations to pregnant workers. Moreover, Widiss explains, all this activity has led to a federal bill that has received strong bipartisan support in the U.S. House of Representatives.\textsuperscript{134}

Widiss further highlights that the interplay of these factors has led to greater workforce fairness. For example, \textit{Young} spurred state and municipal legislation and voluntary action by some employers because it left open the question of employer liability and required intense fact-based analysis on a case-by-case basis. Once states began to pass pregnancy fairness legislation, some employers that operate in more than one state created policies that would comply with the most


\textsuperscript{134} See generally Pregnant Workers Fairness Act, H.R. 1065, 117th Cong. (2021); Pregnant Workers Fairness Act, S. 1486, 117th Cong. (2021).
progressive legislation and applied those policies voluntarily in their workplaces throughout the states. And, once state legislation passed in a large percentage of the states, there was renewed support for a federal law that would grant accommodations to pregnant workers across the nation.

Another important point that Widiss makes is that pregnancy fairness may differ from other proposed state legislation. When local grassroots organizations and national not-for-profit organizations worked with Indiana lawmakers, they focused on the message that pregnancy fairness is not a blue or red state issue. Pregnancy fairness is important to all families and to our society because it furthers healthier pregnancies and babies. Thus, the legislation was characterized as a public health measure that improved the health of working women and their babies.

In sum, Widiss demonstrates the interactions between rights created by the states and those created by federal law, the importance of not only litigating under existing federal law but also of organizing for new legislation at the local and state levels; she also demonstrates the effect that some progressive state laws have on other states and perhaps even on federal law. Finally, her article should encourage politicians in red states to consider recharacterizing proposed legislation as nonpartisan in an effort to appeal to lawmakers of all parties.

CONCLUSION: A MULTI-DIRECTIONAL PATH FORWARD

The essays and articles in this collection provide a reason for optimism to supporters of civil and constitutional rights in an era of federal retrenchment. Although Congress has often been deadlocked in protecting civil and constitutional rights, state legislatures have taken up the task of passing rights-protecting legislation. States can therefore act as the “laboratories of democracy,” creating empirical evidence of the effectiveness of certain provisions, allowing subsequent federal congresses to rely on the experiences of the states in writing new federal legislation.

But the story is even more complicated than that. The essays and articles in this collection demonstrate that protecting rights can also happen at the executive level—with state governors restoring felons’ voting rights, for example—and in the private sector—with corporations responding to state legislation in one state with rights-affirming policies that apply to employees in all states. Even a U.S. Supreme Court case that grants slightly more but unclear protection to a right—such as that found in Young v. United Parcel Services, Inc.—can motivate not only rights-affirming state legislation but also voluntary action by employers that grants greater pregnancy rights and, ultimately, bipartisan support for federal legislation.

The story, then, demonstrates that we are not dealing exclusively with the direct path from state to federal legislation, but improved rights seem to follow an uneven but multi-directional path that involves many types of actions that influence one another both directly and indirectly: federal litigation, state
legislation, federal legislation, voluntary action, and executive orders, among them. And enhancing rights tends to happen incrementally, but with hard work, patience, and luck, all these legal methods combine to improve rights of all U.S. residents.