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Cities as Engines of Justice

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CITIES AS ENGINES OF JUSTICE

*By Jill E. Habig & Joanna Pearl**

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INTRODUCTION

During “Superstorm” Sandy in 2012, New York University’s Langone Medical Center lost power when its auxiliary generator malfunctioned.¹ At the height of the hurricane emergency, hospital staff sprang into action. In some cases, the staff hand-pumped oxygen into patients until they could be transported by ambulance to other facilities.² Ultimately, all 215 patients were evacuated from the hospital.³ After the storm subsided, questions lingered about why Langone’s back-up generators failed to function properly.⁴ Ensuring that generators work is, after all, a safety best practice and a key element of disaster preparation for hospitals.⁵

Failing to have a reliable backup power source for a medical facility responsible for the care of critically ill patients is an example of a design flaw: a mistake or weakness in the way something or some process was designed. The generators at Langone were a single point of failure — a non-redundant part of a system whose failure will cause the entire system to shut down.⁶

This Article contends there is a design flaw in our current democratic system that similarly contains too few fail-safes and undermines a critical aspect of our policymaking infrastructure, i.e. the resources, personnel, and authority to enforce the laws we have passed as a polity. Like a hospital without a generator, an airplane with only one engine, an IT system with compromised critical hardware, or a large city with only one two-lane road out of town,

1. Alexandra Sifferlin, *Lessons from Storm Sandy: When Hospital Generators Fail*, TIME (Oct. 30, 2012) <http://healthland.time.com/2012/10/30/lessons-from-storm-sandy-when-hospital-generators-fail/> [<https://perma.cc/BNW2-2HHB>].

2. Charles Ornstein, *Why Do Hospital Generators Keep Failing?*, PROPUBLICA (Oct. 31, 2012, 4:53 PM), <https://www.propublica.org/article/why-do-hospitals-generators-keep-failing> [<https://perma.cc/A4D7-BQ69>].

3. J. David Goodman & Colin Moynihan, *Patients Evacuated from NYU Langone After Power Failure*, N.Y. TIMES (Oct. 30, 2012), <https://www.nytimes.com/2012/10/30/nyregion/patients-evacuated-from-nyu-langone-after-power-failure.html> [<https://nyti.ms/2yWnTAR>].

4. *Id.*; see also *What Caused Generators to Fail at NYC Hospitals*, CBS/AP (Nov. 2, 2012), <https://www.cbsnews.com/news/what-caused-generators-to-fail-at-nyc-hospitals/> [<https://perma.cc/4KXZ-P3YX>].

5. Sifferlin, *supra* note 1. Jim Mandler, Assistant Vice President for Public Affairs of Continnum Health Partners, commented on the Hurricane Sandy response, saying, “Whenever there is an anticipated event, even if remote, we always make sure the generators are fully fueled and ready to go for at least several days.” *Id.*

6. Steven Vigeant, *How to Find (and Eliminate) Single Points of Failure*, DATA EVOLUTION’S IT EXPERTS BLOG (May 22, 2015, 2:10 PM), <https://www.dataev.com/it-experts-blog/how-to-find-and-eliminate-single-points-of-failure> [<https://perma.cc/XY4Q-QESP>].

concentrating the infrastructure for enforcing our rights in one level of government leaves residents vulnerable to underenforcement when extralegal forces — elections, budgetary challenges, and competing priorities — reduce the function of that governmental body.

Much of the scholarship on the role of cities begins, as one might expect, by looking at municipalities themselves.⁷ The existing scholarship analyzes the unique powers of municipalities, the legal limitations of city authority, and the comparative role of cities in our federal system.⁸ These critical issues are essential to understanding

7. Throughout this Article, we refer to cities, counties, and municipalities interchangeably.

8. See, e.g., Richard Briffault, *Our Localism: Part II – Localism and Legal Theory*, 90 COLUM. L. REV. 346, 354 (1990) (“[M]unicipalities have considerable de facto power to frame local policies and pursue local goals.”); David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1547 (2010) (contending that a municipal “corporation” possesses three powers: (1) those expressly granted to it, (2) those necessarily or fairly implied or incident to the powers expressly granted, and (3) those essential or indispensable to the purposes of the corporation); see also, e.g., Paul Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1121–29 (2012) (discussing the limitations of the subject-based private law exception); Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542, 2545 (2006) (stating cities have limited power in the American political system); Rich Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 178 (2005) (“When states and localities disagree, federalism and localism are conceptually incompatible, and federalism, more often than not, wins.”). On comparative role of cities in our federal system, see, e.g., Kathleen Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1, 14 (2012) (“In the period between 1889 and 1900, the Court issued a series of opinions that zigzagged between addressing state/local constitutional conflicts on the merits without discussing the status of local governments and slowly but surely moving towards a comprehensive federal doctrine of local governmental powerlessness.”); Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1622 (2008) (discussing local governments’ increased interest in affecting immigration policy); Nestor Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 961 (2007) (“The prevailing view of local government identity in federal law is one of fundamental powerlessness, with localities at the whim of states’ plenary authority. In a lesser-recognized tradition, however, courts have allowed local governments to invoke federal authority to resist assertions of state power.”); Amy Widman & Prentiss Cox, *State Attorneys General Use of Concurrent Public Enforcement Authority in Federal Consumer Protection Laws*, 33 CARDOZO L. REV. 53, 55–65 (2011) (analyzing federal statutes that authorize concurrent state enforcement); Paul Diller, *Re-Orienting Home Rule: Part I – The Urban Disadvantage in National and State Lawmaking*, 77 LA. L. REV. 1045, 1047–48 (2017) (highlighting that “cities are addressing subjects or using modes of regulation that are not unique to local government” as a part of their growing activism); Heather Gerken & Jessica Bulman-Pozen, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258 (2009) (discussing the federal government’s dependence on local authorities to administer federal programs); David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 815 (2016) (“The very things that make

the formal power of cities and the relative merits of limitations on those powers. We approach our analysis, however, from a different perspective. We do not start with cities at all. We begin by focusing on a basic, functional question: How do we design an effective system that adequately enforces the laws of our democracy, protecting all members of our communities? How can we make the laws developed through the legislative process at all levels of government a reality for those they were written to protect? Put another way, how do we fully effectuate the democratic process?

Law is the language society uses to document and communicate the rules of our democratic system. Our laws express our values as a community and the will of the People through their representatives.⁹ Laws prohibit myriad behaviors that harm our communities and that we, as a society, have decided should be impermissible: discrimination,¹⁰ predatory lending,¹¹ and environmental despoliation,¹² for example. Having laws on the books provides a deterrent against illegal behavior. But, prohibitions only go so far. Civil law enforcement is essential if our policies are to be a reality for the communities they protect. If the laws passed by our elected representatives are legitimate, we should view enforcement as a necessary corollary to legislative policymaking to ensure compliance with those laws. Indeed, when our laws go unenforced, our democracy cannot function properly.

In practice, however, our communities do not currently receive the full benefit of the laws written to protect them due to at least three

partisan federalism work may prevent smaller national minorities from using local power to affect national discussions.”).

9. See Yehezkel Dror, *Values and the Law*, 17 *ANTIOCH REV.* 440, 440 (1957) (“One of the more important repositories and expressions of the values of any society is its law . . . These legal norms are closely related to various social values, being either direct expression of them or serving them in a more indirect way.”); Philip Sales, *Judges and the Legislature: Values into Law*, 71 *CAMBRIDGE L.J.* 287, 290 (2012) (considering the ways in which the legislature and the judiciary give expression to political and moral values by noting that “the cardinal [rule] of democracy, of course, is that it provides a practical mechanism of control of the rulers by the ruled . . . And hence a safeguard against tyranny and arbitrary rule and motive for the rulers to seek to promote and respect the interests of the ruled”).

10. See, e.g., U.S. CONST. amend. I–X, XIII–XV, IXX; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1964); Americans with Disabilities Act, 42 U.S.C. § 12101–12103 (2009); Fair Housing Act, 42 U.S.C. §§ 3601–3619 (1968).

11. See, e.g., Federal Trade Commission Act, 15 U.S.C. ch. 2 §§ 41–58 (2006); Home Ownership and Equity Protection Act, 12 CFR 226.32; Truth in Lending Act, 15 U.S.C. § 1601 et seq. (1968).

12. See, e.g., Clean Air Act, 42 U.S.C. § 7401 et seq. (1970); Clean Water Act, 33 U.S.C. § 1251 et seq. (1977); Safe Drinking Water Act 42 U.S.C. § 201 (1974).

phenomena described in this Article.¹³ First, our laws are under-enforced, and this “enforcement gap” means that many legal violations go undetected and unaddressed, undermining the force of those laws to regulate conduct in the workplace, marketplace, and broader community.¹⁴ Second, the Trump administration has pulled back on its enforcement of key public rights.¹⁵ Not only have leaders of prominent federal agencies expressed their intention to be less aggressive in fulfilling their roles as protectors of civil, economic, and environmental rights, but many have articulated and demonstrated an outright hostility to those protections.¹⁶ Third, the power of private

13. A full exposition of the legal and political dynamics underpinning these three trends is outside the scope of this Article.

14. See, e.g., Kathleen S. Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, 40 FORDHAM URB. L.J. 1903, 1904–05 (2013); see Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 659–60 (2012) (discussing how the erosion of class action certifications and the Consumer Financial Protection Bureau have led to an enforcement gap for consumer protection, antitrust, and employment violations that should be addressed by state attorneys general using their parens patriae authority); see also Suzette Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 66 U. KAN. L. REV. 325, 379–80 (2017) (noting that increased use of arbitration agreements “does a disservice to those individuals seeking to use the civil rights provision of the modern class action rule,” leading to “less enforcement in the cases where it is needed the most”).

15. See Juliet Eilperin & Darla Cameron, *How Trump Is Rolling Back Obama’s Legacy*, WASH. POST (Jan. 20, 2018), https://www.washingtonpost.com/graphics/politics/trump-rolling-back-obama-rules/?utm_term=.5cc8cde4fb41 [<https://perma.cc/Y74H-5VSF>] (reporting that, as of January 20, 2018, the Trump administration had canceled 130 rules and regulations within the topics of the environment, labor and finance, health care, civil rights, worker and consumer safety, government reform, immigration, and education); see also Juliet Eilperin et al., *Trump Administration Plans to Minimize Civil Rights Efforts in Agencies*, WASH. POST (May 29, 2017), https://www.washingtonpost.com/politics/trump-administration-plans-to-minimize-civil-rights-efforts-in-agencies/2017/05/29/922fc1b2-39a7-11e7-a058-dbb23c75d82_story.html?utm_term=.f51cf022aea2 [<https://perma.cc/XYB3-SH2P>] (discussing the Trump administration’s cuts to staffers of the Education Department’s Office of Civil Rights, termination of enforcement of consent decrees with police departments, and plan to disband the Office of Federal Contract Compliance Programs that has monitored discrimination among federal contractors).

16. See, e.g., Erica Green, *DeVos Education Dept. Begins Dismissing Civil Rights Cases in the Name of Efficiency*, N.Y. TIMES (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/us/politics/devos-education-department-civil-rights.html> [<https://nyti.ms/2Hf9jdU>] (“The Education Department’s Office for Civil Rights has begun dismissing hundreds of civil rights complaints under a new protocol that allows investigators to disregard cases that are part of serial filings or that they consider burdensome to the office.”); Alan Rappeport, *Mick Mulvaney, Consumer Bureau’s Chief, Urges Congress to Cripple Agency*, N.Y. TIMES (Apr. 2, 2018), <https://www.nytimes.com/2018/04/02/us/politics/cfpb-mick-mulvaney.html> [<https://nyti.ms/2Gwm7MI>] (“In his first report to Congress as the acting director of

litigants to vindicate their own rights in court has been diminished; over the past decade, constriction of laws related to class-action lawsuits and the increased acceptance of mandatory arbitration clauses and class-action waivers have left individuals who experience harm in the workplace or at the hands of an unscrupulous company without much meaningful recourse.¹⁷

The confluence of these three trends exposes a design flaw in our current democratic system. Laws are under-enforced, and two of the actors previously well-situated to enforce the rights enshrined in those laws are either inactive or blocked. As a result, our most vulnerable communities are without defenders, the extent of their protections drastically cut as a result of one federal election. This design flaw has both functional and theoretical effects. From a functional perspective, it subjects people to real-life harm and loss of wages, employment, capital, housing, and other necessities of modern life, even when the conduct that caused those losses is contrary to existing law.¹⁸ From the perspective of democratic theory and norms, it undermines the legitimacy of institutions charged with representing the will of the People through rule of law when those laws lack real-life effect.

This Article argues that a system with built-in redundancy and diversification by design, in which every level of government is ready and able to enforce our core rights and freedoms, would resolve this design flaw and yield both practical and theoretical benefits. We present city affirmative litigation as a critical component of this framework. Our proposed solution to this design flaw would incorporate two concepts: redundancy and diversification. By redundancy, we mean that an effective system should have more than a single point of failure. Given the importance of enforcement as a means of effectuating duly-enacted policy and fulfilling the

the Consumer Financial Protection Bureau, Mick Mulvaney called on lawmakers on Monday to cripple the agency that he has been temporarily tasked with overseeing.”); Coral Davenport, *Scott Pruitt, Under Fire, Plans to Initiate a Big Environmental Rollback*, N.Y. TIMES (June 14, 2018), <https://www.nytimes.com/2018/06/14/climate/pruitt-clean-air-water-rollbacks.html> [https://nyti.ms/2HOi2zd] (“Mr. Pruitt has initiated the rollback of dozens of environmental rules over the past year and a half.”).

17. See Gilles & Friedman, *supra* note 14, at 658–60; Malveaux, *supra* note 14, at 376–79; see also Joanna Pearl, *As SCOTUS Abandons Workers, States, Cities Must Fill Void*, NAT’L L. J. (June 7, 2018, 3:06 PM), <https://www.law.com/nationallawjournal/2018/06/07/as-scotus-abandons-workers-states-cities-must-fill-void/?sreturn=20180624035731> [https://perma.cc/4TJ7-8RVU] (discussing the effects of *Epic Systems* decision on modern employment rights).

18. See *infra* Section I.A.

representational values of a democracy, redundancy by design would ensure that no one agency or election could offline enforcement entirely. By diversification, we mean that an effective system should have a diversified set of enforcers to allow for effective resolution of the numerous and complex problems presented by law violations. Additionally, because “the People” can mean different things depending on a district or state’s boundaries, diversification would ensure that different majorities can set different priorities for enforcement.

Increased city engagement in enforcing public rights laws is an important and under-utilized solution that incorporates both concepts of redundancy and diversification.¹⁹ Cities should have the ability to be enforcers and protectors of their communities by investigating legal violations and filing lawsuits. Increasing affirmative litigation by cities is a necessary and desirable response to a design flaw that concentrates too many enforcement resources in one level of government.

Part I describes the three above-listed trends in three sections: Part I.A articulates the need for enforcement as a critical step in policy making efforts and discusses the gap between the laws on the books and the lived realities of many people those laws are written to serve (the so-called “enforcement gap”). Part I.B addresses the role of the federal government as a dominant government enforcer of our core rights and protections and highlights the ways in which the current administration has abdicated that role. Part I.C outlines the legal

19. We acknowledge that states also have the ability to enforce laws that protect the rights of their communities. Indeed, many have been and continue to be leaders in rights enforcement across a wide variety of issues. Complaint, California v. Heald Coll., No. CGC-13-534793 (Cal. Sup. Ct. filed Oct. 10, 2013); Complaint, New York v. Purdue Pharma L.P., No. 400016/2018 (N.Y. Sup. Ct. filed Aug. 14, 2018); Mark L. Earley, *Special Solitude: The Growing Power of State Attorneys General*, 52 U. RICH. L. REV. 561 (2018); Mark Totten, *The Rise of State Attorneys General a Boon to Democracy*, HILL, (July 6, 2017, 1:00 PM), <http://thehill.com/blogs/pundits-blog/state-local-politics/340841-the-rise-of-the-state-attorney-generals-is-boon-to> [<https://perma.cc/QL6K-UVTN>]; see generally *Massachusetts v. EPA*, 549 U.S. 497 (2007); Complaint, Illinois v. City of Chicago, No. 17-cv-6260 (N.D. Ill. filed Aug. 29, 2017). Although a full discussion of the role of states is outside the scope of this Article, we believe that state-level engagement — by attorneys general and state regulatory bodies, for example — is critical to protecting the rights of our most vulnerable communities. We focus on cities for the purpose of this Article because they are under-explored relative to State actors in a system. As we note *infra* Part II, state attorneys general offer additional opportunities to diversify enforcement from the federal government. We do not argue that cities should supplant states as the only or primary enforcer in addition to the federal government. Rather, we highlight cities as an under-utilized opportunity for redundancy and diversification in rights enforcement.

limitations on private enforcement and the practical impact of *Wal-Mart Stores, Inc. v. Dukes*²⁰ and *AT&T Mobility LLC v. Concepcion*²¹ and their progeny on rights enforcement. Part II proposes affirmative litigation by cities as one viable solution to the confluence of factors operating to weaken protections under the law. The concepts of redundancy and diversification offer compelling rationales for increased city affirmative litigation as a design solution to ensure better effectuation of the People's policy choices through their representatives. Moreover, cities should have an active role in rights enforcement at all times, not just in response to the current crisis.²²

I. THE DESIGN FLAW: LEGAL AND PRACTICAL BARRIERS TO ENFORCEMENT

As mentioned above, our current government contains a fundamental design flaw where one point of failure exposes the entire system and leaves the People vulnerable and defenseless. This Part describes three phenomena that prevents those in need of the full protection of law from obtaining the enforcement sought and entitled. This Part proceeds in the three sections: Part I.A addresses the need for enforcement as a critical step in policy making efforts and elaborates on the reputed enforcement gap widening between written law and those people the laws were written to protect. Part I.B discusses federal government's role as a primary enforcer of our rights and protections and emphasizes the ways in which the current administration has failed to fulfill its duties. Part I.C discusses the frameworks of recent precedential class action litigation and explains their legal implications on the private enforcement of rights.

A. Rights Require Enforcement: The Enforcement Gap and Its Impact

Despite the attention new legislation receives in the press and among advocates of all ideologies, once passed, laws protecting our rights to fair treatment in the workplace, marketplace, and community are chronically under-enforced. When compared to the front-end inputs of policymaking — candidate and ballot measure

20. 564 U.S. 338, 356 (2011).

21. 563 U.S. 333, 344 (2011).

22. Although affirmative litigation by cities is one solution to strengthen rights enforcement, it is not the only one. Though not discussed in this Article, one example is the role that states play in enforcing the rights of our communities.

campaigns, legislative proposals, and lobbying — the government has underinvested in the back-end enforcement needed to realize those laws, leaving community members vulnerable.

Scholars and practitioners across academic disciplines have identified many causes²³ of this enforcement gap — including underinvestment and industry capture — but there is little debate that the gap exists.²⁴ The gap persists throughout government, from the Consumer Products Safety Commission (CPSC) to the Department of Justice (DOJ) and beyond.²⁵

This enforcement gap creates a critical hole in the policymaking process and blunts the effect of otherwise-strong laws. Getting laws through the legislative process is a necessary but insufficient component of policymaking. However, without implementation and enforcement, the intent of legislation may never be realized. For example, if a state were to pass a minimum wage law, but no one checks whether companies in fact pay the minimum wage nor are there any consequences to failure to pay such a wage, the majority of workers likely would not receive the benefit of the new law. Across the ten most populous states in the country, wage theft deprives approximately 2.4 million workers of \$8 billion per year, with a direct

23. See, e.g., Morris, *supra* note 14 (“The problem is not a lack of good law [T]he problem is that due to insufficient funding and staffing, industry capture, or some combination of both, these potentially powerful bodies of consumer protection law are woefully under-enforced.”); see also *supra* notes 15–18 and *infra* note 105.

24. “For several decades, scholars and policy experts have pointed out the enormous gaps in consumer protection enforcement, and called for a more effective approach.” Morris, *supra* note 14, at 1906–07 (surveying analysis of consumer protections and calls for increased enforcement); see also Kathleen S. Morris, *Cities Seeking Justice: Local Government Litigation in Public Interest*, in *HOW CITIES WILL SAVE THE WORLD* 189 (Ray Brescia & John T. Marshall eds., 2016) (“[C]ivil laws in the U.S., particularly those that most directly impact the corporate bottom line — such as consumer protection, environmental health, wage-and-hour, and industrial safety regulations — are dangerously under-enforced.”).

25. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 67 (2010) (identifying the chronic underfunding and understaffing of the Consumer Products Safety Commission as a cause of the agency’s having “fallen far short of its statutory mandate”); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1409–10 (2000) (linking insufficient staffing to the Department of Justice’s inability to investigate and detect unconstitutional police practices); David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL’Y J. 59 (2006) (noting that, “[b]ecause of limitations in available resources in many agencies, and the often-politicized environment surrounding regulatory decisions, complaint activities have become in many cases the primary driver of enforcement activity” but that, empirically, “there is a significant gap between the level of complaint activity and underlying violation rates”).

impact on the poverty rate.²⁶ In California, for example, a recent report by the Economic Policy Institute found that minimum wage violations increased poverty rates among workers who experienced wage theft by nearly twenty-three percent.²⁷ In addition, honest businesses that pay the required minimum wage suffer from unfair competition by their rival companies, which can offer lower prices due to their illegally-reduced costs.²⁸ Further, ensuring that policies are implemented and enforced reduces the need for additional policy and lawmaking and informs smarter, more efficient future policy making efforts by road-testing existing laws to see how well they work in protecting people from harm. In other words, enforcement is essential both to effectuate current policy and to inform future policy.²⁹

B. Rights Require Enforcers: The Absentee Federal Government

The federal government plays a critical role in enforcing civil rights, economic protections, and environmental laws that protect our communities. The current federal administration, including the DOJ and other federal agencies, have retreated from this role, meaning that fewer enforcers are focused on protecting the rights and freedoms that define us as Americans.³⁰

The nation's chief law enforcement agency, the DOJ is composed of 115,760 employees, ten percent of whom are attorneys, organized in forty separate component organizations nationwide.³¹ The DOJ is

26. DAVID COOPER & TERESA KROEGER, ECON. POLICY INST., EMPLOYERS STEAL BILLIONS FROM WORKERS PAYCHECKS EACH YEAR 1 (May 10, 2017), <https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year-survey-data-show-millions-of-workers-are-paid-less-than-the-minimum-wage-at-significant-cost-to-taxpayers-and-state-economies/> [<https://perma.cc/GR5C-6EQV>].

27. *Id.* at 5.

28. *Id.* at 29; *see also About Wage Theft*, SMART CITIES PREVAIL, <https://www.smartcitiesprevail.org/about-wage-theft/> [<https://perma.cc/4U5K-UQFJ>].

29. Agencies frequently use their law enforcement experiences to inform policymaking. For example, in promulgating the Telemarketing Sales Rule, the U.S. Federal Trade Commission incorporated its previous law enforcement cases into the rulemaking record and noted: “The record, as well as the Commission’s own law enforcement experience and that of its state and federal counterparts, supports the Commission’s view that the anti-fraud amendments to the TSR are necessary and appropriate to protect consumers from significant financial harm.” 80 Fed. Reg. 77525 (Dec. 14, 2015) (codified at 16 C.F.R. § 310).

30. *See infra* note 35.

31. U.S. DEP’T OF JUSTICE, FY 2017 AGENCY FINANCIAL REPORT I-3, I-6 (2017), <https://www.justice.gov/doj/page/file/1012276/download#introduction> [<https://perma.cc/HA9M-PEZB>].

responsible for policing domestic terrorism, curbing insider trading and monopolies, addressing violations of tax laws, protecting the environment, and enforcing every major piece of federal civil rights legislation, including the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968.³²

The current DOJ, however, has retreated from many of these critical responsibilities, leading former DOJ administrators and legislators to fear that current Attorney General, Jeff Sessions, is rolling back civil rights.³³ While the extent and nature of federal enforcement necessarily varies over time and from administration to administration,³⁴ the hostility of the current federal government to

32. *Id.* at I-3 (“The Department’s litigating divisions represent the rights and interests of the American people and enforce federal criminal and civil laws. The litigating divisions are comprised of the Antitrust (ATR), Civil (CIV), Civil Rights (CRT), Criminal (CRM), Environment and Natural Resources (ENRD), and Tax (TAX) Divisions. The Office of Justice Programs (OJP), the Office on Violence Against Women (OVW), and the Office of Community Oriented Policing Services (COPS) provide leadership and assistance to state, local, and tribal governments.”).

33. See Ryan J. Reilly, *Exclusive: Here’s Jeff Sessions’ Draft Master Plan for the Justice Department*, HUFFINGTON POST (Mar. 9, 2018), https://www.huffingtonpost.com/entry/doj-trump-strategic-plan-civil-rights_us_5a7120c6e4b0a6aa487457b9 [https://perma.cc/S2NZ-E3AE] (describing the anti-civil rights agenda of the DOJ under Attorney General Jeff Sessions and how that agenda is articulated in the Department’s strategic plan. Vanita Gupta, who previously lead the DOJ’s Civil Rights Division, said: “I suppose they don’t have the item that says ‘roll back civil rights progress’ on their strategic plan, which has been what they’ve been doing . . . Frankly they should’ve added that to the list.”); see also Carrie Johnson, *In His First Year as Attorney General, Sessions Transforms Justice in Key Ways*, NAT’L PUB. RADIO (Feb. 9, 2018, 4:52 AM), <https://www.npr.org/2018/02/09/583698634/in-his-first-year-as-attorney-general-sessions-transforms-justice-in-key-ways> [https://perma.cc/6P3D-KDPT] (discussing how in its first year, the Justice Department rescinded guidance for schools that was designed to protect transgender students in bathrooms and locker rooms, issued legal briefs arguing that the 1964 civil rights law did not bar discrimination on the basis of sexual orientation, turned the civil rights unit away from investigating patterns of excessive force and racial profiling by local law enforcement, and stated that the Deferred Action for Childhood Arrivals (DACA) program was “an unconstitutional exercise of authority by the executive branch”).

34. See, e.g., Davenport, *supra* note 16 (“The Obama administration’s regulation took a wide view of how far the federal government could go in its effort to protect waters; Mr. Trump directed Mr. Pruitt to take a far narrower view of the law.”); see generally Gabriel Florit, *40 Years of Budgets Show Shifting National Priorities*, WASH. POST (Mar. 17, 2017), https://www.washingtonpost.com/graphics/politics/budget-history/?utm_term=.b00baeb55f63 [https://perma.cc/ME99-BD28] (discussing how presidential administrations have constructed different discretionary spending limits with respect to agencies and programs in their budget proposals).

protecting these essential rights is striking,³⁵ exacerbating the enforcement gap described in Part I.A. The DOJ's articulated priorities, for example, no longer include civil rights enforcement, replacing it with a focus on "counterterrorism; securing the borders and enhancing immigration enforcement; reducing violent crime; and promoting 'integrity, good government and the rule of law.'"³⁶ The DOJ's budget requests are consistent with these statements, outlining plans to pour resources into immigration and "rule of law" initiatives, while consolidating offices within the Civil Rights Division.³⁷ The NAACP, along with a coalition of other prominent civil rights organizations, recently sent a letter to the Attorney General decrying the DOJ's failure to include civil rights among its priorities and the Department's actions under his leadership, which, taken together, make "explicit" the Attorney General's "intention to abandon one of the most important imperatives of the Department"³⁸

35. Sherrilyn Ifill, *President Trump's First Year Was an Affront to Civil Rights*, TIME (Jan. 17, 2018), <http://time.com/5106648/donald-trump-civil-rights-race/> [<https://perma.cc/9TTP-Y4S4>] ("In his first year leading the DOJ, Attorney General Jeff Sessions may have lost the confidence of the President, but that hasn't stopped the nation's top law enforcement officer from declining to enforce the law whenever civil rights and communities of color are under attack."); Rob Arthur, *Trump's Justice Dep't Isn't Enforcing Civil Rights*, VICE (Feb. 23, 2018), https://news.vice.com/en_us/article/wj44y4/trumps-justice-department-isnt-enforcing-civil-rights [<https://perma.cc/Q5H4-BBMW>] ("The Trump administration is pursuing far fewer civil rights cases than its predecessors, a VICE News review of Justice Department records shows. Total activity in the agency's civil rights division is at a 17-year low, falling well below levels seen in the last two administrations. One DOJ section charged with enforcing laws on police department misconduct has been completely inactive."); Jesselyn McCurdy, *The Justice Department Continues to Roll Back Civil Rights Protections*, ACLU (Nov. 20, 2017, 3:45 PM), <https://www.aclu.org/blog/criminal-law-reform/justice-department-continues-roll-back-civil-rights-protections> [<https://perma.cc/7Y5S-ESPZ>]; see also *supra* note 17.

36. See Reilly, *supra* note 33.

37. See, e.g., Pema Levy, *Justice Dep't Seeks More Funds for Law Enforcement While Squeezing Civil Rights*, MOTHER JONES (Feb. 12, 2018, 5:37 PM), <https://www.motherjones.com/politics/2018/02/justice-department-seeks-more-funds-for-law-enforcement-while-squeezing-civil-rights/> [<https://perma.cc/WH54-92LS>]; Sari Horwitz, *Justice Dep't's \$28 Billion Budget Reflects Sessions's Priorities*, WASH. POST (Feb. 12, 2018), https://www.washingtonpost.com/world/national-security/justice-departments-28-billion-budget-reflects-sessions-priorities/2018/02/12/acb6a642-1032-11e8-9065-e55346f6de81_story.html?utm_term=.b14e3f0211b7 [<http://perma.cc/XWE2-94NG>].

38. Letter from Derrick Johnson et al., President and CEO, NAACP, to Jefferson Sessions, Att'y Gen., U.S. Department of Justice, <http://www.naacp.org/wp-content/uploads/2018/03/Letter-on-DOJ-Priorities-Final-002.pdf> [<https://perma.cc/5JW5-DQHT>] ("... [Y]ou have taken actions that clearly reflect . . . in some instances, affirmative hostility to the very civil rights protections you are charged with enforcing. Under your leadership, the Department reversed its

The DOJ has acted in large part consistently with its articulated priorities. In March 2017, the Attorney General issued a memo instructing Department officials to immediately review all Department activities, including consent decrees previously reached between the Civil Rights Division and local police departments, to ensure they were consistent with the administration's new goals.³⁹ Days later, the DOJ requested that a federal court postpone the implementation of its consent decree with the Baltimore Police Department, causing civil rights advocates, law enforcement veterans, and the officials responsible for putting the agreement in place to express concern.⁴⁰ In early 2018, the administration effectively closed the Office of Access to Justice,⁴¹ whose mission was to encourage fair and accessible outcomes in the justice system by increasing availability of legal assistance to people who cannot afford representation.⁴²

With respect to the Department's new priorities, the DOJ has taken steps to limit the rights of individuals. For example, the DOJ has dispensed with many procedural protections that had been in

long-held position supporting our constitutional challenge to Texas' voter ID law notwithstanding a federal court's ruling in our favor, rolled back federal policing reform efforts, and expressed interest in relitigating the constitutionality of affirmative action despite repeated Supreme Court rulings upholding it. Despite a 57% rise in hate crimes and our explicit request at our meeting that you speak out unequivocally against hate crimes and commit increased resources to investigating groups and individuals engaged in white supremacist violence, you have failed to articulate any measures directly addressed to violent white extremism.”).

39. See Memorandum from the Office of the Att’y Gen. to Heads of Dep’t Components and U.S. Att’ys (Mar. 31, 2017), <https://www.documentcloud.org/documents/3535148-Consentdecreebaltimore.html> [<https://perma.cc/D8Q3-BWG9>]; see also Sari Horwitz et al., *Sessions Orders Justice Department to Review All Police Reform Agreements*, WASH. POST (Apr. 3, 2017), https://www.washingtonpost.com/world/national-security/sessions-orders-justice-department-to-review-all-police-reform-agreements/2017/04/03/ba934058-18bd-11e7-9887-1a5314b56a08_story.html?utm_term=.544db3d28052 [<http://perma.cc/7RWL-VGWQ>].

40. See Horwitz et al., *supra* note 39.

41. Katie Benner, *Justice Dept. Office to Make Legal Aid More Accessible Is Quietly Closed*, N.Y. TIMES (Feb. 1, 2018), <https://www.nytimes.com/2018/02/01/us/politics/office-of-access-to-justice-department-closed.html> [<https://nyti.ms/2GD7aVm>].

42. See *Mission*, OFFICE FOR ACCESS TO JUSTICE, DEP’T OF JUSTICE (Aug. 8, 2017), <https://www.justice.gov/atj> [<https://perma.cc/R2WF-N5GA>] (“ATJ’s mission is to help the justice system efficiently deliver outcomes that are fair and accessible to all, irrespective of wealth and status. ATJ staff works within the Department of Justice, across federal agencies, and with state, local, and tribal justice system stakeholders to increase access to counsel and legal assistance and to improve the justice delivery systems that serve people who are unable to afford lawyers.”).

place for participants in the immigration system.⁴³ In March 2018, the Attorney General announced the elimination of a requirement that asylum seekers get a full hearing before an immigration judge if the judge believes that the claims are fraudulent or unlikely to succeed.⁴⁴ Beginning in October 2018, immigration judges will be required to speed up their processing of cases to receive satisfactory ratings.⁴⁵ In April 2018, Attorney General Sessions announced a new “zero-tolerance policy” for violations of 8 U.S.C. § 1325(a), which prohibits illegal entry and attempted illegal entry into the United States.⁴⁶

43. See Bea Bischoff, *The Kris Kobach Playbook: Jeff Sessions Is Doing Everything in His Power to Make Asylum-Seekers Suffer*, SLATE (July 10, 2018, 3:50 PM), <https://slate.com/news-and-politics/2018/07/jeff-sessions-is-doing-everything-in-his-power-to-make-asylum-seekers-suffer.html> [https://perma.cc/78QN-YKET] (“Without fanfare, Sessions managed to implement harsher guidelines for children appearing in immigration court, limit the ability of immigration attorneys to seek continuances, curtail immigrants’ ability to transfer their case to a court closer to where they are living, and pack the immigration court benches with former ICE attorneys.”); see also Russell Wheeler, *Amid Turmoil on the Border, New DOJ Policy Encourages Immigration Judges to Cut Corners*, BROOKINGS: FIXGOV BLOG (June 18, 2018), <https://www.brookings.edu/blog/fixgov/2018/06/18/amid-turmoil-on-the-border-new-doj-policy-encourages-immigration-judges-to-cut-corners> [https://perma.cc/3CVL-DCCP] (“In courts with more demanding caseloads, judges will often face a choice: protect their economic well-being by cutting due process corners or serve as independent adjudicators.”); Vann R. Newkirk II, *The End of Civil Rights*, ATLANTIC (June 18, 2018), <https://www.theatlantic.com/politics/archive/2018/06/sessions/563006/> [https://perma.cc/L34A-LRVW] (“Sessions has recently pushed for changes in the Executive Office for Immigration Review (EOIR), the immigration-court system embedded within the DOJ. He’s considering ways to force judges to process more deportation cases, changes that several experts say will undoubtedly mean that fewer people receive due process or fair hearings.”). See generally Memorandum from James R. McHenry III, Dir., Exec. Office for Immigration Review, to the Office of the Chief Immigration Judge et al. (Jan. 17, 2018), <https://www.justice.gov/eoir/page/file/1026721/download> [https://perma.cc/7G67-72RC]; see also Press Release, Dep’t of Justice, Att’y Gen. Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), <https://www.justice.gov/opa/press-release/file/1015996/download> [https://perma.cc/Z5SE-W6C7].

44. See, e.g., Antonio Olivo, *Advocates Say Sessions’s Decision to Toss Rule on Asylum Hearings Endangers Thousands*, WASH. POST (Mar. 7, 2018), https://www.washingtonpost.com/local/social-issues/advocates-sessions-decision-to-toss-rule-on-asylum-hearings-endangers-thousands/2018/03/07/24b63b24-2214-11e8-94da-ebf9d112159c_story.html?utm_term=.867f3dc4f6be [http://perma.cc/L6QQ-6SB8].

45. See, e.g., Willa Frej, *DOJ Slaps Quotas on Immigration Judges to Speed Deportations*, HUFFINGTON POST (Apr. 3, 2018, 7:58 AM), https://www.huffingtonpost.com/entry/doj-quotas-on-immigration-judges-to-speed-deportations_us_5ac346cbe4b04646b645d061 [https://perma.cc/JEY2-MKY7].

46. Press Release, Dep’t of Justice, Att’y Gen. Announces Zero-Tolerance Policy for Criminal Illegal Entry, *supra* note 43.

Since the implementation of that policy, hundreds of children have been separated from their parents at the U.S. border.⁴⁷

The DOJ is not alone. Other federal agencies charged with protecting civil, economic, and environmental rights have similarly abandoned their efforts to enforce these rights. The Department of Education has scaled back investigations into civil rights violations at public schools and universities,⁴⁸ sought less funding for civil rights enforcement,⁴⁹ and removed protections for transgender students and victims of sexual assault on campuses nationwide.⁵⁰ Similarly, the Environmental Protection Agency (EPA) has historically “been instrumental in setting policy priorities and writing and enforcing a wide range of laws that have literally changed the face of the Earth for the better.”⁵¹ But, this administration’s EPA has sought to arrest — if not to undo — much of this progress. The EPA Administrator has called for revised, more permissive, emissions standards for cars and trucks⁵² and has loosened regulations on air pollution by decreasing the penalties and corrective action required for companies

47. See Julia Ainsley & Jane C. Timm, *1,995 Children Separated from Families at Border Under ‘Zero Tolerance’ Policy*, NBC (June 15, 2018, 3:37 PM), <https://www.nbcnews.com/politics/donald-trump/1-995-children-separated-families-border-under-zero-tolerance-policy-n883716> [<https://perma.cc/98JW-JAV7>].

48. See Erica L. Green, *Education Dept. Says It Will Scale Back Civil Rights Investigations*, N.Y. TIMES (June 16, 2017), <https://www.nytimes.com/2017/06/16/us/politics/education-department-civil-rights-betsy-devos.html> [<https://nyti.ms/2szkO7x>].

49. See *id.* (“In the administration’s budget request for the fiscal year that begins in October [2017], the Education Department has proposed cutting more than 40 staff positions from the office of civil rights . . .”).

50. See, e.g., Cory Turner & Anya Kamenetz, *The Education Department Says It Won’t Act on Transgender Student Bathroom Access*, NPR (Feb. 12, 2018, 5:39 PM), <https://www.npr.org/sections/ed/2018/02/12/585181704/the-education-department-says-it-wont-act-on-transgender-student-bathroom-access> [<https://perma.cc/A8KP-LKDV>]; Stephanie Saul & Kate Taylor, *Betsy DeVos Reverses Obama-Era Policy on Campus Sexual Assault Investigations*, N.Y. TIMES (Sept. 22, 2017), <https://www.nytimes.com/2017/09/22/us/devos-colleges-sex-assault.html?mtrref=www.google.com&gwh=5F670DE371F884B156C245B6A254BE2B&gwt=pay> [<https://nyti.ms/2yif9l>].

51. *Environmental Enforcer: How Effective Has the EPA Been in Its First 40 Years?*, SCI. AM.: EARTHTALK, <https://www.scientificamerican.com/article/the-epa-first-40-years/> [<https://perma.cc/5HQY-9Y2N>].

52. Press Release, EPA, EPA Administrator Pruitt: GHG Emissions Standards for Cars and Light Trucks Should Be Revised (Apr. 2, 2018), <https://www.epa.gov/newsreleases/epa-administrator-pruitt-ghg-emissions-standards-cars-and-light-trucks-should-be> [<https://perma.cc/VDG4-VUMV>].

found to be polluting.⁵³ The administration has also backed away from efforts to stop or mitigate the effects of global climate change.⁵⁴

Similar retrenchment is evident in consumer protection enforcement at the federal level. In the aftermath of the financial crisis of 2008, Congress created the Consumer Financial Protection Bureau (CFPB) to provide increased accountability for enforcing federal consumer financial laws and protecting consumers in the financial marketplace.⁵⁵ During its first six years, the CFPB pursued an ambitious enforcement agenda, bringing cases to address illegal, predatory practices related to mortgages, debt collection, payday loans, student loans, credit reporting, and deposit products.⁵⁶ In that

53. See, e.g., Memorandum from William L. Wehrum, Assistant Adm'r, Office of Air & Radiation, EPA, to Reg'l Air Div. of Dirs. (Jan. 25, 2018), https://www.epa.gov/sites/production/files/2018-01/documents/reclassification_of_major_sources_as_area_sources_under_section_112_of_the_clean_air_act.pdf [<https://perma.cc/2BP6-M3KR>]; Michael Greshko et al., *A Running List of How President Trump Is Changing Environmental Policy*, NAT'L GEOGRAPHIC (Aug. 21, 2018), <https://news.nationalgeographic.com/2017/03/how-trump-is-changing-science-environment/> [<https://perma.cc/RE7V-B5GS>].

54. See, e.g., Greshko et al., *supra* note 53. Cf. THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 22–23 (Dec. 2017), <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf> [<https://perma.cc/7PV6-KG3U>]; Richard Gonzales, *FEMA Drops 'Climate Change' from Its Strategic Plan*, NPR (Mar. 15, 2018), <https://www.npr.org/sections/thetwo-way/2018/03/15/594140026/fema-drops-climate-change-from-its-strategic-plan> [<https://perma.cc/3QZR-2GAP>].

55. 12 U.S.C. §5491(a) (2010); *About Us: The Bureau*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/about-us/the-bureau/> [<https://perma.cc/4THQ-XVDB>].

56. See, e.g., Consent Order, *In re* Wells Fargo Bank, N.A., CFPB No. 2018-BCFP-0001 (Apr. 20, 2018) (brought against Wells Fargo for improper mortgage practices); CFPB v. Ocwen Fin. Corp., No. 9:17-CV-80495, 2017 WL 1408216 (S.D. Fla. Apr. 20, 2017) (case brought against Ocwen Financial Corporation for a multitude of improper loan practices); CFPB v. Navient Corp., No. 3:17-cv-00101-RDM, 2017 WL 191446 (M.D. Pa. Jan. 18, 2017) (bringing suit against Navient for improper servicing and collection of student loans); CFPB v. Final Judgment and Order for Restitution, Disgorgement, a Civil Money Penalty, and Permanent Injunction Against Defendant Stephen Lyster Siringoringo, No. an Individual, Also D/B/A Siringoringo Law Firm, CFPB v. CFPB v. Siringoringo, No. 8:14-cv-01155-JVS (AJWx) (C.D. Cal. Jan. 11, 2017); Consent Order, *In re* Wells Fargo Bank, N.A., CFPB No. 2016-CFPB-0015 (Sept. 8, 2016); CFPB v. Cashcall, Inc., No. CV 15-7522-JFW (RAOx), 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016) (bringing suit against CashCall for improperly collecting loans that state-licensing and usury laws rendered partially void or uncollectible); Consent Order, *In re* Wells Fargo Bank, N.A., CFPB No. 2016-CFPB-0013 (Aug. 22, 2016); Consent Order, CFPB v. Ocwen Fin. Corp., No. 13-cv-2025 (RMC), 2016 WL 1717364 (D.D.C. Apr. 28, 2016); Consent Order, *In re* Gen. Info. Servs., Inc., CFPB No. 2015-CFPB-0028 (Oct. 29, 2015) (bringing suit against General Information Services for improper credit reporting practices); CFPB v. Corinthian Colls., Inc., No. 1:14-cv-07194, 2015 WL 10854380 (N.D. Ill. Oct. 27, 2015) (bringing suit against Corinthian Colleges in violation of the Fair Debt

time, the Bureau's supervisory and enforcement work resulted in orders of approximately \$11.9 billion in relief to over 29 million consumers across the U.S.⁵⁷

This approach changed dramatically in November 2017, when President Trump appointed Mick Mulvaney Acting Director of the CFPB.⁵⁸ Mulvaney, who also leads the Office of Management and Budget, had been outspoken in his opposition to the CFPB and its mission, calling the Bureau a "sick, sad joke."⁵⁹ The Acting Director subsequently took steps consistent with his articulated value of the Bureau's mission. He requested no funding from the Federal Reserve for the second quarter of the 2018 Fiscal Year,⁶⁰ despite the fact that the budget devoted to the Bureau's enforcement efforts had not decreased in the preceding years.⁶¹ In February 2018, the Bureau

Collection Practices Act); CFPB v. Stipulated Final Judgment and Order with Respect to CFPB v. Wells Fargo Bank, N.A., CFPB No. v. Wells Fargo Bank, N.A., CFPB No. 1:15-cv-00179-RDB (D. Md. Feb. 5, 2015) (bringing suit against Wells Fargo for improper loan collection practices); Consent Order, *In re* Wells Fargo Bank, N.A., CFPB No. 2015-CFPB-0002 (Jan. 22, 2015); Consent Order, *In re* ACE Cash Express, Inc., CFPB No. 2014-CFPB-0008 (July 10, 2014) (bringing suit against Ace Cash Express in connection with its collection of payday loans); CFPB v. Cashcall, Inc., No. 1:13-cv-13167 (GAO), 2014 WL 10321537 (D. Mass. Mar. 21, 2014) (bringing suit against CashCall for improperly collecting loans that state laws rendered void or limited the consumer's obligation to repay).

57. CONSUMER FIN. PROT. BUREAU, FACTSHEET, CONSUMER FINANCIAL PROTECTION BUREAU: BY THE NUMBERS (July 2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201707_cfpb_by-the-numbers.pdf [<https://perma.cc/U4PV-XS35>].

58. Renae Merle, *The CFPB Now Has Two Acting Directors. And Nobody Knows Which One Should Lead the Federal Agency*, WASH. POST (Nov. 24, 2017), https://www.washingtonpost.com/news/business/wp/2017/11/24/the-cfpb-now-has-two-acting-directors-and-nobody-knows-which-one-should-lead-the-federal-agency/?utm_term=.6a0092c3ee77 [<https://perma.cc/P5SM-8DV4>].

59. Victoria Guida, *Trump Taps Mulvaney to Head CFPB, Sparking Confusion over Agency's Leadership*, POLITICO (Nov. 24, 2017, 4:45 PM), <https://www.politico.com/story/2017/11/24/richard-cordray-successor-cfpb-leandra-english-259612> [<https://perma.cc/9SZM-2CUE>].

60. Letter from Mick Mulvaney, Acting Dir., Consumer Fin. Prot. Protection Bureau, to The Honorable Janet L. Yellen, Chair, Bd. of Governors of the Fed. Reserve Sys. (Jan. 17, 2018), https://files.consumerfinance.gov/f/documents/cfpb_fy2018_q2_funding-request-letter-to-frb.pdf [<https://perma.cc/GG2R-KZZG>].

61. The spending by the Bureau division that includes its enforcement function, Supervision, Enforcement, and Fair Lending, had steadily increased leading up to Mulvaney's assuming leadership. See CONSUMER FIN. PROT. BUREAU, CFO UPDATE FOR THE FOURTH QUARTER OF FISCAL YEAR 2012 (2012), https://files.consumerfinance.gov/f/201212_cfpb_CFO-Q4-Update.pdf [<https://perma.cc/S2JA-V3ZU>]; CONSUMER FIN. PROT. BUREAU, CFO UPDATE FOR THE FOURTH QUARTER OF FISCAL YEAR 2013 (2013), https://files.consumerfinance.gov/f/201312_cfpb_cfo-q4-update.pdf

issued an updated strategic plan that offers notably fewer specifics and accountability metrics about its enforcement work than previous iterations.⁶² More recently, the Acting Director proposed dramatic cuts to the Bureau's authority.⁶³ He has also indicated a desire to defer to other enforcers.⁶⁴ In practice, however, this approach has resulted in inaction and retrenchment. The Bureau has brought eight enforcement actions since the Acting Director was appointed in late November 2017.⁶⁵ It dismissed a pending lawsuit it had previously

[<https://perma.cc/4F2T-UXEK>]; CONSUMER FIN. PROT. BUREAU, CFO UPDATE FOR THE FOURTH QUARTER OF FISCAL YEAR 2014 (2014), https://files.consumerfinance.gov/f/201411_cfpb_cfo-quarterly-update_q4.pdf [<https://perma.cc/TZ3R-F6RL>]; CONSUMER FIN. PROT. BUREAU, CFO UPDATE FOR THE FOURTH QUARTER OF FISCAL YEAR 2015 (2015), https://files.consumerfinance.gov/f/201511_cfpb_cfo-quarterly-update_q4.pdf [<https://perma.cc/JA34-W4BP>]; CONSUMER FIN. PROT. BUREAU, CFO UPDATE FOR THE FOURTH QUARTER OF FISCAL YEAR 2016 (2016), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201612_cfpb_CFO-Update-FY16Q4.pdf [<https://perma.cc/4ZFR-T38K>]; CONSUMER FIN. PROT. BUREAU, CFO UPDATE FOR THE FOURTH QUARTER OF FISCAL YEAR 2017 (2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201712_cfpb_CFO-Update-FY2017Q4.pdf [<https://perma.cc/47KF-2LD2>].

62. Compare CONSUMER FIN. PROT. BUREAU, STRATEGIC PLAN FY 2018–2022 (Feb. 12, 2018), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_strategic-plan_fy2018-fy2022.pdf [<https://perma.cc/L3ZT-VP64>] with CONSUMER FIN. PROT. PROTECTION BUREAU, STRATEGIC PLAN FY 2013–FY 2017 (Apr. 2013), <https://s3.amazonaws.com/files.consumerfinance.gov/f/strategic-plan.pdf> [<https://perma.cc/E54U-X3LM>].

63. The Acting Director requested that:

Congress make four changes to the law to establish meaningful accountability for the Bureau: (1) Fund the Bureau through Congressional appropriations; (2) Require legislative approval of major Bureau rules; (3) Ensure that the Director answers to the President in the exercise of executive authority; and (4) Create an independent Inspector General for the Bureau.

CONSUMER FIN. PROT. PROTECTION BUREAU, SEMI-ANNUAL REPORT OF THE BUREAU OF CONSUMER FINANCIAL PROTECTION 2 (2018), https://files.consumerfinance.gov/f/documents/cfpb_semi-annual-report_spring-2018.pdf [<https://perma.cc/R5EU-GL4G>].

64. At a 2018 meeting of the National Association of Attorneys General, the Acting Director announced that the Bureau “would be looking to the state regulators and states attorney general for a lot more leadership when it comes to enforcement.” Allison Schoenthal, *Insight: A Shift in Regulation from the CFPB to the States*, Bloomberg BNA (Aug. 24, 2018), <https://www.bna.com/insight-shift-regulation-n73014482021/> [<https://perma.cc/V9L3-L377>].

65. *Enforcement Actions*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/policy-compliance/enforcement/actions/> [<https://perma.cc/5JRE-H624>]. Comparatively, the CFPB took twenty-three enforcement actions between January 1 and August 15, 2017; in 2016, it took

filed to address alleged unfair, deceptive, and abusive practices and regulatory violations by four online lenders that had allegedly collected debt not legally owed and failed to disclose the true cost of credit.⁶⁶ Moreover, there have been additional reports of the Bureau's closing pending investigations, consistent with the Acting Director's more limited view of the agency's role.⁶⁷

In sum, agencies across the federal government have curtailed their efforts to detect and correct potential illegal behavior in a variety of industries and under an array of laws. Such a retreat poses both functional and theoretical problems for our democracy. From a functional perspective, it means fewer people have recourse when an employer, lender, or landlord harms them, even when that harm violates existing law. From a theoretical perspective, the net effect of the federal government's inaction is that laws duly passed by Congress as representatives of the People have decreased in force and effect. This erodes the legitimacy of our representative government.

C. Other Enforcers Are Restricted: Inability of Private Plaintiffs to Effectively Vindicate Their Own Rights

As explained in Part I.B, the federal government is currently on the sidelines when it comes to rights enforcement.⁶⁸ If the federal government was but one of many actors in the enforcement landscape, the effect of its inaction would be limited. However, the

seventeen actions during that same period, and in 2015, it took thirty-seven. *Id.*; see also Alan S. Kaplinsky, *How Long Can Mick Mulvaney Serve as CFPB Acting Director?*, BALLARD SPAHR LLP: CONSUMER FIN. MONITOR (Feb. 27, 2018), <https://www.consumerfinancemonitor.com/2018/02/27/how-long-can-mick-mulvaney-serve-as-cfpb-acting-director/> [https://perma.cc/KZX3-MK6A] (observing that Mulvaney's appointment as Acting Director became effective on November 25, 2017); Kate Berry, *CFPB's Mulvaney Looks to Rein in 'Tyranny' of Agency He Runs*, AM. BANKER (Apr. 2, 2018), <https://www.americanbanker.com/news/cfpbs-mulvaney-looks-to-rein-in-tyranny-of-agency-he-runs?feed=00000158-babc-dda9-adfa-fefef5720000> [https://perma.cc/JN8Q-SCRM] (noting that by April 2018, Mulvaney had already dropped six actions against payday lenders).

66. Notice of Voluntary Dismissal Pursuant to F.R.C.P. 41(a)(1)(A)(i), CFPB v. Golden Valley Lending, Inc., No. 2:17-cv-02521 (D. Kan. Sept. 8, 2017); Complaint for Permanent Injunction and Other Relief, CFPB v. Golden Valley Lending, Inc., No. 17-cv-3155 (N.D. Ill. Apr. 27, 2017).

67. "Since the Trump administration took over the CFPB in November, the bureau temporarily froze new regulations and instituted a review of enforcement activities under acting director Mick Mulvaney, a longtime critic of the agency. The CFPB hasn't filed any new enforcement actions since November." Yuka Hayashi, *States Target Consumer Issues as Federal Oversight Eases*, WALL ST. J. (Apr. 5, 2018), <https://www.wsj.com/articles/states-target-consumer-issues-as-federal-oversight-eases-1522920601> [https://perma.cc/T4SM-2M5B].

68. See *supra* Section I.B.

alternative enforcers — private plaintiffs — are increasingly restrained in their ability to vindicate their own rights as a result of evolutions in the law on class action lawsuits. This Part discusses the compounding challenge of limited private enforcement that, together with decreased federal enforcement, further widen the gap between law and reality.

Class actions, permitted under Federal Rule of Civil Procedure 23, allow individuals who are victims of fraud or discrimination to pursue legal claims as a group when they have each experienced similar harms.⁶⁹ The use of class actions as a tool for private enforcement of public laws has a long history in our legal system.⁷⁰ Despite criticism for misuse, class actions are widely recognized as an important tool for individual plaintiffs to seek redress for harms that may not be feasible to litigate on their own.⁷¹ Consumer advocates in particular favor the ability of would-be plaintiffs to pursue class actions.⁷² Class actions correct for what can otherwise be an insurmountable imbalance between an individual's relatively small harm and a corporation's outsized illegal gains across a large population of consumers.⁷³ For example, if a company denies overtime to 10,000 workers with an average lost wage of \$500 per worker, the cost of litigating each individual case would dwarf the harm suffered by each worker, despite a sizeable total harm of \$5,000,000.

69. FED. R. CIV. P. 23(a)(2); *see also generally* FED. R. CIV. P. 23.

70. Gilles & Friedman, *supra* note 14, at 624–27.

71. Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 U. KAN. L. REV. 767, 770–71 (2012) (“Class actions are admittedly controversial, viewed by some businesses as ‘legalized blackmail,’ yet also regarded as serving an important public function allowing ‘those who are less powerful to band together — using lawyers as their champions’ — to seek redress of grievances that would ‘go unremedied if each litigant had to fight alone.’”) (internal citation omitted); *see also* Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1714 (2006) (“Despite perceived shortcomings and criticisms of misuse, class actions are an important procedural joinder device in our public justice system for bringing claims on behalf of a large number of individuals when it may be economically unfeasible to assert claims individually.”) [hereinafter *Universes Colliding*].

72. “Without class actions, it is often infeasible for a consumer to hire a lawyer to pursue a claim for a small dollar amount. Class actions also enable courts to assess and remedy the full scope of a company’s wrongdoing.” *Class Actions & Access to Justice*, NAT’L CONSUMER L. CTR., <https://www.nclc.org/issues/arbitration-class-actions.html> [<https://perma.cc/6JM5-E6Z8>].

73. *Id.*

Even with the documented benefits of class actions as both a deterrent to⁷⁴ and a remedy for illegal conduct, the road to bringing a class action to address widespread misconduct is steadily more treacherous.⁷⁵ Consumer advocates bemoan the limitations of contracts that require adjudication of consumer claims through arbitration, particularly when the contract specifies that the arbitration must be pursued individually, rather than on a class basis.⁷⁶ These so-called “forced arbitration” clauses keep consumers and employees from reaching a courtroom.⁷⁷ Additionally, they limit the arbitrator’s ability to understand the full extent of a company’s illegal behavior, because the case cannot be presented on behalf of the full class of harmed victims.⁷⁸

The Supreme Court has erected even more onerous barriers to many plaintiffs’ ability to seek justice through the court system. In *Wal-Mart Stores, Inc. v. Dukes*,⁷⁹ the Court clarified and tightened the scope of Rule 23(a)(2)’s commonality requirement, explaining that “proof of commonality necessarily overlap[ped] with respondents’ merits contention that Wal-Mart engage[d] in a *pattern*

74. See Brian T. Fitzpatrick, *Do Class Actions Deter Wrongdoing?*, in *THE CLASS ACTION EFFECT* 180–203 (Catherine Piché ed., 2018) (evaluating critiques of class actions and concluding that “the conventional view that the class action can be justified by the deterrence rationale alone remains sound”); see generally Russell M. Gold, *Compensation’s Role in Deterrence*, 91 *NOTRE DAME L. REV.* 1997 (2016) (arguing that individual victim compensation increases the deterrent effects of class actions).

75. Weston, *Universes Colliding*, *supra* note 71, at 1714–15 (observing a “trend in corporate America to require the submission of disputes to private arbitration rather than to courts of law via predispute arbitration provisions in a range of contracts involving consumer, employment, health care, and business transactions” and noting that the Class Action Fairness Act of 2005 (CAFA) further restricts judicial class actions by prohibiting litigants from filing judicial class actions involving national claims in state courts).

76. See, e.g., Richard Cordray, Opinion, *Let Consumers Sue Companies*, *N.Y. TIMES* (Aug. 22, 2017), <https://www.nytimes.com/2017/08/22/opinion/let-consumers-sue-companies.html> [<https://nyti.ms/2vjWRyP>]; see also David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 *WIS. L. REV.* 33, 132 (1997).

77. *Forced Arbitration*, *NAT’L CONSUMER L. CTR.*, <https://www.nclc.org/issues/forced-arbitration.html> [<https://perma.cc/K3QJ-8DDW>].

78. *Id.* (“Forced arbitration clauses are found in fine print in contracts for bank accounts, student loans, cell phones, employment, nursing homes and more. These clauses deprive people of their day in court when a company violates the law, forcing victims into a system that is often biased, secretive and lawless. Forced arbitration clauses often contain class action bans that prevent either a judge or an arbitrator from seeing or addressing the full extent of a company’s wrongdoing.”).

79. 564 U.S. 338 (2011).

or practice of discrimination.”⁸⁰ The Court held that the employees’ statistical and testimonial evidence of employment discrimination did not provide sufficient proof that they suffered the same injury or that their Title VII claims depended on answers to common questions.⁸¹ Just months earlier, the Court in *AT&T Mobility LLC v. Concepcion*⁸² held that the Federal Arbitration Act preempts state law prohibiting class-action waivers in arbitration agreements.⁸³ It thus barred the plaintiff consumers in this case from pursuing a class complaint in federal court against AT&T and instead required them to proceed through arbitration on an individual basis.⁸⁴ And in May 2018, in its 5-4 decision in *Epic Systems Corporation v. Lewis*, the court held that employers can contractually forbid workers from arbitrating legal disputes as a class.⁸⁵

Taken together, *Wal-Mart*, *Concepcion*, and *Epic Systems* raise the barriers to entry for class certification in every federal class action matter and allow potential defendants to insulate themselves from class-action lawsuits or class arbitrations by drafting their contracts to prohibit such a remedy. In the wake of *Wal-Mart* and *Concepcion*, scholars and practitioners alike have identified challenges for putative plaintiffs attempting class certification or proceeding to vindicate their rights as a class even if they meet the more stringent requirements for certification.⁸⁶ Having to satisfy the *Wal-Mart* commonality requirement makes it much harder for plaintiffs to address widespread harm, particularly when defendants are increasingly large corporations.⁸⁷ Paradoxically, the greater and more

80. *See id.* at 352.

81. *See id.* at 356.

82. 563 U.S. 333 (2011).

83. “Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” *Id.* at 343.

84. *See id.* at 352.

85. 138 S.Ct. 1612, 1632 (2018).

86. Brian T. Fitzpatrick, Opinion, *Supreme Court Case Could End Class-Action Suits*, SFGATE (Nov. 7, 2010, 4:00 AM), <https://www.sfgate.com/opinion/article/Supreme-Court-case-could-end-class-action-suits-3246898.php> [<https://perma.cc/33QS-AWEZ>]; *see also Forced Arbitration*, *supra* note 77.

87. Sarah Kellogg, *Wal-Mart v. Dukes*, WASH. LAWYER (Sept. 2011), <https://www.dcb.org/bar-resources/publications/washington-lawyer/articles/september-2011-walmart-dukes.cfm> [<https://perma.cc/SB76-6RMQ>] (“While the *Dukes* decision won’t eliminate all class action lawsuits, it will severely curtail similar employment discrimination cases, and will most certainly impact the presentation and success rates of class actions for securities cases and mass torts. By handing defendants the ammunition, they need to effectively slay mega-classes, the

widespread the harm, the more difficult it is to obtain relief and accountability for that harm. And *Wal-Mart* requires plaintiffs seeking injunctive relief to present — and courts to assess — the merits of their case at the class certification stage, effectively making cases harder and more expensive to initiate.⁸⁸ These hurdles, combined with the acceptability of class waivers under *Concepcion*, mean that individual plaintiffs and their representatives have far fewer options for vindicating their rights than they once did.⁸⁹ Each of these barriers benefit large corporations at the expense of individual consumers and workers, regardless of the legal merits of their claims.

Notably, the other branches of the current federal government have joined the federal judiciary in signaling support for the move toward permitting mandatory arbitration and class waivers. In late 2017, for example, pursuant to the Congressional Review Act, Congress passed and the President signed a joint resolution disapproving the final rule published by the CFPB that would have limited companies' ability to use mandatory arbitration clauses and to bar consumers from participating in class action lawsuits.⁹⁰

Court has seriously undermined the class action lawsuit today and in the future.”). See also Marcia L. McCormick, *Implausible Injuries: Wal-Mart v. Dukes and the Future of Class Actions and Employment Discrimination Cases*, 62 DEPAUL L. REV. 711, 728 (2013) (“In procedural terms, the dissimilarities approach, which is now a part of the Rule 23(a)(2) commonality inquiry, will prove an especially high hurdle in cases that present facts that conflict with judges’ worldview. It was evident in this case, as it has been in many other employment discrimination cases at every level of court, that the majority of judges do not believe that employment discrimination occurs very often. And it was this worldview that prompted the majority to find the claims of commonality essentially implausible. For other legal wrongs that courts find unlikely to occur, like the antitrust claim in *Twombly* and the civil rights claim in *Iqbal*, the chances of framing a successful class action seem very slim.”).

88. Gilles & Friedman, *supra* note 14, at 658–59 (noting that “[c]lass actions are on the ropes” in part because of the “development of a standard under which plaintiffs are required to prove by a preponderance of the evidence — just as they would at trial — any fact necessary to meet the requirements of Rule 23, even if it also goes to the merits. This requirement is at its most potent in damages cases under Rule 23(b)(3), where plaintiffs are obligated to establish the predominance of common issues. The Supreme Court’s recent decision in *Wal-Mart Stores, Inc v Dukes*, meanwhile, largely carries these heightened requirements over into the injunctive realm, by redefining the hitherto easy-to-satisfy commonality requirement of Rule 23(a)(2).”).

89. *Id.* at 660 (“All of this, coupled with the Supreme Court’s embrace of class action waivers, radically restricts the continued ability of private actors to vindicate public rights via the class action mechanism.”).

90. See generally Arbitration Agreements, 82 Fed. Reg. 55500 (Nov. 22, 2017) (CRA revocation), <https://www.federalregister.gov/documents/2017/11/22/2017-25324/arbitration-agreements> [<https://perma.cc/6JKQ-RPK8>]; see also CONSUMER

While the full impact of these decisions may not yet be realized,⁹¹ scholars and practitioners predict lasting and destructive ripple effects on the ability of individuals to enforce their own rights. According to the CFPB's 2015 Arbitration Study, tens of millions of consumers use consumer financial products or services that are subject to pre-dispute arbitration clauses.⁹² And nearly all of the arbitration clauses the CFPB studied contained prohibitions on proceeding as a class.⁹³

Scholars highlight the improbability of consumers pursuing individual arbitrations.⁹⁴ This analysis is consistent with how consumers predict their own behavior even when faced with being scammed or defrauded. When the CFPB asked consumers how they would respond to being assessed erroneous credit card fees, they learned that consumers seldom even contemplate bringing formal claims in any forum — litigation or arbitration — even when such avenues as customer service have proven unavailing.⁹⁵

These trends have already had an impact in the courts. In the wake of *Wal-Mart*, courts have denied class certifications in matters involving, for instance, violations of constitutional rights by city police departments and insufficient wage payments.⁹⁶ Further, consistent

FINANCIAL PROTECTION BUREAU, *CFPB Issues Rule to Ban Companies from Using Arbitration Clauses to Deny Groups of People Their Day in Court* (July 10, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-rule-ban-companies-using-arbitration-clauses-deny-groups-people-their-day-court/> [<https://perma.cc/3WUK-FD6M>].

91. In its 2015 Arbitration Study, the Consumer Financial Protection Bureau found an upward trend in the use of arbitration clauses post-*Concepcion*, but noted that the increase was not as dramatic as predicted by some commentators. See CONSUMER FIN. PROT. BUREAU, CONSUMER FINANCIAL PROTECTION BUREAU: ARBITRATION STUDY § 2 at 12 (Mar. 2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [<https://perma.cc/63KZ-J3CS>]; see also Gilles & Friedman, *supra* note 14, at n.166 (citing studies showing a decline in class certification in the years 2009 to 2012).

92. See generally CONSUMER FINANCIAL PROTECTION BUREAU: ARBITRATION STUDY, *supra* note 91.

93. *Id.* § 1 at 10 (“Across each product market included in the study, 85–100% of the contracts with arbitration clauses . . . include such no-class arbitration provisions. Although these terms effectively preclude all class proceedings, in court or in arbitration, some arbitration clauses also expressly waive the consumer’s ability to participate in class actions in court.”).

94. Gilles & Friedman, *supra* note 14, at 633–34.

95. CONSUMER FINANCIAL PROTECTION BUREAU: ARBITRATION STUDY, *supra* note 92, at §1 at 11.

96. *Haus v. City of New York*, 2011 U.S. Dist. LEXIS 155735, at *292–95 (S.D.N.Y. Aug. 31, 2011) (denying class certification because seventeen plaintiffs seeking relief for violations of their constitutional rights had not met the requirements of Rule 23, including the commonality requirements as clarified by *Wal-Mart*); *St. Pierre v. CVS Pharmacy Inc.*, No. 4:13-CV-13202-TSH, 2016 U.S. Dist.

with the *Concepcion* Court's acknowledgment that the Federal Arbitration Act (FAA) "reflect[s] both a 'liberal federal policy favoring arbitration,' and the 'fundamental principle that arbitration is a matter of contract,'"⁹⁷ courts routinely find arbitration clauses enforceable.⁹⁸ Courts have also followed *Concepcion*'s holding that a state "cannot require a procedure [like class arbitration] that is inconsistent with the FAA, even if it is desirable for unrelated reasons"⁹⁹ in granting motions to compel arbitration in matters related to, for example, price fixing,¹⁰⁰ failure to pay wages,¹⁰¹ and the purchase of cell phone services.¹⁰² The Supreme Court relied on *Concepcion* in its *Epic Systems* decision to expand its core holding to

LEXIS 18492, at *12 (D. Mass. Feb. 16, 2016) (denying class certification in a matter related to employer compensation because plaintiffs had not met their burden under *Wal-Mart* "to demonstrate the nature of their alleged injury and to show that other members of the class suffered the same harm."). *But see* Langendorf v. Skinnygirl Cocktails LLC, No. 11 CV 7060, 306 F.R.D. 574, at *580–81 (N.D. Ill. Oct. 30, 2014) (applying *Wal-Mart* and finding that the commonality requirement of Rule 23 was satisfied, but declining to certify the class based on inadequacy of representation).

97. AT&T Mobility v. *Concepcion*, 563 U.S. 333, 339 (2011) (internal citations omitted).

98. *See generally* Ribeiro v. Sedgwick LLP, No. C 16-04507 WHA, 2016 U.S. Dist. LEXIS 152896 (N.D. Cal. Nov. 2, 2016) (granting defendant's motion to compel arbitration based on the signed arbitration agreement in a putative class action alleging gender-based pay and promotion discrimination); *see* Meyer v. Uber Techs., Inc., 868 F.3d 66, 73, 81 (2d Cir. 2017) (applying the FAA and state contract law to grant defendant Uber's motion to compel arbitration in putative class action where the arbitration provision was "reasonably conspicuous" to the plaintiff, and that he had "unambiguously manifested his assent" to be bound by the contract's terms of service).

99. 563 U.S. at 351.

100. *In re* Online Travel Co. (OTC) Hotel Booking Antitrust Litig., 953 F. Supp. 2d 713, 725 (N.D. Tex. 2013) (granting defendant's motion to compel arbitration in consolidated proceeding alleging price fixing against online travel and hotel companies and explaining that, according to *Concepcion*, a state "cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons").

101. *Quevedo v. Macy's, Inc.*, 798 F. Supp. 2d 1122, 1142 (C.D. Cal. 2011) (granting defendant's motion to compel individual arbitration in a putative class action seeking redress for failure to pay wages owed to employees upon termination because defendant had not waived its right to seek arbitration, the arbitration agreement was not unconscionable under state law, and, under *Concepcion*, requiring class arbitration when an arbitration agreement precluded it was "inconsistent with the FAA").

102. *Sidney v. Verizon Comm.*, No. 17 CV 1850 (RJD)(RLM), 2018 U.S. Dist. LEXIS 48485, at *7–9 (E.D.N.Y. Mar. 22, 2018) (granting defendant's motion to compel arbitration in putative class action arising out of fraudulent purchase of cell phone and service on plaintiff's account because, under *Concepcion* and related precedent, the parties' arbitration agreement and the class action waiver contained in it were both enforceable).

employment contracts, explaining that “courts may not allow a contract defense to reshape traditional individualized arbitration by mandating class-wide arbitration procedures without the parties’ consent.”¹⁰³

II. FIXING THE DESIGN FLAW: CITIES AS ENGINES OF JUSTICE

As Part I illuminates, two major enforcers – the federal government and private plaintiffs – have been at least partially removed from the enforcement landscape.¹⁰⁴ Federal retrenchment and restriction of private enforcement only exacerbates an already-present enforcement vacuum.¹⁰⁵ With enforcers at the federal level

103. *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1623 (2018) (“Just as judicial antagonism toward arbitration before the Arbitration Act’s enactment ‘manifested itself in a great variety of devices and formulas declaring arbitration against public policy,’ *Concepcion* teaches that we must be alert to new devices and formulas that would achieve much the same result today. And a rule seeking to declare individualized arbitration proceedings off limits is, the Court held, just such a device.”) (internal citations omitted).

104. *See supra* Part I.

105. *See* Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 918 (2014), <http://www.uclalawreview.org/pdf/61-4-1.pdf> [<https://perma.cc/S9SV-TZ8W>] (“While enactment-enforcement gaps are widespread in criminal law, this discrepancy is uniquely significant in the context of laws that are understood to ‘send a message.’”); Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 8 (2009) (“Prosecutors with large caseloads lack the resources to take every case to trial.”); *Cook County to Stop Prosecuting Some Traffic Offenses Because It Lacks Resources, Foxx’s Office Says*, CHI. TRIB. (June 15, 2017, 2:02 PM), <http://www.chicagotribune.com/news/local/breaking/ct-states-attorney-traffic-offense-prosecution-20170615-story.html> [<https://perma.cc/Y89F-C7BR>]; Lisa Rein & Andrew Ba Tran, *How the Trump Era Is Changing the Federal Bureaucracy*, WASH. POST (Dec. 30, 2017), https://www.washingtonpost.com/politics/how-the-trump-era-is-changing-the-federal-bureaucracy/2017/12/30/8d5149c6-daa7-11e7-b859-fb0995360725_story.html?utm_term=.255048a9146a [<https://perma.cc/F3BC-FSMP>] (describing the “crippling” effect on enforcement from the large number of supervisors who have left OSHA, because supervisors have to review potential enforcement actions); Suzy Khim, *EPA Enforcement Actions Hit 10-Year Low in 2017*, NBC NEWS (Feb. 8, 2018, 6:22 PM), <https://www.nbcnews.com/politics/white-house/epa-enforcement-actions-hit-10-year-low-2017-n846151> [<https://perma.cc/3MAL-T6A7>] (“The past fiscal year marked a historic low for enforcement actions across the board: The number of new civil and criminal cases, defendants charged, and federal EPA inspections and evaluations all reached their lowest levels in at least a decade, according to the data.”); Eric Lipton & Danielle Ivory, *Under Trump, E.P.A. Has Slowed Actions Against Polluters, and Put Limits on Enforcement Officers*, N.Y. TIMES (Dec. 10, 2017), <https://www.nytimes.com/2017/12/10/us/politics/pollution-epa-regulations.html> [<https://nyti.ms/2jDgT4c>]; Kathleen Majorsky, *Enforcement Gap Reveals Difference Between State Laws and Practices*, CENTER FOR PUBLIC INTEGRITY: STATE INTEGRITY 2012, <https://www.publicintegrity.org/2012/08/20/18734/enforcement-gap->

withdrawing and private plaintiffs increasingly powerless, state attorneys general are working hard to fill this void,¹⁰⁶ but there is significantly more to do.

reveals-difference-between-state-laws-and-practices [https://perma.cc/HV49-HLQ6]; Kathleen S. Morris, *San Francisco and the Rising Culture of Engagement in Local Public Law Offices*, reprinted in PAPERS FROM THE ELEVENTH ANNUAL LIMAN PUBLIC INTEREST COLLOQUIUM AT YALE LAW SCHOOL, WHY THE LOCAL MATTERS: FEDERALISM, LOCALISM, & PUBLIC INTEREST ADVOCACY 51, 52 (2008), https://law.yale.edu/system/files/documents/pdf/liman_whyTheLocalMatters.pdf [https://perma.cc/VG3F-SR6T] (“[C]ities are often culturally indifferent (or even resistant) to bringing affirmative cases even when they are not legally restrained from undertaking such work.”); *The Enforcement Gap: Federal Gun Laws Ignored*, AMERICANS FOR GUN SAFETY FOUNDATION 1, 2 (2003), http://content.thirdway.org/publications/10/AGS_Report_-_The_Enforcement_Gap_-_Federal_Gun_Laws_Ignored.pdf [https://perma.cc/M3X7-EME7] (“There is a vast enforcement gap between the level of federal gun crimes and the number of federal prosecutions.”).

106. See, e.g., Complaint for Permanent Injunction and Other Relief, Commonwealth of Pennsylvania v. Navient Corp. & Navient Sol., LLC, No. 3:02-at-06000 (M.D. Penn. filed Oct. 5, 2017) http://media.philly.com/documents/Pa.+v.+Navient.pdf [https://perma.cc/A8DN-7Q7H]; Press Release, New York State Office of the Attorney General, A.G. Schneiderman Leads 11 Attorneys General Opposing Trump Dept. of Labor Program to Offer Amnesty to Labor Law Violators (Apr. 11, 2018), https://ag.ny.gov/press-release/ag-schneiderman-leads-11-attorneys-general-opposing-trump-dept-labor-program-offer [https://perma.cc/9K2E-ZNHN]; *3 Enforcement Priorities for State AGs in 2018*, FOLEY & LARDNER LLP (Jan. 8, 2018), https://www.foley.com/3-enforcement-priorities-for-state-ags-in-2018-01-08-2018/ [http://perma.cc/7H99-89WZ]; Rachel M. Cohen, *The Hour of the Attorneys General: State Democratic AGs Have Assumed New Importance in the Effort to Contain the Trump Presidency*, AM. PROSPECT (Mar. 22, 2017), http://prospect.org/article/hour-attorneys-general [https://perma.cc/LX3K-59X7]; Lauren Dezenski, *In Fight Against Trump, Democratic AGs Take a Page from GOP: States Are Bringing a Growing String of Lawsuits, Complaints and Other Actions Against the Trump Administration — and There’s No End in Sight*, POLITICO (Feb. 7, 2018, 6:00 AM), https://www.politico.com/story/2018/02/07/democratic-attorneys-general-trump-393651 [https://perma.cc/P35S-VG4M]; Edward-Isaac Dove, *The New AG Itching to Take on Trump: New Jersey Attorney General Gurbir Grewal Has Jurisdiction over 20 Trump Properties and Is Ready to Step into Eric Schneiderman’s Void*, POLITICO (May 23, 2018, 5:03 AM), https://www.politico.com/story/2018/05/23/new-jersey-attorney-general-trump-603284 [https://perma.cc/R7XW-7D7R]; Yuka Hayashi, *States Target Consumer Issues as Federal Oversight Eases*, WALL ST. J. (Apr. 15, 2018, 5:30 AM), https://www.wsj.com/articles/states-target-consumer-issues-as-federal-oversight-eases-1522920601 [https://perma.cc/KZH7-VGGB]; Barbara S. Mishkin, *Pennsylvania AG Creates Consumer Financial Protection Unit*, BALLARD SPAHR LLP: CONSUMER FIN. MONITOR (July 14, 2017), https://www.consumerfinancemonitor.com/2017/07/24/pennsylvania-ag-creates-consumer-financial-protection-unit/ [https://perma.cc/H32Q-MUP6]; Gregory Roberts, *States Standing By to Fill ‘Imminent’ CFPB Enforcement Gap*, BLOOMBERG BNA (June 8, 2017), https://www.bna.com/states-standing-fill-n73014452991/ [https://perma.cc/93VS-JR74].

The precarious state of rights enforcement in the United States today exposes a serious design flaw in our system. Reliance on only one level of government to protect our most basic rights subjects the fate of those rights to the unpredictable results of single elections. Our system allows an electoral pendulum swing to significantly impact the protection of our core rights. This is a flaw requiring repair. A more effective system would guard against the de facto nullification of protections we have already agreed upon as a society because there are not enough proverbial “cops on the beat.”

Cities have the ability to file affirmative litigation to protect public rights and address illegal behavior, and thus are an important solution to this design flaw. Not only are cities a solution to address under-enforcement of public rights, but also, they have a permanent role to play in advancing their residents’ rights and the national conversation on critical issues.

This Part discusses the value of redundancy for effective, ongoing rights enforcement and how cities, through their ability to file affirmative cases to address harms to their communities, are key to establishing a desirable rights enforcement framework. It also addresses the role cities play in diversifying our system of rights enforcement by virtue of the unique position they inhabit. As the closest representatives to their communities, cities take the final step of policymaking when they enforce existing laws. And, in so doing, they fulfill their role as representatives of their communities. Finally, cities have the unique ability to push forward social progress in ways consistent with the will of the People at the most local level.

A. Multiple Enforcers Are Desirable to Protect Public Rights

The examples described in this Article make clear that we as a society need enforcers at multiple levels of government focusing on civil rights, environmental protections, and consumer laws. Our society and the problems we face have become sufficiently complex that we need both policymaking and enforcement to happen at all levels of government.¹⁰⁷ In this section, we argue for redundancy of civil enforcement functions.

107. Yishai Blank, *Federalism, Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance*, 37 FORDHAM URB. L.J. 509, 510 (2010) (“Immigration, climate change, labor standards, and the economic crisis are high-profile examples of the fact that it is no longer possible — nor is it desirable — to think, decide, and implement rules and policies only at the federal level or at the state level or at the local level; rather, it has become necessary to govern them at many

Cities are largely untapped resources that are well positioned to step in to protect our public rights through their ability to file affirmative litigation.¹⁰⁸ This work by cities is more critical now than ever. The current federal climate makes abundantly clear the importance of redundancy by design: multiple enforcers with authority to ensure that protections enshrined in law convert to real protections on the ground. Just as hospitals have multiple generators to hedge against a single point of failure, so should our democracy feature multiple options to enforce our legal and constitutional rights. Or to use a more modern example, this recommendation is not unlike applying the theory behind blockchain to our democratic system. Just as blockchain stores information over a distributed network so that no central repository can corrupt the data,¹⁰⁹ so too do we propose empowering a diversity of enforcers across all levels of government such that inaction at one level cannot remove all enforcement activity from the legal marketplace.

What is easy to forget in the tumult of the current federal administration is that the need for redundancy is not a short-term problem or a phenomenon confined to a particular administration.¹¹⁰ While the current administration's lack of commitment to enforcing core civil rights, economic, and environmental protection laws is extreme, the inherent design flaw will persist beyond the conclusion of the current federal administration.

Even when the federal government prioritizes enforcing the public rights laws within its jurisdiction, there are matters that federal enforcement agencies do not address because of resource constraints.¹¹¹ Every office has to make strategic decisions about how to use its resources. The reality is that enforcement actions and affirmative litigation takes significant effort from any agency.¹¹² Even

levels of government — sub-national, national, and supra-national — simultaneously.”).

108. See Morris, *supra* note 25, at 201.

109. See SATOSHI NAKAMOTO, BITCOIN: A PEER-TO-PEER ELECTRONIC CASH SYSTEM 8 (2009), <https://bitcoin.org/bitcoin.pdf> [<https://perma.cc/WQB3-P5UJ>].

110. See Wolf Heydebrand, *Government Litigation and National Policymaking: From Roosevelt to Reagan*, 24 L. & SOC'Y REV. 477, 477 (1990) (analyzing litigation trends administration over administration and noting that “[t]here is some evidence of systematic variation in government litigation and administrative appeals due to an ‘administration effect’ but there are also secular tendencies suggesting a more general ‘government’ effect cutting across various administrations”).

111. See, e.g., Krauss, *supra* note 105, at 8.

112. See, e.g., Charlotte Corley, *Will States Fill the CFPB Enforcement Void?*, AM. BANKER: BANK THINK (June 15, 2018, 9:57 AM), <https://www.americanbanker.com/opinion/will-states-fill-the-cfpb-enforcement-void>

in times of aggressive enforcement activity, there is more illegal behavior than there are resources among enforcers.¹¹³ Under the Obama administration, for example, the federal government could not investigate all the police departments in need of reform, nor could it protect consumers from all predatory businesses, despite an articulated desire to root out police abuses and predatory lending.¹¹⁴ To effectively address the current crisis and to more effectively preserve our rights in the future, we need to diversify our portfolio of civil, economic, and environmental rights investment across the country. Effective enforcement requires cities to be in the mix of enforcers. If we solve for this design flaw now, we protect ourselves against the next time factors — such as those described in Part I — combine to threaten our public rights. In effect, a diversified enforcement portfolio provides a hedge against future threats in any one level of government.

While this recommendation might read as a call for purely redundant enforcement functions, that is not our suggestion. Rather, each government office can and should pursue complementary enforcement, consistent with their varied statutory authorities and jurisdictional constraints, and coordinating where necessary and

[<https://perma.cc/H6UR-QBS2>] (Charlotte Corley, chair of the Conference of State Bank Supervisors and commissioner of the Mississippi Department of Banking and Consumer Finance, reflects on the significant time and resources required to pursue consumer protection cases and explains that it is essential to have multiple state regulatory bodies focused on consumer compliance.).

113. See, e.g., Krauss, *supra* note 105, at 8 (“Prosecutors with large caseloads lack the resources to take every case to trial.”); Dara Lind, *The Government Can’t Enforce Every Law. Who Gets to Decide Which Ones It Does?*, Vox (Mar. 31, 2015, 8:00 AM), <https://www.vox.com/2015/3/31/8306311/prosecutorial-discretion> [<https://perma.cc/LMW8-53R6>] (“[T]he government has limited resources, and discretion is the way it makes decisions about how to spend them.”).

114. See *generally* Press Release, DOJ, Attorney General Holder Announces President Obama’s Budget Proposes \$173 Million for Criminal Justice Reform (Mar. 4, 2014), <https://www.justice.gov/opa/pr/attorney-general-holder-announces-president-obama-s-budget-proposes-173-million-criminal> [<https://perma.cc/YWW4-TD8D>]; Press Release Number, U.S. DOJ, Justice Department Announces More Than \$130 Million in Cost Saving and Efficiency Measures to Utilize Resources More Effectively (Oct. 5, 2011), <https://www.justice.gov/opa/pr/justice-department-announces-more-130-million-cost-saving-and-efficiency-measures-utilize> [<https://perma.cc/752G-WPSS>]; Richard Cordray, *Partnering: The Consumer Financial Protection Bureau and State Attorneys General*, CONSUMER FINANCE (Mar. 8, 2011), <https://www.consumerfinance.gov/about-us/newsroom/partnering-the-consumer-financial-protection-bureau-and-state-attorneys-general/> [<https://perma.cc/NU78-FF2T>] (discussing the need for the federal government to work together with state enforcers “because we can be more effective and efficient by working with you to police the financial marketplace”).

efficient. This robust system of rights enforcement could withstand fluctuations in the resources and activity of any one enforcer.

B. Cities Play a Role Distinct from Other Levels of Government

Affirmative litigation by cities offers unique advantages to communities across the country that cannot be fully addressed by other levels of government.¹¹⁵ Rights enforcement by cities is particularly essential now, but it will always be necessary. While city affirmative litigation can and should complement enforcement work done by other government actors, it is not purely redundant with those functions. This section describes diversification as an essential companion to redundancy in an effective system of rights enforcement.

1. Cities Are the Closest Representatives of Their Communities

City affirmative litigation furthers at least two distinct functions of government: it is critical for successful policy making at the local level and it fulfills cities' democratic imperative, bolstering their moral legitimacy as representatives and guardians of their constituents' interests. Additionally, city affirmative litigation can provide the city and its residents compensation for injuries, outstanding debts, penalties, and the cost of litigation.

Under the first function, city-level enforcement is justified as an extension of a city's policymaking authority. Without enforcement, laws enacted at the local level or that localities have the ability to enforce will not be fully effectuated.¹¹⁶ As scholar Sarah L. Swan argues, "[t]he turn to litigation as a solution . . . is not an affront to democracy."¹¹⁷ Rather, litigation is not inherently less democratic than regulation: our system of political and legal governance is set up to rely on litigation as a mode of governing; the choice to settle any particular litigated matter is up to individual defendants; and, perhaps most importantly as it relates to this Article, "the lever that creates the possibility of litigation functioning as regulation is a violation of existing law."¹¹⁸ When properly viewed as part of the policymaking lifecycle, law enforcement by municipalities is a natural — and essential — part of the democratic process.

115. *See infra* Section II.B.1.

116. *See supra* note 15.

117. Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1270 (2018).

118. *Id.* at 1270–71.

Under the second function, taking action to protect members of a local community is consistent with a city's representational function.¹¹⁹ As compared to other plaintiffs, cities have a strong basis from which to pursue affirmative litigation and are able to vindicate the public interest in a way that private plaintiffs cannot.¹²⁰ As the closest representatives of their constituencies, city governments are also often in the best position to understand the needs of their communities. City offices may be more likely to take up issues important to their residents than representatives at higher levels of government.¹²¹ In addition, because city officials represent a different slice of the electorate than a state or federal official, their view of constituents' priorities and needs may vary dramatically from the conclusions of officials at other levels of government.¹²² Thus, a diversified set of enforcers leads to a diversified set of enforcement priorities. For example, a large, densely-populated city in an otherwise rural state may have strong reasons to prioritize housing code violations due to the public health and economic implications of housing noncompliance for the city. By contrast, state enforcers might focus on farm workers' rights or other issues impacting statewide populations. Neither set of priorities is more or less legitimate; both represent the interests of the constituents served by their respective representatives.

City affirmative litigation can also support municipalities from a fiscal perspective. It will allow them to recoup their own costs as well as recover money for their communities through penalties assessed for illegal behavior or through actions aimed at recovering funds that were illegally withheld from the city or its residents.¹²³ These actions

119. "Attorneys general may not be driven by the pursuit of attorney's fees, but their status as political representatives means that they must balance the interests of the public at large with those of the individuals they purport to represent in an adjudicative capacity." Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 487 (2012).

120. Swan, *supra* note 117, at 1244 (observing that, in tobacco litigation, "changing the plaintiff changed how the harm was understood. Rather than being understood as the result of individual choices for which individuals should bear the cost, plaintiff city claims are reframed as harms to the *public*, which are the result of third-party wrongdoing, and for which, accordingly, those third-party wrongdoers should bear the cost").

121. See Kaitlin Ainsworth Caruso, *Associational Standing for Cities*, 47 CONN. L. REV. 59, 86 (2014) (arguing for associational standing for cities and suggesting that cities may take a stronger interest in local problems – and be able to achieve consensus on those issues more readily – than state level enforcers).

122. *Id.*

123. See, e.g., Complaint at 2, *City of San Francisco v. Nevada*, 2013 WL 5290245 (Cal. Super. 2013) (No. CGC-13-534108); Complaint at 1, *City of New York v. FedEx*

can take the form of lawsuits that put money back in the pockets of those who fell victim to predatory practices and penalize the bad actor,¹²⁴ or money being returned to city coffers.¹²⁵ In both situations, cities are able to vindicate the monetary interests of their communities that have been harmed by illegal behavior. In this way, cities see a return on investment for their affirmative litigation efforts that would not exist if enforcement was left to state and federal players.

Ground Package Sys. Inc., 2013 WL 6845792 (S.D.N.Y. 2013) (No. 13 CV 9173); Press Release, N.Y. City Law Dep't, City Announces Settlement with FedEx Ground over Cigarette Deliveries (Mar. 15, 2013), <http://www.nyc.gov/html/law/downloads/pdf/Fed-Ex%20Cigarette%20Settlement.pdf> [<https://perma.cc/H2CW-DYGW>].

124. For example, in 2007, San Francisco sued Check 'n Go and Money Mart for making payday loans with annual percentage rates over 400, more than eleven times the allowable interest rate in California. Press Release, Office of the City Attorney of S.F., Herreras Payday Lender Case Nets 7.7 Million for Borrowers at Zero Expense to Taxpayers (Aug. 5, 2013), <https://www.sfcityattorney.org/2013/08/05/herreras-payday-lender-case-nets-7-7-million-for-borrowers-at-zero-expense-to-taxpayers/> [<https://perma.cc/5DAZ-59FR>]. The settlement ultimately reached in this matter resulted in \$7.7 million in restitution for harmed consumers. *Id.* In 2016, Los Angeles settled a case with Wells Fargo bank related to the bank's opening of accounts without consumers' consent or knowledge, causing consumers to incur unwanted fees and other negative financial consequences. L.A. obtained a \$50 million civil penalty, which the city indicated would be devoted to future consumer protection. Press Release, L.A. City Attorney's Office, Los Angeles City Attorney Mike Feuer Achieves Historic Result in Consumer Action Against Wells Fargo; Bank to Make Restitution to Customers, Pay \$50-million in Penalties; Unprecedented Coordination with Federal Regulators to Benefit Consumers Nationwide (Sept. 8, 2016), <https://www.lacityattorney.org/single-post/2016/09/08/Los-Angeles-City-Attorney-Mike-Feuer-Achieves-Historic-Result-in-Consumer-Action-Against-Wells-Fargo-Bank-to-Make-Restitution-to-Customers-Pay-50-million-in-Penalties-Unprecedented-Coordination-with-Federal-Regulators-to-Benefit-Consumers-Nationwide> [<https://perma.cc/444U-3RJR>].

125. For example, New York City has actively enforced tobacco and cigarette tax laws in response to tobacco companies refusing to pay the city millions of dollars in tax revenues that would have gone to city services and other vital expenses. Using affirmative litigation, the city responded on several fronts. It filed a complaint stating that FedEx "knowingly" transported, possessed, and distributed contraband cigarettes and committed "racketeering acts" under the RICO statute. Complaint at 1, *City of New York v. FedEx Ground Package Sys. Inc.*, 2013 WL 6845792 (S.D.N.Y. 2013) (No. 13 CV 9173). In 2013, FedEx agreed to pay \$2.4 million to resolve part of the city's claim for delivering untaxed cigarettes. Press Release, N.Y. City Law Dep't, N.Y. City Announces Settlement with FedEx Ground Over Cigarette Deliveries (Mar. 15, 2013), <http://www.nyc.gov/html/law/downloads/pdf/Fed-Ex%20Cigarette%20Settlement.pdf> [<https://perma.cc/H2CW-DYGW>].

2. *The Role of Cities in Advancing Social Progress*

Cities can also be instruments of social progress, both through their ability to instigate and lead national conversations on progressive issues¹²⁶ and their ability to resist national trends that do not align with their communities' vision of justice.¹²⁷ These abilities are unique to cities because their origin is the will of the populace at the local level and further highlight the value of cities working in parallel to other enforcers in a diversified system of public rights enforcement.

Just like states, cities should serve as laboratories of democracy.¹²⁸ Affirmative litigation provides cities with one tool to both advance issues important to their local communities and simultaneously exercise national leadership on an issue by pushing its unique perspective into the national consciousness and conversation.¹²⁹ The San Francisco City Attorney's efforts to fight for marriage equality through the first government-initiated challenge to marriage laws that discriminate against same-sex couples illustrate the influence a city can have in both protecting the civil rights of its residents and in contributing to the national dialogue, influencing the law's development on a national scale.¹³⁰ In its motion for intervention, San Francisco articulated its unique interest in protecting the rights of its residents and the unique harms it experienced as a city from the

126. See Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1748 (2005) (discussing San Francisco's decision to challenge prevailing norms by marrying gay and lesbian couples).

127. Cf. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1265–72 (2009).

128. Cf. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment.”).

129. See, e.g., Joe Palazzolo, *More Cities Suit Up for Legal Actions*, WALL ST. J. (May 3, 2016), <https://www.wsj.com/articles/more-cities-suit-up-for-legal-actions-1462218870> [<https://perma.cc/59XR-957J>]; *Affirmative Litigation*, CITY ATT'Y OF S.F., <https://www.sfcityattorney.org/aboutus/teams/affirmative-litigation/> [<https://perma.cc/2N6E-VFRS>]. See generally *Affirmative Litigation*, PROVIDENCE CITY SOLICITOR, <http://www.providenceri.gov/law-department/affirmative-litigation/> [<https://perma.cc/6CR2-ZZRA>].

130. See, e.g., *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); Press Release, Office of the City Att'y of S.F., San Francisco's Legal Fight for Marriage Equality (Feb. 12, 2004), <https://www.sfcityattorney.org/2004/02/12/san-franciscos-legal-fight-for-marriage-equality/> [<https://perma.cc/7BPJ-24GT>]; Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1282–83 (2010).

denial of those rights.¹³¹ San Francisco argued that, as the local government entity responsible for enforcing California's constitutional amendment banning same-sex marriages against its LGBT citizens, it had a significant and unique interest in the action.¹³² Specifically, the city articulated "not only a financial interest in licensing and performing marriages of same-sex couples and in the tax revenues that flow from weddings held in the City, but also . . . an interest in preventing social, mental health, and other harms suffered by its LGBT citizens."¹³³

Cities can also stake out a position adverse to that adopted by the federal or state government in a way that gives voice to the will of their constituencies.¹³⁴ City affirmative litigation has been a significant tool in the "resistance" movement against actions — and inactions — of the current administration for exactly this reason.¹³⁵ Cities have articulated and advocated in court for positions that represent their residents and are at odds with state or national policy.¹³⁶ Sanctuary city policies and the recent litigation surrounding them is an example of this dynamic in play.¹³⁷ Cities have argued that their duties to protect public safety require them to build relationships of trust with local communities, and that federal

131. See Press Release, City Att'y Dennis Herrera, S.F. Moves to Intervene in Federal Challenge to Proposition 8 (July 23, 2009), <https://www.sfcityattorney.org/wp-content/uploads/2009/07/PROP8-USDIST-INTERVENTION.pdf> [<https://perma.cc/93UZ-HP2B>]; *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 926, 928–30 (N.D. Cal. 2010); *Perry v. Brown*, 671 F.3d 1052, 1065–66 (9th Cir. 2012).

132. Press Release, City Att'y Dennis Herrera, S.F. Moves to Intervene in Federal Challenge to Proposition 8 (July 23, 2009), <https://www.sfcityattorney.org/wp-content/uploads/2009/07/PROP8-USDIST-INTERVENTION.pdf> [<https://perma.cc/PH9E-QAG2>].

133. *Id.*

134. See Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1748 (2005).

135. See *generally* Complaint, *New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766 (S.D.N.Y. 2018) (No. 1:18-cv-02921) (involving cities of New York, San Francisco, Chicago, Providence, Philadelphia, and Seattle). Complaint, *City & County of San Francisco v. Sessions*, No. 3:17-cv-04642 (N.D. Cal. filed Aug. 11, 2017).

136. See *supra* note 135; Press Release, City Attorney of S.F., Herrera moves to invalidate Department of Justice grant conditions targeting sanctuary cities (July 12, 2018), <https://www.sfcityattorney.org/2018/07/12/herrera-moves-to-invalidate-department-of-justice-grant-conditions-targeting-sanctuary-cities> [<https://perma.cc/8JAA-H6BV>].

137. See *City of El Cenizo v. Texas*, 890 F.3d 164, 175 (5th Cir. 2018).

immigration enforcement by local officials undermines the safety of all residents, regardless of their citizenship or documentation.¹³⁸

Taken together, cities can effectuate the will of their constituents both as a reaction against other levels of government and as a proactive means of leading an issue that does not yet have a champion. In both cases, cities can act legitimately as representatives of their communities, vindicating the rights and interests of their residents that have either been ignored or attacked by other officials. Just as local legislation and executive decision-making can be legitimate exercises in cooperative or uncooperative federalism, so too is affirmative litigation and enforcement by cities an extension of those representational roles.¹³⁹

In this way, local enforcement activity can be both a safety valve — a redundant feature that guards against a single point of failure at another level of government — and a diversification feature — a unique opportunity for new and different actions than might otherwise be pursued at the state or federal levels. Unlike the example of the hospital back-up generator, there is no single designer responsible for the design flaw we have identified in our current system. From federal and state policymakers enacting legislation that limits the authorities of local law enforcement, to federal courts progressively circumscribing the role of private plaintiffs, to city

138. *See, e.g.*, Brief of Amici Curiae Cty. of Santa Clara et al. in Support of the City of Philadelphia’s Motion for Preliminary Injunction at 9, *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 271 (E.D. Pa. 2018) (No. 2:17-cv-03894-MMB) (“In exercising its discretion over local law enforcement policy, Philadelphia has made the considered judgment that devoting local resources to immigration enforcement would be detrimental to community safety. Philadelphia is not alone in this judgment. More than 600 counties and numerous cities — including many of the amici — have opted to limit their engagement in federal immigration enforcement efforts.”) (internal citations omitted); *see also* Brief for Plaintiff-Appellee at 2, *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018) (No. 17-cv-05720) (“The 2012 [Welcoming City Ordinance] reaffirmed that removing barriers to ‘the cooperation of all persons, both documented citizens and those without documentation status,’ with law enforcement was ‘essential to prevent and solve crimes and maintain public order, safety, and security in the entire City.’”) (internal citations omitted).

139. We acknowledge that cities have the ability to use these tools to advance all types of policies, not just those of a progressive minority. That is, after all, the nature of a representative democracy. We believe the interests of our communities will be best served, however, if enforcers at multiple levels of government are considering the rights of their communities. The more enforcers on the scene, the fewer points of failure will exist overall. Moreover, each government office is limited in its actions by the constitution and by federal, state, and local law. So, our recommendation for redundancy and diversification should insulate our communities from extreme electoral shifts at any one level of government even while shifts will inevitably happen in varying degrees over time.

officials having to make hard choices about whether to expend resources of affirmative work, the causes are complex and varied. As a result, some cities may encounter barriers to pursuing affirmative litigation, including new state preemption laws and longstanding jurisprudence limiting the power of cities. A full realization of city power would require significant changes throughout our legal and political system. Notwithstanding these obstacles, cities have the power to act now, using the powers already available to them and within the existing legal framework. They can provide redundancy and diversification of rights enforcement immediately, by using their existing tools and authorities.

CONCLUSION

This Article began with a discussion of design flaws and avoidance of single points of failure. Like the hospital dealing with downed generators during a major hurricane, our democratic process suffers from a design flaw when it comes to enforcement of our laws. The laws on the books to protect our communities are insufficiently enforced due to a confluence of factors: The current federal administration has pulled back on its enforcement of key public rights against a backdrop of already insufficient enforcement; the law related to class-action lawsuits has been increasingly constricted; the courts have increasingly accepted mandatory arbitration clauses; and the class-action waivers frequently found in mandatory arbitration clauses have limited the ability of individual plaintiffs to vindicate their own rights without a government champion. Our system is not currently designed to protect our communities' public rights when two of its key protectors – the federal government and private plaintiffs – are handicapped.

The result of this design flaw is two-fold: from a functional perspective, it means that people experience real-life harm that goes unaddressed; from a theoretical perspective, it undermines the legitimacy of our democratic institutions when society's laws lack real-life protective effect. This Article advocated for a system with built-in redundancy and diversification by design, in which every level of government is ready and able to enforce our core rights and freedoms. Affirmative litigation by cities – in addition to engagement by states – is a critical component of this framework. Cities should have the ability to be enforcers and protectors of their communities by investigating legal violations and filing lawsuits. Increasing affirmative litigation by cities is an important solution to

the democratic design flaw that will help us move toward a more effective system of ensuring our laws translate to reality.