Volume 49

Reflections on Lemon v. Kurtzman What Happened When DOGS Tasted Lemon: Australian Reflections on the Contemporary Relevance of Chief Justice Burger's Opinion in Lemon v. Kurtzman*Paul T. Babie*49 Rutgers L. Rec. 155 (2022) | WestLaw | LexisNexis **Introduction**

Professor Josh Blackman, of the South Texas College of Law, recently wrote that Chief Justice Warren Burger ?may be the least influential member of the Burger Court. In modern-day discussions about constitutional law, he barely registers. Justice Blackmun wrote Roe. Justice Powell wrote the Bakke concurrence. Justice Rehnquist led the federalism revolution. Justice Stevens led the Court's liberal wing for decades.?[1]

What about Lemon v. Kurtzman!?[2] Controversy swirls around the Court's treatment of the establishment clause and its three-prong test for determining the constitutionality of government assistance for religion in that case;[3] yet the fact of dissention alone must surely cement Lemon's place as among the most significant of the Court's pronouncements. But more than that, the ?Lemon test? has endured for fifty years as a core component of First Amendment jurisprudence.[4] Together, the controversy and the ongoing importance of the test give Lemon, and so Chief Justice Burger, a lasting place in the American pantheon of constitutional jurisprudence.

Many others have written about Lemon and its attendant controversy as part of its fiftieth anniversary in 2021.[5]This article will not add to that literature. Instead, while the days of Chief Justice Burger's Lemon legacy in American law may be numbered,[6 here I show how it nonetheless retains some relevance not only to contemporary US establishment clause jurisprudence?most recently in Espinoza v. Montana Department of Revenue[7] and in the pending Supreme Court decision in Carson v. Makin[8]?but also, and much more importantly, beyond American borders in what might seem a most unexpected way. It forms an important component of the interpretation given by the High Court of Australia (the Australian equivalent to the Supreme Court of the United States) to the establishment clause found in the Australian Constitution. For that reason, Chief Justice Burger, and Lemon, has an odd yet enduring Australian legacy found in the High Court's decision in Attorney-General (Vic); Ex Rel Black v Commonwealth.[9]

I pause here to make three preliminary points. First, to explain the title of this article. While I say more about it in Part IV, Attorney-General (Vic); Ex Rel Black v Commonwealth involved a challenge brought by an advocacy group known as the Australian Council for the Defence of Government Schools, or, as it more commonly known by its acronym, ?DOGS'.[10 That acronym has been used ever since as the name of the case. Today, one need only mention the DOGS Case and it will be immediately understood by any Australian lawyer to be a reference to Attorney-General (Vic); Ex Rel Black v Commonwealth; indeed, the case is so-called even in formal judicial and academic documents.[11] Hence, the title, and the question I address in this article: What happened when DOGS tasted Lemon? I am of course referring to Australian DOGS! Second, in 2021, Lemon and DOGS both marked important anniversaries: the former its fiftieth, the latter its fortieth; yet, notwithstanding the passage of time, in an area of law that moves quickly, both remain important statements of the law concerning establishment in their respective jurisdictions. Third, Chief Justice Burger's three-prong test in Lemon inextricably links the American and the Australian constitutions, not simply comparatively, but in a substantive way, giving that jurist an enduring legacy, not only within the United States, but also beyond its borders, and for the constitution of another nation.

Those preliminary points made, I want to do four things in this article. First, to provide the briefest of refreshers to Lemon and its significance in American Constitutional jurisprudence. Second, to compare the religion clauses found in the two constitutions. Third, to examine the High Court's decision in DOGS. Fourth, to offer concluding reflections on the Australian legacy of Lemon, and, perhaps surprisingly, the American legacy of DOGS.

[1 Josh Blackman, Will Chief Justice Burger's Official Biography Ever Arrive?, The Volokh Conspiracy (August 31, 2021) https://reason.com/volokh/2021/08/31/will-chief-justice-burgers-official-biography-ever-arrive/?.

[2 Lemon v. Kurtzman, 403 U.S. 602 (1971).

[3 See, e.g., William E. Thro & Charles J. Russo, Lemon v. Kurtzman: Reflections on a Constitutional Catastrophe, Canopy Forum (November 1, 2021) https://canopyforum.org/2021/11/01/lemon-v-kurtzman-reflections-on-a-constitutional-catastrophe/.

[4 See Robert S. Alley, The Constitution & Religion: Leading Supreme Court Cases on Church and State, 82-96 (1999); Herbert M. Kritzer & Mark J. Richards, Jurisprudential Regimes and Supreme Court Decisionmaking: The Lemon Regime and Establishment Clause Cases, 37(4) Law & Soc. Rev. 827 (2003).

[5 See, e.g., Thro & Russo, supra note 3.

[6 See Justice Gorsuch's sustained criticism in a concurring opinion in Shurtleff v. Boston, 596 U. S. ___ (2022). It is widely expected that the Court will adopt that criticism explicitly so as to overturn Lemon in its pending decision in Kennedy v. Bremerton

School District, No. 21-418.
[7 Espinoza v. Montana Department of Revenue, 140 S. Ct. 2246 (2020).
[8 Carson v. Makin, No. 20?1088, now pending before the Supreme Court of the United States. See also, The Supreme Court Seems Ready to Poke a Hole in the Church-State Wall, The Economist (December 11, 2021), https://www.economist.com/united-states/2021/12/09/the-supreme-court-seems-ready-to-poke-a-hole-in-the-church-state-wall.
[9 Attorney-General (Vic); Ex Rel Black v. Commonwealth (hereinafter ?DOGS Case?) (1981) 146 C.L.R. https://staging.hcourt.gov.au/assets/publications/judgments/1981/022--ATTORNEY-GENERAL_(VICT.);_EX_REL._BLACK_v._THE_COMMONWEALTH--(1981)_146_CLR_559.html 559 (Austl.).
[10 Id. at 575.
[11 On the name of the Australian Council for the Defense of Government Schools (DOGS) and the High Court decision, see Press Release 746, DOGS: Australian Council for the Defense of Government Schools Promoting Public Education, Freedom of Religion is Protected by Section 116: Read Murphy's Dissenting Judgement DOGS Case 1981. See also Paul Babie, National Security and the Free Exercise Guarantee of Section 116: Time for a Judicial Interpretive Update, 45(3) Fed. L. Rev. 351 (2017).
View the Entire Article] **3-D Printers**3-D Printed Firearms: How We Got Here, The Ever-Changing Threat, and How We Might Prepare for the Future*Conor O'Shaughnessy*49 Rutgers L. Rec. 136 (2022) | WestLaw | LexisNexis **Abstract**
The advent and increasing affordability of 3-D printers has brought with it new problems as well. Commercially available printers allow users to print almost anything they can think of as long as they have a design file for it. Most users use these tools to print fairly innocuous items, ranging from prototypes or models to tools, toys, and jewelry. However, the 3-D printer has also brought with it the ability for users to print unregistered and untraceable firearms from the privacy of their own homes. This problem first materialized in 2012 with Defense Distributed, an open-source company that creates digital schematics for firearms that can be downloaded and used to print those firearms by anyone with a proper 3-D printer. Defense Distributed uploaded various computer aided design (CAD) files, including the plans for a single shot pistol, The Liberator. The United States government was quick to step in and force the company to take down the CAD files while they decided if distribution of the design constituted a violation of the International Traffic in Arms Regulations (ITAR). A change in administration resulted in the government settling with Defense Distributed out of court. The Department of State issued the company a license allowing them to again distribute the plans online and announced that 3-D gun blueprints would no longer fall under the purview of ITAR. Defense Distributed's victory was short lived as various states brought lawsuits against the company, seeking to stop the dissemination of the CAD files online. While these lawsuits are ongoing, a temporary injunction remains in place that still prohibits the publishing of the gun blueprints. More recently, Defense Distributed decided to sell a CNC milling machine that is very similar to a 3-D printer. This device uses CAD files as a guide to mill aluminum into metal firearm frames and parts, allowing owners to make untraceable firearms in their homes. While these machines do not ?print? an entire weapon they still present a potential threat to public safety. The most pressing threat posed by unregulated firearms is the proliferation of at-home ghost gun kits. While the Department of Justice is on the verge of closing significant federal regulatory loopholes that have helped allow this rise in ghost guns, the surge is indicative of more problems to come. This note will describe all of the relevant background behind the 3-D printing of firearms and the evolving legal landscape. This note will then proceed to discuss the current proliferation of ghost gun kits since the beginning of the COVID-19 pandemic within the larger context of untraceable firearms. This note will also consider the existing major firearm regulatory schemes and if any of them could be used to regulate 3-D firearms in the future. Furthermore, this note addresses various constitutional hurdles that lawmakers face in attempting to regulate 3-D printed guns, the 3-D printers, or the 3-D blueprints. Lastly, this note will discuss potential solutions to the 3-D gun regulation problem and how they might be implemented sooner rather than later.
View the Entire Article Third-Party Funding Litigation Lawyers, Funds, & Money: The Legality of Third-Party Litigation Funding in the United States*Justin Boes*49 Rutgers L. Rec. 118 (2022) | WestLaw | LexisNexis **Introduction**
Imagine there is a plaintiff with a meritorious claim, but, because of the high costs of litigation, he cannot afford to bring or maintain it. Though there is a market for such claims and feasible fee arrangements are available, his claim is nonetheless rejected because of the litigation costs, the high risk of losing, and/or the unlikelihood of settlement. The claim, regardless of its merits, is over before it begins. There is now, however, one more option available to such plaintiffs: third-party litigation funding.
Increasingly, third-parties?investors with no legal interests in cases?are funding lawsuits, bearing most or all of the cost and risk of litigation.[1] In exchange for financing a lawsuit, an investor will receive a large percentage of an award or settlement.[2]
Third-party litigation funding's proponents believe it empowers claimants to bring meritorious claims against defendants, providing them the otherwise unobtainable sling and rocks needed to challenge corporate goliaths.[3] Its opponents?chief among them the U.S. Chamber Institute for Legal Reform, an affiliate of the U.S. Chamber of Commerce?believe it encourages and enables claimants to

bring frivolous and abusive claims and have, accordingly, attempted to frustrate these funding arrangements.[4]
In 2009, the U.S. Chamber Institute, recognizing that ?third-party funding governed in the United States by a patchwork of relatively weak laws, cases, rules, and regulations,? issued a seminal report on third-party litigation funding, predicting that it would cause substantial litigation abuse and that, under the doctrines of champerty and maintenance, it must be prohibited.[5]
American courts, despite the Institute's arguments, have largely upheld these arrangements on public policy grounds, concluding, like Australian and English courts before them, that, whatever the potential for abuse, third-party litigation funding allows low-resourced claimants greater access to justice.[6] The U.S. Chamber Institute thus re-focused its attention on the issue of disclosure, arguing that financing agreements must be disclosed to defendants.[7] In the twelve years since the Report's publication, American courts have grappled with the Institute's arguments and have, by and large, rejected them, permitting third-party litigation funding and placing materials relating to these financing agreements beyond the scope of discovery.[8]
Part I of this Note provides a general overview of third-party litigation funding, from its modern origins in Australia and England to the litigation market as currently constituted in the United States. It concludes with a discussion of the U.S. Chamber Institute's 2009 Report, putting it in the political context of the tort-reform movement.
Part II reviews court opinions over the last decade that have considered the issue of whether the doctrines of champerty and maintenance necessarily bar third-party litigation funding in the United States, issues that were unlitigated when the Chamber Institute published its 2009 Report.
Part III reviews court opinions over the last decade concerning third-party litigation funding in the discovery context. In particular, whether financing agreements are generally ?relevant? within the meaning of Federal Rule of Civil Procedure 26(a) as well as whether these agreements are protected under attorney-client privilege or the work-product doctrine.
Finally, Part IV briefly considers other developments regarding the disclosure of third-party litigation financing agreements. In particular, an Institute-sponsored proposal to add an additional fifth prong to Rule 26(a) to the Rules of Civil Procedure, which would require parties to disclose financing agreements to opposing parties ?without awaiting a discovery request.?[9]
[1 Victoria A. Shannon, Harmonizing Third-Party Litigation Funding, 36 Cardozo L. Rev. 861, 863 (2015).
[2 Id.
[3 See Joseph J. Stroble & Laura Welikson, Third-Party Litigation Funding: A Review of Recent Industry Developments, 87 Def. Couns. J. 1, 2 (2020).
[4 See generally John Beisner et al., U.S. Chamber Inst. For Legal Reform, Selling More Lawsuits, Buying More Trouble: Third-Party Litigation Funding a Decade Later (2020) [hereinafter Chamber Report II.
[5 John Beisner et al., U.S. Chamber Inst. For Legal Reform, Selling Lawsuits, Buying Trouble: Third-Party Litigation Funding in the United States (2009) [hereinafter Chamber Report I.
[6 See Stroble & Welikson, supra note 4, at 7.
[7 Chamber Report II, supra note 5, at 26.A
[8 See Stroble & Welikson, supra note 4, at 10?15.
[9 Fed. R. Civ. P. 26(a). **View the Entire Article Equal Protection**Racial Barriers to Equal Protection: United States v. Madero *Nelson Torres-Rios*49 Rutgers L. Rec. 102 (2022) | WestLaw | LexisNexis **Abstract**
For most Americans, United States citizenship guarantees all the rights and privileges provided by the federal constitution. For the 3 million American citizens who reside in Puerto Rico, a population greater than 20 states,[1 the constitution does not provide for representation in Congress nor participation in federal elections.[2 Facing dire needs resulting from hurricanes, earthquakes, and fiscal crises, these American citizens seek the assistance of the judicial branch which has historically ignored their constitutional claims. The relationship between Puerto Rico and the U.S. federal government underscores most of its challenges. The U.S. Supreme Court and U.S. Congress continue to promote a political relationship that contradicts fundamental constitutional principles such as Equal Protection guaranteed by the Fifth and Fourteenth Amendments.[3 With the century-old ?Insular Cases? which define the constitutional contours between the island and the federal government, the court continues to ignore that 98 percent of Americans living in the territories are racial minorities.[4 United States v. Vaello Madero[5 exemplifies the colonial relationship that will test whether the Supreme Court will ignore its constitutional duty to extend the Equal Protection Clause[6 to the American citizens of Puerto Rico via a heightened scrutiny analysis, or, in the alternative, continue to hold that Congress acting under its plenary power pursuant to the Territorial Clause,[7 may treat Puerto Rico differently than the states.[8 Under proper review, Puerto Rico's population, reflecting a suspect class via ethnicity and race, mandates the court's application of strict scrutiny in lieu of the rational basis test.[9 [1 The Population of Puerto Rico Exceeds the Populations of 20 States, Puerto Rico Report (last updated June 25, 2020), https://www.puertoricoreport.com/population-puerto-rico-exceeds-populations-21-states/#.YfsHrGBOlhB.

[2 Aaron Steckelberg & Chiqui Esteban, More than 4 Million Americans Don't Have Anyone to Vote for Them in Congress, Washington Post (Sep. 28, 2017), https://www.washingtonpost.com/graphics/2017/national/fair-representation/.
[3 ?Equal Protection?, Legal Information Institute (last visited Feb. 9, 2022), https://www.law.cornell.edu/wex/equal_protection#:~:text=Equal%20Protection%20refers%20to%20the,in%20similar%20conditions%20and%20circumstances.
[4] Hunter Schwarz, John Oliver on Why U.S. Territories Don't Have Full Voting Rights, Washington Post (Mar. 9, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/03/09/john-oliver-on-why-u-s-territories-dont-have-full-voting-rights/; see also note 14 infrafor a discussion of the Insular Cases.
[5 United States v. Vaello Madero, 956 F.3d 12 (1st Cir. 2020). Note that some sources use ?Vaello Madero? or ?Vaello-Madero? inconsistently or interchangeably. The editors have used the spelling ?Vaello Madero? throughout the article for clarity.
[6 James Madison, one of the most influential framers of the U.S. Constitution and author of the Federalist Papers, focused on the concept of equal protection and the dangers of majoritarian attacks against minorities. See James S. Liebman & Brandon L. Garett, Madisonian Equal Protection, 104 Colum. L. Rev. 837 (2004) (?James Madison greatest works of constitutional theory-his writings leading up to the Convention, his speeches there, and Nos. 10 and 51 of The Federalist, following the Convention-focus on the problem of equal protection. His overarching concern-what he called the most 'dreadful class of evils' besetting the new nation under the Articles of Confederation, more dreadful even than the weak national government-was the "factious spirit" in the states which chronically drove stable and interested majorities to enact 'unjust' measures benefiting themselves while systematically neglecting or harming weaker groups and the public good. In a more modern tongue, the most serious problem the new constitution had to solve was discrimination against persistently disfavored groups through state action lacking a sufficient relationship to legitimate state ends?). Id. at 843. The Federalist Papers also place the constitutional duty on judges who are ?likewise the best authorities to entrust with the role of enforcing external protections of the few (minorities) from the many (majorities), because they are the least likely to try to aggrandize the kind of power in the few (the government) that most threatens the many (the people).? Id. at 926. ?Madison's writings in the constitutional period contain three references to 'injustices? or ?oppression' based on the victims' personal status. The first two-crucially, given the nation's subsequent history, are to factions defined by race. The third is to government preferences among practitioners of different occupations. Id. at 867.
[7 The Territorial Clause and its reach were held to be temporary in nature as early as 1787. ?And a legislative power ?without limitation? is A REPUGNANCY TO CONSTITUTIONAL GOVERNMENT which was expressly avoided by the Framers. There is no form of Federal governance of any kind authorized under the Property Clause, nor is there any form of Federal governance authorized under its progenitor, the Resolution of October 10, 1780. Federal territorial governance of a particular sort is authorized but ONLY under the Northwest Ordinance of July 13, 1787. And by this ordinance, the role of Congress in Federal territorial governance is both temporary and indirect. See Bill Howell, Federal Power over Public Lands: A Critical Analysis of Congressional Research Service Report RL30126, American Lands Council (Oct. 1, 2019), https://www.congress.gov/116/meeting/house/110088/documents/HHRG-116-II13-20191017-SD043.pdf.
[8 Califano v. Gautier Torres, 435 U.S. 1, 3 n.4 (1978) (per curiam) (?Congress has the power to treat Puerto Rico differently, and that every federal program does not have to be extended to it?).
[9 Classification on which to base disparate treatment of particular groups of people, should be scrutinized to determine if it violates equal protection. See Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 271-272 (1979). Depending on the classification at issue, courts apply different levels of review. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439-441 (1985). Because Puerto Rico is overwhelmingly populated by a minority group, the court should thus apply strict scrutiny, which provides that ?Certain suspect classifications?race, alienage and national origin?require what the Court calls strict scrutiny, which entails both a compelling governmental interest and narrow tailoring.? Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F. 3d 1, 8-9 (1st Cir. 2012) (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); see also Cleburne, 473 U.S. at 439-41 (suspect classifications are often ?deemed to reflect prejudice and antipathy, a view that those in the burdened class are not as worthy or deserving as others,? and because ?such discrimination is unlikely to be soon rectified by legislative means?); Washington v. Davis, 426 U.S. 229, 239 (1976) (noting that a ?central purpose? of equal protection ?is the prevention of official conduct discriminating on the basis of race?).
View the Entire Article The Affordable Care ActACA on Life Support: The Affordable Care Act, Medicaid Expansion, and Reckoning with Sebelius During the COVID-19 Pandemic*Kyle J. Kilkenny*49 Rutgers L. Rec. 81 (2021) | WestLaw | LexisNexis
Abstract
In an effort to address the cost of healthcare and the number of uninsured people in the United States, Congress passed the Patient

Protection and Affordable Care Act, commonly called the ?Affordable Care Act,? ?ACA,? or ?Obamacare,? in 2010. Signed into law by President Barack Obama, the Act required states to expand Medicaid coverage to various segments of the population not previously covered by the program, or states may lose all of their federal Medicaid funding. Additionally, a provision known as the ?individual mandate? required those uninsured by the government or their employer to either pay a small penalty to the Internal Revenue Service or purchase private insurance. In 2012, a group of 26 states and other parties sued Health and Human Services Secretary, Kathleen Sebelius, and related parties regarding the constitutionality of the statute. In a 5-4 decision, the U.S. Supreme Court in National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012), found the individual mandate constitutional under Congress's power to tax but found the Medicaid expansion provision to be unconstitutionally coercive under Congress's spending power.

This note will seek to further contextualize Justice Ginsburg's dissent, which argued the Medicaid expansion provision should not have been struck down by the majority, as the states are merely expecting Medicaid funds from Congress, but they are not at all entitled to them if they do not meet the criteria set by Congress, in the present moment. This note will explore the COVID-19 pandemic and the role that the states and the federal government ought to play in ensuring the general welfare of the nation is protected, primarily by either expanding Medicaid or otherwise ensuring free healthcare in response to the greatest economic and health crisis in over a century. To achieve this, the note will revisit the ACA and the Supreme Court's spending clause analysis given the changing dimensions of the healthcare debate, with employer-sponsored insurance enrollment declining (along with overall employment) and government insurance and subsidies for COVID-19 testing dominating the market, and analyze, through a policy-oriented lens, whether states ought to take the lead in closing the so-called ?coverage gap,? or whether Congress should have the power to expand insurance in a cooperative federalism model, especially in a deadly pandemic emergency which was not at all contemplated by the Court in Sebelius.

View the entire article LGBTQ+ Equality The Future of LGBTQ+ Equality After Obergefell and Bostock*Victoria D. Manuel*49 Rutgers L. Rec. 60 (2021) | WestLaw | LexisNexis **Abstract**

The Supreme Court's decisions in Obergefell v. Hodges and Bostock v. Clayton County are justly regarded as landmark decisions in American jurisprudence and, more importantly, significant milestones in the history of lesbian, gay, bisexual, transgender, and queer (?LGBTQ+?) Americans. However, these important decisions are not the end of the movement for LGBTQ+ equality, and many more obstacles remain for the LGBTQ+ community.

This article will begin with an overview of the legal history of sexual orientation and gender identity in the United States; the recognition of and enactment of constitutional and civil rights by courts and legislatures; and the discrimination performed by each. The next part is an overview of the future of sexual orientation and gender identity law, including the Equality Act and other legal issues.

The thesis of this article is to state the urgent need for passage of the Equality Act and the introduction and passage of other legal devices that will relieve the undue burdens still faced by ordinary LGBTQ+ Americans after the Supreme Court's decisions in Obergefell v. Hodges and Bostock v. Clayton County.

View the entire Article Interstate Compacts The Nostalgia of Eternity: Interstate Compacts, Time, and Mortality*Sheldon H. Laskin* 49 Rutgers L. Rec. 25 (2021) | WestLaw | LexisNexis **Introduction**

?Although the idea of permanence appears to be traditionally associated with legislation, law is inevitably constrained by time. Laws are doomed to face a destiny like the mythological character Kronos: they overthrow existing laws, have a period to reign, but are destined to be overthrown again by the next generation. Like Kronos, legislators often experience the ?nostalgia of eternity,' refusing their mortality as well as that of their rules." [2

An interstate compact designed to promote uniformity in state taxation would appear to have little in common with an interstate compact designed to fight corruption in the Port of New York.[3 Yet recent cases concerning these two very different subjects illustrate that interstate compacts can experience similar aging issues that can create an existential crisis decades after their formation. Who could have anticipated when the New York Waterfront Commission Compact was adopted in 1953 that the proliferation of containerized shipping would cause New Jersey, one of the Compact's two parties, to attempt to withdraw from the Compact in 2018, leading to litigation over its right to do so?[4 And who would have predicted when the Multistate Tax Compact was formed in 1967 that the adoption of an income tax apportionment formula by a non-party state would, three decades later, cause the Compact states to abandon a different apportionment formula that had been integral to the Compact from its inception, leading to multiple lawsuits challenging their authority to do so?[5

It should not be surprising that the passage of time can cause even the most well-reasoned and carefully written compact to become destabilized in a much different economic or legal environment than existed when it was written. When that occurs, it isn't easy to

?fix? the compact to address the problem. Interstate compacts are often considered contracts.[6 If they were private contracts, the parties to the contract would always be free to modify it. But because interstate compacts are also statutes, modifying the compact is no easy task. First, the compact must provide a method to modify it. And then the legislature in each state would need to enact a statute that makes the change. The situation is even more complicated if the compact is a congressionally approved compact like the Waterfront Compact. Such compacts constitute federal law.[7 Congress would usually need to approve any change to such a compact.[8 If the compact provides no mechanism to resolve the problem, the compact may face an existential crisis ? states may determine the only solution is to withdraw. This is precisely what happened with the Waterfront Compact and the Multistate Tax Compact. This Article explores the derivation, causes and ? at least in the case of the Multistate Tax Compact ? the resolution of such a crisis.

While it is not possible to anticipate all the circumstances that could adversely affect a compact's continuing viability, it is possible to include certain tools in the compact that can help the states more nimbly adapt to those changed circumstances than through the vagaries of litigation. The Article will explore some of those tools.

Part II of the Article will recount a brief history of the New York Waterfront Commission Compact and the Multistate Tax Compact. Part III will describe the developments that led to the litigation that threatened each Compact's continuing viability. Part IV will discuss the recent litigation that threatened both compacts and the deficiencies in each compact that made litigation likely. Part V will suggest some legal tools that future compact drafters might consider to reduce the likelihood of such destabilizing litigation occurring. Part VI will offer a brief conclusion.

[2 Antonios Kouroutakis & Sofia Ranchordás, Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies, 25 Minn. J. Int'l L. 29, 49?50 (2016) (footnotes omitted).

[3 U.S. Const. art. I, § 10, cl. 3. (providing ?No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State.?). Justice Story defined an ?agreement? or ?compact? to refer to ?private rights of sovereignty; such as questions of boundary; interests in land situate in the territory of each other; and other internal regulations for the mutual comfort and convenience of states bordering on each other.? 2 Story, Commentaries on the Constitution of the United States (5th ed. 1891), sec. 1403, as cited in Comment, The Power of the States to Make Compacts, 31 Yale L.J. 635, 636 (1922). Notwithstanding the seemingly mandatory requirement of congressional consent, the Supreme Court has made clear that many such agreements or compacts among states do not require congressional approval. See, e,g., Virginia v. Tennessee, 148 U.S. 503 (1893); New Hampshire v. Maine, 426 U.S. 363 (1976); United States Steel Corporation v. Multistate Tax Commission, 434 U.S. 452 (1978). Interstate compacts do not require congressional consent if they do not ?enhance the political power of the member States in a way that encroaches upon the supremacy of the United States.? United States Steel Corp., 434 U.S. at 472.

[4 Waterfront Commission of N.Y. Harbor v. Murphy, 429 F. Supp. 3d 1 (D.N.J. 2019), rev'd and remanded for dismissal, 961 F. 3d 234 (3d Cir. 2020), cert. denied No. 20 ? 772, -- S. Ct. --, 2021 WL 5434352(2021).

[5 Moorman Manufacturing Company v. Bair, 437 U.S. 267 (1978); Gillette Commercial Operations v. Dep't. of Treasury, 878 N.W. 2d 891 (Mich. App. 2015), appeal denied 880 N.W. 2d 230 (MI 2016), cert. denied 137 S. Ct. 2157 (2017); Gillette Company v. Franchise Tax Board, 363 P. 3d 94 (CA 2015), cert. denied 137 S. Ct. 294 (2016); Kimberly-Clark Corporation v. Commissioner of Revenue, 880 N.W. 2d 844 (Minn. 2016), cert. denied 137 S. Ct. 598 (2016); Graphic Packaging Corp. v. Hegar, 538 S.W. 3d 89 (Texas 2017); Health Net. Inc. v. Dep't. of Revenue, 415 P.3d 1034 (OR 2018).

[6 See, e.g., Green v. Biddle. 21 U.S. (8 Wheat.) 1, 92-93 (1823).

[7 Cuyler v. Adams, 449 U.S. 433 (1981).

[8 Congress has in effect preauthorized New York and New Jersey to amend the Waterfront Compact by both states enacting mutual legislation. Waterfront Commission Compact, N. Y.-N. J., Pub. L. No. 83-252, 67 Stat. 541 (1953).

View the entire article] **Anti-Slapp Statutes**The Need for Uniform Exemptions in State Anti-SLAPP Statutes*Tanvi Valsangikar*49 Rutgers L. Rec. 1 (2021) | WestLaw | LexisNexis **Introduction**

Strategic lawsuits against public participation (SLAPPs) are baseless lawsuits that weaponize the judicial system to chill critics' exercise of free speech on matters of significant public concern by burdening them with pointless litigation and escalating legal costs. Many states have rightly recognized the danger of SLAPP suits to citizens' First Amendment rights of free speech and expression and have responded by passing laws, called anti-SLAPP statutes, that allow for the swift dismissal of these frivolous suits.[2 These statutes protect citizens' right to free speech in any type of forum on any issue of public importance by providing mechanisms for expedited dismissals of SLAPP suits for defendants and imposing mandatory penalties of attorney fees or litigation costs for plaintiffs who cannot meet the burden of proving their claims have a valid legal foundation.

But while some state anti-SLAPP statutes are intended to *protect* First Amendment interests, they can paradoxically have the effect

of *preventing* people who need to turn to the courts to vindicate legal interests from doing so. Some of the anti-SLAPP statutes' broad definitions of protected activity may inadvertently discourage plaintiffs with meritorious claims from utilizing the courts, as the scope of protected activities appears to leave little room for plaintiffs to raise a valid complaint and lends the statute to misuse by opportunistic defendants. For example, in *Hunter v. CBS Broadcasting, Inc.*,[3 the defendants eluded a legitimate employment discrimination claim by exploiting the California anti-SLAPP statute's broad requirement that protected activity must be of interest to the public. In response to Hunter's contention that CBS had not hired him for a weatherman position because he was older and a male, CBS was able to misuse the anti-SLAPP statute to argue that a television station's selection of weather news anchors qualified as an issue of public interest because weather reporting itself was an issue of public interest.[4 The California appellate court accepted this interpretation of the statute to hold that CBS' activity was protected by the First Amendment and remanded the case for the trial court to consider whether Hunter had demonstrated a reasonable probability of prevailing on the merits of his claims.[5
The *Hunter* case is not the only instance of defendants misusing anti-SLAPP motions. Indeed, one California Supreme Court decision observed that the anti-SLAPP motion would soon be used as a cure-all to circumvent legitimate cases in which the motion was never intended to apply.[6 Thus, this note compares various state anti-SLAPP statutes to analyze how successfully they protect defendants from frivolous lawsuits and the extent to which they unwittingly prevent plaintiffs with legitimate civil claims from pursuing redress. Drawing on this analysis, the note proposes a uniform set of exemptions that seeks to protect financially insecure litigants who are most vulnerable to SLAPP suits and who do not have the resources to defend themselves from baseless claims.
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[3 Hunter v. CBS Broadcasting, Inc., 221 Cal. App. 4th 1510 (Cal. Ct. App. 2013).
[4 Nina Golden, *SLAPP Down: The Use (and Abuse) of Anti-SLAPP Motions to Strike*, 12 RUTGERS J. PUB. POL'Y 1, 28 (2015).
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View the entire article] Older Issues ? **INTRODUCTION**

Imagine there is a plaintiff with a meritorious claim, but, because of the high costs of litigation, he cannot afford to bring or maintain it. Though there is a market for such claims and feasible fee arrangements are available, his claim is nonetheless rejected because of the litigation costs, the high risk of losing, and/or the unlikelihood of settlement. The claim, regardless of its merits, is over before it begins. There is now, however, one more option available to such plaintiffs: third-party litigation funding.

Increasingly, third-parties?investors with no legal interests in cases?are funding lawsuits, bearing most or all of the cost and risk of litigation.[1] In exchange for financing a lawsuit, an investor will receive a large percentage of an award or settlement.[2]

Third-party litigation funding's proponents believe it empowers claimants to bring meritorious claims against defendants, providing them the otherwise unobtainable sling and rocks needed to challenge corporate goliaths.[3] Its opponents?chief among them the U.S. Chamber Institute for Legal Reform, an affiliate of the U.S. Chamber of Commerce?believe it encourages and enables claimants to bring frivolous and abusive claims and have, accordingly, attempted to frustrate these funding arrangements.[4]

In 2009, the U.S. Chamber Institute, recognizing that ?third-party funding governed in the United States by a patchwork of relatively weak laws, cases, rules, and regulations,? issued a seminal report on third-party litigation funding, predicting that it would cause substantial litigation abuse and that, under the doctrines of champerty and maintenance, it must be prohibited.[5]

American courts, despite the Institute's arguments, have largely upheld these arrangements on public policy grounds, concluding, like Australian and English courts before them, that, whatever the potential for abuse, third-party litigation funding allows low-resourced claimants greater access to justice.[6] The U.S. Chamber Institute thus re-focused its attention on the issue of disclosure, arguing that financing agreements must be disclosed to defendants.[7] In the twelve years since the Report's publication, American courts have grappled with the Institute's arguments and have, by and large, rejected them, permitting third-party litigation funding and placing materials relating to these financing agreements beyond the scope of discovery.[8]

Part I of this Note provides a general overview of third-party litigation funding, from its modern origins in Australia and England to the litigation market as currently constituted in the United States. It concludes with a discussion of the U.S. Chamber Institute's 2009 Report, putting it in the political context of the tort-reform movement.

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[7 Chamber Report II, supra note 5, at 26.A
[8 See Stroble & Welikson, supra note 4, at 10?15.
[9 Fed. R. Civ. P. 26(a). **View the Entire Article Equal Protection**Racial Barriers to Equal Protection: United States v. Madero *Nelson Torres-Rios*49 Rutgers L. Rec. 102 (2022) | WestLaw | LexisNexis **Abstract**
For most Americans, United States citizenship guarantees all the rights and privileges provided by the federal constitution. For the 3 million American citizens who reside in Puerto Rico, a population greater than 20 states,[1 the constitution does not provide for representation in Congress nor participation in federal elections.[2 Facing dire needs resulting from hurricanes, earthquakes, and fiscal crises, these American citizens seek the assistance of the judicial branch which has historically ignored their constitutional claims. The relationship between Puerto Rico and the U.S. federal government underscores most of its challenges. The U.S. Supreme Court and U.S. Congress continue to promote a political relationship that contradicts fundamental constitutional principles such as Equal Protection guaranteed by the Fifth and Fourteenth Amendments.[3 With the century-old ?Insular Cases? which define the constitutional contours between the island and the federal government, the court continues to ignore that 98 percent of Americans living in the territories are racial minorities.[4 United States v. Vaello Madero[5 exemplifies the colonial relationship that will test whether the Supreme Court will ignore its constitutional duty to extend the Equal Protection Clause[6 to the American citizens of Puerto Rico via a heightened scrutiny analysis, or, in the alternative, continue to hold that Congress acting under its plenary power pursuant to the Territorial Clause,[7 may treat Puerto Rico differently than the states.[8 Under proper review, Puerto Rico's population, reflecting a suspect class via ethnicity and race, mandates the court's application of strict scrutiny in lieu of the rational basis test.[9 [1 The Population of Puerto Rico Exceeds the Populations of 20 States, Puerto Rico Report (last updated June 25, 2020), https://www.puertoricoreport.com/population-puerto-rico-exceeds-populations-21-states/#.YfsHrGBOlhB.
[2 Aaron Steckelberg & Chiqui Esteban, More than 4 Million Americans Don't Have Anyone to Vote for Them in Congress, Washington Post (Sep. 28, 2017), https://www.washingtonpost.com/graphics/2017/national/fair-representation/.
[3 ?Equal Protection?, Legal Information Institute (last visited Feb. 9, 2022), https://www.law.cornell.edu/wex/equal_protection#:~:text=Equal%20Protection%20refers%20to%20the,in%20similar%20conditions%20and%20circumstances.
[4] Hunter Schwarz, John Oliver on Why U.S. Territories Don't Have Full Voting Rights, Washington Post (Mar. 9, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/03/09/john-oliver-on-why-u-s-territories-dont-have-full-voting-rights/; see also note 14 infrafor a discussion of the Insular Cases.
[5 United States v. Vaello Madero, 956 F.3d 12 (1st Cir. 2020). Note that some sources use ?Vaello Madero? or ?Vaello-Madero? inconsistently or interchangeably. The editors have used the spelling ?Vaello Madero? throughout the article for clarity.
[6 James Madison, one of the most influential framers of the U.S. Constitution and author of the Federalist Papers, focused on the concept of equal protection and the dangers of majoritarian attacks against minorities. See James S. Liebman & Brandon L. Garett, Madisonian Equal Protection, 104 Colum. L. Rev. 837 (2004) (?James Madison greatest works of constitutional theory-his writings leading up to the Convention, his speeches there, and Nos. 10 and 51 of The Federalist, following the Convention-focus on the problem of equal protection. His overarching concern-what he called the most 'dreadful class of evils' besetting the new nation under the Articles of Confederation, more dreadful even than the weak national government-was the "factious spirit" in the states which

chronically drove stable and interested majorities to enact 'unjust' measures benefiting themselves while systematically neglecting or harming weaker groups and the public good. In a more modern tongue, the most serious problem the new constitution had to solve was discrimination against persistently disfavored groups through state action lacking a sufficient relationship to legitimate state ends?). Id. at 843. The Federalist Papers also place the constitutional duty on judges who are ?likewise the best authorities to entrust with the role of enforcing external protections of the few (minorities) from the many (majorities), because they are the least likely to try to aggrandize the kind of power in the few (the government) that most threatens the many (the people).? Id. at 926. ?Madison's writings in the constitutional period contain three references to 'injustices? or ?oppression' based on the victims' personal status. The first two-crucially, given the nation's subsequent history, are to factions defined by race. The third is to government preferences among practitioners of different occupations. Id. at 867.

[7 The Territorial Clause and its reach were held to be temporary in nature as early as 1787. ?And a legislative power ?without limitation? is A REPUGNANCY TO CONSTITUTIONAL GOVERNMENT which was expressly avoided by the Framers. There is no form of Federal governance of any kind authorized under the Property Clause, nor is there any form of Federal governance authorized under its progenitor, the Resolution of October 10, 1780. Federal territorial governance of a particular sort is authorized but ONLY under the Northwest Ordinance of July 13, 1787. And by this ordinance, the role of Congress in Federal territorial governance is both temporary and indirect. See Bill Howell, Federal Power over Public Lands: A Critical Analysis of Congressional Research Service Report RL30126, American Lands Council (Oct. 1, 2019), https://www.congress.gov/116/meeting/house/110088/documents/HHRG-116-II13-20191017-SD043.pdf.

[8 Califano v. Gautier Torres, 435 U.S. 1, 3 n.4 (1978) (per curiam) (?Congress has the power to treat Puerto Rico differently, and that every federal program does not have to be extended to it?).

[9 Classification on which to base disparate treatment of particular groups of people, should be scrutinized to determine if it violates equal protection. See Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 271-272 (1979). Depending on the classification at issue, courts apply different levels of review. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439-441 (1985). Because Puerto Rico is overwhelmingly populated by a minority group, the court should thus apply strict scrutiny, which provides that ?Certain suspect classifications?race, alienage and national origin?require what the Court calls strict scrutiny, which entails both a compelling governmental interest and narrow tailoring.? Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F. 3d 1, 8-9 (1st Cir. 2012) (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); see also Cleburne, 473 U.S. at 439-41 (suspect classifications are often ?deemed to reflect prejudice and antipathy, a view that those in the burdened class are not as worthy or deserving as others,? and because ?such discrimination is unlikely to be soon rectified by legislative means?); Washington v. Davis, 426 U.S. 229, 239 (1976) (noting that a ?central purpose? of equal protection ?is the prevention of official conduct discriminating on the basis of race?).

View the Entire Article The Affordable Care ActACA on Life Support: The Affordable Care Act, Medicaid Expansion, and Reckoning with Sebelius During the COVID-19 Pandemic*Kyle J. Kilkenny*49 Rutgers L. Rec. 81 (2021) | WestLaw | LexisNexis

Abstract

In an effort to address the cost of healthcare and the number of uninsured people in the United States, Congress passed the Patient Protection and Affordable Care Act, commonly called the ?Affordable Care Act,? ?ACA,? or ?Obamacare,? in 2010. Signed into law by President Barack Obama, the Act required states to expand Medicaid coverage to various segments of the population not previously covered by the program, or states may lose all of their federal Medicaid funding. Additionally, a provision known as the ?individual mandate? required those uninsured by the government or their employer to either pay a small penalty to the Internal Revenue Service or purchase private insurance. In 2012, a group of 26 states and other parties sued Health and Human Services Secretary, Kathleen Sebelius, and related parties regarding the constitutionality of the statute. In a 5-4 decision, the U.S. Supreme Court in National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012), found the individual mandate constitutional under Congress's power to tax but found the Medicaid expansion provision to be unconstitutionally coercive under Congress's spending power.

This note will seek to further contextualize Justice Ginsburg's dissent, which argued the Medicaid expansion provision should not have been struck down by the majority, as the states are merely expecting Medicaid funds from Congress, but they are not at all entitled to them if they do not meet the criteria set by Congress, in the present moment. This note will explore the COVID-19 pandemic and the role that the states and the federal government ought to play in ensuring the general welfare of the nation is protected, primarily by either expanding Medicaid or otherwise ensuring free healthcare in response to the greatest economic and health crisis in over a century. To achieve this, the note will revisit the ACA and the Supreme Court's spending clause analysis given the changing dimensions of the healthcare debate, with employer-sponsored insurance enrollment declining (along with overall

employment) and government insurance and subsidies for COVID-19 testing dominating the market, and analyze, through a policy-oriented lens, whether states ought to take the lead in closing the so-called ?coverage gap,? or whether Congress should have the power to expand insurance in a cooperative federalism model, especially in a deadly pandemic emergency which was not at all contemplated by the Court in Sebelius.

View the entire article LGBTQ+ Equality The Future of LGBTQ+ Equality After Obergefell and Bostock*Victoria D. Manuel*49 Rutgers L. Rec. 60 (2021) | WestLaw | LexisNexis **Abstract**

The Supreme Court's decisions in Obergefell v. Hodges and Bostock v. Clayton County are justly regarded as landmark decisions in American jurisprudence and, more importantly, significant milestones in the history of lesbian, gay, bisexual, transgender, and queer (?LGBTQ+?) Americans. However, these important decisions are not the end of the movement for LGBTQ+ equality, and many more obstacles remain for the LGBTQ+ community.

This article will begin with an overview of the legal history of sexual orientation and gender identity in the United States; the recognition of and enactment of constitutional and civil rights by courts and legislatures; and the discrimination performed by each. The next part is an overview of the future of sexual orientation and gender identity law, including the Equality Act and other legal issues.

The thesis of this article is to state the urgent need for passage of the Equality Act and the introduction and passage of other legal devices that will relieve the undue burdens still faced by ordinary LGBTQ+ Americans after the Supreme Court's decisions in Obergefell v. Hodges and Bostock v. Clayton County.

View the entire Article Interstate Compacts The Nostalgia of Eternity: Interstate Compacts, Time, and Mortality*Sheldon H. Laskin* 49 Rutgers L. Rec. 25 (2021) | WestLaw | LexisNexis **Introduction**

?Although the idea of permanence appears to be traditionally associated with legislation, law is inevitably constrained by time. Laws are doomed to face a destiny like the mythological character Kronos: they overthrow existing laws, have a period to reign, but are destined to be overthrown again by the next generation. Like Kronos, legislators often experience the ?nostalgia of eternity,' refusing their mortality as well as that of their rules." [2

An interstate compact designed to promote uniformity in state taxation would appear to have little in common with an interstate compact designed to fight corruption in the Port of New York.[3 Yet recent cases concerning these two very different subjects illustrate that interstate compacts can experience similar aging issues that can create an existential crisis decades after their formation. Who could have anticipated when the New York Waterfront Commission Compact was adopted in 1953 that the proliferation of containerized shipping would cause New Jersey, one of the Compact's two parties, to attempt to withdraw from the Compact in 2018, leading to litigation over its right to do so?[4 And who would have predicted when the Multistate Tax Compact was formed in 1967 that the adoption of an income tax apportionment formula by a non-party state would, three decades later, cause the Compact states to abandon a different apportionment formula that had been integral to the Compact from its inception, leading to multiple lawsuits challenging their authority to do so?[5

It should not be surprising that the passage of time can cause even the most well-reasoned and carefully written compact to become destabilized in a much different economic or legal environment than existed when it was written. When that occurs, it isn't easy to ?fix? the compact to address the problem. Interstate compacts are often considered contracts.[6 If they were private contracts, the parties to the contract would always be free to modify it. But because interstate compacts are also statutes, modifying the compact is no easy task. First, the compact must provide a method to modify it. And then the legislature in each state would need to enact a statute that makes the change. The situation is even more complicated if the compact is a congressionally approved compact like the Waterfront Compact. Such compacts constitute federal law.[7 Congress would usually need to approve any change to such a compact.[8 If the compact provides no mechanism to resolve the problem, the compact may face an existential crisis ? states may determine the only solution is to withdraw. This is precisely what happened with the Waterfront Compact and the Multistate Tax Compact. This Article explores the derivation, causes and ? at least in the case of the Multistate Tax Compact ? the resolution of such a crisis.

While it is not possible to anticipate all the circumstances that could adversely affect a compact's continuing viability, it is possible to include certain tools in the compact that can help the states more nimbly adapt to those changed circumstances than through the vagaries of litigation. The Article will explore some of those tools.

Part II of the Article will recount a brief history of the New York Waterfront Commission Compact and the Multistate Tax Compact. Part III will describe the developments that led to the litigation that threatened each Compact's continuing viability. Part IV will discuss the recent litigation that threatened both compacts and the deficiencies in each compact that made litigation likely. Part V will suggest some legal tools that future compact drafters might consider to reduce the likelihood of such destabilizing litigation

occurring. Part VI will offer a brief conclusion.
[2 Antonios Kouroutakis & Sofia Ranchordás, Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies, 25 Minn. J. Int'l L. 29, 49?50 (2016) (footnotes omitted).
[3 U.S. Const. art. I, § 10, cl. 3. (providing ?No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State.?). Justice Story defined an ?agreement? or ?compact? to refer to ?private rights of sovereignty; such as questions of boundary; interests in land situate in the territory of each other; and other internal regulations for the mutual comfort and convenience of states bordering on each other.? 2 Story, Commentaries on the Constitution of the United States (5th ed. 1891), sec. 1403, as cited in Comment, The Power of the States to Make Compacts, 31 Yale L.J. 635, 636 (1922). Notwithstanding the seemingly mandatory requirement of congressional consent, the Supreme Court has made clear that many such agreements or compacts among states do not require congressional approval. See, e,g., Virginia v. Tennessee, 148 U.S. 503 (1893); New Hampshire v. Maine, 426 U.S. 363 (1976); United States Steel Corporation v. Multistate Tax Commission, 434 U.S. 452 (1978). Interstate compacts do not require congressional consent if they do not ?enhance the political power of the member States in a way that encroaches upon the supremacy of the United States.? United States Steel Corp., 434 U.S. at 472.
[4 Waterfront Commission of N.Y. Harbor v. Murphy, 429 F. Supp. 3d 1 (D.N.J. 2019), rev'd and remanded for dismissal, 961 F. 3d 234 (3d Cir. 2020), cert. denied No. 20 ? 772, -- S. Ct. --, 2021 WL 5434352(2021).
[5 Moorman Manufacturing Company v. Bair, 437 U.S. 267 (1978); Gillette Commercial Operations v. Dep't. of Treasury, 878 N.W. 2d 891 (Mich. App. 2015), appeal denied 880 N.W. 2d 230 (MI 2016), cert. denied 137 S. Ct. 2157 (2017); Gillette Company v. Franchise Tax Board, 363 P. 3d 94 (CA 2015), cert. denied 137 S. Ct. 294 (2016); Kimberly-Clark Corporation v. Commissioner of Revenue, 880 N.W. 2d 844 (Minn. 2016), cert. denied 137 S. Ct. 598 (2016); Graphic Packaging Corp. v. Hegar, 538 S.W. 3d 89 (Texas 2017); Health Net. Inc. v. Dep't. of Revenue, 415 P.3d 1034 (OR 2018).
[6 See, e.g., Green v. Biddle. 21 U.S. (8 Wheat.) 1, 92-93 (1823).
[7 Cuyler v. Adams, 449 U.S. 433 (1981).
[8 Congress has in effect preauthorized New York and New Jersey to amend the Waterfront Compact by both states enacting mutual legislation. Waterfront Commission Compact, N. Y.-N. J., Pub. L. No. 83-252, 67 Stat. 541 (1953).
View the entire article] **Anti-Slapp Statutes**The Need for Uniform Exemptions in State Anti-SLAPP Statutes*Tanvi Valsangikar*49 Rutgers L. Rec. 1 (2021) | WestLaw | LexisNexis **Introduction**
Strategic lawsuits against public participation (SLAPPs) are baseless lawsuits that weaponize the judicial system to chill critics' exercise of free speech on matters of significant public concern by burdening them with pointless litigation and escalating legal costs. Many states have rightly recognized the danger of SLAPP suits to citizens' First Amendment rights of free speech and expression and have responded by passing laws, called anti-SLAPP statutes, that allow for the swift dismissal of these frivolous suits.[2 These statutes protect citizens' right to free speech in any type of forum on any issue of public importance by providing mechanisms for expedited dismissals of SLAPP suits for defendants and imposing mandatory penalties of attorney fees or litigation costs for plaintiffs who cannot meet the burden of proving their claims have a valid legal foundation.
But while some state anti-SLAPP statutes are intended to *protect* First Amendment interests, they can paradoxically have the effect of *preventing* people who need to turn to the courts to vindicate legal interests from doing so. Some of the anti-SLAPP statutes' broad definitions of protected activity may inadvertently discourage plaintiffs with meritorious claims from utilizing the courts, as the scope of protected activities appears to leave little room for plaintiffs to raise a valid complaint and lends the statute to misuse by opportunistic defendants. For example, in *Hunter v. CBS Broadcasting, Inc.*,[3 the defendants eluded a legitimate employment discrimination claim by exploiting the California anti-SLAPP statute's broad requirement that protected activity must be of interest to the public. In response to Hunter's contention that CBS had not hired him for a weatherman position because he was older and a male, CBS was able to misuse the anti-SLAPP statute to argue that a television station's selection of weather news anchors qualified as an issue of public interest because weather reporting itself was an issue of public interest.[4 The California appellate court accepted this interpretation of the statute to hold that CBS' activity was protected by the First Amendment and remanded the case for the trial court to consider whether Hunter had demonstrated a reasonable probability of prevailing on the merits of his claims.[5
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[3 Hunter v. CBS Broadcasting, Inc., 221 Cal. App. 4th 1510 (Cal. Ct. App. 2013).
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Third-Party Funding Litigation Lawyers, Funds, & Money: The Legality of Third-Party Litigation Funding in the United States *Justin Boes*49 Rutgers L. Rec. 118 (2022) | WestLaw | LexisNexis **INTRODUCTION**
Imagine there is a plaintiff with a meritorious claim, but, because of the high costs of litigation, he cannot afford to bring or maintain it. Though there is a market for such claims and feasible fee arrangements are available, his claim is nonetheless rejected because of the litigation costs, the high risk of losing, and/or the unlikelihood of settlement. The claim, regardless of its merits, is over before it begins. There is now, however, one more option available to such plaintiffs: third-party litigation funding.
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[9 Fed. R. Civ. P. 26(a). **View the Entire Article Equal Protection**Racial Barriers to Equal Protection: United States v. Madero *Nelson Torres-Rios*49 Rutgers L. Rec. 102 (2022) | WestLaw | LexisNexis **Abstract**
For most Americans, United States citizenship guarantees all the rights and privileges provided by the federal constitution. For the 3 million American citizens who reside in Puerto Rico, a population greater than 20 states,[1 the constitution does not provide for representation in Congress nor participation in federal elections.[2 Facing dire needs resulting from hurricanes, earthquakes, and fiscal crises, these American citizens seek the assistance of the judicial branch which has historically ignored their constitutional claims. The relationship between Puerto Rico and the U.S. federal government underscores most of its challenges. The U.S. Supreme Court and U.S. Congress continue to promote a political relationship that contradicts fundamental constitutional principles such as Equal Protection guaranteed by the Fifth and Fourteenth Amendments.[3 With the century-old ?Insular Cases? which define the constitutional contours between the island and the federal government, the court continues to ignore that 98 percent of Americans living in the territories are racial minorities.[4 United States v. Vaello Madero[5 exemplifies the colonial relationship that will test whether the Supreme Court will ignore its constitutional duty to extend the Equal Protection Clause[6 to the American citizens of Puerto Rico via a heightened scrutiny analysis, or, in the alternative, continue to hold that Congress acting under its plenary power pursuant to the Territorial Clause,[7 may treat Puerto Rico differently than the states.[8 Under proper review, Puerto Rico's population, reflecting a suspect class via ethnicity and race, mandates the court's application of strict scrutiny in lieu of the rational basis test.[9 [1 The Population of Puerto Rico Exceeds the Populations of 20 States, Puerto Rico Report (last updated June 25, 2020), https://www.puertoricoreport.com/population-puerto-rico-exceeds-populations-21-states/#.YfsHrGBOlhB.
[2 Aaron Steckelberg & Chiqui Esteban, More than 4 Million Americans Don't Have Anyone to Vote for Them in Congress, Washington Post (Sep. 28, 2017), https://www.washingtonpost.com/graphics/2017/national/fair-representation/.
[3 ?Equal Protection?, Legal Information Institute (last visited Feb. 9, 2022), https://www.law.cornell.edu/wex/equal_protection#:~:text=Equal%20Protection%20refers%20to%20the,in%20similar%20conditions%20and%20circumstances.
[4] Hunter Schwarz, John Oliver on Why U.S. Territories Don't Have Full Voting Rights, Washington Post (Mar. 9, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/03/09/john-oliver-on-why-u-s-territories-dont-have-full-voting-rights/; see also note 14 infrafor a discussion of the Insular Cases.
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The Affordable Care ActACA on Life Support: The Affordable Care Act, Medicaid Expansion, and Reckoning with Sebelius During the COVID-19 Pandemic*Kyle J. Kilkenny*49 Rutgers L. Rec. 81 (2021) | WestLaw | LexisNexis **Abstract**
For most Americans, United States citizenship guarantees all the rights and privileges provided by the federal constitution. For the 3 million American citizens who reside in Puerto Rico, a population greater than 20 states,[1 the constitution does not provide for representation in Congress nor participation in federal elections.[2 Facing dire needs resulting from hurricanes, earthquakes, and fiscal crises, these American citizens seek the assistance of the judicial branch which has historically ignored their constitutional claims. The relationship between Puerto Rico and the U.S. federal government underscores most of its challenges. The U.S. Supreme Court and U.S. Congress continue to promote a political relationship that contradicts fundamental constitutional principles such as Equal Protection guaranteed by the Fifth and Fourteenth Amendments.[3 With the century-old ?Insular Cases? which define the constitutional contours between the island and the federal government, the court continues to ignore that 98 percent of Americans living in the territories are racial minorities.[4 United States v. Vaello Madero[5 exemplifies the colonial relationship that will test whether the Supreme Court will ignore its constitutional duty to extend the Equal Protection Clause[6 to the American citizens of Puerto

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In an effort to address the cost of healthcare and the number of uninsured people in the United States, Congress passed the Patient Protection and Affordable Care Act, commonly called the ?Affordable Care Act,? ?ACA,? or ?Obamacare,? in 2010. Signed into law by President Barack Obama, the Act required states to expand Medicaid coverage to various segments of the population not previously covered by the program, or states may lose all of their federal Medicaid funding. Additionally, a provision known as the ?individual mandate? required those uninsured by the government or their employer to either pay a small penalty to the Internal Revenue Service or purchase private insurance. In 2012, a group of 26 states and other parties sued Health and Human Services Secretary, Kathleen Sebelius, and related parties regarding the constitutionality of the statute. In a 5-4 decision, the U.S. Supreme Court in National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012), found the individual mandate constitutional under Congress's power to tax but found the Medicaid expansion provision to be unconstitutionally coercive under Congress's spending power.
This note will seek to further contextualize Justice Ginsburg's dissent, which argued the Medicaid expansion provision should not have been struck down by the majority, as the states are merely expecting Medicaid funds from Congress, but they are not at all entitled to them if they do not meet the criteria set by Congress, in the present moment. This note will explore the COVID-19 pandemic and the role that the states and the federal government ought to play in ensuring the general welfare of the nation is protected, primarily by either expanding Medicaid or otherwise ensuring free healthcare in response to the greatest economic and

health crisis in over a century. To achieve this, the note will revisit the ACA and the Supreme Court's spending clause analysis given the changing dimensions of the healthcare debate, with employer-sponsored insurance enrollment declining (along with overall employment) and government insurance and subsidies for COVID-19 testing dominating the market, and analyze, through a policy-oriented lens, whether states ought to take the lead in closing the so-called ?coverage gap,? or whether Congress should have the power to expand insurance in a cooperative federalism model, especially in a deadly pandemic emergency which was not at all contemplated by the Court in Sebelius.

View the entire article LGBTQ+ Equality The Future of LGBTQ+ Equality After Obergefell and Bostock*Victoria D. Manuel*49 Rutgers L. Rec. 60 (2021) | WestLaw | LexisNexis **Abstract**

The Supreme Court's decisions in Obergefell v. Hodges and Bostock v. Clayton County are justly regarded as landmark decisions in American jurisprudence and, more importantly, significant milestones in the history of lesbian, gay, bisexual, transgender, and queer (?LGBTQ+?) Americans. However, these important decisions are not the end of the movement for LGBTQ+ equality, and many more obstacles remain for the LGBTQ+ community.

This article will begin with an overview of the legal history of sexual orientation and gender identity in the United States; the recognition of and enactment of constitutional and civil rights by courts and legislatures; and the discrimination performed by each. The next part is an overview of the future of sexual orientation and gender identity law, including the Equality Act and other legal issues.

The thesis of this article is to state the urgent need for passage of the Equality Act and the introduction and passage of other legal devices that will relieve the undue burdens still faced by ordinary LGBTQ+ Americans after the Supreme Court's decisions in Obergefell v. Hodges and Bostock v. Clayton County.

View the entire Article Interstate Compacts The Nostalgia of Eternity: Interstate Compacts, Time, and Mortality*Sheldon H. Laskin* 49 Rutgers L. Rec. 25 (2021) | WestLaw | LexisNexis **Introduction**

?Although the idea of permanence appears to be traditionally associated with legislation, law is inevitably constrained by time. Laws are doomed to face a destiny like the mythological character Kronos: they overthrow existing laws, have a period to reign, but are destined to be overthrown again by the next generation. Like Kronos, legislators often experience the ?nostalgia of eternity,' refusing their mortality as well as that of their rules." [2

An interstate compact designed to promote uniformity in state taxation would appear to have little in common with an interstate compact designed to fight corruption in the Port of New York.[3 Yet recent cases concerning these two very different subjects illustrate that interstate compacts can experience similar aging issues that can create an existential crisis decades after their formation. Who could have anticipated when the New York Waterfront Commission Compact was adopted in 1953 that the proliferation of containerized shipping would cause New Jersey, one of the Compact's two parties, to attempt to withdraw from the Compact in 2018, leading to litigation over its right to do so?[4 And who would have predicted when the Multistate Tax Compact was formed in 1967 that the adoption of an income tax apportionment formula by a non-party state would, three decades later, cause the Compact states to abandon a different apportionment formula that had been integral to the Compact from its inception, leading to multiple lawsuits challenging their authority to do so?[5

It should not be surprising that the passage of time can cause even the most well-reasoned and carefully written compact to become destabilized in a much different economic or legal environment than existed when it was written. When that occurs, it isn't easy to ?fix? the compact to address the problem. Interstate compacts are often considered contracts.[6 If they were private contracts, the parties to the contract would always be free to modify it. But because interstate compacts are also statutes, modifying the compact is no easy task. First, the compact must provide a method to modify it. And then the legislature in each state would need to enact a statute that makes the change. The situation is even more complicated if the compact is a congressionally approved compact like the Waterfront Compact. Such compacts constitute federal law.[7 Congress would usually need to approve any change to such a compact.[8 If the compact provides no mechanism to resolve the problem, the compact may face an existential crisis ? states may determine the only solution is to withdraw. This is precisely what happened with the Waterfront Compact and the Multistate Tax Compact. This Article explores the derivation, causes and ? at least in the case of the Multistate Tax Compact ? the resolution of such a crisis.

While it is not possible to anticipate all the circumstances that could adversely affect a compact's continuing viability, it is possible to include certain tools in the compact that can help the states more nimbly adapt to those changed circumstances than through the vagaries of litigation. The Article will explore some of those tools.

Part II of the Article will recount a brief history of the New York Waterfront Commission Compact and the Multistate Tax Compact. Part III will describe the developments that led to the litigation that threatened each Compact's continuing viability. Part IV will

discuss the recent litigation that threatened both compacts and the deficiencies in each compact that made litigation likely. Part V will suggest some legal tools that future compact drafters might consider to reduce the likelihood of such destabilizing litigation occurring. Part VI will offer a brief conclusion.

[2 Antonios Kouroutakis & Sofia Ranchordás, Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies, 25 Minn. J. Int'l L. 29, 49?50 (2016) (footnotes omitted).

[3 U.S. Const. art. I, § 10, cl. 3. (providing ?No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State.?). Justice Story defined an ?agreement? or ?compact? to refer to ?private rights of sovereignty; such as questions of boundary; interests in land situate in the territory of each other; and other internal regulations for the mutual comfort and convenience of states bordering on each other.? 2 Story, Commentaries on the Constitution of the United States (5th ed. 1891), sec. 1403, as cited in Comment, The Power of the States to Make Compacts, 31 Yale L.J. 635, 636 (1922). Notwithstanding the seemingly mandatory requirement of congressional consent, the Supreme Court has made clear that many such agreements or compacts among states do not require congressional approval. See, e,g., Virginia v. Tennessee, 148 U.S. 503 (1893); New Hampshire v. Maine, 426 U.S. 363 (1976); United States Steel Corporation v. Multistate Tax Commission, 434 U.S. 452 (1978). Interstate compacts do not require congressional consent if they do not ?enhance the political power of the member States in a way that encroaches upon the supremacy of the United States.? United States Steel Corp., 434 U.S. at 472.

[4 Waterfront Commission of N.Y. Harbor v. Murphy, 429 F. Supp. 3d 1 (D.N.J. 2019), rev'd and remanded for dismissal, 961 F. 3d 234 (3d Cir. 2020), cert. denied No. 20 ? 772, -- S. Ct. --, 2021 WL 5434352(2021).

[5 Moorman Manufacturing Company v. Bair, 437 U.S. 267 (1978); Gillette Commercial Operations v. Dep't. of Treasury, 878 N.W. 2d 891 (Mich. App. 2015), appeal denied 880 N.W. 2d 230 (MI 2016), cert. denied 137 S. Ct. 2157 (2017); Gillette Company v. Franchise Tax Board, 363 P. 3d 94 (CA 2015), cert. denied 137 S. Ct. 294 (2016); Kimberly-Clark Corporation v. Commissioner of Revenue, 880 N.W. 2d 844 (Minn. 2016), cert. denied 137 S. Ct. 598 (2016); Graphic Packaging Corp. v. Hegar, 538 S.W. 3d 89 (Texas 2017); Health Net. Inc. v. Dep't. of Revenue, 415 P.3d 1034 (OR 2018).

[6 See, e.g., Green v. Biddle. 21 U.S. (8 Wheat.) 1, 92-93 (1823).

[7 Cuyler v. Adams, 449 U.S. 433 (1981).

[8 Congress has in effect preauthorized New York and New Jersey to amend the Waterfront Compact by both states enacting mutual legislation. Waterfront Commission Compact, N. Y.-N. J., Pub. L. No. 83-252, 67 Stat. 541 (1953).

View the entire article] **Anti-Slapp Statutes**The Need for Uniform Exemptions in State Anti-SLAPP Statutes*Tanvi Valsangikar*49 Rutgers L. Rec. 1 (2021) | WestLaw | LexisNexis **Introduction**

Strategic lawsuits against public participation (SLAPPs) are baseless lawsuits that weaponize the judicial system to chill critics' exercise of free speech on matters of significant public concern by burdening them with pointless litigation and escalating legal costs. Many states have rightly recognized the danger of SLAPP suits to citizens' First Amendment rights of free speech and expression and have responded by passing laws, called anti-SLAPP statutes, that allow for the swift dismissal of these frivolous suits.[2 These statutes protect citizens' right to free speech in any type of forum on any issue of public importance by providing mechanisms for expedited dismissals of SLAPP suits for defendants and imposing mandatory penalties of attorney fees or litigation costs for plaintiffs who cannot meet the burden of proving their claims have a valid legal foundation.

But while some state anti-SLAPP statutes are intended to *protect* First Amendment interests, they can paradoxically have the effect of *preventing* people who need to turn to the courts to vindicate legal interests from doing so. Some of the anti-SLAPP statutes' broad definitions of protected activity may inadvertently discourage plaintiffs with meritorious claims from utilizing the courts, as the scope of protected activities appears to leave little room for plaintiffs to raise a valid complaint and lends the statute to misuse by opportunistic defendants. For example, in *Hunter v. CBS Broadcasting, Inc.*,[3 the defendants eluded a legitimate employment discrimination claim by exploiting the California anti-SLAPP statute's broad requirement that protected activity must be of interest to the public. In response to Hunter's contention that CBS had not hired him for a weatherman position because he was older and a male, CBS was able to misuse the anti-SLAPP statute to argue that a television station's selection of weather news anchors qualified as an issue of public interest because weather reporting itself was an issue of public interest.[4 The California appellate court accepted this interpretation of the statute to hold that CBS' activity was protected by the First Amendment and remanded the case for the trial court to consider whether Hunter had demonstrated a reasonable probability of prevailing on the merits of his claims.[5 The *Hunter* case is not the only instance of defendants misusing anti-SLAPP motions. Indeed, one California Supreme Court decision observed that the anti-SLAPP motion would soon be used as a cure-all to circumvent legitimate cases in which the motion was never intended to apply.[6 Thus, this note compares various state anti-SLAPP statutes to analyze how successfully they protect defendants from frivolous lawsuits and the extent to which they unwittingly prevent plaintiffs with legitimate civil claims from

pursuing redress. Drawing on this analysis, the note proposes a uniform set of exemptions that seeks to protect financially insecure litigants who are most vulnerable to SLAPP suits and who do not have the resources to defend themselves from baseless claims.
[2 *State Anti-SLAPP Laws*, PUBLIC PARTICIPATION PROJECT, https://anti-slapp.org/your-states-free-speech-protection#scorecard (last visited Dec. 31, 2020) (identifying the scope of anti-SLAPP laws in Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Guam, Hawaii, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia and Washington).
[3 Hunter v. CBS Broadcasting, Inc., 221 Cal. App. 4th 1510 (Cal. Ct. App. 2013).
[4 Nina Golden, *SLAPP Down: The Use (and Abuse) of Anti-SLAPP Motions to Strike*, 12 RUTGERS J. PUB. POL'Y 1, 28 (2015).
[5 *Id.* [6 *See* Briggs v. Eden Council for Hope & Opportunity, 969 P.2d 564 (Cal. 1999) (Baxter, J., dissenting).
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INTRODUCTION

Imagine there is a plaintiff with a meritorious claim, but, because of the high costs of litigation, he cannot afford to bring or maintain it. Though there is a market for such claims and feasible fee arrangements are available, his claim is nonetheless rejected because of the litigation costs, the high risk of losing, and/or the unlikelihood of settlement. The claim, regardless of its merits, is over before it begins. There is now, however, one more option available to such plaintiffs: third-party litigation funding.

Increasingly, third-parties?investors with no legal interests in cases?are funding lawsuits, bearing most or all of the cost and risk of litigation.[1] In exchange for financing a lawsuit, an investor will receive a large percentage of an award or settlement.[2]

Third-party litigation funding's proponents believe it empowers claimants to bring meritorious claims against defendants, providing them the otherwise unobtainable sling and rocks needed to challenge corporate goliaths.[3] Its opponents?chief among them the U.S. Chamber Institute for Legal Reform, an affiliate of the U.S. Chamber of Commerce?believe it encourages and enables claimants to bring frivolous and abusive claims and have, accordingly, attempted to frustrate these funding arrangements.[4]

In 2009, the U.S. Chamber Institute, recognizing that ?third-party funding governed in the United States by a patchwork of relatively weak laws, cases, rules, and regulations,? issued a seminal report on third-party litigation funding, predicting that it would cause substantial litigation abuse and that, under the doctrines of champerty and maintenance, it must be prohibited.[5]

American courts, despite the Institute's arguments, have largely upheld these arrangements on public policy grounds, concluding, like Australian and English courts before them, that, whatever the potential for abuse, third-party litigation funding allows low-resourced claimants greater access to justice.[6] The U.S. Chamber Institute thus re-focused its attention on the issue of disclosure, arguing that financing agreements must be disclosed to defendants.[7] In the twelve years since the Report's publication, American courts have grappled with the Institute's arguments and have, by and large, rejected them, permitting third-party litigation funding and placing materials relating to these financing agreements beyond the scope of discovery.[8]

Part I of this Note provides a general overview of third-party litigation funding, from its modern origins in Australia and England to the litigation market as currently constituted in the United States. It concludes with a discussion of the U.S. Chamber Institute's 2009 Report, putting it in the political context of the tort-reform movement.

Part II reviews court opinions over the last decade that have considered the issue of whether the doctrines of champerty and maintenance necessarily bar third-party litigation funding in the United States, issues that were unlitigated when the Chamber Institute published its 2009 Report.

Part III reviews court opinions over the last decade concerning third-party litigation funding in the discovery context. In particular, whether financing agreements are generally ?relevant? within the meaning of Federal Rule of Civil Procedure 26(a) as well as whether these agreements are protected under attorney-client privilege or the work-product doctrine.

Finally, Part IV briefly considers other developments regarding the disclosure of third-party litigation financing agreements. In particular, an Institute-sponsored proposal to add an additional fifth prong to Rule 26(a) to the Rules of Civil Procedure, which would require parties to disclose financing agreements to opposing parties ?without awaiting a discovery request.?[9]

[1 Victoria A. Shannon, Harmonizing Third-Party Litigation Funding, 36 Cardozo L. Rev. 861, 863 (2015).
[2 Id.
[3 See Joseph J. Stroble & Laura Welikson, Third-Party Litigation Funding: A Review of Recent Industry Developments, 87 Def. Couns. J. 1, 2 (2020).
[4 See generally John Beisner et al., U.S. Chamber Inst. For Legal Reform, Selling More Lawsuits, Buying More Trouble: Third-Party Litigation Funding a Decade Later (2020) [hereinafter Chamber Report II.
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[2 Aaron Steckelberg & Chiqui Esteban, More than 4 Million Americans Don't Have Anyone to Vote for Them in Congress, Washington Post (Sep. 28, 2017), https://www.washingtonpost.com/graphics/2017/national/fair-representation/.
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[9 Classification on which to base disparate treatment of particular groups of people, should be scrutinized to determine if it violates equal protection. See Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 271-272 (1979). Depending on the classification at issue, courts apply different levels of review. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439-441 (1985). Because Puerto Rico is overwhelmingly populated by a minority group, the court should thus apply strict scrutiny, which provides that ?Certain suspect classifications?race, alienage and national origin?require what the Court calls strict scrutiny, which entails both a compelling governmental interest and narrow tailoring.? Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F. 3d 1, 8-9 (1st Cir. 2012) (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); see also Cleburne, 473 U.S. at 439-41 (suspect classifications are often ?deemed to reflect prejudice and antipathy, a view that those in the burdened class are not as worthy or deserving as others,? and because ?such discrimination is unlikely to be soon rectified by legislative means?); Washington v. Davis, 426 U.S. 229, 239 (1976) (noting that a ?central purpose? of equal protection ?is the prevention of official conduct discriminating on the basis of race?).
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The Affordable Care ActACA on Life Support: The Affordable Care Act, Medicaid Expansion, and Reckoning with Sebelius During the COVID-19 Pandemic*Kyle J. Kilkenny*49 Rutgers L. Rec. 81 (2021) | WestLaw | LexisNexis **Abstract**
For most Americans, United States citizenship guarantees all the rights and privileges provided by the federal constitution. For the 3 million American citizens who reside in Puerto Rico, a population greater than 20 states,[1 the constitution does not provide for representation in Congress nor participation in federal elections.[2 Facing dire needs resulting from hurricanes, earthquakes, and fiscal crises, these American citizens seek the assistance of the judicial branch which has historically ignored their constitutional claims. The relationship between Puerto Rico and the U.S. federal government underscores most of its challenges. The U.S. Supreme Court and U.S. Congress continue to promote a political relationship that contradicts fundamental constitutional principles such as Equal Protection guaranteed by the Fifth and Fourteenth Amendments.[3 With the century-old ?Insular Cases? which define the constitutional contours between the island and the federal government, the court continues to ignore that 98 percent of Americans living in the territories are racial minorities.[4 United States v. Vaello Madero[5 exemplifies the colonial relationship that will test whether the Supreme Court will ignore its constitutional duty to extend the Equal Protection Clause[6 to the American citizens of Puerto

The Affordable Care ActACA on Life Support: The Affordable Care Act, Medicaid Expansion, and Reckoning with Sebelius During the COVID-19 Pandemic*Kyle J. Kilkenny*49 Rutgers L. Rec. 81 (2021) | WestLaw | LexisNexis **Abstract**
In an effort to address the cost of healthcare and the number of uninsured people in the United States, Congress passed the Patient Protection and Affordable Care Act, commonly called the ?Affordable Care Act,? ?ACA,? or ?Obamacare,? in 2010. Signed into law by President Barack Obama, the Act required states to expand Medicaid coverage to various segments of the population not previously covered by the program, or states may lose all of their federal Medicaid funding. Additionally, a provision known as the ?individual mandate? required those uninsured by the government or their employer to either pay a small penalty to the Internal Revenue Service or purchase private insurance. In 2012, a group of 26 states and other parties sued Health and Human Services Secretary, Kathleen Sebelius, and related parties regarding the constitutionality of the statute. In a 5-4 decision, the U.S. Supreme Court in National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012), found the individual mandate constitutional under Congress's power to tax but found the Medicaid expansion provision to be unconstitutionally coercive under Congress's spending power.
This note will seek to further contextualize Justice Ginsburg's dissent, which argued the Medicaid expansion provision should not have been struck down by the majority, as the states are merely expecting Medicaid funds from Congress, but they are not at all entitled to them if they do not meet the criteria set by Congress, in the present moment. This note will explore the COVID-19 pandemic and the role that the states and the federal government ought to play in ensuring the general welfare of the nation is protected, primarily by either expanding Medicaid or otherwise ensuring free healthcare in response to the greatest economic and

health crisis in over a century. To achieve this, the note will revisit the ACA and the Supreme Court's spending clause analysis given the changing dimensions of the healthcare debate, with employer-sponsored insurance enrollment declining (along with overall employment) and government insurance and subsidies for COVID-19 testing dominating the market, and analyze, through a policy-oriented lens, whether states ought to take the lead in closing the so-called ?coverage gap,? or whether Congress should have the power to expand insurance in a cooperative federalism model, especially in a deadly pandemic emergency which was not at all contemplated by the Court in Sebelius.

View the entire article LGBTQ+ Equality The Future of LGBTQ+ Equality After Obergefell and Bostock*Victoria D. Manuel*49 Rutgers L. Rec. 60 (2021) | WestLaw | LexisNexis **Abstract**

The Supreme Court's decisions in Obergefell v. Hodges and Bostock v. Clayton County are justly regarded as landmark decisions in American jurisprudence and, more importantly, significant milestones in the history of lesbian, gay, bisexual, transgender, and queer (?LGBTQ+?) Americans. However, these important decisions are not the end of the movement for LGBTQ+ equality, and many more obstacles remain for the LGBTQ+ community.

This article will begin with an overview of the legal history of sexual orientation and gender identity in the United States; the recognition of and enactment of constitutional and civil rights by courts and legislatures; and the discrimination performed by each. The next part is an overview of the future of sexual orientation and gender identity law, including the Equality Act and other legal issues.

The thesis of this article is to state the urgent need for passage of the Equality Act and the introduction and passage of other legal devices that will relieve the undue burdens still faced by ordinary LGBTQ+ Americans after the Supreme Court's decisions in Obergefell v. Hodges and Bostock v. Clayton County.

View the entire Article Interstate Compacts The Nostalgia of Eternity: Interstate Compacts, Time, and Mortality*Sheldon H. Laskin* 49 Rutgers L. Rec. 25 (2021) | WestLaw | LexisNexis **Introduction**

?Although the idea of permanence appears to be traditionally associated with legislation, law is inevitably constrained by time. Laws are doomed to face a destiny like the mythological character Kronos: they overthrow existing laws, have a period to reign, but are destined to be overthrown again by the next generation. Like Kronos, legislators often experience the ?nostalgia of eternity,' refusing their mortality as well as that of their rules." [2

An interstate compact designed to promote uniformity in state taxation would appear to have little in common with an interstate compact designed to fight corruption in the Port of New York.[3 Yet recent cases concerning these two very different subjects illustrate that interstate compacts can experience similar aging issues that can create an existential crisis decades after their formation. Who could have anticipated when the New York Waterfront Commission Compact was adopted in 1953 that the proliferation of containerized shipping would cause New Jersey, one of the Compact's two parties, to attempt to withdraw from the Compact in 2018, leading to litigation over its right to do so?[4 And who would have predicted when the Multistate Tax Compact was formed in 1967 that the adoption of an income tax apportionment formula by a non-party state would, three decades later, cause the Compact states to abandon a different apportionment formula that had been integral to the Compact from its inception, leading to multiple lawsuits challenging their authority to do so?[5

It should not be surprising that the passage of time can cause even the most well-reasoned and carefully written compact to become destabilized in a much different economic or legal environment than existed when it was written. When that occurs, it isn't easy to ?fix? the compact to address the problem. Interstate compacts are often considered contracts.[6 If they were private contracts, the parties to the contract would always be free to modify it. But because interstate compacts are also statutes, modifying the compact is no easy task. First, the compact must provide a method to modify it. And then the legislature in each state would need to enact a statute that makes the change. The situation is even more complicated if the compact is a congressionally approved compact like the Waterfront Compact. Such compacts constitute federal law.[7 Congress would usually need to approve any change to such a compact.[8 If the compact provides no mechanism to resolve the problem, the compact may face an existential crisis ? states may determine the only solution is to withdraw. This is precisely what happened with the Waterfront Compact and the Multistate Tax Compact. This Article explores the derivation, causes and ? at least in the case of the Multistate Tax Compact ? the resolution of such a crisis.

While it is not possible to anticipate all the circumstances that could adversely affect a compact's continuing viability, it is possible to include certain tools in the compact that can help the states more nimbly adapt to those changed circumstances than through the vagaries of litigation. The Article will explore some of those tools.

Part II of the Article will recount a brief history of the New York Waterfront Commission Compact and the Multistate Tax Compact. Part III will describe the developments that led to the litigation that threatened each Compact's continuing viability. Part IV will

discuss the recent litigation that threatened both compacts and the deficiencies in each compact that made litigation likely. Part V will suggest some legal tools that future compact drafters might consider to reduce the likelihood of such destabilizing litigation occurring. Part VI will offer a brief conclusion.

[2 Antonios Kouroutakis & Sofia Ranchordás, Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies, 25 Minn. J. Int'l L. 29, 49?50 (2016) (footnotes omitted).

[3 U.S. Const. art. I, § 10, cl. 3. (providing ?No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State.?). Justice Story defined an ?agreement? or ?compact? to refer to ?private rights of sovereignty; such as questions of boundary; interests in land situate in the territory of each other; and other internal regulations for the mutual comfort and convenience of states bordering on each other.? 2 Story, Commentaries on the Constitution of the United States (5th ed. 1891), sec. 1403, as cited in Comment, The Power of the States to Make Compacts, 31 Yale L.J. 635, 636 (1922). Notwithstanding the seemingly mandatory requirement of congressional consent, the Supreme Court has made clear that many such agreements or compacts among states do not require congressional approval. See, e,g., Virginia v. Tennessee, 148 U.S. 503 (1893); New Hampshire v. Maine, 426 U.S. 363 (1976); United States Steel Corporation v. Multistate Tax Commission, 434 U.S. 452 (1978). Interstate compacts do not require congressional consent if they do not ?enhance the political power of the member States in a way that encroaches upon the supremacy of the United States.? United States Steel Corp., 434 U.S. at 472.

[4 Waterfront Commission of N.Y. Harbor v. Murphy, 429 F. Supp. 3d 1 (D.N.J. 2019), rev'd and remanded for dismissal, 961 F. 3d 234 (3d Cir. 2020), cert. denied No. 20 ? 772, -- S. Ct. --, 2021 WL 5434352(2021).

[5 Moorman Manufacturing Company v. Bair, 437 U.S. 267 (1978); Gillette Commercial Operations v. Dep't. of Treasury, 878 N.W. 2d 891 (Mich. App. 2015), appeal denied 880 N.W. 2d 230 (MI 2016), cert. denied 137 S. Ct. 2157 (2017); Gillette Company v. Franchise Tax Board, 363 P. 3d 94 (CA 2015), cert. denied 137 S. Ct. 294 (2016); Kimberly-Clark Corporation v. Commissioner of Revenue, 880 N.W. 2d 844 (Minn. 2016), cert. denied 137 S. Ct. 598 (2016); Graphic Packaging Corp. v. Hegar, 538 S.W. 3d 89 (Texas 2017); Health Net. Inc. v. Dep't. of Revenue, 415 P.3d 1034 (OR 2018).

[6 See, e.g., Green v. Biddle. 21 U.S. (8 Wheat.) 1, 92-93 (1823).

[7 Cuyler v. Adams, 449 U.S. 433 (1981).

[8 Congress has in effect preauthorized New York and New Jersey to amend the Waterfront Compact by both states enacting mutual legislation. Waterfront Commission Compact, N. Y.-N. J., Pub. L. No. 83-252, 67 Stat. 541 (1953).

View the entire article] **Anti-Slapp Statutes**The Need for Uniform Exemptions in State Anti-SLAPP Statutes*Tanvi Valsangikar*49 Rutgers L. Rec. 1 (2021) | WestLaw | LexisNexis **Introduction**

Strategic lawsuits against public participation (SLAPPs) are baseless lawsuits that weaponize the judicial system to chill critics' exercise of free speech on matters of significant public concern by burdening them with pointless litigation and escalating legal costs. Many states have rightly recognized the danger of SLAPP suits to citizens' First Amendment rights of free speech and expression and have responded by passing laws, called anti-SLAPP statutes, that allow for the swift dismissal of these frivolous suits.[2 These statutes protect citizens' right to free speech in any type of forum on any issue of public importance by providing mechanisms for expedited dismissals of SLAPP suits for defendants and imposing mandatory penalties of attorney fees or litigation costs for plaintiffs who cannot meet the burden of proving their claims have a valid legal foundation.

But while some state anti-SLAPP statutes are intended to *protect* First Amendment interests, they can paradoxically have the effect of *preventing* people who need to turn to the courts to vindicate legal interests from doing so. Some of the anti-SLAPP statutes' broad definitions of protected activity may inadvertently discourage plaintiffs with meritorious claims from utilizing the courts, as the scope of protected activities appears to leave little room for plaintiffs to raise a valid complaint and lends the statute to misuse by opportunistic defendants. For example, in *Hunter v. CBS Broadcasting, Inc.*,[3 the defendants eluded a legitimate employment discrimination claim by exploiting the California anti-SLAPP statute's broad requirement that protected activity must be of interest to the public. In response to Hunter's contention that CBS had not hired him for a weatherman position because he was older and a male, CBS was able to misuse the anti-SLAPP statute to argue that a television station's selection of weather news anchors qualified as an issue of public interest because weather reporting itself was an issue of public interest.[4 The California appellate court accepted this interpretation of the statute to hold that CBS' activity was protected by the First Amendment and remanded the case for the trial court to consider whether Hunter had demonstrated a reasonable probability of prevailing on the merits of his claims.[5 The *Hunter* case is not the only instance of defendants misusing anti-SLAPP motions. Indeed, one California Supreme Court decision observed that the anti-SLAPP motion would soon be used as a cure-all to circumvent legitimate cases in which the motion was never intended to apply.[6 Thus, this note compares various state anti-SLAPP statutes to analyze how successfully they protect defendants from frivolous lawsuits and the extent to which they unwittingly prevent plaintiffs with legitimate civil claims from

pursuing redress. Drawing on this analysis, the note proposes a uniform set of exemptions that seeks to protect financially insecure litigants who are most vulnerable to SLAPP suits and who do not have the resources to defend themselves from baseless claims.
[2 *State Anti-SLAPP Laws*, PUBLIC PARTICIPATION PROJECT, https://anti-slapp.org/your-states-free-speech-protection#scorecard (last visited Dec. 31, 2020) (identifying the scope of anti-SLAPP laws in Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Guam, Hawaii, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia and Washington).
[3 Hunter v. CBS Broadcasting, Inc., 221 Cal. App. 4th 1510 (Cal. Ct. App. 2013).
[4 Nina Golden, *SLAPP Down: The Use (and Abuse) of Anti-SLAPP Motions to Strike*, 12 RUTGERS J. PUB. POL'Y 1, 28 (2015).
[5 *Id.* [6 *See* Briggs v. Eden Council for Hope & Opportunity, 969 P.2d 564 (Cal. 1999) (Baxter, J., dissenting).
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