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STATES AS CIVIL RIGHTS ACTORS: ASSESSING ADVOCACY MECHANISMS WITHIN A STATE'S LEGISLATIVE, EXECUTIVE, AND JUDICIAL BRANCHES

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**STATES AS CIVIL RIGHTS ACTORS: ASSESSING ADVOCACY
MECHANISMS WITHIN A STATE’S LEGISLATIVE, EXECUTIVE, AND
JUDICIAL BRANCHES**

*Jennifer Safstrom **

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I. INTRODUCTION

A British politician, David Miliband, once said, “My advice is very simple: if you can win a small battle, it gives you confidence in the political process to take on bigger battles, and so it is very much a bottom-up grass-roots way of doing politics.” While his perspective—of starting small and building up—is an often-used strategy used by advocates of all stripes, his quote does not give sufficient credence to the intrinsic value of these small battles. These efforts are an end unto themselves, as the smaller battles within each state are not just training to take on larger federal battles; rather, state-level policymaking has the ability to positively or negatively impact the lives of countless individuals.

Miliband’s perspective, like that of many advocates, is outcome focused. Rather, there is great value in analyzing the small battles as independent milestones in securing rights and bolstering protections for a number of communities and populations. Rather than assessing any one particular movement, the aim of this paper is to understand the tactics and weapons being utilized within state systems, to identify trends, and to draw predictions about states as players in the civil rights movement more broadly.

First, this paper asserts that states are an important civil rights battleground. By assessing the development or stagnation of employment civil rights efforts through the lens of different state actors, this paper maps the landscape of these battles, allowing future advocates to pick the best path to forge onwards. Second, in contrast to Miliband, this paper views state civil rights efforts as a goal unto themselves. The process of advocating for civil rights offers important lessons, not just for pursuing federal efforts, but also for: (1) securing or bolstering affirmative protections immediately for vulnerable populations; (2) enhancing future advocacy efforts at the state level; and (3) encouraging future advocacy within each state, at the local level. While many advocates might immediately apply these lessons to federal civil rights efforts, due to the perceived threat of the Trump administration,¹ recognizing the role states currently play in civil rights efforts and the role they could *potentially* play is valuable well beyond its applicability to the current administration.

II. BACKGROUND

This paper analyzes the role of states as civil rights actors. State civil rights policies have been in response to the actions (or inaction) of the federal government.² State policies are also a reaction to the policy choices of cities and localities.³ This analysis aims to draw parallels, distinctions, and trends from current civil rights efforts in the employment context. Additionally, this paper draws conclusions about

1. *See generally Trump Administration Civil and Human Rights Rollbacks*, LEADERSHIP CONF. ON CIV. & HUM. RTS., <https://civilrights.org/trump-rollbacks/> (last visited Feb. 25, 2019), *archived at* <https://perma.cc/NF24-JVPY>.

2. *State Civil Rights Offices*, FINDLAW, <https://civilrights.findlaw.com/enforcing-your-civil-rights/state-civil-rights-offices.html> (last visited Feb. 25, 2019), *archived at* <https://perma.cc/F2ZN-62DA>.

3. *The Power of State Preemption: Preventing Progress and Threatening Equality*, MOVEMENT ADVANCEMENT PROJECT (May 2018), <http://www.lgbtmap.org/file/Preemption-Report-FINAL.pdf>, *archived at* <https://perma.cc/R2D5-9Z2W>.

how these movements will develop and what lessons can be drawn from these examples to apply in the future.

This piece does not take a position on the effectiveness or efficiency of these proposed civil rights efforts. To the extent that these are policies pursued by states in an effort to expand civil rights protections and safeguard the interests of marginalized workers, this paper looks to assess the role of various state actors in furthering these efforts. For instance, there have been recent efforts to prohibit employers from asking about a job candidate's salary history.⁴ This policy is meant to ensure that pay gaps, particularly for women, are not compounded over time by breaking a cycle that often occurs in employment: prior salary is used to determine one's new salary.⁵ By preventing employers from inquiring about a person's previous wages, it breaks the chronic cycle of underpayment. This rationale is what prompted Massachusetts to become the first state in the nation to pass a law that bans employers from asking job candidates about their salary history.⁶ While the Massachusetts law did provide other protections, some have been critical of the salary history provision as being superfluous.⁷ A main critique is that employers have developed work-arounds to the legislation.⁸ Rather than asking for salary history, instead employers inquire about salary expectations as a roundabout way of soliciting the same information. Employers support this approach, as it "gives the candidate the ability to share what they seek to make for the role. It lets you decide if you should keep talking with them. It also tells you whether they've done their homework or not."⁹ Ultimately, this paper does not seek to determine the efficacy of the salary history initiative, or comparable movements, but rather to assess the role of state actors in furthering an initiative that aims to protect the rights of workers.

III. LEGISLATIVE BRANCH

State legislatures are key actors within the civil rights context in two ways. First, state legislatures are able to pass protective legislation that goes above and beyond the floor set in federal civil rights legislation. As such, they can significantly expand the rights available to vulnerable populations within the state by extending the scope

4. Lydia Frank, *Why Banning Questions About Salary History May Not Improve Pay Equity*, HARV. BUS. REV. (Sept. 5, 2017), <https://hbr.org/2017/09/why-banning-questions-about-salary-history-may-not-improve-pay-equity>, archived at <https://perma.cc/BER8-DUAM>.

5. *Salary history bans*, HR DIVE (Feb. 20, 2019), <https://www.hrdiver.com/news/salary-history-ban-states-list/516662/>, archived at <https://perma.cc/WU6S-Q4WX>.

6. Frank, *supra* note 4.

7. Clare Foran, *A Step Toward Equal Pay for Men and Women*, ATLANTIC (Aug. 3, 2016), <https://www.theatlantic.com/politics/archive/2016/08/gender-wage-gap-massachusetts/494045/>, archived at <https://perma.cc/222P-L7UH>.

8. Kimberly A. Klimczuk, *A Closer Look At Massachusetts' Equal Pay Legislation*, MASS. B. ASS'N, <https://www.massbar.org/publications/lawyers-journal/lawyers-journal-article/lawyers-journal-2017-march-april/a-closer-look-at-massachusetts-equal-pay-legislation> (last visited Mar. 23, 2019), archived at <https://perma.cc/ZTZ4-5EZK>.

9. *The Salary History Question: Alternatives for Recruiters and Hiring Managers*, HR PROFS. MAG., <http://hrprofessionalsmagazine.com/the-salary-history-question-alternatives-for-recruiters-and-hiring-managers> (last visited Mar. 23, 2019), archived at <https://web.archive.org/web/20170806111221/http://hrprofessionalsmagazine.com/the-salary-history-question-alternatives-for-recruiters-and-hiring-managers>.

of coverage, adding substantive protections, or enhancing available remedies. In addition, states can restrict action by local government officials by passing preemption laws, preserving legislative control on the state level. Analyzing the ways legislators can act to expand or curtail protections is critical in furthering civil rights in employment.

A. Protective Legislation

States have often passed legislation that is broader and more protective than federal policies. For example, although President Obama implemented ban-the-box efforts through executive order by “directing federal agencies to delay inquiries into job applicants’ records until later in the hiring process,” bipartisan legislation stalled.¹⁰ Thus, while federal government employees and contractors receive these protections, there is no federal mandate that requires states and private companies comply with such a provision.¹¹ However, “a total of 31 states, representing nearly every region of the country, have adopted statewide policies” to ban-the-box, with eleven states having “mandate[d] the removal of conviction history questions from job applications for private employers.”¹² These policies offer protections to those with a previous criminal history, particularly early in the hiring process.¹³

Proactive engagement by states has also been evident in the salary history movement. At least five states, including Massachusetts, Delaware, New York, California, and Oregon, and several cities have passed measures that ban employers from inquiring about salary history.¹⁴ The Massachusetts law includes an anti-retaliation provision.¹⁵ Delaware’s provision includes “penalties from \$1,000 to \$5,000 for a first offense, and up to \$10,000 for a subsequent offense.”¹⁶ Although the Equal Pay Act and Title VII do not permit wage discrimination, there is no comparable protection on the federal level to safeguard against disclosure of past salary—information that can be used to perpetuate and justify the pay gap.¹⁷

10. Roy Maurer, *In Focus: More ‘Ban the Box’ Laws and Rules*, SOC’Y FOR HUM. RESOURCE MGMT. (Dec. 6, 2016), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/in-focus-more-ban-the-box-laws-and-rules.aspx>, archived at <https://perma.cc/7BZY-ED2Y>; Beth Avery & Phil Hernandez, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair-Chance Policies to Advance Employment Opportunities for People with Past Convictions*, NAT’L EMP. L. PROJECT (Sept. 25, 2018), <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>, archived at <https://perma.cc/M57X-DEPA>.

11. Avery & Hernandez, *supra* note 10.

12. *Id.*

13. The parallels between ban-the-box and voter enfranchisement movements are beyond the scope of this paper, but should be assessed in greater detail, as this synergy might partially explain the growing national trend on the state level, despite national policy stagnation. See Vishal Agraharkar, *Giving A Second Chance at Citizenship*, BRENNAN CTR. FOR JUST. (July 16, 2015), <https://www.brennancenter.org/blog/giving-second-chance-citizenship>, archived at <https://perma.cc/BH6C-FN2V>.

14. Levi Perkins, *Salary History Bans Gain Momentum*, CORP. SCREENING (Oct. 26, 2017), <https://www.corporatescreening.com/2017/08/03/salary-history-bans-gain-momentum/>, archived at <https://perma.cc/LES4-6AJ9>; Ryan Golden & Valerie Bolden-Barrett, *Women Who Refuse to Disclose Salary History More Likely to be Paid Less*, HR DIVE (June 29, 2017), <https://www.hrdiver.com/news/women-who-refuse-to-disclose-salary-history-more-likely-to-be-paid-less/445993/>, archived at <https://perma.cc/LES4-6AJ9>.

15. Perkins, *supra* note 14.

16. *Id.*

17. 29 U.S.C. § 206 (2012); 42 U.S.C. § 2000e.

Another example of state action is exemplified in laws mandating paid leave. These policies go beyond the requirements of the Family Medical Leave Act (FMLA), which “provides up to 12 weeks of unpaid leave during a 12 month period to care for a newborn, adopted or foster child, or to care for a family member, or to attend to the employee’s own serious medical health condition.”¹⁸ Currently, three states offer paid family and medical leave; five states require paid sick leave; and nine states provide limited leave for parents to attend school-related activities.¹⁹ Many of these states have “expanded either the amount of leave available or the classes of persons for whom leave may be taken.”²⁰ For instance, Minnesota’s law expands coverage to “[a]ll employers with 21 or more employees . . . [and] all employers with at least 1 employee for school activities leave only.”²¹

Although the Equal Employment Opportunity Commission (EEOC) and many advocates have asserted that sexual orientation and gender identity are covered by Title VII of the Civil Rights Act,²² there is no federal law that explicitly bars employment discrimination on those bases.²³ The District of Columbia and 22 states have passed legislation that prohibits employment discrimination on the basis of sexual orientation and/or gender identity.²⁴ The scope of protection varies by state. For instance, Delaware’s law offers protection for public and private employees on the basis of sexual orientation, “[b]ut gender identity and gender expression protections are only available for state employees.”²⁵

In sum, there are numerous examples, with even more outside the employment context, in which states have passed state legislation in order to protect the civil rights of marginalized groups.²⁶ Such legislation is common when states are seeking to provide additional protections, establishing a threshold within the state that is higher than the floor established in federal legislation.²⁷ These policies aim to provide substantive protections that would not otherwise be available on the federal or local level.²⁸ In addition to safeguarding the rights of residents, the implementation of such policies provides a foundation for further advocacy efforts—assessing the

18. *State Family and Medical Leave Laws*, NAT’L CONF. ST. LEGISLATURES (July 19, 2016), <http://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx>, archived at <https://perma.cc/44TA-HAGS>.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII*, EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt_examples_decisions.cfm (last visited Mar. 23, 2019), archived at <https://perma.cc/4YUL-79SW>.

23. *2017 Workplace Equality Fact Sheet*, OUT & EQUAL, <http://outandequal.org/2017-workplace-equality-fact-sheet/> (last visited Mar. 23, 2019), archived at <https://perma.cc/LRE2-NGR6>.

24. *Id.*

25. Jerome Hunt, *A State-by-State Examination of Nondiscrimination Laws and Policies*, CTR. FOR AM. PROGRESS ACTION FUND 6, https://cdn.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf (last visited Mar. 23, 2019), archived at <https://perma.cc/9GXJ-KT2H>.

26. *Id.* at 2.

27. *Id.* at 1–2.

28. *Id.*

efficacy of such policies, plugging loopholes that emerge in practice, furthering regulations and compliance efforts, as well as developing precedent for other states and advocates to follow.

B. Preemption Laws

While some states have opted to act proactively, guaranteeing affirmative protections for employees, some states have preempted localities from passing such policies on the local level.²⁹ Such legislation “overrides—‘preempts’—local policies or withdraws authority from local governments,” leaving them unable to pass provisions within the municipality or city on a particular issue.³⁰ Some scholars recognize a notable shift: what was originally developed as a tool to protect legitimate state interests in perpetuating uniform policies throughout the state is now being used as a means by which to entrench political differences.³¹

This “trend toward intrusive state oversight has been most notable in—but is by no means exclusive to—states with conservative state governments that are home to progressive cities,” limiting the ability of these localities to control their own policies.³² There has been a number of examples in which state preemption, particularly in the employment context, “has historically been used for good: to ensure that minimum labor standards are applied statewide.”³³

Preemption has been used to usurp local legislation on a range of issues—from preventing gun regulation³⁴ to curtailing environmental regulation³⁵—but most recently preemption has been a dominant instrument in state regulation to squelch local experimentation and curtail employment civil rights.³⁶ Advocates of preemption policies favor the consistency brought by state-level policy making, as the state retains consolidated control.³⁷ Opponents note that this approach limits the experimentation

29. This paper does not aim to explain the legal authority behind preemption laws. However, to the extent that preemption laws seek to redraw the line between state and municipal authority, it is important to understand where this divide naturally falls. Under Dillon’s Rule, a “local government may exercise only those powers that the state expressly grants to it, the powers necessarily and fairly implied from that grant, and the powers that are indispensable to the existence of the unit of local government.” *Dillon’s Rule*, BLACK’S LAW DICTIONARY (10th ed. 2014).

30. Richard Briffault et al., *The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond*, 11 ADVANCE 3, 3 (2017).

31. *Id.*

32. *Id.*

33. Marni von Wilpert, *City Governments Are Raising Standards for Working People—and State Legislators Are Lowering Them Back Down*, ECON. POL’Y INST. (Aug. 26, 2017), <http://www.epi.org/publication/city-governments-are-raising-standards-for-working-people-and-state-legislators-are-lowering-them-back-down/>, archived at <https://perma.cc/R49G-DL3C>.

34. *Preemption of Local Laws*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <http://law-center.giffords.org/gun-laws/policy-areas/other-laws-policies/preemption-of-local-laws/#state> (last visited Mar. 23, 2019), archived at <https://perma.cc/U43V-UPJ3>.

35. See Matthew Porter, *State Preemption Law: The Battle for Local Control of Democracy*, BEYOND PESTICIDES (2017), <https://www.beyondpesticides.org/assets/media/documents/lawn/activist/documents/State-Preemption.pdf>, archived at <https://perma.cc/HXJ5-744X>.

36. von Wilpert, *supra* note 33.

37. *Id.*

that can occur on the local level and that it hamstring localities that wish to be responsive to their needs and constituents.³⁸

Such efforts have been utilized in preempting localities from setting minimum wage laws. In recent years, “more than 40 cities or counties in states such as California, New Mexico, and Arizona have adopted local minimum wage laws.”³⁹ This growth is contrasted by laws in at least 25 states “that preempt cities from passing their own local minimum wage laws.”⁴⁰ Preemption efforts in some states, including Missouri, have been in direct response to city efforts to expand the minimum wage. Missouri’s new preemption law will effectively roll back “St. Louis’ \$10-an-hour minimum wage ordinance passed earlier this year . . . [meaning] thousands of minimum-wage earners in the city could go back to earning the state rate of \$7.70 an hour.”⁴¹ Similarly, Alabama’s recently passed preemption law nullified a Birmingham City Council ordinance that would have raised the local minimum wage to \$10.10; accordingly, the city’s minimum wage was reduced to the currently imposed federal floor: \$7.25.⁴²

Similar rollbacks have occurred in many states across an array of issues. In Indiana, for instance, the state legislature issued a state preemption law banning local government entities from enacting ban-the-box laws.⁴³ This abolished the protections that had been implemented in the city of Indianapolis and in Marion County, which had passed ban-the-box legislation, that were protective of applicants with criminal convictions.⁴⁴

A comparable use of preemption laws is evident in places such as Tennessee, Arkansas, and North Carolina, all of which have “passed explicit statutory preemption of local anti-discrimination ordinances.”⁴⁵ The text of the Tennessee law, “called the Equal Access to Intrastate Commerce Act, defined ‘sex’ as the designation indicated on an individual’s birth certificate.”⁴⁶ In North Carolina, the state preemption law that made national headlines overturned a Charlotte ordinance barring discrimination for transgender individuals related to bathroom use.⁴⁷ However, it “also pre-

38. *Id.*; Porter, *supra* note 35.

39. *Fighting Preemption: The Movement for Higher Wages Must Oppose State Efforts to Block Local Minimum Wage Laws*, NAT’L EMP. L. PROJECT, <http://www.nelp.org/content/uploads/Fighting-Preemption-Local-Minimum-Wage-Laws.pdf> (last visited Mar. 23, 2019), *archived at* <https://perma.cc/2D2E-VC2F>.

40. *Id.*

41. Yuki Noguchi, *As Cities Raise Minimum Wages, Many States Are Rolling Them Back*, NPR (July 18, 2017 4:39 PM), <https://www.npr.org/2017/07/18/537901833/as-cities-raise-minimum-wages-many-states-are-rolling-them-back>, *archived at* <https://perma.cc/6T3J-RPT2>.

42. von Wilpert, *supra* note 33.

43. *Indiana Bans Cities from Banning the Box as More States Pursue Preemption Laws*, GARTNER INC. (May 11, 2017 3:58 PM), <https://www.cebglobal.com/talentedaily/indiana-bans-cities-from-banning-the-box-as-more-states-pursue-preemption-laws/>, *archived at* <https://perma.cc/8TET-5666> [hereinafter *Indiana*].

44. *Id.*

45. *City Rights in an Era of Preemption: A State-by-State Analysis*, NAT’L LEAGUE CITIES (2017), <http://nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf>, *archived at* <https://perma.cc/ZXU7-UGX3>.

46. *Id.*

47. David Graham, *North Carolina Overturns LGBT-Discrimination Bans*, ATLANTIC (Mar. 24, 2016), <https://www.theatlantic.com/politics/archive/2016/03/north-carolina-lgbt-discrimination-transgender-bathrooms/475125/>, *archived at* <https://perma.cc/4TQR-ZXJX>.

vent[ed] any local governments from passing their own non-discrimination ordinances, mandate[d] that students in the state’s schools use bathrooms corresponding to the gender on their birth certificate, and prevent[ed] cities from enacting minimum wages higher than the state’s.”⁴⁸ Although partially repealed due to national pushback, the current legislation retains a preemption provision that blocks local jurisdictions from passing ordinances similar to Charlotte’s until 2020, placing a moratorium on “anti-discrimination measures protecting [Lesbian Gay Bisexual Transgender] people — but only until 2020, instead of indefinitely.”⁴⁹

Preemption laws in other states can be just as restrictive but even more broad.⁵⁰ For instance, “South Carolina enacted a bill (SB 218) that prohibits any political subdivision from requiring employers to grant any employee benefit beyond wages, including ‘paid days off for holidays, paid sick leave, paid vacation leave, paid personal necessity leave, retirement benefits, and profit-sharing benefits.’”⁵¹ Comparable language is being considered in a bill pending in Minnesota (HF 600) that “expressly prevents localities from enacting or administering any sick leave, scheduling, or minimum wage laws.”⁵² Such provisions have a dramatic impact not only because they cut across various employment-related civil rights issues and impact a great number of diverse groups and individuals, but also because they so markedly strip authority away from municipal governments.⁵³

Laws in other states, even policies designed to be protective, can be restrictive when preemption clauses are included. For instance, Arizona enacted a mandatory paid sick leave law. The policy “provides paid sick leave to nearly every employee in the state,” expands the number of sick leave hours that can be awarded annually, and also “raises the state’s minimum wage on an ongoing basis.”⁵⁴ Oregon has passed a similar preemptive ordinance.⁵⁵ While such a policy provides a high state minimum threshold, such policies also have the effect of making the state’s statutory floor equivalent to a ceiling, as local jurisdictions are not able to regulate in ways that are more protective than the state.⁵⁶ While such moderate stances might pave the path to compromise, these policies can still derail efforts to expand employment protections; worse still, they can have adverse, unintended consequences that undercut the same communities these policies aim to serve.⁵⁷

Such policies may also block related legislation that was not explicitly contemplated in the preemption law. For instance, New York City is poised to expand the

48. *Id.*

49. Camila Domonoske, *North Carolina Repeals Portions Of Controversial ‘Bathroom Bill’*, NPR (Mar. 30, 2017 3:11 AM), <https://www.npr.org/sections/thetwo-way/2017/03/30/522009335/north-carolina-lawmakers-governor-announce-compromise-to-repeal-bathroom-bill>, archived at <https://perma.cc/2RR5-3SUR>.

50. *See generally* Indiana, *supra* note 43.

51. *Id.*

52. *Id.*

53. *See generally id.*

54. Annemaria Duran, *Arizona Creates Two Laws to Preempt Sick Leave*, SWIPECLOCK WORKFORCE MGMT. (Mar. 28, 2017), <http://www3.swipeclock.com/arizona-creates-two-laws-to-preempt-sick-leave/>, archived at <https://perma.cc/AB5U-JBYK>.

55. *Id.*

56. *Id.*

57. *Id.*

city's paid sick leave to "require employers to grant paid time off as 'safe time' to employees when they or a family member have been the victim of domestic violence, sexual abuse, stalking, or other 'family offense matters.'"⁵⁸ It seems unlikely that the inclusion of leave for domestic violence issues would be permitted under a state preemption law like South Carolina's, which limits localities from expanding family or sick leave policies on a city or municipal level.⁵⁹ Given there was no indication that paid leave was considered for this contingent of victims, such protections may be preempted by the letter of the law, even if such a repercussion was entirely unforeseen and not intended to be included within the scope of the preemption law's purview.

In short, preemption policies have generally been used, at least in recent times, to curtail localities in passing policies that are more protective of civil rights in employment.⁶⁰ While affirmative state legislation could expand the rights of prospective workers and employees in the workplace, preemption laws restrict cities and other municipalities from expanding coverage, services, and protections to certain categories of individuals on the local level.⁶¹ While preemption efforts have the capacity to frustrate advocates or undermine momentum, understanding how such laws shape state and local legislative efforts can provide context to the dynamic nature of advocacy. While it may appear advocacy efforts have taken one step forward and two steps back, at least in particular states, advocates are now on notice: civil rights efforts must be maintained to protect against backslide or backlash.⁶² This is a valuable lesson for planning future efforts within the state and across other states.

IV. EXECUTIVE BRANCH

Although the legislature of a state has substantive power in adopting new legislation that can be determinative in setting the state's practices, the executive branch of the state has substantial authority in crafting executive policy and guiding its implementation. As such, the governor, state attorney general, and state agencies have a notable ability to develop protective policies and usher the enforcement of a state's civil rights policies.

58. *New York City Amends Sick Leave Law, Adds 'Safe Time' for Domestic Violence Victims*, GARTNER INC. (Oct. 25, 2017 12:37 PM), <https://www.cebglobal.com/talentedaily/new-york-city-amends-sick-leave-law-adds-safe-time-for-domestic-violence-victims/> archived at <https://perma.cc/ZS47-DQSK>.

59. Annamaria Duran, *South Carolina Passes Preemptive Sick Leave Law*, SWIPELOCK WORKFORCE MGMT. (Apr. 25, 2017), <https://www3.swipeclock.com/blog/south-carolina-passes-preemptive-sick-leave-law/>, archived at <https://perma.cc/3BEU-ALQF>.

60. Briffault, *supra* note 30.

61. *Id.*

62. Marni von Wilpert, *State and local policymakers should beware preemption clauses*, ECON. POL'Y INST. (Jan. 12, 2018 12:53 PM), <https://www.epi.org/blog/state-and-local-policymakers-should-beware-preemption-clauses-snuck-into-legislation/>, archived at <https://perma.cc/XNG8-SDGY>; Bryce Covert, *The Conservative Backlash Against Minimum Wage and Paid Sick Leave Victories Sweeping the Nation*, THINK PROGRESS (June 16, 2016, 12:00 PM), <https://thinkprogress.org/the-conservative-backlash-against-minimum-wage-and-paid-sick-leave-victories-sweeping-the-nation-61f26429300a/>, archived at <https://perma.cc/CC82-Q6VE>.

A. Governor

The governor of a state has the ability to act unilaterally through two key mechanisms: the power of the veto and state executive action or policy.⁶³ Such powers are separate from a governor's other abilities.⁶⁴ Some of these powers vary by state, such as controlling the appointment of state attorneys general.⁶⁵ Some powers, such as providing direction to state departments and agencies, as well as the ability to command public attention or influence the media, are universal.⁶⁶ In some cases, governors have used their authority to bring affirmative lawsuits challenging federal policy (executive orders, regulations, and guidance).⁶⁷ These powers have been utilized by governors in various ways, both to augment civil rights protections and to curtail such efforts.

The use of the veto power clearly intersects with the ability of the legislature to promulgate laws that define the civil rights framework on a state-by-state basis. In August 2018, a bill that would prohibit employers from inquiring about an applicant's salary history passed the state legislature by a wide margin, in both the state House (91-24) and Senate (35-18).⁶⁸ However, Governor Bruce Rauner vetoed the bill, instead preferring Massachusetts' salary history law because of its benefits—for employers.⁶⁹ Governor Rauner emphasized a provision in the Massachusetts' legislation that permits employers to seek pay history once they have offered a candidate the job and salary.⁷⁰ Advocates had viewed the exclusion of this provision from the Illinois bill positively, as post-offer salary disclosures could undermine the purpose of the legislation because these disclosures “could reduce an employee's raise or bonus down the road if it is revealed he or she was earning much less before,” effectively undermining the purpose of the legislation.⁷¹ The state legislature has twice failed to override the veto, effectively rendering the legislation dead.⁷²

63. *Governors' Powers and Authority*, NATIONAL GOVERNORS ASSOCIATION (2018), <https://www.nga.org/consulting/powers-and-authority/#overview>, archived at <https://perma.cc/2NX4-ZM2J>.

64. See generally *id.*

65. COUNCIL ON ST. GOV'TS, *THE BOOK OF THE STATES 2017 189-94* (2017), <http://knowledge-center.csg.org/kc/system/files/4.10.2017.pdf>, archived at <https://perma.cc/UPP8-PHZ5>.

66. *Governors' Powers and Authority*, *supra* note 63.

67. See generally Mallory Shelbourne, *GOP Governor Backs Challenge to Trump Executive Order*, HILL (Jan. 31, 2017 1:56 PM), <https://thehill.com/homenews/317139-gop-governor-backs-challenge-to-trump-executive-order>, archived at <https://perma.cc/8527-RJTV>.

68. *Illinois Governor Vetoes Ban on Salary History Inquiries*, GARTNER INC. (Aug. 31, 2017), <https://www.cebglobal.com/talentedaily/illinois-governor-vetoes-ban-on-salary-history-inquiries/>, archived at <https://perma.cc/C9T7-4LNL>.

69. Letter from Bruce Rauner, Governor of Ill., to Ill. House of Representatives (Aug. 25, 2017), <http://www.ilga.gov/legislation/fulltext.asp?DocName=10000HB2462gms&GA=100&SessionId=91&DocTypeId=HB&LegID=103476&DocNum=2462&GAID=14&Session=>, archived at <https://perma.cc/7Q89-GJUE>; Alexia Elejalde-Ruiz, *Rauner Vetoes Bill That Would Bar Employers from Asking About Salary History*, CHI. TRIB. (Aug. 28, 2017), <http://www.chicagotribune.com/business/ct-illinois-no-salary-history-bill-veto-0829-biz-20170828-story.html>, archived at <https://perma.cc/XUG7-NE5E>.

70. Letter from Bruce Rauner, *supra* note 69.

71. Elejalde-Ruiz, *supra* note 69.

72. Kate Tornone, *Second Attempt at Illinois Salary History Ban Fails*, HR DIVE (Nov. 9, 2017), <https://www.hrdiver.com/news/second-attempt-at-illinois-salary-history-ban-fails/510534/>, archived at <https://perma.cc/2ALA-8XG4>.

The refusal to use veto power is also notable. For instance, refusing to exercise his veto privilege, Michigan Governor Rick Snyder signed off on a sweeping preemption law that “prohibits local governments from adopting, enforcing, or administering an ordinance, local policy or resolution requiring private employers to provide employees ‘any specific fringe benefit or any other benefit for which the employer would incur an expense, including, but not limited to,’ paid or unpaid leave time.”⁷³ Similarly, Governor John Kasich signed a minimum-wage preemption law, effectively blocking “Cleveland’s local minimum wage proposal from being placed on the ballot in 2017,” a measure that would have “proposed to raise the minimum wage citywide to \$12 an hour in January 2018, and eventually to \$15 in 2021.”⁷⁴ As a result, the state’s minimum wage of \$8.10 will remain in effect.⁷⁵

By contrast, Missouri Governor Jay Nixon vetoed a preemption law that would have barred municipalities from mandating that employers provide benefits above the limits set forth in state and federal law.⁷⁶ Employment benefits were defined to include “anything of value an employee may receive from an employer in addition to wages and salary including, but not limited to, paid or unpaid days off from work for holidays, sick leave, vacation, and personal necessity.”⁷⁷ In his veto letter, Governor Nixon noted the importance of empowering local governments to manage local issues and enabling local elections to improve accountability through the democratic response of local voters.⁷⁸

In 2018, Governor Mark Dayton of Minnesota “vetoed the Republican Legislature’s effort to stop cities from requiring employers to offer paid time off or a \$15-an-hour minimum wage.”⁷⁹ His veto has effectively paved the way for various localities, including St. Paul and Minneapolis, to raise the local minimum wage to \$15, well above the state’s current minimum wage of \$9.50 an hour.⁸⁰ This veto blocked the preemption law that would have curtailed the local expansion of minimum wage, protecting the rights of “150,000 workers [to] the earned sick and safe time benefits they have secured.”⁸¹

However, Governor Dayton’s use of the veto in this case was bittersweet, as he noted in his veto letter:

73. Sebastian Chilco, *Preemption Law Results Show Different Approaches States Take with Local Sick Leave Measures*, LITTLER MENDELSON P.C. (July 22, 2015), <https://www.littler.com/publication-press/publication/preemption-law-results-show-different-approaches-states-take-local>, archived at <https://perma.cc/U6PK-7PT4>.

74. von Wilpert, *supra* note 33.

75. *Id.*

76. Chilco, *supra* note 73.

77. *Id.*

78. Letter from Jeremiah Nixon, Governor of Mo., to the Sec’y of State of the State of Mo. (July 10, 2015), <http://www.house.mo.gov/billtracking/bills151/rpt/HB722v1.pdf>, archived at <https://perma.cc/STZG-LYXN>.

79. Rachel Stassen-Berger, *Mark Dayton Vetoes Bill Curtailing Cities’ Paid-time Off, Minimum Wage Rules*, PIONEER PRESS (May 30, 2017), <http://www.twincities.com/2017/05/30/mark-dayton-vetoes-bill-curtailling-cities-paid-time-off-minimum-wage-rules/>, archived at <https://perma.cc/43L9-AL8V>.

80. *Id.*

81. Letter from Mark Dayton, Governor of Minn., to Michelle L. Fischblach, President of the Senate of the State of Minn. (May 30, 2017), https://www.leg.state.mn.us/archive/vetoes/2017_sp1veto_ch2.pdf, archived at <https://perma.cc/7PLU-LJGG>.

The legislation also includes changes to public employee retirement plans and addresses wage theft. These provisions would improve the economic security of tens of thousands of Minnesotans, including hardworking state employees and retirees. It is reprehensible that the Republican legislative majorities would attach these provisions to the preemption legislation which I have said for weeks that I would not accept.⁸²

These examples frame how the use of (or failure to utilize) the gubernatorial veto power can impact the state's legal framework, particularly related to the adoption of protective legislation or the promulgation of preemption laws by the state legislature.

One additional mechanism is the use of executive policy to effectuate change. There are several examples of such policies that have manifested themselves in the area of sexual orientation protections. For instance, in Arizona, state Executive Order 2003-22, signed by Governor Janet Napolitano, directs "that no state agency, board or commission . . . shall discriminate in employment solely on the basis of an individual's sexual orientation."⁸³ There are several states that have comparable orders, such as Montana.⁸⁴ Governor Steve Bullock's executive order prohibits discrimination on the basis of sexual orientation and gender identity for state employees, state contractors, and state subcontractors.⁸⁵ Other anti-discrimination executive orders have varied in scope and robustness. In Pennsylvania, for instance, Governor Tom Wolf has signed a state executive order declaring that "[n]o agency under the Governor's jurisdiction shall discriminate against any employee or applicant for employment on the basis of race, color, religious creed, ancestry, union membership, age, gender, sexual orientation, gender identity or expression, national origin, AIDS or HIV status, or disability."⁸⁶

However, executive action by the governor is easier to overturn or modify than legislation. It is also more limited in scope, typically only applying to state employees and/or contractors. One such example occurred in Virginia in 2006, when Governor Tim Kaine signed an executive action that expanded the state's anti-discrimination policy, adding veteran status and sexual orientation.⁸⁷ However, in 2010, Governor Bob McDonnell signed a new executive order, rescinding the one issued by

82. *Id.*

83. Hunt, *supra* note 25, at 23.

84. *Id.* at 57.

85. *Montana Gov. Steve Bullock Signs Executive Order Protecting LGBT State Employees*, HUM. RTS. CAMPAIGN (Jan. 18, 2016), <https://www.hrc.org/blog/montana-governor-steve-bullock-signs-executive-order-protecting-lgbt-state>, archived at <https://perma.cc/F57H-B3YV>.

86. Pa. Exec. Order No. 2016-04 (Apr. 7, 2016), https://www.governor.pa.gov/executive_orders/executive-order-2016-04-equal-employment-opportunity, archived at <https://perma.cc/5R3P-L9B6>.

87. Va. Exec. Order No. 1 (Jan. 14, 2006), http://digitool1.lva.lib.va.us:1801/webclient/DeliveryManager?pid=42767&custom_att_2=direct, archived at <https://perma.cc/5C5A-HVM6>.

Governor Kaine.⁸⁸ His order maintained protections for all other protected categories, including veterans, but removed “sexual orientation” from the list.⁸⁹ This change was prompted, in part, by the advice of then-Attorney General Ken Cuccinelli II.⁹⁰ His role and influence are assessed in further detail in the next section, which contemplates the role of a state Attorney General to influence policy.

Louisiana has experienced similar reversals in executive policy but has moved in the opposite direction, seeking to expand LGBT protections. Governor John Bel Edwards signed a nondiscrimination executive order last year that rescinded an executive order that had been implemented by former Governor Bobby Jindal.⁹¹ The new “executive order protects against LGBT discrimination for state employees and workers hired by state contractors” while also providing “employment safeguards on the basis of race, religion, political affiliation, disability and age, among others, but recognizes an exemption for churches and religious organizations.”⁹² This effectively implemented protections for LGBT persons in the absence of a state anti-discrimination statute and also reinstated coverage that had been previously set forth in comparably progressive executive orders by former Governors Edwin Edwards and Kathleen Blanco.⁹³ The fallout of this executive action is also discussed in the next section, noting the intervention of the Louisiana Attorney General in this matter.

B. State Attorney General

A state’s attorney general is the chief legal officer for the jurisdiction and is generally imbued with broad authority to interpret and enforce a state’s laws and policies.⁹⁴ Although typically elected by the public, attorneys general in some states are appointed by the Governor, elected by the state legislature, or selected by the

88. Va. Exec. Order No. 6 (2010), http://digitool1.lva.lib.va.us:1801/webclient/DeliveryManager?pid=717224&custom_att_2=direct, archived at <https://perma.cc/YXL7-LWDR>.

89. Christina Bellantoni, *Virginia Gov. Bob McDonnell Rolls Back Non-Discrimination Protections for Gay State Workers*, TPM MEDIA (Feb. 17, 2010), <http://talkingpointsmemo.com/dc/virginia-gov-bob-mcdonnell-rolls-back-non-discrimination-protections-for-gay-state-workers>, archived at <https://perma.cc/D4P4-YBB2>.

90. Rosalind Helderman, *Virginia Attorney General to Colleges: End Gay Protections*, WASH. POST (Mar. 6, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/05/AR2010030501582.html>, archived at <https://perma.cc/K3UA-V34E>.

91. La. Exec. Order No. JBE 2016-11 (Apr. 13, 2016), <http://gov.louisiana.gov/assets/ExecutiveOrders/JBE16-11.PDF>, archived at <https://perma.cc/EP66-XQYE>.

92. Nick Gass & Nolan McCaskill, *Louisiana Governor Signs Exec. Order Against LGBT Discrimination*, POLITICO (Apr. 13, 2016), <https://www.politico.com/story/2016/04/louisiana-lgbt-laws-discrimination-221878>, archived at <https://perma.cc/MA5E-67KX>.

93. *Id.*

94. “As the chief legal officer of the states, commonwealths and territories of the United States, the attorneys general serve as counselors to their legislatures and state agencies and also as the ‘People’s Lawyer’ for all citizens. While varying from one jurisdiction to the next due to statutory and constitutional mandates, typical powers of the attorneys general include the authority to issue formal opinions to state agencies; act as public advocates in areas such as child support enforcement, consumer protections, antitrust and utility regulation; propose legislation; enforce federal and state environmental laws; represent the state and state agencies before the state and federal courts; handle criminal appeals and serious statewide criminal prosecutions; institute civil suits on behalf of the state; represent the public’s interests in charitable trust and solicitations; and operate victim compensation programs.” See *What Does an Attorney General Do?*, NAT’L ASS’N ATT’YS GEN., http://www.naag.org/naag/about_naag/faq/what_does_an_attorney_general_do.php (last visited Mar. 31, 2019), archived at <https://perma.cc/BGP2-KTWU>.

state's Supreme Court.⁹⁵ Generally, an attorney general has the latitude to engage in a state's legal operations, ranging from the issuance of formal opinions to state agencies, to the proposal of legislation, to litigation.⁹⁶ The exercise of these powers can have a significant impact on a state's employment discrimination protections, particularly when the line between legal advice and policy implementation is blurred. Indeed, all but two state attorneys general are affiliated with either the Republican or Democratic Party.⁹⁷ This partisan affiliation supports the assertion that making policy is essential to the role of a state attorney general, with functions extending well beyond apolitical legal advising.

As noted above, Virginia Governor McDonnell used his executive authority to issue an order rescinding formal protections established by the previous governor.⁹⁸ This policy was arguably motivated, at least in part, by the counsel of then-Attorney General Ken Cuccinelli II.⁹⁹ His legal analysis of the state's legal framework was influential. In a 2010 letter to public colleges and universities that had expanded school policies to enhance LGBT protections, Virginia Attorney General Ken Cuccinelli II interpreted the state's existing laws in the following way: "It is my advice that the law and public policy of the Commonwealth of Virginia prohibit a college or university from including 'sexual orientation,' 'gender identity,' 'gender expression,' or like classification as a protected class within its non-discrimination policy absent specific authorization from the General Assembly."¹⁰⁰

The ways in which a state attorney general can use its authority is widely varied. By contrast, California's Attorney General is tasked with using his or her discretion in promulgating Assembly Bill 1887.¹⁰¹ This Bill, passed last year, "forbids state-funded travel to states that, since June 26, 2015, have enacted laws discriminating against people on the basis of sexual orientation, gender identity or gender expression."¹⁰² The Bill originally included Kansas, North Carolina, Mississippi, and Ten-

95. "The attorney general is popularly elected in 43 states, the District of Columbia, Guam, and the Northern Mariana Islands. The governor appoints the attorney general in five states (Alaska, Hawaii, New Hampshire, New Jersey and Wyoming) and in the three jurisdictions of American Samoa, Puerto Rico, and the Virgin Islands. In Maine, the attorney general is selected by secret ballot of the legislature, and in Tennessee, by the state Supreme Court." See *How Does One Become an Attorney General?*, NAT'L ASS'N ATT'YS GEN., http://www.naag.org/naag/about_naag/faq/how_does_one_become_an_attorney_general.php (last visited Mar. 31, 2019), archived at <https://perma.cc/Q7PY-XDNW>.

96. *What Does an Attorney General Do?*, supra note 94.

97. *Attorney General (State Executive Office)*, BALLOTPEDIA, [https://ballotpedia.org/Attorney_General_\(state_executive_office\)](https://ballotpedia.org/Attorney_General_(state_executive_office)) (last visited Mar. 31, 2019) archived at <https://perma.cc/H9YT-D32A>.

98. Va. Exec. Order No. 6, supra note 88.

99. Helderman, supra note 90.

100. *Id.*; Pam Spaulding, *Asking for a Brain Drain: Virginia's AG Rescinds Protections for LGBT People on University Campuses*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffingtonpost.com/pam-spaulding/asking-for-a-brain-drain_b_488395.html, archived at <https://perma.cc/HK8W-AH9L>.

101. *Prohibition on State-Funded and State-Sponsored Travel to States with Discriminatory Laws*, CAL. DEP'T JUST., <https://oag.ca.gov/ab1887> (last visited Mar. 31, 2019), archived at <https://perma.cc/E7XS-YS5W>.

102. Sofia Lotto Persio, *California Travel Ban Extended to Four More States Over Anti-LGBT Laws*, NEWSWEEK (June 23, 2017), <http://www.newsweek.com/california-travel-ban-eight-states-lgbt-discrimination-homophobic-laws-628483>, archived at <https://perma.cc/3X8V-54C6>.

nessee, but tasked the Attorney General to update the list of forbidden states as necessary.¹⁰³ Just months ago, California Attorney General Xavier Becerra added Alabama, Kentucky, South Dakota, and Texas to the list, “doubling the number of the blacklisted states initially included in the legislation.”¹⁰⁴ In a public statement, Attorney General Becerra noted the role of the state’s justice department in protecting the rights of all Californians and its commitment to members of the LGBT community.¹⁰⁵ This use of inter-state opposition through an attorney general is a unique model, but has proven successful in garnering public attention.¹⁰⁶ Businesses and citizens are concerned about the potential impacts of California’s travel restrictions;¹⁰⁷ as a result, legislators, too, will have to worry about the consequence of their policy-making within the state because of the Bill’s broader effects, which was part of California’s impetus in passing these restrictions.¹⁰⁸

Virginia and California provide nearly diametrically opposed scenarios, in which the exercise of discretion in a professional capacity by each state’s respective attorney general yielded disparate results on the same issue.¹⁰⁹ An attorney general also has the ability to utilize discretion in the implementation of their duties.¹¹⁰ In Louisiana, disagreement between the Governor and the Attorney General regarding the scope of authority for each of these actors has resulted in a lawsuit.¹¹¹

As previously mentioned, Governor Edwards of Louisiana issued an executive order prohibiting discrimination against LGBT state employees and contractors.¹¹² Governor Edwards has filed a lawsuit against Attorney General Jeff Landry for failure to comply with the Executive Order.¹¹³ The Governor’s action to force the Attorney General’s compliance came after Landry had rejected 31 state contracts because they included language that protects gays and transgender employees from workplace discrimination.¹¹⁴ Attorney General Landry refused to accept those contracts because he felt such provisions, like the Executive Order itself, exceeded the

103. *Id.*

104. *Id.*

105. Press Release, California Attorney General Xavier Becerra, Alabama, Kentucky, South Dakota and Texas Added to List of Restricted State Travel (June 22, 2017), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-alabama-kentucky-south-dakota-and-texas-added-list>, archived at <https://perma.cc/P5CQ-YA7V>.

106. *Id.*

107. Nolan Hicks & Marty Toohey, *Businesses Fear More Fallout May Follow California Travel Ban to Texas*, STATESMAN (June 23, 2017), <http://www.statesman.com/news/state--regional-govt--politics/businesses-fear-more-fallout-may-follow-california-travel-ban-texas/oi5NMxMg6pST9Dsn9KuknK/>, archived at <https://perma.cc/E276-9D7V>.

108. *Id.*

109. Compare Press Release, California Attorney General Xavier Becerra, *supra* note 105, with Sophia Yan, *Virginia is for Lovers. But How About Gay Ones?*, TIME (Mar. 11, 2010), <http://content.time.com/time/nation/article/0,8599,1971393,00.html>, archived at <https://perma.cc/JW4M-LJEG>.

110. Gregory F. Zoeller, *Duty to Defend and the Rule of Law*, 90 VA. L.J. 513, 515 (2015).

111. Julia O’Donoghue, *Gov. John Bel Edwards Files Lawsuit Against AG Jeff Landry Over LGBT Protections*, NOLA.COM (Sep. 30, 2016), https://www.nola.com/politics/2016/09/john_bel_edwards_plans_to_sue.html archived at <https://perma.cc/8MAB-P5WR>.

112. Gass & McCaskill, *supra* note 92.

113. O’Donoghue, *supra* note 111.

114. *Id.*

scope of the state's laws.¹¹⁵ The judicial resolution of this conflict between officers of the executive branch will be discussed in further detail in Part V.

An attorney general can also file suit on behalf of the state, often for the purpose of furthering the goals of the state's administration. In Illinois, Attorney General Lisa Madigan filed a lawsuit in October 2017 against a national payday lender "for imposing highly restrictive non-compete agreements on low-wage customer service employees at its 33 locations" across the state.¹¹⁶ The suit alleges the company violated the Illinois Freedom to Work Act, a state law that "prohibits the use of non-compete agreements for employees earning minimum wage or less than \$13 an hour."¹¹⁷ Illinois successfully reached an agreement with Jimmy John's last year for similar violations of the non-competition clause restriction established in the Act.¹¹⁸ These litigation efforts positively impact low-wage workers by removing barriers to future employment; this is especially important for civil rights efforts because low-wage workers are disproportionately women and individuals of color.¹¹⁹ This type of affirmative litigation is also consistent with other national efforts. For instance, New York's Attorney General "challenged the restrictive covenants in legal news provider Law360's employment agreements, in addition to challenging the Jimmy John's restrictive covenants."¹²⁰

Additionally, while other state attorneys general have used their litigation authority to put a check on executive functions, such as Kentucky's Attorney General regarding educational policies by the state's governor,¹²¹ this power is also relevant in the employment civil rights context. Although no specific examples were found, this is a potential area of development for an attorney general to bring action against a state's administration, specifically a governor, to challenge legislation.

Although the ability for a state attorney general to sue the federal government on behalf of the state is beyond the scope of this paper, it is a tool that has been

115. *Id.*

116. Press Release, Illinois Attorney General Madigan, AG Sues National Payday Lender for Unlawful Use of Non-Compete Agreements (Oct. 25, 2017), http://www.illinoisattorneygeneral.gov/press-room/2017_10/20171025d.html, archived at <https://perma.cc/R5J7-RV2K>.

117. *Id.*

118. Sarah Whitten, *Jimmy John Drops Noncompete Clauses Following Settlement*, CNBC, <https://www.cnbc.com/2016/06/22/jimmy-johns-drops-non-compete-clauses-following-settlement.html> (last updated June 22, 2016), archived at <https://perma.cc/GRU4-G9DH>.

119. *Millions of Low-wage Workers in the US Are Struggling to Survive*, OXFAM (June 21, 2016), <https://www.oxfamamerica.org/explore/stories/millions-of-low-wage-workers-in-the-us-are-struggling-to-survive/>, archived at <https://perma.cc/GT79-UMUT>.

120. Debbie Berman, Andrew Vail & Amit Patel, *Illinois Attorney General Targets Customer Service Worker Non-Competition Provisions*, LEXOLOGY (Nov. 7, 2017), <https://www.lexology.com/library/detail.aspx?g=b2811da8-faa3-4339-9dec-6276ee9e6ffe>, archived at <https://perma.cc/2XJM-Y7Q>.

121. Adam Beam, *Kentucky AG Vows to Sue Governor Over Education Order*, U.S. NEWS & WORLD REP. (June 7, 2017), <https://www.usnews.com/news/best-states/kentucky/articles/2017-06-07/kentucky-attorney-general-threatens-to-sue-governor-again>, archived at <https://perma.cc/G6VC-GN97>.

utilized in other areas of the law, such as immigration,¹²² education,¹²³ and net neutrality.¹²⁴ As such, while the results of a state's efforts to act in direct contravention of federal policy are not assessed, it is important to note that ongoing litigation by a state attorney general has a myriad of consequences. Such impacts include shaping a state's internal policymaking, promoting collaboration between states, causing schisms between states with divided interests, shaping public perception of the state government, and influencing corporate behavior.¹²⁵ State activism has become part and parcel of the national dialogue regarding a number of civil rights issues.¹²⁶

Such efforts demonstrate the prosecutorial power of a state attorney general in furthering (or curtailing) civil rights within the state, particularly in relation to enforcement efforts and direct challenges to the state's policy development.¹²⁷

C. State Agencies

The activities of state agencies and departments are within the purview of the state's executive branch. Thus, while agencies act in accordance with the objectives outlined by the governor, state executive agencies play an important role in regulation and enforcement of employment policies.¹²⁸

For instance, in Washington, the state's Department of Labor & Industries drafted proposed rules to assist with the implementation of a voter-passed initiative that "raised the state's minimum wage and required employers to provide paid sick leave."¹²⁹ The Department distributed information to the public regarding the proposed rules and stakeholder responses.¹³⁰ While this does not involve the creation of original policy as is done by a state legislature, the role of the state agency in clarifying the legislation through its rulemaking authority will guide the implementation

122. Matt Zapotosky, *Attorneys General from 15 States, D.C. Sue to Save DACA*, WASH. POST (Sept. 6, 2017), https://www.washingtonpost.com/world/national-security/attorneys-general-from-15-states-dc-sue-to-save-daca/2017/09/06/98bca3b2-930f-11e7-aace-04b862b2b3f3_story.html?utm_term=.8fec07a3b3d4, archived at <https://perma.cc/P32Y-EEZE>.

123. Richard Moody, *Schneiderman: I'll Sue You. This Time Betsy DeVos for Not Enforcing For-profit School Oversight Rule*, HUDSON VALLEY 360 (Oct. 19, 2017), <https://www.hudsonvalley360.com/article/schneiderman-i%E2%80%99ll-sue-you-time-betsy-devos-not-enforcing-profit-school-oversight-rule>, archived at <https://perma.cc/ME75-LCP7>.

124. Debra Cassens Weiss, *FCC Repeals Net Neutrality Rules; at Least 2 State AGs Plan to Challenge*, A.B.A. J. (Dec. 14, 2017), http://www.abajournal.com/news/article/fcc_repeals_net_neutrality_rules_state_ag_s_plan_a_multistate_challenge/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email, archived at <https://perma.cc/ME75-LCP7>.

125. See Zapotosky, *supra* note 122; Moody, *supra* note 123.

126. See Zapotosky, *supra* note 122; Moody, *supra* note 123.

127. See Zapotosky, *supra* note 122; Moody, *supra* note 123.

128. See *State Agency Asking for Input on Paid Sick Leave Rules*, ASS'N WASH. CITIES (May 16, 2017), <https://wacities.org/news/2017/05/16/state-agency-asking-for-input-on-paid-sick-leave-rules>, archived at <https://perma.cc/JCE7-6KT4>; WASH. ADMIN. CODE § 296-128-600, I-1433 Draft Proposed Rules (Apr. 7, 2017), https://s3-us-west-1.amazonaws.com/ehq-production-us-california/64333b2b4ff449112b8724ac8f2482fc0550fb01/documents/attachments/000/000/339/original/I-1433_Draft_Proposed_Rules_-_Pre-CR102.pdf?1491606888, archived at <https://perma.cc/2PQ9-CE9X>.

129. *State Agency Asking for Input on Paid Sick Leave Rules*, *supra* note 128.

130. I-1433 Draft Proposed Rules, *supra* note 128.

of the policy for employers and employees alike.¹³¹ These actions can substantially impact the success or failure of the legislation in practice, which can be as influential as the original intent behind the legislation or executive order.

Another example is New York's Labor Department. Governor Andrew Cuomo asked the state's Labor Department to look into the challenges faced by workers with on-call scheduling.¹³² In response, the Department is issuing new rules for "[w]orkers whose schedules change at the last minute would get extra pay and other protections."¹³³ The Labor Department's work to address these issues primarily benefits the low-income workers that serve as the backbone of the retail and restaurant industries, which most commonly use on-call scheduling practices.¹³⁴ The proposed rules would require two-weeks' advance notice for scheduling, provide bonus compensation for last-minute assignments, and demand compensation for scheduling shifts within the two-week scheduling window.¹³⁵

Such regulatory efforts provide tangible benefits to workers, while still allowing for public input.¹³⁶ This assessment of the contribution of state executive agencies and departments does not account for other possible areas of intersection, such as related state-services employment. For instance, under the American Recovery and Reinvestment Act of 2009, the federal government provided "\$500 million in state grants for employment services, mainly for low-income adults."¹³⁷

V. JUDICIAL BRANCH

State courts also have an important role to play in the advancement of civil rights, particularly in the employment context. It is precisely because state judges are the ultimate arbiters of the meaning of state laws, particularly in situations where there is division between a state's governor, attorney general, and legislature.¹³⁸

As referenced in the preceding section, Louisiana Governor Edwards passed an executive order to expand the protections available to LGBT state employees and contractors.¹³⁹ In response to Attorney General Landry's failure to comply with the

131. *State Agency Asking for Input on Paid Sick Leave Rules*, *supra* note 128; I-1433 Draft Proposed Rules, *supra* note 128.

132. Graig Zappia, *New York's On-call Employees to Receive an Economic Boost Through New Call-in Pay Regulation*, TULLY RINCKEY PLLC (Jan. 31, 2018), <https://www.tullylegal.com/resources/articles/new-yorks-call-employees-receive-economic-boost-new-call-pay-regulation/>, archived at <https://perma.cc/6NKK-J3Z6>.

133. Brian Nearing & Matthew Hamilton, *State Moves to Benefit Workers for Last-Minute Scheduling*, TIMES UNION (Nov. 10, 2017), <http://www.timesunion.com/business/article/State-moves-to-protect-workers-from-last-minute-12347846.php>, archived at <https://perma.cc/C75P-EQ35>.

134. *Id.*

135. *Id.*

136. *Id.*

137. John Rossheim, *Stimulus Allocates Billions for Job-Training Opportunities*, MONSTER, <https://www.monster.com/career-advice/article/economic-stimulus-job-training>, archived at <https://perma.cc/CF45-SDQE>.

138. *Comparing Federal & State Courts*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts> (last visited Feb. 24, 2019), archived at <https://perma.cc/VJZ8-S5ZV>.

139. Elizabeth Crisp, *John Bel Edwards Signs Executive Order Barring LGBT Discrimination in State Government*, ADVOC. (Apr. 17, 2016 3:52 PM), https://www.theadvocate.com/baton_rouge/news/politics/article_baac9eaa-9b7e-55d3-8578-45cd3d85f283.html, archived at <https://perma.cc/V6RQ-9RET>.

Executive Order, as demonstrated by Landry's denial of state contracts that included provisions protective of LGBT individuals, the Governor filed a lawsuit.¹⁴⁰ Baton Rouge District Court Judge Todd Hernandez held that the Executive Order exceeded the scope of Governor Edwards' authority because the Order "create[s] new and/or expand[s] upon existing Louisiana law as opposed to directing a faithful execution of the existing laws of Louisiana."¹⁴¹ After Judge Hernandez issued the permanent injunction, the Governor's office removed the protective language from the state's contracts, in part to ensure that healthcare coverage for state employees was not disrupted.¹⁴² Governor Edwards also appealed the decision to the Louisiana First Circuit Court of Appeal.¹⁴³ The appellate court affirmed the ruling of the district court, holding that Governor Edwards' Executive Order was overly broad. In its unanimous opinion, appellate Judge Toni Higginbotham explained that the Governor had exceeded his authority because "the Louisiana Legislature and the people of the State of Louisiana have not yet revised the laws and/or the state Constitution to specifically add 'sexual orientation' or 'gender identity.'"¹⁴⁴ Governor Edwards and his team are considering their legal options, including an appeal to the state's Supreme Court, on the grounds that the Governor did not exceed his constitutional authority or inappropriately exercise legislative authority in issuing his Executive Order.¹⁴⁵

Last year, the Kentucky Supreme Court struck down a Louisville ordinance raising the minimum wage above the state's threshold, as violative of the state's "'comprehensive scheme' of state employment laws by raising the minimum wage."¹⁴⁶ The lone dissenter in the 6-1 decision, Justice Sam Wright, noted the following in his opinion:

The language establishing a minimum wage does not, as the majority asserts, amount to something expressly permitted by the statute being prohibited by the ordinance. The statute requires an employer to pay a wage of "not less than" the amount set by statute. This statute was passed to protect workers from being paid a lesser wage.

140. Alex Woodward, *Gov. Edwards Sues AG Landry over LGBT Protections*, ADVOC. (Sept. 20, 2016), https://www.theadvocate.com/gambit/new_orleans/news/the_latest/article_8b9b53a9-a7c2-59f1-9061-6c79263537c1.html, archived at <https://perma.cc/V6RQ-9RET>.

141. Dep't of Justice v. Edwards, 2017-0173, p. 4 (La. App. 1 Cir. 11/1/17); 233 So. 3d 76, 79; Mark Ballard, *Judge Finds Gov. John Bel Edwards Exceeded Constitutional Authority with LGBT Order*, ADVOC. (Dec. 14, 2016), http://www.theadvocate.com/baton_rouge/news/politics/article_cd533496-c223-11e6-8936-7b8f5b354e04.html, archived at <https://perma.cc/5NXU-NJQB>.

142. *Id.*

143. Mark Ballard, *Appeals Court Hears Arguments in Dispute Between Edwards, Landry over LGBT-rights Order*, ADVOC. (Aug. 15, 2017), http://www.theadvocate.com/baton_rouge/news/politics/article_cf62bcaa-81b0-11e7-8f02-a39ade9c9463.html, archived at <https://perma.cc/ZKD6-6WTC>.

144. Mark Ballard, *Appeals Court Upholds Ruling That Gov. Edwards Overstepped with LGBT Rights Order*, ADVOC. (Nov. 1, 2017), http://www.theadvocate.com/baton_rouge/news/politics/article_b44b7036-bf29-11e7-980c-87d5d444e508.html, archived at <https://perma.cc/V53E-FYTM>.

145. *Id.*

146. Ky. Rest. Ass'n v. Louisville/Jefferson Cty. Metro Gov't, 501 S.W.3d 425 (Ky. 2016); Ryland Barton, *Kentucky Supreme Court Strikes Down Louisville Minimum Wage Ordinance*, 89.3 WFPL (Oct. 20, 2016), <http://wfpl.org/kentucky-supreme-court-strikes-down-louisville-minimum-wage-ordinance/>, archived at <https://perma.cc/5CNW-7X6N>.

The majority's view is that the statute expressly permitted the employer to pay the minimum. This reading of the statute requires a view that it was passed to protect the employer. The majority's conclusion is inconsistent with the purpose of the statute and its history. There is simply no conflict between the two laws.¹⁴⁷

Some judicial opinions have yielded mixed results. For example, in September 2018, the Minnesota Court of Appeals partially upheld a Minneapolis city ordinance mandating paid sick leave.¹⁴⁸ The court determined “that the city cannot require employers located outside the city limits to provide employees with paid sick days,” but that “the city may continue to impose paid sick leave on Minneapolis-based businesses.”¹⁴⁹ This opinion affirmed a January 2017 decision by the Hennepin County District Court that similarly allowed for the business regulation to stand within city limits, but held that Minneapolis could not impose the ordinance on employers without a physical presence in the city.¹⁵⁰

State courts have the ability to be innovative in developing progressive common law as well. In 2018, the Massachusetts Supreme Judicial Court was the nation's “first appellate court in any jurisdiction to hold that medical marijuana users may assert state law handicap or disability discrimination claims—regardless of whether the state's medical marijuana statute provides explicit employment protections.”¹⁵¹ The court's unanimous ruling allows “medical marijuana users to assert claims for handicap discrimination under the Massachusetts Fair Employment Practices Act,” even though the ruling (and the underlying statute) “does not provide an implied, private right of action by employees against employers.”¹⁵² This decision affirmed employment protections for individuals with disabilities who exercise their rights under the state's medical marijuana policy, requiring employers to go through the interactive process of determining whether a reasonable accommodation would allow the prospective or current employee to fulfill the expectations and responsibilities of the work.¹⁵³

Ultimately, judicial actors are influential in the development of employment civil rights policies on the state level. The determinations of the court not only impact the work of the legislative and executive branches but also expand protections by

147. *Id.*

148. Frederick Melo, *Minneapolis Paid Sick Leave Mandate Limited to Employers Within the City, Appeals Court Rules*, TWIN CITIES PIONEER PRESS, (Sept. 18, 2017), <https://www.twincities.com/2017/09/18/minneapolis-paid-sick-leave-mandate-limited-to-employers-within-the-city-appeals-court-rules/>, archived at <https://perma.cc/ZHQ6-2L6C>.

149. Frederick Melo, *Court Gives Mixed Opinion on Minneapolis Paid Sick Leave Law*, GRASSROOTS CHANGE (Sept. 20, 2017), <https://grassrootschange.net/2017/09/court-gives-mixed-opinion-minneapolis-paid-sick-leave-law/> <https://perma.cc/L9AH-CP9P>.

150. *Id.*

151. Nonnie Shivers, *The Top Employment Cases of 2017 and a Sneak Peek at 2018*, OGLETREE DEAKINS (Aug. 23, 2017), <https://ogletree.com/shared-content/content/blog/2017/august/the-top-employment-cases-of-2017-and-a-sneak-peek-at-2018>, archived at <https://perma.cc/S8S8-USAR>.

152. Michael Clarkson & Tae Philips, *Massachusetts Supreme Judicial Court Issues Groundbreaking Decision Allowing Medical Marijuana User to Assert State Law Handicap Discrimination Claim*, OGLETREE DEAKINS (July 18, 2017), <https://ogletree.com/shared-content/content/blog/2017/july/massachusetts-supreme-court-allows-medical-marijuana-user-to-assert-handicap-discrimination-claim>, archived at <https://perma.cc/Q9ZV-4QAK>.

153. *Id.*

upholding employee-friendly policies, curtailing protections for vulnerable groups, or even resolving conflicts internal to the executive branch.

VI. ANALYSIS OF STATE CAPACITY TO ACT IN FURTHERANCE OF CIVIL RIGHTS

This section summarizes key takeaways, abstracting critical lessons for advocates in approaching future efforts to expand protections for vulnerable populations. While these lessons are by no means exhaustive, they encompass the variety of issues, actors, and outcomes that can result from efforts to advance rights in the employment sphere.

A. Advocates should seek to build coalitions between state actors and engage in multi-front policy reform measures.

Advocates should seek to find parity between the objectives they seek and the policy tools they utilize to obtain those outcomes. These political and social levers should be an intentional choice, aimed to link the end-goal, policy tool, and state actor with one another. Some strategies are not new, but have been used with renewed vigor or have been creatively modified to advance policy objectives. However, in an era of deep fissure between parties, advocates should seek to build coalitions that will yield results.

For instance, the increased use of preemption legislation is an old political tool that has experienced a marked revival.¹⁵⁴ This methodology has most recently been used to preempt progressive localities from expanding protections beyond those provided by the state.¹⁵⁵ Most advocates favoring employee protections would not seek to use preemption as a mechanism for state policy. First, affirmative legislation would have the same impact in establishing rights for individuals. Second, preemption often imposes a ceiling for protective policies, rather than encouraging municipal policies that are broader than the state's protections. However, using preemption laws to prevent conservative localities from passing restrictive legislation could be a beneficial strategy. A preemption policy that "prohibits local laws that limit LGBT protections" could have a very different impact than a policy that "prohibits local laws that define LGBT protections more narrowly than those provided to state employees."¹⁵⁶

Since the November 2016 elections, the demographics of state politics have changed, particularly with the rise of single-party control within branches and across

154. Lauren E. Phillips, *Impeding Innovation: State Preemption of Progressive Local Regulations*, 117 COLUM. L. REV. 2225, 2244-45 (2017).

155. Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 J. FEDERALISM 403, 403 (2017).

156. *Id.*

branches of the state systems. Only three states—Iowa, Kentucky, and New Hampshire—have politically split chambers of their state legislatures.¹⁵⁷ By contrast, the other 47 states are either unicameral bodies or are under single-party legislative control.¹⁵⁸ Even more astounding is that 32 states have “single-party control over the legislative *and* executive branches—state house, senate, and governor.”¹⁵⁹

In states with split legislatures, but even more so in states within exclusively Republican control, advocates should still make efforts to build stakeholder and political coalitions. Although unsuccessful in the case of Minnesota, many advocates have attempted to mix liberal and conservative policies in one bill—aiming to force individual politicians to accept the bitter with the sweet.¹⁶⁰ But even bills that contain compromise may not always successfully appeal to every actor, although such policies provide a strong model for future movements. For instance, the Minnesota Governor vetoed legislation that combined a minimum-wage preemption policy with enhancements to public employee retirement plans and wage-theft protections.¹⁶¹ Combining political interests into a single piece of legislation can help achieve compromise and enhance the buy-in of multiple stakeholders.

This is particularly important for bringing together state actors to act in unison in politically divided states. Recognizing that every actor matters, serves a unique role, and enjoys different powers and authority, is a framework that can allow room for compromise. Focusing on individual actors, but also keeping in mind the relationship between these entities, is critical for coalescing efforts and requires a multi-front approach to break down barriers to reform. Without such global thinking about the interactions within the state system, differences between stakeholders can undermine productivity and cooperation, such as they did in Louisiana.¹⁶²

Messaging plays a key role in facilitating such compromise. For instance, emphasis on the disproportionate impact of particular employment practices on particular minority communities could inhibit a campaign’s ability to garner support from non-minorities or conservative legislators or voters.¹⁶³ Apathy, or in some cases open hostility, to identity politics in civil rights messaging can hinder efforts.¹⁶⁴ The importance of messaging has been evident in the development of the felon enfranchisement movement.¹⁶⁵ Both law enforcement associations and religious institutions, which have been associated with the political right, often have a sincere interest in

157. Keesha Gaskins, *The Importance of State Legislatures, Redistricting, and Civil Rights*, BRENNAN CTR. FOR JUST. (Nov. 8, 2012), <https://www.brennancenter.org/blog/importance-state-legislatures-redistricting-and-civil-rights>, archived at <https://perma.cc/UC7W-ZP48>.

158. *Id.*

159. *Id.* (emphasis added).

160. Briana Bierschbach, *It’s Locals vs. the Legislature, Round 2: The Battle Over Pre-Emption is Back at the Minnesota Capital*, MINNPOST, (Mar. 9, 2018), <https://www.minnpost.com/politics-policy/2018/03/its-locals-vs-legislature-round-2-battle-over-pre-emption-back-minnesota-cap/>, archived at <https://perma.cc/G4FJ-WLGZ>.

161. *Id.*

162. Ballard, *supra* note 141.

163. Desmond King & Rogers M. Smith, *Focus: Racial Inequality and the Weakening of Voting Rights in America*, DISCOVER SOC’Y (June 1, 2016), <https://discoversociety.org/2016/06/01/focus-racial-inequality-and-the-weakening-of-voting-rights-in-america/>, archived at <https://perma.cc/47WM-Y7WJ>.

164. *Id.*

165. Reuven Ziegler, *Legal Outlier, Again? U.S. Felon Suffrage: Comparative and International Human Rights Perspectives*, 29 B.U. INT’L L.J. 197, 208 (2011).

the rehabilitation of felony offenders and their successful reintegration into their communities.¹⁶⁶ Inclusive messaging that can appeal to a wide base of values has the potential to mobilize unlikely allies that have been oppositional to civil rights efforts.¹⁶⁷ This strategy was effective in Rhode Island,¹⁶⁸ Nevada,¹⁶⁹ and Nebraska,¹⁷⁰ where advocates have found success in securing the endorsement of such entities for felon voting rights bills. Messaging is just as important in advancing ban-the-box efforts, as advocacy on this issue is a natural extension of felon enfranchisement efforts. These movements both seek to integrate diverse partners for the benefit of those with criminal convictions; both movements could also benefit from the adoption of similar messaging strategies.¹⁷¹

Finally, as part of these efforts, advocates should seek robust enforcement mechanisms as much as facially favorable policies. Particularly when a private right of action is not available, state enforcement is critical. This speaks to the importance of ongoing advocacy to breathe full life into legislation so that it becomes policy, not just dead-letter law. It also highlights the permanent role of states in furthering civil rights efforts beyond just preliminary legislation. For instance, ensuring that a state agency's goal-setting and budget-planning provide sufficient means for enforcement allows for progressive results. A strong policy with no ability to follow through on those commitments can undermine public trust; perfect legislation on the books is insufficient if, for example, inadequate funding is provided to accomplish the goals of the legislation. These issues should be explicitly contemplated by advocates early on, in the original development of policy proposals, and in bolstering existing state systems to provide immediate protections for diverse, yet marginalized, communities. At the same time that these back-doors provide new battlegrounds for expanding rights, it is also terrain that advocates must defend against encroachment.

B. Advocates should highlight that state civil rights policies substantially impact residents, businesses, and democracy itself.

This section addresses the impact that state civil rights legislation can have in influencing the daily lives of citizens and shaping the policy of businesses within the

166. *Rhode Island Voters Approve Voting Rights for People on Probation and Parole*, BRENNAN CTR. FOR JUST. (Nov. 8, 2006), <https://www.brennancenter.org/sites/default/files/analysis/RI%204%20press%20release.pdf>, archived at <https://perma.cc/U9VR-Q4N4>.

167. John Gallagher & Chris Bull, *Perfect Enemies*, WASH. POST, <https://www.washingtonpost.com/wp-srv/style/longterm/books/chap1/perfectenemies.htm> (last visited Feb. 27, 2019), archived at <https://perma.cc/5PXZ-M4RP>.

168. *Rhode Island Voters Approve Voting Rights for People on Probation and Parole*, *supra* note 166.

169. *Voting Rights Restoration Efforts in Nevada*, BRENNAN CTR. FOR JUST. (June 26, 2017), <https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-nevada>, archived at <https://perma.cc/SP2J-SDP3>.

170. *Voting Rights Restoration Efforts in Nebraska*, BRENNAN CTR. FOR JUST. (Apr. 6, 2017), <https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-nebraska>, archived at <https://perma.cc/U4HD-2CFM>.

171. Agraharkar, *supra* note 13.

state. These impacts can be far-reaching, but states are also fundamental to the development of our democratic process on a national level.

1. Residents

States serve a critically important role in furthering policies that have an impact on the daily lives of their citizens. Even in cases where there is no federal recourse for a civil rights violation, an individual may be able to seek relief at the state level.¹⁷² Even the smallest state in the country by population—Wyoming—has nearly 600,000 residents.¹⁷³ Adding state protections, even in the smallest state, expands civil rights coverage for a large number of Americans. Similarly, every state that enacts restrictive policies has a notable effect too. Just because the stakes of state politics are relatively smaller than those related to federal policy-making regarding the policy's scope of coverage, a state's policies are inescapable for the residents of that territory.¹⁷⁴

Citizens also play a critical role in holding political officials accountable for their policy choices through our democratic processes. This is explored further later in this section.

2. Businesses

Businesses are important stakeholders within the state system. Corporations have the ability to influence state policy-making, particularly with the power of their financial influence. While lobbying and direct candidate contributions are obvious mechanisms for corporate actors, their daily operations can also deeply influence state policy. For instance, North Carolina has had to reckon with the *en masse* pull-out of several business ventures that are estimated to have cost the state more than \$630 million.¹⁷⁵ Generally, banking, entertainment, sports, research, and tourism have taken substantial hits.¹⁷⁶ Perhaps most notably, “PayPal signed a legal document with 67 other companies against HB2 and cancelled plans to open a Charlotte center, which would have added 400 jobs, with \$20.4 million in annual salaries,” contributing to the state's \$58 million in technology losses.¹⁷⁷

172. *What are Civil Rights?*, FINDLAW, <https://civilrights.findlaw.com/civil-rights-overview/what-are-civil-rights.html> (last visited Feb. 27, 2019), archived at <https://perma.cc/XS8J-V8WL>.

173. *State Population Totals and Components of Change: 2010-2016*, U.S. CENSUS BUREAU (2017), <https://www.census.gov/data/tables/2016/demo/popest/state-total.html>, archived at <https://perma.cc/6YYW-UDTA>.

174. Nicole DuPuis et al., *City Rights in an Era of Preemption: A State-by-State Analysis 2018 Update*, NAT'L LEAGUE CITIES 16, <https://www.nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf> (last visited Mar. 23, 2019), archived at <https://perma.cc/GC58-FHXG>.

175. Corinne Journey, *North Carolina's Bathroom Bill Flushes Away \$630 Million In Lost Business*, FORBES (Nov. 3, 2016), <https://www.forbes.com/sites/corinnejourney/2016/11/03/north-carolinas-bathroom-bill-flushes-away-750-million-in-lost-business/#5f10761e4b59>, archived at <https://perma.cc/A32V-3EVS>.

176. *Id.*

177. *Id.*

Companies are also able to take action independent of the political system. This can serve to cue politicians to changing tides, as some companies are ready to evolve their business practices. Noting trends in the business community can also be extremely beneficial. For instance, the percent of Fortune 500 companies that included sexual orientation in their nondiscrimination policy rose from just 4% in 1996 to 92% in 2017; the inclusion of transgender protections in Fortune 500 nondiscrimination policies rose from 3% to 82% in the same decade.¹⁷⁸ Another example of employers joining forces to engage in protective action for their employees occurred last year, in which almost 30 nationwide employers “like Gap, Pepsi and American Airlines, signed an Equal Pay Pledge promoted by the White House in which they committed to conducting annual audits of their pay by gender across all job categories.”¹⁷⁹ While not dispositive, this stark trend can offer insight into the evolution of civil rights in employment but can also provide political cover to legislators and other state actors.

Even companies that are recalcitrant to take action are likely to alter their behavior when faced with administrative challenges.¹⁸⁰ National companies are likely to find a tipping point in their practice, where implementing different policies, forms, and oversight measures are excessively complicated by trying to meet the requirements of highly-variant state policies.¹⁸¹ In these cases, businesses, for efficiency and cost-saving motives, can opt to follow the highest common denominator.¹⁸² Employers have recognized “the patchwork of regulations that has been emerging, the complexity facing HR is indeed increasing exponentially” because of the “time, resources, and energy adjusting policies across their geographically distributed workforces.”¹⁸³ Accordingly, national or multi-state companies may opt to follow the most robust regulatory regime, complying with the most restrictive requirements, rather than continuing to differentiate their practices. In this way, even a single state’s policy can have national consequences if employers opt to follow the most expansive level of protections for a particular category of employees.

Companies also care about their public image. One scholar considered the options open to employers in St. Louis, where employees benefitted from a city ordinance raising the minimum wage to \$10 before the state’s preemption law nullified this provision.¹⁸⁴ In reflecting on this dilemma, he noted employers have to decide whether to: “1. Cut everyone who was bumped up to \$10 back to their wage level as of May; 2. Keep everyone at \$10 who was given the bump in May; [or] 3. Pick and

178. 2017 *Workplace Equality Fact Sheet*, *supra* note 23.

179. Stacy Cowley, *Illegal in Massachusetts: Asking Your Salary in a Job Interview*, N.Y. TIMES (Aug. 2, 2016), <https://www.nytimes.com/2016/08/03/business/dealbook/wage-gap-massachusetts-law-salary-history.html>, archived at <https://perma.cc/EH9J-TSJM>.

180. Brian Kropp, *Business Group Urges Congress to Legislate Family Leave Standard*, GARTNER (Apr. 25, 2017), <https://www.cebglobal.com/talentedaily/business-group-urges-congress-to-legislate-paid-family-leave-standard/>, archived at <https://perma.cc/A2RG-GU6L>.

181. *Id.*

182. *Id.*

183. *Id.*

184. *How Should Employers Respond When the Minimum Wage Falls?*, GARTNER, <https://www.cebglobal.com/talentedaily/how-should-employers-respond-when-the-minimum-wage-falls/> (last visited Mar. 7, 2019), archived at <https://perma.cc/K7EB-4AN9>.

choose who gets to stay at \$10 (the better performers, more essential folks).”¹⁸⁵ This can be challenging for employers who receive pushback from their employees as well as in the realm of public perception. Such considerations force employers to critically weigh potential harms that could result from their pushback on progressive, rights-expansive state policies.

3. Democracy

Advocates should also promote in their messaging the significant value that these civil rights initiatives have within our democracy. Civil rights are hard to secure, but they are often even harder to take away.¹⁸⁶ Promoting political action from individual citizens and safeguarding states as laboratories of democracy are independently important goals, above and beyond the substance of employment rights advocacy.

First, citizens are empowered to engage in the democratic process. This can have tangible, positive results in the form of electing representatives who are true to the interests of the community. These gains can also be manifested in voter-enacted changes to a state’s policy, such as through ballot amendments. A ballot measure was how Milwaukee citizens passed a city ordinance requiring employers to provide paid sick leave, with 69% of voters in favor of the provision.¹⁸⁷ However, Wisconsin’s 2011 preemption law nullified Milwaukee’s ordinance.¹⁸⁸ While it might be ironic to underscore citizens’ influence in voting by highlighting an example in which that will was overridden by the legislature, such opportunities provide the public with the motivation to respond in force—at the ballot box in the next election. Increasing transparency can allow citizens to make more informed decisions; when elected officials act in clear opposition to the will of the electorate, then voters are motivated to respond decisively.

Moreover, in envisioning states as laboratories of democracy, examples of successful policies can provide the federal government with a blueprint for successful policy-making on the national level. This can promote clarity with data collection and analytics, allowing scholars in law, economics, sociology, and other fields to expand their data set and resolve conflicts.¹⁸⁹ For instance, conflicting data regarding the impact of minimum-wage legislation on particular industries could be investigated more fully.¹⁹⁰ Experimentation with different types of policies can also help bring to light unintended consequences of such laws. For instance, salary history prohibitions that are meant to close the gender wage gap may not, in actuality,

185. *Id.*

186. *Civil Rights vs. Civil Liberties*, FINDLAW, <https://civilrights.findlaw.com/civil-rights-overview/civil-rights-vs-civil-liberties.html> (last visited Feb. 27, 2019), archived at <https://perma.cc/WY4B-52CF>.

187. von Wilpert, *supra* note 33.

188. *Id.*

189. *Id.*

190. *Id.* Conflicting research from economists at the University of California, Berkeley, and a team of economists at the University of Washington offered divergent analyses of the impacts of San Francisco’s minimum wage law. The former research said there was no evidence of job loss resulting from the law. The latter study concluded the minimum-wage ordinance lowered employee earnings due to a reduction of hours worked.

achieve the intended goal of gender parity.¹⁹¹ Possible adverse side effects might include: (1) employers may assume those who refuse to disclose their pay earn less; (2) employers may view non-disclosure as a signal of an intent to negotiate aggressively; (3) employers may perceive women, but not men, negatively for signaling a desire to negotiate.¹⁹²

None of these consequences may come to pass—but being able to say so definitively would make the movement for such protections more compelling. For instance, many opponents of gay marriage feared this policy was the first step in stripping them of their religious liberties.¹⁹³ Instead, religious advocates have won a series of important legal battles affirming their rights.¹⁹⁴ Additionally, implementing a variety of strategies on the state level will allow advocates to identify loopholes or unintended consequences when such policies are put into practice, which can help bolster the robustness of laws that are designed to protect marginalized or vulnerable workers.¹⁹⁵

Finally, the enactment of these policies through our democratic process has a strong social justice implication. Given that civil rights employment policies are intended to support employees who are part of protected classes, are affiliated with vulnerable populations, or are disproportionately represented amongst minimum-wage earners, these policies have a broad, significant impact on equity in our society.

VII. CONCLUSION

As demonstrated through numerous examples—through the legislative, executive, and judicial branches—state actors are an essential component of current civil rights advocacy and can play an even more expansive role if advocates learn to leverage the actors and processes within the state policy-making system. Understanding the role of each actor and the interaction of these actors in the state system can allow advocates to gain traction in the expansion of civil rights efforts. While providing important lessons for activism on the federal level, the work done up to this point in time is useful in several other ways. First, it can provide a blueprint for securing or bolstering affirmative protections immediately, expanding protection and services for vulnerable populations. Moreover, these efforts can guide advocates in planning for future advocacy efforts at the state level, as well as efforts within each state. Ultimately, recognizing the role of states as civil rights actors can help current and

191. Frank, *supra* note 4; *supra* Section II: Background.

192. *Id.*

193. Billy Hallowell, *5 Major Fears Gay Marriage Opponents Have About the Potential Nationwide Legalization of Same-Sex Unions*, BLAZE (June 28, 2013), <http://www.theblaze.com/news/2013/06/28/5-major-fears-gay-marriage-opponents-have-about-the-potential-nationwide-legalization-of-same-sex-unions>, archived at <https://perma.cc/N692-K9AZ>.

194. Dan McLaughlin, *Religious Liberty, Trump Win Important Victories at the Supreme Court*, NAT'L REV. (June 26, 2017), <http://www.nationalreview.com/article/448984/supreme-court-victories-religious-liberty-and-trump-administration-term-ends>, archived at <https://perma.cc/V4B5-QVQC>.

195. H. Beales et al., *Government Regulation: The Good, The Bad, & The Ugly*, REG. TRANSPARENCY PROJECT FEDERALIST SOCIETY (June 12, 2017), <https://regproject.org/paper/government-regulation-the-good-the-bad-the-ugly/>, archived at <https://perma.cc/R2ZN-EMG9>.

future advocacy efforts, particularly as they relate to the recruitment of diverse stakeholders, engagement of the citizenry, and shaping future policy in employment civil rights.