

## NOTE

# DISCRETE AND INSULAR AND SHACKLED: AN EQUAL PROTECTION ARGUMENT TO ATTACK POLICIES AND PRACTICES ALLOWING FOR THE SHACKLING OF PREGNANT PRISONERS

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*The shackling of pregnant incarcerated individuals before, during, and after labor is a practice that persists in many jurisdictions within the United States despite the draconian nature of and lack of necessity for the practice. These policies and practices are enforced despite the large potential for emotional, physical, and mental harm to both the individual and the child they deliver. Despite growing domestic and international anti-shackling advocacy, there has yet to be a successful legal mechanism for seeking recourse established for those subjected to shackling policies and practices in the United States. This Note contextualizes shackling and offers a potential legal mechanism to attack shackling through the Equal Protection Clause of the Fourteenth Amendment. Specifically, this note argues for the establishment of pregnant incarcerated individuals as a discrete and insular minority for the purposes of heightened scrutiny for judicial reviews of state action, given the small population size, severe risks of harm, and unique vulnerabilities of the class.*

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## INTRODUCTION

*“Pregnant incarcerated people are one of the most marginalized and forgotten groups in our country.”*

– Dr. Carolyn Sufrin<sup>1</sup>

Many jurisdictions allow the practice of requiring pregnant prisoners to be shackled during labor despite growing international and national advocacy against the practice.<sup>2</sup> Shackling is carried out through unwritten practices, written policies, and explicit laws.<sup>3</sup> A couple of the many complaints raised in connection with shackling highlight the draconian nature of the practice and the elevated health risks to both the laboring individuals and the child being born, who are already in a position of heightened health risk due to pregnancy alone.<sup>4</sup> While these policies also have the potential to affect transgender individuals who are pregnant at the time of their incarceration, the vast majority of focus and research has been on cisgender women and inmates in female prisons and jails.<sup>5</sup>

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<sup>1</sup> Jonathan Lambert, *Pregnant Behind Bars: What We Do and Don’t Know About Pregnancy and Incarceration*, NPR: SHOTS (Mar. 21, 2019, 5:29 PM), <https://www.npr.org/sections/health-shots/2019/03/21/705587775/pregnant-behind-bars-what-we-do-and-dont-know-about-pregnancy-and-incarceration>.

<sup>2</sup> REBECCA PROJECT FOR HUMAN RIGHTS & NAT’L WOMEN’S LAW CTR., *MOTHERS BEHIND BARS: A STATE-BY-STATE REPORT CARD AND ANALYSIS OF FEDERAL POLICIES ON CONDITIONS OF CONFINEMENT FOR PREGNANT AND PARENTING WOMEN AND THE EFFECT ON THEIR CHILDREN 6–7* (2010). When this report was compiled, there were ten states with laws on the books addressing the practice. *Id.* at 6. However, of the states without laws banning the practice, some of the states had little to no guidance on when and who should make the determination of whether shackles should be used and thirty-one of the forty states without bans had no policy for holding an institution accountable for the use of shackles without a justification. *Id.* at 6–7. The number of states with bans on the books is now up to twenty-two, but laws on the books do not necessarily mean that the bans are being followed, particularly because there are no strict reporting requirements in these bans. Ginette G. Ferszt et al., *Where Does Your State Stand on Shackling of Pregnant Incarcerated Women?*, 22 *NURSING FOR WOMEN’S HEALTH* 17, 18 (2018); Lindsay Whitehurst, *States Weigh Bans on Shackling Jailed Moms During Childbirth*, ASSOCIATED PRESS (Mar. 13, 2019), <https://apnews.com/8e3ab1726aaa4b0696bb86fd4946cb42>.

<sup>3</sup> See Ferszt, *supra* note 2, at 18; Ashley Southall & Benjamin Weiser, *Police Forced Bronx Woman to Give Birth While Handcuffed, Lawsuit Says*, N.Y. TIMES (Dec. 6, 2018), <https://www.nytimes.com/2018/12/06/nyregion/pregnant-inmate-shackled-lawsuit.html>.

<sup>4</sup> See Ferszt, *supra* note 2, at 19.

<sup>5</sup> The language of this Note will largely reflect the majority focus although the policy recommendations are intended to encapsulate all pregnant incarcerated individuals, including those left out by the mainstream attention.

While it is easy to consider these practices abstractly and still note how horrific they are in practice, it should never be forgotten the real impacts they have on individuals.<sup>6</sup> There are countless, heart wrenching narratives from women who have been subjected to this treatment that display the raw and real consequences of allowing shackling policies and practices.<sup>7</sup> Take for example the story of a woman who was incarcerated in the Bronx.<sup>8</sup> She was 40 weeks pregnant when she went into labor and the correctional officers refused to remove any of her restraints for almost an hour at the hospital, despite her struggling in excruciating pain and the doctors asking that the restraints entirely be removed, warning the accompanying officer of the risks the restraints posed for someone in labor.<sup>9</sup> The woman, in her complaint, noted that she had been humiliated and traumatized by the delivery, which occurred with one of her arms still shackled to the bed.<sup>10</sup> She further noted that she has been unable to confide in her family about the experience.<sup>11</sup> This is, unfortunately, just one of the many narratives about these horrible practices and many stories are often accompanied by horrible, irreversible physical repercussions of the practices.

While the risks of shackling policies have been well documented and researched, likely leading to the recent surge in anti-shackling laws at both state and federal levels, there has not been a successful legal mechanism for challenging the entire practice.<sup>12</sup> Challenges have centered around due process<sup>13</sup> and cruel and unusual punishment attacks.<sup>14</sup> There has been some success in these domestic challenges, but largely for individuals seeking recourse from past harm in a manner that has not helped eliminate these policies and practices in action.<sup>15</sup> Challenges have also relied on international human rights frameworks, despite the realities that the United States is often criticized globally for human rights viola-

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<sup>6</sup> See ACLU REPRODUCTIVE FREEDOM PROJECT & ACLU NATIONAL PRISON PROJECT, *THE SHACKLING OF PREGNANT WOMEN & GIRLS IN U.S. PRISONS, JAILS, & YOUTH DETENTION CENTERS* (2012).

<sup>7</sup> *Id.* at 2–3.

<sup>8</sup> Southall & Weiser, *supra* note 3.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Leonie Stoute, *Break Every Chain: Bringing an End to the Unconstitutional Shackling of Pregnant Inmates*, 60 *How. L. J.* 749, 763 (2017); Elizabeth Alexander, *Unshackling Shawanna: The Battle Over Chaining Women Prisoners During Labor and Delivery*, 32 *U. ARK. LITTLE ROCK L. REV.* 435, 447 (2010).

<sup>13</sup> Alexander, *supra* note 12, at 447.

<sup>14</sup> Stoute, *supra* note 12, at 769.

<sup>15</sup> *Id.* at 767–68.

tions and not abiding by the human rights treaties to which they are signatories.<sup>16</sup>

This Note will explore a potential new way of attacking these policies by relying on the Equal Protection Clause of the Fourteenth Amendment through a framework of pregnant incarcerated individuals as a discrete and insular minority.<sup>17</sup> First, this Note will provide context about these policies and practices, including the major arguments proffered in support of and against them and the international and domestic positions on the practice. Second, this Note will discuss why the current gender and pregnancy equal protection jurisprudence provides improper and insufficient protection for incarcerated pregnant individuals, given the excising of pregnancy from the gender analysis and heightened health risks and specific potential harms of pregnant prisoners due to their position as both pregnant and subject to shackling. Finally, this Note will explore a new potential classification of “pregnant incarcerated individual” as a discrete and insular minority as a legal mechanism for challenging these policies, specifically drawing attention to the unique characteristics of this group of individuals and how the justifications often proffered for these policies fall flat.

## I. CONTEXT OF SHACKLING POLICIES AND PRACTICES

Since the early 2000s, there has been widespread activism nationally and internationally about the problems posed by shackling policies in relation to how they affect incarcerated pregnant persons.<sup>18</sup> This recent slew of activism, in large part, came in response to increasing populations of female prisoners for largely non-violent drug offenses.<sup>19</sup>

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<sup>16</sup> Dana Sussman, *Bound by Injustice: Challenging the Use of Shackles on Incarcerated Pregnant Women*, 15 *CARDOZO J. L. & GENDER* 477, 483–84 (2009); Hilary Hammell, *The International Human Right to Safe and Humane Treatment During Pregnancy and a Theory for its Application in U.S. Courts*, 33 *WOMEN’S RTS. L. REP.* 244, 248–49 (2012); International Human Rights Clinic University of Chicago Law School, CLAIM, & ACLU National Prison Project, *The Shackling of Incarcerated Pregnant Women: A Human Rights Violation Committed Regularly in the United States* (Aug. 2013), [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT\\_CCPR\\_NGO\\_USA\\_15235\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT_CCPR_NGO_USA_15235_E.pdf) (last visited Jan. 9, 2020); USA: “Not Part of my Sentence”: *Violations of the Human Rights of Women in Custody*, AMNESTY INT’L (Mar. 1999).

<sup>17</sup> See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (establishing that if a group constitutes a discrete and insular minority that is being prejudiced by governmental action, the action might be subjected to higher levels of judicial scrutiny that it must pass in order to stand as constitutional). This will be discussed in more depth *infra* Part III.

<sup>18</sup> Alexander, *supra* note 12, at 436–38.

<sup>19</sup> Carolyn Sufirin, Lauren Beal, Jennifer Clarke, Rachel Jones & William D. Mosher, *Pregnancy Outcomes in US Prisons, 2016–2017*, 109 *AJPH OPEN-THEMED RES.* 799 (2019) (looking at the most recently available data on pregnancy outcomes in US prisons, also noting that there was a 742% increase in the numbers of women in prisons in the United States in 2016 as compared to 1980); see also Alison L. Smock, *Childbirth in Chains: A Report on the Cruel But Not So Unusual Practice of Shackling Incarcerated Pregnant Females in the United*

Shackling policies and practices can include but are not limited to having restraints around wrists and ankles as well as chains around someone's stomach during pregnancy.<sup>20</sup> Activists have explored shackling practices throughout the prisoner's pregnancy, including concerns about restraint use during second and third trimesters as well as during and directly after labor.<sup>21</sup> The majority of activist focus has been on the laboring and postpartum period given the specific health risks to both the mother and fetus.<sup>22</sup>

Many credible medical associations and organizations have spoken out against these policies, referencing the specific health risks and concerns associated with shackling pregnant individuals.<sup>23</sup> Shackling policies present a wealth of physical and mental health risks and complications during one's pregnancy.<sup>24</sup> Physical restraints can interfere with a pregnant person's balance and make it harder for the individual to avoid potentially life threatening injuries during their second and third trimesters.<sup>25</sup> Shackling can interfere with a mother's ability to move or shift position during labor, which can lead to extreme pain, increased physical stress, a "decreased amount of oxygen available to the fetus . . . severe bruising, abrasions, and other injuries to the mother."<sup>26</sup> These practices also impede the ability of medical professionals from assessing and acting on critical health needs during labor, especially if the mother

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*States*, 3 TENN. J. RACE, GENDER & SOC. JUST. 111, 113 (2014) (discussing how shackling policies can be understood as an outgrowth of a penal institution centered around dealing with male offenders, who commit more violent offenses, responding to an influx of female prisoners of reproductive age).

<sup>20</sup> International Human Rights Clinic University of Chicago Law School, CLAIM, & ACLU National Prison Project, *supra* note 16.

<sup>21</sup> Smock, *supra* note 19, at 120–21; AM. MED. ASS'N, AN "ACT TO PROHIBIT THE SHACKLING OF PREGNANT PRISONERS" MODEL STATE LEGISLATION (2015), online at <https://www.ama-assn.org/sites/default/files/media-browser/specialty%20group/arc/shackling-pregnant-prisoners-issue-brief.pdf> (last visited Jan. 9, 2020).

<sup>22</sup> Smock, *supra* note 19, at 122.

<sup>23</sup> AMERICAN MEDICAL ASSOCIATION, *supra* note 21, at 3; AMERICAN COLLEGE OF NURSE-MIDWIVES, POSITION STATEMENT: SHACKLING/RESTRAINT OF PREGNANT WOMEN WHO ARE INCARCERATED (2010), online at <http://www.midwife.org/ACNM/files/ACNMLibraryData/UPLOADFILENAME/000000000276/Anti-Shackling%20Position%20Statement%20June%202012.pdf> (last visited Jan. 9, 2020); ACLU REPRODUCTIVE FREEDOM PROJECT & ACLU NATIONAL PRISON PROJECT, *supra* note 6.

<sup>24</sup> ACLU REPRODUCTIVE FREEDOM PROJECT & ACLU NATIONAL PRISON PROJECT, *supra* note 6.

<sup>25</sup> Julie B. Ehrlich & Lynn M. Paltrow, *Jailing Pregnant Women Raises Health Risks*, WOMEN'S ENews, (Sept. 20, 2006), <https://womensenews.org/2006/09/jailing-pregnant-women-raises-health-risks/>; AMERICAN MEDICAL ASSOCIATION, *supra* note 21, at 2–3. Pregnancy is known for being associated with increased balance issues, so this risk is something that should not be taken lightly, given the ways in which restraints and shackles limit an individual's mobility.

<sup>26</sup> Smock, *supra* note 19, at 118, 120–21; AMERICAN MEDICAL ASSOCIATION, *supra* note 21, at 3; AMNESTY INTERNATIONAL, *supra* note 16, at 10–11; AMERICAN COLLEGE OF NURSE-MIDWIVES, *supra* note 23.

needs to undergo an emergency caesarian section procedure.<sup>27</sup> Remaining restrained during the post-partum period can result in ineffective healing, leading to increased risk for thromboembolic disease or hemorrhaging during this period, and can impair the mother's ability to care for and bond with the newborn baby.<sup>28</sup> Further, correctional officers often refuse to remove shackles or restraints even at the request of the medical professionals, which can add to the potential health risks and damage a laboring individual and the fetus are exposed to.<sup>29</sup> Sometimes, the long term physical harm can even produce an inability to have any more children.<sup>30</sup>

Shackling can also be exceptionally demoralizing and traumatic for pregnant and laboring individuals.<sup>31</sup> Being exposed to tortuous levels of pain and being treated as less than human can lead to long term mental health consequences resulting in extreme mental anguish. Restraint use means that people can be stuck in demoralizing positions, sometimes around officers of the opposite gender.<sup>32</sup> Further, being shackled might mean that individuals are unable to move around freely and has left women in conditions that force them to soil themselves, adding to the ways in which they experience embarrassment and demoralization.<sup>33</sup> These compounding physical and mental health implications mean that the experience of being shackled during pregnancy and labor might live with the individual in countless ways for the rest of their lives.<sup>34</sup>

#### A. *The International Position on Shackling of Pregnant Women*

Various international bodies have addressed shackling policies in relation to general incarcerated populations as well as specifically relating to the pregnant population.<sup>35</sup> The international consensus on shackling practices is clear. Established international human rights law makes it abundantly apparent that shackling pregnant inmates is a human rights

<sup>27</sup> Regina Cardaci, *Care of Pregnant Women in the Criminal Justice System*, 113 AMER. J. OF NURSING 40, 42 (2013); AMERICAN MEDICAL ASSOCIATION, *supra* note 21, at 3. Even five-minute delays in beginning caesarian procedures can result in health complications like "permanent brain damage for the baby." Smock, *supra* note 19, at 120.

<sup>28</sup> Jennifer G. Clarke & Rachel E. Simon, *Shackling and Separation: Motherhood in Prison*, 15 AM. MED. ASS'N J. ETHICS 779, 781–82 (2013); AMERICAN COLLEGE OF NURSE-MIDWIVES, *supra* note 23.

<sup>29</sup> AMNESTY INTERNATIONAL, *supra* note 16, at 10–11; AMERICAN MEDICAL ASSOCIATION, *supra* note 21, at 3.

<sup>30</sup> *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 526 (8th Cir. 2009).

<sup>31</sup> Smock, *supra* note 19, at 124; AMNESTY INTERNATIONAL, *supra* note 16, at 10–12.

<sup>32</sup> Smock, *supra* note 19, at 123.

<sup>33</sup> *Id.* at 123; Sussman, *supra* note 16, at 501.

<sup>34</sup> Smock, *supra* note 19, at 123.

<sup>35</sup> Brett Dignam & Eli Y. Adashi, *Health Rights in the Balance: The Case Against Perinatal Shackling of Women Behind Bars*, 16 HEALTH & HUM. RTS. J. 13, 17–18 (2014).

violation.<sup>36</sup> This is something that has been both specifically condemned as a practice and encapsulated by other international human rights directives such as prohibitions against cruel and unusual punishment.<sup>37</sup> Further, it is of note that the United States is either a signatory on the treaties and conventions listed below, or it is a member state of the United Nations voting in support of passing standards and rules that ban shackling practices.<sup>38</sup> Despite these international anti-shackling commitments, the United States still allows the practice to occur and these public obligations are important to remember when considering the role of having mechanisms to effectively tackle these policies and practices in the United States. This must be considered a justification for taking such legal action.

A host of international instruments ban the practice of shackling pregnant individuals, either explicitly or implicitly covered by other provisions. While there is not space to delve into the range of instruments that touch on shackling practices, a couple of the instruments are worth noting as they explicitly focus on shackling of pregnant individuals, and the United States supported their passage.<sup>39</sup> The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules) were adopted in 2010 as part of an effort to set international minimum standards for the treatment of women prisoners, considering the unique challenges and considerations that come into play when faced with female prisoners.<sup>40</sup> Rule 24 of the Bang-

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<sup>36</sup> Sussman, *supra* note 16, at 488–92.

<sup>37</sup> *Id.* at 490–91.

<sup>38</sup> *Id.* at 489.

<sup>39</sup> Some other conventions and agreements are informative but not necessarily as on point as the mentioned instruments. The International Covenant on Civil and Political Rights has an international ban on cruel and unusual punishment, something that shackling practices is commonly thought to be. International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171 art. 7 (entered into force Mar. 23, 1976, adopted by the United States Sept. 8, 1992). The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment institutes a ban on acts that cause severe mental or physical pain or suffering ordered by an official for any reason based on discrimination of any kind, which discrimination on the basis of pregnancy status falls under. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* 10 Dec. 1984, G.A. Res. 39/46, U.N. GAOR 39th Sess., Supp. No. 51, U.N. Doc. A/39/51, art. 1 (1984) (entered into force June 26, 1987). Finally, the United Nations Convention on the Elimination of All Forms of Discrimination Against Women requires that states ensure all women appropriate services and care in relation to their pregnancy, labor, and post-partum periods as a means of not discriminating in health services and trying to ensure healthy, unimpeded pregnancy and labor. Convention on the Elimination of All Forms of Discrimination Against Women, adopted by General Assembly on 18 Dec., 1979, GA Res. 34/180, 34 U.N. GAOR Supp. (No. 46) art. 12, (entered into force 3 September, 1981).

<sup>40</sup> United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders, G.A. Res. 65/229 (Dec. 21, 2010) [*hereinafter* Bangkok Rules]. These rules were in large part adopted because women in many countries constitute the fastest growing prison demographic. Because prisons and prison regulations were designed around

kok Rules explicitly provides that the shackling of pregnant women during labor, during birth, and immediately after birth violates international standards.<sup>41</sup> In establishing this rule, the instrument's commentary specifically notes the health concerns associated with shackling.<sup>42</sup> Further, in response to flight risk and danger concerns, Rule 24's commentary provides that "[o]ther means of meeting security needs can and should be found."<sup>43</sup>

Along with the Bangkok Rules, the United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) were adopted unanimously in 2015 by the United Nations General Assembly.<sup>44</sup> The Mandela Rules established that shackles should never be used as a punishment for behavior.<sup>45</sup> Further, the Rules established that the "use of chains, irons or other instruments of restraint which are inherently degrading or painful shall be prohibited,"<sup>46</sup> and that the only two acceptable instances to utilize restraints are either (1) to prevent a prisoner from escaping during movement between locations, or (2) when there is no other means of preventing the prisoner from injuring themselves, others, or property and these circumstances have to be explicitly authorized by law.<sup>47</sup> Even when relying on these circumstances when restraints are allowed and authorized by law, there are principles that govern restraint use in these circumstances, including that restraints should only be imposed "when no lesser form of control would be effective to address the risks posed by unrestricted movement;" that restraints should be the least intrusive necessary; and that restraints should only be used for the required period of time, being "removed as soon as possible after the risks posed" have dissipated.<sup>48</sup> Further, the Mandela Rules establish that "[i]nstruments of restraint shall never be used on women during labour, during childbirth and immediately after childbirth."<sup>49</sup>

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the concept of a male offender, the Bangkok Rules were created and agreed upon as a means to adjust for the new needs and services that were needed by the growing female population. PENAL REFORM INT'L, U.K. BANGKOK RULES ON WOMEN OFFENDERS AND PRISONERS: SHORT GUIDE 3-4 (2013), <http://www.penalreform.org/wp-content/uploads/2013/07/PRI-Short-Guide-Bangkok-Rules-2013-Web-Final.pdf>.

<sup>41</sup> Bangkok Rules at 24.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners, GA Res 70/175, UNGAOR, 70th Sess, UN Doc A/RES/70/175 (2015) [*hereinafter* Mandela Rules]; UN, *international experts urge countries to apply 'Nelson Mandela Rules' in prisons*, UN News (July 18, 2016), <https://news.un.org/en/story/2016/07/534632-un-international-experts-urge-countries-apply-nelson-mandela-rules-prisons>.

<sup>45</sup> Mandela Rules at 43(2).

<sup>46</sup> *Id.* at 47(1).

<sup>47</sup> *Id.* at 47(2).

<sup>48</sup> *Id.* at 48(1).

<sup>49</sup> *Id.* at 48(2).

Given that these two instruments specifically protect pregnant incarcerated individuals from being shackled, one might think that there is adequate protection against the practice already in place in the form of international law. Unfortunately, international obligations only provide so much protection to individuals against state action since the harshest sanction for violating an international obligation is still essentially a piece of paper from an international court or body, such as the United Nations, stating that the state failed to meet its obligation to protect an individual's rights.<sup>50</sup> The reality is that an international law violation rarely amounts to more than a slap on the wrist, especially in the context of the United States.<sup>51</sup> However, it is important to remember that the United States is bound by these obligations and fails to meet these obligations by not requiring widespread bans of shackling practices and policies.<sup>52</sup> These international obligations should inform our courts' jurisprudence and their considerations of what are inappropriate governmental classifications.<sup>53</sup>

### B. *The Domestic Focus on Shackling Policies and Practices*

Activist focus on shackling practices has had some beneficial outcomes legislatively. As of 2017, 22 states and the District of Columbia had legally imposed "some form of anti-shackling statute."<sup>54</sup> Further, the First Step Act, passed in 2018 and enacted in 2019, banned the practice in federal prisons.<sup>55</sup> Despite this though, the practice still remains allowable in many local jurisdictions in the United States.<sup>56</sup> Further, it is hard to know how effective these recent legislative "wins" will be at actually combatting the practice at this point, for many of them have only re-

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<sup>50</sup> See generally Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most*, 44 J. PEACE RES. 407 (2007) (looking at the failures of governments to adequately abide by the international obligations they bind themselves to in treaties, resolutions, and other international instruments); Amy C. Harfeld, *Oh Righteous Delinquent One: The United States' International Human Rights Double Standard—Explanation, Example, and Avenues for Change*, 4 N.Y.C. L. REV. 59 (2001) (examining the failure of the United States to make meaningful change in line with international human rights obligations due to their usage of reservations, making the gesture of signing merely symbolic, and providing recommendations for future practice).

<sup>51</sup> See Harfeld, *supra* note 50, at 63.

<sup>52</sup> *Id.* at 90 n.163.

<sup>53</sup> Specifically, courts should take this into consideration when making determinations of whether something is prejudicial governmental behavior. See *infra* Part II.

<sup>54</sup> Erica Duff, *Reproduction as a Site of Punishment: Shackling Pregnant Women during Labor and Delivery in Modern American Prisons*, 7 VA. J. CRIM. L. 16, 28 (2019).

<sup>55</sup> First Step Act, 18 U.S.C. § 4322 (2019). This a particularly descriptive piece of legislation because it accounts for options to handle the widespread justifications, like escape concerns, while also providing widespread action to protect against the practice.

<sup>56</sup> Duff, *supra* note 54, at 27–29.

cently gone into effect.<sup>57</sup> Including the First Step Act, none of the anti-shackling laws include a complete ban against shackling.<sup>58</sup>

Every state with an anti-shackling law in the United States has a provision allowing for the use of restraints on pregnant inmates under “extraordinary circumstances”.<sup>59</sup> There are a few commonly relied on circumstances used to utilize the loophole: whether the inmate is a flight risk and whether the inmate poses a threat to others or themselves or if there is an extraordinary circumstance requiring the practice.<sup>60</sup> The problem with these justifications is that they are determined subjectively by the accompanying correctional officer, even in the face of medical professional’s requests to remove patients’ restraints and the blatant reality is that neither of these circumstances is likely to be close to reality when someone is going through labor.<sup>61</sup> Despite the nonsensical foundation for allowing these loopholes, there is not a single state shackling ban without some way to allow the practice in certain circumstances.<sup>62</sup>

These exceptions have also been codified in the federal ban seen in the First Step Act,<sup>63</sup> although that regulation handles these exceptions better than some of the other bans by requiring the use of the least restrictive restraints when relying on an exception.<sup>64</sup> Moreover, even under the exceptions, the First Step Act bans restraint use under the exceptions if they place restraints “around the ankles, legs, or waist of the prisoner;” if they shackle the prisoner’s “hands behind [their] backs;” if they “restrain a prisoner in a 4-point restraint;” or if they “attach [the] prisoner to another prisoner.”<sup>65</sup> These qualifications work to combat many of the concerns raised in objection to exceptions within bans.<sup>66</sup> However, by providing for any sort of exception, the First Step Act still leaves a gaping opening for potential harm.

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<sup>57</sup> There are genuine concerns about implementation already being noted, including uneven and delayed implementation as well as concerns about oversight and funding for the implementation. Tim Lau, *Historic Criminal Justice Reforms Begin to Take Effect*, BRENNAN CTR. FOR JUST. (July 25, 2019), <https://www.brennancenter.org/blog/historic-criminal-justice-reforms-begin-to-take-effect>; Ayesha Rascoe, *3 Months Into New Criminal Justice Law, Success for Some and Snafus for Others*, NPR: POL. (Apr. 1, 2019), <https://www.npr.org/2019/04/01/708326846/3-months-into-new-criminal-justice-law-success-for-some-and-snafus-for-others>. Further, most of the focus on the First Step Act has been on release and sentence changes, which means that the federal ban on shackling practices are likely to fall through the cracks.

<sup>58</sup> First Step Act, 18 U.S.C. § 4322 (2019); Chris DiNardo, *Pregnancy in Confinement, Anti-Shackling Laws and the “Extraordinary Circumstances” Loophole*, 25 DUKE J. GENDER L. & POL’Y 271, 279–80 (2018).

<sup>59</sup> DiNardo, *supra* note 58, at 280, 282.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 294.

<sup>63</sup> First Step Act, 18 U.S.C. § 4322 (2019).

<sup>64</sup> *Id.* § 4322(b).

<sup>65</sup> *Id.* § 4322(b)(3).

<sup>66</sup> DiNardo, *supra* note 58, at 292–93.

There has been some domestic success in seeking recourse through the courts for the harms and indignity caused by shackling practices under the Eighth Amendment's prohibition of cruel and unusual punishment.<sup>67</sup> There have only been a handful of cases, but on the whole, courts have been receptive to providing recourse for harm.<sup>68</sup> In part, this is because the Prison Litigation Reform Act has made it increasingly difficult for prisoners to access the courts, acting as a deterrent against bringing suits and seeking recourse.<sup>69</sup> Perhaps the best example of recourse through the court system is seen in *Nelson v. Correctional Medical Services*, coming out of the Eighth Circuit.<sup>70</sup>

Nelson brought a suit alleging an Eighth Amendment violation for cruel and unusual punishment occurring when she was shackled during the birth of her second child.<sup>71</sup> Despite officer testimony that Nelson did not pose a flight risk or security threat during her transport to the hospital—and directly disregarding the lieutenant's instruction to rush the transport and forgo restraints before traveling—the transporting officer chose to delay travel and place handcuffs on Nelson.<sup>72</sup> The officer restrained Nelson at the hospital, shackling her to the wheelchair she was transported in and then shackling both of her ankles to opposite sides of the hospital bed, despite her being well into the final stage of labor.<sup>73</sup> The officer refused to unshackle Nelson until she went into the delivery room, despite the severe pain she was experiencing and repeated requests from her nurse that the restraints be removed.<sup>74</sup> Nelson was unable to move her legs or readjust during the most painful stage of labor.<sup>75</sup> Nelson alleged that the shackling caused “extreme mental anguish and pain, permanent hip injury, torn stomach muscles, and an umbilical hernia requiring surgical repair. She . . . also alleged damage to her sciatic nerve.”<sup>76</sup> Nelson was advised that she should not try to have more children in the future due to the long-term complications caused by these

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<sup>67</sup> Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CAL. L. REV. 1239, 1247 (2012).

<sup>68</sup> It should be noted that the United States Supreme Court has never heard a case directly addressing whether the shackling of pregnant prisoners during their pregnancies, labor period, and post-partum period constitutes cruel and unusual punishment.

<sup>69</sup> DiNardo, *supra* note 59, at 288–89. See generally David M. Alderstein, *In Need of Correction: The “Iron Triangle” of the Prison Litigation Reform Act*, 101 COLUM. L. REV. 1681 (2001) (looking at the Prison Litigation Reform Act and the ways in which it fails to adequately protect prisoners' rights while also failing to allow administrative institutions to be fully free from judicial intrusion).

<sup>70</sup> *Nelson v. Corr. Med. Servs.*, 583 F.3d 522 (8th Cir. 2009).

<sup>71</sup> *Id.* at 527.

<sup>72</sup> *Id.* at 525.

<sup>73</sup> *Id.* at 525–526.

<sup>74</sup> *Id.* at 526.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

injuries.<sup>77</sup> The Eighth Circuit noted that the actions of the correctional officer could be understood under the cruel and unusual punishment jurisprudence as the officer displaying deliberate indifference to Nelson's constitutional rights and allowed Nelson's suit to survive a motion for summary judgment.<sup>78</sup> At the subsequent trial, the officer was found to have violated Nelson's rights by being deliberately indifferent to her medical needs.<sup>79</sup>

By finding in these cases that the women's medical needs were disregarded, the courts have begun to take a vital step in publicly combating the policies and practices. The problem with this mechanism of attacking the policies is that the Eighth Amendment precedents have not resulted in any trickle-down effect that prevents the harm before it occurs. Countless individuals remain vulnerable to potential harm caused by shackling, which will continue to be the case until there is an outright end to the practice. Further, due to the Prison Litigation Reform Act, the damages that prisoners usually receive are nominal at best.<sup>80</sup> For instance, Nelson only received nominal damages of \$1.00 for the harms she suffered as a result of the shackling during her labor.<sup>81</sup> Nominal damages diminish the real recourse that suits are able provide for individuals.

## II. THE EXISTING EQUAL PROTECTION FRAMEWORK: GENDER AND PREGNANCY ANALYSES

The Equal Protection Clause is supposed to ensure that a state governs impartially amongst its citizens and does not draw arbitrary lines that have nothing to do with the governmental objective of some act on the basis of some category that means that certain groups are prejudiced.<sup>82</sup> If a class is entitled to heightened scrutiny, the class still has to prove discriminatory purpose and discriminatory impact in order to successfully establish a violation.<sup>83</sup> Since discriminatory purpose and impact change in accordance with the specific governmental action being

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<sup>77</sup> *Id.* It cannot be underscored enough how Nelson suffered many of the real health complications that health professionals raise as concerns in opposing shackling practices. While thankfully there was not also risk to her child's life, this instance of what might be considered relatively unrestrictive restraining still had huge cascading health complications for the mother.

<sup>78</sup> *Id.* at 534.

<sup>79</sup> Nelson v. Turnesky, No. 1:04CV00037 JMM, 2010 WL 3655565, at \*1 (E.D. Ark. 2010).

<sup>80</sup> Nelson, 2010 WL 3655565, at \*7.

<sup>81</sup> *Id.* at \*1.

<sup>82</sup> Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 142 n.97 (1989).

<sup>83</sup> *Id.* at 131–32 n.40.

challenged,<sup>84</sup> this Note will only focus on the requirements of establishing a class deserving of some form of heightened scrutiny.

The Supreme Court has already established an equal protection framework for dealing with actions and policies that make classifications and hands down different treatment on the basis of gender and pregnancy status. The roots of this jurisprudence come out of litigation in the 1970s as women began raising legal challenges in the courts attacking laws that discriminated on the basis of gender and sex.<sup>85</sup> The first case to find a governmental action unconstitutional, *Reed v. Reed*, was not handed down until 1971.<sup>86</sup> The Court in *Reed* relied on a rational relationship test in striking down what it deemed as an arbitrary regulation that legally preferred men over women as administrators of estates, where the state argued that this choice was needed to eliminate hearings on the merits of who should be the administrator by choosing simply the man every time.<sup>87</sup> The rational relationship test was later abandoned for gender classifications in favor of intermediate scrutiny, a judicial inquiry existing as a sort of middle ground between rational basis and strict scrutiny review that has been edited and updated by the Court over time for gender.<sup>88</sup> The Court articulated its justifications for viewing gender as a class that should be considered inherently suspect in *Frontiero v. Richardson*, listing the historical stereotypes based on gender and immutability of gender as a trait.<sup>89</sup> In its most current iteration, seen in the case of *United States v. Virginia*, the Court required governmental actors to provide that a gender classification be substantially related to an important governmental objective that is supported by an exceedingly persuasive justification for using the gender classification that is not reliant on

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<sup>84</sup> *Id.*

<sup>85</sup> Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKLEY WOMEN'S L. J. 1, 1 (1985).

<sup>86</sup> *Reed v. Reed*, 404 U.S. 71, 71–72, 76 (1971).

<sup>87</sup> *Id.* at 76.

<sup>88</sup> The progress of the Court first moved to strict scrutiny before settling on intermediate scrutiny, which was later updated from other iterations of intermediate scrutiny for other classifications. See *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (plurality opinion) (using strict scrutiny to invalidate a statute that allowed males in the armed services an automatic dependency allowance for their wives but requiring servicewomen to prove their husbands were dependent); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (establishing intermediate scrutiny requiring statutes relying on a gender classification to be substantially related to the achievement of an important governmental purpose and used a higher level of scrutiny (intermediate scrutiny) to overturn a state statute that had a higher alcohol purchasing age for men than women on a 1.82% discrepancy on the basis of gender for arrests due to drunk driving); *United States v. Virginia*, 518 U.S. 515, 524 (1996) (updating intermediate scrutiny to include a requirement of the state to put forth an exceedingly persuasive justification that is not based in traditional gender stereotypes while invalidating the admissions policy of Virginia Military Institute, a public institution, in excluding women as Virginia had no comparable women's only equivalent).

<sup>89</sup> See *Frontiero*, 411 U.S. at 686.

overly broad gender stereotypes.<sup>90</sup> This heightened scrutiny that the Court has settled on established gender as at least a quasi-suspect class, if not something slightly higher.<sup>91</sup>

Unfortunately, despite the fact that pregnancy discrimination is now understood as a form of gender discrimination in the workplace context,<sup>92</sup> it does not fall under the same equal protection standard as other potentially gendered classifications.<sup>93</sup> In *Geduldig v. Aiello*, the Supreme Court held that pregnancy could not be used as a sex based classification, despite being a gender-linked medical condition, and thus was only subject to a rational basis review.<sup>94</sup> The statute at question in *Geduldig* excluded disabilities resulting from medical complications during normal pregnancy from state disability insurance coverage programs, meaning that unemployed individuals relying on the program could not rely on receiving benefits for normal complications during their pregnancies.<sup>95</sup> The Court focused on pregnancy as if it were similar to any other disability, a point that the dissent argues falls flat, since pregnancy is a disability suffered only by women and can be as or more demanding medically than other conditions.<sup>96</sup> Despite the dissent's arguments that this was blatantly a form of sex discrimination and thus should be subjected to the precedent at the time, strict scrutiny,<sup>97</sup> the majority held that the State had "a legitimate interest in maintaining the self-supporting nature of its insurance program" and limiting which resources were given out to adequately provide for what it was supposed to by not covering certain conditions was rationally related to that interest.<sup>98</sup>

This position that pregnancy discrimination was not a form of sex or gender discrimination was underscored in another case, *General Electric Co. v. Gilbert*, a case similar to *Geduldig* but for a private insurance

<sup>90</sup> *Virginia*, 518 U.S. at 524.

<sup>91</sup> See Galloway, *supra* note 82, at 125–36.

<sup>92</sup> See Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (amending Title VII of the Civil Rights Act of 1964 to incorporate pregnancy discrimination as a form of prohibited sex discrimination in the employment context in direct response to the holdings in *Geduldig v. Aiello* and *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), both of which had held that pregnancy discrimination was not a form of gender discrimination). It should be noted that even though the Pregnancy Discrimination Act effectively overrules *Geduldig* and *Gilbert* in the workplace context, the holding has never been specifically overruled and thus continues to apply in other contexts that might regulate pregnancy. Lauren Sudeall Lucas, *Here's Why Equal Protection May Not Protect Everyone Equally*, WASH. POST (Sept. 23, 2015) <https://www.washingtonpost.com/news/in-theory/wp/2015/09/23/heres-why-equal-protection-may-not-protect-everyone-equally/>.

<sup>93</sup> See *Geduldig v. Aiello*, 417 U.S. 484 (1974).

<sup>94</sup> *Id.* at 495–96.

<sup>95</sup> *Id.* at 487–89.

<sup>96</sup> *Id.* at 500–02 (Brennan, J., dissenting).

<sup>97</sup> *Id.* at 502–05 (Brennan, J., dissenting). The dissent noted that this statute would fail this analysis. *Id.*

<sup>98</sup> *Id.* at 496–97.

program through an employer.<sup>99</sup> In *Gilbert*, the Court held that the program, which covered sicknesses and absences associated with disabilities but not those associated with pregnancy, did not discriminate on the basis of sex.<sup>100</sup> So, even with a heightened standard of judicial scrutiny on the basis of gender, pregnancy itself is subject to rational basis review, a standard that is not difficult to meet.<sup>101</sup>

The reality of this low constitutional bar is that pregnant individuals are unprotected in many circumstances.<sup>102</sup> Regardless of incarceration status, pregnancy itself can be an extremely difficult and taxing medical condition, threatening the lives of pregnant individuals even if they are not incarcerated.<sup>103</sup> To just briefly discuss the potential complications of pregnancy, pregnancy can cause anemia; urinary tract infections; depression; anxiety; hypertension; gestational diabetes, which may or may not go away post-delivery; ectopic pregnancies, which can result in lasting damage to the pregnant individual's organs; miscarriage; infection, including infectious diseases that pose an increased risk to pregnant individuals like HIV, viral hepatitis, and sexually transmitted diseases; preeclampsia; placenta previa; placental abruption; and preterm labor.<sup>104</sup> These are just some of the range of health complications that a laborer might experience, not including the range of potential health risks compounded when restraints are added into the equation.<sup>105</sup> Further, the United States has one of the highest maternal mortality rates in the world, estimated to be "26.4 per 100,000 live births in 2015" and rising during a period where globally maternal mortality rates were decreasing.<sup>106</sup>

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<sup>99</sup> *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).

<sup>100</sup> *Id.* at 140, 145–46.

<sup>101</sup> Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1319 (2018).

<sup>102</sup> It should be noted that the Supreme Court has only really addressed discriminatory pregnancy classifications in the employment context. There is no way to divine what the Court would do when faced with the classifications in other contexts but given the strong judicial principle of stare decisis it can be assumed that they would subject all pregnancy classifications to the *Geduldig* and *Gilbert* rational basis review.

<sup>103</sup> Carl Zimmer, *Silent Struggle: A New Theory of Pregnancy*, N.Y. TIMES (Mar. 14, 2006), <https://www.nytimes.com/2006/03/14/health/silent-struggle-a-new-theory-of-pregnancy.html>.

<sup>104</sup> *What Health Problems Can Develop During Pregnancy*, U.S. DEP'T HEALTH & HUM. SERVS.: NAT'L INST. CHILD HEALTH AND HUM. DEV. (last reviewed Jan. 31, 2017), <https://www.nichd.nih.gov/health/topics/preconceptioncare/conditioninfo/health-problems>; *Pregnancy Complications*, CTR. FOR DISEASE CONTROL AND PREVENTION: REPROD. HEALTH (last modified Aug. 13, 2020), <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-complications.html>; *Pregnancy Complications*, U.S. DEP'T HEALTH & HUM. SERVS.: OFF. ON WOMEN'S HEALTH (last updated Apr. 19, 2019), <https://www.womenshealth.gov/pregnancy/youre-pregnant-now-what/pregnancy-complications>.

<sup>105</sup> AM. MED. ASS'N, *supra* note 21, at 3.

<sup>106</sup> Anita Slomski, *Why Do Hundreds of US Women Die Annually in Childbirth?*, 321 JAMA 1239, 1239 (2019).

Despite these real risks and concerns, by subjecting pregnancy to a lower standard of judicial scrutiny than regular gender equal protection analysis classifications, the Court has essentially given a free ride to government actors attempting to use pregnancy as a classification in a statute, policy, or practice, just as they might use any other medical condition, leaving all pregnant individuals at risk of being prejudiced and harmed by policies.<sup>107</sup> All pregnant individuals are harmed by this lack of judicial oversight, even more so if the group of pregnant individuals is particularly vulnerable, such as those individuals who are incarcerated during their pregnancy.<sup>108</sup>

### III. DISCRETE AND INSULAR MINORITY: AN INSULAR CLASS THAT IS NOT TOO EXPANSIVE TO PROTECT

One thing is clear: pregnant prisoners are in need of a new pathway to attack shackling policies and practices given that they are failed by the regular equal protection pathways. Given that none of the conventional legal mechanisms have been successful thus far,<sup>109</sup> what remains are unconventional ways of approaching the problem legally. This Note offers one potential mechanism: a classification of pregnant prisoners as a discrete and insular minority under the Equal Protection Clause that is distinct and unique from both the regular pregnancy equal protection analysis and the regular gender equal protection analysis. This new classification is required because general analyses fail to protect pregnant prisoners from harm in their uniquely vulnerable situations.

The discrete and insular minority classification is one that justifies courts using some form of heightened scrutiny, above rational basis review, when looking at laws, policies, and practices.<sup>110</sup> This comes out of a famous footnote in the case *United States v. Carolene Products Co.*<sup>111</sup> In this case, the Supreme Court upheld a federal statute that prohibited interstate shipments of filled milk, relying on deference to the legislature under a rational basis review of the statute.<sup>112</sup> In its opinion, the Court provided a double standard of review, establishing a presumption of constitutionality for statutes, policies, and practices reviewed under a ra-

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<sup>107</sup> See Nora Christie Sandstad, *Pregnant Women and the Fourteenth Amendment: A Feminist Examination of the Trend to Eliminate Women's Rights*, 26 L. & INEQ: J. THEORY & PRAC. 171, 189–95 (2008) (exploring the ways in which equal protection jurisprudence mandates a viewing of pregnant individuals as the same as non-pregnant individuals, which can subject pregnant individuals to unique harms).

<sup>108</sup> Catherine Ingram Fogel, *Pregnant Inmates: Risk Factors and Pregnancy Outcomes*, (Jan. 1993) [https://www.jognn.org/article/S0884-2175\(15\)33023-9/pdf](https://www.jognn.org/article/S0884-2175(15)33023-9/pdf).

<sup>109</sup> See *infra* Part II.

<sup>110</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 151–54.

tional basis test unless they are interfering with someone's fundamental rights or are aimed at discrete and insular minorities.<sup>113</sup> If something is subject to a simple rational basis review, this means that the statute, policy, or practice will be upheld as constitutional if it is rationally related to a legitimate governmental interest.<sup>114</sup> When a policy, practice, or statute results in prejudice against discrete and insular minorities, the Court's guidance indicates that these might have to survive a "more searching judicial inquiry," or, rather, something higher than the rational basis review, but not necessarily demanding a strict scrutiny review.<sup>115</sup> This discrete and insular minority analysis has been used in the past to create classes that are constitutionally guaranteed a certain level of scrutiny, as seen above for gender or in other cases such as racial discrimination, national origin, or disability.<sup>116</sup> It is important to note that heightened scrutiny is not required with the Court's word choice of "may demand."<sup>117</sup> This might lead the Court to not find a required heightening of scrutiny in some cases, but should not be taken to mean that this is not a viable pathway for attacking classifications. Ultimately, just because something is not guaranteed does not mean that it is a legal mechanism that should not be attempted.

There is no single set definition for what constitutes a discrete and insular minority. The Court has relied on a variety of factors to determine whether a group might satisfy this label and be justified in receiving heightened scrutiny as a class, including whether an immutable trait defines the group; whether the group has faced a history of discrimination; inherent differences between the group affected and others; a history of animosity; salience of features; whether the group is politically underrepresented or powerless; whether the group is a minority; choice; and the historical background of the decision, including any substantive de-

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<sup>113</sup> *Id.* at 152 n.4. This note will only focus on the discrete and insular minority path of achieving heightened scrutiny due to the focus on the equal protection clause but if governmental action infringes on a fundamental right, including those rights enumerated in the Bill of Rights and rights that are deeply rooted in the nation's history and traditions, the action will only be upheld as constitutional if it is supported by a compelling state interest and the means of reaching the objective of the interest is narrowly tailored to be the least possible infringement that the government could make on this interest. *Washington v. Glucksburg*, 521 U.S. 702, 721 (1997).

<sup>114</sup> This is an easy constitutional bar to pass. The objective of the statute, policy, or practice needs only to be a conceivable objective, and the chosen legal mechanism for achieving the ends only needs to be a reasonable mechanism of accomplishing the objective. *See generally* ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 999–1014 (5th ed. 2015) (explaining the nuances of the constitutional jurisprudence establishing the boundaries of the rational basis review).

<sup>115</sup> *Carolene Products Co.*, 304 U.S. at 152 n.4.

<sup>116</sup> For a further discussion of these classifications, *see* Galloway, *supra* note 82, at 130–47.

<sup>117</sup> *Carolene Products Co.*, 304 U.S. at 152 n.4.

partures from procedures and decision making.<sup>118</sup> Another perhaps more workable definition understands a discrete and insular minority as “a group of people in a larger community whose members are clearly within the group (or any person about whom it is thought to be reasonably clear that the person is or is not a member of the group) and whose membership as a whole somehow stays apart from, is kept apart from, or is treated differently by the community as a whole.”<sup>119</sup> This better understands the nuances of how a discrete and insular minority argument might be made for a small distinct class in the context in which they are being classified, such as pregnant prisoners in a prison setting, and not just as pregnant prisoners in any context.

Pregnant prisoners should be understood as a discrete and insular minority, and they may benefit from utilizing this classification to attack shackling policies and practices. Firstly, shackling policies and practices of this kind solely affect those individuals who are pregnant or who might become pregnant during their incarceration or interaction with the criminal justice system.<sup>120</sup> Thus, they single out a distinct, small group solely on the basis of their pregnancy status in the prison or detention context. This is a small portion of the overall prisoner population, with the most recent statistics from December 2016 finding that about 0.6% of all women in prisons were pregnant (around 12,000 individuals at any given time).<sup>121</sup> This is a miniscule class in relation to the total prisoner population in the United States, which the most recent Bureau of Justice Statistics data reports is 6,613,500.<sup>122</sup> These individuals’ pregnancies result most often in live births or in miscarriages.<sup>123</sup> Further, this small class is uniquely being harmed by the policies and practices in question.<sup>124</sup> As mentioned above, there are taxing physical and mental health complications associated with shackling practices during pregnancy and labor.<sup>125</sup> The lasting damage to both the pregnant individual and the fetus only happens to this small class, making them uniquely prejudiced in

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<sup>118</sup> See *Village of Arlington Heights v. Metro. Housing Development Corp.*, 429 U.S. 252, 268 (1977); see also *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 273, 287 (1979); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). It should be noted that none of these specific classifiers are necessarily mandated for a finding that scrutiny should be heightened for a class, and thus should only be considered guidance.

<sup>119</sup> *Discrete and Insular Minority*, BOUVIER LAW DICTIONARY (desk ed. 2012).

<sup>120</sup> Juan Thompson, *New York is Illegally Shackling Pregnant Incarcerated Women*, INTERCEPT (Feb. 20, 2015, 4:40 PM), <https://theintercept.com/2015/02/20/ny-illegally-shackling-pregnant-incarcerated-women/>.

<sup>121</sup> Sufrin, *supra* note 19, at 801.

<sup>122</sup> Danielle Kaeble & Mary Cowhig, *Bureau of Justice Statistics, U.S. Dep’t of Justice, Correctional Populations in the United States, 2016* (2018), available at <https://www.bjs.gov/content/pub/pdf/cpus16.pdf>.

<sup>123</sup> Sufrin, *supra* note 19, at 801.

<sup>124</sup> Thompson, *supra* note 120.

<sup>125</sup> See *supra* Part I.

comparison to the majority of non-pregnant prisoners. This is exactly the type of prejudice to a small minority that was addressed in *Carolene Products* footnote 4<sup>126</sup> as a situation that should raise suspicion in the eyes of courts and the severity of the potential harm bears in favor of heightening scrutiny when considering these policies. Further, in line with the Supreme Court's considerations in past class determinations, this group does constitute a minority that is severely underrepresented in the larger prisoner population context that has no choice in the manner in which they are being treated at the time these shackling decisions are being made.<sup>127</sup>

While not necessarily enforceable, the international perspectives on shackling pregnant inmates should be considered as a sign of the community's treatment standards when thinking about how these individuals are prejudiced.<sup>128</sup> Courts should consider the fact that the United States has voted multiple times in support of international obligations that provide protection for pregnant individuals against this specific harm.<sup>129</sup> This signals a desire to not prejudice and harm pregnant prisoners more than other prisoners might be harmed in a medical situation and to provide them with the dignity and respect that all humans deserve. Further, this indicates a legislative determination already being made against these sorts of classifications are suspect.

Further, the reasons given in the statutes that do limit the use of this practice in existing bans are arbitrary and nonsensical, signaling prejudice to a specific group for discriminatory purposes, something that courts do consider when evaluating equal protection clause violations.<sup>130</sup> Common loopholes existing in bans, including that the prisoner is a flight risk or that the prisoner is a danger to themselves or others, fall flat when put into the context of someone going through labor.<sup>131</sup> As Amy Fetting, the deputy director of the ACLU's National Prison Project, notes, "the physical conditions of labor make escape attempts unlikely, and there are no documented cases of a woman getting away while having a child."<sup>132</sup> If anything, this condition makes these pregnant individuals the least likely individuals to be able to escape or be a danger to others at the times these policies and practices are utilized by correctional officers.

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<sup>126</sup> *United States v. Carolene Products Co.*, 304 U.S. at 152 n.4 (1938).

<sup>127</sup> *See* Sufirin, *supra* note 19, at 801.

<sup>128</sup> *See supra* Part I.A.

<sup>129</sup> *See infra* Part II.

<sup>130</sup> *See, e.g.*, *Batson v. Kentucky*, 476 U.S. 79 (looking at racially motivated peremptory challenges and introducing a pretext requirement that the person emphasizing the strike must overcome, showing that their reason for striking the juror(s) was race-neutral, if the challenger is able to establish a showing the strike(s) were motivated by the intention to eliminate potential jurors on the basis of their race).

<sup>131</sup> Whitehurst, *supra* note 2.

<sup>132</sup> *Id.*

This bears heavily in favor of ruling that this class is vulnerable and needs heightened protection in the context they are set in.

While no one of these justifications alone might bear in the establishment of a new distinct and insular minority argument, the combination of the arguments above does weigh in favor of heightening scrutiny. Given the vulnerabilities of prisoners,<sup>133</sup> often unable to control their daily lives and choices,<sup>134</sup> and the singling out of pregnant prisoners by these policies,<sup>135</sup> it is hard not to see how they are small, insular, and harmed.

#### CONCLUSION

Given the reality that harm from shackling policies and practices persists, every single tool must be utilized to stop the horrendous human rights violations that pregnant prisoners are subjected to in the United States. While there is some movement towards eliminating the practice, no action yet has gone far enough to ensure that individuals are being treated with care, dignity, and respect during their pregnancies, labor, and postpartum periods.<sup>136</sup> If this new framework were successful at establishing a heightened standard of scrutiny for shackling practices and policies, there might be huge momentum towards ridding the United States of these practices all together, as there would be new avenues for attacking the practices as unconstitutional across all jurisdictions in the country.

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<sup>133</sup> *Prisoners as a Vulnerable Population*, U.C. BERKELEY (June 6, 2018), [https://cphs.berkeley.edu/policies\\_procedures/sc502.pdf](https://cphs.berkeley.edu/policies_procedures/sc502.pdf).

<sup>134</sup> Jerry Metcalf, *A Day in the Life of a Prisoner*, MARSHALL PROJECT (July 12, 2018, 10:00 PM), <https://www.themarshallproject.org/2018/07/12/a-day-in-the-life-of-a-prisoner>.

<sup>135</sup> Roxanne Daniel, *Prisons Neglect Pregnant Women in their Healthcare Policies*, Prison Pol’y Initiative (Dec. 5, 2019), <https://www.prisonpolicy.org/blog/2019/12/05/pregnancy/>.

<sup>136</sup> *Id.*