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A Biden Executive Branch and Its Supporters May Find the Federal Courts an Obstacle

*Heather Elliott**

INTRODUCTION

Relaxing nutrition standards for school meals.[1] Removing water-quality protection from a significant percentage of the nation's waters.[2] Allowing employers to pay the sub-minimum wage for tipped employees even when those employees are performing untipped work.[3] Loosening restrictions on

* Alumni, Class of '36 Professor of Law, the University of Alabama School of Law. Portions of this essay draw on my previous work in *Gorsuch v. the Administrative State*, 70 ALA. L. REV. 703 (2019), and *Justice Gorsuch's Would-Be War on* Chevron, 21 GREEN BAG 2D 315 (2018).

[1] Child Nutrition Programs: Flexibilities for Milk, Whole Grains, and Sodium Requirements, 83 Fed. Reg. 63,775 (Dec. 12, 2018), *vacated and remanded by* Ctr. for Sci. in the Pub. Int. v. Perdue, 438 F. Supp. 3d 546 (D. Md. 2020).

[2] Navigable Waters Protection Rule, 85 Fed. Reg. 22,250 (Apr. 21, 2020).

[3] Tip Regulations Under the Fair Labor Standards Act (FLSA), 82 Fed. Reg. 57,395 (Dec. 5, 2017), *prohibited by* Public Law 115–141, Div. S., Tit. XII, sec. 1201, 132 Stat. 348, 1148–49 (2018).

toxic air pollutants.[4] Weakening workers' rights to unionize and bargain collectively.[5] Abandoning efforts to ensure fair housing opportunities.[6] These and dozens more actions[7] were taken by the Trump administration to weaken the workplace, consumer, and environmental regulations through which the federal government, at the behest of Congress, protects the American people.

President Joe Biden issued nearly a score of memoranda in his first weeks in office announcing plans to restore the federal regulations that make America safer, cleaner, and more equitable.[8] He ordered his administrative agencies to suspend Trump regulations where possible and to expedite the restoration of rules that protect consumers, workers, children, the environment, poor people, disabled people, and other vulnerable persons and entities.[9] Some of those actions, like the Trump actions before them, have already been stymied in court.[10]

Indeed, the federal courts played a key role in preventing some of the worst of Trump's abuses.[11] Unfortunately, federal courts are likely also to

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[4] National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Reconsideration of Supplemental Finding and Residual Risk and Technology Review, 85 Fed. Reg. 31,286 (May 22, 2020).

[5] *See, e.g.*, UPMC & Its Subsidiary, UMPC Presbyterian Shadyside, 368 N.L.R.B. No. 2 (2019); Bexar County Performing Arts Center Foundation, 368 N.L.R.B. No. 46 (2019); Kroger Limited Partnership, 368 N.L.R.B. No. 64 (2019).

[6] Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,899 (Aug. 7, 2020).

[7] *See generally Regulatory Rollback Tracker*, ENV'T & ENERGY L. PROGRAM, HARV. L. SCH., https://eelp.law.harvard.edu/portfolios/environmental-governance/regulatory-rollback-tracker/ [https://perma.cc/B7EK-VEC5]; Isaac Arnsdorf et al., *Tracking the Trump Administrations "Midnight Regulations,"* PROPUBLICA (Feb. 8, 2021), https://projects.propublica.org/trump-midnight-regulations/ [https://perma.cc/EHT3-Z38M].

[8] Aishvarya Kavi, *Biden's 17 Executive Orders and Other Directives in Detail*, N.Y. TIMES (Jan. 20, 2021), https://www.nytimes.com/2021/01/20/us/biden-executive-orders.html [https://perma.cc/Y6A8-9QMZ].

[9] *E.g.*, Exec. Order No. 13,985, 86 Fed. Reg. 7,009 (Jan. 25, 2021); Exec. Order No. 13,988, 86 Fed. Reg. 7,023 (Jan. 25, 2021); Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 25, 2021); Exec. Order No. 13,992, 86 Fed. Reg. 7,049 (Jan. 25, 2021); Exec. Order No. 13,993, 86 Fed. Reg. 7,051 (Jan. 25, 2021); Exec. Order No. 13,999, 86 Fed. Reg. 7,211 (Jan. 26, 2021); Exec. Order No. 14,005, 86 Fed. Reg. 7,475 (Jan. 28, 2021); Exec. Order No. 14,009, 86 Fed. Reg. 7,793 (Feb. 2, 2021). *See generally 2021 Joseph R. Biden Jr. Executive Orders*, NAT'L ARCHIVES (July 7, 2021), https://www.federalregister.gov/presidential-documents/executive-orders/joe-biden/2021 [https://perma.cc/UT66-387S].

[10] *E.g.*, Texas v. United States, 524 F. Supp. 3d 598, 607 (S.D. Tex. 2021) (enjoining Biden administration moratorium on deportations); Ala. Ass'n of Realtors v. United States Dept. of Health & Hum. Servs., No. 20-CV-3377 (DLF), 2021 WL 1779282, at *1 (D.D.C. May 5, 2021) (vacating nationwide moratorium on evictions imposed by the Centers for Disease Control to help control the Covid-19 pandemic); 2021 WL 1946376 (D.D.C. May 14, 2021) (staying order pending appeal); 2021 WL 2221646 (D.C. Cir. June 2, 2021) (refusing to vacate stay).

[11] The Trump administration lost many of the lawsuits brought to challenge deregulatory actions, in large part by ignoring the requirements of the Administrative Procedure Act. *See, e.g.*, Lawrence Hurley, *Trump Administration's 'Sloppy' Work Has Led to Supreme Court Losses*, REUTERS (Jun. 18, 2020), https://www.reuters.com/article/us-usa-court-immigration-trump-analysis/trump-administrations-sloppy-work-has-led-to-supreme-court-losses-idUSKBN23P3M2 [https://perma.cc/Q33H-YBPS]; Fred Barbash & Deanna Paul, *The Real Reason the Trump Administration is Constantly Losing in Court*, WASH. POST (Mar. 19, 2019), https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-

hinder President Biden's efforts to return the federal government to its proper role in implementing federal statutes. Some of that judicial interference arises from doctrines that make it difficult for regulatory beneficiaries to defend regulation or to attack deregulation; some of it may arise from a revolution in administrative law doctrine threatened by the current Supreme Court.

First, current Article III standing doctrine throttles lawsuits by those who are protected by regulations while throwing wide the courthouse door for those regulated. As the Court held in *Lujan v. Defenders of Wildlife*, industries and other entities *regulated* by administrative agencies are much more likely to meet standing requirements—and thus have access to the federal courts—than are human beings and other entities *protected* by those administrative agencies.[12] The same asymmetry obstructs suits aimed at suspending deregulatory actions imposed in the last days of Trump's administration—suits intended to protect regulatory beneficiaries while the Biden administration moves to re-regulate. As a result, citizen suits intended to reinforce the Biden agenda may thus fail at the threshold, while suits challenging Biden regulations will proceed. Even when plaintiffs survive standing hurdles, moreover, the doctrine limits the relief courts may grant, making it more difficult for courts to reinforce regulatory action even when that is what the law demands.

Second, as many commentators have noticed, the Supreme Court seems poised to upset decades of administrative law precedent. Conservative Supreme Court justices criticize *Chevron* and its progeny, cases that require courts to defer to expert agencies when those experts give reasonable interpretations of ambiguous statutes and regulations. If those cases are overturned, Biden-agency expertise will at best have persuasive authority as courts reach their own resolutions of statutory ambiguities—which, given the recent influx of conservative jurists to the federal bench, are likely to narrow the scope of regulatory action.

Finally, some Justices apparently wish to abolish the administrative state itself, despite the essential protections and benefits administrative agencies provide to the American people. Current doctrine requires deference to *Congress*, even when Congress delegates extremely broad policymaking discretion to agencies;[13] several Justices have suggested that such delegation is unconstitutional.[14] Justices Thomas and Gorsuch have even gestured toward a belief that the structure of the administrative state itself unconstitutional,[15]

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is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9_story.html [https://perma.cc/96M3-CH2Q].

[12] 504 U.S. 555, 561–62 (1992). *See infra* Part I.

[13] *See* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 459 (2001).

[14] Gundy v. United States, 139 S. Ct. 2116, 2130 (2019) (Alito, J., concurring); *id.* at 2131 (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.). *See infra* Part III.

[15] Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2212 (2020) (Thomas, J., concurring); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1154 (10th Cir. 2016) (Gorsuch, J., concurring).

and the Court has taken small steps in that direction.[16] Moves to implement such beliefs jeopardize the progressive agenda the Biden administration was elected to pursue.

This Article examines the problems the Biden administration and its supporters face from these doctrines. Part I discusses the obstacles presented by current standing doctrine. Part II discusses threatened abandonment of *Chevron* and other deference doctrines. Part III discusses the broader threat to the administrative state posed by the views of at least four members of the Supreme Court. Finally, Part IV discusses some tools available to would-be litigators and to the Executive Branch itself to succeed in spite of these doctrines: writing statutes and regulations that bolster the standing of regulatory beneficiaries; improving statutes and regulations to survive judicial review, should the Court abolish some or all of the deference doctrines; and expanding the federal judiciary—and potentially the Supreme Court itself—to reduce the politicized nature of the courts. The use of those tools will help the Biden administration restore the federal regulatory safety net.

I. Standing Doctrine Will Inhibit Public Interest Litigation in Support of the Biden Agenda

The basics of Article III standing doctrine are "numbingly familiar."[17] For a plaintiff to bring suit an Article III court, she must satisfy a three-part test: she must show that (1) that she has suffered (or is threatened with) an injury in fact that is "concrete and particularized" and is "actual or imminent," not "conjectural or hypothetical"; (2) that at least a portion of her

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[16] The Court recently held that administrative law judges (ALJs) are not "employees" of the Executive Branch but are instead "Officers of the United States" requiring nomination by the President under the Constitution's Appointments Clause. Lucia v. SEC, 138 S. Ct. 2044, 2053 (2018); *see also* Carr v. Saul, 141 S. Ct. 1352, 1359 (2021) (holding that administrative exhaustion was not required in cases challenging status of Social Security disability ALJs under *Lucia*). As Professor Beermann has argued, political appointment poses a threat to the perceived impartiality of ALJs. Jack Beermann, *The Future of Administrative Law Judge Selection*, Regul. Rev. (Oct. 29, 2019), https://www.theregreview.org/2019/10/29/beermann-administrative-law-judge-selection/ [https://perma.cc/6KCS-XKR5].

[17] William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 222 (1988). For excellent recent discussions of standing doctrine more generally, see Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 Wm. & Mary L. Rev. 2285, 2286 (2018); Fred O. Smith, Jr., *Undemocratic Restraint*, 70 Vand. L. Rev. 845, 845–46 (2017); Erwin Chemerinsky, Closing the Courthouse Door: How Your Constitutional Rights Became Unenforceable (2017); Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 Tex. L. Rev. 1061, 1112–14 (2015); Tara Leigh Grove, *Standing Outside Article III*, 162 U. Pa. L. Rev. 1311 (2014); Aziz Z. Huq, *Standing for the Structural Constitution*, 99 Va. L. Rev. 1435 (2013); Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 Nw. U. L. Rev. 169, 178–79 (2012); Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 Stan. L. Rev. 591, 595–96 (2010); Elizabeth Magill, *Standing for the Public: A Lost History*, 95 Va. L. Rev. 1131, 1134–35 (2009); Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781, 814–18 (2009); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 Cornell L. Rev. 275, 289–90 (2008); Jonathan R. Siegel, *A Theory of Justiciability*, 86 Tex. L. Rev. 73, 75 (2007).

injury is fairly traceable to the actions of the defendant; and (3) that the relief requested in her suit redresses at least some of her claimed injury.[18]

As the Court held in *Lujan v. Defenders of Wildlife*, industries and other entities *regulated* by administrative agencies are much more likely to meet these requirements—and thus have access to the federal courts—than are human beings and other entities *protected* by those administrative agencies.[19] As a result, citizen suits intended to reinforce the Biden agenda—whether by suing those who violate Biden rules or by suing to suspend Trump-era deregulations—may fail at the threshold, while suits challenging Biden regulations will almost certainly proceed; even in suits where citizens are able to proceed, standing doctrine limits the relief courts may grant.

A. The Asymmetry in Court Access Authorized by Standing Doctrine Harms Public-Interest Litigants

In *Lujan v. Defenders of Wildlife*, the Supreme Court emphasized that its Article III standing doctrine gives certain plaintiffs easier access to the federal courts than other plaintiffs. When "the plaintiff is himself an object of the action (or forgone action) at issue . . . there is ordinarily little question that" he has standing.[20] When, however, "the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish."[21] The doctrine thus permits suits by regulated entities (companies or individuals whose activities will be limited by government regulation) much more readily than it does those by regulatory beneficiaries (those who will benefit from the restrictions imposed by government regulation).

Take, for example, the cases *Steel Co. v. Citizens for a Better Environment*[22] and *Bennett v. Spear*.[23] *Steel Company* involved an environmental group's challenge to the Steel Company's violations of the Emergency Protection and Community Right-to-Know Act (EPCRA), which Congress enacted to provide communities with knowledge about the toxic chemicals used in their midst.[24] The environmental group represented precisely the individuals that Congress, in enacting EPCRA, had intended to benefit, and the Steel Company had concededly violated the strictures of the Act. The Court undertook an extraordinarily complicated analysis of the plaintiffs' claimed injuries, the causal links between those injuries and the defendant Steel Company, and the likely redress provided by the remedies the plaintiffs

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[18] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).
[19] *Id.* at 561–62.
[20] *Id.*
[21] *Id.* at 562.
[22] 523 U.S. 83 (1998).
[23] 520 U.S. 154 (1997). This comparison rests on analysis given by Philip Weinberg in *Unbarring the Bar of Justice: Standing in Environmental Suits and the Constitution*, 21 PACE ENV'T. L. REV. 27 (2003).
[24] *See generally* Heather Elliott, *Steel Company v. Citizens for a Better Environment*, 26 ECOLOGY L.Q. 709 (1999).

sought, ultimately rejecting the plaintiffs' standing and dismissing the case while giving "a narrow, grudging, indeed hostile, reading of Congress's citizen suit provisions."[25]

By contrast, in *Bennett v. Spear*, the Court readily found that ranchers had standing to sue under the Endangered Species Act, because their ranching activities were constrained by the Act.[26] This was so even though a victory for the ranchers would *harm* protected species, showing that the Court had "greater concern for business interests alleging economic harm from government"[27] than for the entities—including endangered species—that Congress intended to protect.

Numerous other cases demonstrate the asymmetry in access created by Article III standing doctrine. To mention just a few: the Court has rejected standing for regulatory beneficiaries in *Sierra Club v. Morton*,[28] where environmental groups sued to protect forest lands; *Allen v. Wright*,[29] where Black parents challenged an IRS policy that allowed tax exemptions for whites-only private schools; *Lujan*,[30] already mentioned, where biologists and others sued to protect endangered species; *City of Los Angeles v. Lyons*,[31] where a Black man who had been subjected to violence at the hands of the Los Angeles Police Department sued to stop the LAPD's use of chokeholds; and *Summers v. Earth Island Institute*,[32] where an environmental group sued over federal forest policy. The lower courts, of course, follow suit. In recent cases, federal district judges found standing lacking for plaintiffs challenging the deregulation of for-profit tertiary schools[33] and for plaintiffs opposing the lifting of fair housing protections.[34]

This asymmetry in access has been the subject of numerous criticisms. For example, standing doctrine may reinforce the problem of agency "capture" (where an agency, which interacts regularly with those it regulates, comes to see the regulated, rather than those who benefit from regulation, as its constituency).[35] Given standing's asymmetry, lawsuits against agencies are

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[25] Weinberg, *supra* note 23, at 45.

[26] 520 U.S. at 166.

[27] The asymmetry extends to decisions, not just about standing, but also about the availability of judicial review. *See* Cass R. Sunstein, *Reviewing Agency Action after* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 660 (1985) ("The Court's decisions reflect skepticism about the appropriateness of judicial supervision of the regulatory process at the behest of statutory beneficiaries."). *But see* A.H. Barnett & Timothy D. Terrell, *Economic Observations on Citizen Suit Provisions of Environmental Legislation*, 12 DUKE ENV'T. L. & POL'Y F. 1 (2001) (contending that it is environmental groups that have the advantage, given generous citizen suit provisions and broad availability of standing).

[28] 405 U.S. 727, 735 (1972).

[29] 468 U.S. 737, 751 (1984).

[30] 504 U.S. at 562.

[31] 461 U.S. 95, 110 (1983).

[32] 555 U.S. 488, 496 (2009).

[33] Am. Fed'n of Tchrs. v. DeVos, 484 F. Supp. 3d 731, 743–44 (N.D. Cal. 2020).

[34] Nat'l Fair Hous. All. v. Carson, 330 F. Supp. 3d 14 (D.D.C. 2018).

[35] *See* Richard J. Pierce, Lujan v. Defenders of Wildlife*: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1170–71 (1993); *see also* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163,

more likely to proceed when they are filed by regulated industry.[36] To stave off those lawsuits, an agency may craft its regulations in a way that favors the regulated industry. This, in turn, reinforces the capture of agencies by regulated industry; such "'capture' is a version of the phenomenon the Framers called 'factionalism.' [Standing doctrine thus may] maximiz[e] the potential growth of the political pathology the Framers most feared and strived to minimize."[37]

More broadly, standing's asymmetry "systematically favors the powerful over the powerless."[38] This bias means that "the power to trigger judicial review is afforded most readily to those who have traditionally enjoyed the greatest access to the processes of democratic government."[39] Standing doctrine has thus been found more readily not only for regulated entities over regulatory beneficiaries, but also, it has been argued, for the privileged rather than the underprivileged.[40]

Often, the Court has justified denying standing to regulatory beneficiaries on the grounds that large groups of people—such as those who benefit from pollution control laws or workplace regulation—can protect themselves through the political process, and that using the courts to redress widely shared injuries is improper.[41] But, as students of democracy have long

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165 (1992); *cf.* Hessick, *supra* note 17, at 327 (noting value of lawsuits in deterring undesirable private conduct).

[36] Pierce, *supra* note 35, at 1194–95.

[37] *Id.* at 1195; s*ee also* Sierra Club v. Morton, 405 U.S. 727, 745–46 (1972) (Douglas, J., dissenting) ("The suggestion that Congress can stop action which is undesirable is true in theory; yet even Congress is too remote to give meaningful direction and its machinery is too ponderous to use very often. The federal agencies of which I speak are not venal or corrupt. But they are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency which in time develops between the regulator and the regulated.").

[38] Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 304 (2002); *see also* Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1168 (1993) ("Justice Scalia's view of separation of powers threatens to constitutionalize an unbalanced scheme of regulatory review. . . . The courts can protect the interests of regulated entities, but the interests of 'regulatory beneficiaries' are left to the political process." (footnote omitted)).

[39] Nichol, *Standing for Privilege*, *supra* note 38, at 333.

[40] *See id.* at 322–29; *cf.* Bayefsky, *supra* note 17, at 2292 (noting that courts tend to rely on quantifiable economic and property injuries in finding standing and tend to reject claims of injury that do not involve economic or property-based harms). Justice Douglas raised a similar concern when he dissented in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 229 (1974) (Douglas, J., dissenting). In preventing citizens from challenging certain actions under the Incompatibility Clause, Justice Douglas argued that standing doctrine "protects the status quo by reducing the challenges that may be made to it and to its institutions. It greatly restricts the classes of persons who may challenge administrative action. Its application in this case serves to make the bureaucracy of the Pentagon more and more immune from the protests of citizens." *Id.*

[41] *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 500 (1975) ("Without [standing] limitations . . . the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights."); United States v. Richardson, 418 U.S. 166, 179 (1974) (noting that the plaintiff could seek redress through the "traditional electoral process"). Then-Judge Scalia emphasized that standing was necessary to keep the courts from invading the provinces of the other branches.

noted, the mere fact of widespread harm does not lead to political mobilization.[42] Often, regulations protect large swathes of the population from harms that are relatively minor when considered person by person, but that are significant in the aggregate.

For example, EPA has imposed air quality regulations limiting the emissions of particulate matter because such particulates cause adverse health effects.[43] Imagine that an anti-regulatory EPA lifts those restrictions or fails to enforce against those violating them. A political movement can coalesce around these anti-regulatory actions only with a great deal of time and expense, which is unlikely in a world where citizens worry about any number of issues.[44] Yet the aggregate harm from EPA's action is significant and, if unlawful, should be prevented.[45]

Thus, dismissing a case because an injury is widely shared, on the assumption that the populace will mobilize to obtain redress through the political branches, does not take into account political reality. And the EPA example focuses primarily on transaction costs and other microeconomic aspects of political mobilization; even more problems arise when one takes into account America's history of excluding certain groups from the political process altogether[46] and of providing disproportionate access to and control over the political process and regulatory agencies to well-organized lobbies who represent the interests of the powerful.[47]

Some have even contended that standing doctrine—and its preference for challenges to regulation over suits to enforce regulation—is a modern version of economic substantive due process. After all, a strict view of standing produces results akin to those of the *Lochner* era, "when constitutional provisions were similarly interpreted so as to frustrate regulatory initiatives in

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Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983) (standing doctrine keeps plaintiffs from "remov[ing a] matter from the political process and plac[ing] it in the courts").

[42] Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1311 (1976).

[43] OFFICE OF AIR & RADIATION, U.S. EPA, AIR QUALITY INDEX: A GUIDE TO AIR QUALITY AND YOUR HEALTH 11 (2000).

[44] As scholars of market failures have shown, certain kinds of injuries shared by large numbers of people are unlikely to give rise to political solutions because of collective action problems such as free riding or the tragedy of the commons. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).

[45] *See generally* OFFICE OF AIR QUALITY PLANNING AND STANDARDS, U.S. EPA, REGULATORY IMPACT ANALYSIS FOR THE FINAL REVISIONS TO THE NATIONAL AMBIENT AIR QUALITY STANDARDS FOR PARTICULATE MATTER at ES-14 (2013), https://www3.epa.gov/ttnecas1/regdata/RIAs/finalria.pdf [https://perma.cc/G4PD-WVHF] (finding net benefits of particulate-matter air-quality standards in the billions of dollars).

[46] *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); JOHN GAVENTA, POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACHIAN VALLEY (1980).

[47] *See generally* ROBERT G. KAISER, SO DAMN MUCH MONEY: THE TRIUMPH OF LOBBYING AND THE CORROSION OF AMERICAN GOVERNMENT (2009).

deference to private-law understandings of the legal system."[48] For this reason, many have criticized standing doctrine as a vehicle for judges to implement hidden assumptions about people and politics—for example, assumptions that economic harm is more important than stigmatic harm—that would be controversial if made plain.[49]

Standing doctrine, then, creates an asymmetry of access: it is easier for those who oppose regulation to challenge regulations than it is for those who support regulation to reinforce it. Of course, that regulated entities have easier access to the courts because of standing doctrine does not mean they will win on the merits. But they will win some or even many of them, especially in the more conservative Article III courts created by President Trump and the Republican-majority Senate since 2016.[50]

B. Standing's Asymmetry Makes Challenging Deregulatory Actions Even More Difficult

Standing's asymmetry not only prevents certain kinds of plaintiffs from suing; it also means that certain *types* of lawsuits are more likely to fail at the standing threshold. Deregulatory actions, for example, are usually pleasing to regulated entities, who therefore have no reason to sue over such actions.[51] Regulatory beneficiaries harmed by deregulation must thus bring their own lawsuits and, to do so, must satisfy the standing test, even though, for regulatory beneficiaries, standing is "ordinarily substantially more difficult to establish."[52] Some portion of those would-be plaintiffs fail the standing test, meaning that deregulation winds up subject to less judicial scrutiny than regulatory actions; judicial oversight of executive action is asymmetrical. When combined with other obstacles to suits challenging regulatory inaction,[53] deregulation is more likely to continue unchecked.

The Trump administration engaged in deregulatory efforts starting in 2017 (in the form of both deregulatory rules[54] and lack of enforcement[55]) and

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[48] Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1458 (1988); *see also* Fletcher, *supra* note 18, at 233.

[49] *E.g.*, Bayefsky, *supra* note 17, at 2323–422; Daniel A. Farber, *Standing on Hot Air:* American Electric Power *and the Bankruptcy of Standing Doctrine*, 121 YALE L.J. ONLINE 121 (2011).

[50] *E.g.*, Lawrence Hurley, *On Guns, Abortion and Voting Rights, Trump Leaves Lasting Mark on U.S. Judiciary*, REUTERS (Jan. 15, 2021), https://www.reuters.com/world/us/guns-abortion-voting-rights-trump-leaves-lasting-mark-us-judiciary-2021-01-15/ [https://perma.cc/2LWD-JQXW].

[51] This, of course, is not always true. *See* Am. Chemistry Council v. Dep't of Transp., 468 F.3d 810, 811 (D.C. Cir. 2006) (a regulated entity sought further regulation from the Department of Transportation because of a troublesome lacuna in the existing regulations; the court inexplicably found that they lacked standing).

[52] Lujan v. Defs. of Wildlife, 504 U.S. 555, 562 (1992).

[53] *See* Sunstein, *supra* note 27, at 666.

[54] *See generally Regulatory Rollback Tracker*, *supra* note 7.

[55] *See* ENV'T L. INST., ENVIRONMENTAL PROTECTION IN THE TRUMP ERA 34–37 (2018), https://www.eli.org/sites/default/files/book_pdfs/environmentalprotectiontrumpera.pdf [https://perma.cc/U3HL-3C7W].

continued to issue deregulating rules up to the days before President Biden was inaugurated.[56] Lame duck rules, issued after a president has lost an election for a second term, have been called "midnight regulation" —or, in the context of deregulatory actions, midnight *de*regulation.[57] As Professor Beermann has argued, midnight deregulation "is more likely to be contrary to the public interest" than midnight regulation, "benefiting narrow interests at the expense of the health and welfare of the general public" and "reflect[ing] favors to special interests that would not be palatable absent timing that reduce[s] the political consequences."[58]

But, despite the harm midnight deregulation causes, such deregulation is harder to challenge in the federal courts because of the Supreme Court's constitutional standing doctrine. Regulated entities are likely to be quite happy with midnight actions that lessen regulatory burdens; they will not bring suit. Those harmed by the deregulatory action—those who would have benefited from the higher regulatory burdens—must pass a tougher test to gain access to the federal courts. As I discussed above,[59] the Supreme Court has made clear that standing doctrine requires much more of regulatory beneficiaries. This is not to say that judicial review is unavailable; there may be plaintiffs with standing. The issue is one of likelihood: a midnight deregulation is more likely to avoid court oversight than a midnight regulation. Thus, Trump-era deregulatory rules will be less likely to be overturned in court, allowing such rules—antithetical to the Biden administration's agenda—to persist into the Biden-Harris years.

And it is likely not possible for the Biden administration to swiftly replace Trump administration deregulatory rules with new, re-regulatory rules. Since the *Seatbelts* case, the Supreme Court has essentially required a complete new rulemaking if an agency seeks to revise or rescind an existing rule.[60] Thus Biden's agencies will be required to go through the full Administrative Procedure Act process to replace Trump's deregulatory actions (though the agencies may in some cases be able to springboard off Obama-era rulemak-

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[56] *See* Dan Goldbeck & Sam Batkins, *Trump's Raucous "Midnight"*, 44 REGUL. 8, 8 (2021) (noting that the Trump administration promulgated 56 final rules in November, 84 in December, and 71 in the days of January before President Biden was inaugurated); *see also* Hannah Leibson, *A Primer on Midnight Regulations*, REGUL. REV. (Jan. 13, 2021), https://www.theregreview.org/2021/01/13/leibson-primer-midnight-regulations/ [https://perma.cc/37BA-BH4G]; Maegan Vazquez et al,, *Trump Administration Pushes 'Midnight Regulations' After Breaking Records for Final-Year Rulemaking*, CNN (Dec. 6, 2020), https://www.cnn.com/2020/12/06/politics/trump-midnight-regulations-record-rulemaking/index.html [https://perma.cc/P9C2-PMWZ].

[57] Jack M. Beermann, *Midnight Deregulation*, *in* TRANSITIONS: LEGAL CHANGE, LEGAL MEANINGS 27 (Austin Sarat ed., 2012).

[58] *Id.*

[59] *See supra* Section I.A.

[60] Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 45 (1983). In this case, the Reagan administration attempted to relax a rule promulgated under President Carter that imposed stringent requirements on automakers to provide seatbelts and air bags. The Supreme Court held that the new rule could survive only if supported by evidence of changed circumstances; it was not enough that the Reagan administration would have decided the matter differently, had it conducted the original rulemaking.

ings[61]). Moreover, the Biden rules—because they will presumably impose more burdens on regulated entities—will be challenged in court by plaintiffs that have almost unquestioned standing to sue.[62]

C. Standing Doctrine Also Constrains the Relief Courts Can Award

Standing doctrine does not only constrain would-be plaintiffs; it also constrains the courts themselves. The Court has held since the early 1980s that a party must show standing for every form of relief sought.[63] And, in 2017, the Court held that intervenors, if they seek relief different at all from that sought by the original plaintiff, must independently satisfy Article III standing requirements.[64] This prevents a regulatory beneficiary from intervening as a party in a suit brought by a regulated entity if, as would usually be the case, the would-be intervenor seeks relief different from that requested by the regulated entity, and the court concludes that the regulatory beneficiary lacks standing. Standing doctrine thus prevents a federal court exercising its discretion as to what relief best resolves the case before it.

Why does this matter? Imagine a case in which a chemical manufacturer is challenging a Biden administration regulation that limits the use of certain toxic substances. The manufacturer will have almost unquestioned standing, because its freedom of action is constrained by the regulation, and it will seek to have the regulation reversed. An environmental group seeks to intervene to defend the regulation and to seek penalties against the manufacturer for violating the regulation. If the environmental group cannot show independent standing, the court cannot impose penalties on the manufacturer; at best it can uphold the regulation.

II. Possible Abandonment of Judicial Deference Would Imperil Biden Agenda

As the previous Part demonstrates, federal courts are more hospitable to suits by regulated entities than to those brought by regulatory beneficiaries.

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[61] The Administrative Procedure Act requires an agency seeking to promulgate a regulation to publish a notice of proposed rulemaking, to receive public comment on the proposed rule, and to publish a final rule with a justification that includes the expert basis for the rule and explanations of how the agency considered and responded reasonably to public comment. *See generally* Todd Garvey, Cong. Rsch. Serv., R41546, A Brief Overview of Rulemaking and Judicial Review (2017). Because many of the rules overturned by the Trump administration had only recently been adopted by the Obama administration, the administrative records of at least some of the Obama rulemakings should require only minimal updating and could be reissued relatively swiftly. However, experts note that Trump's gutting of agency staff will slow agencies down even in rulemakings where little updating is required. *E.g.*, Coral Davenport, *Restoring Environmental Rules Rolled Back by Trump Could Take Years*, N.Y. Times (Jan. 22, 2021), https://www.nytimes.com/2021/01/22/climate/biden-environment.html [https://perma.cc/628P-CUE7].

[62] *See supra* Section I.A.

[63] City of Los Angeles v. Lyons, 461 U.S. 95, 110 (1983).

[64] Town of Chester, N.Y. v. Laroe Ests., Inc., 137 S. Ct. 1645, 1651 (2017).

Since the early 1980s, however, a regulatory beneficiary seeking to defend a regulation could, if it survived the standing threshold, have some confidence that the court would uphold the regulation. For decades, federal doctrine has required federal courts to defer to many types of administrative action. That required deference has, at least to some extent, limited court authority to stymie executive policy.

But a revolution in administrative law doctrine may be imminent. At least four members of the current Court have expressed a desire to overturn cases such as *Chevron*, *City of Arlington*, *Brand X*, and *Auer*, all of which require deference to agency interpretation of ambiguous statutes and regulations.[65] If deference is abandoned, a court, rather than accepting the expert agency's resolution of statutory ambiguity, establishes a single judicial interpretation—perhaps consistent with the agency view, perhaps not—that only Congress may alter.

While, in the absence of mandatory deference, an agency interpretation can *persuade* a court to view a statute a particular way,[66] the judge is free *not* to be persuaded. Given the number of conservative judges installed on the bench during the Trump administration, an abandonment of *Chevron* deference means that, in many cases, conservative, anti-regulatory, anti-federal-government judges would provide authoritative interpretations of ambiguous statutes and would presumably choose the interpretations that narrow the scope of agency action and limit the regulatory protections provided to the American people. President Biden may therefore face significant challenges in implementing his agenda, if his agencies do not receive the deference courts have accorded for the last four decades.

A. Current Doctrine Requires Extensive Deference to Agency Decisionmaking

Chevron, U.S.A., Inc. v. Natural Resources Defense Council famously requires courts to defer to an agency's reasonable interpretation of an ambiguous statute the agency is charged with implementing. The case involved the calculation of emissions from power plants.[67] A Carter administration rule

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[65] *See* Heather Elliott, *Gorsuch v. The Administrative State*, 70 ALA. L. REV. 703, 704 (2019).

[66] United States v. Mead Corp., 533 U.S. 218, 221 (2001) (holding that *Chevron* deference was not applicable to tariff classifications and that classifications deserved, at best, "respect according to [their] persuasiveness"); *see also* Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

[67] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 839–40 (1984).

resulted in stricter emissions controls, while the newer Reagan rule permitted more pollution.[68] Environmentalists sued, arguing that the Clean Air Act forbade increased pollution. The Court held that Clean Air Act did not, by its terms, preclude either interpretation.[69] Under existing doctrine governing the standard of review, the Court could have interpreted the Act de novo;[70] instead, the Court held that courts should defer to an agency's reasonable resolution of statutory ambiguity.[71] Once ambiguity is found, the court must guard against unreasonable interpretations, but its role goes no further.[72] That approach to review of agency statutory interpretation has been the law since 1984.

City of Arlington further broadened the scope of deference to agency interpretations of ambiguous statutes.[73] There, the statutory provision at issue affected the scope of the agency's authority. If the statute was interpreted one way, then the agency had power to act; if it was interpreted another way, then the agency lacked power. The question was whether the jurisdictional nature of the question counseled against deference (after all, one might expect the agency to self-deal in making a decision about the boundaries of its own power). The Court found that *Chevron* deference applied even to questions about the boundaries of the agency's jurisdiction. Chief Justice Roberts (joined by Justices Kennedy and Alito) dissented: courts must "ensur[e] that the Legislative Branch has in fact delegated lawmaking power to an agency within the Executive Branch, before the Judiciary defers to the Executive on what the law is."[74]

Another expansion of *Chevron* deference emerged in *Brand X*.[75] Chevron Step Two requires a court to defer to an agency's reasonable resolution of statutory ambiguity. But some ambiguous statutes have not yet been inter-

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[68] *Id.*

[69] *Id.* at 859–60 (interpreting 42 U.S.C. § 7411).

[70] *See* 5 U.S.C. § 706; *see also* Richard W. Murphy, *Abandon* Chevron *and Modernize Stare Decisis for the Administrative State*, 69 ALA. L. REV. 1, 5 n.15 (2017).

[71] *Chevron*, 467 U.S. at 865. *Chevron* has been called revolutionary. *E.g.*, Jonathan T. Molot, *Reexamining* Marbury *in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1259 n.78 (2002); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1062 (1995); Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 284 (1986). *But see* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1120–21 (2008) ("Although the 'revolutionary' nature of *Chevron* seems accepted by lawyers, lower court judges, and academics, at the level of Supreme Court practice, and even doctrine, *Chevron*'s status strikes us as something short of that."); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512 ("It should not be thought that the *Chevron* doctrine—except in the clarity and the seemingly categorical nature of its expression—is entirely new law.").

[72] *Chevron*, 467 U.S. at 866.

[73] *See generally* City of Arlington v. FCC, 569 U.S. 290, 290 (2013) (Scalia, J., writing for the court, held that courts must, when there is ambiguity, defer to an agency interpretation of its own authority).

[74] *Id.* at 327 (Roberts, C.J., dissenting).

[75] *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

preted by agencies, and a lawsuit involving that statute, then, requires the *court* to interpret the ambiguous provision. What is the status of that interpretation going forward? The Supreme Court in *Brand X*[76] said that *Chevron* required the earlier judicial interpretation to give way to the later administrative interpretation.[77] If the earlier court opinion made clear that the statute was ambiguous, Justice Thomas wrote for the Court, then the agency remains free to interpret the statute for itself. Otherwise, "allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute, as the Court of Appeals assumed it could, would allow a court's interpretation to override an agency's."[78]

In 1997, in *Auer v. Robbins*, the Court established an even stronger category of deference when agencies are interpreting their own ambiguous regulations.[79] Such interpretations are "controlling unless 'plainly erroneous or inconsistent with the regulation.'"[80] And agencies are "free to write the regulations as broadly as [they] wish[ ], subject only to the limits imposed by the statute."[81]

Taken together, *Chevron*, *City of Arlington*, *Brand X*, and *Auer* establish a regime of deference to expert regulatory agencies. Courts police the margins of agency statutory and regulatory interpretation, ensuring that those interpretations are reasonably supported by statutory and regulatory text, but courts do not "say what the law is." Instead, according to *Chevron*, Congress has deemed that agencies have that duty.

Chevron and its follow-on cases are not inherently pro-regulation: as *Chevron* itself shows, an interpretation adopted by a conservative administration—one that interprets the statute narrowly and lessens regulatory protections—will receive deference. But the deference doctrines do create a pro-regulation bias when applied to progressive regulation. Under those cases, the Biden administration can expect that its expert actions, when based on reasonable statutory interpretation, will survive judicial scrutiny.

An abandonment of *Chevron* deference, however, threatens Biden regulatory actions. Take the facts of *Chevron* itself. The Reagan administration had narrowed a Carter administration rule. Had Carter been returned to office in 1985, his administration could have re-imposed the more protective regulation, and, under *Chevron*, that interpretation would have been upheld. Without *Chevron*, however, the federal court decides for itself the meaning of the Clean Air Act provision at issue, considering the agency position as only one factor in many in interpreting the law.[82] If a federal court in 1985 were to adopt a conservative interpretation, the second Carter administration

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[76] *See id.*
[77] *Id.* at 982.
[78] *Id.*
[79] 519 U.S. 452, 461 (1997)
[80] *Id.* (internal quotation marks omitted) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).
[81] *Id.* at 463.
[82] *See supra* note 66 (describing *Mead-Skidmore* "deference," under which the agency view is at best persuasive authority).

would have been required to regulate according to that conservative approach. Likewise, in a no-*Chevron* world, the Biden administration would be at the mercy of statutory interpretations adopted by federal judges—more than a quarter of whom have now been appointed by Donald Trump.[83] What's more, once the courts adopted a resolution of the statutory ambiguity, that resolution would bind the agency: it could not revisit the ambiguity. Only Congress could amend the statute to change its meaning.

B. Current Threats to Abandon the Deference Doctrines are a Threat to the Biden Agenda

The Court has already narrowed the application of *Chevron*. Courts are now required to ascertain whether Congress empowered the agency to take on the interpretive role before giving deference,[84] and courts are to look skeptically on an agency's interpretative role when a rule with major consequences is at issue.[85] Several members of the Court have expressed desire to further narrow or even abandon *Chevron* and its children.

Most vehement is Justice Gorsuch. While on the Tenth Circuit, then-Judge Gorsuch wrote a lengthy concurrence in a case called *Gutierrez-Brizuela v. Lynch* that lays out his position: "[T]he fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."[86] Indeed, he says, "*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty."[87] He describes *Chevron* ultimately as a threat to the constitutional structure:

> After all, *Chevron* invests the power to decide the meaning of the law, and to do so with legislative policy goals in mind, in the very entity charged with enforcing the law. Under its terms, an administrative agency may set and revise policy (legislative), override adverse judicial determinations (judicial), and exercise enforcement discretion (executive). Add to this the fact that today many administrative agencies "wield[ ] vast power" and are overseen by political appointees (but often receive little effective oversight from the chief executive to whom they nominally report), and you have a pretty potent mix. Under any conception of our separation of powers, I would have thought powerful and centralized authorities like

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[83] John Gramlich, *How Trump Compares With Other Presidents In Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/ [https://perma.cc/D3EB-3HA3].

[84] *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

[85] *See* Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000); King v. Burwell, 576 U.S. 473, 485 (2015).

[86] 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

[87] *Id.* at 1152.

> today's administrative agencies would have warranted less deference from other branches, not more.[88]

Likewise, Justice Gorsuch would abandon *City of Arlington*: "[I]f an agency can interpret the scope of its statutory jurisdiction one way one day and reverse itself the next (and that is exactly what *City of Arlington*'s application of *Chevron* says it can), you might well wonder: where are the promised 'clearly delineated boundaries' of agency authority?"[89]

Justice Thomas is also on record as an opponent of *Chevron* deference. He wrote in *Michigan v. EPA* that "we seem to be straying further and further from the Constitution without so much as pausing to ask why. We should stop to consider that document before blithely giving the force of law to any other agency 'interpretations' of federal statutes."[90] Most recently, in a dissent from denial of certiorari,[91] he contended that *Chevron* was wrongly decided[92] and that, perhaps, it was not entitled to stare decisis.[93] One might think that Justice Thomas, as the author of *Brand X*, would not be a vote to overturn it. But, Justice Thomas wrote in 2020 with regard to *Brand X*, "it is never too late to surrender former views to a better considered position."[94] Moreover, he wrote, "*Chevron* arguably sets out an interpretive tool and so may not be entitled to stare decisis treatment. . . . The same can be said of . . . *Brand X* . . . ."[95]

Chief Justice Roberts may be a potential opponent of *Chevron* as well: he has certainly narrowed *Chevron*'s application, developing the "major questions" doctrine mentioned above.[96] And he has joined in some of the dissents from denial of certiorari and statements upon denial of certiorari that criticize *Chevron*.[97] But it is unclear whether he would take the step of overturning a forty-year-old precedent.[98] Indeed, in *June Medical Services v. Russo*, the Chief Justice voted to strike down a Louisiana abortion statute,[99] even though he had dissented in a case that struck down a virtually indistinguishable Texas statute.[100] After a discussion of the importance of precedent and

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[88] *Id.* at 1155 (citation and footnote omitted).

[89] *Id.* at 1154–55 (citing Mistretta v. United States, 488 U.S. 361, 372–73 (1989)).

[90] 576 U.S. 743, 760–64 (2015) (Thomas, J., concurring); *see also* PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2057 (2019) (Thomas, J., concurring).

[91] *See infra* Section II.C.

[92] Baldwin v. United States, 140 S. Ct. 690, 690–94 (2020) (Thomas, J., dissenting from denial of certiorari) (making an argument that parallels then-Judge Gorsuch's concurrence in *Gutierrez-Brizuela*).

[93] *Id.* at 691 n.1 (2020) (Thomas, J., dissenting from denial of certiorari).

[94] *Id.* at 690 (internal quotation and citation omitted).

[95] *Id.* at 691 n.1.

[96] *See supra* note 85 and accompanying text.

[97] Scenic Am., Inc. v. Dep't of Transp., 138 S. Ct. 2 (2017) (statement of Gorsuch, J., joined by Roberts, C.J., and Alito, J., respecting the denial of certiorari).

[98] *Cf.* June Med. Servs. LLC v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, J., concurring in the judgment) (applying stare decisis to strike down a statute that he would have upheld if no precedent had existed).

[99] *Id.*

[100] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2330 (2016) (Alito, J., dissenting, joined by Roberts, C.J., and Thomas, J.).

stare decisis, the Chief Justice concluded that "[b]ecause Louisiana's admitting privileges requirement would restrict women's access to abortion to the same degree as Texas's law, it also cannot stand under our precedent."[101]

Similarly, Justice Alito has joined in a few opinions at the margins—for example, rejecting the extension of *Chevron* to certain fact patterns[102]—but does not appear to share the desire to overturn *Chevron* in full. Commentators have suggested that Justice Kavanaugh is likely to vote to change the deference doctrines.[103] In particular, they note a book review then-Judge Kavanaugh wrote in 2016 that suggested the need to "rein in" *Chevron* and emphasized that the rule of law "depends on neutral, impartial judges who say what the law is, not what the law should be."[104] We do not yet know about Justice Barrett, who wrote only two opinions applying *Chevron* during her brief tenure on the Seventh Circuit,[105] and who has participated in no Supreme Court case involving a debate over *Chevron* since she was confirmed.[106]

In perhaps a hopeful outcome for the Biden administration, the Court squarely faced the opportunity to abandon Auer deference and decided not to. Instead, it complicated *Auer* deference in *Kisor v. Wilkie*, listing a variety of conditions for applying *Auer* deference: is the regulation "genuinely ambiguous"?; even if so, is the agency's interpretation reasonable?; even if so, does the interpretation "reflect an agency's authoritative, expertise-based, fair, or considered judgment"?[107] *Auer* deference is thus presumably less deferential than before, but it is still good law.

Concurring in the judgment in *Kisor*, Justice Gorsuch argued that *Auer* should simply be overruled. He wrote an extensive opinion that criticizes *Auer* much as his concurrence in *Gutierrez-Brizuela* criticized *Chevron*.[108]

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[101] June Med. Servs., 140 S. Ct. at 2133, 2139; s*ee also* Kisor v. Wilkie, 139 S. Ct. 2400, 2424 (2019) (Roberts., C.J., concurring in part) (expressly joining majority opinion upholding *Auer v. Robbins* for stare decisis reasons).

[102] *See, e.g.*, City of Arlington v. FCC, 569 U.S. 290, 317 (2013) (Roberts, C.J., dissenting, joined by Kennedy & Alito, J.J.)

[103] *See* Kent Barnett, Christina L. Boyd, & Christopher J. Walker, *Judge Kavanaugh,* Chevron *Deference, and the Supreme Court*, REGUL. REV. (Sep. 3, 2018), www.theregreview.org/2018/09/03/barnett-boyd-walker-kavanaugh-chevron-deference-supreme-court/ [https://perma.cc/VHN5-FGKJ] (citing Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016)).

[104] *Id.* (citing Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016)).

[105] *See* Cook Cty., Ill. v. Wolf, 962 F.3d 208, 235 (7th Cir. 2020) (Barrett, J., dissenting) (stating her conclusion, contrary to the panel majority, that Department of Homeland Services interpretation would be upheld at Step Two of *Chevron*); Ruderman v. Whitaker, 914 F.3d 567, 573 (7th Cir. 2019) (Barrett, J.) (giving *Chevron* deference to a Board of Immigration Appeals decision regarding the meaning of a provision of the Immigration and Nationality Act). She also mentions *Chevron* in Meza Morales v. Barr, 973 F.3d 656 (7th Cir. 2020), but only in the process of stating that *Auer*, not *Chevron*, deference was relevant to the interpretive question.

[106] In *Salinas v. U.S. R.R. Ret. Bd.*, 141 S. Ct. 691, 701 (2021), Justice Barrett joined Justice Thomas's dissent in a statutory interpretation case, but the case did not involve *Chevron*.

[107] 139 S. Ct. 2400, 2415–18 (2019).

[108] *Id.* (Gorsuch, J., concurring).

Justices Thomas, Alito, and Kavanaugh joined part or all of that concurrence. While the Chief Justice, concurring in part with the majority opinion, wrote that "the distance between the majority and Justice GORSUCH is not as great as it may initially appear,"[109] Justice Gorsuch's concurrence in the judgment made clear his desire that, in the future, "this Court will find the nerve it lacks today and inter *Auer* at last."[110]

Say a majority of the Court does emerge to abandon one or more of the deference doctrines. What are the consequences for the Biden administration? As already noted, a return to *de novo* review of statutes altogether—thus completely abandoning *Chevron* deference—is likely harmful to the Biden regulatory agenda, especially given the increasing conservatism of the federal bench: federal judges, sans *Chevron*, would be the sole interpreters of federal statutes, finding Biden regulatory interpretations at best persuasive.[111] Conservative judges would presumably interpret ambiguous statutes in a way hostile to federal regulatory power.

Even without changes in the deference doctrines, some lower courts have already blocked Biden actions. A Trump-appointed judge enjoined the Biden administration's pause on immigration deportations,[112] for example, applying an interpretation of the Immigration and Naturalization Act that seems inconsistent with the text of the statute itself,[113] with prior precedent,[114] and with the longstanding policy of leaving immigration decisions almost entirely to the President.[115] Similarly, a Trump-appointed judge vacated the CDC's moratorium on evictions during the Covid-19 pandemic (albeit staying his ruling pending appeal),[116] despite broad statutory language

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[109] *Id.* at 2424 (Roberts, C.J., concurring in part).

[110] *Id.* at 2426 (Gorsuch, J., concurring). Then-Judge Barrett wrote only one opinion that even mentioned *Auer*, and that opinion was decided after *Kisor*; the opinion contains little to no hint at now-Justice Barrett's views on *Auer* deference. *See* Meza Morales v. Barr, 973 F.3d 656, 664 (7th Cir. 2020) (noting that *Kisor* "recently warned us not to leap too quickly to the conclusion that a rule is ambiguous").

[111] *See supra* note 66 (describing Mead-Skidmore "deference," under which the agency view is at best persuasive authority).

[112] *E.g.*, Texas v. United States, 524 F. Supp. 3d 598, 607 (S.D. Tex. 2021).

[113] *See* 8 U.S.C. § 1231 (while stating in paragraph (a)(1)(A) that aliens "shall" be removed within 90 days of being ordered removed, the provision in paragraph (a)(3) also authorizes extensions of that 90 days and anticipates that they will be common enough to require a regulatory structure: "If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General.").

[114] *E.g.*, Zadvydas v. Davis, 533 U.S. 678, 682 (2001) (noting that the Immigration & Naturalization Act contemplates deportable aliens remaining in the United States after the 90 day period); s*ee also* Shalini Bhargava Ray, *Immigration Law's Arbitrariness Problem*, 121 COLUM. L. REV. (forthcoming 2021) (discussing the myriad ways the immigration bureaucracy has long exercised discretion in deciding whether and when to deport those who have violated immigration laws, including in deferring deportation past the 90-day deadline).

[115] *E.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2409 (2018) (noting "the deference traditionally accorded the President in this sphere").

[116] Ala. Ass'n of Realtors v. U.S. Dept. of Health & Hum. Servs., No. 20-CV-3377 (DLF), 2021 WL 1779282, at *1 (D.D.C. May 5, 2021) (vacating nationwide moratorium on evictions imposed by the Centers for Disease Control to help control the Covid-19 pandemic);

empowering the CDC to prevent the transmission of disease.[117] In June 2021, a Trump-appointed judge enjoined President Biden's suspension of the sale of new oil and gas leases, applying a dubious interpretation of the Outer Continental Shelf Lands Act.[118] If conservative judges are willing to make such strained interpretations of statutory text in a world where deference to administrative action is required, it is easy to imagine how badly the Biden administration would fare in a world without deference.[119]

III. Some Justices Want to Abolish the Administrative State Altogether

More concerning than potential revamping of the deference doctrines is the possibility that the Court would take more drastic measures against the administrative state itself. Recent opinions by several Justices echo early New Deal cases that severely limited the powers of the federal government.[120] While a return to pre-1937 understandings of the constitutional structure seems unlikely, that the possibility even exists is frightening.

One merely need think of the state of the nation in the early 20th century to understand the devastating consequences of such a move. In the years

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2021 WL 1946376 (D.D.C. May 14, 2021) (staying order pending appeal); 2021 WL 2221646 (D.C. Cir. June 2, 2021) (refusing to vacate stay).

[117] *See* 42 U.S.C. § 264 ("The Surgeon General, with the approval of the Secretary, is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession."). The District Court in *Alabama Association of Realtors* found this power "tethered to—and narrowed by" the second sentence of the statute, which states "[f]or purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary." The court applied the canon of statutory construction *ejusdem generis* to conclude that the eviction moratorium was not sufficiently similar to inspection, fumigation, and the like. *Id.* at *5. But, as the Northern District of Georgia found in a similar challenge to the CDC's moratorium, this argument ignores the broad language of the first sentence granting authority to the CDC, failed to account for the statute's use of the word "including," and overlooked other provisions of the statute. Brown v. Azar, 497 F. Supp. 3d 1270, 1281–85 (N.D. Ga. 2020).

[118] Louisiana v. Biden, No. 2:21-CV-00778, 2021 WL 2446010 (W.D. La. June 15, 2021) (holding, implausibly, that states faced irreparable harm through mere delay in consideration of oil leases, and holding, in a strained reading of the Outer Continental Shelf Lands Act, that the President, to whom OCSLA gives broad authority in executing leases, lacked the implicit power to pause consideration of such leases).

[119] Trump-appointed judges are also making bad constitutional decisions. In late May 2021, the Sixth Circuit enjoined a component of President Biden's Covid-19 relief package, the Restaurant Revitalization Fund, which for 21 days targeted relief funds to businesses owned by women, veterans, and racial minorities before then opening the fund to all applicants; the court held that the brief period of targeted relief violated the Constitution, despite extensive evidence assembled by Congress that the Covid-19 pandemic had caused significantly worse problems for female- and minority-owned businesses. Vitolo v. Guzman, 999 F.3d 353, 356 (6th Cir. 2021).

[120] Gundy v. United States, 139 S. Ct. 2116, 2130 (2019) (Alito, J., concurring); *id.* at 2131 (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.)

preceding the Great Depression, the *Lochner* Court struck down law after law meant to protect workers, consumers, women, and children. To note just a few: *Lochner* itself struck down limits on weekly working hours for laborers;[121] *United States v. E. C. Knight Co.* (the Sugar Trust Case) limited Congress's power to regulate monopolistic practices in manufacturing;[122] *Adair v. United States* and *Coppage v. Kansas* allowed railroad companies to prohibit union membership among their employees;[123] *Hammer v. Dagenhart* and *Bailey v. Drexel Furniture Co.* struck down federal legislation prohibiting child labor;[124] and *Adkins v. Children's Hospital* struck down a federal minimum-wage law.[125]

China also provides a cautionary and contemporary comparative. Chinese workers famously enjoy few to no protections from exploitation by employers;[126] a recent exposé of working conditions in China describes the use of forced labor and even torture in the manufacture of many goods we purchase here in the United States.[127] China's environment is famously poisoned, with poor air quality, contaminated soil, and nonpotable water.[128] Critics describe China's current regulatory structure as similar to that in the United States before the explosion of consumer and environmental regulations in the late 1960s: laws exist, but enforcement is left to localities, which do little to enforce.[129] In the United States, this approach led famously to

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[121] 198 U.S. 45 (1905).

[122] 156 U.S. 1 (1895).

[123] 208 U.S. 161 (1908); 236 U.S. 1 (1915).

[124] 247 U.S. 251 (1918); 259 U.S. 20 (1922).

[125] 261 U.S. 525 (1923).

[126] *E.g.*, Paul Mazur, *Apple Puts Key Contractor on Probation over Labor Abuses in China*, N.Y TIMES (Nov. 9, 2020), https://www.nytimes.com/2020/11/09/business/apple-china-pegatron.html [https://perma.cc/2M4L-DHGJ] (stating that contractor "has been accused of a number of labor and environmental abuses over the years"); David Barboza, *After Spate of Suicides, Technology Firm in China Raises Workers' Salaries*, N. Y. TIMES (June 2, 2010), https://www.nytimes.com/2010/06/03/business/global/03foxconn.html [https://perma.cc/J5T7-VER9] (citing "recurring reports of harsh labor conditions at its factories, including long working hours and claims by labor rights activists that the company treats workers like machines").

[127] AMELIA PANG, MADE IN CHINA: A PRISONER, AN SOS LETTER, AND THE HIDDEN COST OF AMERICA'S CHEAP GOODS (2021).

[128] *E.g.* Mervyn Piesse, *China Continues to Confront Steep Environmental Challenges*, FUTURE DIRECTIONS INT'L (Nov. 5, 2020), https://www.futuredirections.org.au/publication/china-continues-to-confront-steep-environmental-challenges/ [https://perma.cc/XAD8-R7QC] (noting for example that, in 2013, particulate-matter air pollution in Beijing "had surpassed 800, far exceeding the 500-point scale used to measure air pollution internationally" and that 20 percent of China's rivers "are so severely polluted that they are too toxic for physical contact").

[129] Melanie Hart & Jeffrey Cavanagh, *Environmental Standards Give the United States an Edge over China*, CTR. FOR AM. PROGRESS (Apr. 20, 2012), https://www.americanprogress.org/issues/green/news/2012/04/20/11503/environmental-standards-give-the-united-states-an-edge-over-china/#:~:text=our%20environmental%20regulations%20give%20U.S.,polluting%20factories%20close%20their%20doors [https://perma.cc/AMP8-AXBC] ("China's current environmental protection system looks a lot like what was in place in the United States before 1970.").

rivers that were so polluted they could catch on fire,[130] air quality so poor that it killed people,[131] and levels of lead so high they caused increased criminality in generations of Americans.[132]

A decision finding unconstitutional the current delegation of power to federal agencies would thus undo decades of progress in consumer, environmental, and workplace protection: our currently broken Congress can't even pass a budget,[133] much less adopt complicated regulatory provisions. Of course, states should be free to step in (although the *Lochner* Court struck down state regulations as well[134]). But not all states will act to protect the vulnerable. Remember, for example, that more than half of the states seized the opportunity to be "right to work" —i.e., anti-labor-union—states, once the law permitted such a move.[135]

What is the argument against the federal administrative state? To be sure, it has long been clear that administrative agencies are constitutionally fraught. Administrative agencies appear to make law (exercising legislative power), enforce that law (executive power), and adjudicate disputes under that law (judicial power).[136] This combination of powers raises structural constitutional concerns, concerns that peaked in the mid-1930s as a result of

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[130] *Id.* (describing the Cuyahoga River in 1969 as "carr[ying] so much oil and debris that . . . it erupted into flames").

[131] Jim Dwyer, *Remembering a City Where the Smog Could Kill*, N.Y. TIMES (Feb. 28, 2017), https://www.nytimes.com/2017/02/28/nyregion/new-york-city-smog.html [https://perma.cc/H5RC-4KYF] ("Thanksgiving weekend in 1966 was warm, and a haze of smog — sulfur dioxide and carbon monoxide — wrapped around the city. About 200 people died, a toll similar to a smog crisis in 1953.").

[132] Alex Knapp, *How Lead Caused America's Violent Crime Epidemic*, FORBES (Jan. 3, 2013), https://www.forbes.com/sites/alexknapp/2013/01/03/how-lead-caused-americas-violent-crime-epidemic/?sh=E946cb412c48 [https://perma.cc/Z7VR-7UL2] ("[V]iolent crime rose as a result of lead poisoning because of leaded gasoline. It declined because of lead abatement policies.").

[133] Jennifer Scholtes & Caitlin Emma, *'Going to Be a Long Winter': Congress Hits Snooze on Funding the Government*, POLITICO (June 15, 2021), https://www.politico.com/news/2021/06/15/going-to-be-a-long-winter-congress-hits-snooze-on-funding-the-government-494410 [https://perma.cc/C3R7-7NYF] (noting that Congress has not passed a regular appropriations bill on time in over a decade and uses continuing resolutions as stop-gaps "that spell budgetary turmoil for the Pentagon, not to mention every non-defense agency at the whim of the fickle spending process").

[134] *Lochner* itself involved New York wage-and-hour statutes, Lochner v. New York, 198 U.S. 45 (1905), and *Coppage* struck down state protections for union members, Coppage v. Kansas, 236 U.S. 1 (1915).

[135] In 1947, the Taft-Hartley Act outlawed closed union shops (in which the union's collective bargaining contract with the employer authorized hiring only of union members), 29 U.S.C. §§ 158(a)(3), 158(b)(2), and also authorized individual states to prohibit union security clauses (in which employees could refuse to join the union but were required to contribute financially to the work of the union), 29 U.S.C. § 164(b). Twenty-seven states have exercised their authority to prohibit union security clauses. *See Right to Work States Timeline*, NAT'L RIGHT TO WORK COMM. (2018), https://nrtwc.org/facts/state-right-to-work-timeline-2016/ [https://perma.cc/9VKU-3UJG].

[136] *See, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231–54 (1994).

New Deal economic regulation adopted to address the unprecedented challenges of the Great Depression.[137]

The Supreme Court initially rejected key New Deal legislation, some on the ground that it exceeded Congress's authority to permit administrative agencies to take action that looked like legislation. In *Panama Refining Co. v. Ryan*, the Court struck down a provision of the National Industrial Recovery Act (NIRA) as an impermissible delegation of legislative authority.[138] And in *A.L.A. Schechter Poultry Corp. v. United States*, the Court struck down the heart of the NIRA, finding that it gave essentially standardless authority to the Executive Branch to regulate the economy.[139] As Justice Cardozo wrote in his concurrence, "[t]his is delegation running riot. No such plenitude of power is susceptible of transfer."[140] And, indeed, NIRA not only delegated essentially unconstrained powers to the Executive Branch, but also delegated authority to private industry trade groups to develop codes of fair competition for the President to approve.[141]

Schechter's nondelegation doctrine was essentially moribund within a couple of years,[142] however, as the Court issued the opinions that would establish the broad Commerce Clause power that characterizes modern federal legislation.[143] In the succeeding decades, the Court upheld statute after statute that gave agencies broad authority to regulate, so long as it could discern

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[137] *See, e.g.*, Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1248 (1986) (claiming that New Deal programs reveal "a belief that comprehensive government intervention was not only a useful corrective but an essential ingredient for maintaining a general state of equilibrium in the economy").

[138] 293 U.S. 388, 432–33 (1935).

[139] 295 U.S. 495, 541–42 (1935).

[140] *Id.* at 553.

[141] *See* Rabin, *supra* note 137, at 1243–44 ("Section 3 of the NIRA granted authority to the President to approve 'codes of fair competition' submitted by industry trade groups. The codes were to be promulgated by industry groups that were 'truly representative' and were not to 'promote monopolies.' But beyond these cautionary terms, the statute contained virtually no limiting language. . . . [T]he Act left the content of the codes purposely vague. . . . With so little substantive constraint, the codes could address a vast range of business practices, including price levels, wage and hour provisions, price discrimination, advertising practices, and output restrictions." (footnote omitted)).

[142] Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1401 (2000) (pointing out that, after *Schechter*, "[t]he Court never again expressly applied the nondelegation doctrine to invalidate a statute"). Of course, Congress has never again tried to delegate the authority to regulate the economy to private industry trade groups; presumably that would not fly even in the modern administrative state. *See* Rabin, *supra* note 137, at 1257 ("*Schechter* arguably retains its authority as a statement of the outer limits of federal regulatory power. Even today, a congressional act which set up a business regulatory commission with plenary power to establish 'fair competitive practices' enumerated by industry trade groups would be of doubtful validity. In *Schechter*, the nondelegation doctrine found its home as a residual check on wholesale amalgamation of public and private spheres of activity.").

[143] *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 111 (1942); United States v. Darby, 312 U.S. 100, 113–14 (1941); Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 548 (1937); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 1 (1937).

an "intelligible principle" laid down by Congress to constrain agency discretion.[144]

An effort to revive the nondelegation doctrine in the late twentieth century was rejected by a unanimous Court in *Whitman v. American Trucking Associations, Inc.*[145] Justice Scalia wrote for the Court:

> In the history of the Court we have found the requisite "intelligible principle" lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring "fair competition." We have, on the other hand, . . . found an "intelligible principle" in various statutes authorizing regulation in the "public interest." In short, we have "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[146]

Justice Scalia wrote for a unanimous Court in rejecting the D.C. Circuit's effort to revive *Shechter* and *Panama Refining*. And his opinion on the matter had been clear from his confirmation hearing for the Supreme Court: "[I]t is very difficult for the courts to say how much delegation is too much. It is a very, very difficult question, and I think it expressed the view that, in most cases, the courts are just going to have to leave that constitutional issue to be resolved by the Congress."[147]

Justice Gorsuch would apparently take a different approach. In his Tenth Circuit *Guttierez-Brizuela* concurrence, he revealed a largely nineteenth century perspective on the administrative state.[148] Indeed, Judge Gorsuch seems to be staking out a pre-New Deal view of the delegation of

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[144] Bressman, *supra* note 142, at 1404–05.

[145] 531 U.S. 457, 476 (2001).

[146] *Id.* at 474–75 (citations omitted).

[147] *Nomination of Judge Antonin Scalia, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 36 (1986) (statement of Judge Antonin Scalia).

[148] For example, in his view, the kinds of things Congress can delegate to agencies are quite limited: "Congress may condition the application of a new rule of general applicability on factual findings to be made by the executive (so, for example, forfeiture of assets might be required if the executive finds a foreign country behaved in a specified manner)," Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1154 (10th Cir. 2016) (Gorsuch, J., concurring) (citing Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 388 (1813)), and "Congress may allow the executive to resolve 'details' (like, say, the design of an appropriate tax stamp)," *id.* (citing In re Kollock, 165 U.S. 526, 533 (1897)). This view, based on cases from 1813 and 1897, would rule out the work of almost all regulatory agencies and their organic acts. Making factual findings regarding asset forfeiture and designing tax stamps are a far cry from regulating "in the public interest," as many twentieth century statutes authorize. *See, e.g.*, Nat'l Broad. Co. v. United States, 319 U.S. 190, 224–25 (1943) (upholding Federal Communications Commission's power to regulate airwaves to serve the "public interest, convenience or necessity"); N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 24–25 (1932) (upholding Interstate Commerce Commission's power to approve railroad consolidations if in the "public interest"), or setting national ambient air quality standards at a level "requisite to protect the

legislative power. Elsewhere he refers to "so-called 'delegated' legislative authority."[149] He has written that "[s]ome thoughtful judges and scholars have questioned whether standards like [the intelligible principle doctrine] serve as . . . a license for [the improper delegation of legislative authority], undermining the separation between the legislative and executive powers that the founders thought essential."[150] Here is how he put it while on the Tenth Circuit:

> [C]an Congress really delegate its legislative authority—its power to write new rules of general applicability—to executive agencies? The Supreme Court has long recognized that under the Constitution "congress cannot delegate legislative power to the president" and that this "principle [is] universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution." Yet on this account of *Chevron* we're examining, its whole point and purpose seems to be exactly that—to delegate legislative power to the executive branch.[151]

Justice Gorsuch has now brought these views to the Supreme Court in *Gundy v. United States*.[152] The case involved the Sex Offender Registration and Notification Act (SORNA), which established registration criteria for sex offenders convicted after the statute's enactment and, for those already convicted, delegated authority to Attorney General "to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offender."[153] Four Justices found that this latter "delegation easily passes constitutional muster."[154]

Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, dissented. "[I]t would frustrate 'the system of government ordained by the Constitution'," Gorsuch wrote, "if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals."[155] The intelligible-principle test "has been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional."[156] Justice Gorsuch notes that the intelligible-principle test was first stated in the 1920s[157] and would take the doctrine back to those roots, when the Court would ask:

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public health," Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 473 (2001) (upholding Clean Air Act's delegation of authority to EPA to set national ambient air quality standards).

[149] Caring Hearts Pers. Home Servs., Inc. v. Burwell, 824 F.3d 968, 969 (10th Cir. 2016) (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984)).

[150] *Gutierrez-Brizuela*, 834 F.3d at 1154 (Gorsuch, J., concurring).

[151] *Id.* at 1153–54 (Gorsuch, J., concurring) (quoting Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892)) (citation and emphasis omitted).

[152] 139 S. Ct. 2116, 2131 (2019).

[153] 34 U.S.C. § 20913(d).

[154] *Gundy*, 139 S. Ct. at 2121.

[155] *Id.* at 2133 (quoting Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892)).

[156] *Id.* at 2140.

[157] *Id.* at 2138–39.

> Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands.[158]

He concludes by writing, "I remain hopeful that the Court may yet recognize that, while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation's chief prosecutor the power to write his own criminal code. That 'is delegation running riot.'"[159]

Justice Alito concurred in the judgment but wrote separately to state "since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards." He then made clear that he was open to revisiting nondelegation doctrine: "If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment."[160]

As indicated by his joining the *Gundy* dissent, Justice Thomas would take extreme steps to limit the authority that Congress can confer on administrative agencies. In *Whitman*, he stated "On a future day, . . . I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers."[161] Unlike Justice Scalia, who described himself as a "fainthearted originalist" because there were certain cases where he would not be able to bring himself to vote for the originalist view,[162] Justice Thomas has repeatedly suggested he

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[158] *Id.* at 2141.
[159] *Id.* at 2148.
[160] *Id.* at 2130–31.
[161] Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 487 (2001) (Thomas, J., concurring) ("I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'"). *Cf.* Wellness Intern. Network, Ltd. v. Sharif, 575 U.S. 665, 709 (2015) (Thomas, J., dissenting) ("Our Constitution is not a matter of convenience, to be invoked when we feel uncomfortable with some Government action and cast aside when we do not.").
[162] *See generally* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989). He gives flogging as an example; flogging would not be cruel and unusual punishment on an originalist view, but he still could not see himself voting to affirm a law that imposed flogging as a punishment. Given Justice Scalia's firm support for the administrative state, see generally Elliott, *supra* note 65.

is willing to burn down various longstanding structures of constitutional law.[163] And he appears to be inviting nondelegation challenges.[164]

Justice Kavanaugh did not participate in *Gundy*, but in a more recent concurrence to a denial of certiorari, he indicated he would be willing to limit Congress's authority to delegate rulemaking power to agencies, at least when "a major policy question of great economic and political importance" is at stake.[165] Justice Barrett had not yet joined the Court when *Gundy* was decided, but, in previous academic writing, she sounds more like Justice Scalia in *Whitman*: "[T]he Suspension Clause stands as an exception to the nondelegation doctrine, which emphasizes the extremely broad leeway that Congress enjoys in assigning responsibilities to the Executive Branch. . . . [T]he notoriously lax 'intelligible principle' test reflects the Court's conclusion that the decision of how to carry out routine social and economic policy belongs almost entirely to Congress."[166]

In the end, four clear votes exist for a revolution in nondelegation doctrine, and Justice Kavanaugh is apparently a fifth vote for at least a constriction of Congress's authority to delegate. It remains to be seen how Justice Barrett will influence the debate. The Court has, however, recently rejected other invitations to rewrite the constitutional law of the Executive Branch.[167] At the same time, the conservative majority created by the Trump adminis-

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[163] *E.g.* Comptroller of Treasury of Md. v. Wynne, 575 U.S. 542, 577 (2015) (Thomas, J., dissenting) (arguing for rejection of dormant commerce clause doctrine); Gonzales v. Raich, 545 U.S. 1, 57 (2005) (O'Connor, J., dissenting, joined by Roberts, C.J. and Thomas, J.) (arguing for rejection of modern view of interstate commerce clause).

[164] *See* Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2382 (2020) (noting that "[n]o party has pressed a constitutional challenge to the breadth of the delegation involved here").

[165] Paul v. United States, 140 S. Ct. 342 (2019) (Kavanaugh, J., concurring with denial of certiorari).

[166] Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 318 (2014).

[167] For example, in one recent decision, a majority of the Court took a modest step to constrain the administrative step but refused to take the bold step; Justices Thomas and Gorsuch would have been bold. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2192 (2020) (striking down provision of the Dodd-Frank Act that prevented the president from freely removing the director of the Consumer Financial Protection Bureau but refusing to overturn *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), which allows restrictions on the President's power of removal when the agency is headed by a multi-member panel); *id.* at 2211–12 (Thomas, J., joined by Gorsuch, J. concurring in part) ("The decision in *Humphrey's Executor* poses a direct threat to our constitutional structure and, as a result, the liberty of the American people. The Court concludes that it is not strictly necessary for us to overrule that decision. . . . But with today's decision, the Court has repudiated almost every aspect of *Humphrey's Executor*. In a future case, I would repudiate what is left of this erroneous precedent."). Interestingly, Justice Kavanaugh did not join Justice Thomas's dissent even though Kavanaugh had written a D.C. Circuit opinion finding the CFPB's structure unconstitutional and had noted strong criticisms of *Humphrey's Executor*. *See* PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 34 n.15 (D.C. Cir. 2016), *rev'd en banc* 881 F.3d 75 (2018). In the *en banc* opinion reversing, Judge Pillard noted the seeds of destruction that would be sown by affirming Justice Kavanaugh's opinion: "A constitutional analysis that condemns the CFPB's for-cause removal provision provides little assurance against—indeed invites—the judicial abolition of all independent agencies." *Id.* at 133. Given that the Supreme Court has now condemned the for-cause provision, independent agencies are a threatened species.

tration and the then-majority-Republican Senate has only just gotten started.[168]

IV. Ways to Counter These Potential Problems

The Biden administration and Democrats in Congress could and should pursue several avenues to address the problems I have described. First, when agencies adopt new rules and regulations to replace Trump-era deregulatory measures, the agencies should include factual findings that make it harder for the federal courts to dismiss cases based on Article III standing doctrine. Second, Congress should write clearer statutes, and agencies should root their regulations, to the extent possible, in strong interpretations so that Biden policies can survive judicial review, should the Court abolish some or all of the deference doctrines. Third, Congress should add many judges to the lower federal courts; President Biden should then nominate judges who take broader views of standing doctrine, deference to administrative agencies, and the constitutionality of the administrative state; and the Senate should confirm these judges as quickly as possible. Finally, Congress and President Biden should take steps to alter the politicization of the Supreme Court, which could include expanding the size of the Court itself.

A. Addressing Standing Issues Through Regulation

While I have argued that the Court would push back against legislative and executive efforts to *alter* Article III standing (by, *e.g.*, abolishing the injury-in-fact requirement),[169] some aspects of the doctrine can be exploited by the Biden administration and Democrats in Congress to allow standing to more plaintiffs. First, as Mark Seidenfeld and Allie Akre argue, "Congress can influence standing by explicitly recognizing actual harms and causal connections."[170] On their view, Congress can use statutory language to identify the concrete interests protected by the legislation (thus helping the federal

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[168] For example, in July 2021, the conservative wing of the Court dismantled most of the rest of the Voting Rights Act, clearing the way for most of the anti-democratic voting laws being enacted in Republican states. *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021) (decided 6-3 along straight party lines). *See also* Adam Liptak, *Supreme Court Upholds Arizona Voting Restrictions*, N.Y Times (July 1, 2021), https://www.nytimes.com/2021/07/01/us/politics/supreme-court-arizona-voting-restrictions.html [https://perma.cc/VW7D-MYMD] ("The Supreme Court on Thursday gave states new latitude to impose restrictions on voting, using a ruling in a case from Arizona to signal that challenges to laws being passed by Republican legislatures that make it harder for minority groups to vote would face a hostile reception from a majority of the justices.").

[169] Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. Rev. 159, 190 (2011) (in part invoking *City of Boerne v. Flores* to argue that the Court will no more let Congress alter Article III standing doctrine than it would let Congress alter First Amendment doctrine).

[170] Mark Seidenfeld & Allie Akre, *Standing in the Wake of Statutes*, 47 Ariz. L. Rev. 745, 748 (2015).

courts understand that a plaintiff suing under the statute has suffered an injury in fact), can trace the causal chain between a statutory violation and that injury in fact, and can explain why statutory remedies redress that injury.[171] The Biden administration could thus work with Congress to amend existing statutes and write new statutes that contain explicit language supporting the standing of citizens who would sue to enforce those statutes.

Second, Biden administrative agencies may also take steps to facilitate standing for those who would sue in the federal courts. As Rachel Klarman and Will Dobbs-Allsopp argue in a forthcoming essay, agencies can "design regulations so as to increase the likelihood advocates can establish standing in the event of future rollbacks, thereby empowering progressive groups to more robustly challenge the next conservative administration's inevitable deregulatory agenda."[172] The authors seize on two wrinkles in the Court's standing jurisprudence: injury caused by the denial of information,[173] and injury caused to organizations by interference with their organizational mission.[174] Agencies, they argue, should craft regulations that create a right to information in individual citizens or groups, that mandate input from advocacy organizations in administering agency programs, or that allow advocacy organizations to enforce regulatory requirements through agency procedures, enabling regulatory beneficiaries in later lawsuits to satisfy Article III standing requirements by pointing to concrete injuries caused by denial of information, denial of the opportunity to provide input, or denial of agency procedures.

B. Writing Clearer Statutes and More Persuasive Regulations

If the Supreme Court abandons some or all of the deference doctrines, the Biden administration can, first, ask Congress to enact statutes that authorize the Biden regulatory agenda. After all, *Chevron*, *Brand X*, and *City of Arlington* apply only when statutes are ambiguous. While Congress often writes vague statutes and leaves the details to regulatory agencies, legislators

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[171] *Id.* at 749–52.

[172] Rachel Klarman & Will Dobbs-Allsopp, *Solving Standing's Corporate Bias: How Agencies Can Empower Advocates to Challenge Deregulation*, ROOSEVELT INST. (July 2021), https://rooseveltinstitute.org/wp-content/uploads/2021/07/RI_GFILegalStanding_IssueBrief_202107-1.pdf [https://perma.cc/HVV5-6PUB].

[173] *E.g.,* FEC v. Akins, 524 U.S. 11, 21 (1998) ("this Court has previously held that a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute") (citing Public Citizen v. Dep't of Just., 491 U.S. 440, 449 (1989)).

[174] *E.g.*, Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982) ("concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes" injury in fact for Article III standing purposes).

are free to adopt more detailed statutes.[175] Indeed, Congress could incorporate Biden regulations *as* those details.[176]

Enacting such statutes would almost certainly require abolishing the filibuster, given that the current Republican members of the Senate would otherwise obstruct any such efforts.[177] To abolish the filibuster is to make it easier not only for the current Democratic Congress to pass laws but also for a later Republican Congress to do the same. Democrats should therefore think carefully about whether the near-term advantage of a filibuster-free Senate is worth the long-term costs of losing a powerful tool to obstruct future Republican lawmaking.

Agencies can also promulgate regulations with especial care, knowing that (in the absence of *Chevron*) a regulation must *persuade* the courts. In this regard, remember that *Skidmore* "deference" is not solely about a regulation's persuasive logic; the Court in *Skidmore* emphasized that courts should recognize agency expertise and should seek to make court actions consonant with agency enforcement.[178] Agencies could therefore craft regulations with an eye toward persuading federal judges that jettisoning agency interpretations would violate *Skidmore*.

C. Expanding the Lower Federal Courts

President Trump appointed 226 judges to the federal bench, including 54 appeals court judges.[179] In doing so, he altered the political balance of the Second, Third, and Eleventh Circuits.[180] As discussed above, some of these new judges have already blocked regulatory actions of the Biden administration.[181] Because federal judges are appointed for life, they are immovable obstacles (at least as long as their opinions are consistent with Supreme Court precedent).

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[175] *E.g.*, Christopher J. Walker, *Restoring Congress's Role in the Modern Administrative State*, 116 MICH. L. REV. 1101, 1116–17 (2018) (review of JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND SEPARATION OF POWERS (2017)).

[176] *Cf.* Bradford C. Mank, *Are Title VI's Disparate Impact Regulations Valid?*, 71 U. CIN. L. REV. 517, 520 (2002) (noting that Congress has incorporated regulatory language into certain statutes).

[177] *E.g.*, Carl Hulse & Nicholas Fandos, *Democrats and Activists Focus on the Filibuster After a Defeat on Voting Rights*, N.Y. TIMES (June 23, 2021), https://www.nytimes.com/2021/06/23/us/politics/filibuster-elections-bill.html [https://perma.cc/P3K3-S2JQ] ("Democrats and activists say the increasing Republican reliance on the filibuster will only intensify calls to jettison it and potentially bring about critical mass for a rules change as Democrats remain determined to pass some form of the elections measure and other parts of their agenda opposed by Republicans.").

[178] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("[G]ood judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons.").

[179] Gramlich, *supra* note 83.

[180] *Factbox: Donald Trump's Legacy—Six Policy Takeaways*, REUTERS (Oct. 30, 2020), https://www.reuters.com/article/us-usa-trump-legacy-factbox/factbox-donald-trumps-legacy-six-policy-takeaways-idUSKBN27F1GK [https://perma.cc/KYE5-25E8].

[181] *See supra* notes 112–19 and accompanying text.

One avenue for ameliorating the influence of these judges is to expand the number of seats on the lower federal courts. This is not a partisan suggestion: the caseload of the federal judiciary has expanded significantly over the last three decades while the number of judges has stayed the same.[182] The Judicial Conference of the United States in 2020 recommended adding 5 judges to the Ninth Circuit, adding 65 new judges to the district courts, and making 5 temporary district court judgeships permanent. noting that case filings from 1990 to 2018 had increased 39 percent in the district courts and 15 percent in the appeals courts.[183] By March 2021, the Judicial Conference had upped the district court numbers to 77 new seats and 9 temporary seats made permanent.[184] Both Democratic and Republican lawmakers agree on the need to increase the size of the federal judiciary.[185]

The Biden administration should work with Congress to add these new judgeships. President Biden should then appoint, and the Senate confirm, judges with approaches to constitutional law, statutory interpretation, and administrative law that will serve to counterbalance the extreme conservatives appointed by President Trump and the McConnell-led Senate.

D. Altering the U.S. Supreme Court

The current Supreme Court includes two justices whose presence results from appalling political manipulations by Republicans. Justice Gorsuch holds a seat that should have been filled by then-Chief-Judge of the D.C. Circuit Merrick Garland, who was nominated by President Obama after Justice Antonin Scalia's death. Then Senate majority leader Mitch McConnell refused to hold hearings on the Garland nomination, kept the seat empty for 422 days, and led Republicans to confirm Gorsuch after Donald Trump took the Presidency.[186] McConnell argued that the presidential election—nine months away—was too close to justify President Obama's filling the seat.[187]

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[182] *Judiciary Makes the Case for New Judgeships*, UNITED STATES COURTS (June 30, 2020), https://www.uscourts.gov/news/2020/06/30/judiciary-makes-case-new-judgeships [https://perma.cc/FZW5-48A4] ("The creation of new judgeships has not kept pace with the growth in case filings over three decades, producing 'profound' negative effects for many courts across the country, U.S. District Judge Brian S. Miller told Congress today.").

[183] *Id.*

[184] *Judiciary Seeks New Judgeships, Reaffirms Need for Enhanced Security*, U.S. COURTS (Mar. 16, 2021), https://www.uscourts.gov/news/2021/03/16/judiciary-seeks-new-judgeships-reaffirms-need-enhanced-security [https://perma.cc/YGY3-PW8X].

[185] Todd Ruger, *Lawmakers in Both Parties Push to Add Judges to Overworked Federal Courts*, ROLLCALL (Mar. 16, 2021), https://www.rollcall.com/2021/03/16/lawmakers-in-both-parties-push-to-add-judges-to-overworked-federal-courts/ [https://perma.cc/K5T8-CMVP] ("A House Judiciary subcommittee already held a hearing that highlighted bipartisan backing to add judges to overworked district courts that are the most used by the public — something Congress hasn't done in a comprehensive way since 1990.").

[186] Alana Abramson, *Neil Gorsuch Confirmation Sets Record for Longest Vacancy on 9-Member Supreme Court*, TIME (Apr. 7, 2017), https://time.com/4731066/neil-gorsuch-confirmation-record-vacancy/ [https://perma.cc/7V5X-JSQG].

[187] Mitch McConnell & Chuck Grassley, *Democrats Shouldn't Rob Voters of Chance to Replace Scalia*, WASH. POST (Feb. 18, 2016), https://www.washingtonpost.com/opinions/mccon-

Then, when Justice Ruth Bader Ginsburg died only 45 days before the 2020 presidential election, McConnell rushed to install Justice Amy Coney Barrett, who was confirmed on October 26, 2020, barely a month after Justice Ginsburg's death.[188]

The Biden administration has been urged to take steps to redress this malfeasance. Professor Klarman has written that, "[e]ssentially, Democrats face a choice between responding to norm violations in kind, which risks furthering a vicious cycle to the bottom that eventually will destroy democracy, or adhering to the norms while Republicans systematically violate them—a sort of unilateral disarmament that rarely works out well for the disarming party."[189] Professor Grove, on the other hand, has cautioned that the very independence of the federal judiciary is at stake.[190]

The question, then, is what, if anything, to do. In April 2021, Democrats in both houses of Congress introduced bills to expand the size of the Supreme Court from nine to thirteen seats.[191] Structural proposals have been floated that would make the Supreme Court even larger,[192] would do away with the idea of permanent Supreme Court justices (instead rotating lower court judges on and off the Court),[193] would impose term limits on the justices,[194] would give each President two appointments,[195] or would change the

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nell-and-grassley-democrats-shouldnt-rob-voters-of-chance-to-replace-scalia/2016/02/18/e5ae9bdc-d68a-11e5-be55-2cc3c1e4b76b_story.html [https://perma.cc/MY25-6FL4].

[188] Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html [https://perma.cc/DY6K-8NXR] ("The vote concluded a brazen drive by Republicans to fill the vacancy created by the death of Justice Ruth Bader Ginsburg just six weeks before the election. They shredded their own past pronouncements and bypassed rules in the process, even as they stared down the potential loss of the White House and the Senate.").

[189] Michael Klarman, *Why Democrats Should Pack the Supreme Court*, TAKE CARE BLOG (Oct. 15, 2018), https://takecareblog.com/blog/why-democrats-should-pack-the-supreme-court [https://perma.cc/45EP-8FXF].

[190] Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 544–45 (2018).

[191] Judiciary Act of 2021, S. 1141, 117th Cong. (2021); Judiciary Act of 2021, H.R. 2584, 117th Cong. (2021).

[192] *E.g.,* Elie Mystal, *There is Only One Solution to the Amy Coney Barrett Debacle*, NATION (Oct. 15, 2020), https://www.thenation.com/article/politics/expand-supreme-court/ [https://perma.cc/LG2Z-JTGR] (suggesting, for a variety of reasons, a Court with 29 seats); Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 DUKE L.J. 1439, 1442 (2009) (suggesting that the Court increase in size to at least 13 and hear cases in panels with the possibility of *en banc* review).

[193] Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 185 (2019) (technically, Epps and Sitaraman suggest confirming all members of the lower courts of appeal as associate justices, so that the Court would have, given current numbers, 188 members—the current 9 plus all 179 circuit court judges; the Court would then sit in panels of 9 selected at random with some controls for political balance).

[194] AM. ACAD. ARTS & SCIS., OUR COMMON PURPOSE: REINVENTING AMERICAN DEMOCRACY FOR THE 21ST CENTURY 6 (2020); Bruce Ackerman, *Trust in the Justices of the Supreme Court Is Waning. Here Are Three Ways to Fortify the Court*, L.A. TIMES (Dec. 20, 2018), https://www.latimes.com/opinion/op-ed/la-oe-ackerman-supreme-court-reconstruction-20181220-story.html [https://perma.cc/SLF8-NKZ6]; Roger C. Cramton, *Reforming the Supreme Court*, 95 CALIF. L. REV. 1313, 1323–24 (2007); Steven G. Calabresi & James Lin-

selection process to make nominations less political.[196] Critics have also suggested altering the power of judicial review[197] or stripping the Court of jurisdiction over certain types of cases.[198]

Even in early 2021, I would have been reluctant to recommend any significant changes to the Court, on the ground that such changes would lead to a continual tit-for-tat competition between Democrats and Republicans as power switched between the parties election by election. Now that the current Court has legitimized the Republican assault on democracy, however,[199] it seems that the nation stands on a knife-edge between democracy and one-party rule. President Biden's Supreme Court commission may arrive at sensible solutions,[200] but seems unlikely to reach any definitive answers in time to save the 2022 primaries from the machinations of anti-democratic Republicans.[201] The Biden administration and the Democratic Congress need either (1) to abolish the filibuster and enact the For the People Act of 2021[202] and the John Lewis Voting Rights Act[203] or (2) add at least two seats to the Supreme Court.

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dgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 822 (2006).

[195] Alicia Bannon, *An Overlooked Idea for Fixing the Supreme Court*, BRENNAN CTR. FOR JUST. (Mar. 12, 2021), https://www.brennancenter.org/our-work/analysis-opinion/overlooked-idea-fixing-supreme-court [https://perma.cc/YH7C-7S3B] ("Giving each president two seats to fill during a four-year term would decouple the nomination process from the departure of sitting justices: a president would get two appointments regardless of whether three justices leave the bench or none at all. . . . [As a result] the size of the Court would fluctuate and likely stay above the current nine justices, and it would include periods with an even number of justices."); Daniel Hemel, *Can Structural Changes Fix the Supreme Court?*, 35 J. OF ECON. PERSPS. 119, 133–34 (2021).

[196] *E.g.*, Epps & Sitaraman, *supra* note 193, at 193 (proposing a 15-member Court, five appointed by Democrats, five appointed by Republicans, and five selected unanimously, or by super-majority, by those ten justices from existing circuit and district court judges).

[197] Charlie Savage, *Experts Debate Reducing the Supreme Court's Power to Strike Down Laws*, N.Y. TIMES (June 30, 2021), https://www.nytimes.com/2021/06/30/us/politics/supreme-court-commission.html [https://perma.cc/E8T6-FE99] ("Nikolas Bowie, a Harvard Law School professor, denounced the power of the Supreme Court to strike down laws enacted by Congress as an 'antidemocratic superweapon' and said, 'I encourage you to advocate for reforms that will abolish the practice.'").

[198] *Id.* For a general discussion of jurisdiction stripping, see Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 888–916 (2011).

[199] *See supra* note 168.

[200] Savage, *supra* note 197 ("Mr. Biden has charged the 36-member, ideologically diverse commission — which is led by Bob Bauer, an N.Y.U. Law professor who served as a White House counsel under President Barack Obama, and Cristina M. Rodríguez, a Yale Law School professor and former Justice Department official — with producing a report assessing ideas for changing the court.").

[201] *Voting Laws Roundup: May 2021*, BRENNAN CTR. FOR JUST. (May 28, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021 [https://perma.cc/UKV2-XKMB] (cataloging anti-democratic laws enacted and bills introduced by Republicans around the country).

[202] H.R. 1, 117th Cong. (2021).

[203] H.R. 4, 116th Cong. (2019).

Conclusion

Joe Biden and Kamala Harris were elected with over 81 million votes to Trump and Pence's 74 million, and with an Electoral College vote of 306 to 232. Biden and Harris are thus entitled to pursue the agenda on which they ran, which includes a restoration of a wide variety of strong federal regulatory protections for consumers, workers, and the environment. Yet existing Supreme Court doctrine, as well as doctrinal changes that may occur in the future, threaten to derail that agenda. The Biden administration should take steps—from the relatively minor (taking especial care in writing regulations, given the threats posed by later judicial review) to the unprecedented (adding several seats to the U.S. Supreme Court) —to protect the American people.

Public Care in Public Law: Structure, Procedure, and Purpose

Blake Emerson[*]

This Article responds to recent mobilization around the "politics of care" by articulating a legal principle of public care within U.S. constitutional, statutory, and administrative law. Public care requires executive officials to attend to the needs and values of those who have a stake in law's administration. This principle has three components. The regulatory purpose *of public care, which is recognized in various statutory authorities of the welfare state, requires government to provide those goods and services that are necessary for people to exercise moral and political agency. The* administrative procedure *of public care, which is recognized by the Administrative Procedure Act of 1946, requires that federal agencies act with due regard for the interests and input of affected parties. The* constitutional structure *of public care, recognized by the Take Care Clause, requires that the President listen to subordinate officials who have specific legal, professional, and expert authority. These three dimensions of care together offer an attractive picture of what the administrative state ought to do and how it ought to do it. The principle of public care, which is informed by Progressive political thought and feminist social theory, emphasizes social solidarity, deliberative policymaking, and official collaboration, rather than executive unilateralism, instrumental-reasoning, and isolated individualism.*

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INTRODUCTION

As the vote tallies turned in his favor, then-Vice President Biden appeared in Wilmington, Delaware to address an anxious, divided, and afflicted nation. He described his upcoming "responsibility as President" as a "duty of care for all Americans."[1] It was a brief but important moment. Biden's invocation of "care" resonated with some lasting features of the American constitutional order as well as with the crises of the present moment. The concept of care is recognized in the Constitution, which provides that the President "shall take Care that the Laws be faithfully executed."[2] He must ensure that the officers and agencies who carry out the law do so diligently and responsibly. But Biden spoke of a duty to the people themselves, to "all Americans." Here his understanding of care went beyond attention to what the legal rules require and toward the ultimate beneficiaries and addressees of the law.

This understanding of the presidency as a caregiving role was a central theme of the Biden campaign, which not only portrayed Biden as personally caring but also focused on policy reforms in health, child, and elder care.[3] As the television networks called the election for Biden but President Trump did not concede, Biden said that it was "time to heal"—to heal from the aggression and division of the past four years, yes; but also to heal, in a literal sense, from a deadly pandemic that had stricken and paralyzed the nation for months on end.[4]

In this last aspect, Biden's rhetoric of care overlapped with what Amy Kapczynski and Gregg Gonsalves have called a "politics of care," a bold proposal to respond to the pandemic and rebuild the welfare state on the model of mutual aid and support.[5] Gonsalves and Kapczynski argue that the federal government should employ social workers, health educators, home health aides, and other caregivers to address the pandemic as well as the broader public health crises caused by unemployment and the destruction of the social safety net. Their policy agenda responds to what Nancy Fraser, Emma Dowling, and others have described as the "crisis of care" brought about by

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[1] Lynn Sweet, *Text: Joe Biden, on Verge of Victory Says, "We're Beating Donald Trump,"* CHI. SUN-TIMES (Nov. 6, 2020), https://chicago.suntimes.com/politics/2020/11/6/21553752/text-joe-biden-verge-victory-says-we-are-beating-donald-trump [https://perma.cc/EV3N-WK4U].

[2] U.S. CONST. art. II, § 3.

[3] Anne Linskey & Matt Viser, *Biden Unveils $775 Billion Plan for Universal Preschool, Child Care and Elder Care*, WASH. POST (July 21, 2020), https://www.washingtonpost.com/politics/biden-to-unveil-775-billion-plan-for-universal-preschool-child-care-and-elder-care/2020/07/20/e273dabc-cae7-11ea-91f1-28aca4d833a0_story.html [https://perma.cc/Y4K4-MA3L] ("Throughout most of his campaign, Joe Biden has sought to put forward a singular idea: I care.").

[4] Amber Phillip, *Joe Biden's Victory Speech, Annotated*, WASH. POST (Nov. 7, 2020), https://www.washingtonpost.com/politics/2020/11/07/annotated-biden-victory-speech/ [https://perma.cc/D7GG-SK8U].

[5] Amy Kapczynski & Gregg Gonsalves, *The New Politics of Care*, BOS. REV. (Apr. 27, 2020), http://bostonreview.net/politics/gregg-gonsalves-amy-kapczynski-new-politics-care [https://perma.cc/Y33L-R5Q9].

aging populations, women's increasing workforce participation, the persistently gendered maldistribution of childcare responsibilities, the privatization of welfare-state functions, and a global capitalist economy that drafts low-wage workers into underpaid caregiving services.[6] Fraser sees this constellation of forces triggering political demands "for social arrangements that could enable people of every class, gender, sexuality, and colour to combine social-reproductive activities with safe, interesting, and remunerative work."[7]

Biden's care proposals envision more conventional—if quite expansive—programs such as universal preschool, funding for childcare facilities, and tax credits for child and elder care.[8] The significantly expanded childcare tax credits in the American Rescue Plan Act have begun to put this agenda into action.[9] Such programs build on decades of efforts to theorize "care as a public value" and thus fairly compensate and equitably distribute those caregiving services that enable people to survive, grow, and flourish.[10]

The politics of care also circulates far beyond the immediate context of health and childcare. It provides a lens for non-reformist criminal-legal reform.[11] Care also frames the Working Families Party platform to address

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[6] Nancy Fraser, *Contradictions of Capital and Care*, 100 NEW LEFT REV. 99, 99 (2016); *see also* EMMA DOWLING, THE CARE CRISIS: WHAT CAUSED IT AND HOW CAN WE END IT? 203-5 (2021) (envisioning a political community centering on care that would work to "maintain, contain, and repair the world we live in and the physical, emotional, and intellectual capacity to do so."); STEVEN KLEIN, THE WORK OF POLITICS: MAKING A DEMOCRATIC WELFARE STATE 162-71 (2020) (describing "caregiving" supports in Swedish welfare state as an example of how the such institutions can "shape the possibilities for democratic action"). *See generally* ANDREAS CHATZIDAKIS, JAMIE HAKIM, JOE LITTLER, CATHERINE ROTTENBERG, & LYNNE SEGAL, THE CARE COLLECTIVE, THE CARE MANIFESTO: THE POLITICS OF INTERDEPENDENCE (2020) (arguing for a collective, interdependent, and public politics of care).

[7] Fraser, *supra* note 6, at 116.

[8] *See* Linskey & Viser, *supra* note 3. The recently enacted American Rescue Plan follows through on parts of this vision with expansive child tax credits among other income supports. *See generally* Tony Romm, *Congress Adopts $1.9 Trillion Stimulus, Securing First Major Win for Biden*, WASH. POST (Mar. 10, 2020), https://www.washingtonpost.com/us-policy/2021/03/10/house-stimulus-biden-covid-relief-checks/ [https://perma.cc/D5SL-A7RV].

[9] *See* Kelly Anne Smith, *President Biden Signs Stimulus Package into Law – Here's How It'll Affect You*, FORBES (Mar. 11, 2021), https://www.forbes.com/advisor/personal-finance/biden-signs-third-stimulus-package/ [https://perma.cc/2QFJ-EZ6J].

[10] Linda C. McClain, *Care as a Public Value: Linking Responsibility, Resources, and Republicanism*, 76 CHI.-KENT. L. REV. 1673, 1677 (2001); *see also* Deborah Stone, *Welfare Policy and the Transformation of Care, in* REMAKING AMERICA: DEMOCRACY AND PUBLIC POLICY IN AN AGE OF INEQUALITY 183 (Joe Soss, Jacob S. Hacker & Suzanne Mettle eds., 2007); JOAN TRONTO, CARING DEMOCRACY: MARKETS, EQUALITY, AND JUSTICE (2013).

[11] *See* Amna Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 110 (2020) ("The calls to divest from the carceral state are often accompanied by demands to build infrastructures of care. . . ."); L. A. CNTY. ALTS. TO INCARCERATION WORK GRP., FINAL REPORT: CARE FIRST, JAIL LAST: HEALTH AND RACIAL JUSTICE STRATEGIES FOR SAFER COMMUNITIES 10 (2020), https://lacalternatives.org/wp-content/uploads/2020/03/ATI_Full_Report_single_pages.pdf [https://perma.cc/9CUU-4LAA] ("We can commit to no longer rely on our law enforcement agencies, courts and jails to function as our social safety net, and instead reinvest in our communities to build a robust system of care—led and actively informed by our health systems, social service agencies, community and faith-based organizations, and formerly incarcerated individuals and their loved ones—to provide the housing, social services, medical and mental health care that will allow our communities to thrive."). On

systemic racism, rebuild public infrastructure, provide good jobs and universal healthcare, and generally meet the demands of social solidarity.[12] Across these various contexts, the theory and practice of care recognize social interdependency and collective responsibility for individual well-being.

The concept of care has been deployed in these ways to diagnose and to remedy some of the ailments and injustices of our present moment. The term has been used to describe and promote multiple kinds of relationships and programs ranging from literal health or childcare services to figurative care for institutions and values. This Article, written for the *Harvard Law & Policy Review's* issue on The Progressive Administrative State, develops a legal principle of public care that is responsive to and overlaps with these various social and political understandings. This principle should allow the discourse of care to move within and transform the framework of governance in the United States.

The principle of public care I have in mind already exists—but ought to be more deeply institutionalized—within the American administrative state. It governs the conduct of officials who implement the law, ranging from the President to other executive and administrative officers.[13] Public care requires these officials to attend to the needs and values of those who have a stake in law's administration. Public care precludes purely hierarchical, unilateral, or instrumental forms of action, in which one leader dictates to followers or subjects what they must do. It instead requires that the President and administrative officials listen to one another and respond to the input of the private parties their acts and policies touch.

Public care is more than a structural and procedural principle, however. Care is a purpose that statutory law advances, providing a reason that guides the exercise of official discretion. As a regulatory purpose, care requires that the government invest in the welfare of individuals. It directs the state to provide those institutions, services, and protections that are necessary to people's moral and political agency but which they cannot obtain on their own initiative.

While recognized in key aspects of American public law, the principle of public care departs from some currently dominant practices of administration. First, we are in a period of what now-Justice Elena Kagan famously dubbed "presidential administration."[14] A close cousin of the "unitary theory" of the executive,[15] presidential administration maintains that the President generally can and should direct executive agencies, take ownership of their regulatory decisions, and be held politically accountable for those decisions.

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the challenge of disentangling care from carceral logics, see Sunita Patel, *Embedded Healthcare Policing*, 69 UCLA L. REV. (forthcoming 2022).

[12] Working Families Party, *Read the Charter*, PEOPLE'S CHARTER, https://www.peoplescharter.us/read-the-charter [https://perma.cc/H8KM-HG85].

[13] Public care might also be extended to cover obligations of legislators and judges, but these are beyond the scope of this Article.

[14] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246 (2001).

[15] *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994).

Public care instead insists on dialogue within the executive between the President and subordinate officials, rather than subjecting those officials to the President's political dictates.

Second, we are in the midst of a conservative reaction that privileges the rights of certain individuals, corporations, and religious groups against government interference.[16] This negative conception of rights, as a sphere of independence from the political community, ignores the fact that many, if not most, individual interests can only be satisfied in and through a system of social support.[17] Public care recognizes that we can only become and remain effective rights-bearers insofar as civil society and the state equip us to exercise such rights.

Third, we are on the other side of a "cost-benefit revolution," in which regulatory programs are assessed primarily by the metric of economic efficiency.[18] In executive branch practice, this approach has often skewed regulatory analysis towards monetary valuations that fail to capture not only net utility but also the distinct values of fair distribution, public deliberation, and social solidarity.[19] Public care centers the interests and voice of the disempowered and the least well off, as well as the plurality of social and moral concerns that regulation implicates, rather than net economic gains alone.

Public care is not strictly opposed to utilitarian reasoning, or to the language of rights, or to the use of executive power in the public interest. Public care, rather, provides a way of and a reason for administrative action that is separate from the weighing of costs and benefits, from the protection of private discretion against public interference, and from the President's policymaking authority. Public care broadly requires that government officials facilitate the agency of other people—both of other public officers and of private persons—rather than command them. That commitment has formal dimensions—care as a "way of" acting—that guide and constrain the

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[16] *See, e.g.*, Burwell v. Hobby Lobby, 573 U.S. 682, 689 (2014) (holding that the application of the Affordable Care Act's contraceptive coverage mandate to closely held for-profit corporations with religious objections to such contraception violated the Religious Freedom Restoration Act). For discussion, see Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1495–1507 (2015).

[17] *See, e.g.*, John Dewey, *Outlines of a Critical Theory of Ethics*, *in* 3 JOHN DEWEY, THE EARLY WORKS, 1882–1892 at 322 (Jo Ann Boyston, ed., 1969) ("In the realization of individual there is found also the needed realization of some community of persons of which the individual is a member."); DOWLING, THE CRISIS OF CARE, *supra* note 6, at 30 ("Against the idea of the autonomous individual whose concerns revolve around himself and is always hailed as the epitome of social progress and individual freedom, we can ask what this celebration of individual autonomy obfuscates: who does the work to allow for that individual to emerge and thrive?"). On the Progressive understanding of the social constitution of rights, see BLAKE EMERSON, THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY 67 (2019) ("The rise of the administrative state is . . . not simply a story of public power curtailing individual rights but also of the simultaneous production of rights by the state itself."); *see also* DERRICK DARBY, RACE, RIGHTS, AND RECOGNITION 74 (2009) ("[T]here are no rights that exist prior to and independent of some form of formal or informal social recognition of ways of acting and being treated by a community of persons.").

[18] CASS R. SUNSTEIN, THE COST-BENEFIT REVOLUTION (2020).

[19] *See infra* Part II.B.

substantive concern with providing care services—care as a "reason to" act. As a way of acting, public care requires officials to entertain and respond to the viewpoints and values of the persons their acts affect. As a policy reason that guides official action, public care requires government to support materially the moral and political capacities of the people over whom it exercises jurisdiction. As a matter of both form and substance, practices of public care invariably recognize the interdependence of actors and the need for joint action in pursuing common projects.

This Article will show that public care is recognized by specific legal authorities, including Article II of the Constitution, the Administrative Procedure Act of 1946 and its case law, as well as various programmatic statutes of the American welfare state, such as the Patient Protection and Affordable Care Act. The connections amongst these discrete legal provisions would be difficult to make out were it not for the insights of social and political theory. In particular, the implicit legal principle of public care becomes visible in light of Progressive political thought and its intersections with feminist theory. In the late nineteenth and early twentieth century, the Progressives advanced a distinctive understanding of the role of government in public life.[20] They focused not on protecting isolated private rights but rather on supporting individuals' capacity to become equal and active members of the democratic community.[21] Progressives constructed a "maternalist welfare state" that extended the caregiving role of the family to public life, requiring the government to provide for education, health, and other basic material needs.[22] This historical background provides promising models—and some notes of caution—for the reconstruction of the welfare state in the present.

Though public care is a general legal obligation, applicable to officials regardless of their gender or sex,[23] it is informed by the insights of feminist theory. Feminists have variously understood "care" as a moral psychology centered on social interdependence rather than individual rights,[24] as a political obligation to provide for basic human needs and development,[25] as a social responsibility to provide for both the vulnerable and their direct

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[20] *See* EMERSON, *supra* note 17, at 61–111.

[21] *See infra* Part I.A.

[22] THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 2 (1992).

[23] *See* Kathryn Abrams, *The Second Coming of Care*, 76 CHI.-KENT L. REV. 1605, 1606 (2001) ("[C]are is no longer framed as an attribute supporting an essentialist characterization of women. It is now recognized as a complex set of practices that are structured, supported, and incentivized."); Ruth Rubio-Marín, *The (Dis)establishment of Gender: Care and Gender Roles in the Family as a Constitutional Matter*, 13 INT'L J. CON. L. 788 (2015) (describing and arguing for constitutional support for care-giving responsibilities in a way that would destabilize the inequitably gendered distribution of such responsibilities).

[24] *See* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 74, 43 (1982).

[25] *See* Daniel Engster, *Care Ethics and Natural Law Theory: Toward an Institutional Political Theory of Caring*, 66 J. POL. 113, 131–32 (2004).

caretakers,[26] as a component of democratic equality,[27] and as an un- or under-compensated labor that undergirds the capitalist economy.[28] These diverse perspectives share an understanding that dependency is a defining feature of social life, and that the proper structure and distribution of the relationships among caregivers, those who are cared-for, and the political community as a whole pose central questions of justice.[29]

This feminist viewpoint is useful for conceptualizing and critiquing the administrative state today. Agencies exercise power, provide services, and distribute benefits on behalf of the people in cases where private initiative is insufficient to secure either individual rights or the common interest. They care for the public. Like many other caregiving institutions, however, government bureaucracies' capacity to further the interests of those subject to their authority is accompanied by the risk of arbitrariness, coercion, and abuse. And yet, administrative law scholarship usually does not theorize regulatory actions in terms of care, focusing instead on formal questions statutory authorization, on procedural fairness, or on constitutional concerns such as the separation of powers.[30]

The failure to theorize and meet the obligation of public care within administrative law may be a symptom of the false, arguably patriarchal dichotomy between a supposedly rational language of law, right, and authority, on the one hand, and merely affective capacities of empathy, concern, and attachment, on the other.[31] This Article rejects this binary, identifying already existing but underappreciated care obligations within administrative

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[26] *See generally* THE SUBJECT OF CARE: FEMINIST PERSPECTIVES ON DEPENDENCY (Eva Feder Kittay & Ellen K. Feder eds., 2002); *see also* Joan Tronto, *Care as a Basis for Radical Political Judgments*, 10 HYPATIA 141 (1995); Eva Feder Kittay, *A Feminist Public Care Ethic Meets the New Communitarianism*, 11 ETHICS 523, 533 (2001).

[27] *See* TRONTO, *supra* note 10, at 107–08.

[28] *See generally* Fraser, *supra* note 6; DOWLING, *supra* note 6. This perspective has been elaborated within feminist social reproduction theory. *See, e.g.*, Ellie Gore & Genevieve LeBaron, *Using Social Reproduction Theory to Understand Unfree Labor*, 43 CAPITAL AND CLASS 561, 564 (2019) (social reproduction theory "challenges the analytical separation of reproduction and production, and the so-called private and public realms of the economy. It foregrounds forms of work and social provisioning that have been historically viewed as non- or 'extra' economic, such as unwaged care and domestic work."); Silvia Federici, *Social Reproduction Theory: History, Issues, and Present Challenges* 2 RADICAL PHIL. 55, 55 (2019) ("Placing the spotlight on the work that produces the work-force has made possible a new understanding of the mechanisms by which capitalist society has been reproduced."). For a summary of the historical development of relations of social reproduction and its study in sociology, see Barbara Laslett & Johanna Brenner, *Gender and Social Reproduction: Historical Perspectives* 1989 ANN. REV. SOC. 381 (1989).

[29] *See* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition,* 20 YALE J.L. & FEMINISM 1 (2008). Fineman's understanding of vulnerability and call for a responsive state that addresses it overlaps with public care. But her theory seems to reject individual independence as a valid norm, whereas public care aims to create the material and social preconditions for such agency.

[30] A notable exception is Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441 (2010). For discussion of his fiduciary view, see Part II.A, infra.

[31] On the masculinist characteristics of bureaucracy and the welfare state, see Wendy Brown, *Finding the Man in the State*, 18 FEMINIST STUD. 7, 12 (1992).

law's reason-giving requirements. It argues that mutuality, collaboration, and concern are at least as important ingredients to good governance as are hierarchy, efficiency, and impartiality.

The argument proceeds in three parts. Part I describes care as a regulatory purpose animating the American welfare state, particularly in health law. I suggest ways in which this purpose should motivate the Biden Administration's implementation of the Affordable Care Act and related federal health services. Part II shows that the concept of care has bearing on agencies' obligation to exercise their authority in a reasonable manner. Core administrative law requirements of reason-giving, respect for reliance interests, and provision of notice and opportunity for comment institutionalize administrative-procedural care. A public care approach to administrative law, however, cautions against exclusive reliance on cost-benefit analysis and instead would promote equality of public participation and influence in the administrative process. Part III examines the structural-constitutional norms that flow from the President's duty of faithful execution. Contrary to the unitary theory of the executive, I argue that the "take care" obligation implies that the President's executive role is indirect and deliberative, rather than a matter of hierarchical command. This argument has implications for the future of agency independence and the civil service. It requires greater legislative, executive, and judicial respect for the professional judgment of civil servants, including the maintenance of for-cause removal protections and increased procedural rights for career staff to participate in policymaking decisions.

I. Public Care as a Regulatory Purpose

This Part examines public care as a purpose that the American administrative state has pursued and ought to pursue further. Considered as a regulatory purpose, public care is the *goal* of providing goods, services, and protections that enable private parties to advance their interests and exercise their rights. It establishes background conditions that make formal legal entitlements socially real. This regulatory purpose is recognized by particular statutory authorities and guides the exercise of administrative discretion within the bounds of law.[32] It gives executive officials a lens through which to understand and properly apply the statutes they implement. Administrators who are committed, as a matter of law or policy, to the goal of public care will use governmental power to enable the moral and political agency of statutory beneficiaries. They will avoid regulatory regimes that reduce the level or quality of material support for people's agency in service of other policy objectives. This Part will first show how the purpose of public care has been partially institutionalized over the historical development of American

[32] *See* Kevin M. Stack, *Purposivism in Executive Branch Interpretation: How Administrative Agencies Interpret Statutes*, 109 Nw. U. L. Rev. 871, 875 (2015) ("[S]tatutory delegations . . . impose obligations to exercise . . . authority in accordance with the purposes or principles that Congress has established in statute.").

welfare state since the Progressive Era. It will then describe how that purpose has been advanced in statutory health law, particularly in the Affordable Care Act. Finally, it will suggest how this purpose of care could be better advanced through administrative policy changes concerning contraceptive coverage and Medicaid work requirements.

A. A Brief History of Public Care from Progressive Maternalism to the Subordinate Welfare State

Public care is rooted in the history of the regulatory state. In the Progressive Era, reformers militated for the dramatic expansion of administrative capacity to address the social needs and problems generated by industrial capitalism. They argued that nineteenth century ideologies of isolated individualism and laissez-faire were inadequate to meet people's material and spiritual interests.[33] Jane Addams, for instance, argued that the government had to "minister to genuine social needs, through the political machinery, and at the same time to remodel that machinery so that it shall be adequate to its new task" by combining good-government professionalism with a sense of social sympathy.[34] The task was to broaden the horizons of citizens from their own parochial concerns and towards generalizable interests. "If we believe that the individual struggle for life may widen into a struggle for the lives of all, surely the demand of an individual for decency and comfort, for a chance to work and obtain the fullness of life may be widened until it gradually embraces all members of the community, and rises to a sense of common weal."[35] Mary Follett, similarly, argued for a "new state" in which individuals would understand their own freedom in relation to their participation in social groups, the nation, and ultimately humanity as a whole.[36] Beyond voting and representative government, Follett argued that democracy must make "every man and his basic needs the basis and substance of politics."[37] She understood the legitimate exercise of political authority not to be "power-over," in which one person commanded others what to do, but rather a "jointly developed, a co-active, not a coercive power."[38] She accordingly understood public law, and administrative agencies in particular, as attempting to "interweave" conflicting social interests.[39]

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[33] *See* EMERSON, *supra* note 17, at 61–66; *see also* JAMES T. KLOPPENBERG, UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN POLITICAL THOUGHT, 1870-1920 298–394 (1986).

[34] JANE ADDAMS, DEMOCRACY AND SOCIAL ETHICS 272 (1905).

[35] *Id.* at 269.

[36] MARY PARKER FOLLETT, THE NEW STATE: GROUP ORGANIZATION THE SOLUTION TO POPULAR GOVERNMENT 333 (1st ed., Longman's, Green & Co. 1918).

[37] *Id.* at 185.

[38] Mary Parker Follett, *Power*, *in* DYNAMIC ADMINISTRATION: THE COLLECTED PAPERS OF MARY PARKER FOLLETT 95, 101 (Henry D. Metcalf & L. Urwick eds., 1940).

[39] MARY PARKER FOLLETT, CREATIVE EXPERIENCE 292 (Longmans, Green & Co. 1924).

This Progressive project aimed to establish care as an official governmental obligation.[40] John Dewey and James Tufts turned away from the conflictual models of social order expressed by Social Darwinists and towards "the method of mutual protection and care" supported by both moral sympathy and scientific knowledge.[41] They urged a new public philosophy of collective democratic responsibility and administrative social provision. This philosophy would not abandon the value of individual freedom, but rather furnish the material, social, and political foundations that would make freedom a lived reality for all, achieving the "effective—not merely formal—freedom of every social member."[42] They advocated for a welfare state that would give individuals "equal opportunity" to develop their capacities to the fullest, including by providing "education as a public interest and care" and the provision of "proper food, hygiene, and medical care."[43]

The focus on governance as care in the Progressive Era had a gendered dimension. Women took a prominent role in the social and moral reform movements of the time, including for settlement houses, juvenile justice, temperance, sanitation, fair labor conditions, pure food and drugs, as well as suffrage.[44] The United States developed what Theda Skocpol has called a "maternalist welfare state," as women expanded the discourse and practice of family and household management to social policy.[45] As Paula Baker puts it, Progressive women "sought to bring the benefits of motherhood to the public sphere" by making social reproduction a matter of political concern.[46] The United States Children's Bureau, established in 1912 under the impetus of women's clubs, was a landmark in American state-building, investigating and supporting maternal and child welfare in coordination with state-level

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[40] Care was hardly the sole concern of Progressive political thought, which was also concerned with values such as democracy, positive freedom, moral reform, good-government, and administrative efficiency. *See* EMERSON, *supra* note 17 at 60–112; *see also* William J. Novak, *The Progressive Idea of Democratic Administration*, 167 U. PA. L. REV. 1823, 1831–47 (2019); Daniel T. Rodgers, *In Search of Progressivism*, 10 REVS. IN AM. HISTORY 113 (1982).

[41] JOHN DEWEY & JAMES TUFTS, ETHICS 372 (1908).

[42] *Id.* at 472.

[43] *Id.* at 449, 549.

[44] *See* Elisabeth Israels Perry, *Men Are from the Gilded Age, Women Are from the Progressive Era*, 1 J. GILDED AGE AND THE PROGRESSIVE ERA 25, 41 (2002); On the links between feminist political mobilization around women's suffrage and welfare state supports, see Wendy Sarvasy, *Beyond the Difference Versus Equality Policy Debate: Post-suffrage Feminism, Citizenship, and the Quest for a Feminist Welfare State*, 17 SIGNS 329 (1992).

[45] SKOCPOL, *supra* note 22, at 2, 317–20 (1992). *But see* Kathyryn Kish Sklar, *The Historical Foundations of Women's Power in the Creation of the American Welfare State, in* MOTHERS OF A NEW WORLD: MATERNALIST POLITICS AND THE ORIGINS OF WELFARE STATES 43, 45 (Seth Koven & Sonya Mitchell, eds. 1993) (arguing that middle class women's reform movements were not merely modeled on motherhood and familial relations but more broadly served as a "surrogate for working class social-welfare activism").

[46] Paula Baker, *The Domestication of Politics: Women and American Political Society, 1780–1920*, 89 AM. HIST. REV. 620, 640 (1984).

agencies.[47] Governmental subsidization, regulation, and supplementation of familial care recast the state itself as a caretaking institution.[48]

The moral maternalism of the Progressive state could be invasive and coercive, however. Whereas workmen's compensation programs offered rule-based, adjudicatory resolution of workplace injury claims, mother's aid programs involved intensive supervision and surveillance of indigent women to ensure that they met the moral requirements of reformers' Protestant ethic.[49] In their juvenile justice reform efforts, middle class women sought to police, regulate, and reform the sexual mores of young, working class, often minority women.[50] Women in the Indian Service likewise took on the role of "federal mothers" to Indian "wards," infantilizing them and attempting through education to assimilate them into white culture.[51] The risk of disciplinary domination remained acute throughout the subsequent development of the welfare state in the twentieth century, as caseworkers have exercised significant, morally judgmental, discretionary control over the lives of claimants.[52] Because of care's intimacy, and the unequal position of the cared-for and the care-giver, its practice could involve disempowerment, abuse, and even violence, particularly where overlaid on preexisting forms of social, political, and racial subordination.[53]

Those injustices, while real and profound, do not disqualify public care as a potentially valuable practice. Any and every framework for the exercise of governmental coercion can be misused. Nonetheless, these examples highlight the specific pathologies toward which public care is prone, and against which its sound administration must guard. Public care carries the risk that officials with greater social, political, or economic power will pressure those with less to lead the lives the powerful think are morally appropriate. That kind of oppressive "care" is to be distinguished from the normatively desirable practice, identified by Dewey, Tufts, and Follett, of providing the resources for people to realize their own potential as engaged participants in the democratic community. The procedural and structural dimensions of public care described in Parts II and III serve as checks against substantive

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[47] *See* SKOCPOL, *supra* note 22, at 483–512.

[48] *See* Carol Nackenoff, *Toward a More Inclusive Community: The Legacy of Female Reformers in the Progressive State*, *in* THE PROGRESSIVES' CENTURY: POLITICAL REFORM, CONSTITUTIONAL GOVERNMENT, AND THE MODERN AMERICAN STATE 219, 219–20 (Stephen Skowronek, Stephen M. Engel, & Bruce Ackerman eds., 2016); LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 37–64 (1994).

[49] *See* Barbara J. Nelson, *The Origins of the Two-Channel Welfare State: Workmen's Compensation and Mothers' Aid, in* WOMEN, THE STATE, AND WELFARE 123, 123–24 (Linda Gordon ed., 1990).

[50] *See* MARY E. ODEM, DELINQUENT DAUGHTERS: PROTECTING AND POLICING ADOLESCENT SEXUALITY IN THE UNITED STATES, 1885–1920, at 129–32 (1995).

[51] *See* CATHLEEN D. CAHILL, FEDERAL FATHER & MOTHERS: A SOCIAL HISTORY OF THE UNITED STATES INDIAN SERVICE, 1869–1933, at 6, 63–81 (2011).

[52] *See* Joel F. Handler, *Discretion in Social Welfare: The Uneasy Position in the Rule of Law,* 92 YALE L.J. 1270, 1272 (1983).

[53] *See* Jerry L. Mashaw, *Welfare Reform and Local Administration of Aid to Families with Dependent Children in Virginia,* 57 VA. L. REV. 818, 818–19 (1971).

caregiving practices that disregard the self-understandings and interests of purported beneficiaries.

The American welfare state maintained a practice of public caring throughout the twentieth century, though this orientation has always been partial and precarious. From the advent of Social Security in the New Deal,[54] to the introduction of Medicare and Medicaid in the 1960s,[55] the state has provided an array of supports, benefits, and services that private initiative and the marketplace alone could or would not. It would be inaccurate to describe the twentieth century state as "maternalist" on the whole, however. The gendered social policy of the Progressive Era placed women into a subordinate position vis-à-vis male bread-winners.[56] The welfare state that has developed since the New Deal remained in many respects "patriarchal," in the sense that it prioritized work-based entitlements disproportionately enjoyed by men over caregiving supports that disproportionately went towards women.[57] Women have often been treated as the "conduit" for policies that are aimed not at women's own well-being but rather at the children they care for.[58] Such patriarchal policies have long been contested. As Karen Tani has shown, during the 1930s and 40s civil servants in the Social Security Administration argued for a "general governmental obligation to meet human need"[59] and understood welfare claimants as holding "democratic rights" to such provision.[60] Their vision, however, lost out over agency lawyers' emphasis on formal procedural rights, such as notice and a hearing.[61] The legalistic values of impartiality and procedural fairness took priority over social workers' efforts to institutionalize a public duty to provide adequate care for those in need.

The gendered hierarchy of welfare administration has also been heavily racialized. Welfare programs in the New Deal provided women of color with inferior supports or excluded them entirely.[62] The welfare rights struggle in the 1960s succeeded in improving access and benefits for black claimants in

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[54] *See* EDWIN E. WITTE, THE DEVELOPMENT OF THE SOCIAL SECURITY ACT: A MEMORANDUM ON THE HISTORY OF THE COMMITTEE ON ECONOMIC SECURITY AND DRAFTING AND LEGISLATIVE HISTORY OF THE SOCIAL SECURITY ACT, 111–97 (1962).

[55] *See* Wilbur J. Cohen, *Reflections on the Enactment of Medicare and Medicaid*, HEALTH CARE FIN. REV. 3, 3 (Ann. Supp. 1985).

[56] *See* Nancy Fraser & Linda Gordon, *A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State*, *in* THE SUBJECT OF CARE: FEMINIST PERSPECTIVES ON DEPENDENCY 14, 23–26 (Eva Feder Kittay & Ellen K. Feder eds., 2002).

[57] *See generally* Carole Pateman, *The Patriarchal Welfare State*, *in* DEMOCRACY AND THE WELFARE STATE 231 (Amy Gutmann ed., 1998). *But see* GORDON, *supra* note 48, at 7–8 (1994) (the inferior supports of Aid for Dependent Children were "designed by women and indeed feminist women, champions of child welfare.").

[58] Virginia Sapiro, *The Gender Basis of American Social Policy*, *in* WOMEN, THE STATE AND WELFARE 36, 45 (Linda Gordon ed., 1990).

[59] KAREN TANI, STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE 1935–1972, at 57–80 (2016). *See id.* at 276.

[60] *Id.* at 58.

[61] *See id.* at 57–112.

[62] *See* JILL QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY 21–25 (1994).

the short term but precipitated a racist backlash that undermined public support for welfare spending in the years to come.[63] Welfare rights mobilization at the same time worked to shift the institutional structure of the welfare state away from the discretionary practice of Progressive maternalism and towards a more rule-based and routinized regime. In *Goldberg v. Kelley*,[64] claimants won a due process right to a hearing prior to the termination of benefits. But arguments for substantive constitutional entitlements to public support, which would have enshrined the purpose of public care in fundamental law, foundered.[65] The resulting formalization of welfare criteria to meet the demands of administrative due process led to the "bureaucratization" of welfare agencies and the "proletarianization" of their workforces.[66] As I will discuss in Part III, this shift from civil servant professionalism towards bureaucratic hierarchy aligns with a unitary theory of executive power that is inconsistent with the structural demands of public care.

Beginning in the 1970s, fiscal pressures and rightward ideological shifts reduced funding levels and imposed new conditions on welfare recipients, such as work requirements.[67] These trends deepened over the course of the Reagan Administration and continued into the Clinton Administration.[68] The 1996 Personal Responsibility and Work Opportunities Act codified state-level experiments with work requirements and other eligibility barriers.[69] This conceptual change from "welfare" and "dependency" to "personal responsibility" and "work opportunities" captured a normative reorientation from public care towards a paternalistic effort to cultivate rugged individualism amongst the impoverished.

B. Public Care in Healthcare

Despite the subordinate position and subordinating tendencies of the American welfare state, public care's emphasis on satisfying basic human needs has nonetheless taken shallow root in health law. Medicaid provides healthcare benefits to individuals with low incomes, whereas Medicare provides them to the elderly and disabled.[70] These statutes have partially trans-

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[63] *See* Dorothy E. Roberts, *Review: Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563, 1572 (1996).

[64] 397 U.S. 254 (1970).

[65] *See* JOEL F. HANDLER & YEHESKEL HASENFELD, THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA 118 (1991); Tani, *supra* note 59, at 260–69.

[66] William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System,* 92 YALE L.J. 1198, 1199 (1983); JERRY L. MASHAW, RICHARD A. MERRILL, PETER M. SHANE, M. ELIZABETH MAGILL, MARIANO-FLORENTINO CUELLAR, & NICHOLAS R. PARRILLO, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 416 (7th ed. 2014).

[67] *See* HANDLER & HASENFELD, *supra* note 65, at 119–22, 132–58.

[68] *See generally* John O'Connor, *US Social Welfare Policy: The Reagan Record and Legacy*, 27 J. SOC. POL. 37 (1998); Yvonne Zylan & Sarah Soule, *Ending Welfare as We Know It (Again): Welfare State Retrenchment*, 1989–1995, 79 SOC. F. 623, 630 (2000).

[69] Zylan & Soule, *supra* note 68, at 630.

[70] *See* Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare For?*, 70 STAN. L. REV. 1689, 1711–13 (2018). The Clinton-Era welfare reforms also included support for State Children's Health Insurance Programs (SCHIP) which provides health insurance to

formed healthcare provision into a field of public law constituted not by individual aims and private-professional standards but instead by the broad, evolving, and contested purposes of Congress.[71] They provide a positive law foundation for what Lindsay F. Wiley has called "health justice," which draws on communitarian political thought to articulate the collective rather than merely individual interests at issue in healthcare policy.[72] The purpose of Medicaid, for instance, is in part to "to furnish . . . medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services."[73] When Congress provides that the government will provide "assistance on behalf of" particular groups and individuals, it acknowledges and codifies a collective, public responsibility to care for others, to attend to and advance the material interests of certain vulnerable classes of citizens. It lays the legal groundwork for ongoing democratic discourse—within and without the state—concerning which "health capabilities" are necessary for individuals determine and pursue their life plans.[74] With this statutory foundation, care needs have become more than mere political factors that may motivate policy. The purpose of public care now has legal authority, giving guidance to administrative officials on how to interpret and apply a thicket of extant statutory provisions.[75]

The American health regime is far from purely public, however. It also consists in the public subsidy and regulation of private health insurance schemes.[76] As Gabriel Winant has shown, this hybrid system has expanded to fill the central socioeconomic role that industrial production played in the mid twentieth century.[77] The industrial working class, suffering under the strains of work-related ailments and unemployment, became the patient base for a healthcare industry financed initially through collective bargaining of health insurance plans and, increasingly, through the extensive public sup-

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children whose families cannot afford it but do not qualify for Medicaid. *See* Karl Kronebusch & Brian Elbel, *Simplifying Children's Medicaid and SCHIP: What Helps? What Hurts? What's Next for the State?*, 23 HEALTH AFF. 233, 233–34 (2004).

[71] *See* Abbé R. Gluck, *Symposium Issue Introduction: The Law of Medicare and Medicaid at Fifty*, 15 YALE J. HEALTH 1, 1, 5–6 (2015).

[72] Linsday F. Wiley, *From Patient Rights to Health Justice: Securing the Public's Interest in Affordable, High-Quality Healthcare* 37 CARDOZO L. REV. 833, 837, 879 (2016)*; see also* Lindsay F. Wiley, *Health Law as Social Justice*, 24 CORNELL J. L. & PUB. POL'Y 47 (2014).

[73] 42 U.S.C. § 1396–1. *See* Gresham v. Azar, 950 F.3d 93, 104 (D.C. Cir. 2020) (describing this provision as "the primary purpose of Medicaid").

[74] *See* Jennifer Ruger, *The Health Capability Paradigm and the Right to Health Care in the United States*, 37 THEORETICAL MED. AND BIOETHICS 275, 279 (2016).

[75] *See* Michael J. Graetz & Jerry L. Mashaw, *Ethics, Institutional Complexity and Health Care Reform: The Struggle for Normative Balance*, 10 J. CONTEMP. HEALTH L. & POL'Y 93, 103 (1994) (ethical analysis of healthcare system should answer the question, "[w]hat is the balance of normative commitments structured into the system and how does that balance comport with our sense of appropriate resource allocation and internal priority setting?").

[76] *See* JACOB S. HACKER, THE DIVIDED WELFARE STATE: THE BATTLE OVER PUBLIC AND PRIVATE BENEFITS IN THE UNITED STATES 7–27 (2002).

[77] *See* Gabriel Winant, *"Hard Times Make for Hard Arteries and Hard Livers": Deindustrialization, Biopolitics, and the Making of a New Working Class*, 53 J. SOC. HIST. 107, 108 (2019).

ports of Medicare and Medicaid.[78] This private-public system at the same time initially excluded healthcare workers from the labor protections industrial workers had won and enjoyed.[79] Today the state heavily subsidizes this work force through Medicaid, but the federalist structure of the system, budgetary austerity, and statutory exclusions from labor protections have made large swaths of this economy a "sweated industry" of underpaid, subordinated workers.[80]

The partial institutionalization of public care in the twentieth century has carried over into twenty-first century healthcare policy. As Nicole Huberfeld observes, the American healthcare system at the close of the twentieth-century remained extraordinarily unequal, fragmented, and partial, "existing in an ordered chaos sustained by a century-long political rejection of collective response to the human need for care through unitary health reform."[81] The Affordable Care Act at once moved the system towards greater comprehensiveness but built on and maintained the complex patchwork of care institutions, systems, and norms that preexisted it.[82] It created what Allison K. Hoffman has called a "weak statutory right to healthcare" for those in "medically vulnerable populations."[83] Among other things,[84] the Act expanded Medicaid,[85] created tax credits for the purchase of health insurance,[86] established government-run insurance exchanges,[87] required insurers to cover customers at roughly equal rates and regardless of preexisting conditions,[88] and imposed penalties on large employers who do not offer insurance to their full-time employees.[89]

The Affordable Care Act as enacted, however, is not the Affordable Care Act we now enjoy. In *NFIB v. Sebelius*,[90] the Supreme Court held that the Act's provisions empowering the Secretary of Health and Human Services to withhold existing Medicaid funding from states that did not agree to expand Medicaid exceeded Congress' powers under the Spending Clause.[91] The Court acknowledged that Congress may and frequently does condition

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[78] *See* GABRIEL WINANT, THE NEXT SHIFT: THE FALL OF INDUSTRY AND THE RISE OF HEALTH CARE IN RUST BELT AMERICA 138 (2021).

[79] *See id.* at 135–38, 151–58, 163.

[80] EILEEN BORIS & JENNIFER KLEIN, CARING FOR AMERICA: HOME HEALTH WORKERS IN THE SHADOW OF THE WELFARE STATE 10–14 (2012).

[81] Nicole Huberfeld, *The Universality of Medicaid at Fifty*, 15 YALE J. HEALTH POL'Y L. & ETHICS 67, 67–68 (2015).

[82] *See* Gluck, *supra* note 71, at 5–14; Abbé Gluck & Thomas Scott-Railton, *Affordable Care Act Entrenchment*, 108 GEO. L. J. 495, 507 (2020).

[83] Allison K. Hoffman, *A Vision of an Emerging Right to Health Care in the United States: Expanding Health Care Equity Through Legislative Reform*, *in* THE RIGHT TO HEALTH AT THE PUBLIC/PRIVATE DIVIDE: A GLOBAL COMPARATIVE STUDY 345, 348 (Colleen M. Flood & Aeyal Gross eds., 2014).

[84] *See* Gluck & Scott-Railton, *supra* note 82, at 508–11 (describing provisions of ACA).

[85] *See* 42 U.S.C. § 1396a.

[86] *See* 26 U.S.C. § 36B.

[87] *See* 42 U.S.C. § 18031.

[88] *See* 42 U.S.C. §§ 300gg, 300gg–4.

[89] *See* 26 U.S.C. § 4980H.

[90] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 520–23 (2012).

[91] *See id.* at 576–84.

receipt of federal funding on various requirements.[92] However, it concluded that the threat that current Medicaid funds might be withheld from a state that did not accept expansion amounted to impermissible "coercion,"[93] in part because of the scale of this withholding power, and in part because the ACA did not merely amend Medicaid but rather "enlist[ed] states in a new spending program."[94]

The Court's conclusion that the Medicaid expansion amounted to a "new"[95] program relied on a stereotyped and indefensible circumscription of the boundaries of public care. The Court noted that, prior to the ACA, Medicaid was "designed to cover medical services for four particular categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children,"[96] whereas the ACA's Medicaid expansion would "meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level."[97] This was a significant expansion of the program, to be sure. But the Court failed to identify a categorical difference between the newly and the previously covered groups that would render the Medicaid expansion a "shift in kind, not merely degree."[98]

The original and the expanded version of Medicaid both express and enact public care, providing the basic material support of health insurance for those who are unlikely to be able to obtain it on their own. The Court had no basis for concluding that adults earning only up to $14,856 per year do not count among "the neediest among us" whereas the previously covered groups do.[99] The claim that the groups covered by original and expanded Medicaid are fundamentally different relies on an unfounded and ideologically freighted distinction between groups the Court seems to regard as the deserving poor and those who the Justices think are or ought to be self-supporting and autonomous.[100] The Court lacked the constitutional authority and institutional competence to determine the boundaries of the population with the greatest care needs.

Even in the truncated form approved by the Supreme Court, the Affordable Care Act combines two conflicting philosophies that Deborah Stone has identified within American health law and policy: on the one hand, an "individual-responsibility model," which allows healthcare consumers, insurers, and providers to make their own "choices" in the marketplace within the constraint of their ability to pay, and a "social-solidarity model,"

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[92] 567 U.S. at 576.
[93] *Id.* at 579.
[94] *Id.* at 584.
[95] *Id.* at 582.
[96] *Id.* at 575.
[97] *Id.* at 583.
[98] *Id.*
[99] *Id.* at 575. Calculation based on Federal Poverty Level in 2012. *See* 2012 HHS POVERTY GUIDELINES, U.S. DEP'T OF HEALTH & HUMAN SERVS., https://aspe.hhs.gov/2012-hhs-poverty-guidelines#thresholds [https://perma.cc/QK4W-BNRZ].
[100] On the historically entrenched categories of the "deserving" and "undeserving" poor, see HANDLER & HASENFELD, *supra* note 65, at 44–81.

which provides some health needs as a matter of right.[101] The solidarity model is closely related to the practice of public caring that has been at work in American public law since the Progressive Era. What Stone describes as the "logic of solidarity" in social insurance is premised on responsibilities of "mutual aid amongst a group of people who see themselves as sharing a common interest" and accordingly evince a "willingness to help each other."[102]

This solidaristic understanding of health policy broadly aligns with the "ethic of care" articulated by Carol Gilligan, which treats "self and other as independent" and works to establish and maintain "mutuality of respect and care" between people.[103] But the ACA invites us to rethink the relationship between law and care, even though the forms of care it provides are partial and incremental. Whereas Gilligan portrayed care ethics as broadly opposed to legalistic ways of thinking,[104] the ACA shows how legal rights can in fact help to define and entrench practices of care within society. Friendly amendments to care ethics have recognized that the morality of rights and the morality of care can work hand in hand.[105] The fundamental importance of giving and receiving care may justify conferring positive rights to caregivers, such as parents, nurses, and aides, as well as the cared-for, such as children, the disabled, or the elderly.[106] As Robin West has recognized in the context of childcare, such "rights to supported caregiving" can be justified on the liberal principle that receiving such care is a precondition for moral personhood.[107] We generally can't become functioning, independent adults unless someone provides for us in our youth. Throughout the rest of our lives, we remain, as Seyla Benhabib observes, "embodied beings with needs and vulnerabilities."[108] The effective exercise of our rights depends on meeting these needs and tending to these vulnerabilities. We have great difficulty remaining independent agents when we are in the grip of physical suffering

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[101] Deborah A. Stone, *The Struggle for the Soul of Health Insurance*, 18 J. HEALTH POL., POL'Y & L. 287, 289 (1993); Gluck & Scott-Railton, *supra* note 82, at 511–12.

[102] Stone, *supra* note 101, at 289.

[103] GILLIGAN, *supra* note 24, at 74, 104.

[104] *Id.* at 54.

[105] *See* Monique Deveaux, *Shifting Paradigms: Theorizing Care and Justice in Political Theory*, 10 HYPATIA 115, 118 (1995). (criticizing "dichotomous" understanding of the ethic of care versus rights-based understandings of justice). *See generally* SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY (1989) (applying liberal theories of justice to family and gender relations, which centrally concern care responsibilities).

[106] Eva Feder Kittay, *Taking Dependency Seriously: The Family Medical Leave Act Considered in Light of Social Organization of Dependency Work and Gender Equality*, 10 HYPATIA 8 (1995); *see also* Allison Hoffman, *The Reverberating Risk of Long-Term Care*, 15 YALE J. HEALTH POL'Y, L., & ETHICS 57 (2015).

[107] Robin West, *The Right to Care*, *in* THE SUBJECT OF CARE: FEMINIST PERSPECTIVES ON DEPENDENCY 88, 98 (Eva Feder Kittay & Ellen K. Feder eds., 2002).

[108] SEYLA BENHABIB, SITUATING THE SELF: GENDER, COMMUNITY AND POSTMODERNISM IN CONTEMPORARY ETHICS 189 (1992); *see also* Fineman, *supra* note 29, at 8.

or when we face the risk of crippling financial loss should we become sick or otherwise in need of medical care.[109]

The Affordable Care Act gives legal protection against some of these sorts of risks by, amongst other things: imposing requirements that insurance plans cover certain essential benefits and provide coverage irrespective of preexisting conditions; setting out rights against race, sex, and religious discrimination in healthcare provision; and providing expanded financial support for people who cannot afford health insurance.[110] But these provisions nonetheless stand alongside those that preserve and in some respects extend the individualist model of the private health insurance scheme that is in conflict with the purpose of public care. Recall that the purpose of public care is to provide individuals with the goods and services they need to exercise their agency. Health is one of those basic goods that enables people to define and advance their rights and interests. If individuals lack the resources or information to acquire this good on their own, public care requires that it be provided.

The ACA is in tension with this principle to the extent that it relies in part on the fiction of individual choice over health and healthcare.[111] The employer provided health insurance scheme the Act leaves in place ties insurance to individuals' labor market participation and value. This scheme enhances employers' coercive power over their employees in a way that reduces rather than increases employees' moral agency.[112] All of the difficulties associated with losing and obtaining new health insurance increase employees' exit costs and thus the bargaining position of the employer. The Act also creates incentives for employers to adopt wellness programs in which employees enjoy premium reductions for engaging in health-promoting activities such as exercise. These initiatives do not appear to promote healthier activities, however, but rather merely shift healthcare costs onto less healthy populations.[113] In addition, the Act's insurance exchanges, which provide insurance access to those who don't have employer-provided insurance and don't qualify for Medicaid, are built upon the ideal of consumer sovereignty. In the healthcare context, however, this ideal is deeply flawed if not incoherent.[114] People often do not have clearly formed preferences about health plans and lack sufficient information to choose among them.[115] No amount of tinkering with the choice architecture is likely to make rational decision-

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[109] *See* Seema Mohapotra & Lindsay F. Wiley, *Feminist Perspectives in Health Law*, 47 J. L. MED. & ETHICS 103, 104–5 (2019).

[110] *See* Gluck & Scott-Railton, *supra* note 82, at 508–11.

[111] *See generally* Nicole Huberfeld & Jessica L. Roberts, *Health Care and the Myth of Self-Reliance*, 57 B.C. L. REV. 1 (2016).

[112] *See* ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) 37–71 (2017) (arguing that employers operate as governments and often exercise arbitrary power over their employees).

[113] Jill R. Horwitz, Brenna D. Kelly & John E. DiNardo, *Wellness Incentives in the Workplace: Cost Savings Through Cost Shifting to Unhealthy Workers*, 32 HEALTH AFF. 468 (2013).

[114] Allison K. Hoffman, *The ACA's Choice Problem*, 45 J. HEALTH POL., POL'Y & L. 501 (2020).

[115] *Id.* at 504.

making both meaningful and efficient in a field as complex and consequential as health insurance. The "modern American obsession with choice" that the ACA encodes has therefore impeded this practice of public caring.[116]

There are some signs that the winds are shifting, however. Hoffman hoped that the ACA would make it possible for "public consciousness . . . to accept the solidaristic norm and support a notion of sharing of health resources more collectively."[117] Abbé Gluck and Thomas Scott-Railton show that this change is indeed in the winds, as the ACA has shifted the terms of public deliberation on health insurance, moving us towards a more universal and solidaristic system.[118] Bipartisan support for mandatory coverage of preexisting conditions, for instance, has "occurred as a result of the ACA as lived facts on the ground . . . have evolved into new understandings of rights."[119] In addition, the expansion of the Medicaid system to cover a much broader portion of low-income healthcare consumers has increased support for publicly provided health insurance, such as Senator Bernie Sanders' influential proposal for "Medicare for All."[120] The practice of public care has generated wider expectations that the government will continue to provide and expand such care.

C. Furthering the Purpose of Care through Administrative Policy Change

The previous Sections have examined the significant but contested and marginalized commitment to public care in American welfare and health law. This Section considers how the purpose of public care has been undermined by the actions of the Trump Administration, and how that purpose might be more effectively advanced through administrative policy change concerning contraceptive coverage and Medicaid work requirements.

The Trump Administration's rule on women's contraceptive coverage evinced a failure to implement the regulatory purpose of public care, insofar as it gave unreasonably narrow effect to the Affordable Care Act's Women's Health Amendment.[121] That amendment states that health insurance must "at minimum provide coverage for and shall not impose any cost sharing requirements" for "additional preventive care and screening" for "women."[122] The purpose of this amendment was to ensure health equity for women.[123] The late Justice Ginsburg would later interpret this provision in light of the Court's recognition, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[124] that "[t]he ability of women to participate equally in the economic

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[116] *Id.* at 508.
[117] Hoffman, *supra* note 83, at 369.
[118] Gluck & Scott-Railton, *supra* note 82, at 558–66.
[119] *Id.* at 559.
[120] *Id.* at 561–66.
[121] 42 U.S.C. § 300gg–13(a)(4).
[122] *Id.*
[123] Rebecca Hall, *The Women's Health Amendment and Reproductive Freedom: Finding a Sufficient Compromise*, 15 J. HEALTHCARE L. & POL'Y 401, 406–07 (2012).
[124] 505 U.S. 833 (1992).

and social life of the Nation has been facilitated by their ability to control their reproductive lives."[125] The amendment thus provides for basic material support for individual, and arguably collective, agency. By increasing women's reproductive autonomy, the amendment enables them both to pursue their private plans and participate as equals in public and political fora.[126]

The Obama Administration's initial implementation of the amendment, which included conscience-based exemptions for certain religious employers, drew objection from religious organizations. In *Burwell v. Hobby Lobby Stores, Inc.*,[127] the Court held that the Religious Freedom Restoration Act (RFRA) required that existing regulatory exemptions for religious nonprofits be extended to closely held religious for-profits. The Trump Administration went beyond *Hobby Lobby*'s requirements,[128] providing that any employer with a moral or religious objection to providing contraceptive coverage not only did not have to provide such coverage but did not need to certify their objection so as to enable their employees to obtain no-cost coverage by other means.[129] The rule imposed a substantial financial burden on many women employed by religious employers, predicted to result in between 70,500 and 126,400 women losing access to no-cost contraceptive coverage.[130] The Supreme Court nonetheless upheld the rule in *Little Sisters of the Poor v. Pennsylvania*.[131]

As the late Justice Ginsburg noted in her dissent, the majority's interest in the rights of religious groups "casts totally aside countervailing rights and interests," namely those of women.[132] Ginsburg understood that the rule would leave tens of thousands of women "to fend for themselves," rather than receive the attention and support from the government that the Affordable Care Act contemplated.[133] As Elizabeth Sepper notes, conscience rights held by healthcare providers impose significant costs on the quality of patient care and may also result in sex discrimination.[134] Exemptions for religious organizations further deteriorate what Cary Franklin has called "the infrastructure of provision," the governmental support that enables people to

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[125] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 741 (2014) (Ginsberg, J., dissenting) (quoting *Casey*, 505 U.S. at 856).

[126] *Cf.* Ruth Rubio-Marín, *Women and Participatory Constitutionalism*, 18 INT'L J. CONST. L. 233, 246 (2020) (explaining social and economic barriers to women's participation in constitution-making, including childcare responsibilities).

[127] 573 U.S. 682 (2014).

[128] Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed Reg. 47,792, 47,806 (Oct. 13, 2017).

[129] *Id.* at 47, 808–09.

[130] 83 Fed. Reg. 57,536, 57,578, 57,580 (Nov. 15, 2018).

[131] Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2373 (2020).

[132] *Id.* at 2400 (Ginsberg, J., dissenting).

[133] *Id.*

[134] Elizabeth Sepper, *Conscientious Refusals of Care*, *in* THE OXFORD HANDBOOK OF U.S. HEALTH LAW 354, 362–66, 373–74 (I. Glenn Cohen, Allison K. Hoffman, and William M. Sage, eds. 2017).

make effective use of their constitutional right to reproductive freedom.[135] This is not to deny that some level of accommodation for religious objections may be statutorily required by RFRA.[136] The problem is that the existing rules do not approach any reasonable balance between such conscience rights and the ACA's codified public care obligations.[137] The sorts of "complicity based conscience claims" the Government recognized in this case work considerable material and dignitary harms on women who lose access to contraceptive coverage.[138]

The Biden Administration can and should rely upon public care rationales to rescind and replace the existing contraceptive coverage rules. The purpose of public care demands attention to values including economic well-being but going further to encompass people's full and equal participation in social and economic life. That purpose would provide support for significantly narrowing religious exemptions, as it would increase the strength of the government's interests in providing no-cost contraceptive coverage. For instance, even assuming the self-certification requirement would impose a substantial burden on some employers' religious conscience, the government should make the case that that burden is the least restrictive means to advance the government's compelling interest not only in women's economic security but also in their ability to pursue their life plans and to participate as equals within the political community.[139] Even if such arguments do not ultimately prevail before a Court keen to protect religious and business interests, the government ought to invoke and emphasize the public care purposes that the ACA and the welfare state more broadly institutionalize. It should speak in a language that will influence public discourse around care even if it does not persuade the Court.

Another example of implementing care as a regulatory purpose concerns Medicaid work requirements approved by the Trump Administration. The Trump Administration encouraged states to impose work requirements as a condition for receipt of the ACA's expanded Medicaid benefits.[140] While billed as an effort to improve health outcomes, the true motive for these work requirements seems to have been to increase the burden of participation so as to limit access to Medicaid for certain classes of beneficiaries

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[135] Cary Franklin, Griswold *and the Public Dimension of the Right to Privacy*, YALE L. J. F. 332, 338 (2015).

[136] 42 U.S.C. § 2000bb; Religious Exemptions and Accommodations, 82 Fed. Reg. at 47,802; *Little Sisters of the Poor*, 140 S. Ct. at 2378 (2020).

[137] On the lack of balance in the Trump administration's religious conscience policies, see Elizabeth Sepper, *Toppling the Ethical Balance — Health Care Refusal and the Trump Administration*, 381 N. ENG. J. MED. 896 (2019).

[138] *See* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L. J. 2516, 2566–78 (2015).

[139] *See* 42 U.S.C. § 2000bb–1(b); Burwell v. Hobby Lobby Stores, Inc. 573 U.S. 682, 728 (2014) (assuming without deciding that there is a compelling governmental interest in no-cost contraceptive coverage).

[140] PAMELA HERD & DONALD P. MOYNIHAN, ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS 116–19 (2018).

deemed undeserving.[141] In *Gresham v. Azar*,[142] D.C. Circuit held that the Trump Administration's approval of Arkansas' Medicaid work requirements was arbitrary because it "prioritize[d] a non-statutory objective to the exclusion of the statutory purpose."[143] The statutory purpose was to "to furnish . . . medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services."[144] The court distinguished this purpose from that of the Temporary Assistance for Needy Families Program (TANF), which is explicitly geared towards "end[ing] the dependence of needy parents."[145]

Medicaid, by contrast, is a statute of public care. Its central goal is not to end dependency but rather to provide a modicum of support for those who find themselves responsible for dependents or are themselves in a state of dependency. Work requirements fit uneasily, if at all, with the purpose of public care. Noah Zatz has shown, in the context of TANF, that policymakers purport to justify work requirements either on the grounds that they encourage economic self-sufficiency, or because work activities are somehow virtuous, or because work provides a social benefit in exchange for social support.[146] In approving Arkansas' work requirements, the Trump Administration transplanted the self-sufficiency and self-improvement rationales to the healthcare context. Health and Human Services Secretary Azar argued that work requirements would "improv[e] health outcomes . . . address[ ] behavioral and social factors that influence health outcomes; and . . . incentiviz[e] beneficiaries to engage in their own health care and achieve better health outcomes."[147]

As noted, these objectives were probably mere pretext for dismantling or at least reducing the Act's expansion of Medicaid. But suppose for the sake of argument that the objective of improving health outcomes was offered in good faith and that the administration had shown that this objective could be efficiently achieved through work requirements. Even so, achieving the goal of improved health outcomes in this manner was beyond the scope of, and was likely to undermine, the domain public care that Medicaid and the ACA describe. Medicaid and the Affordable Care Act codify a democratic understanding that healthcare coverage is an essential good that should be publicly furnished to those who are unable to pay. When HHS pursued the goal of improved health outcomes without concern for decline in health

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[141] *Id*. For a broader description of litigation around Medicaid as well as Food Stamp work requirements, and analysis of the impact of litigation and federalist implementation structures on the durability of these programs, see Andrew Hammond, *Litigating Welfare Rights: Medicaid, SNAP, and the Legacy of the New Property*, 115 NW. U. L. REV. 361 (2020).

[142] 950 F.3d 93 (D.C. Cir. 2020).

[143] *Id.* at 104.

[144] 42 U.S.C. § 1396–1.

[145] *Gresham v. Azar*, 950 F.3d 93, 101 (D.C. Cir. 2020) (quoting 42 U.S.C. § 601(a)(2)).

[146] *See generally* Noah D. Zatz, *What Welfare Requires from Work*, 54 UCLA L. REV. 373 (2006).

[147] *Gresham*, 950 F.3d at 97.

coverage, it not only acted outside the bounds of its statutory authority but, worse, put the statute's central objective of healthcare coverage in jeopardy. Public commenters had raised the concern that the work requirements would result in a loss of healthcare coverage.[148] While the Secretary acknowledged these concerns, the court held this discussion of the issue to be "conclusory," given that he did not justify his finding that the health benefits of work requirements would exceed the cost in terms of lost healthcare coverage: "Nodding to concerns raised by commenters only to dismiss them is not a hallmark of reasoned decision-making."[149]

Here, the regulatory purpose of care overlaps with care as a procedural principle, which is to be discussed in the next Part. The Secretary's failure to offer a reasoned response to commenters' objections concerning loss of healthcare coverage evinced his lack of concern for Medicaid's purpose of care. One might generously concede to the Trump Administration that some individuals might enjoy health improvements as a result of incentives that coerced them to seek employment. But any individuals who lose Medicaid coverage as a result of work requirements nonetheless have been deprived of the public care that Congress intended to provide.

The Supreme Court initially planned to review Medicaid work requirements but removed the cases from its docket at the request of the Biden Administration, which is unwinding the Trump-era waiver programs.[150] As the Biden Administration rethinks the implementation of Medicaid, it can rely on and articulate the value of public care that is expressed and codified in Medicaid. It can explain that public health insurance provision is not a matter of charity or kind-heartedness, but rather of ensuring that people have the material capacity to exercise their moral and political agency within the democratic community. By providing such public care as widely and efficiently as possible, the Biden Administration can trigger a virtuous cycle in which people experience the practice of care and so become committed to the provision of care as a governmental responsibility. It can forthrightly reject the distinction between the "neediest" groups the Supreme Court is willing to recognize and those childless adults who also need public support to effectively exercise their rights.

II. Public Care as Administrative Procedure: Reasonable Agencies and the Affected Public

The previous Part examined public care as a regulatory purpose the administrative state pursues. This Part now examines public care as a procedural principle in administrative law. Whereas regulatory-purposive care is a

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[148] *See id.* at 103.

[149] *Id.*

[150] James Romoser, *Court Nixes Upcoming Argument on Medicaid Work Requirements*, SCOTUSblog (Mar. 11, 2021, 12:55 PM), https://www.scotusblog.com/2021/03/court-nixes-upcoming-argument-on-medicaid-work-requirements [https://perma.cc/TV7Q-9CCV].

reason for which the state should act, administrative-procedural care is a *way* in which the state should act. Administrative-procedural care requires that agency officials exercise their discretion in a way that is responsive to the interests of the parties their acts and policies affect and implicate. Agencies' purposive care obligations are "nested" within,[151] constrained, and informed by this broader procedural requirement to demonstrate attention to and deliberate with members of the public. Administrative-procedural care ensures that the effort to provide care does not convert into a coercive effort to dictate to citizens what their interests and needs consist in.

This Part will reappraise core doctrines and procedures of administrative law as obligations of public care. Administrative law, at bottom, aims to ensure that government action is attentive and responsive to human concerns. Agencies must care—and show that they care—about the people their policies impact. Their decisions must take relevant factors into account, not consider inappropriate factors, and respond to the viewpoints and interest of affected parties. Analyzing these core aspects of administrative law as responsibilities of care casts them in a new light. Administrative law should be understood to convey respect and concern not only for the law itself but for private persons the law benefits and burdens. The administrative process does not always adequately exhibit this kind of concern, insofar as public participation in administrative policymaking is skewed towards powerful parties, well-equipped interest groups, and single-minded concern with economic efficiency. This Part will first interpret administrative law's core legal requirements as recognizing procedural care obligations. It will then provide suggestions for how agencies could better comply with these obligations through more extensive and equitable public participation in the administrative process.

A. Reasonable Administrative Care

Administrative law is all about reasonableness. *Chevron* tells us that where a statute is ambiguous, courts should defer to agencies' "reasonable" interpretations.[152] This reasonableness determination overlaps with the Administrative Procedure Act's (APA) requirement that agency action cannot be "arbitrary" or "capricious."[153] Where statutory requirements are not themselves dispositive of the course of conduct to be taken, the agency must analyze and address the problem in a way that is responsive to all relevant concerns and not misled by extraneous ones.[154]An agency must provide a

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[151] *See* TRONTO, *supra* note 10, at 21 (describing how "care practices can be *nested* in several ways" in the sense that the ultimate care for an individual such as a patient requires that the direct provision of care be informed by relevant professional standards and maintenance of necessary technical knowledge and equipment).

[152] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 845 (1984).

[153] 5 U.S.C. § 706.

[154] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

"reasoned explanation for its action."[155] When it changes policy, it must "display awareness" that it is doing so, explain any altered factual findings, and take into account any "serious reliance interests" engendered by its previous policy.[156]

As David Zaring has argued, we can conceptualize the many standards of judicial review of administrative action as all imposing a "reasonable agency standard,"[157] analogous to tort law's standard of the "reasonable person."[158] The reasonable person exercises "reasonable care,"[159] which is "that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against the probable danger."[160] Administrative law's reasonableness requirements similarly recognize a duty of care, or attention, consideration, and regard for the interests relevant to agencies' conduct. There are, of course, many important differences between the concept of reasonableness in tort and administrative law, not least that the reasonableness of an agency's conduct will be measured by the agency's articulated explanation for its action rather than simply by the objective reasonableness of its conduct. Whereas tort law centrally concerns private conduct, administrative law concerns public actors who have affirmative legal obligations to provide services, rather than merely a negative obligation not to harm others. Evan J. Criddle describes agencies' affirmative duties as fiduciary obligations to advance the interest of others.[161] They are "bound to exercise reasonable prudence when exercising delegated powers."[162] In both tort and fiduciary law, reasonable care requires a concern for others that informs and constrains what one would otherwise do. The reasonableness standard "represents the moral judgment of the community"[163] and as such incorporates a requirement of "adequate respect and appreciation" for all of the moral interests that are put at risk or otherwise implicated by the conduct in question.[164] The duty of reasonable care is an obligation to consider the welfare of others when one acts in the world.[165] It acknowledges the fact that we live together in society

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[155] F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).

[156] *Id.*

[157] David Zaring, *Reasonable Agencies*, 97 VA. L. REV. 136, 138 (2010).

[158] *See, e.g.*, Bethel v. New York City Transit Authority, 703 N.E.2d 1214 (N.Y. 1998).

[159] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 3 (AM. L. INST. 2010).

[160] Brown v. Kendall, 60 Mass. (6. Cush.) 292 (Mass. 1850).

[161] *See generally* Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006).

[162] *Id.* at 151.

[163] 3 FOWLER V. HARPER, FLEMING JAMES JR., & OSCAR S. GRAY, THE LAW OF TORTS § 16.2 at 432–34 (3d ed. 2007).

[164] Seana Valentine Shiffrin, *The Moral Neglect of Negligence, in* 3 OXFORD STUDIES IN POLITICAL PHILOSOPHY 200, 201 (David Sobel, Peter Vallentyne & Steven Wall. eds., 2017).

[165] The reasonableness standard, of course, has a troubled, gendered history. The "reasonable person" was once the "reasonable man," and the duty of reasonable care historically excluded injuries historically more likely to be suffered by women, such as emotional injuries suffered from witnessing injury to a child. *See* Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 814 (1990). "Care" in tort

and are responsible for how our actions impact one another. To this extent, tort and fiduciary law's notion of reasonableness is comparable to administrative law's, as agencies must consider how their collective actions put at risk or benefit the interests of private parties.

Many failures in agency reasoning can be seen as failures of respect for the interests involved. In *Motor Vehicle Manufacturers Ass'n of United States, Inc. v. State Farm Mutual Automobile Insurance Co.*,[166] the Court held that the National Highway Traffic Safety Administration had unlawfully rescinded a regulation requiring that cars be manufactured with either airbags or automatic seatbelts.[167] It concluded the agency had acted arbitrarily because it had failed to consider the possibility of requiring airbags alone given that the benefits of automatic seatbelts were unproven.[168] We might interpret this ruling as concerned with the agencies' carelessness or inattention to the human interest in safety that the statute was meant to protect. Even if it had been legitimate for the agency to act on the basis of the deregulatory policies of the incumbent President,[169] the failure to contemplate an obvious alternative showed a lack of respect for the people whose lives would be put at risk by the deregulatory action.

Administrative-procedural care is also recognized and enforced by the APA's notice-and-comment rulemaking process, in which agencies must publish proposed rules and accept and respond to comments from the public.[170] We might understand that process as purely informational, giving affected parties the opportunity to advise the agency of any errors it has made and challenge the agency in court for failure to address them. But there's more to the comment process than that. Responses to comments, which often run scores or even hundreds of pages in the *Federal Register*, express attentiveness to the points of view, the judgments, and the interests of members of the public. Such responses acknowledge that official acts are done on behalf of people and for them, and thus must be sensitive to what the people themselves know and think about the problem at hand.

Notice-and-comment requirements fulfill functions roughly analogous to a physician's fiduciary duty to obtain informed consent from a patient. In both contexts, one party, who has superior knowledge and control over another, must explain a proposed treatment that will affect and may injure the

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law long predates and partially excludes the feminist ethic of care, imposing masculine understandings of duty, such as by excluding any affirmative obligation to come to the aid of others. *See, e.g.*, Leslie Bender, *The Changing Values in Tort Law*, 25 TULSA L. REV. 759, 767–73 (1990) (arguing that tort law does not currently recognize interpersonal care responsibilities and proposing that it should); Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 33–34 (1988) (offering a feminist critique of the no-duty-to-rescue rule).

[166] 463 U.S. 29, 57 (1983).

[167] *Id.* at 57 (1983).

[168] *Id.* at 46 (1983).

[169] *Id.* at 59 (Rehnquist, J., concurring).

[170] 5 U.S.C. § 553(c).

dependent party.[171] Administrative action, of course, does not require the consent of regulated parties and beneficiaries. But it does generally require that they be notified of proposed courses of conduct and have a meaningful opportunity to communicate their views and interests to the expert agency before it takes binding action. In both the law of informed consent and in administrative law, the decision-making process must respect the "intersubjectivity" of care: the contemplated action must be justified on the basis of the values, interests, and knowledge of both the caregiver and the parties who receive care.[172]

When an agency invests considerable time and effort to respond to comments, it demonstrates not only its diligence but its respect and concern for members of the public.[173] By contrast, a failure to respond to relevant comments conveys a failure to consider the way in which rules are likely to affect regulated parties or beneficiaries. For instance, in *United States v. Novia Scotia Food Products Corp.*[174] the Court of Appeals for the Second Circuit invalidated a regulation on fish smoking in part for failure to respond to a comment by Nova Scotia that the requirement would "completely destroy" the whitefish products it produced.[175] "[T]o sanction silence in the face of such vital questions" would make the notice-and-comment provisions "less than an adequate safeguard against arbitrary decision-making."[176] The arbitrariness in question is an unjustified resolution to do as one pleases in the face of evidence that one's conduct will substantially harm the interests of others. This is regulatory negligence.

Such carelessness was a consistent feature of the Trump administration, which had a markedly bad track record in administrative law cases.[177] One of the most notable instances of thoughtless administration was the Department of Homeland Security's failed attempt to rescind the Deferred Action for Childhood Arrivals Program (DACA).[178] Chief Justice Roberts held that the rescission was arbitrary and capricious in part because it failed to consider the reliance interests of DACA recipients, including their educational, business, and familial plans, as well as the interests of governments in the revenue and economic benefits of recipients' labor.[179] In this case, the human stakes of agency action were quite plain, as rescission of DACA would have

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[171] *See e.g.*, Matthew v. Mastromonaco, 733 A.2d 456, 459 (N.J. 1999); Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 496 (Cal. 1990) (en banc).

[172] *See* John P. Goldberg, *The Fiduciary Duty of Care*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 405, 414 (Evan J. Criddle et al. eds., 2019).

[173] *See* Batterton v. Marshall, 648 F.2d 694, 703 (D.C. Cir. 1980) (notice-and-comment provides for "public participation and fairness to affected parties").

[174] 568 F.2d 240, 245 (2d Cir. 1977).

[175] *Id.* at 245.

[176] *Id.* at 253.

[177] *Roundup: Trump-Era Agency Policy in the Courts*, N.Y.U. INST. FOR POL'Y INTEGRITY, https://policyintegrity.org/trump-court-roundup [https://perma.cc/2YET-MHKS]; *see also* Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 DUKE L.J. 1651, 153 (2019) ("[T]he Trump administration has doggedly ignored some settled administrative-law expectations for agency decisionmaking.").

[178] Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915 (2020).

[179] *Id.*

left hundreds of thousands of undocumented residents liable to deportation, despite their significant ties to the country. The government's failure to take these interests seriously showed disregard and disrespect for DACA recipients as well as other stakeholders.[180] Indeed, as Justice Sotomayor pointed out in her partial concurrence, the respondents' complaints "plausibly alleged" animus, raising a colorable equal protection claim.[181]Administrative law standards do not require any such showing of an invidious motive, however. It is enough to fail review if the agency has simply ignored important human interests, as though the relevant officials couldn't be bothered, or as though certain people were somehow outside the circle of public concern.

The Trump Administration's Title X rule on federal funding of family planning similarly evinced a failure of procedural care.[182] Title X gives the Secretary of the Department of Health and Human Services (HHS) authority to make grants for family planning services.[183] But these grants may not be "used in programs where abortion is a method of family planning."[184] The Trump Administration's rule followed on a series of prior interpretations that struck varying balances between reproductive healthcare access and the requirement not to fund abortions. The Trump Administration's rule strongly disfavors interests in reproductive health and freedom relative to the rule it replaced, which was issued at the end of the Clinton Administration.[185] It forbids Title X providers from making abortion referrals, requires physical and financial separation of Title X projects from abortion-related activities, and permits providers to decline to discuss abortion in the course of providing pregnancy counseling, which is required by appropriations rider to be "nondirective."[186]

In *California v. Azar*,[187] the Ninth Circuit Court of Appeals reversed the district court and upheld this rule, concluding that it rested on a reasonable interpretation of the law under *Chevron* and was adequately justified on the record.[188] That holding was questionable for two reasons. First, it strains credulity that pregnancy counseling could be truly "nondirective" where providers must offer referral for prenatal services, must not refer for abortion, and may refuse to provide abortion counseling even if a patient seeks information about abortion.[189] As Judge Paez put it in dissent, the rules ensure that "patients are steered toward childbirth at every turn."[190] They direct the patient away from an option a patient may seek to understand and that the

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[180] On the interests in social recognition and inclusion implicated in DACA, see Blake Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, 128 YALE L. J. 2122, 2195–2216 (2019).
[181] 140 S. Ct. at 1917 (Sotomayor, J., concurring in part and dissenting in part).
[182] *See* 84 Fed. Reg. 7714 (Mar. 4, 2019).
[183] 42 U.S.C. § 300(a).
[184] 42 U.S.C. § 300a-6.
[185] *See* 65 Fed. Reg. 41270 (July 3, 2000).
[186] California v. Azar, 950 F.3d 1067, 1080–82 (9th Cir. 2020).
[187] 950 F.2d 1067 (9th Cir. 2020).
[188] *Id.* at 1084–1105.
[189] *Id.* at 1088.
[190] *Id.* at 1107 (Paez, J., dissenting).

Constitution makes available to them.[191] In this sense, the rule fails to show reasonable care for the reproductive aspects of the human condition and the autonomy interests they implicate.[192] The second problem with the court's conclusion was that the agency did not adequately address commenters' concern that the rule's constraints would force major providers to leave the program entirely to maintain their ethical obligations to patients.[193] HHS was sanguine that new providers with moral or religious convictions would come in to fill the gap, but did not provide any real evidence for its predictions.[194] In this respect, the ruling failed to give adequate attention to the expressed viewpoints and interests of regulatory beneficiaries.[195]

Here, as with the DACA rescission, the failure to take seriously concrete harms that the agency had been alerted should have rendered the action arbitrary. The rule's restrictions threaten to dismantle the infrastructure of family planning services for many low-income Americans.[196] That is a particularly stark failure of care, as it impacts both caregiving parents and cared-for dependents. The Biden Administration's HHS has proposed a rule that would rescind the Trump Administration rule and largely reinstitute previous requirements, including allowing abortion referral.[197] As it revises and finalized the proposal, the agency should advance the purpose of public care by construing grant recipients' obligations broadly. For instance, the final rule might require abortion referrals upon clients' request but allow re-

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[191] *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

[192] It is worth noting here that Carol Gilligan's original work on the ethic of care considered women's moral reasoning over abortion decision as its central example. GILLIGAN, *supra* note 24, at 64–128. She describes, based on interviews, different stages of moral reasoning in which pregnant women thought through their care-responsibilities in determining whether or not to have an abortion. Because the regulatory structure of the Title X rule proactively discourages abortion and allows providers to conceal abortion options from pregnant persons, it plays a paternalistic role in depriving women of this sort of moral agency. This regulation is an example of a pathology of care—an attempt to make a moral judgment for pregnant persons rather than give them the resources to make the decision on their own.

[193] *See Azar*, 950 F.3d 1067, at 1116 (Paez, J., dissenting).

[194] *See* 84 Fed. Reg. 7714, 7781 (Mar. 4, 2019); *Azar*, 950 F.3d at 1116 (Paez, J., dissenting).

[195] HHS further argued that the rule's provisions disallowing abortion referrals and allowing providers to refuse abortion counseling were necessary to protect religious conscience. *See* 84 Fed. Reg. 7714, 7747–49 (Mar. 4, 2019). It is not clear, however, how Title X rules could place legally cognizable burdens on religious conscience given the courts' prior jurisprudence on subsidies in this field. The Court has held, in a prior case on Title X regulations, that the right to abortion is not disfavored by the state's decision not to fund abortion. *See* Rust v. Sullivan, 500 U.S. 173, 193 (1991). If that is so, there should be no basis for claiming that religious conscience rights are burdened where the state conditions receipt of federal family planning funds on the provision of abortion referral or counseling. If the constitutional right to abortion is preserved even if the government chooses not to subsidize it, presumably the same principle ought to apply for religious conscience rights.

[196] As a consequence of the rules, Planned Parenthood, which serves forty percent of Title X recipients, announced that it has ceased participating in the program. Sarah McCammon, *Planned Parenthood Withdraws from Title X Program Over Trump Abortion Rule*, NPR (Aug. 19, 2019), https://www.npr.org/2019/08/19/752438119/planned-parenthood-out-of-title-x-over-trump-rule [https://perma.cc/DT9R-NGP7].

[197] 86 Fed. Reg. 19,812, 19,818 (Apr. 15, 2021).

cipients with self-certified conscience objections not to provide abortion counseling.[198] HHS should meet the procedural obligation of public care by giving careful consideration to the input of all affected parties, including particularly the beneficiaries of the Title X program—the people who require reproductive healthcare services to participate freely and equally within economic, social, and political life.

B. Heightening Care Obligations

While administrative law requires agencies to exercise public care, the public law system today is too unequal and too preoccupied with efficiency concerns to meet the procedural demands of care. In the heady days of the Civil Rights Revolution, the expansion of hearing and public participation rights was motivated by the need to open the administrative process to the input of marginalized groups.[199] Rulemaking today is often something different. The process tends to be dominated by powerful regulated parties as opposed to diffuse beneficiaries.[200] The changes made to proposed rules tend to reflect this imbalanced participation.[201] Moreover, agencies are usually reluctant to make significant changes to their regulatory policies on the basis of the comments they receive. Given that courts often look skeptically at significant changes between the proposed and final rule,[202] agencies have strong incentives to "get it right the first time"[203] rather than treat the comment period as a genuine opportunity for public deliberation. The consequence is that the comment period theatrically rehearses the more informal kinds of stakeholder engagement that went on when the rule was being developed.[204] At least in some important cases, this pre-comment period is also "monopolized by regulated parties."[205]

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[198] The proposal would allow but not require both referrals and counseling. *Id.*

[199] *See, e.g.*, Off. of Commc'n of the United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966); Goldberg v. Kelly, 397 U.S. 254 (1970). *See generally* Charles A. Reich, *The Law of the Planned Society*, 75 YALE L. J. 1227 (1966).

[200] *See* Jason Webb Yackee & Susan Webb Yackee, *A Bias Toward Business? Assessing Interest Group Influence on the U.S. Bureaucracy,* 68 J. POL. 128, 128–29 (2006); Cynthia R. Farina, Dmitry Epstein, Josiah Heidt, & Mary J. Newhart, *Knowledge in the People: Rethinking "Value" in Public Rulemaking Participation*, 47 WAKE FOREST L. REV. 1185, 1186–87 (2012).

[201] *See* Amy McKay & Susan Webb Yackee, *Interest Group Competition on Federal Agency Rules*, 35 AM. POL. RSCH. 336, 350 (2007); Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emissions Standards*, 63 ADMIN. L. REV. 99, 130–32 (2011).

[202] *See, e.g.*, Nat'l Black Media Coal. v. F.C.C., 791 F.2d 1016, 1022 (2d Cir. 1986) ("While a final rule need not be an exact replica of the rule proposed in the Notice, the final rule must be a logical outgrowth of the rule proposed. Clearly, if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal.") (internal citations and quotations omitted).

[203] William F. West, *Inside the Black Box: The Development of Proposed Rules and the Limits of Procedural Controls*, 41 ADMIN. & SOC. 576, 582 (2009).

[204] E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L. J. 1490, 1492 (1992).

[205] *See* Wagner, Barnes & Peters, *supra* note 201, at 125.

The structural imbalances in the rulemaking process evince a procedural failure of public care. The comment period has arguably become an opportunity for regulated industries to push the agency to adopt favorable rules and pack the rulemaking record with as many objections to regulatory protections as possible. As currently constituted and practiced, the procedure shows a lack of attention and concern for the interests of beneficiaries.

Similar problems plague regulatory impact analysis, which focuses on the monetary costs and benefits of agency action. Regulatory impact analysis has been a staple of the American administrative state since the method was introduced by the Reagan Administration. According to Executive Orders 12,866[206] and 13,563,[207] agencies must submit major rules to the White House's Office of Information and Regulatory Affairs (OIRA) for review. Agencies must prepare regulatory impact analyses that measure the monetary costs and benefits of their rules.[208] Though these executive orders allow agencies to note and rely on qualitative values like fairness, equity, and dignity,[209] costs and benefits are to be monetized or otherwise quantified where possible.[210] Even under Democratic Presidents, regulatory review has often taken a skeptical eye towards regulation and functioned as a "one-way ratchet" to reduce and delay regulatory interventions.[211] The Trump administration's iteration of this process altogether excluded consideration of benefits, taking the deregulatory philosophy of the past forty years to an absurd extreme.[212]

Even honestly and competently conducted cost-benefit analysis can constitute its own kind of carelessness. Economic losses are inevitably easier to count in dollars than non-economic gains, such as health or dignitary effects. And the methods of translation are prone to underestimate and misrepresent their value. The "value of a statistical life," for instance, is based on how much money people in high risk jobs are willing to accept for a certain percentage increase in the risk of death.[213] The amount of money such people will accept for a certain percentage risk of increased death is a function not of some objectively true valuation of their safety but rather of the price the labor market will bear and their need for income to meet their needs.[214] Such prices, in turn, are the product of current social arrangements, which

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[206] Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

[207] Exec. Order No. 13,563, 3 C.F.R. 13,563 (2011).

[208] *See* 3 C.F.R. 13,563 at 215–16.

[209] *Id.*

[210] *See* OFF. OF MGMT & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR A-4, REGULATORY IMPACT ANALYSIS: A PRIMER 1, 18 (Sept. 17, 2003), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf [https://perma.cc/KZ46-F9HS].

[211] *See* Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENV. & ADMIN. L. 209, 268–72 (2012).

[212] *See generally* Richard Revesz, *Editorial—The Trump Administration's Attacks on Regulatory Benefits*, 14 REV. ENV. ECON. AND POL'Y 2 (2020).

[213] *See* Cass Sunstein, *Are Poor People Worth Less than Rich People? Disaggregating the Value of Statistical Lives* 2 (John M. Olin Program in L. & Econ., Working Paper No. 207, 2004).

[214] *Id.* at 25–26.

may themselves be inefficient, unfair, even dominating. When the government takes current "willingness to pay" or "willingness to accept" as the baseline by which to measure whether and how to regulate, it naturalizes economic conditions as they are, rather than placing in question whether such conditions are in need of fundamental reform. In addition, this approach treats values like life and health as fungible with monetary values, so that life saved by a regulatory requirement is balanced against a certain amount of money firms and others have to pay out or forgo to meet a regulatory requirement. This translation serves the important function of showing that non-economic values such as life have significant economic value as well.[215] Accounting of this sort can prove powerful in preventing unjustified deregulatory actions.[216] But cost-benefit analysis risks moral myopia and distortion when it becomes the primary method of reasoning through regulatory alternatives, as it has today.

The problem is not the concern with economic effects per se, which are certainly central in assessing whether and how to regulate. Rather, the failure of care consists in the effort to turn each and every human value into a dollar amount, instead of trying to understand the distinctive features of multiple values and the social groups who hold them.[217] Consider, for instance, that in tort law, the costs and benefits of conduct are part, but not all, of how trial courts are supposed to assess whether a party acted reasonably.[218] In the encompassing moral language of the common law, factors like custom and the number of persons whose interests are put at risk are relevant, above and beyond net utility, in determining whether reasonable care was exercised.[219]

Administrative reasoning should (re)learn to incorporate, and to articulate rationally, such a pluralistic understanding of moral and political values. Instead, the fiction of the perfectly competitive market has come to set the normative baseline for human goods that are not in fact rooted in their exchange value.[220] It is symptomatic of the neoliberal regime we inhabit that public policy is evaluated primarily from the standpoint of economic efficiency, rather than from the standpoint of equality, positive freedom, or social solidarity.[221] This approach fails to recognize citizens' and others' rights

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[215] John D. Graham, *Saving Lives through Administrative Law and Economics*, 157 U. PA. L. REV. 395, 465–81 (2008).

[216] Caroline Cecot, *Deregulatory Cost-Benefit Analysis and Regulatory Flexibility*, 68 DUKE L.J. 1593, 1628–36 (2019).

[217] ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 192 (1993).

[218] United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (stating cost-benefit test for negligence but noting that, if custom dictated greater or lesser precautions than the test, "custom should control").

[219] Restatement (Second) of Torts § 293 (Am. L. Inst. 1965).

[220] WENDY BROWN, EDGEWORK: CRITICAL ESSAYS ON KNOWLEDGE AND POLITICS 42 (2005).

[221] *See* Jedediah Britton-Purdy, David Singh Grewal, Amy Kapcznski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L J. 178, 1797–1800 (2020); Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 L. & CONTEMP. PROBS. 71, 72–73 (2014).

and capacities as moral agents to determine what level of risk they are willing to accept under conditions of profound uncertainty.[222]

President Biden's memorandum on *Modernizing Regulatory Review* takes a step in the direction of public care.[223] Substantively, it deemphasizes the weighing of monetary cost and benefits and highlights instead the multiple values that are implicated in the administrative process, including "racial justice" and "the interests of future generations," and other non-quantifiable benefits, as well as distributional concerns.[224] Procedurally, it directs the Office of Management and Budget to reform regulatory review collaboratively with staff in executive departments and agencies in a way that would conform to the principles of structural-constitutional care discussed in Part III below. This Memorandum, on its own, is merely a shift in tone, not a detailed program. But it shows a noteworthy effort to change the focus of review away from overall economic gain and towards other human concerns the administrative state must attend to.

It is unlikely that simply fine-tuning cost benefits analysis will give adequate weight to value pluralism or to distributional concerns. The information costs of accurate distributional analysis and the difficulties of translating non-monetary values into dollars make it difficult to shoehorn concerns other than economic efficiency into a fundamentally economic framework.[225] Reorienting our administrative process around a philosophy of public care would therefore require more robust deliberative democratic processes to engage the affected public.[226] There are some promising practices already underway. Brian Feinstein has examined and recommended extension of "identity conscious" participation provisions in federal regulatory agencies that aim to give voice to otherwise underrepresented constituencies.[227] Michael Sant'Ambrogio and Glen Staszewski have documented how the Forest Service, Nuclear Regulatory Commission, and the Consumer Financial Protection Bureau engage in extensive public involvement during the process of formulating their rules.[228] Based on their research and proposals, the Administrative Conference of the United States (ACUS) has recom-

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[222] DOUGLAS A. KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY 47, 90 (2010).

[223] 86 Fed. Reg. 7223 (Jan. 26, 2021).

[224] *Id.*

[225] On the informational and expressive challenges of distributionally weighted cost-benefit analysis, see Daniel Hemel, *Regulation and Redistribution with Lives in the Balance*, U. CHI. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3796235 [HTTPS://PERMA.CC/GNJ2-MEZL]. On the failure of cost-benefit analysis to capture value pluralism, see ANDERSON, *supra* note 217, at 147–67 (1993).

[226] *See* EMERSON, *supra* note 17, at 149–85 (normative defense of the need for egalitarian public participation in the administrative state).

[227] Brian Feinstein, *Identity-Conscious Administrative Law: Lessons from Financial Regulators*, GEO. WASH. L. REV. (forthcoming 2021), https://ssrn.com/abstract=3787704 [HTTPS://PERMA.CC/5BRS-3AS2].

[228] Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U.L. REV. 793, 823–26 (2021).

mended that agencies adopt general policies explaining their pre-notice participation procedures.[229] The ACUS Recommendation also provides that:

> When agencies believe that their public engagement may not reach all affected interests, they should consider conducting outreach that targets experts not already likely to be involved, individuals with knowledge germane to the proposed rule who do not typically participate in rulemaking, and members of the public with relevant views that may not otherwise be represented.[230]

Public participation and engagement are costly, however, and agencies must already comply with a number of onerous procedural requirements, not least of which is the White House's regulatory review process itself.[231] The costs of participation might be compensated for by allowing agencies to avoid the OIRA review process if they engage in sufficiently robust and inclusive public participation prior to issuance of proposed rules. For example, an agency might avoid OIRA review on a particular rule if it engages in pre-notice listening sessions composed of a cross-section of relevant stakeholders, including in particular those ordinary citizens and marginalized groups that do not ordinarily contribute to the agency's rulemaking process. The agency would then have to document how these listening sessions informed the proposal and explain how its regulation took into account the viewpoints and interests of all groups, including those who ordinarily do not participate in the rulemaking. The proposed rule would need to be cleared by a "regulatory public defender" within the agency or detailed from the White House with responsibility to ensure that the agency had demonstrated due engagement and consideration of all affected interests.[232]

This proposal is meant to be experimental, allowing some agencies to go on with ordinary regulatory review processes, and others to begin to develop a new and inclusive regulatory discourse that would demonstrate care for a wider spectrum of human interests.

III. Public Care as Constitutional Structure: The Qualified Hierarchy of the Executive

The previous Parts articulated the regulatory purpose of care and the set of administrative procedures that require officials to take due consideration of relevant social interests when they implement the law. This Part now turns to official relations within the executive branch, in particular the relationship between the President, principal officers, and the civil service. I re-

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[229] Admin. Conf. of the U.S., Notice of Adoption of Recommendation 2018–7, Public Engagement in Rulemaking, 84 Fed. Reg. 2139, 2146 (Feb. 6, 2019).

[230] *Id.* at 2148.

[231] See Emerson, *supra* note 17, at 175.

[232] The proposal for a regulatory public defender is from Mariano-Florentino Cuellar, *Rethinking Regulatory Democracy*, 57 Admin. L. Rev. 411, 491 (2005).

fer to the subset of public care obligations that apply to the President's relation to other administrative officials as structural-constitutional care.

Structural-constitutional care is textually anchored in Article II of the Constitution, which provides that the President "shall take Care that the Laws be faithfully executed."[233] I argue for an understanding of the President's caretaking obligation as a responsibility to defer to and respect the reasonable judgments of other officials while maintaining the integrity of law-administration as a whole. This interpretation departs from "unitary" theories of the executive[234] in understanding the President's caretaking obligation not as license for unilateral command but as an injunction to deliberate with other responsible executive officers. Structural-constitutional care is a responsibility to work with other officials rather than to subject them to one's will. Such care is a component of the more general principle of public care, insofar as it requires one particular official—the President—to take into account the interest, viewpoints, and values of other officeholders. Having interpreted the Take Care Clause in light of the principle of public care, I argue that the Clause supports limitations on the President's power to remove administrative officials. Such restrictions reinforce the President's caretaking obligation, which he has incentives to shirk, with specific protections that encourage intra-branch deliberation and law-oriented decision-making. More broadly, structural-constitutional care would oblige the President and appointed officials to heed the reasoned advice of career officials with relevant authority and expertise.

A. Taking Care and Executive Branch Structure

Proponents of "unitary" presidential control over administration have interpreted the Take Care Clause as granting or at least affirming a presidential power to control how all other executive officials exercise their discretion.[235] They argue that the President must have whatever powers are necessary to ensure that other executive officials implement the laws faithfully. He could not guarantee these other officials' faithful execution if he could not direct and remove them.[236] In *Seila Law v. Consumer Financial Protection Bureau*,[237] the Supreme Court relied on this reasoning to hold unconstitutional a statutory restriction on the President's power to remove the Director of the Consumer Financial Protection Bureau (CFPB).[238] In cases like this, the Take Care Clause operates to confirm the President's unilateral power over other executive officers.

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[233] U.S. CONST. art. II, § 3, cl. 5.

[234] *E.g.*, Stephen G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

[235] *Id.* at 1167 (1992).

[236] *See* Myers v. United States, 272 U.S. 52, 117 (1926); Morrison v. Olson, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting).

[237] 140 S. Ct. 2183 (2020).

[238] *Id.* at 2197.

The Clause as understood by unitary theorists underscores stereotypically masculine understandings of political power, favoring dominance, authority, and control over deliberation, attentiveness, and interdependency.[239] It therefore runs contrary to the principal of public care this paper has developed. It is important to underscore, however, that the unitary theory is not only inconsistent with the moral insights of feminist and Progressive political thought but also unconvincing as a matter of textual interpretation and original public meaning. As Justice Kagan noted in partial dissent in *Seila Law*, the Clause "speaks of duty, not power."[240] It obliges the President to safeguard and maintain the steady, conscientious, and fair implementation of law. The caretaking obligation does not augment but rather restricts the President's supervision to the "faithful" execution of the law. Professors Andrew Kent, Ethan J. Leib, and Jed Shugerman have shown that "faithful execution" in the Founding Era was a fiduciary obligation associated with "true, honest, diligent, due, skillful, careful, good faith, and impartial execution of law."[241]

These official qualities are markedly different from attitudes of "direction" and "control" that usually predominate in discussions of the Executive.[242] They are instead oriented towards preserving, improving, and attending to interests other than one's own.[243] An honest person says the truth, rather than whatever is most convenient to them, so that the facts are known. One who is skillful and diligent does their job in the right way, rather than in the way that is easiest or most profitable, so that the work is of good quality. The President's caretaking obligation, similarly, is a duty to orient his conduct toward the law rather than his own interest, so that the acts of government are reliably motivated by, linked to, and confined within known and stable rules.[244] This duty of care requires "special attention" to ensure that the requirements established and the powers granted by statute are put into effect.[245] The law must guide the President's conduct, and the law's sound administration must count as one of his ends.

The caretaking obligation extends further than particular statutes and towards preservation of the constitutional system that authorizes law and limits it.[246] The President, like other officeholders, is a caretaker for the Constitution and the laws. He holds certain legal powers in trust, to be used

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[239] Eileen McDonagh & Paula A. Monopoli, THE GENDERED STATE AND WOMEN'S POLITICAL LEADERSHIP, IN FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES, 169, 179–81 (2012).

[240] 140 S. Ct. at 2228 (Kagan, J., dissenting in part).

[241] Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2118 (2019).

[242] *See, e.g.*, *Myers*, 272 U.S. at 117; *Seila Law*, 140 S. Ct. at 2203–04.

[243] Evan J. Criddle & Evan Fox-Decent, *Guardians of the Legal Order: The Dual Commissions of Public Fiduciaries,* FIDUCIARY GOVERNMENT 67, 84 (2017).

[244] *Seila Law*, 140 S. Ct. at 2228 (Kagan, J., dissenting in part) (the Take Care Clause requires "fidelity to law itself, not to every Presidential policy preference").

[245] Kent, Leib & Shugerman, *supra* note 241, at 2134.

[246] *See also* U.S. CONST. art. II, § 1, cl. 8 ("Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—'I do solemnly swear (or affirm) that I will

appropriately for the common interest. That means there may be some things the President or his voters want him to do, even things that the law might formally allow him to do, that he should not do because they will undermine the impartial administration of law or the health of the constitutional order as a whole.[247]

We need not rely on hypotheticals to understand what it is for the President to breach his caretaking obligations. What David L. Noll calls "administrative sabotage," aiming to subvert and cripple statutorily mandated programs, has been a lasting strategy of political efforts to dismantle the administrative state.[248] Though Democratic Presidents have hardly been innocent of breaches of caretaking duties,[249] these failures of care have been particularly pronounced on the conservative side of the aisle where the welfare state is concerned, given the Republican Party's ideological opposition to the statutory purposes underlying that state. The Trump Administration was rife with examples.[250] As Nicholas Bagley has shown, "President Trump . . . exploited his position as the head of the executive branch . . . to sabotage the very law he is charged with administering,"[251] in particular the Affordable Care Act. His very first executive order directed executive branch agencies to "take all actions consistent with the law to minimize the unwarranted economic and regulatory burdens of the Act."[252] This was an example of complying with the letter of the law while failing to care for its spirit. The instances of sabotage were legion: cutting ninety percent of the budget for HealthCare.gov, undermining the ACA's coverage regulations with expansion of "short term" and "association health plans," and ending cost-sharing payments to insurers.[253]

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faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.'").

[247] *See* Neil S. Siegel, *After the Trump Era: A Constitutional Role Morality for Presidents and Members of Congress*, 107 GEO. L. J. 109, 146–54 (2018) (describing rhetorical, procedural, and substantive requirements of political officials' role, including reaching out to and deliberating with members of the other party and adhering to established norms and conventions). Insofar as Siegel's understanding of official role morality requires political moderation, it differs from public care, which includes a substantive commitment to support individuals' moral and political agency. But administrative-procedural and structural-constitutional care may often require moderation and compromise with viewpoints other than that of the President and the President's political party.

[248] David L. Noll, *Administrative Sabotage*, 120 MICH. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3880678 [https://perma.cc/SW3N-C3PX].

[249] *See generally* Joshua Blackman, *Presidential Maladministration*, 2018 U. ILL. L. REV. 398 (2019).

[250] Blake Emerson, *The Departmental Structure of Executive Power: Subordinate Checks from Madison to Mueller*, 38 YALE J. REG. 91, 156 (2021).

[251] NICHOLAS BAGLEY, EXECUTIVE POWER AND THE AFFORDABLE CARE ACT, IN THE TRILLION DOLLAR REVOLUTION: HOW THE AFFORDABLE CARE ACT TRANSFORMED POLITICS, LAW, AND HEALTH CARE IN AMERICA 192–93 (Abbe R. Gluck & Ezekiel J. Emanuel, eds. 2020).

[252] Exec. Order. No. 13,765, 82 Fed. Reg. 8351 (Jan. 20, 2017).

[253] *See* Bagley, *supra* note 251, at 198–202.

A number of cities brought suit, alleging that such instances constituted a violation of the President's caretaking obligation.[254] While the District Court for the District of Maryland dismissed these claims, the court's argument turned largely on the judiciary's capacity to interfere in matters left to executive discretion, rather than with the underlying question of whether the President had failed to exercise his discretion so as to faithfully execute the law.[255] Whether or not the court was correct on that jurisdictional question, the point here is that the substance of the caretaking obligation is to ensure that the laws are administered well and that the legal system as a whole remains functional.[256] This obligation leaves significant leeway in the President's hands to determine what the sound administration of law requires. But the content of the take-care obligation cannot be determined wholly subjectively according to the President's will; in that case it would not be a meaningful legal duty at all. A President's attempts to make the laws unworkable because he does not like them or because they contravene his political commitments violates his caretaking obligations—whether or not such violations are justiciable.

This way of thinking about presidential caretaking has implications for the constitutional structure of the executive branch. The first is that the hierarchical structure of the branch must be qualified or partially flattened by the requirements of due caretaking. As Gillian Metzger has argued, the Take Care Clause together with other constitutional provisions requires the President's "overall hierarchical control and accountability" over and for the subordinate offices and agencies of the executive branch.[257] Unlike unitary theorists of the executive, however, Metzger does not understand this "duty to supervise" as requiring presidential control over all decisions within the branch. Rather it can be and, in many contexts, should be met instead through "systematic" forms of bureaucratic control such as the use of audits and the issuance of circulars and enforcement guidance.[258] This account rightly focuses on the obligations, rather than merely the powers, of the presidency, and shifts attention away from personal, plebiscitary authority towards steadier forms of administrative routine.

Understanding the President's caretaking role complicates Metzger's emphasis on hierarchy, however. To ground the duty to supervise, Metzger relies in part on the hierarchical structure contemplated in the Appointments Clause,[259] which provides that the President may appoint principal officers to lead executive departments and empowers Congress to vest the appointment of inferior officers in those principals.[260] But the Appointments Clause

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[254] *See, e.g.,* City of Columbus v. Trump, 453 F.Supp.3d 770 (D. Md. 2020).
[255] *Id.* at 800–04.
[256] *See* Shalini Bhargava Ray, *Abdication Through Enforcement*, 96 IND. L.J. (forthcoming 2021), https://ssrn.com/abstract=3573110 [https://perma.cc/R8ZX-K8XR].
[257] Gillian Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1845 (2015).
[258] *Id.* at 1840.
[259] Id. at 1879.
[260] U.S. CONST. art. II, sec. 2, cl. 2.

also incorporates lateral checks amongst the branches, including the requirement of senatorial advice and consent and Congress' power to vest the appointment of inferior officers in the courts.[261] In addition, when the President nominates an official to head a department, the President's caretaking obligations should be understood to require her to select someone with subject-matter and managerial skills that are "germane" to that post.[262] For instance, the very first Congress required that the attorney general be "learned in the law."[263] Picking an attorney general with no background or training in law would be inconsistent with the President's caretaking responsibilities as applied to her appointment powers. The legal obligation to match the candidate to the official role is politically rather than judicially enforced by way of the senate's advice and consent role. But it is a genuine obligation nonetheless, which may go underenforced without senatorial watchfulness. As George A. Kraus and Anne Joseph O'Connell have shown, there are often significant tradeoffs between President's incentives to choose "loyal" officers and to choose "competent" ones.[264]

Beyond the initial appointment decision, due regard for the law also requires that the President respect and heed the independent judgment of the officials she appoints. The President, at a minimum, must seriously entertain the viewpoints of subordinate officials with knowledge about the legal issues in question in order to show that her conduct is appropriately oriented toward the law. As Shalev Roisman has argued, the President has a "duty to deliberate," which requires "gathering relevant information and making a considered judgment before exercising power delegated directly to her."[265] If she does not listen to what qualified subordinates think about areas within their jurisdiction, she is likely to err as to what the law requires. That is because such officials' narrower remit should enable them to devote their attention to the problems before them and understand their workings much better than a President who must oversee the execution of all laws at once.

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[261] *Id.* The third option for inferior officers is that the President may appoint them "alone," without senatorial consent. *Id.* This possibility confirms presidential control but complicates the hierarchy. *Id; see* Emerson, *supra* note 250, at 114–15.

[262] *See* Shoemaker v. United States, 147 U.S. 282, 301 (1893); Weiss v. United States, 510 U.S. 163, 174 (1994). These cases allow the assignment of additional "germane" duties to officers beyond the duties of the office to which they were appointed. This conclusion implies that germaneness inquiries might apply to the Appointments Clause generally. *See* Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613, 663 (2020) ("All but the strictest formalists . . . would permit a person confirmed to a 'germane' position to serve temporarily in a different, principal Office."). It would be anomalous if germaneness were constitutionally relevant to the assignment of additional duties to an already appointed officer but not to the prior decision to appoint a particular person to a certain office in the first place.

[263] An Act to establish the Judicial Courts of the United States, ch. 20, § 35, 1 Stat. 73, 93 (1789).

[264] George A. Kraus & Anne Joseph O'Connell, *Loyalty–Competence Trade-off's for Top U.S. Federal Bureaucratic Leaders in the Administrative Presidency Era*, 49 PRES. STUD. Q. 527, 530 (2019).

[265] Shalev Roisman, *Presidential Law*, 105 MINN. L. REV. 1269, 1292 (2021). For arguments against the currently limited reviewability of presidential decisions, see generally Kevin Stack, *The Reviewability of the President's Statutory Powers*, 62 VAND. L. REV. 1171 (2009); Kathryn Kovacs, *Constraining the Statutory President*, 98 WASH. U.L. REV. 62 (2020).

Reliance on the judgment of subordinate officials with specific authority and expertise provides some security that the ultimate decision will be guided by the purposes of the law rather than by irrelevant political or policy concerns foisted upon a compliant bureaucracy.

In the usual case of legislative delegation, where Congress vests discretionary power in an official other than the President, such as a cabinet secretary, the President does not possess authority to dictate how the statutorily designated officer exercises her power. While some unitary theorists claim that the President possesses such power, and Presidents often act as if they possess it, such an implied right of direction is difficult to square with statutory text explicitly vesting authority in another official.[266] Moreover, the President's structural-constitutional obligation to faithfully enforce the law requires her to support the administrative-procedural care obligations that statutory law and judicial interpretation have imposed on agencies. The President therefore has the duty and power to ensure that agencies exercise their authority reasonably, which might include alerting agencies to any political preferences of the White House that are relevant to the statutory scheme the agency implements. But the President does not have the power to dictate the agency's course of conduct or require that it consider a factor that is irrelevant to the statutory scheme. A public care perspective on executive power would reject those occasional decisions in which reviewing courts seem to approve of such White House interference.[267] It insists that the agency act for reasons grounded in the law rather than the President's will.

Taking care of the law, in other words, requires what Joan Tronto has called "caring with"—a democratic ethos that relies not on command and control but on "plurality, communication, trust, and respect."[268] Without ignoring the President's electoral mandate to speak for the nation as a whole, structural-constitutional care insists also on a democratic organization of offices which, to borrow Seana Valentine Shiffrin's terms, "manifests equality in its explicit structure."[269] Executive branch relations based on "trust" between the President and other officers are likely not only to enhance the programmatic quality of administration but also to reflect back on citizens an image of their own deliberative responsibilities.[270]

Structural-constitutional care therefore requires a substantially qualified official hierarchy. Beyond the Take Care Clause itself, the Opinion Clause empowers the President to "require the Opinion, in writing, of the principal

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[266] *See generally* Kevin Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006).

[267] *See* Sierra Club v. Costle, 657 F.2d 298, 408 (D.C. Cir. 1981).

[268] *See* TRONTO, *supra* note 10, at 35.

[269] Seana Valentine Shiffrin, *Speaking Amongst Ourselves: Democracy and the Law*, THE TANNER LECTURES ON HUMAN VALUES 16 (Apr. 18–19, 2017), https://tannerlectures.utah.edu/Shiffrin%20Manuscript.pdf [https://perma.cc/P9T3-GCD7].

[270] *See generally* WILLIAM G. RESH, RETHINKING THE ADMINISTRATIVE PRESIDENCY: TRUST, CAPITAL, AND APPOINTEE-CAREER RELATIONS IN THE GEORGE W. BUSH ADMINISTRATION (2015). On the trust-promoting features of administrative procedure, see generally Edward H. Stiglitz, *Delegating for Trust*, 166 U. PA. L. REV. 633 (2018).

Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."[271] The Clause pulls in two directions. It suggests that the President would have final decisional authority over some matters of law administration. At the same time, as Peter Shane has argued, the clause expresses an "ethos of deliberation."[272] It indicates that the President's conduct should, at least in certain cases, be guided by the input of his principal officers.[273] The Clause implies that these officers' opinions must be independent from the President's. It would be of no use to the President's careful decision-making if the principal officers were lackeys who merely flattered the President with what he wanted to hear. Furthermore, these officers' opinions must concern "the Duties of their respective Offices."[274] Such duties are separate from the President's will and power, because the executive departments are established not by the President, but by Congress.[275] If the President is to respect the law, he must consider the written opinions conveyed to him by the officers Congress empowers.[276]

Failure to consider subordinates' judgments, by contrast, may evince a failure to act on the basis of law. If the President or his political appointees altogether ignore the considered views of administrative officials who work on and attend to particular policy issues on a daily basis, there will be reason to suspect that the law is merely a pretext for the political officials' actions, rather than the reason for which they act.[277] This concern with presidential policy concerns undermining agency decision-making arose when the Obama Administration interfered with the Food and Drug Administration's decision to offer the Plan-B contraceptive over the counter. In *Tummino v. Torti*,[278] the District Court for the Eastern District of New York found the

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[271] U.S. CONST. art. II, §. 2, cl. 1.

[272] PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 11 (2009).

[273] Emerson, *supra* note 250, at 111–12.

[274] U.S. CONST. art. II, §. 2, cl. 1.

[275] *See* U.S. CONST. art. II, § 2, cl. 2 ("Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."); *Id.* art. I, § 8, cl. 18 (Congress has power to "carr[y] into Execution" powers vested in "the Government of the United States, or in any Department or Officer thereof.").

[276] The Office of Legal Counsel plays a significant role in providing such advice, but the degree to which it offers genuinely impartial opinions and constraints is fiercely disputed. *Compare* Trevor Morris, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L REV. 1448, 1455–58 (2010) *with* Peter M. Shane, *Executive Branch Self-Policing in Times of Crisis: The Challenges for Conscientious Legal Analysis,* 5 J. NAT'L SEC. L. & POL'Y 507, 517–18 (2012) *and* Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 809–10 (2017). The executive branch also relies heavily on interagency working groups to vet regulations where multiple agencies have a stake in the issue. *See* Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 182–83 (1995); Roisman, *supra* note 265, at 1326–31.

[277] *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2575 (2019) (Secretary of Commerce's decision to add citizenship question was arbitrary because it was based on a pretextual rationale). Justice Roberts in this case missed the opportunity to underscore the relationship between pretext and the Secretary's failure to listen to the advice of subordinates, in this case the staff of the Census Bureau.

[278] 603 F. Supp. 2d 519 (E.D.N.Y. 2009).

resulting decision unlawful, in part because the White House "wrested control over the decision-making . . . from staff that would have normally issued the final decision[.]"[279] In many other cases, courts rely on reports from agency staff to assess whether the agency leadership's decision is well-reasoned.[280] Reliance on the record composed by inferior officers and other subordinate officials empowers these officials to contest arbitrary assertions of policy preference and encourages instead a "dialogue inside the agency."[281] Caretaking thus requires not only a stable system for applying policy downwards through the hierarchy but a complementary system for communicating information and judgments upward.

The Trump Administration's response to the COVID-19 pandemic evinced a failure of caretaking in this specific, structural sense: he failed to listen to and interfered with the work of the professional government officials who staff and constitute the executive departments, particularly the Department of Health and Human Services, and its component agency, the Centers for Disease Control.[282] We also saw Trump flout mask wearing guidance and reject school closure recommendations from government scientists.[283] Trump's conduct constituted a failure of care in the direct, purposive sense that the President could have done more to protect people physically

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[279] Tummino v. Torti, 603 F. Supp. 2d 519, 523 (E.D.N.Y. 2009) (FDA action on Plan B unlawful because "wrested control over the decision-making . . . from staff that normally would issue the final decision"). For the leading discussion, see Lisa Heinzerling, *The FDA's Plan B Fiasco: Lessons for Administrative Law*, 111 GEO. L.J. 962, 981–82 (2014).

[280] *See, e.g.*, Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 104 (1983) (relying in part on "staff reports" to conclude agency action not arbitrary and capricious); Mobil Pipe Line Co. v. FERC, 676 F.3d 1098, 1099, 1102–05, 1103 n.2 (D.C. Cir. 2012) (Kavanaugh, J.) (relying on Federal Energy Regulatory Commission "expert staff" to conclude Commission's decision unlawful).

[281] *See* E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts, and Agencies*, 16 VILL. ENVTL. L.J. 1, 12 (2005); *see also* Emerson, *supra* note 250, at 145–47.

[282] *See, e.g.*, Cheyenne Haslett & Anne Flaherty, *Amid Pandemic, Confidence in CDC Erodes with Questions of Political Interference*, ABC NEWS (Sept. 26, 2020), https://abcnews.go.com/Politics/amid-pandemic-confidence-cdc-erodes-questions-political-interference/story?id=73239582 [https://perma.cc/5YN6-JGFW]; Eric Lipton, David E. Sanger, Maggie Haberman, Michael D. Shear, Mark Mazzetti & Julian E. Barnes , *He Could Have Seen What Was Coming: Behind Trump's Failure on the Virus*, N.Y. TIMES (Apr. 11, 2020), https://www.nytimes.com/2020/04/11/us/politics/coronavirus-trump-response.html [https://perma.cc/84LC-YPTG]; Abby Goodnough & Maggie Haberman, *White House Rejects C.D.C.'s Coronavirus Reopening Plan*, N.Y. TIMES (July 14, 2020), https://www.nytimes.com/2020/05/07/us/politics/trump-cdc.html [https://perma.cc/A9JE-LRFG]; Sheryl Gay Stolberg, *A C.D.C. Official Says She Was Ordered to Destroy an Email Showing Trump Appointees Attempted to Interfere with a Report's Publication*, N.Y. TIMES (Dec. 9, 2020), https://www.nytimes.com/live/2020/12/10/world/covid-19-coronavirus/a-cdc-official-says-she-was-ordered-to-destroy-an-email-showing-trump-appointees-attempted-to-interfere-with-a-reports-publicati [https://perma.cc/PRZ4-WAHN].

[283] Tara McKelvey, *Coronavirus: Trump to Defy 'Voluntary' Advice for Americans to Wear Masks*, BBC NEWS (Apr. 4, 2020), https://www.bbc.com/news/world-us-canada-52161529 [https://perma.cc/DXA5-N98X] Eliza Relman, *Trump is Forcing the CDC to Ease School Reopening Guidelines Despite Experts' Warnings that Kids Will Be Super-Spreaders*, BUS. INSIDER (Jul. 8, 2020), https://www.businessinsider.com/trump-defies-cdc-director-threatens-cuts-states-with-closed-schools-2020-7 [https://perma.cc/TY7V-79BU]; Associated Press, *The Latest: Trump Contradicts CDC Director on Vaccines, Masks*, AP NEWS (Sept. 16, 2020), https:/

against a deadly virus.[284] But it also represented a related failure to preserve the structures of deliberation, comity, and jurisdictional differentiation that the Constitution contemplates for the executive branch.[285] This not to say that scientists are infallible or that government officials are generally better informed than private parties. Indeed, the administrative-procedural dimension of care discussed in Part II emphasizes the need for government agencies to consult with private parties who hold relevant information and value-orientations. The point here is that presidential caretaking depends on extensive consultation that informs executive policymaking. When the President and political appointees ignore and even threaten the independent judgment of agency officials, they fail to fulfill their obligation to carefully and faithfully execute the law.

While these lapses have been acute during the Trump administration, the problem is not one of personal psychology but of broader trends in ideological and institutional development. For decades, Presidents across both parties have chipped away at the subordinate checks within the executive, undermining the civil service and attempting to maximize presidential control.[286] The regulatory review process described in Part II.B has been a part of that trend, imposing centralized White House direction over executive agency rulemaking. The unitary theory of the executive and now-Justice Kagan's theory of presidential administration fortify this trend with constitutional and democratic justifications for extensive presidential control.[287] At the same time, as William H. Simon has diagnosed in the realm of welfare administration, the civil service has long been hollowed out by disinvestment and by increasingly stringent hierarchical constraints on the discretion of lower-level officials, reducing not only the prestige but the professional ethos and judgment of government service.[288] Such "proletarianization" of the civil service has converged with what Jon D. Michaels calls "deep service contracting," in which private contractors, "working for practically every federal agency, draft legal memoranda for agency leadership, produce economic and scientific studies critical to the rulemaking process, design government license and benefit applications, . . . and author parts of final rules[.]"[289] Outsourcing of this sort undermines the internal checks and balances within the administrative state, as contractors do not enjoy the same employment pro-

/apnews.com/article/election-2020-virus-outbreak-health-delaware-wilmington-9e5568c6d2a6e7a3f05bc4e8b57fc8aa [https://perma.cc/RGJ5-NHCB].

[284] *See* Alyssa Bilinski & Ezekiel J. Emanuel, *COVID-19 and Excess All-Cause Mortality in the US and 18 Comparison Countrie*s, 324 JAMA 2100 (2020), https://jamanetwork.com/journals/jama/fullarticle/2771841 [https://perma.cc/LLB2-TGE6] ("Compared with other countries, the US experienced high COVID-19–associated mortality and excess all-cause mortality into September 2020. . . . This may have been a result of several factors, including weak public health infrastructure and a decentralized, inconsistent US response to the pandemic.").

[285] Emerson, *supra* note 250, at 145–46.

[286] *See* JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO AMERICAN DEMOCRACY 82–118 (2017).

[287] Kagan, *supra* note 14, at 2331–39.

[288] *See generally* Simon, *supra* note 66.

[289] *See* MICHAELS, *supra* note 286, at 111–12.

tections as civil servants, and so are more likely to bend to the will of their political principals.[290]

The Trump Administration's criticism of the "deep state" took aim at the already weakened deliberative structures within the branch.[291] As Michaels has argued, however, the American state's "depth" is a virtue.[292] The civil service is socially, economically, disciplinarily, jurisdictionally, and politically diverse, recreating the complex ecosystem of American democracy within the executive branch.[293] Structural-constitutional care requires that we reverse the trend toward consolidated unitary power and increase the quality, quantity, and independence of the civil service. The President must enjoy advice from and work under the salutary constraint imposed by professionals with subject-matter expertise and policy perspectives that do not necessarily align with her own. Such a qualified hierarchy will help to ensure that the law is executed with care for the information and values that are relevant to the legislative scheme Congress enacts.

B. Careful Removal

The principle of qualified hierarchy has implications for the question of for-cause removal. Hierarchy requires that the President, directly or indirectly, supervise all persons within the executive branch. But must she be able to fire any of them for whatever reason she wants? Unitary executive theorists take that position.[294] In this Section, I argue that a proper understanding of the President's caretaking obligation supports congressional power to impose removal restrictions on both principal and inferior officers. More broadly, public care requires the diffusion of authority throughout the executive branch hierarchy, so that political decisions are informed and constrained by professional norms and other relevant policy values.

Seila Law embraced the unitary executive view that the President must be able to control and remove other executive officers.[295] In his opinion for the Court, Chief Justice Roberts held that it was unconstitutional for Congress to condition the removal of the single Director of the CFPB on "ineffi-

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[290] *Id.* at 126–30.

[291] *See* Kelsey Brugger, *Trump Order Looks to Dismantle the 'Deep State[,]'* E&E NEWS (Oct. 20, 2020), https://www.eenews.net/stories/1063716869 [https://perma.cc/9X8Y-8R5F]; Reuters Staff, *Trump Says Without Proof that FDA 'Deep State' Slowing COVID Trials*, REUTERS (Aug. 22, 2020), https://www.reuters.com/https://perma.cc/8H4S-BLFFarticle/us-health-coronavirus-trump-fda/trump-says-without-proof-that-fda-deep-state-slowing-covid-trials-idUSKBN25I0LF [https://perma.cc/8H4S-BLFF].

[292] *See generally* Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653 (2018). For a more ambivalent assessment of depth, see STEPHEN SKOWRONEK, JOHN A. DEARBORN & DESMOND KING, PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE (2021).

[293] *See* Michaels, *supra* note 292, 1660–63.

[294] *See* Calabresi & Prakash, *supra* note 15, at 597.

[295] *See* Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 375–82 (2020).

ciency, neglect of duty, or malfeasance in office."[296] The holding itself is fairly modest, as it leaves the CFPB otherwise intact and does not reach multi-member bodies such as the Federal Trade Commission and the Securities Exchange Commission or restrictions on the removal of inferior officers. However, the logic of the opinion and of the Roberts Court's removal jurisprudence more broadly is to erode restrictions on the President's ability to remove, and thus to command and control, other officers within the executive.[297] The reasoning of *Seila Law* puts into doubt the constitutionality of for-cause removal protections in other independent agencies. It permits for-cause removal for the heads of "multimember agencies that do not wield substantial executive power."[298] But what counts as "substantial" is left undefined. Already, in *Collins v. Yellen*,[299] the Supreme Court has held unconstitutional removal restrictions on the head of the Federal Housing Finance Authority, who arguably wields significantly less coercive power over private parties than the CFPB Director.

Seila Law and *Collins* also heighten concern that protections for lower-level civil servants will be held unconstitutional or otherwise undermined by executive actions. Roberts treats protections on "inferior officers" as an "exception" to the President's unilateral control of the executive branch, lying at the "outermost constitutional limits of permissible congressional restrictions on the President's removal power."[300] This characterization follows on other recent holdings that expose such restrictions to constitutional challenge. In *Lucia v. Securities and Exchange Commission*,[301] the Court held that administrative law judges (ALJs) of the Commission count as such "inferior Officers.""[302] Removal restrictions on ALJs generally may now prove problematic, as such judges can only be removed for good cause by the Merit Systems Protection Board, the members of which may themselves only be removed for good cause.[303] The Court in *Free Enterprise Fund* ruled that similar "dual for-cause" restrictions were unconstitutional.[304] As Justice Breyer observed in his concurrence in *Lucia*, these holdings together "risk transforming administrative law judges from independent adjudicators into dependent adjudicators, serving at the pleasure" of political appointees.[305]

The Trump administration also took steps to undermine independent decisional authority and advice-giving by career civil servants. One executive order, explicitly relying on *Lucia*, removed administrative law judges from the competitive service and allowed agencies to choose their ALJs directly

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[296] Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197 (2020); 12 U.S.C. § 5491(c)(3) (2018).
[297] *See also* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010).
[298] *Seila Law*, 140 S. Ct. at 2199.
[299] 141 S. Ct. 1761, 1784 (2021).
[300] *Seila Law*, 140 S. Ct. at 2199–2200.
[301] 138 S. Ct. 2044 (2018).
[302] *Id.* at 2055.
[303] 5 U.S.C § 7521(a) (2018). *See* Kent Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L. J. 1695, 1709–11 (2020).
[304] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492 (2010).
[305] Lucia v. S.E.C., 138 S. Ct. at 2060 (Breyer, J., concurring in part).

rather than from a list provided by the Office of Personnel Management.[306] Another executive order sought to exempt officials with policymaking responsibilities from civil service protections.[307] Momentum has thus built to institute the unitary executive theory through a combination of stringent constitutional rules against statutory removal restrictions and executive actions that subject subordinate administrative officials to political control. Though Biden swiftly rescinded Trump's directive regarding protections for policy staff, he has not done the same with regards to ALJ protections.[308] Meanwhile the broader project of undermining the independence of the civil service remains alive and well in the conservative establishment.[309]

The principle of qualified hierarchy that stems from the presidential caretaking obligations provides a constitutional basis to allow Congress to restrict the President's removal powers over both principal and inferior executive officers. It is hard to see how the President's executive power—which is limited by his duty of *faithful* execution—could be undermined by statutory requirements that he can only remove officials for "good" reasons, such as "inefficiency, neglect of duty, or malfeasance in office."[310] If an official fails on any of those accounts, care for the proper administration of law might in fact require the President to remove her and replace her with someone competent. Removal for other reasons, such as policy disagreements within the bounds of law, may undermine the President's caretaking responsibilities. As I argued in the last Section, presidential caretaking requires that subordinate officials within the executive exercise and communicate independent judgment. If the President may remove executive officials simply on the grounds that they disagree about policy, such officers will have reason not to communicate contrary opinions to the President for fear of reprisal.

Presidents, meanwhile, face strong incentives to act unilaterally. Deliberation is costly, can cause delay, and can create openings for political opposition to contest the President's decisions. First-term Presidents usually want to win reelection, and reelection may require delivering on campaign

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[306] Exec. Order 13,843, Excepting Administrative Law Judges from the Competitive Service, 83 Fed. Reg. 32,755 (July 10, 2018).

[307] Exec. Order 13,957, Creating Schedule F in the Excepted Service, 85 Fed. Reg. 67,635 (Oct. 21, 2020).

[308] Exec. Order 14,029, Revocation of Certain Presidential Actions and Technical Amendment, 86 Fed. Reg. 27,025, 27026 (May 14, 2021); Exec. Order, 14,003, Protecting the Federal Workforce, 86 Fed. Reg. 7231, 7231 (Jan. 27, 2021).

[309] James Sherk, *Increasing Accountability in the Civil Service*, CENTER FOR AMERICAN FREEDOM, https://americafirstpolicy.com/docs/trump-civili-service-reform.pdf [https://perma.cc/AXW2-257K]; Nicole Ogrysko, *Schedule F is gone, but the debate continues in Congress*, FED. NEWS NETWORK (Feb. 24, 2021), https://federalnewsnetwork.com/workforce/2021/02/schedule-f-is-gone-but-the-debate-continues-in-congress/ [https://perma.cc/BC7V-CU97].

[310] See Morrison v. Olson, 487 U.S. 654, 692 (1988) (a "good cause" restriction on inferior officers does not "impermissibly burden" the President's executive power); *see also* Jerry Mashaw, *Of Angels, Pins, and For-Cause Removal: A Requiem for the Passive Virtues*, U. CHI. L. REV. ONLINE (2020), https://lawreviewblog.uchicago.edu/2020/08/27/seila-mashaw/ [https://perma.cc/2X8P-DZN9].

promises to use the powers of their office to fulfill various policy goals.[311] The constitutional caretaking obligation therefore requires external reinforcement to ensure that the President fulfills the duty the Constitution bestows upon him. Administrative law principles of reason giving, record keeping, and rule following achieve this to some extent. Removal restrictions are necessary because they, unlike most administrative law rules, concern the President's power directly.

These restrictions are important not solely, or even principally, because of the specific protection they give one official. More important is the ethos of independent deliberative responsibility they communicate to executive branch personnel. The Court's removal jurisprudence further undermines executive officials' orientation toward law and orients them instead toward the will of the President. If such an attitude becomes dominant within the government, then careful implementation of law will give way to obedience to presidential policy. That servile self-understanding would likely seep out into the broader public, which will witness and experience the work of government not as the joint product of mutually responsive officials but rather as the hierarchical implementation of a charismatic leader's commands. Biden's invocation of the presidential duty of care invites us to step back from the brink of such presidentialist authoritarianism.[312] A more deliberative, pluralistic, and caring executive branch does not require that the President refrain from removing officials he has statutory authority to remove or that he forgo all supervision and influence over the conduct of government agencies. Nor does it require Congress to insulate each and every executive officer from removal. Rather, it requires the President, Congress, and the Court to approach and structure the execution of law as a collaborative endeavor, in which directives are conditioned and delimited by due consideration.

By rolling back parts of the Trump Administration's assault on the civil service, the Biden Administration has taken a first step to reestablish a qualified hierarchy within the executive. Michaels and I have argued elsewhere that Biden might also require executive agencies to issue procedural rules that would require agency heads to "heed the advice of career staff" and defer to their consensus advice.[313] This proposal aligns with Simon's earlier criticism of the transformation in welfare administration in the 1970 and '80s, when the welfare bureaucracy was deskilled and subject to strict hierarchical control.[314] What is needed today, as Simon put it then, is for public law and executive branch practice to recognize civil servants' "claims to participate in interpreting the goals" of the policies they administer.[315] The professions that constitute the civil service, such as law, public administration, and social and

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[311] Terry M. Moe & Scott A. Wilson, *The President and the Politics of Structure*, 5 LAW & CONTEMP. PROBS. 1, 11 (1994).

[312] *See generally* Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civil Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. REV. DISC. 418 (2021).

[313] *See* Emerson & Michaels, *supra* note 312, at 436.

[314] *See generally* Simon, *supra* note 66.

[315] *Id.* at 1264.

natural science "provide evidence of the possibility of universalistic and altruistic commitment in public life and of responsibility and autonomy in work."[316] Formally respecting civil servants' independent judgment might in some cases impose costs on the Biden Administration's implementation of progressive policy priorities, including those that embody the regulatory purpose of care. But such a diffusion of responsibility would have the virtue of communicating to career and elected officials, and to the public at large, that the law is to be administered through thoughtful consultation, rather than by dictate from on high. Structural-constitutional care requires as much.

CONCLUSION

This Article has outlined the principle of public care along its three dimensions. The principle of public care generally requires officials to implement the law in a way that responds to and advances the interests of those the law affects. More specifically, it requires the President to listen to subordinates so as to evince an orientation towards law rather than solely her own objectives. It further requires agencies to attend to the input of affected parties in implementing policy. And public care requires government to provide individuals with the resources they need to exercise their moral and political agency. The argument has focused on those aspects of public care that are already embedded in U.S. constitutional and statutory law. These commitments to care could be more fully implemented through executive and legislative actions that disown presidential unilateralism, require agencies to deliberate with affected parties on materially equal terms, and more broadly provide health- and other care services to members of the public. Public care presents an attractive model for what government should do and how it ought to do it, orienting official practice towards mutual aid and concern rather than the creation of a maximally efficient marketplace.

There are, to be sure, tensions within this vision. Administrative-procedural care requires due regard for the perspectives of all affected parties. But in a nation where many are deeply committed to isolated individualism and limited government, some parties are unlikely to accept care as a regulatory purpose, preferring instead that government leave people to their own devices. Those perspectives need to be taken seriously. But the practice of care does not mean accepting each and every viewpoint simply because those viewpoints are widely or profoundly held. It rather requires that policies en-

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[316] *Id.* at 1266. Simon's emphasis on professionalism borrows from the German philosopher G.W.F. Hegel's understanding of the state bureaucracy as "the universal class," and rejects Max Weber's formalistic model of bureaucratic rationality. *Id.* at 1224–45. Hegel's thought also underlies my argument for Progressive administration in THE PUBLIC'S LAW, *see* EMERSON, *supra* note 17, at 23–37, 61–118, though I unfortunately did not encounter Simon's argument during my research. Whereas Simon focuses on the value of professionalism and the class position of the welfare bureaucracy, THE PUBLIC'S LAW emphasizes the ethical orientation of the Hegelian administrative state towards preserving individual autonomy and the way in which this ideal was democratized in the hands of the American Progressives.

gage, respond to, and when necessary, adjust to affected parties' reasonable beliefs and values. Those kinds of accommodations can be justified in terms of the purpose of care so long as they are calculated to further the overall quality or extent caregiving services. They allow the circle of care to widen incrementally, opening up people's political perspectives as they experience public care's salutary effects.

Incrementalism, of course, has its costs. These are measured in healthcare policy by physical and financial suffering and even death. There is certainly much to be said for a more sweeping legislative as well as administrative politics of care that reengages the government in funding and directly providing care services, not only in healthcare specifically but also in schooling, public safety, and environmental, consumer and worker protections—which is to say, across the full spectrum of the administrative state's jurisdiction. The regulatory purpose of care gives officials reason to pursue such policies, even as the structures and procedures of care place conditions on the ways in which these policies may be pursued.

Downsizing the Deportation State

*Jennifer Lee Koh**

The contemporary deportation state—the federal administrative infrastructure for enforcing the immigration laws through deportation and detention—has grown steadily for well over two decades. During the Trump era, the deportation state engaged in spectacles of cruelty against immigrants and received encouragement from blatantly anti-immigrant rhetoric from the former president. However, its overall growth also reflected an extension of past practice from prior administrations. In this Article, I argue that the Biden administration should not only pursue an immigration agenda that seeks to reverse Trump-era immigration policies and enact legislative immigration reform—which it has expressed a commitment to doing—but should also seek to downsize the deportation state. To do so, it should place particular attention on how agency funding, management of the bureaucracy, and relationships with subfederal and private entities might impact successive Presidents' capacity to engage in mass deportation and detention.

INTRODUCTION

What might President Biden's immigration legacy be? Based on the campaign and first several months of office, the Biden administration has demonstrated a commitment to undoing many of its predecessor's immigration policies. Immediately after taking office, President Biden issued a series of executive orders and proclamations that reversed some of the most controversial immigration policies of the Trump era, such as the travel bans[1] and

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[1] *See Proclamation on Ending Discriminatory Bans on Entry to the United States*, WHITE HOUSE (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-ending-discriminatory-bans-on-entry-to-the-united-states/?fbclid=IWAR2nuFi5JI1bMyysdA0vaLa2vDi2FnnjCIsh6PC5Eh0Z5RtoPZ6e-5UT7lY [https://perma.cc/4K3L-RWVG].

efforts to rescind Deferred Action for Childhood Arrivals (DACA).[2] With respect to prosecutorial discretion, the Administration has revised the immigration enforcement priorities aimed at guiding deportation and detention decisions,[3] which appear to have had some impact on the number of arrests and deportations in the interior United States.[4] Immigration agencies sought to change course on a range of practices, from highly visible programs such as the Migrant Protection Protocols (MPP), which required asylum seekers to remain physically in Mexico while having their asylum claims heard by the immigration courts,[5] to seemingly mundane but deeply frustrating practices with respect to the treatment of blank spaces on immigration applica-

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[2] *See Executive Order on Preserving and Fortifying Deferred Action for Childhood Arrivals* (DACA), WHITE HOUSE (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/preserving-and-fortifying-deferred-action-for-childhood-arrivals-daca/ [https://perma.cc/3LSS-586Y]. Other actions addressed the counting of noncitizens in the U.S. Census, ending construction of the border wall, and repealing the elimination of enforcement priorities in immigration. *See Executive Order on Ensuring a Lawful and Accurate Enumeration and Apportionment Pursuant to the Decennial Census* (Jan. 20, 2021), WHITE HOUSE https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-ensuring-a-lawful-and-accurate-enumeration-and-apportionment-pursuant-to-decennial-census/ [https://perma.cc/3XXG-CJ76]; *Proclamation on Termination of Emergency with Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction*, WHITE HOUSE (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-termination-of-emergency-with-respect-to-southern-border-of-united-states-and-redirection-of-funds-diverted-to-border-wall-construction/ [https://perma.cc/2TTH-RJNZ]; *Executive Order on the Revision of Civil Immigration Enforcement Policies and Priorities*, WHITE HOUSE (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-the-revision-of-civil-immigration-enforcement-policies-and-priorities/ [https://perma.cc/4B4H-2S3E].

[3] *See* Memorandum from David Pekoske, Acting Sec'y, Dep't of Homeland Sec., Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities (Jan. 20, 2021), https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf [https://perma.cc/PD5F-ZX7Q]; Memorandum from Tae D. Johnson, Acting Dir. of U.S. Immigr. & Customs Enf't, Interim Guidance: Civil Immigration Enforcement and Removal Priorities (Feb. 18, 2021), https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf [https://perma.cc/75G9-TDJY]; *see also* Memorandum from John D. Trasvina, Principal Legal Advisor, U.S. Immigr. & Customs Enf't, Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities (May 27, 2021), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf.

[4] *See* Michelle Hackman, *Deportations and Arrests of Immigrants in the U.S. Illegally Fall Sharply Under Biden*, WALL ST. J. (Apr. 4, 2021, 10:00 AM), https://www.wsj.com/articles/deportations-and-arrests-of-immigrants-in-the-u-s-illegally-fall-sharply-under-biden-11617544800 [https://perma.cc/X8SW-LVH6].

[5] *See* Molly O'Toole & Molly Hennessy-Fiske, *Biden Administration to Start Processing 'Remain in Mexico' Asylum Seekers in California*, L.A. TIMES (Feb. 11, 2021), https://www.latimes.com/politics/story/2021-02-11/biden-administration-to-process-asylum-seekers-in-california-forced-under-trump-to-remain-in-mexico [https://perma.cc/82AS-BX7S]. On June 1, 2021, DHS announced the formal termination of MPP. *See* Memorandum from Alejandro N. Mayorkas, Sec'y, Dep't of Homeland Sec., Termination of the Migrant Protection Protocols Program (June 1, 2021), https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf [https://perma.cc/G4WJ-JXQ2].

tion forms.[6] In litigation over controversial Trump-era policies such as the public charge rule (which sought to deny green cards to immigrants who received certain public benefits)[7] and the withholding of federal funds to sanctuary cities,[8] the Administration moved to dismiss the actions in light of anticipated policy changes.[9] During its first week, the Biden administration also announced its support for immigration legislation that would create mechanisms for millions of people who currently lack authorized status to establish pathways to permanent residence and U.S. citizenship.[10]

Immigrant communities and their allies expressed a mixture of cautious optimism and continued concern at the start of 2021. Despite President Biden's stated commitment to distinguishing himself from Trump on immigration, many policies remained in place during the first six months of the new President's term—perhaps due to the pace at which regulatory and administrative change can realistically take place, but perhaps also due to lack of political priority. For instance, the Biden administration continued to employ and defend the summary expulsion of families and adults seeking asylum at the United States–Mexico border pursuant to Title 42 of the United States Code. The Trump administration had justified Title 42 expulsions on public health grounds related to COVID-19, but the practice has come to signify the most recent iteration of the politicization of, and hostility towards, asylum seekers at the southern border.[11] The judiciary has slowed other immigration policy initiatives from the Biden administration. A significant early effort to exercise prosecutorial discretion, a 100-day moratorium

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[6] *See USCIS Confirms Elimination of "Blank Space" Criteria*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Apr. 1, 2021), https://www.uscis.gov/news/alerts/uscis-confirms-elimination-of-blank-space-criteria [https://perma.cc/Z48E-44S2].

[7] *See* Joseph Daval, *The Problem with Public Charge*, 130 YALE L.J. 998, 1004–05 (2021).

[8] *See generally* Peter Margulies, *Deconstructing "Sanctuary Cities": The Legality of Federal Grant Conditions that Require State and Local Cooperation on Immigration Enforcement*, 75 WASH. & LEE L. REV. 1507 (2018) (analyzing constitutional and statutory issues arising out of federal efforts to restrict sanctuary city funding).

[9] *See* Sophia Tareen & Jessica Gresko, *Biden Administration Won't Defend Trump Immigration Rule*, AP NEWS (Mar. 9, 2021), https://apnews.com/article/supreme-court-trump-immigration-case-db42f1db13f8f4f82befdbf880656a6e [https://perma.cc/WC3B-EHQ8]; Lawrence Hurley, *Biden Seeks Dismissal of 'Sanctuary' Funding Dispute at Supreme Court*, REUTERS (Mar. 4, 2021, 5:54 PM), https://www.reuters.com/article/us-usa-court-immigration/biden-seeks-dismissal-of-sanctuary-funding-dispute-at-supreme-court-idUSKCN2AW2WN [https://perma.cc/D7SU-FE3D].

[10] *See Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize our Immigration System*, BIDEN-HARRIS TRANSITION (Jan. 20, 2021), https://web.archive.org/web/20210120162259/https://buildbackbetter.gov/press-releases/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/ [https://perma.cc/84B8-PVM3]; *Statement by Joseph R. Biden, Jr. on Introduction of the U.S. Citizenship Act of 2021*, WHITE HOUSE (Feb. 18, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/18/statement-by-president-joseph-r-biden-jr-on-introduction-of-the-u-s-citizenship-act-of-2021/ [https://perma.cc/67JP-TD8H].

[11] *See* Molly O'Toole, *Biden Promised Change at the Border. He's Kept Trump's Title 42 Policy to Close It and Cut Off Asylum*, L.A. TIMES (Mar. 19, 2021, 5:12 PM), https://www.latimes.com/politics/story/2021-03-19/a-year-of-title-42-both-trump-and-biden-have-kept-the-border-closed-and-cut-off-asylum-access [https://perma.cc/U64H-BWBW].

on deportations, was enjoined by a federal court.[12] By August 2021, federal district courts in Texas had issued three nationwide injunctions prohibiting the Biden administration from moving forward with key immigration policy departures from Trump—restoring DACA, terminating MPP, and implementing enforcement priorities.[13] The Administration's management of migration at the southern border and the human rights emergency involving Central American countries (primarily El Salvador, Guatemala, and Honduras) requires continued attention. And despite President Biden's early support for comprehensive immigration reform in Congress, the viability of meaningful legislative options remains unclear.[14]

The Biden administration could approach its immigration policies not only through the lens of distinguishing itself from Trump or through the enactment of new laws and policies, but from a broader historical perspective that accounts for the growth of the modern deportation state. This perspective recognizes that the government's capacity to engage in immigration enforcement—especially detention and deportation—has grown steadily over time, and that scaling back the size and scope of the governmental infrastructure that has made mass detention and deportation possible is warranted. After all, funding for Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP), the two main federal agencies responsible for enforcing the immigration laws in the interior and at the border, exceeds that of any other law enforcement agency in the federal government.[15] In fiscal year 2019, ICE received $8.3 billion in funding, and

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[12] *See* Texas v. United States, No. 6-21-cv-00003, 2021 U.S. Dist. LEXIS 14116, at *2 (S.D. Tex. Jan. 26, 2021) (finding that State of Texas had standing due to likelihood of irreparable harm resulting from moratorium, and was likely to succeed on statutory and arbitrary and capricious claims); *see also* Anil Kalhan, *Immigration Enforcement, Strategic Entrenchment, and the Dead Hand of the Trump Presidency,* 2021 U. ILL. L. REV. ONLINE 46 (2021) (discussing moratorium and *Texas v. United States* litigation).

[13] *See* Texas v. United States, No. 1:18-cv-00068, 2021 WL 2033433 (S.D. Tex. July 16, 2021) (enjoining reinstatement of DACA); Texas v. Biden, No. 2:21-cv-067-Z, 2021 WL 3603341 (N.D. Tex. Aug. 13, 2021) (enjoining termination of MPP and ordering continued operation of program until certain conditions met); Texas v. United States, No. 6:21-cv-00016, 2021 WL 3683913 (S.D. Tex. Aug. 19, 2021) (enjoining implementation of Biden administration enforcement priorities).

[14] The House of Representatives passed the Dream and Promise Act in the spring of 2021, which is significantly narrower than the U.S. Citizenship Act set forth by the President with respect to both the categories of people eligible for legalization and the criminal bars to potential immigration relief. *See* Nicole Narea, *The House's Piecemeal Immigration Reform, Explained*, VOX (Mar. 18, 2021), https://www.vox.com/policy-and-politics/2021/3/12/22321668/house-immigration-reform-dream-promise-farm-worker [https://perma.cc/RFR2-R8E5]. In August 2021, the press reported that certain members of Congress were advocating for the inclusion of immigration provisions in the budget reconciliation bill. Rebecca Beitsch, *Budget Package Includes Pathway to Citizenship, Green Cards for Millions*, HILL (Aug. 9, 2021), https://thehill.com/policy/national-security/566964-budget-reconciliation-package-includes-pathway-to-citizenship.

[15] *See* Muzaffar Chishti & Jessica Bolter, *As #DefundThePolice Movement Gains Steam, Immigration Enforcement Spending and Practices Attract Scrutiny*, MIGRATION POL'Y INST. (June 25, 2020), https://www.migrationpolicy.org/article/defundthepolice-movement-gains-steam-immigration-enforcement-spending-and-practices-attract [https://perma.cc/3PTQ-XLUB].

CBP, $17.7 billion—for both agencies, resources nearly three times greater than received around the time of their creation in 2003.[16] Indeed, the federal government has spent a total of $333 billion on those agencies since 2003.[17] Increased funding has given rise to greater capacity. As of January 2021, the two agencies employ nearly 50,000 border and interior enforcement agents, reflecting increases of two- to three-fold since 2003.[18] Prior to 2003, the former federal agency the Immigration and Naturalization Service (INS) deported fewer than 40,000 people, but by FY 2019 ICE removed over 260,000—a more than four-fold increase.[19] The numbers of people detained each year by immigration authorities have likewise undergone exponential increases.[20]

Yet this growth in the deportation state has yielded troubling results. The dominant tools used by immigration enforcement—quasi-criminal measures like physical incarceration, with attendant costs leading to family separation, displacement, and distrust in government—have led to harms exacted upon immigrant communities, especially communities of color. More enforcement resources have not led to greater legal compliance. The agencies, in turn, have developed reputations for lawlessness, which have undermined their legitimacy. And the deportation state has played a strong role in perpetuating legacies of racial injustice and white supremacy in the United States.

This Article contends that an overarching goal for the Biden administration should be to reduce the overall size, scale, and support for the federal government's capacity to detain and deport. Such efforts necessarily involve confronting—and questioning—the substantive rules of immigration law dealing with who to admit, how to distribute benefits, the centrality of deportation in immigration enforcement, and how deportation takes place. The focus of this Article, however, is on questions that are adjacent to core immigration law rules, such as how and to what extent enforcement operations are resourced, how internal staffing and management of the immigra-

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[16] *See* AM. IMMIGR. COUNCIL, THE COST OF IMMIGR. ENFORCEMENT AND BORDER SECURITY 2–3, (Jan. 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_cost_of_immigration_enforcement_and_border_security.pdf [https://perma.cc/86XW-YMAC] (reporting that funding in FY 2003 was $3.3 billion for ICE, and $5.9 billion for CBP).

[17] *See id.* at 1.

[18] *See id.* (noting that number of border enforcement agents employed by CBP is nearly double that of FY 2003 levels, and almost triple in the case of ICE).

[19] *See* U.S. IMMIGR. & CUSTOMS ENF'T, FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 18–19, https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf [https://perma.cc/XKY2-FAC6]. In FY 2020, ICE reportedly conducted 185,884 removals, which the agency acknowledged was a thirty percent decrease, likely due to Title 42 expulsions at border. *ICE Statistics*, U.S. IMMIGR. & CUSTOMS ENF'T (2021), https://www.ice.gov/remove/statistics [https://perma.cc/C7P3-5AWZ].

[20] *See* Emily Kassie, *How Trump Inherited His Expanding Detention System*, MARSHALL PROJECT (Feb. 12, 2019, 3:45 PM), https://www.themarshallproject.org/2019/02/12/how-trump-inherited-his-expanding-detention-system [https://perma.cc/XB2Q-97RF] (showing roughly six-fold increase in numbers of people detained by federal immigration authorities per day from FY 1994 to 2019).

tion bureaucracy takes place, and how external relationships with entities outside the federal government help grow the potential reach of the deportation state. As part of this symposium on agency restructuring to advance progressive agendas, this Article contends that these questions warrant direct attention and concern. It highlights three key areas: first, the capacity of and funding for the administrative bureaucracy; second, the management of the civil servants and frontline agents, and third, the contracts, agreements and collaborations entered into by federal immigration agencies.

In doing so, this Article seeks to make two broader contributions to current immigration discourse. First, given the recognition that the executive branch has come to occupy a central—if not the most critical—role in shaping immigration policy, it encourages reform-minded scholars, policymakers and advocates to think about designing an immigration system that not only responds to the excesses of the Trump era, but also reduces the likelihood of a future President inheriting a maximally resourced deportation bureaucracy. Second, by focusing on aspects of the deportation state—funding, staffing, and contracts—that tend to evade significant public attention, this Article encourages critical examination of ways in which the deportation state might expand through mechanisms that are not immediately evident and that are prone to escaping accountability.

Part I of the Article provides a brief overview of the current state of immigration law and policy in early 2021, providing background on preceding administrations beginning with President William J. Clinton. Part II sets forth rationales for downsizing the deportation state, grounded in fairness, effectiveness, legitimacy, and racial justice considerations. Part III explores issues related to funding, supervision, and management of the front line as well as the subfederal and private relationships that arise out of the contemporary deportation state. The Article concludes with restrained optimism for the short term, and a call for sustained attention to the government's deportation capacity in the long term.

I. How We Got Here: The Expansion of the Deportation State

This Part highlights the expansion of the deportation state from the Clinton administration through Trump, with significant emphasis on the latter.[21] The discussion below advances two consistent but distinct points.

[21] For analysis of the Trump era, see Fatma Marouf, *Immigration Challenges of the Past Decade and Future Reforms*, 73 SMU L. Rev. F. 87 (2020) (describing immigration policies under Trump, emphasizing increased enforcement, expansions to immigration detention, dismantling of asylum and refugee systems, and rise of racism and white nationalism); Bill Ong Hing, *Entering the Trump Ice Age: Contextualizing the New Immigration Enforcement Regime*, 5 Tex. A&M L. Rev. 253, 257 (2018) (comparing immigration proposals issued by Trump administration to historical examples—including Reagan, Clinton, Bush, and Obama—and arguing that "when Trump Administration actions and proposals are juxtaposed with those of other eras, many similarities surface—and in some cases are harsher than what President Trump has proposed."); Jaclyn Kelley-Widmer, *Unseen Policies: Trump's Little-Known Immi-*

First, irrespective of differences in political party and in rhetoric about the value and contributions of immigrants in the U.S., each administration has nonetheless taken steps that bolster the federal government's detention and deportation capacity. Second, this Part understands the Trump administration's immigration policies as *both* a departure from *and* a continuation of past administrations. President Trump was unique in his zealous and steadfast commitment to undermining the benefits and protections available to immigrants, the use of unwaveringly negative rhetoric with respect to immigrants, and the eager enactment of immigration policies designed to maximize human suffering. But the former President's policies also benefited from the deportation bureaucracy created and expanded by his predecessors and cannot be understood as an aberration from past Presidents.

A. Setting the Stage: From Clinton to Obama

Explaining the rise of the deportation state calls for a special focus on the role of presidential administrations led by both political parties in recent decades, which set the stage for the Trump era's deployment of immigration power.[22] Despite the obvious differences amongst former Presidents Clinton, George W. Bush, and Barack Obama with respect to the traditional political spectrum, like the proverbial frog in warm water that slowly comes to a boil, the deportation state grew under each administration.

President Clinton held the U.S. Presidency at a time when the prevailing public sentiment was quick to assign blame to immigrants, recipients of public benefits, and—arguably most of all—the "criminal alien."[23] While campaigning for his second term in 1996, President Clinton signed into law two pieces of legislation that enacted extensive and lasting changes to the immigration laws designed to bring greater harshness to the statutory scheme, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), and Antiterrorism and Effective Death Penalty Act (AEDPA).[24] IIRIRA and AEDPA laid much of the foundation for immigration enforcement today. With respect to deportation power, IIRIRA and AEDPA expanded the classes of people subject to potential deportation (especially due

gration Rules as Executive Power Grab, 35 GEO. IMMIGR. L. J. 801 (2021) (detailing transformation of immigration system through executive policies "out of the public view").

[22] While the discussion here begins with President Clinton, the growth of the contemporary deportation state also predates the Clinton administration. *See* César Cuauhtémoc García Hernández, *Criminalizing Migration*, 150 DAEDALUS 106, 115 (2021) ("Across the last four decades in the United States, the ideological commitment to stigmatize migrants through the use of criminal law has enjoyed bipartisan support.").

[23] *See* Jennifer M. Chacon, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1844 (2007).

[24] As Clinton stated at the signing ceremony for IIRIRA, the bill "strengthens the rule of law by cracking down on illegal immigration at the border, in the workplace, and in the criminal justice system." Gerhard Peters & John T. Woolley, *William J. Clinton, Statement on Signing the Omnibus Consolidated Appropriations Act*, THE AMERICAN PRESIDENCY PROJECT (Sept. 30, 1996), https://www.presidency.ucsb.edu/node/221661 [https://perma.cc/T8V5-F9UX].

to prior convictions), restricted the ability to defend oneself from removal by imposing various bars to discretionary relief, and authorized the creation of deportation procedures that empowered front line agents to directly process certain kinds of removal orders.[25] The laws also laid the groundwork for the ballooning of immigration detention through the creation of large categories of people subject to mandatory detention,[26] and eliminated opportunities to challenge various immigration decisions and policies by restricting judicial review.[27] By making large numbers of people deportable while removing discretion from immigration judges to even consider possible defenses to removal and not providing opportunities for lawfully-sanctioned migration at the front end, the 1996 laws ultimately enhanced Presidential power over the immigration system. As Adam Cox and Cristina Rodriguez explain, a de facto delegation of immigration power to the President in the modern era has resulted.[28]

When President Bush took office in January 2001, he expressed support for comprehensive immigration reform and adopted language that was generally positive on immigration, consistent with the Republican Party at the time.[29] But the events of September 11, 2001, the resulting "War on Terror," and the conflation of national security with immigration enforcement led to significant shifts in the Bush administration's immigration policies.[30] The Bush administration oversaw the creation of the Department of Homeland Security (DHS) in 2002, which consolidated the enforcement functions of the former Immigration and Naturalization Service (INS) into the new agencies ICE and CBP, and placed immigration service and benefits functions within a separate agency, Citizenship and Immigration Services (US-

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[25] *See generally* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000) (discussing impact of IIRIRA and AEDPA); *see also* Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 270–73 (2012) (describing criminal grounds of removal, limitations on defenses to removal, and restrictions on judicial review); Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 191, 196–99 (2017) (describing effect of 1996 laws on expedited removal).

[26] *See* Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L.J. 363, 364–65 (2014).

[27] *See* Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1412 (1997).

[28] *See* ADAM B. COX & CRISTINA M. RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW 98–101, 127–29 (2020); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 510–11 (2009); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 108 (2015).

[29] *See* Don Gonyea, *The GOP's Evolution on Immigration*, NAT'L PUB. RADIO (Jan. 25, 2018), https://www.npr.org/2018/01/25/580222116/the-gops-evolution-on-immigration [https://perma.cc/W545-JEHJ].

[30] Politicians criticized the then-INS for its failure to detect the individuals responsible for the 9/11 attacks, several of whom were later found to have overstayed their visas. *See generally* Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81 (2005); Chacon, *supra* note 23; Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law"*, 29 N.C. J. INT'L L. & COM. REG. 639 (2004).

CIS). [31] President Bush continued to express support for legislative immigration reform (including the creation of pathways to citizenship for undocumented persons), and contended that "the vast majority" of undocumented immigrants "are decent people who work hard, support their families, practice their faith, and lead responsible lives."[32] But the former President also contended that "[i]llegal immigration . . . brings crime to our communities"[33] and oversaw a number of initiatives that maximized enforcement of the immigration laws.[34] For instance, the Bush administration enhanced resources for border and interior immigration enforcement, expanded the use of immigration detention, engaged in immigration raids in workplaces and homes, and increased collaborations with local law enforcement and the criminal justice system.[35] Ultimately, comprehensive immigration reform efforts in Congress failed in 2006 and 2007.[36] Funding for immigration enforcement nevertheless grew. From FY 2003 to FY 2008, the combined budgets of ICE and CBP increased from $9.2 billion to $15.4 billion.[37]

The election of President Barack Obama brought hope of positive change for immigrant communities. But the Obama administration began by vigorously pursuing immigration enforcement, as part of an aspirational and theoretical understanding that building a record of tough enforcement would persuade skeptical members of Congress to support comprehensive immigration reform.[38] However, Congress's ultimate refusal to move forward on immigration legislation left the Obama administration with record-high deportation numbers and a reputation as "Deporter-in-Chief" amongst immigration advocates—without the sought-after reform.[39] Recognizing the lack of legislative options, the use of prosecutorial discretion in immigration

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[31] *See* Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law,* 69 ADMIN. L. REV. 347, 379-80 (2017).

[32] *President George W. Bush, Address to the Nation on Immigration Reform*, GEORGE W. BUSH WHITE HOUSE ARCHIVES (May 15, 2006), https://georgewbush-whitehouse.archives.gov/news/releases/2006/05/20060515-8.html [https://perma.cc/Z4UA-LWR9].

[33] *Id.*

[34] DEP'T HOMELAND SEC., BUREAU OF IMMIG. & CUSTOMS ENF'T, ENDGAME: OFFICE OF DETENTION AND REMOVAL STRATEGIC PLAN, 2003 – 2012, DETENTION AND REMOVAL STRATEGY FOR A SECURE HOMELAND 1 (2012) http://cryptogon.com/docs/endgame.pdf [https://perma.cc/2XZD-ZZR3] ("We must strive for 100% removal rate.").

[35] *See* Miller, *supra* note 30; Chacon, *supra* note 23; Kanstroom, *supra* note 30.

[36] *See* RUTH ELLEN WASEM, CONG. RES. SERV., R42980, BRIEF HISTORY OF COMPREHENSIVE IMMIGRATION REFORM EFFORTS IN THE 109TH AND 110TH CONGRESSES TO INFORM POLICY DISCUSSIONS IN THE 113TH CONGRESS, (2013), https://fas.org/sgp/crs/homesec/R42980.pdf [https://perma.cc/SR6J-BSAD]. Legislatively, the REAL ID Act of 2005 introduced provisions to heighten evidentiary standards for asylum seekers to prevail in their claims. *See id.* at 2.

[37] *See* AM. IMMIGR. COUNCIL, *supra* note 16, at 3.

[38] *See* Kevin R. Johnson, *Lessons About the Future of Immigration Law from the Rise and Fall of DACA*, 52 U.C. DAVIS L. REV. 343, 349–50 (2018).

[39] RANDY CAPPS ET AL., REVVING UP THE DEPORTATION MACHINE: ENFORCEMENT UNDER TRUMP AND THE PUSHBACK 14 (2018) (noting that "[p]eak removals from the U.S. interior occurred during FY 2009-11 (exceeding 200,000 annually), while ICE arrests peaked at more than 300,000 each year during FY 2010-11.").

enforcement to shield certain groups of immigrants from deportation became one of the Obama administration's signature policies.[40] Many people benefitted from the embrace of prosecutorial discretion, most visibly (but not exclusively) from the creation of DACA. Reliance on executive-level discretion also highlighted the existence of at least two deeper problems in the deportation state and with the Administration's rhetoric. First, the Obama administration's efforts to inject a sense of proportionality and restraint were not welcomed at the front lines of the immigration enforcement agencies, thereby casting doubt on ICE and CBP's institutional capacity to value goals outside of enforcement.[41] Second, in an effort to convey that *some* immigrants deserved to be exempt from enforcement, the Obama administration communicated that *other* immigrants were legitimate targets for deportation—an ethos exemplified by President Obama's infamous assertion that deferred action be expanded to "families, not felons."[42]

Despite President Obama's efforts to achieve relief for immigrants short of legislative reform, the deportation capacity of the federal government continued to grow. ICE's collaboration with the criminal legal system, including state and local actors, was justified in part by the need to identify enforcement priorities.[43] Enforcement funding, deportations, and detention continued.[44] Using FY 2003 as a point of comparison, the combined budgets of ICE and CBP had more than doubled by the last full fiscal year of the Obama administration.[45]

B. Immigration in the Trump Era

The strong consensus amongst advocates for immigrants is that the Trump Presidency engaged in devastating and harmful policy and discourse that transformed various aspects of the immigration system. From 2017 to 2020, the federal government's commitment to criminalizing immigrants, ending asylum protections, eliminating avenues for lawful migration and entrenching racial hierarchy were sustained and unrelenting. Efforts to track each policy action have yielded abundant counts. Researchers at the Migra-

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[40] *See generally* Johnson, *supra* note 38.

[41] *See, e.g.*, Chen, *supra* note 31, at 385–87; Stephen Lee & Sameer M. Ashar, *DACA, Government Lawyers, and the Public Interest*, 87 FORDHAM L. REV. 1879, 1880–81, 1892 (2019); Michael Kagan, *Binding the Enforcers: The Administrative Law Struggle Behind Pres. Obama's Immigration Actions*, 50 U. RICH. L. REV. 665, 685 (2016).

[42] *Remarks by the President in Address to the Nation on Immigration*, OBAMA WHITE HOUSE ARCHIVES (Nov. 20, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration [https://perma.cc/73J6-N32J].

[43] *See* AM. IMMIGR. COUNCIL, THE CRIMINAL ALIEN PROGRAM (CAP): IMMIGRATION ENFORCEMENT IN PRISONS AND JAILS 1 (2013), https://www.americanimmigrationcouncil.org/sites/default/files/research/cap_fact_sheet_8-1_fin_0.pdf [https://perma.cc/8CKL-CE5X] (describing information-sharing program that "extends to every area of the country and intersects with most state and local law enforcement agencies").

[44] *See* AM. IMMIGR. COUNCIL, *supra* note 16, at 3 (showing combined ICE and CBP budget for FY 2009 as $17.2 billion, and for FY 2016 as $19.2 billion).

[45] *See id.* (showing combined ICE and CBP budget for FY 2003 as $9.2 billion, and for FY 2016 as $19.2 billion).

tion Policy Institute identified over four hundred immigration-related executive actions from the start of 2017 through the summer of 2020.[46] The Immigration Policy Tracking Project, developed by Lucas Guttentag with support from Yale Law School and Stanford Law School, contains over 1,000 entries documenting every immigration policy, from nearly every corner of the immigration system, beginning in January 2017 through the inauguration of President Biden in January 2021.[47]

The changes wrought by Trump immigration policies have been significant at every level, from the granular day-to-day operation of the immigration bureaucracy to the broader aims and structure of the immigration agencies. The Trump administration sought to weaken the benefits-granting side of the immigration state, for instance by severely curtailing the availability of asylum for individuals persecuted in their home countries through an array of changes affecting policies and practices at the border and within the U.S.[48] The adjudication of immigration benefits available for noncitizens in the U.S.—opportunities to seek lawful permanent residence, citizenship applications, and even work permits—stalled or became subject to new rules.[49] Through multiple executive-level bans, the former President restricted the availability of visas for individuals seeking permission to enter the U.S. from their countries.[50] The Trump administration also took numerous steps to bolster USCIS's enforcement work while minimizing its service-oriented mission,[51] such as through the referral of benefits applications to ICE and growing its fraud and denaturalization units.[52]

When it comes to immigration enforcement, the administrative state continued to grow under Trump. Although prior administrations expanded detention and deportation capacity, those practices in the Trump era were more indiscriminate due to the lack of enforcement priorities, at times more

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[46] *See generally* Sarah Pierce & Jessica Bolter, *Dismantling and Reconstructing the U.S. Immigration System: A Catalog of Changes under the Trump Presidency*, MIGRATION POL'Y INST. (2020), https://www.migrationpolicy.org/research/us-immigration-system-changes-trump-presidency [https://perma.cc/L7G3-4XGX].

[47] *See* IMMIGRATION POLICY TRACKING PROJECT, https://immpolicytracking.org [https://perma.cc/4SG6-VFA7].

[48] *See* Lindsay M. Harris, *Asylum Under Attack*, 67 LOYOLA L. REV. 1, 7–19 (2020).

[49] *See, e.g.*, Stuart Anderson, *USCIS Immigration Delays Grow Longer and Longer*, FORBES (Jan. 31, 2019, 12:12 AM), https://www.forbes.com/sites/stuartanderson/2019/01/31/uscis-immigration-delays-grow-longer-and-longer/?sh=115a802a2254 [https://perma.cc/MAX2-97EJ].

[50] *See, e.g.*, Proclamation No. 10014, 85 Fed. Reg. 23441 (Apr. 22, 2020); Proclamation No. 10052, 85 Fed. Reg. 38263 (June 25, 2020).

[51] *See* Beth K. Zilberman, The Institutional Design of Immigration Enforcement 33–35 (April 2021) (unpublished manuscript) (on file with author).

[52] *See* Cassandra Burke Robertson & Irina D. Manta, *(Un)Civil Denaturalization*, 94 N.Y.U. L. REV. 402, 409–14 (2019); Debra Cassens Weiss, *Justice Department Creates Unit to Denaturalize Citizens Who Didn't Disclose Crimes,* ABA J. (Feb. 27, 2020, 11:54 AM), https://www.abajournal.com/news/article/justice-department-creates-standalone-unit-to-denaturalize-citizens-who-didnt-disclose-crimes [https://perma.cc/F29R-SFFF].

spectacular in cruelty,[53] and other times hidden far from public view until whistleblowers and advocates intervened.[54] ICE agents pursued arrests to the fullest extent permitted under the federal statutes, with explicit instructions from the President and agency heads to treat any immigrant believed to have violated the immigration laws as a priority for deportation.[55] The Attorney General undermined and politicized the already-fragile decisional independence of the immigration courts and Board of Immigration Appeals (BIA).[56] A range of substantive and procedural interpretations of the law—particularly through the frequent use of the Attorney General's power to certify BIA decisions and issue precedential decisions that reflected the President's immigration policy agenda—narrowed opportunities for people to seek relief from removal.[57] ICE subjected nearly all arrested immigrants to detention, and over time expanded its reliance on a web of jail facilities that spanned private ownership, state and local jails, and federal facilities.[58] In addition to ICE, which is tasked with the civil deportation system, the Department of Justice directed federal criminal prosecutors to deploy their authority to criminally prosecute individuals for immigration violations to the maximum levels possible.[59] During this time period, funding for ICE and CBP operations continued to grow despite public outcry regarding multiple policies—family separation, the detention of children, MPP, to name a few—that seemed designed to inflict cruelty and break the spirits of immigrant communities. Indeed, from FY 2017 to FY 2021, combined funding for the two agencies jumped from $20.1 billion to $26 billion.[60]

State and local governments facilitated mixed outcomes with respect to the growth of the deportation state. States and localities in immigrant-friendly jurisdictions enacted a wide array of legislation, policies and prac-

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[53] *See, e.g.,* Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2363–9 (2019) (discussing family separation as a "spectacular" act of violence but arguing that family separation is fundamental to multiple components of U.S. immigration system).

[54] *See, e.g.,* Rachel Treisman, *Whistleblower Alleges 'Medical Neglect,' Questionable Hysterectomies of ICE Detainees,* NAT'L PUB. RADIO (Sept. 16, 2020, 4:43 AM), https://www.npr.org/2020/09/16/913398383/whistleblower-alleges-medical-neglect-questionable-hysterectomies-of-ice-detaine [https://perma.cc/L9JZ-HSCT].

[55] *See* SHOBA SIVAPRASAD WADHIA, BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP 30–38 (2019).

[56] *See* Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control Over Immigration Adjudication*, 108 GEO. L.J. 579, 584–85 (2020); INNOVATION LAW LAB & S. POVERTY LAW CTR., THE ATTORNEY GENERAL'S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL 7 (2019), https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf [https://perma.cc/CVC8-HBLL].

[57] *See* Kim Bellware, *On immigration, Attorney General Barr Is His Own Supreme Court. Judges and Lawyers Say That's a Problem*, WASH. POST (Mar. 5, 2020, 9:51 AM), https://www.washingtonpost.com/immigration/2020/03/05/william-barr-certification-power/ [https://perma.cc/T2JJ-7CH6].

[58] *See* Marouf, *supra* note 21, at 95–96.

[59] *See* Ingrid V. Eagly, *The Movement to Decriminalize Border Crossing,* 61 B.C. L. REV. 1967, 1977–91 (2020) (discussing adoption of "zero tolerance" approach to criminal prosecution of immigration offenses at border under Trump Administration).

[60] *See* AM. IMMIGR. COUNCIL, *supra* note 16.

tices designed to stymie the federal government's deportation goals.[61] These resistance efforts led to lower levels of enforcement in some areas of the U.S.[62] But the Trump administration sought to retaliate against jurisdictions that enacted sanctuary and other local policies aimed at protecting immigrants, for instance by threatening jurisdictions with the elimination of federal funding as well as enhancing targeted enforcement efforts.[63] On the flip side, other states and localities enacted "anti-sanctuary" policies or undertook actions to enhance the strength of federal immigration enforcement.[64]

The federal government has bolstered its deportation capacity by expanding its contracts with private technology companies to increase surveillance of immigrant communities, thereby extending and automating the deportation state's reach. The use of information technology throughout immigration governance pre-dates the Trump administration.[65] Under Trump, ICE deployed technologies that allowed it to purchase data mined from an increasing number of facets of everyday life—utility company profiles, facial recognition, and license plate scanners, by way of example—thereby enabling it to seek enforcement against a broader range of noncitizens.[66]

Along the way, the erosion of basic democratic and rule of law norms has taken place.[67] The subversion of constitutional and statutory requirements regarding the appointment of agency heads led to the existence of

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[61] *See* Rose Cuison Villazor & Pratheepan Gulasekaram, *Sanctuary Networks*, 103 MINN. L. REV. 1209, 1225–50 (2019) (describing broad range of sanctuary-type practices and policies in public and private sectors); *see also* Christopher N. Lasch, R. Linus Chan, Ingrid V. Eagly, Dina Francesca Haynes, Annie Lai, Elizabeth M. McCormick & Juliet P. Stumpf, *Understanding "Sanctuary Cities,"* 59 B.C. L. REV. 1703, 1736–51 (2018) (tracing range of policies enacted at the local level); Huyen Pham & Pham Hoang Van, *Subfederal Immigration Regulation and the Trump Effect,* 94 N.Y.U. L. REV. 125, 129–31 (2019) (presenting empirical analysis of local and state responses to Trump-era immigration policies and finding strong trend of enacting pro-immigrant policies).

[62] *See* Hamed Aleaziz, *How ICE Became the Face of Trump's Immigration Crackdown and Where It Goes from Here After Biden Is in Charge*, BUZZFEED (Dec. 7, 2020, 12:48 PM), https://www.buzzfeednews.com/article/hamedaleaziz/trump-ice-biden-future [https://perma.cc/9GYB-GW28].

[63] *See, e.g.,* Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (purporting to eliminate federal funding for sanctuary cities); Caitlin Dickerson & Zolan Kanno-Youngs, *Border Patrol Will Deploy Elite Tactical Agents to Sanctuary Cities*, N.Y. TIMES (Feb. 14, 2020), https://www.nytimes.com/2020/02/14/us/Border-Patrol-ICE-Sanctuary-Cities.html [https://perma.cc/65LG-B2DR].

[64] *See generally* Pratheepan Gulasekaram, Rick Su & Rose Cuison Villazor, *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837 (2019) (examining emergence, and implications, of subfederal laws seeking to compel local government compliance with federal immigration authorities).

[65] *See generally* Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1 (2014).

[66] *See* McKenzie Funk, *How ICE Picks Its Targets in the Surveillance Age*, N.Y. TIMES MAG. (Oct. 2, 2019), https://www.nytimes.com/2019/10/02/magazine/ice-surveillance-deportation.html [https://perma.cc/Q89J-2FPD]; Alvaro M. Bedoya, *The Cruel New Era of Data-Driven Deportation*, SLATE (Sept. 22, 2020, 1:40 PM), https://slate.com/technology/2020/09/palantir-ice-deportation-immigrant-surveillance-big-data.html [https://perma.cc/J94D-Z2PT].

[67] *See* ANIL KALHAN, AM. CONST. SOC'Y, BUILDING IMMIGRATION POLICY BACK BETTER 4, (2020), https://www.acslaw.org/wp-content/uploads/2021/01/Kalhan_Whats-the-Big-Idea-Book-2020-26-31.pdf [https://perma.cc/927H-5L24].

strings of acting officials purporting to carry out the duties of agency leadership.[68] In some cases, the courts intervened to invalidate policy actions taken by invalidly appointed agency heads,[69] highlighting the ways in which the legitimacy of agency leadership has been undermined by those appointments. Another area that has subverted rule of law norms involves the relationship between the executive and the courts. Immigration agencies under the Trump administration repeatedly defied the authority of the federal courts, for instance, by deporting people despite federal court orders staying deportation.[70] As I have explored elsewhere, the executive's outright defiance of the judiciary in the deportation context is a byproduct of the legal framework, institutional design, and bureaucratic conditions that have empowered various components of the deportation state to disregard the rule of law and judicial authority.[71]

II. Questioning the Deportation State

Given the extent to which immigration policy was prioritized during the Trump era, it is both necessary—and consistent with Biden's campaign goals—for the Biden administration to distinguish itself from and reverse the actions of its predecessor. Still, the Biden administration should approach immigration not only in response to Trump, but also with attention to the impact of its practices and policies on successive administrations. While every Presidential election introduces opportunities for change, the executive's deportation power has an accumulating effect, such that as one administration consolidates power to detain and deport in the hands of the executive, that power transfers to the next administration. To that end, the Biden administration should seek to downsize the deportation state. This Part briefly discusses the policy and normative justifications for doing so, grounded in practical fairness, effectiveness, rule of law, and racial hierarchy.

The deportation bureaucracy has evolved into a regime that wields disproportionate levels of power over its subjects, and its operative realities raise extensive fairness concerns. Despite the courts' longstanding treatment of

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[68] *See* U.S. Gov't Accountability Off., B-331650, Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland Security (2020), https://www.gao.gov/products/b-331650 [https://perma.cc/XX55-25LP].

[69] *See, e.g.*, Batalla Vidal v. Wolf, 501 F. Supp. 3d 117 (E.D.N.Y. 2020) (finding that then-Acting Secretary of Homeland Security Chad Wolf had not been lawfully serving in role and on that basis invalidating Wolf memorandum seeking to suspend DACA pending DHS review of program).

[70] *See* Jennifer Lee Koh, *Executive Defiance and the Deportation State*, 130 Yale L.J. 948, 966–82 (2021) (describing defiance by ICE officials responsible for executing deportations in violation of federal court orders, and by Board of Immigration Appeals for failure to follow federal court remands).

[71] *See generally id.*

deportation as a civil sanction that does not rise to the level of punishment,[72] treating deportation as the only consequence of an immigration law violation fails to reflect a basic level of proportionality justified under the law, as numerous scholars have argued.[73] The government's power to incarcerate people goes hand in hand with the deportation power, given that the statute authorizes ICE to detain anyone charged with possible removal, and deprives broad categories of noncitizens from bond hearings before immigration judges under the mandatory detention statutes.[74] Relatedly, the harms exacted by deportation—family separation, loss of community, loss of home—far outweigh its benefits. Indeed, Angélica Cházaro's normative critique of deportation's legitimacy contends that violence lies at the heart of deportation and practice, both with respect to the process itself (which involves the physical seizure and displacement of persons) and with respect to its consequences on the lives of people impacted by deportation.[75]

The system's reliance on incarceration, including private prisons, facilitates the exercise of state power and abuse over people in ICE's custody and adds a structural layer of unfairness to its impact on immigrant communities and individuals. As César Cuauhtémoc García Hernández's work calling for the abolition of immigration detention shows, an elaborate web of immigration detention centers ultimately dehumanizes immigrants; treats them as commodities to maximize the wealth of for-profit prisons, local officials and others; and operates through an intentional pattern of stigmatization and segregation of migrant bodies.[76] However, the harms of deportation and detention are not limited to the physical removal and caging of immigrant bodies. Moreover, Eisha Jain has detailed how deportation reflects only a portion of a far more extensive framework—"the tip of a much larger enforcement pyramid"—that enhances immigrant vulnerability in a host of everyday interactions (including but not limited to police and employers).[77]

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[72] *See generally* Fong Yue Ting v. United States, 149 U.S. 698 (1893); *cf.* Padilla v. Kentucky, 559 U.S. 356, 364 (2010) (describing deportation as "an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes").

[73] *See, e.g.*, Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1688–89 (2009); Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 417–18 (2012); Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 EMORY L. J. 1243, 1245–48 (2013); Jason A. Cade, *Judging Immigration Equity: Deportation and Proportionality in the Supreme Court*, 50 U.C. DAVIS L. REV. 1029, 1035 (2017).

[74] *See, e.g.*, 8 U.S.C. §1226(a) (authorizing detention "pending a decision on whether the alien is to be removed from the United States"); 8 U.S.C. §1266(c) (mandating detention for noncitizens with certain prior convictions).

[75] *See* Angélica Cházaro, *The End of Deportation*, UCLA L. REV. (forthcoming 2021).

[76] *See* César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons,* 97 B.U. L. REV. 245, 249–51 (2017); *see also* CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS (2019).

[77] *See* Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463, 1473 (2019).

Taking fairness considerations seriously leads to questioning whether ICE and CBP's core enforcement work—the work of detention and deportation—should continue in its present form. Rather than treat deportation as the default sanction, various scholars have expressed support for intermediate sanctions that fall short of deportation, such as penalties, fines, or waiting times.[78] Along those lines, Peter Markowitz calls for "optimal enforcement scaling," which involves questioning current political commitments to ensuring an enforcement response to every violation.[79] Regarding detention, various commentators have urged treating immigration detention as the exception, rather than the norm.[80]

Assuming that the tools of enforcement (here, detention and deportation) exist not only for the sake of enforcement (detaining and deporting), but for the purpose of encouraging compliance with the law, then the very effectiveness of the government's current enforcement approach is also questionable.[81] As Professor Markowitz points out, despite the growth of ICE and CBP, rates of compliance with the immigration laws have not actually increased. Indeed, since the creation of those agencies, the total population of unauthorized immigrants has expanded by more than seventy percent.[82] Some may contend that growth in the undocumented population or unauthorized border crossings mean that the agencies ought to engage in more, not less, enforcement. But a reflexive insistence on more enforcement overlooks the alternative possibility of the government engaging its resources to

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[78] *See, e.g.*, Eagly, *supra* note 59, at 2024–27 (discussing immigration scholarship supporting intermediate sanctions other than deportation, citing to Adam Cox, Michael Wishnie, Juliet Stumpf, and Allison Tirres).

[79] Peter L. Markowitz, *After ICE: A New Humane & Effective Immigration Enforcement Paradigm*, 55 WAKE FOREST L. REV. 89, 133–36 (2020) [hereinafter Markowitz, *After ICE*]; *see also* Peter L. Markowitz, *Abolish ICE . . . and Then What?*, 129 YALE L.J. FORUM 130 (2019) [hereinafter Markowitz, *Abolish ICE*].

[80] *See, e.g.*, ALINA DAS, NO JUSTICE IN THE SHADOWS: HOW AMERICA CRIMINALIZES IMMIGRANTS 204 (2020) (asserting that discrete immigration enforcement reforms "are just placeholders until we can achieve the real goal: the abolition of immigration imprisonment"); Margo Schlanger, *The President and Immigration Law Series: The Urgent Need to Shrink Immigration Detention,* JUST SECURITY (Oct. 13, 2020), https://www.justsecurity.org/72821/the-president-and-immigration-law-series-the-urgent-need-to-shrink-immigration-detention/ [https://perma.cc/SH5X-S6HM] (arguing in favor of "dramatically shrink[ing] immigration detention"). For an earlier discussion of detention abolition, see Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 58 (2010) (suggesting "a more fundamental reconsideration of immigration control policies premised upon convergence with criminal enforcement").

[81] As Professor Markowitz puts it, "detentions and deportations are means, not ends," meaning that "[j]ust as the goal of criminal justice systems is to reduce crime rates, not to maximize incarceration, policymakers must judge the effectiveness of America's immigration enforcement system on the ultimate measure that matters: compliance with immigration law." Peter L. Markowitz, *A New Paradigm for Humane and Effective Enforcement*, CTR. FOR AM. PROGRESS (Nov. 30, 2020, 9:00 AM), https://www.americanprogress.org/issues/immigration/reports/2020/11/30/493173/new-paradigm-humane-effective-immigration-enforcement/ [https://perma.cc/4HU4-88TG].

[82] *See* Markowitz, *After ICE*, *supra* note 79, at 105.

facilitate compliance with the immigration laws.[83] Doing so would better meet the challenges of the immigration system and, as Amanda Frost has detailed, are consistent with cooperative enforcement efforts taking place in other areas of administrative law, such as occupational health, environmental, securities, and food and drug safety, in which federal agencies take steps to encourage regulated entities to comply with the law rather than resorting first to the most drastic sanctions available under the law.[84]

In addition to fairness and effectiveness concerns, ICE and CBP have developed strong reputations as rogue agencies, such that fueling their expansion raises serious rule of law and legitimacy concerns. Much public outcry has resulted from the abusive and coercive tactics employed by the deportation state. The agencies have also demonstrated a steady failure to follow their own rules, much less constitutional standards.[85] Trump promised to "take the shackles off" of immigration agents,[86] a policy choice that led to a radicalization of the front line—what Hiroshi Motomura describes as "rogue by design."[87] In the case of CBP, border agents suffer from the highest rates of alleged misconduct than any other federal law enforcement agency, and various commentators have described its institutional culture as lawless and militarized.[88] The perceptions of illegitimacy associated with those agencies in turn weakens confidence in the government and rule of law in the United States, particularly amongst immigrants.[89]

The legal framework developed by the courts and Congress facilitates the tremendous power exercised by the deportation state's front line, which it exercises with little accountability. CBP and ICE agents have the power to issue removal orders directly against certain immigrants: individuals apprehended at or near the border (through expedited removal), those who re-

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[83] *See also* Amanda Frost, *Cooperative Enforcement in Immigration Law,* 103 IOWA L. REV. 1, 3 (2017) (arguing for cooperative enforcement approaches, in which "government officials would proactively assist a subset of unauthorized immigrants come into compliance with the law").

[84] *See* Markowitz, *Abolish ICE*, *supra* note 79, at 137–38; Frost, *supra* note 83, at 3–4.

[85] *See* Markowitz, *After ICE*, *supra* note 79, at 104 (observing that "ICE has also amassed a notorious record of lies and racism").

[86] C-SPAN, White House Daily Briefing (Feb. 21, 2017), https://www.c-span.org/video/?424360-1/sean-spicer-briefs-reporters-white-house [https://perma.cc/87SC-6DLB] ("The President wanted to take the shackles off individuals in these agencies," referring to ICE and CBP); *see also* Nicholas Kulish, Caitlin Dickerson & Ron Nixon, *Immigration Agents Discover New Freedom to Deport Under Trump,* N.Y. TIMES (Feb. 25, 2017) (describing ICE officers as "newly emboldened, newly empowered and already getting to work" in contrast to restraints imposed by Obama-era deportation priorities).

[87] Hiroshi Motomura, *Arguing About Sanctuary*, 52 U.C. DAVIS L. REV. 435, 457 (2018).

[88] *See* Garrett M. Graff, The *Green Monster: How the Border Patrol Became America's Most Out-of-Control Law Enforcement Agency*, POLITICO MAG. (Nov. 2014), https://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220 [https://perma.cc/4VF5-4JUM]; Garrett M. Graff, *The Border Patrol Hits a Breaking Point*, POLITICO MAG. (July 15, 2019), https://www.politico.com/magazine/story/2019/07/15/border-patrol-trump-administration-227357 [https://perma.cc/S9Z5-BHJ3].

[89] *See* Kari Hong, *10 Reasons Why Congress Should Defund ICE's Deportation Force*, 43 N.Y.U. REV. L. & SOC. CHANGE: HARBINGER 40, 41–42 (2019).

entered after a prior removal (through reinstatement), and non-lawful permanent residents with aggravated felony convictions (through administrative removal).[90] These orders constitute the vast majority of all removals issued by the federal government.[91] ICE agents make decisions about who to arrest, who to process for removal, and who to detain. In certain respects, they exert control over the conditions of detention.[92] They communicate with noncitizens about the law and legal options. But in their work, they encounter few constraints, whether from federal courts, immigration judges, agency lawyers, or even professional rules of conduct.[93] Allegations of racism directly from the rank-and-file of the deportation agencies are extensive. Nonetheless, the Supreme Court has decreased ICE and CBP agent accountability, holding that monetary damages under *Bivens* are unavailable against CBP agents even in the case of shooting and death,[94] and insulating expedited removal from judicial review.[95] Certainly, specific statutes that empower the front line, such as expedited removal, are ripe for attention.[96] But in the absence of deep revision from the courts and legislature, the case for diluting the size and scope of the front line is strong.

Finally, critiques of the present-day deportation state are inseparable from concerns about the perpetuation of racial insubordination. The overwhelming percentage of persons directly impacted by the deportation state are Latinx.[97] And Black immigrants, in particular, comprise a disproportionate number of immigrants facing deportation, reflecting an entrenchment of anti-blackness associated with the criminal legal system.[98] The criminal grounds of deportation as well as the deportation state's long-standing reliance on various points of entry to the criminal legal system—law enforcement stops, arrests, and probation for instance—contribute to this state of

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[90] *See generally* Koh, *supra* note 25 (describing use of procedures that enable front line officers to directly issue removal orders with minimal or no administrative and judicial review).

[91] *See id.*

[92] *See* Koh, *supra* note 70, at 961–62.

[93] *See, e.g.*, Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. Rev. 475, 512–15 (2013) (describing informal communications, including scripts used by ICE officers, to encourage detained noncitizens to agree to entry of stipulated removal orders).

[94] *See* Hernandez v. Mesa, 140 S. Ct. 735, 739 (2020); *see also Constitutional Remedies – Bivens Actions – Search and Seizure – Hernandez v. Mesa*, 134 Harv. L. Rev. 550, 550 ("*Hernandez* ultimately serves as another illustration of the Court's failure to hold rogue government officials accountable for constitutional violations.").

[95] *See* Koh, *supra* note 70, at 957–58 (discussing implications of judicial review over expedited removal in light of Supreme Court's decision in *DHS v. Thuraissigiam*, 140 S. Ct. 1959 (2020)).

[96] *See id.*

[97] *See, e.g.*, Yolanda Vazquez, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, 76 Ohio St. L. J. 599, 602–04 (2015).

[98] *See* Black Alliance for Just Immigration & NYU Immigrant Rights Clinic, The State of Black Immigrants, Part II: Black Immigrants in the Mass Criminalization System, http://baji.org/wp-content/uploads/2020/03/sobi-fullreport-jan22.pdf [https://perma.cc/AHN9-PJQH].

affairs.[99] Racial insubordination has been central to the deployment of immigration detention and deportation throughout history as well as in the modern era.[100] Increasingly, the immigrants' rights movement has linked its vision for change with grassroots calls for racial justice and criminal law reform, which includes calls to reduce the government's power to detain and deport.[101]

III. Long-Term Shifts for the Future

In this Part, I identify three core areas that might facilitate a downsizing of the deportation state. The discussion focuses on agency resources, management, and internal and external relationships. By restructuring the immigration bureaucracy to lessen the focus on detention and deportation, the agencies might be better positioned to engage in compliance-oriented, humanitarian work necessitated by migration realities and challenges.

A. Funding

Calls to defund ICE and CBP have increasingly moved to the forefront of the immigrants' rights movement, and for good reason. Movement-based proposals for defunding are typically linked to long-term goals of abolishing the agencies altogether; however, even with abolition unlikely to take place in the near future, a deeper consideration of the degree of funding allocated to deportation is in order. The growth of Congressional funding for immigration enforcement through budgetary allocations for ICE and CBP over roughly the past two decades has been extraordinary.[102] Every year, DHS has justified its funding proposals to Congress by emphasizing the need to protect the country and maintain public safety (including from threats from unidentified "enemies").[103] Although DHS is comprised of twenty-nine different agencies, ICE and CBP alone received nearly thirty percent of DHS's budget allocation in fiscal year 2020.[104] As discussed in Part I, the accumulation of funding for ICE and CBP took place over time, and back-

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[99] *See* Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. Davis L. Rev. 171, 173 (2018); Eisha Jain, *Arrests as Regulation*, 67 Stan. L. Rev. 809, 825 (2015).

[100] *See* García Hernández, *supra* note 76, at 247–48.

[101] *See generally* Kevin R. Johnson, *Bringing Racial Justice to Immigration Law*, 116 Nw. U. L. Rev. Online 1 (2021) (arguing for recognition "that the movement for justice for noncitizens of color shares important commonalities with the goals of the Black Lives Matter movement").

[102] *See generally* Am. Immigr. Council, *supra* note 16.

[103] *See* U.S. Immigr. & Customs Enf't, FY 2019 Budget in Brief 1 (2019), https://www.dhs.gov/sites/default/files/publications/DHS%20BIB%202019.pdf [https://perma.cc/YCA8-QPVY] ("Our great Nation has always been shielded from threats by distance and by two oceans, but we can no longer have confidence in that protection; threats exist both outside and inside our borders. Our enemies are adapting rapidly and plotting against us at an alarming rate.").

[104] *See* Chishti & Bolter, *supra* note 15.

ward-looking assessments of those agencies show funding increases steadily taking place.[105] The most significant expenses appear to be operational expenses and officer salaries, the latter fueled by expansions in hiring at the front line agent level.[106]

Congress has periodically chosen to hinge funding on specific purposes and outcomes, at times at devastating human cost. Under the bed funding mandate in place from 2010 to 2017, for instance, Congress made DHS's funding contingent upon ICE maintaining a certain number of detention beds per day (initially set at 33,400), which fueled a rise in the incarceration of individuals.[107] Even where funding increases appear designed to meet humanitarian challenges, mismanagement has resulted, thereby leading to a concern that the deportation state is ill-equipped to justify the simultaneous acquisition of resources for humanitarian goals while maintaining an agency culture that is overwhelmingly focused on enforcement. In 2019, for instance, Congress allocated funds to CBP for families and children at the border, but government reports a year later revealed that the agency had misspent the funds on dirt bikes, canine supplies, and surveillance systems.[108]

One might posit that funding allocations are a byproduct of the broader immigration law framework in place, such that substantive reforms will naturally lead to a gradual defunding of the immigration enforcement agencies. To some extent, this may be true—but not entirely. If large-scale legalization takes place, then significant numbers of persons otherwise subject to enforcement action would indeed become eligible to gain status. With fewer people subject to enforcement, then the justification for deportation and detention may diminish. But the experience of the Obama administration suggests that exempting a subset of the immigrant population from the prospect of deportation will not necessarily temper the deportation state.[109] In large part, this was the result of the Obama administration's hesitation towards questioning the legitimacy of deportation and detention altogether and its

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[105] *See id.* (noting a nearly tripling of ICE and CBP budget since the founding of DHS in 2002).

[106] *See* Daniel Bush, *The Challenges Biden Will Face on Immigration Reform*, PBS NEWS HOUR (Dec. 2, 2020, 5:00 PM), https://www.pbs.org/newshour/nation/the-challenges-biden-will-face-on-immigration-reform [https://perma.cc/9BMB-S3LX] (reporting that in FY 2020, 85 percent of CBP's "14.9 billion pot of discretionary spending went to salaries and expenses," and that "nearly all of [ICE]'s $8 billion discretionary spending in fiscal year 2020 went to staff salaries and other expenses associated with running the agency"); *see also* Chishti & Bolter, *supra* note 16 (noting that CBP, with a total staff of more than 60,000, boasts 44,000 "armed, sworn law enforcement officers"—the largest number of all federal agents, and that "ICE's workforce of more than 20,000 includes 13,300 law enforcement officers.").

[107] *See* Anita Sinha, *Arbitrary Detention? The Immigration Detention Bed Quota*, 12 DUKE J. CONST'L. L. & PUB. POL'Y 77, 86–88 (2017) (describing origins of detention bed quota).

[108] *See* David Welna, *Government Watchdog Says Aid for Migrants Misspent by Border Agency*, NAT'L PUB. RADIO (July 15, 2020, 8:30 PM), https://www.npr.org/2020/07/15/891636652/government-watchdog-says-aid-for-migrants-misspent-by-border-agency [https://perma.cc/9XCY-F2PW].

[109] *See* Marisa Franco & Carlos Garcia, *The Deportation Machine Obama Built for President Trump*, THE NATION (June 27, 2016), https://www.thenation.com/article/archive/the-deportation-machine-obama-built-for-president-trump/ [https://perma.cc/RL5G-F69E] (describing growth in immigration enforcement funding under Obama).

justification that enforcement priorities enabled it to focus on persons with serious criminal records, exemplified by the "families, not felons" logic.[110] And as Professor Chazaro has argued, efforts that focus primarily on legalization for some suffer from the problem of exacerbating the conditions of illegality for others.[111] For those who may not qualify for legalization due to encounters with the criminal legal system or because they otherwise lack the qualities deemed necessary for such relief, the dangers associated with the deportation state continue.[112]

Thus, even in the event that immigration reform legislation takes place in the early years of the Biden Presidency, funding decisions nonetheless warrant close interrogation. The process of setting an agency's budget is an opaque process to much of the public, and involves Congress, the President, and the agencies. Congress possesses the classic power of the purse over agency funding.[113] Congressional committees evaluate agency funding proposals and must approve final agency budgets through annual appropriations bills.[114] However, negotiations over a particular budget begin long before the President submits it to Congress for committee hearings and voting. The Office of Management and Budget (OMB) is a central player in receiving budget proposals from administrative agencies across the federal government; those agencies must justify their funding requests in detailed reports. The President can inject the administration's policy preferences during the OMB review process.[115] The President can, for instance, work through the appropriations process to redesignate funding streams devoted to immigration detention to other purposes—a maneuver that may have particular impact on private prisons, whose contracts depend on the existence of Congressional funding.[116]

Funding considerations may also affect the capacity of the immigration bureaucracy to bring people into compliance with the law. Currently, the benefits-adjudicating agency USCIS is almost entirely self-funded through application fees and does not require congressional approval through the an-

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[110] *See supra* discussion accompanying note 42.

[111] *See* Angelica Chazaro, *Beyond Respectability: Dismantling the Harms of "Illegality"*, 52 HARV. J. LEGIS. 355, 357 (2015).

[112] Indeed, the first summary of the Biden immigration legislation made clear that lawful permanent residence would be contingent on passing "criminal and national security background checks." *See Fact Sheet*, *supra* note 10.

[113] *See* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1343 (1988).

[114] *See* Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937) ("[N]o money can be paid out of the Treasury unless it has been appropriated by an act of Congress.").

[115] *See* Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control,* 125 YALE L.J. 2182, 2187–92 (2016) (describing role of Resource Management Offices at OMB and opportunities for Presidential influence over budget approval process).

[116] *See* César Cuauhtémoc García Hernández, *Biden's Migration Policy Options*, BORDER CRIMINOLOGIES BLOG (Jan. 11, 2021), https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2021/01/bidens-migration [https://perma.cc/DGL5-AGUU].

nual budgeting process.[117] But Congress could appropriate additional funds to USCIS in order to increase its capacity, particularly for benefits applications that are not driven by fees (such as asylum applications), or to increase its receptivity to granting fee waivers in an effort to reduce financial barriers to immigration law compliance.[118] Increases to USCIS's funding capacity also require strong management of the agency's priorities, which are discussed in the next section.

The implementation details of how major changes in funding allocations could take place, while beyond the scope of this Article, might occupy future scholars. Although legal scholars have widely recognized the astronomical funding expansions for immigration enforcement that have occurred over time, legal scholarship that directly interrogates the federal agency funding process in the immigration enforcement context is strikingly minimal.[119] The case for shifting the historical trajectory of increased funding for immigration enforcement is strong. How such a shift is achieved, as a matter of politics and law, is a question that warrants sustained attention into the future.

B. Agency Staffing and Management

A second area of potential focus is the staffing, management, and supervision of the deportation state itself. The executive branch is far from monolithic. Administrative law scholars have vigorously explored the dynamics associated with the operation of politically appointed agency leaders working alongside career civil servants.[120] Under some accounts, civil servants have been characterized as a check on agency heads, reflecting greater political neutrality, more expertise and fidelity to an agency's mission.[121] While political appointees come and go, the underlying culture, mission, and values

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[117] *See* 6 U.S.C. § 296(c); WILLIAM A. KANDEL, CONG. RESEARCH SERV., R44038, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS) FUNCTIONS AND FUNDING (May 15, 2015).

[118] *See* Jens Hainmueller et al., *A Randomized Controlled Design Reveals Barriers to Citizenship for Low-Income Immigrants*, PROC. NAT'L ACAD. SCIS. 939, 944 (2018) (finding that lowering the fees associated with naturalization applications would increase naturalization rates amongst low-income immigrants).

[119] Legal scholarship has addressed discrete questions related to funding, often prompted by specific political disputes, for instance around whether the federal government has the authority to restrict federal funding to sanctuary jurisdictions or the implications of President Trump's demands for border wall funding. *See, e.g.,* Margulies, *supra* note 9; Raymond H. Brescia, *The Shifting Frontiers of Standing: How Litigation Over Border Wall Funding is Exposing Standing's Current Doctrinal Fault Lines,* 68 UCLA L. REV. DISCOURSE 80 (2020). Gillian Metzger has commented upon the general marginalization of the agency funding and appropriations process in public law doctrine, and thoughtfully explored "the implications of taking appropriations seriously" in doctrinal analysis. Gillian E. Metger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1080–83 (2021).

[120] *See, e.g.*, Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 530–50 (2015) (describing agency heads, civil servants and civil society as reflecting separation of powers dynamics and principles within administrative agencies).

[121] *See id.* at 540–41 (discussing civil servants as an "institutional counterweight" to agency heads); *see also* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dan-*

are shaped in large part by civil servants and front line agents.[122] The task of supervising the existing deportation state rests largely with the President and executive branch leadership.[123]

In the immigration enforcement context, however, as discussed in Part II, the civil servants and frontline agents powering the deportation state have suffered from unusual levels of politicization and at times shown contempt for the rule of law.[124] The cultures of ICE and CBP, for instance, have long demonstrated pro-deportation cultures that fail to account for the service and humanitarian elements of the immigration laws, particularly amongst the front line officers tasked with conducting investigations, arrests, and managing the detention and deportation process.[125] According to Shalini Bhargava Ray, the lack of enforcement priorities under Trump amounted to an abdication of the President's constitutional duty to faithfully execute the laws as a result of his failure to supervise the bureaucracy.[126]

The influence of the ICE and CBP unions in particular merit closer scrutiny. During the Obama era, the ICE officers' union spearheaded (ultimately unsuccessful) litigation in response to DACA, leading to the decision to centralize discretion over DACA in USCIS.[127] The agency front line's commitment to prioritizing deportation found a warm welcome, however, in President Trump, who the enforcement unions endorsed during his campaign.[128] The role of the ICE and CBP unions in shaping agency culture and policy surfaced again in the last days of the Trump administration, upon news brought to light by a government whistleblower that the Administration had entered into agreements that would have required the Biden administration to receive union approval before changing enforcement policy.[129]

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gerous Branch from Within, 115 YALE L.J. 2314 (2006); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423 (2009).

[122] *See* Michaels, *supra* note 120, at 541–47.

[123] *See* Shalini Bhargava Ray, *Abdication Through Enforcement*, 96 IND. L. J. (forthcoming 2021) (manuscript at 9), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3573110 [https://perma.cc/P8G7-XE3V] ("[O]n most leading theories of the presidency, the President has, at a minimum, a duty to oversee the bureaucracy"); *see also* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001) (exploring the impact of presidential administrations on agency functioning).

[124] *See supra* discussion at notes 85–89.

[125] *See* Koh, *supra* note 70; Robert Knowles & Geoffrey Heeren, *Zealous Administration: The Deportation Bureaucracy*, 72 RUTGERS U. L. REV. 749, 753–55 (2020); Nina Rabin, *Victims or Criminals? Discretion, Sorting and Bureaucratic Culture in the U.S. Immigration System*, 23 S. CAL. REV. L. & SOC. JUST. 195, 209–25 (2014).

[126] *See* Ray, *supra* note 123.

[127] *See* Kagan, *supra* note 41, at 684–92.

[128] *See* Ryan Devereaux, *An Unchecked Union*, THE INTERCEPT (Dec. 27, 2020, 8:00 AM), https://theintercept.com/2020/12/27/border-patrol-trump-biden-politics/ [https://perma.cc/3FQR-YF5F] (observing that CBP union's endorsement of Trump was first endorsement of a presidential campaign in union's history); Kim Kelly, *Abolish ICE's Union*, NEW REPUBLIC (Sept. 2, 2019), https://newrepublic.com/article/154915/abolish-ice-immigration-customs-enforcement-union [https://perma.cc/5SSY-ZCYN].

[129] *See* Zolan Kanno-Youngs & Charlie Savage, *Trump Official's Last-Day Deal with ICE Union Ties Biden's Hands*, N.Y. TIMES (Feb. 1, 2020), https://www.nytimes.com/2021/02/01/us/politics/cuccinelli-biden-ice.html [https://perma.cc/DAE8-5YH6].

The staffing, supervision and management of immigration judges (IJs) also play a meaningful role in the system. The hiring of IJs—already affected by a history of politicization, particularly during the Bush era[130]—intensified during the Trump administration. Record numbers of new IJs were hired, while dozens resigned or retired—some while issuing public statements indicating that their resignations were in direct protest to policies like family separation and IJ case quotas.[131] The American Bar Association expressed concern about the lack of sufficient vetting during the evaluation process for IJs.[132] At the agency appellate level, many Trump-appointed members of the BIA were IJs with astoundingly high asylum denial rates.[133] And the IJ union—which issued vocal criticisms of the former Administration's policies impacting the immigration courts—was de-certified towards the end of 2020, during the last months of the Trump administration, in what appeared to have been an act of retaliation against the organization.[134]

Changing agency culture is a long-term project that involves many areas of agency management. While it may be tempting to view the process of addressing agency culture as a form of bureaucratic administration, as opposed to law,[135] the question of how supervision of the front line takes place comprises a part of what Gillian Metzger and Kevin Stack have characterized as "internal administrative law." According to Metzger and Stack, those "core internal features of agencies—such as management structures, guidance, planning and coordination, civil service, professionalism, and the like"

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[130] *See* U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL (2008), https://oig.justice.gov/sites/default/files/legacy/special/s0807/final.pdf [https://perma.cc/G3BH-EL5N].

[131] *See, e.g.*, Ilyce Shugall, *Why I Resigned as an Immigration Judge*, L.A. TIMES (Aug. 4, 2019, 4:00 AM), https://www.latimes.com/opinion/story/2019-08-03/immigration-court-judge-asylum-trump-policies [https://perma.cc/9GZR-S6NT]; *Why Immigration Judges Opt to Leave Over Trump Policies,* NAT'L PUB. RADIO, (Feb. 10, 2020, 5:08 AM), https://www.npr.org/2020/02/10/804408028/why-immigration-judges-opt-to-leave-over-white-house-policies [https://perma.cc/UH7L-WSZM].

[132] *See* Reade Levinson, Kristina Cooke & Mica Rosenberg, *Special Report: How Trump Administration Left Indelible Mark on U.S. Immigration Courts,* REUTERS (Mar. 8, 2021, 7:06 AM), https://www.reuters.com/article/us-usa-immigration-trump-court-special-r/special-report-how-trump-administration-left-indelible-mark-on-u-s-immigration-courts-idUSKBN2B0179 [https://perma.cc/UV6R-AJXP].

[133] *See* Felipe de la Hoy, *The Shadow Court Cementing Trump's Immigration Policy,* NATION (June 30, 2020), https://www.thenation.com/article/society/trump-immigration-bia/ [https://perma.cc/6UM7-GW62] (describing appointment of immigration judges with extremely high asylum denial rates to BIA, including "one judge who threatened to unleash a dog on a 2-year-old boy during a hearing").

[134] *See* Joe Davidson, *In a Rare Move, Trump Appointees Bust Union, Hit Federal Immigration Judges*, WASH. POST (Nov. 6, 2020, 6:00AM), https://www.washingtonpost.com/politics/trump-union-bust-immigration-judges/2020/11/05/f4dbee26-1f86-11eb-9ec3-3a81e23c4b5e_story.html [https://perma.cc/U2EY-R62L] (describing action by Federal Labor Relations Authority to decertify National Association of Immigration Judges).

[135] *See* Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1244 (2017) (observing and critiquing that "key features of internal administration—internal policies, procedures, practices, oversight mechanisms, and the like—are rarely viewed as part of administrative *law*").

have increasingly become subjects of scholarly attention, and accordingly "need to be recognized as central to administrative law."[136]

A range of internal administrative law measures might further the diminishing of the deportation state. Simply reducing the number of agents may encounter complications related to unionization as well as civil servant protections. But hiring standards and job qualifications for positions throughout the immigration bureaucracy matter, as do systems governing internal promotions and job incentives. Taking steps to cultivate expertise amongst the rank-and-file, as well as amongst agency adjudicators, requires investments in training and centralization. Developing rigorous systems for internal accountability, discipline, and oversight to respond to complaints about officer misconduct and failure to adhere to law and policy is a related option. So is growing the capacity of internal agency offices aimed at promoting positive values and norms.[137] Funding decisions are a key component of how the employee base of the immigration enforcement agencies develop, which requires action from Congress. But as with funding, sustained and focused attention to how the frontline actors within the broader deportation state evolve should be a priority. Despite these challenges, the Biden administration nonetheless has a meaningful role to play in the supervision and management of the bureaucracy.

C. Subfederal and Private Extensions of the Deportation State

Even if the core infrastructure of ICE and CBP undergoes significant reductions in funding and fundamental changes in staffing, the fact remains that the modern deportation state has expanded by way of collaborations with entities outside the federal government. Two prominent sources of collaboration have been state and local law enforcement, and private industry. Indeed, both immigration federalism and privatization across the administrative state have attracted considerable attention from scholars.[138]

With respect to state and local law enforcement authorities directly collaborating with ICE, the nature of the federal government's collaboration varies widely by jurisdiction but is also contingent on the federal executive

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[136] *Id.* at 1246.

[137] *See* Christopher J. Walker & Rebecca Turnbull, *Operationalizing Internal Administrative Law*, 71 HASTINGS L.J. 1227, 1246 (2020) (suggesting greater attention on use of agency offices described in Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53 (2014)).

[138] *See* David Rubenstein, *Supremacy, Inc.!*, 67 UCLA L. REV. 1130, 1133–34 (2020) ("While some commentators hail federal outsourcing as a key innovation of modern government, others decry outsourcing's distorting effects on constitutional rights, separation of powers and administrative law."); Jennifer Chacon, *Immigration Federalism in the Weeds*, 66 UCLA L. REV. 1330, 1340–47 (2019) (describing significant literature on immigration federalism, and noting that "over the past three decades, the immigration federalism literature has focused on many of the same questions common in federalism scholarship more generally – the relationship between distribution of governmental power and individual rights, the appropriate scope of federal preemption, and the contours and limits of anticommandeering principles under the Tenth Amendment").

branch's commitment to such relationships. In a number of areas, state and local law enforcement continue to enter into agreements—known as 287(g) agreements—to deputize nonfederal police officers with immigration powers,[139] which were introduced under Bush, scaled back under Obama, and proliferated under Trump.[140] Many local law enforcement agencies also provide opportunities for enhanced ICE's presence in communities through their policies and practices of honoring ICE's requests to hold people temporarily for immigration purposes (known as detainers).[141] Despite high levels of cooperation with immigration enforcement in some parts of the country, other state and local jurisdictions have actively resisted federal immigration enforcement efforts through the enactment of sanctuary policies that prevent cooperation with federal immigration authorities, funding deportation defense and other immigration legal services, and regulating or prohibiting the expansion of private immigration detention centers.[142]

When it comes to privatization, some aspects of private industry participation in immigration enforcement are well-documented, such as the role of the for-profit prison industry in bolstering immigration detention.[143] The GEO Group and CoreCivic, both publicly traded corporations that have made political contributions and lobbied for stricter immigration enforcement policies, provided roughly half of the bed space for ICE during the Trump administration in locations throughout the country.[144] Critiques of the lack of accountability and standards related to detention conditions at private facilities are particularly strong.[145] Both companies enjoy decade-long contracts with ICE, which if permitted to run would outlast the Biden administration. Notably, resistance to some of these contracts have bubbled up at the subfederal level, with states such as California and Washington passing laws that would prohibit the renewal of existing contracts for for-profit immigration detention after the expiration of current agreements.[146]

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[139] *See generally* Huyen Pham, *287(g) Agreements in the Trump Era*, 75 WASH. & LEE L. REV. 1253, 1257–73 (2018) (explaining 287(g) agreements and use under Bush and Obama Administrations).

[140] *See id.* at 1273–75.

[141] *See, e.g.,* Kate Evans, *Immigration Detainers, Local Discretion, and State Law's Historical Constraints*, 84 BROOK. L. REV. 1085, 1089 (2019).

[142] *See supra* discussion accompanying notes 62–65.

[143] *See* Jennifer Chacon, *Privatized Immigration Enforcement,* 52 HARV. C.R.-C.L. REV. 1 (2017) (discussing range of private entities' participation in immigration enforcement and analyzing critiques of privatization in context of immigration detention); César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CAL. L. REV. 1449, 1510 (2015).

[144] *See* Hauwa Ahmed, *How Private Prisons Are Profiting Under the Trump Administration*, CTR. FOR AM. PROGRESS (Aug. 30, 2019, 9:02 AM), https://www.americanprogress.org/issues/democracy/reports/2019/08/30/473966/private-prisons-profiting-trump-administration/ [https://perma.cc/Q274-L55V].

[145] *See* U.S. DEP'T OF HOMELAND SEC., ICE DOES NOT FULLY USE CONTRACTING TOOLS TO HOLD DETENTION FACILITY CONTRACTORS ACCOUNTABLE FOR FAILING TO MEET PERFORMANCE STANDARDS (2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-18-Jan19.pdf [https://perma.cc/6DN7-VYS8].

[146] *See* Aris Folley, *Washington State Senate Passes Legislation to Ban Private, For-Profit Prisons*, HILL (Mar. 31, 2021, 5:14 PM), https://thehill.com/homenews/state-watch/545844-

But the privatization of immigration enforcement is not limited to incarceration, and now extends to the use of widespread technological surveillance over potential enforcement subjects. With political momentum growing against the private prison industry, GEO Group and CoreCivic have reportedly turned to other aspects of immigration enforcement. GEO Group, for instance, has invested in ankle monitoring (which is used heavily by ICE as an alternative to physical incarceration).[147] The federal deportation state's contracts with privatized surveillance and data-gathering collides with state and local government, thereby implicating multiple sectors in efforts to enhance immigration enforcement efforts in immigrant communities.[148] ICE has contractual relationships with private companies that purchase and consolidate data from a wide range of sources, such as state Departments of Motor Vehicles, private company utility records, and social media profiles.[149] A dizzying web of relationships and entities populate this emerging space. Advocates and scholars have just begun to reveal the range of companies participating in technology surveillance for immigration enforcement purposes, and includes entities like Palantir, Clearview AI, Vigilant Solutions, Thomson Reuters, LexisNexis, and Amazon.[150] Even in states that have adopted sanctuary and no-sharing policies with ICE, ICE has managed to receive information through such technology companies, or even directly from state offices (at times in contravention of state policy).[151] To increase its reach, ICE also deploys sophisticated technology from private companies that engage in facial recognition and license plate scanning.[152] In general, the very existence of such contracts and technological

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washington-state-senate-passes-legislation-to-ban-private-for-profit [https://perma.cc/BTJ6-DJTK].

[147] *See* Jamiles Lartey, *Think Private Prison Companies Are Going Away Under Biden? They Have Other Plans*, THE MARSHALL PROJECT (Nov. 17, 2020), https://www.themarshallproject.org/2020/11/17/think-private-prison-companies-are-going-away-under-biden-they-have-other-plans [https://perma.cc/779K-5S3E].

[148] *See supra* discussion accompanying notes 65–66.

[149] *See* Drew Harwell, *ICE Investigators Used a Private Utility Database Covering Millions to Pursue Immigration Violations*, WASH. POST (Feb. 26, 2021, 4:55 PM), https://www.washingtonpost.com/technology/2021/02/26/ice-private-utility-data/ [https://perma.cc/DS2P-QTBM]; Bedoya, *supra* note 66.

[150] *See, e.g.*, JULIE MAO, JUST FUTURES LAW, STATE DRIVER'S LICENSE DATA: BREAKING DOWN DATA SHARING AND RECOMMENDATIONS FOR DATA PRIVACY, (Mar. 2020), https://justfutureslaw.org/wp-content/uploads/2020/04/2020-3-5-State-DMV-Data-Sharing-Just-Futures-Law.pdf [https://perma.cc/S97M-RGZE]; Harwell, *supra* note 14 (describing databases owned by Thomson Reuters and Equifax that contract with DHS).

[151] *See* Funk, *supra* note 66 (describing ICE access to Washington State Department of Licensing's Driver and Plate Search database due to changes in system that allowed law enforcement officers to log on and run their own searches); April Glaser, *Sanctuary Cities Are Handing ICE a Map*, SLATE (Mar. 18, 2018, 2:06 PM), https://slate.com/technology/2018/03/how-ice-may-be-able-to-access-license-plate-data-from-sanctuary-cities-and-use-it-for-arrests.html [https://perma.cc/GD8S-8NE9].

[152] *See* Drew Harwell & Tony Romm, *ICE is Tapping into a Huge License-Plate Database, ACLU says, Raising New Privacy Concerns About Surveillance*, WASH. POST (Mar. 13, 2019, 11:40 AM), https://www.washingtonpost.com/technology/2019/03/13/ice-is-tapping-into-huge-license-plate-database-aclu-says-raising-new-privacy-concerns-about-surveillance/ [https://perma.cc/8HXW-FABT]. The Obama Administration laid the groundwork for such

innovations is subject to minimal public scrutiny. Often, they become known primarily through the work of advocates, despite their profound influence on the capacity of the deportation state.[153]

Again, congressional funding considerations in combination with political will are key to shifting the dynamics of these seemingly ever-expanding contracts. For some issues—reliance on subfederal and private entities for immigration detention, for instance—the case for change may already be at a tipping point, particularly in light of the Biden administration's stated commitment to ending the federal criminal justice system's reliance on private prisons.[154] With others, such as the use of surveillance technology and artificial intelligence, the need for shifts may be less obvious, in part due to the complexity, opacity, and rapidly shifting nature of technological surveillance in the modern era.[155] And while certain technological innovations and private collaborations may present benefits for the immigration bureaucracy,[156] the executive branch should proceed cautiously when adopting new technologies in the interest of reform, particularly to the extent those efforts provide resources for future administrations hostile to the human rights of immigrants to manipulate and expand deportation capacity. Political will and activism at all levels—including at the local level and amongst consumers and shareholders—are necessary to generate substantial change. That momentum has also been building, whether in the form of state and local efforts to

relationships with Silicon Valley, although some such contracts—such as one to engage in license plate tracking—were rejected by head agency officials due to privacy concerns. *See* Ellen Nakashima & Josh Hicks, *Department of Homeland Security Cancels National License-Plate Tracking Plan*, WASH. POST (Feb. 19, 2014), https://www.washingtonpost.com/world/national-security/dhs-cancels-national-license-plate-tracking-plan/2014/02/19/a4c3ef2e-99b4-11e3-b931-0204122c514b_story.html [https://perma.cc/NLR9-KY99].

[153] For instance, the grassroots and movement-building organization Mijente has spearheaded a number of campaigns aimed at surveillance and the use of technology in immigration enforcement and policing. *See, e.g.*, #NOTECHFORICE, https://notechforice.com [https://perma.cc/ML6F-KEEA]. Legal advocacy organizations such as Just Futures Law have generated reports, pursued Freedom of Information Act (FOIA) and other litigation to highlight the harms associated with technological surveillance and ICE contracts with private technology companies. *See, e.g.*, *Resource Pages*, https://justfutureslaw.org/resources/ [https://perma.cc/3KBJ-HXH9] (listing reports and litigation work).

[154] *See* Exec. Order No. 14006, 86 Fed. Reg. 7483 (Jan. 26, 2021) (directing Attorney General to refrain from renewing private prison contracts for use in federal criminal system, but not immigration detention).

[155] A significant literature has critiqued the rise of big data policing and surveillance, and has raised a host of concerns, including the potential for bias, lack of governmental regulation, privacy, and enhancements to surveillance capacity. *See, e.g.*, Ryan Calo & Danielle Keats Citron, *The Automated Administrative State: A Crisis of Legitimacy*, 70 EMORY L.J. 797 (2021); Elizabeth E. Joh, *The New Surveillance Discretion: Automated Suspicion, Big Data, and Policing*, 10 HARV. L. & POL'Y REV. 15, 19 (2016).

[156] For a description of technological innovations taking place across the administrative state, see DAVID FREEMAN ENGSTROM ET AL., GOVERNMENT BY ALGORITHM: ARTIFICIAL INTELLIGENCE IN FEDERAL ADMINISTRATIVE AGENCIES (2020), https://www-cdn.law.stanford.edu/wp-content/uploads/2020/02/ACUS-AI-Report.pdf [https://perma.cc/5L5C-TNFJ].

close detention centers and local jails,[157] grassroots efforts to identify and articulate the harms of increased technology surveillance,[158] or movements for privatized self-regulation to enhance accountability.[159]

Conclusion

This Article has encouraged the Biden administration to approach its immigration policy with the goal of downsizing the deportation state, a shift that would depart not just from the Trump era but from multiple administrations before it. Three particular areas—funding, staffing and supervision, and subfederal and privatization collaborations—constitute significant dimensions of any effort to minimize the size, scope, and capacity of the bureaucratic apparatus tasked with conducting deportations and detentions. Each of these three areas is interconnected. Removing immigration enforcement's heavy reliance on carceral tools such as detention, for instance, may be fundamentally addressed through funding and collaborations with subfederal and private entities. Increasing the compliance capacity of the immigration bureaucracy requires rethinking funding streams for immigration enforcement as well as supervision and staffing of the immigration state. If we are serious about orienting the system towards a greater measure of fairness, justice, and humanity, each of these areas requires specific attention.

The Biden administration may offer a glimmer of hope for immigrant communities in the short term, but the past several decades have illustrated the vulnerability of immigrant communities to the country's political whims. Even as immediate reforms and legislative fixes remain essential, shaping the nature of the contemporary deportation state should remain a priority in the long run.

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[157] *See* Matt Katz, *County Officials Shutting ICE Out of Local Jails*, Nat'l Public Radio (Oct. 14, 2018, 8:00 AM), https://www.npr.org/2018/10/14/657238852/jails-nationwide-end-contracts-with-immigration-and-customs-enforcement [https://perma.cc/8C6Z-XJ6L].

[158] *See, e.g.,* Grassroots Leadership, Just Futures Law & Mijente, Austin's Big Secret: How Big Tech and Surveillance Are Increasing Policing (2020), https://grassrootsleadership.org/sites/default/files/reports/austins_big_secret_how_big_tech_and_surveillance_are_increasing_policing.pdf [https://perma.cc/8BCF-EFV8] (detailing surveillance technology and contracts used by Austin Police Department, and connection to immigration enforcement actions).

[159] *See* Sonia K. Katyal, *Private Accountability in the Age of Artificial Intelligence*, 66 UCLA L. Rev. 54, 99–100 (2019) (suggesting that private industry take steps to enhance accountability and transparency in use of artificial intelligence, in light of civil rights concerns); Muzaffar Chishti & Jessica Bolter, "*Cubicle Activism": Companies Face Growing Demands from Workers to Cut Ties with ICE and Others in Immigration Arena*, Migration Pol'y Inst. (Oct. 30, 2019), https://www.migrationpolicy.org/article/cubicle-activism-companies-face-worker-demands-cut-ties-ice [https://perma.cc/AWG8-RZP3].

The Discriminatory Purpose of the 1994 Crime Bill

Noam Biale,* *Elizabeth Hinton*,** *Elizabeth Ross****

Harsh criminal sentencing laws enacted in the 1980s and 1990s have received renewed attention through a confluence of two seemingly contradictory events: an awakening to racial justice concerns through protests against the police killings of George Floyd and Breonna Taylor (among many others), and the election of President Joseph R. Biden, Jr., who, as a senator, was one of the chief architects of policies that fueled mass incarceration and exacerbated racial disparity in the criminal legal system. Historians in particular have begun to study declassified documents and newly available archival evidence that provide critical insight into the behind-the-scenes deal-making and legislative intent that led to the crime control policies that emerged at the federal level since the 1960s. Specifically, historical research indicates that federal lawmakers were well aware of the racially disparate impact of mandatory minimum sentencing schemes and the death penalty, yet chose to double down on those policies and reject alternative proposals that would have made the application of criminal law more equitable. This new frontier of historical research is not merely of academic interest; it has important implications for constitutional scholars and defense attorneys who can draw on these findings to challenge criminal statutes under the Equal Protection Clause.

This Article highlights the power of collaboration between historians and legal scholars and practitioners who wish to train this new historical analysis on the modes and means by which our criminal legal system reinforces racial inequality. We focus our approach through the lens of a relatively obscure provision of the Violent Crime Control and Law Enforcement Act of 1994, which imposed a one-year mandatory minimum for distributing narcotics within 1,000 feet of a public housing project. We examine the barriers to challenging such a statute under the Equal Protection Clause based on current Supreme Court precedent and circuit caselaw. We suggest a jurisprudential avenue for renewed equal protection challenges, namely, supplying evidence that Congress adhered to particular policies with full knowledge of their discriminatory impact. We examine the disparate enforcement of the public housing provision and its discriminatory purpose, as informed by newly developed historical evidence about the 1994 Crime Bill. Finally, we consider the lessons criminal defense attorneys and policymakers may learn from our example. We argue that a nuanced understanding of the true history of the war on crime is essential if President Biden and those in his administration who played instrumental roles in creating these discriminatory policies are serious about responding to the demand from the streets to dismantle them.

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INTRODUCTION

Kendall Johnson[1] is a 32-year-old Black man from Brooklyn. He grew up in the Bushwick Houses, a housing project run by the New York City Housing Authority (NYCHA) in a historically poor and crime-ridden neighborhood on the border of Brooklyn and Queens. Mr. Johnson's parents still live in the Bushwick Houses. Because of a drug conviction he received in his early twenties, Mr. Johnson is unable to live with them. After graduating high school and attending some college, Mr. Johnson worked for a time at a clothing retailer. He was let go from that job and struggled to find employment. He turned to selling drugs for money and thus began a cycle of criminal convictions and incarceration that has persisted for the better part of a decade. In the summer of 2019, Mr. Johnson was released from New York state prison and returned to Brooklyn. Without a job, stable housing, or economic prospects, he agreed to sell less than a gram of cocaine base—commonly known as crack—and 0.03 grams of heroin. He arranged to make the sale to a buyer in the vicinity of the Bushwick Houses. The buyer, however, was a confidential informant, and on June 25, 2019, Mr. Johnson was arrested and charged federally in the United States District Court for the Eastern District of New York with narcotics conspiracy and distributing narcotics within 1,000 feet of a public housing project. Because the aggregate weight of narcotics sold by the conspiracy was so small, the mandatory minimum sentences determined by drug weight[2] were not triggered. But the government's decision to charge him based on his proximity to the Bushwick Houses, under 21 U.S.C. § 860(a), threatened a one-year mandatory minimum sentence if Mr. Johnson were convicted of that count.

The Bushwick Houses and other NYCHA housing projects in New York City are concentrated in neighborhoods with a much higher percentage

[1] The authors wish to thank Mr. Johnson for his willingness to share his story.
[2] *See, e.g.*, 21 U.S.C. § 841(b)(1)(A)–(B).

of Black and Latino residents than the City at large. Nationally, although African Americans and Latinos make up approximately one-third of the U.S. population, the population that resides in public housing is two-thirds Black and Latino. In New York City, that ratio exceeds 90%. Further, charging data from a representative sample of federal judicial districts indicates that nearly 93% of defendants charged with violating the public housing provision of § 860(a) are Black or Latino, while 7% are white. These statistics demonstrate that people of color are charged with narcotics offenses based on proximity to public housing projects at rates far in excess of their representation in the general population, in the public housing population, and even at a significantly higher rate than their representation among defendants in federal drug cases, a demographic already racially skewed. Based on these statistics, which provide strong evidence of selective enforcement of the statute, could Kendall Johnson challenge his prosecution under the Equal Protection Clause, the provision of the Fourteenth Amendment whose "central purpose . . . is the prevention of official conduct discriminating on the basis of race"?[3]

Under prevailing law, the answer is no. In a series of cases in the 1970s, the Supreme Court held that simply showing a discriminatory impact of legislation is insufficient to sustain an equal protection challenge. The challenger must additionally demonstrate discriminatory *intent* or *purpose* of the legislature in enacting the legislation. This standard makes proving a violation of the Equal Protection Clause far more difficult (indeed, some courts and commentators have remarked that it is virtually impossible) since legislators learned quickly to draft statutes that were facially neutral and to avoid outright racist commentary in their statements in favor of such statutes. Thus, efforts to challenge arbitrary and racially discriminatory sentencing schemes, such as the 100-to-1 crack/powder cocaine federal sentencing disparity, all ran aground based on defendants' failure to prove discriminatory intent. Federal appellate courts deployed a variety of arguments to turn back such challenges, including relying on assumptions Congress made about crack being more addictive (even while acknowledging the lack of scientific basis for such assumptions), the presence of Black members of Congress who voted for tough sentencing laws, and the notion that to the extent such laws disproportionately affected minority communities they actually constituted a disproportionate *benefit* and thus could not indicate racial animus.

Recent examinations by historians of the political motivations and policy concerns surrounding these legislative decisions thoroughly debunk such already questionable rationales. Historians have begun to unearth evidence from newly available archival sources of Congress's awareness of the disparate racial impact of crime legislation, and legislative trade-offs and missed opportunities to address that impact in the Violent Crime Control and Law Enforcement Act of 1994, referred to hereinafter as the 1994 Crime Bill. This new historical evidence informs a picture of Congress's "[a]dherence to

[3] Washington v. Davis, 426 U.S. 229, 239 (1976).

a particular policy or practice, 'with full knowledge of the predictable effects of such adherence upon racial imbalance,'"[4] which the Supreme Court has held may provide circumstantial evidence of discriminatory intent. Historical research, combined with the increased accessibility of federal charging and sentencing data, may be fruitfully employed to reframe how courts consider equal protection challenges to facially neutral sentencing statutes.

This Article provides an example of such a challenge, focusing on a provision of the 1994 Crime Bill that amended the Controlled Substances Act, title 21, section 860(a), to impose a one-year mandatory minimum sentence for drug crimes committed within 1,000 feet of a public housing project. Part I begins by providing the legal framework for establishing a violation of the Equal Protection Clause with the Supreme Court's requirement of proof of discriminatory intent. Part II reviews prior failed efforts to challenge federal sentencing schemes under this rubric. Part III lays out the components of an equal protection challenge to the public housing provision: the origin of the statute; its disparate impact on Black and Latino communities; and the history of federal regulation of crime in public housing, leading up to and culminating in the 1994 Crime Bill generally and the inclusion of the public housing provision in particular. Part IV describes the application of this approach in Kendall Johnson's case, in which the defense deployed this argument in a motion to dismiss the count carrying a mandatory minimum sentence. It concludes by considering the implications of our approach for criminal defense attorneys, as well as for policymakers facing calls for reform from the streets — a forceful demand for a gut renovation of the legal structures President Biden and others built a quarter century ago.

I. Legal Framework: Discriminatory Intent and Adherence to Discriminatory Policy

Adopted in response to the Civil War and the notorious *Dred Scott* decision, the Fourteenth Amendment to the Constitution broadly guarantees "equal protection of the laws" to "[a]ll persons born or naturalized in the United States."[5] "The central purpose of the Equal Protection Clause . . . is the prevention of official conduct discriminating on the basis of race."[6] The Supreme Court has held that, to violate the Clause a statute need not be facially discriminatory, because even "[a] statute, otherwise neutral on its face," may violate the Fourteenth Amendment if it is applied "so as invidiously to discriminate on the basis of race."[7] Thus, in several decisions follow-

[4] Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464–65 (1979) (quoting Penick v. Columbus Bd. of Educ., 429 F. Supp. 229, 255 (1977)).

[5] U.S. Const. amend. XIV, § 1.

[6] *Davis*, 426 U.S. at 239.

[7] *Id.* at 241.

ing the adoption of the Fourteenth Amendment, the Supreme Court struck down facially neutral laws that had a stark discriminatory impact.

In the 1886 case of *Yick Wo v. Hopkins*,[8] for example, the Court overturned a San Francisco ordinance governing the permitting of laundry businesses. The absence of any standards guiding the decision making of the city's Board of Supervisors overseeing such permitting, the Court held, meant that "[t]he power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint."[9] Moreover, statistics showing how that discretion was applied revealed a stark pattern of discrimination: Approximately 200 permits of Chinese laundry businesses were denied, and only one was approved.[10] Based on these statistics alone, the Supreme Court struck down the laundry-permitting ordinance on equal protection grounds, holding that such a stark discriminatory impact bespoke a discriminatory purpose.[11]

Similarly, in *Gomillion v. Lightfoot*,[12] a redistricting case, the City of Tuskegee, Alabama had redrawn its municipal limits "to remove from the city all save four or five of its 400 Negro voters [more than 98%] while not removing a single white voter or resident."[13] In response to these stark statistics, the Supreme Court noted that the defendants "invoke[d] generalities expressing the State's unrestricted power—unlimited, that is, by the United States Constitution—to establish, destroy, or reorganize by contraction or expansion its political subdivisions, to wit, cities, counties, and other local units."[14] Acknowledging the breadth of such power, the Supreme Court nevertheless held, based on the statistical effect of the municipal boundary-making, "[i]f these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote."[15] In other words, as in *Yick Wo*, while the state enjoyed broad discretion in drawing political subdivisions, the statistical evidence of discriminatory impact was so stark that it indicated, on its own, a discriminatory purpose in the redrawing of the city's limits.

One might think, based on these decisions, that stark statistical disparity on racial lines would be grounds to challenge the statute causing the disparity under the Equal Protection Clause, and that the statistics cited above

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[8] 118 U.S. 356 (1886).
[9] *Id.* at 366–67.
[10] *See id.* at 356 (providing, in the syllabus of the Opinion, the precise statistics indicating that one Chinese laundry was approved).
[11] *Id.* at 374.
[12] 364 U.S. 339 (1960).
[13] *Id.* at 341.
[14] *Id.* at 342.
[15] *Id.* at 341.

regarding the public housing provision would provide at least a colorable claim of a constitutional violation. But in a series of decisions in the mid-1970s, the Court erected a formidable barrier to such challenges, holding proof of discriminatory impact to be insufficient on its own, and holding instead that "[p]roof of racially discriminatory *intent* or *purpose* is required to show a violation of the Equal Protection Clause."[16] Justice Byron White, who was instrumental in the advancement of the Kennedy Administration's civil rights agenda while in the Justice Department but took a decidedly conservative turn as a justice after his appointment in 1962,[17] played a critical role in several of these decisions, first setting forth a strict new standard for establishing an equal protection violation, and then, in subsequent cases, seeking to limit that decision from its arguable implication, *i.e.*, that proof of discrimination was a near impossibility.

The first of these cases, *Washington v. Davis*, decided in 1976, involved a qualifying exam for police officer positions in Washington, D.C. The district court found no discriminatory intent in instituting the exam and held that the Black plaintiff's claim of a violation of the Due Process Clause (incorporating the Equal Protection Clause) failed. The Court of Appeals reversed, holding that the "lack of discriminatory intent in designing and administering [the exam] was irrelevant; the critical fact was, rather, that a far greater proportion of blacks — four times as many—failed the test than did whites."[18] The Supreme Court, with Justice White writing for the majority, held that sole focus on the discriminatory impact of a policy, while mandated by Title VII of the Civil Rights Act of 1964, was in error when the plaintiff brought a constitutional claim. The Court stated, "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact."[19] The Court noted: "This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination."[20] "Necessarily," the Court added, "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."[21] "Nevertheless," the Court stated, "we have not held that a law, neutral on its face and serving ends otherwise within the power of gov-

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[16] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (emphasis added).

[17] *See generally* Dennis J. Hutchinson, *The Man Who Once was Whizzer White*, 103 YALE L.J. 43 (1993).

[18] Washington v. Davis, 426 U.S. 229, 237 (1976).

[19] *Id.* at 239.

[20] *Id.* at 241.

[21] *Id.* at 242.

ernment to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another."[22]

The Court expanded on *Davis* the following year in the 1977 decision *Village of Arlington Heights v. Metropolitan Housing Development Corporation* (*Arlington Heights*), a case involving a zoning ordinance.[23] The Court, in an opinion by Justice Powell, stated that *Davis* reaffirmed that racially disproportionate impact is insufficient on its own to show discriminatory purpose. The Court recognized that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[24] While the impact of an official action "may provide an important starting point" to the analysis, *unless* the pattern were "as stark as that in *Gomillion* or *Yick Wo*," which the Court noted will only be in "rare" cases, courts must "look to other evidence" for proof of discriminatory intent.[25] The Court suggested several "evidentiary source[s]" from which proof may be drawn, including, "[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes," "[d]epartures from the normal procedural sequence," "[s]ubstantive departures," and "[t]he legislative or administrative history . . . especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports."[26] This list did not "purport[ ] to be exhaustive,"[27] and the presence or absence of one particular factor is not dispositive.

Despite having written the *Davis* decision, Justice White dissented in *Arlington Heights*, arguing that the Court should have remanded to the Court of Appeals to reconsider its decision in light of the intervening authority of *Davis*. Justice White wrote, "The Court's articulation of a legal standard nowhere mentioned in *Davis* indicates that it feels that the application of *Davis* to these facts calls for substantial analysis. If this is true, we would do better to allow the Court of Appeals to attempt that analysis in the first instance."[28] Justice White also objected to the Court's "embark[ing] on a lengthy discussion of the standard for proving the racially discriminatory purpose required by *Davis* for a Fourteenth Amendment violation" because, since the district court had found that the zoning decision "was motivated 'by a legitimate desire to protect property values and the integrity of the Village's zoning plan' . . . [t]here is thus no need for this Court to list various

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[22] *Id.*

[23] 429 U.S. 252 (1977).

[24] *Id.* at 266; *see also* Orange Lake Assocs., Inc. v. Kirkpatrick, 21 F.3d 1214, 1226 (2d Cir. 1994).

[25] *Arlington Heights*, 429 U.S. at 266.

[26] *Id.*

[27] *Id.* at 268.

[28] *Id.* at 272 (White J., dissenting).

'evidentiary sources' or 'subjects of proper inquiry' in determining whether a racially discriminatory purpose existed."[29]

Following *Arlington Heights*, the Supreme Court has noted the "difficulties" it erected for proving the "motives or purposes" of legislation, especially when such motives can be gleaned only from statements of a few legislators.[30] Lower courts have also commented that the Supreme Court's standard is especially hard to meet because "discriminatory intent is rarely subject to direct proof,"[31] and because "[t]he task of recognizing intent is made particularly difficult by 'the growing unacceptability of overtly bigoted behavior, and a growing awareness of the possible legal consequences of such behavior.'"[32] Notably, however, even under the unforgiving *Arlington Heights* standard, "a plaintiff need not prove that the 'challenged action rested solely on racially discriminatory purposes.'"[33] Rather, it is necessary to prove only "that a discriminatory purpose has been *a* motivating factor in the decision" to establish a violation of the Equal Protection Clause.[34]

Moreover, "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause,"[35] and in a pair of decisions two terms after *Arlington Heights*, the Court further refined the discriminatory intent standard, in different contexts and in seemingly contradictory terms. First, in June 1979, the Supreme Court applied the standard to a claim of gender discrimination. In *Personnel Administrator of Massachusetts v. Feeney* (*Feeney*),[36] a woman challenged a Massachusetts law that gave preference to veterans for civil service jobs because, as there were few female veterans at the time, the law had "a devastating impact upon the employment opportunities of women."[37] The Supreme Court had previously vacated the judgment and remanded to the lower court to reconsider its ruling in light of the intervening authority of *Davis*. On remand, the district court concluded that the veterans' hiring preference was "inherently nonneutral because it favors a class from which women have traditionally been excluded."[38] The Attorney

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[29] *Id.* at 273 (White J., dissenting).

[30] Hunter v. Underwood, 471 U.S. 222, 228 (1985) ("Proving the motivation behind official action is often a problematic undertaking.").

[31] Hayden v. Paterson, 594 F.3d 150, 163 (2d Cir. 2010).

[32] United States v. Bannister, 786 F. Supp. 2d 617, 665 (E.D.N.Y. 2011) (quoting United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276, 1369 (S.D.N.Y. 1985)).

[33] *Hayden*, 594 F.3d at 163 (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977)); *see also Hunter*, 471 U.S. at 232 ("[A]n additional purpose . . . would not render nugatory the purpose to discriminate against all [B]lacks."); *accord* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 277 (1979) ("Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not.").

[34] Vill. of Arlington Heights, 429 U.S. at 265–66 (emphasis added); *accord id.* at 265 ("[R]acial discrimination is not just another competing consideration.").

[35] Grutter v. Bollinger, 539 U.S. 306, 327 (2003).

[36] 442 U.S. 256 (1979).

[37] *Id.* at 260.

[38] *Id.*

General of Massachusetts again sought Supreme Court review, and this time the Court reversed.

The Court, in an opinion by Justice Stewart, began by noting that the Federal Government and virtually all of the states granted some sort of hiring preference to veterans, and that the Massachusetts law at issue expressly applied to "any person, male or female, including a nurse" who was honorably discharged from military service.[39] Nevertheless, despite "the apparent attempts by Massachusetts to include as many military women as possible within the scope of the preference," at the time, 98% of veterans in Massachusetts were male.[40] Turning to the legal framework, the Court cited race as the "paradigm" for classifications that "in themselves supply a reason to infer antipathy."[41] Gender classifications were "not unlike those based upon race," and recent cases had required that such classifications be subjected to heightened scrutiny (though not the touchstone of strict scrutiny that the Court applied to race-based classification).[42] Based on *Davis* and *Arlington Heights*, however, the disproportionate impact of a statute on gender should be treated only as "an important starting point," given that "*purposeful* discrimination" alone "offends the Constitution."[43] Applying these principles to the Massachusetts hiring scheme, the Supreme Court cited two factual findings that the district court had made, which the plaintiff had conceded: that the preference for veterans was "legitimate and worthy" and that it was "*not* a pretext for gender discrimination."[44] The Court then discounted the evidence of disparate impact, since, unlike in *Yick Wo*, in which the impact of the ordinance provided evidence of its underlying discriminatory purpose, here "the purposes of the statute provide the surest explanation for its impact."[45] The Court then stated that the "dispositive question" was whether "a gender-based discriminatory purpose has, at least in some measure, shaped the Massachusetts veterans' preference legislation."[46] In light of the district court's finding—and the plaintiff's concession—that the legislative purpose of advancing the hiring of veterans was legitimate and non-discriminatory, the plaintiff could not claim that the preference was inherently "gender-biased" based on its impact.[47]

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[39] *Id.* at 261–62.
[40] *Id.* at 269–70.
[41] *Id.* at 272.
[42] *Id.* at 272–73.
[43] *Id.* at 274 (emphasis added) (internal quotation marks omitted).
[44] *Id.* at 274–75 (emphasis added).
[45] *Id.* at 275.
[46] *Id.* at 276. Justice Stevens concurred, and was joined by Justice White, in questioning whether this was in fact the relevant question, stating, "If a classification is not overtly based on gender, I am inclined to believe the question whether it is covertly gender based is the same as the question whether its adverse effects reflect invidious gender-based discrimination." *Id.* at 281 (Stevens, J., concurring). But because there was a sufficiently large number of non-veteran men disadvantaged by the statute, the statistics were, for Justices Stevens and White, sufficient to find no invidious discrimination.
[47] *Id.* at 277.

The plaintiff was thus left to argue that the "natural and foreseeable consequences" of the legislation indicated the intent behind it.[48] The Supreme Court declined to incorporate this kind of presumption of intent based on natural and foreseeable consequences from criminal law, holding that discriminatory intent in the equal protection context requires more—"it implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part '*because of*,' not merely '*in spite of*,' its adverse effects upon an identifiable group."[49] Notably, for this gloss on intent, the Court cited no prior authority, other than a concurrence by Justice Stewart that stated that "awareness" of race is not "the equivalent of discriminatory intent."[50] Yet the Court qualified this statement in a footnote, stating:

> This is not to say that the inevitability or foreseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent. Certainly, when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of [the Massachusetts law], a strong inference that the adverse effects were desired can reasonably be drawn. But in this inquiry—made as it is under the Constitution—an inference is a working tool, not a synonym for proof. When, as here, the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate, and when, as here, the statutory history and all of the available evidence affirmatively demonstrate the opposite, the inference simply fails to ripen into proof.[51]

Put another way, the Court stated, "What a legislature or any official entity is 'up to' may be plain from the results its actions achieve, or the results they avoid."[52] Nevertheless, the Court held, "When the totality of legislative actions establishing and extending the Massachusetts veterans' preference are considered, the law remains what it purports to be: a preference for veterans of either sex over nonveterans of either sex, not for men over women."[53]

As we will see, *Feeney*'s mode of analysis—brushing aside evidence of discriminatory impact and even awareness of such impact where a plaintiff could not show that a legislature selected its course of conduct "because of" rather than "in spite of" such impact—was oft-repeated by courts in assessing equal protection claims in the criminal sentencing context without the qualification or nuance suggested in the decision's footnote.

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[48] *Id.* at 278.
[49] *Id.* at 279 (emphasis added).
[50] *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 179 (1977) (Stewart, J. concurring).
[51] *Feeney*, 442 U.S. at 279 n.25.
[52] *Id.* at 279 n.24.
[53] *Id.* at 280 (internal citation omitted).

While *Feeney* completed a triumvirate of decisions making equal protection claims virtually impossible to prove, another 1979 case, decided less than a month after *Feeney*, notably drew a line against the encroachment of the demanding *Davis/Arlington Heights* standard from an area where it had traditionally been far more active in rooting out discrimination — school desegregation. The Court had been active in the years since *Brown v. Board of Education* in pursuing its mandate to end segregation in schools. In *Columbus Board of Education v. Penick*, the Court encountered an argument by a "highly segregated"[54] school district in Columbus, Ohio, that lower courts' desegregation orders violated *Davis* and *Arlington Heights* because the plaintiff could not show a discriminatory purpose.[55] Justice White, who as Deputy Attorney General had dispatched federal marshals to oversee integration efforts in the South,[56] wrote for the majority (with Justice Powell in dissent), this time holding that *Davis* posed no barrier to the lower courts' desegregation mandate. The Court rejected the argument that by relying on the "natural and foreseeable consequences" of the school board's practices was "nothing more than equating impact with intent, contrary to the controlling precedent." Justice White's opinion quoted the district court's statement that *Davis* and *Arlington Heights* did not forbid "the foreseeable effects standard from being utilized as one of the several kinds of proofs from which an inference of segregative intent may be properly drawn."[57] Further, the Court added, "Adherence to a particular policy or practice, 'with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn.'"[58] Thus, the combination of the qualifying language noted in *Feeney* and the Supreme Court's embrace of the district court's reasoning in *Penick* demonstrate that disparate impact remains a relevant factor—indeed, potentially a powerful one—in determining discriminatory purpose, where legislators are aware of such an impact and nevertheless adhere to the policy that causes it.

II. Failed Efforts to Challenge Crack Sentencing Laws in the Federal Circuit Courts

Whatever nuance the Supreme Court introduced into the demanding standard of discriminatory purpose, however, lower courts largely overlooked it in assessing equal protection claims arising from the harsh federal sentenc-

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[54] 443 U.S. 449, 452 (1979).

[55] *Id.* at 464.

[56] *Justice Byron White*, N.Y. Times (Apr. 16, 2002), https://www.nytimes.com/2002/04/16/opinion/justice-byron-white.html [https://perma.cc/Q648-JVKL].

[57] *Penick.*, 443 U.S. at 464–65 (quoting *Penick*, 429 F. Supp. at 255).

[58] *Id.* at 465. Notably, the decision in *Penick* did not discuss *Feeney*, except to cite its footnote acknowledging that when disproportionate impact is "inevitable . . . , a strong inference that the adverse effects were desired can reasonably be drawn."

ing regimes enacted in the 1980s and 1990s. In challenges to the 100-to-1 crack/powder cocaine sentencing disparity enacted in the Anti-Drug Abuse Act of 1986 (and incorporated into both substantive criminal law under 21 U.S.C. § 841(b) and the U.S. Sentencing Guidelines' drug quantity table), defendants repeatedly brought dramatic evidence of disparate impact to the attention of courts in nearly every federal circuit. Yet the circuit courts uniformly rejected these challenges,[59] discounting evidence of discriminatory impact and holding that even if Congress was aware of such impact, that was immaterial in the absence of proof that the disparity was enacted *because of* rather than *in spite of* its racist results.

For example, in *United States v. Lattimore*,[60] the Eighth Circuit addressed statistical evidence from Minnesota that showed that, in 1988, 96.6% of those charged with crack offenses were Black, whereas 79.6% charged with powder offenses were white.[61] Although acknowledging these statistics, the court held that they "do not indicate a violation of equal protection in the federal constitution sense" because, as in *Feeney*, Congress did not "select[ ] or reaffirm[ ]" the policy "because of" rather than "in spite of," the adverse effects on people of color.[62] Instead, the Eighth Circuit stated, "the legitimate noninvidious purposes" of the 100-to-1 ratio "cannot be missed,"—namely, the assumption (unsupported by science) that crack was more addictive and more dangerous—and thus there was no equal protection violation. This holding plainly did not adhere to the Supreme Court's admonition that disparate impact remained important evidence of discriminatory intent; to the contrary, it held that such impact had *no* constitutional weight where there was a non-discriminatory rational basis for the policy. That holding not only contravened *Feeney* and *Penick*; it avoided the application of strict scrutiny to equal protection analysis and ignored the Supreme Court's statements in *Arlington Heights* and subsequent cases that a discriminatory intent need not be the *sole* rationale for legislation to violate the Equal Protection Clause.

Other courts followed similar erroneous pathways. In *United States v. Moore,*[63] the Second Circuit noted that "statistical evidence of [the] discriminatory impact" of the 100-to-1 ratio was "irresistible," and that certain debates surrounding the legislation in 1986 described "gangs of young black men push[ing] their rocks on passing motorists . . . [l]ess than a block from where unsuspecting white retirees play tennis."[64] But although these facts "raise[d] the judicial eyebrow," the Circuit rejected the defendant's equal

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[59] *See, e.g.*, United States v. Thurmond, 7 F.3d 947, 951 (10th Cir. 1993); United States v. Reece, 994 F.2d 277, 278–79 (6th Cir. 1993); United States v. Frazier, 981 F.2d 92, 94–95 (3d Cir. 1992); United States v. Galloway, 951 F.2d 64, 65–66 (5th Cir. 1992); United States v. House, 939 F.2d 659, 664 (8th Cir. 1991).

[60] 974 F.2d 971 (8th Cir. 1992).

[61] *Id.* at 975 (citing State v. Russell, 477 N.W.2d 886, 887 (Minn. 1991)).

[62] *Id.* (internal quotation marks omitted).

[63] 54 F.3d 92 (2d Cir. 1995).

[64] *Id.* at 98 (quoting 132 CONG. REC. S4668 (daily ed. Apr. 22, 1986)).

protection claim because, it held, "Congress enacted the sentencing ratio for a valid, stated purpose," thus applying rational basis review rather than strict scrutiny.[65] The court dismissed as irrelevant that the medical establishment had discredited the notion that crack is more addictive than powder cocaine because subsequent scientific disagreement with congressional findings did not establish discriminatory purpose and because "this reason was never the *sole* rationale justifying the 100 to 1 ratio."[66] The Second Circuit hastened to add that its decision was unaffected by recent conclusions of the Sentencing Commission and arguments in the media that the ratio should be revised.[67]

Other examples of tortured logic abound in these decisions. In reasoning that would echo in *post hoc* defenses of the 1994 Crime Bill, the D.C. Circuit held that the 1986 Act could not have had a discriminatory purpose because, "[a]fter all, the Congress of 1986 was composed of many congressmen, including a number of African-Americans, who could have been expected to attack promptly any legislation thought to stem from discriminatory purpose—let alone legislation accompanied by racist remarks."[68] For good measure, the D.C. Circuit added that "the legislation may actually disproportionately *benefit* African-Americans who live in areas plagued with crack distribution and use."[69]

Notably, although all equal protection challenges to the 100-to-1 ratio failed in the circuit courts, and none were taken up by the Supreme Court,[70] the circuits felt compelled to issue repeated precedential opinions rejecting such challenges—as though the same rule of law had to be justified again and again in the face of an ever-increasing body of statistics showing stark discrimination. Over time, a few decisions recognized the deficiencies in the reasoning of these opinions. Although concurring in the result of one such decision, Judge Gerald Heaney of the Eighth Circuit wrote that the disparate treatment of Black and white drug suspects "makes the war on drugs look like a war on minorities."[71] While Judge Heaney acknowledged there may be legitimate, non-discriminatory reasons to treat crack cocaine differently from powder, at least some portion of the disparity could be accounted for, he argued, because "parts of our society view the young black male as a figure of social disruption, and will seek to punish him more harshly than his white suburban counterpart."[72] Nevertheless, Judge Heaney—whose remarks

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[65] *Id.* (citing United States v. Stevens, 19 F.3d 93, 97 (2d Cir. 1994)).
[66] *Id.* at 99 (emphasis added).
[67] *Id.*
[68] United States v. Johnson, 40 F.3d 436, 440 (D.C. Cir. 1994).
[69] *Id.* at 441 n.2.
[70] The Supreme Court did not address the 100-to-1 ratio in any fashion until its 2007 decision Kimbrough v. United States, 552 U.S. 85 (2007), which held that district courts had discretion to vary downward from the Sentencing Guidelines to account for policy disagreements with the Sentencing Commission on its disparate treatment of crack and powder cocaine.
[71] United States v. Willis, 967 F.2d 1220, 1226 (8th Cir. 1992) (Heaney, J., concurring) (internal quotation marks and alteration omitted).
[72] *Id.*

were joined by another judge of the three judge panel, thus representing a majority—was constrained to concur based on "our prior decisions that hold there is no merit in [the defendant's] equal protection argument."[73]

One final decision merits note: in yet another case from the Eighth Circuit, *United States v. Clary*, the district court had gone below the ten-year mandatory minimum sentence in a crack case on equal protection grounds.[74] The district court analyzed the equal protection claim "by examining the role that racism has played in criminal punishment in this country since the late seventeenth century," citing "the unconscious predisposition of legislators," and discussing news articles about "gang-affiliated, gun-toting, young black males" that were entered into the *Congressional Record* in support of the statute, as well as Congress's arbitrary doubling of the ratio from 50-to-1 to 100-to-1.[75] Despite recognizing that the district court's "painstakingly crafted opinion" was "the most complete record on this issue to come before this court," the Eighth Circuit rejected its reasoning as failing to meet *Feeney*'s standard of showing a decision made "because of" rather than "in spite of" discriminatory impact.[76] The Circuit dismissed entirely the notion that "unconscious racism" could have anything whatsoever to do with the question of discriminatory purpose.[77] The court also discounted the evidence of media reports entered into the *Congressional Record* because, it stated, while "this information may have affected at least some legislators, these articles hardly demonstrate that the stereotypical images 'undoubtedly' influenced the legislators' racial perceptions."[78] Finally, the court cited evidence in the record that demonstrated, in its view, that Congress had acted without racial animus. For this conclusion, the court cited testimony before the district court of Eric E. Sterling, Counsel to the Subcommittee of Criminal Justice of the House of Representatives at the time the statute was enacted, who stated that "the members of Congress did not have racial animus, but rather 'racial consciousness,' an awareness that the *'problem in the inner cities . . . was about to explode into the white part of the country*.'"[79] That testimony—which reads to the modern eye as an *admission* of discriminatory purpose—was "the most pertinent" factor for the Eighth Circuit in holding that Congress acted without such purpose.[80] The Circuit reversed the district court's decision and remanded with instructions to impose the mandatory minimum sentence.

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[73] *Id.*
[74] 34 F.3d 709 (8th Cir. 1994).
[75] *Id.* at 711 (citing United States v. Clary, 846 F. Supp. 768, 774–84 (E.D. Mo. 1994)).
[76] *Id.* at 713.
[77] *Id.*
[78] *Id.*
[79] *Id.* at 714 (emphasis added).
[80] *Id.*

III. Regulating Narcotics In Public Housing: the 1994 Crime Bill and Federal Crime Policy

We now turn to our case study of the public housing provision of the 1994 Crime Bill. We will first describe briefly the legislative history of the provision prior to the 1994 Bill, then discuss its disparate impact since passage, and finally return to the social and political cross-currents that led to its adoption in the Clinton Administration's 1994 crime legislation. We are not making an argument about individual legislators' subjective states of mind (although some of the comments in the *Congressional Record* quoted below certainly raise questions about the subjective intent of the speakers). Indeed, courts' demand for evidence of such subjective animus reflects a misunderstanding of what the Equal Protection Clause requires and how racial bias operates. Instead, we are making an argument about congressional intent, based on objective historical evidence of the policies debated and political trade-offs made in a specific historical context, from which, we argue, discriminatory purpose may be deduced.

A. Statutory Framework

As amended by the 1994 Crime Bill, section 860(a) of Title 21 of the United States Code makes it a federal crime to distribute, possess with intent to distribute, or manufacture narcotics "in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility."[81] Section 860(a) (originally § 405A) was added to the Controlled Substances Act of 1970 in the joint budget resolution for fiscal year 1985, covering drug manufacturing and distribution within one thousand feet of public or private elementary and secondary schools and providing no mandatory minimum sentence for a first offense.[82] After the powder cocaine-related death of University of Maryland basketball star Len Bias, the statute was amended in the Anti-Drug Abuse Act of 1986 to include colleges and universities, with enhanced penalties for repeat offenses.[83] In 1988, Congress added playgrounds, youth centers, swimming pools and video arcades, though restricting the statute's reach to one hundred feet of those facilities.[84] The Crime Control Act of 1990 imposed a one-year mandatory minimum sentence for a first offense under the statute (which it recodified at

[81] 21 U.S.C. § 860(a).
[82] Pub. L. No. 98-473, 98 Stat. 1873 (1984).
[83] Pub. L. No. 99-570 § 1104, 100 Stat. 3207 (1986).
[84] Pub. L. No. 100-690 § 6458, 102 Stat. 4181 (1988). Following the 1988 law, the Sentencing Guidelines added a section carrying enhanced penalties for narcotics offenses committed near "protected locations." U.S. Sent'g Guidelines Manual § 2D1.2 (U.S. Sent'g Comm'n 2018).

21 U.S.C. § 860) but did not modify its substantive provisions focusing on locations where children were likely to be targeted by drug dealers.[85]

Senator Bill Bradley, Democrat of New Jersey, first introduced the expansion of the statute to public housing as an amendment to the Senate version of the 1991 Violent Crime Control Act, which was authored by then-Senator Biden. The legislative debate, such as it was, covers only a single page of the *Congressional Record*. Senator Bradley introduced the amendment, contrasting public housing residents to "[m]ost" people who "do not need criminal penalties to declare our homes drug-free zones."[86] He characterized public housing projects as "open-air drug markets, full of violence" where "by the afternoon or early evening, the streets and hallways are abuzz with drug trafficking and violence."[87] He added that parents of children who live in public housing "know the calendar. They breathe easier in the winter, when some of the drug dealers actually prefer to be in prison, where it is warm and cheap, and they can stay in business. Come spring and summer, they are back on the streets."[88] The 1991 bill did not become law, but as will be discussed below, the Clinton Administration later endorsed the inclusion of Senator Bradley's proposal in the 1994 Crime Bill.

B. Disparate Impact

Although African Americans and Latinos represent collectively 31.7% of the U.S. population,[89] and demographic statistics from 2017 of the approximately two million Americans residing in public housing indicate that 67% are people of color,[90] statistics in a representative sample of defendants charged with violating the public housing provision of § 860(a) reveal that among 807 defendants for whom race can be determined, 91.7% of defendants charged with violating the public housing provision were African American, Latino or Native American, while 8.3% were non-Hispanic white.[91]

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[85] Pub. L. No. 101-647 § 1214, 104 Stat. 4789 (1990).

[86] 137 CONG. REC. S8878-03 (1991).

[87] *Id.*

[88] *Id.*

[89] *Quick Facts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/IPE120218 [https://perma.cc/V6UW-RXZF].

[90] *Assisted Housing: National and Local Datasets*, U.S. DEP'T OF HOUS. & URBAN DEV., https://www.huduser.gov/portal/datasets/assthsg.html [https://perma.cc/G3Q6-LGZW].

[91] We sampled data from sixty-one judicial districts—representing approximately 65% of the ninety-four judicial districts throughout the country—to determine charging statistics for section § 860(a); how often federal prosecutors charge the public housing provision in particular when charging defendants under the statute; and the race of the defendants in those cases. The data was obtained by conducting searches of criminal reports on Pacer of cases from the last twenty years (earlier cases do not have electronic records) and sorting those cases by codes related to the statute (there are six codes associated with 21 U.S.C. § 860(a)—we searched each of these codes). The sixty-one districts we searched were selected solely based on their electronic filing system's having a fee exemption for counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A, and represent a cross-section of circuits and geographic regions throughout the country. Further information about the specific provision of section § 860(a) charged in each case was obtained by reviewing the charging instrument. Finally, the race of the defendant was determined by cross-referencing the name of the individual on Pacer

Notably, a study of drug defendants generally in Bureau of Prisons custody (for fiscal year end 2012) found that 76% of such defendants were Black or Latino, while 22% were white.[92] Thus, people of color are overrepresented in cases charging the public housing provision well beyond their proportion of the general population and the population of public housing residents *and* to an even greater degree than in the already-skewed federal drug defendant population.[93]

Section 860(a) is disparately charged in judicial districts throughout the country. Some districts have never charged a § 860(a) case relating to public housing, schools, playgrounds, or any other provision of the statute, while other districts regularly deploy the statute. For example, the statute has rarely been charged in the last twenty years in the Second Circuit, which covers New York, Connecticut and Vermont, except in the Western District of New York, which has charged the statute twenty-seven times. Meanwhile the Northern District of Iowa and the District of Kansas have each charged the statute over one hundred times in that same period (though neither has ever charged the public housing provision).

Charging of the public housing provision specifically is even more haphazard and discriminatory. The provision is virtually never used in some districts that include the country's most populous metropolitan centers. For

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and the three-digit code associated with the judicial district with information on the Bureau of Prisons' "inmate locator" function on the BOP's website. The BOP distinguishes between "black" and "white" individuals but does not indicate whether the "white" individuals are "Hispanic or non-Hispanic." Accordingly, we kept track of the names of individuals classified as "white" and assumed that any individual who does not have a well-recognized "Hispanic" surname is "non-Hispanic." Of the 862 overall defendants charged with the public housing provision, race could not be determined for 55 defendants, or approximately 6% of the sample. Data supporting these statistics are on file with the authors.

[92] *See* SAM TAXY, JULIE SAMUELS, & WILLIAM ADAMS, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., DRUG OFFENDERS IN FEDERAL PRISON: ESTIMATES OF CHARACTERISTICS BASED ON LINKED DATA 3 (2015).

[93] These differences are statistically significant; in other words, a random draw of each population is highly unlikely to produce the statistics represented in our data set. We used a Welch's test to compare the difference between the distributions around two means to assess the likelihood that they could be drawn from the same overall proportion in a population. The t-statistic for Welch's test is calculated as:

Calculating the t-statistic provides a p-value, which, if less than or equal to 0.05, is considered to be statistically significant. For all comparisons, X1 (the portion of all section 860(a) defendants who are Black and/or Latino) is 0.917, N1 (the total number of 860(a) defendants) is 807, and S1 (the standard deviation) is 0.0097115. When compared with the population a large, X2 is 0.32 (the portion that is Black and Latino), N2 is 328,239,523 (the total US population), and S2 = 0.0000257, t=1,746 and the value of p is less than 0.001 (highly statistically significant). When compared with the population in public housing, X2 is 0.67 (the portion of the public housing population that is Black, Latino, or both), N2 is 2,000,000 (the total public housing population), and S2 = 0.00003325 (the standard deviation), t = 723 and the value of p is less than 0.001 (highly statistically significant). And, when compared with the federal prison population reflected in the BJS study, X2 is 0.76 (the portion of the 2012 federal prison population serving time for all drug offenses that is Black, Latino, or both), N2 is 94,678 (the total federal prison population serving time for drug offenses), and S2 = 0.0013886 (the standard deviation), t = 460 and the value of p is less than 0.001 (highly statistically significant). Accordingly, in each one of these scenarios, the percentage of minorities charged with the public housing provision could not be the result of a random sampling of any of these three populations.

example, the sixty-nine defendants charged with the statute in the last two decades in New York City and Connecticut all come from three federal cases, and *not a single one* (for whom race information was available) was white. Meanwhile, data from districts where the public housing provision was used frequently strongly reinforce the inference of discriminatory enforcement. Federal prosecutors in the Northern District of West Virginia have used the provision frequently, charging 125 defendants in the last twenty years (the Southern District of West Virginia has no such cases). Those 125 cases accounted for the vast majority—76%—of white defendants who had been charged with the provision nationally. But in a state which, according to recent census figures is 92% "non-Hispanic white,"[94] whites still made up *only 40%* (51/125) of the defendants charged with the public housing provision, while Black Americans, who made up 3.6% of the population, represented *44%* of the defendants charged with the provision. If one removes the Northern District of West Virginia from national statistics, the disparate impact of the public housing provision nationally shifts to 97.7% minority and 2.28% white,[95] arguably approaching *Yick Wo* and *Gomillian*-level disparate impact.

In addition to this statistical disparity, the geographic history of public housing suggests a disparate impact. In New York City, for example, African Americans and Latinos make up 91.5% of public housing residents, as compared with approximately 67% nationally.[96] The location of public housing projects is historically bound to the City's history of segregation. As millions of Black people fled racial terrorism in the deep South and migrated North in the 1920s and 30s, thousands settled in Brooklyn attracted by the promise of safety and employment opportunities at the Navy Yard.[97] At the same time, two social programs were being implemented that would change the makeup of neighborhoods and shape the City as we know it today. First, the process known as "redlining," undertaken by the Federal Housing Administration (FHA), designated certain neighborhoods as ineligible for federal backing of mortgages, thus eliminating one of the critical stepping stones out

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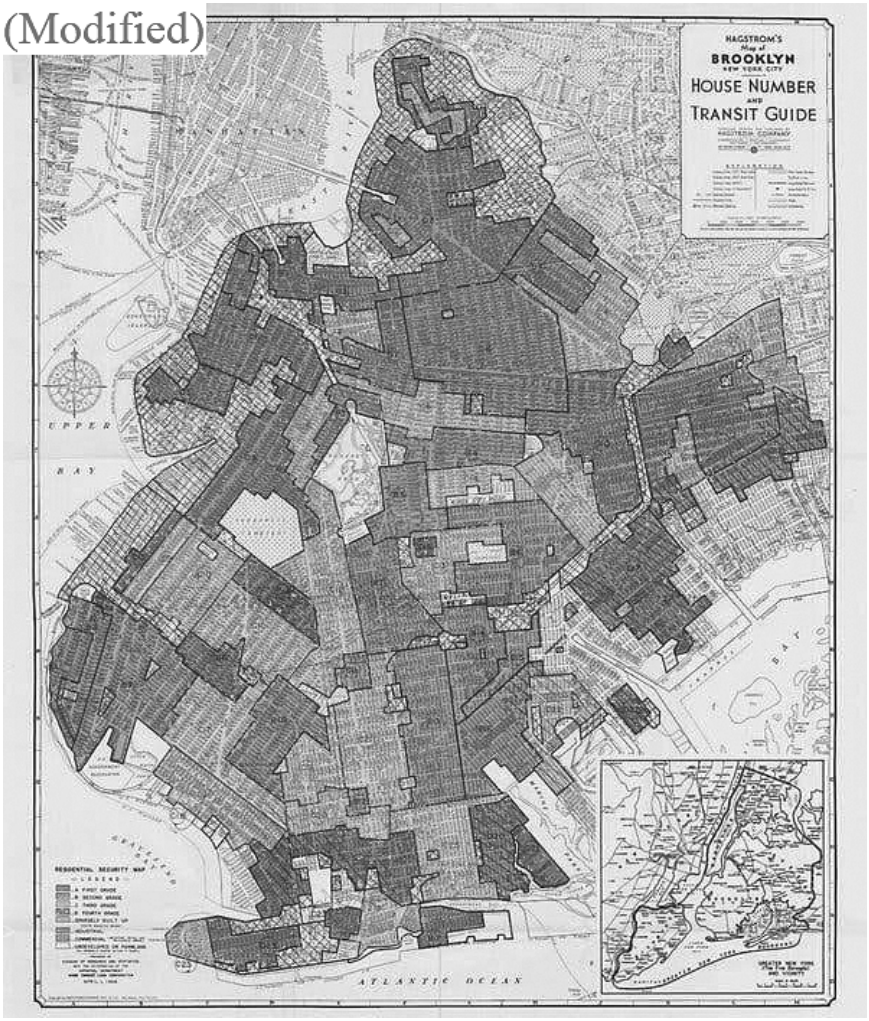
[94] *QuickFacts: West Virginia*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/WV [https://perma.cc/YB48-LZKX].

[95] If one also removes the District of Puerto Rico, the other district that makes up a substantial portion of cases and is also largely homogenous, the numbers shift slightly from the national figures to 93.6% African American and Latino and 6.3% white.

[96] NYU FURMAN CTR., FACT BRIEF: HOW NYCHA PRESERVES DIVERSITY IN NEW YORK'S CHANGING NEIGHBORHOODS 3 (April 2019), https://furmancenter.org/files/NYCHA_Diversity_Brief_Final-04-30-2019.pdf [https://perma.cc/962P-22GX]; NAT'L LOW INCOME HOUS. COAL., WHO LIVES IN PUBLIC HOUSING? 3 (2012), https://nlihc.org/sites/default/files/HousingSpotlight2-2.pdf [https://perma.cc/G8R5-YSKC]. And nationwide, people of color constitute 67% of public housing residents. U.S. DEP'T OF HOUS. & URBAN DEV., ASSISTED HOUSING: NATIONAL AND LOCAL DATASETS, https://www.huduser.gov/portal/datasets/assthsg.html [https://perma.cc/E7DZ-YA5X].

[97] *See generally* ISABEL WILKERSON, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION (2010); Alison Gregor, *Bedford-Stuyvesant: Diverse and Changing*, N.Y. TIMES (Jul. 9, 2014), https://www.nytimes.com/2014/07/13/realestate/bedford-stuyvesant-diverse-and-changing.html [https://perma.cc/YG87-FDNX].

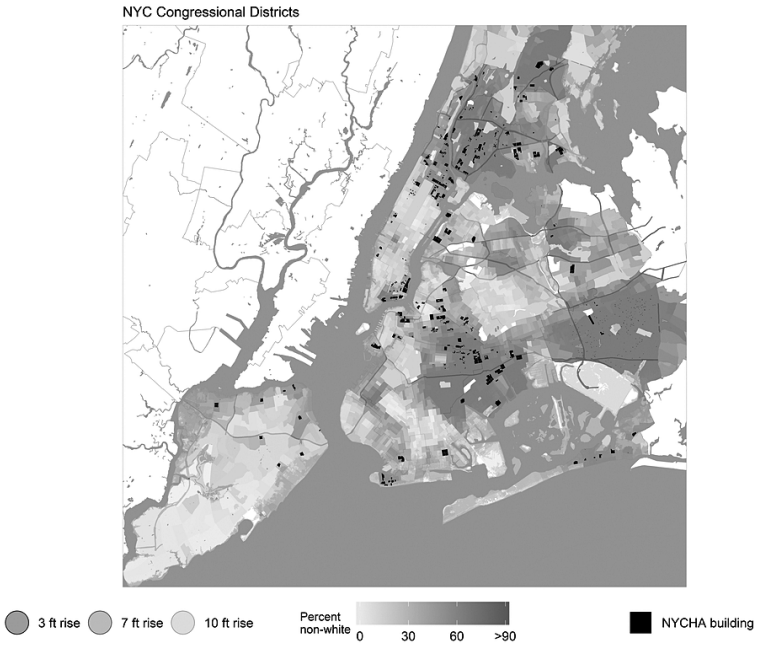
of poverty for African Americans and other ethnic minorities.[98] A 1938 map showing the FHA's division of Brooklyn reflects neighborhoods designated as "D – Fourth Grade," i.e., hazardous for underwriting mortgages in red (hence the term "redlining").[99]



[98] *See* Emily Badger, *How Redlining's Racist Effects Lasted for Decades*, N.Y. TIMES (Aug. 24, 2017), https://www.nytimes.com/2017/08/24/upshot/how-redlinings-racist-effects-lasted-for-decades.html [https://perma.cc/D5Q5-UT8X]. *See generally* Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/ [https://perma.cc/J37T-5N2N] ("Redlining went beyond FHA-backed loans and spread to the entire mortgage industry, which was already rife with racism, excluding black people from most legitimate means of obtaining a mortgage.").

[99] Badger, *supra* note 98.

At the same time, "NYCHA was organized in the 1930s with the hope of 'eliminating the crime, illness, poverty, and moral decay bred by slums."[100] The earliest developments were racially segregated low-rise buildings built for middle-income families.[101] In an effort termed "slum clearance," entire blocks of deteriorating tenements were demolished and, in some cases, replaced with cheaply constructed, often high-density apartment buildings.[102] As a result of these processes and white flight to the suburbs, by the 1960s, the population of NYCHA buildings was mostly minority tenants.[103] According to NYCHA's Special Tabulation of Resident Characteristics, the most recent available statistics being from 2016, 45.6% of resident families are Black; 44.4% of resident families are Latino; 4.8% are white; and 4.6% are Asian.[104] A recent map of congressional districts in New York City shows demographic patterns and the location of public housing projects reflecting their location in predominantly minority communities:[105]



[100] United States v. Bannister, 786 F. Supp. 2d 617, 633 (E.D.N.Y. 2011) (alterations omitted) (quoting KENNETH T. JACKSON, ENCYCLOPEDIA OF NEW YORK 954 (1995)).

[101] *Id.*

[102] *Id.* (quoting NICHOLAS DAGEN BLOOM, PUBLIC HOUSING THAT WORKED: NEW YORK IN THE TWENTIETH CENTURY 129–32, 142–43 (2008)).

[103] *Id.* at 634.

[104] N.Y.C. HOUS. AUTH., SPECIAL TABULATION OF RESIDENT CHARACTERISTICS 3 (2016), https://www1.nyc.gov/assets/nycha/downloads/pdf/Resident-Data-Summaries.pdf [https://perma.cc/LPJ5-V78F].

[105] *Mapping NYCHA Communities' Disinvestment: Segregation, Police Stops, Unemployment, and Poverty*, DATA FOR PROGRESS, https://www.dataforprogress.org/nycha-maps [https://perma.cc/QV6F-GPRX].

Comparing the areas of the two maps where the Federal Housing Authority designated neighborhoods unworthy of home loans and the location of housing projects today shows the endemic, systematic segregation of race and poverty in Brooklyn, which echoes across New York City generally. Thus, the stark overrepresentation of African Americans and Latinos in the few New York City cases charging § 860(a) should come as no surprise based on the demographics of individuals residing not just in NYCHA housing, but also in the neighborhoods in which such housing is located. Although the statute had been infrequently deployed in New York City, its enforcement was virtually guaranteed to result in a stark disparate impact on minorities, since it would inevitably target residents living in the most heavily non-white communities in the City.[106] This is so despite consistent evidence that whites use and sell narcotics at rates similar to or greater than people of color.[107] In other words, the statute targets enforcement in geographic areas in New York City that have no correlation with rates of drug sales and use; enforcement is targeted instead where the greatest number of African Americans and Latinos will be captured. Of course, in the post-*Davis*/*Arlington Heights* world, that, in and of itself, is likely insufficient to make out an equal protection claim. Thus, a careful and nuanced understanding of the history of the public housing provision—and the social and political circumstances in which it arose—is necessary to launch a credible attack on the statute.

C. History of the Public Housing Provision

The modern prosecution of the wars on crime and drugs at the federal level stretches back to President Lyndon Johnson's declaration of a "War on Crime" in 1965 and had produced such disparate racial impact within the American criminal legal system by the time of the debate over the 1994 Crime Bill that the historical record makes clear Congress's awareness of such disparate impact. Indeed, federal policymakers were presented with several alternative strategies to address the problem of crime and drugs that involved treatment and prevention measures, as well as redirecting power and economic resources to low-income communities of color. Yet the White House and Congress pursued a course of action that rejected such proposals and instead vastly expanded policing, surveillance, and incarceration. In the 1994 Bill's final version, Congress opted to expand the nation's policing apparatus without addressing the apparent racial disparities that sustained that system in any meaningful way.

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[106] *Cf.* Floyd v. City of New York, 959 F. Supp. 2d 540, 660–64 (S.D.N.Y. 2013) (holding NYPD policy of targeting "the right people" for *Terry* stops in NYCHA housing projects with demonstrated discriminatory effect violated Equal Protection Clause).

[107] *See, e.g.*, Michelle Y. Ewert, *One Strike and You're Out of Public Housing: How the Intersection of the War on Drugs and Federal Housing Policy Violates Due Process and Fair Housing Principles*, 32 HARV. J. RACIAL & ETHNIC JUST. 57, 73 (2016); *see generally* MICHELLE ALEXANDER, THE NEW JIM CROW 8 (2012).

1. Racialized Roots of Federal Crime Policy

The roots of the 1994 Crime Bill and the rise of mass incarceration date back far beyond the "War on Drugs" of the 1980s. When President Johnson began the national law enforcement program in the context of landmark civil rights legislation and unprecedented social change in the 1960s, federal policymakers established a role for the federal government in police, courts, and prison systems for the first time in American history.[108] The Omnibus Crime Control and Safe Streets Act of 1968, the first major piece of national law enforcement legislation, marked the official beginning of federal investment and influence in local policing and criminal justice that endured through subsequent reauthorizations and major federal crime control bills from the Anti-Drug Abuse Acts of 1986 and 1988 to the 1994 Crime Bill to, most recently, the First Step Act of 2019.

From the Johnson Administration onwards, federal crime control policies targeted young Black men between the ages of fifteen and twenty-four with new policing and surveillance programs, as well as ever-increasing harsh sentencing measures.[109] A growing consensus of policymakers, social scientists, and law enforcement officials concluded that only intensified enforcement of the criminal law in Black urban neighborhoods, combined with greater punishment, would prevent crime and "disorder" in the future.[110] Na-

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[108] Indeed, Johnson's declaration broke from the previous two centuries of federal approaches to local law enforcement. Crime control matters had previously rested under the domain of state governments.

[109] The specific targeting of Black men between the ages of fifteen and twenty-four for national law enforcement programs runs through the memoranda and internal reports examined in ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION (2016). Within the Johnson Administration, PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUST., THE CHALLENGE OF CRIME IN A FREE SOCIETY: A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 5, 35, 44 (1967); and NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968) contain the most clearly articulated public expressions of this agenda. *See also* NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA (2014); Naomi Murakawa, *The Origins of the Carceral Crisis: Racial Order as 'Law and Order' in Postwar American Politics*, *in* RACE AND AMERICAN POLITICAL DEVELOPMENT 234–55 (Joseph Lowndes, Julie Novkov & Dorian T. Warren eds., 2008); Vesla Mae Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 STUD. AM. POL. DEV. 230 (2007); Velsa Mae Weaver, Frontlash: Race and the Politics of Punishment (2007) (Ph.D. dissertation, Harvard University) (ProQuest).

[110] The mission of Johnson's War on Crime was to expand surveillance and police patrol in low-income urban communities. Without invoking race explicitly, the White House and Congress built a set of punitive policies that focused on controlling this group by expanding the field of surveillance and patrol around them. Across political and ideological lines, federal policymakers shared a set of assumptions about African Americans, poverty, and crime, namely, they interpreted Black urban poverty as pathological—as the product of individual and cultural "deficiencies." The seemingly neutral statistical and sociological "truth" of Black criminality was wholly unsupported by empirical data, yet this stereotype guided the strategies federal policymakers developed for the War on Crime, first in the 1960s, then through the 1970s and the War on Drugs in the 1980s and beyond. *See* HINTON, *supra* note 110; HEATHER ANN THOMPSON, WHOSE DETROIT?: POLITICS, LABOR, AND RACE IN A MODERN AMERICAN CITY (2004); MICHAEL W. FLAMM, IN THE HEAT OF THE SUMMER: THE NEW YORK

tional law enforcement programs that focused on Black neighborhoods from the outset heightened the chance of arrest for young African American men and fostered the rise of a statistical apparatus primarily concerned with measuring street crime. All of these reinforced the association between Black neighborhoods and criminality and the escalation of punitive policies for the remainder of the 20th Century and into the 21st.

In the 1970s, the arrest and incarceration of young African American men became a deliberate strategy to prevent future crime. From the perspective of President Richard Nixon's Advisory Council, his closest aides, and Nixon himself, at the heart of the crime problem lay the *street* crime problem, which was seen as a Black, urban issue.[111] Nixon officials assumed that the "criminal species" could be "found predominantly in the slums of urban America and not in the suburbs."[112] The President himself expressed this sentiment bluntly: "You have to face the fact that the whole problem is really the blacks," Nixon's chief of staff H.R. Haldeman quoted Nixon as saying in Haldeman's diary entry from April 1969. "The key is to devise a system that recognizes this while not appearing to."[113] In a systematic way, Nixon recognized that the politics of crime control could effectively conceal the racist intent behind his administration's punitive domestic policies that directly targeted low-income African Americans.

Meanwhile, the racially targeted crime control strategies adopted by Johnson, Nixon, and subsequent presidential administrations yielded increased possibilities for supervision in the halls of urban schools, in the elevators of housing projects, and in the reception rooms of welfare offices in low-income communities of color. Soon, federal policymakers required employment initiatives, public schools, and grassroots organizations to partner with juvenile courts, police departments, and correctional facilities in order to receive funding. Over time, the vast and ever-expanding network of institutions responsible for surveillance, arrest, and incarceration evolved out of the fusion of law enforcement and social welfare programs—including public housing. The result was a historical and legal shift from controlling individuals to controlling communities and spaces.

RIOTS OF 1964 AND THE WAR ON CRIME (2016); JORDAN T. CAMP, INCARCERATING THE CRISIS: FREEDOM STRUGGLES AND THE RISE OF THE NEOLIBERAL STATE (2016); MAX FELKER-KANTOR, POLICING LOS ANGELES: RACE, RESISTANCE, AND THE RISE OF THE LAPD (2018).

[111] The decision on the part of the Nixon Administration to target young Black men as a strategy to fight the War on Crime was further rationalized by the new theoretical and scientific approaches to understanding Black criminal behavior. The influential political scientist James Q. Wilson worked in the Nixon Administration and attributed the increase of violent crime in the 1960s to the nation's growing youth population and urged policymakers to develop crime control programs based on demographic realities. "The only sure way we know of fighting crime is birth control," Wilson concluded. James Q. Wilson, *Crime in the Streets*, 5 PUB. INT. 26, 32 (1966). For Wilson, to curtail crime rates "short of locking up everyone under 30 years of age," urban police needed to make "the scene of the prospective crime" more secure. *Id.* at 34.

[112] *See* HINTON, *supra* note 110.

[113] H. R. HALDEMAN, THE HALDEMAN DIARIES: INSIDE THE NIXON WHITE HOUSE 53 (1994).

2. The Criminalization of Public Housing

As described above in the New York City example, structural racism and state-sponsored segregation measures such as redlining played an important role in skewing the population of urban public housing projects to be majority minority. The federal government aided in facilitating this segregation by actively redlining Black neighborhoods, supporting racially restrictive covenants that forbid Black people from buying property, and subsidizing segregated white suburbs.[114]

By the late 1970s, public housing developments suffered from extreme rates of racial segregation, poverty, residential abandonment, and crime. These problems continued to escalate when President Ronald Reagan launched the "War on Drugs" in 1984, amid a policy climate of disinvestment and federal retrenchment from social programs.[115] As it evolved during the Reagan Administration, antidrug policy forged even stronger linkages between social welfare and crime control programs, expanding general surveillance and the rise of mass incarceration in the process.

To implement the Reagan Administration's strategies nationwide and coordinate the activities of criminal justice, law enforcement, and military officials at all levels of government, White House officials created the Drug Policy Board. This body designed and oversaw national punitive programs and developed the policies that would go on to inform the Omnibus Anti-Drug Abuse Act of 1988.[116] Institutionalizing the recommendations of the Drug Policy Board, this Act began an unprecedented, targeted attack on drugs in public housing. The congressional findings labeled drug dealers as

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[114] In effect, by guaranteeing home equity loans while simultaneously divesting and diverting resources from urban areas to suburban ones, the federal government redistributed wealth to middle-class white suburbanites. Beginning in 1934, Federal Housing Authority (FHA) loans made mortgages easier to attain than ever before for middle-class homebuyers. KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 203–05 (1987). But because FHA insurance required appraisals, homeowners were unable to purchase in neighborhoods deemed risky. *Id.* at 209–10. Segregated black neighborhoods automatically received the lowest-quality rating, often colored red on real estate maps (hence the term "redlining"). *Id.* at 200. Appraisers consulted the FHA's *Underwriting Manual*, which instructed that "inharmonious racial or nationality groups" made a neighborhood undesirable for a prospective buyer." *Id.* at 208.

[115] Between fiscal year 1981 and fiscal year 1982, the Reagan Administration cut annual federal spending on social programs from $94.8 billion to $88.8 billion, including a decrease of $490 million from child nutrition programs, and a $341 million reduction in Aid to Families with Dependent Children payments. Richard S. Williamson, *A New Federalism: Proposals and Achievements of President Reagan's First Three Years*, 16 PUBLIUS 11, 14 (1986). The poverty rate itself also rose from 15 percent in 1975 to 23 percent by 1987. *See* MARGY WALLER, BROOKINGS INST., BLOCK GRANTS: FLEXIBILITY VS. STABILITY IN SOCIAL SERVICES (2005), http://www.brookings.edu/es/research/projects/wrb/publications/pb/pb34.pdf [https://perma.cc/FC8N-XD5B]; ANDREW E. BUSCH, RONALD REAGAN AND THE POLITICS OF FREEDOM (2001); Charlotte Saikowski, *Strengthening the Social Fabric*, CHRISTIAN SCI. MONITOR, Nov. 15, 1988; Leith Mullings, *Losing Ground: Harlem, the War on Drugs, and the Prison Industrial Complex*, 5 SOULS 1 (2003); Ronald Reagan, *Radio Address to the Nation on Welfare Reform*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/radio-address-the-nation-welfare-reform-0 [https://perma.cc/3VLJ-PHAW].

[116] Pub. L. No. 100-690, 102 Stat. 4181 (1988).

"imposing a reign of terror on public and other federal assisted low-income housing tenants."[117]

To fight drugs in public housing and ensure that they remained drug-free, Congress amended the Housing Act of 1937 and required Public Housing Authorities (PHAs) to add clauses to their leases prohibiting tenants, their household members, and guests from engaging in any drug-related criminal activity "on or near the public housing premises."[118] Under the terms of the policy, any tenant who engaged in illegal activity in the vicinity of a public housing site could be evicted, and any person convicted of a drug offense would be permanently eliminated from all federal benefits. The legislation also required PHAs to collaborate with local police departments in developing crime prevention plans under the Public Housing Drug Elimination Program (DEP) section of the law. Following the enactment of the law, across the United States, Housing Authorities and local police departments shared records and worked to increase surveillance.[119] The DEP provided funding through the Department of Housing and Urban Development (HUD) for anti-drug efforts by local housing authorities, including collaboration with local police.[120] The effect of these and other efforts federal policymakers created to increase patrol and surveillance in public housing areas criminalized entire low-income communities of color.

During the 1990s, policing tactics in public housing developments became even more aggressive. The leading research institute for policing practices, the Police Executive Research Forum, published a book in 1990 that examined drug crime-specific policing strategies employed in public housing.[121] It described approaches for "occupying the community," such as opening "mini-police stations" and increasing police presence and enforcement efforts within public housing developments,[122] with partial funding of these efforts coming from DEP.[123] It was in this context that Senator Bradley initially introduced his amendment to the Controlled Substances Act to provide enhanced penalties for drug crimes in and around public housing sites. As noted, while this proposal generated little controversy or debate, it did not become law until the political winds that ushered in the 1994 Crime Bill were blowing at full force following the election of Bill Clinton as the 42nd President.

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[117] Congressional findings, 42 U.S.C §?11901.

[118] 42 U.S.C. § 1437d(l)(5).

[119] Emily Ponder Williams, *Fair Housing's Drug Problem: Combating the Racialized Impact of Drug-Based Housing Exclusions Alongside Drug Law Reform*, 54 HARV. C.R.-C.L. L. REV. 769 (2019).

[120] BARBARA WEBSTER & EDWARD F. CONNORS, NAT'L INST. OF JUST., THE POLICE, DRUGS, AND PUBLIC HOUSING (1992).

[121] DEBORAH LAMM WEISEL, POLICE EXECUTIVE RESEARCH FORUM, TACKLING DRUG PROBLEMS IN PUBLIC HOUSING: A GUIDE FOR POLICE (1990).

[122] *Id.* at 101–02.

[123] Jeffrey Fagan, Garth Davies & Jan Holland, *The Paradox of the Drug Elimination Program in New York City*, 13 GEO. J. ON POVERTY, L. & POL'Y 416, 417 (2006).

3. The Politics of Crime Control: Public Housing and the 1994 Crime Bill

As it became clear to Democrats that Republicans had taken control of "the crime issue," then-Senator Joe Biden (D-DE) and Representative Chuck Schumer (D-NY) led the party in their quest to reclaim it for the Democratic platform.[124] Schumer declared that "it was imperative for the Democrats to put their own stamp on crime."[125] This became a central political strategy despite lawmakers' full awareness of widespread and pervasive discriminatory impacts within the criminal legal system. They chose *not* to address these issues meaningfully, opting instead to expand the system as-is. As early as August 1991, the United States Sentencing Commission concluded in a special report to Congress that racial disparities in sentencing began to increase after 1984.[126] "This differential application on the basis of race," the Commission wrote, "reflects the very kind of disparity and discrimination the Sentencing Reform Act [of 1984], through a system of guidelines, was designed to reduce."[127] In response, Representative Don Edwards (D-CA) introduced the Sentencing Uniformity Act of 1992. On the House Floor, Edwards cited the Sentencing Commission's discovery that decisions to prosecute under the mandatory minimum sentences enacted in the 1980s "are based not on neutral factors, but rather on factors such as race, gender, crime rates and caseloads, circuit, and prosecutorial practices."[128] "In particular," he stated, "a greater proportion of black defendants received sentences at or above the mandatory minimum level, followed by Hispanics, and then whites. Departures from the mandatory minimum are most likely to be granted to whites, and least likely to Hispanics."[129]

Nevertheless, Democrats pushed forward while Republicans also worked to retain control of the crime issue. In 1992, during his first term as Attorney General, William P. Barr released the Justice Department report *The Case for More Incarceration*, which argued for implementing policies that would greatly increase the level of incarceration in the United States, even asserting that "[the] benefits of increased incarceration would be enjoyed disproportionately by black Americans living in inner cities."[130] That same year,

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[124] Guy Gugliotta, *Crime Bill a Hostage of Politics*, WASH. POST (Aug. 5, 1992), https://www.washingtonpost.com/archive/politics/1992/08/05/crime-bill-a-hostage-of-politics/e3ecbbdb-8259-4cc7-a407-deee5038bbd0/ [https://perma.cc/B2RK-RDCR].

[125] *Id.*

[126] U.S. SENT'G COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (AS DIRECTED BY SECTION 1703 OF PUBLIC LAW 101-647) 82 (1991), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991_Mand_Min_Report.pdf [https://perma.cc/5QN8-CRAH].

[127] *Id.* at ii.

[128] 102 CONG. REC. H6079 (daily ed. Oct. 1, 1992) (statement of Rep. Don Edwards).

[129] *Id.*

[130] U.S. DEP'T OF JUST., OFF. OF POL'Y DEV., THE CASE FOR MORE INCARCERATION vi (1992), https://www.ojp.gov/pdffiles1/Digitization/139583NCJRS.pdf [https://perma.cc/G7GR-KJYH].

Barr testified in a congressional hearing that "our criminal justice system is designed to be fair and, in fact, is the fairest known to man."[131] This was despite all evidence to the contrary of pervasive discrimination in the criminal legal system.

It was in this political context that then-Governor Bill Clinton utilized a "New Democrat" political strategy, fully embracing the crime issue while running for president. He courted endorsements from police associations and unions,[132] touted his support for the death penalty (even leaving the campaign trail to oversee the execution of Ricky Ray Rector, an incarcerated Black man who was so intellectually disabled that he saved the dessert from his last meal to eat after his execution),[133] and promoted a crime plan that called for more cops and fewer guns on the street.[134] In a particularly poignant moment, just before Super Tuesday, the Clinton campaign organized a press conference at Stone Mountain Correctional Facility. This small prison is located in Stone Mountain, Georgia, a town best-known for hosting the rebirth of the Ku Klux Klan.[135] The photograph that circulated in newspapers the following day was striking: four white politicians speaking in front of a group of nearly all Black men in prison uniforms:[136]

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[131] *Role of the Department of Justice and the Drug War, Weed and Seed: Hearing Before the Select Committee on Narcotics Abuse and Control*, 102nd Cong. 24 (1992) (remarks of William P. Barr).

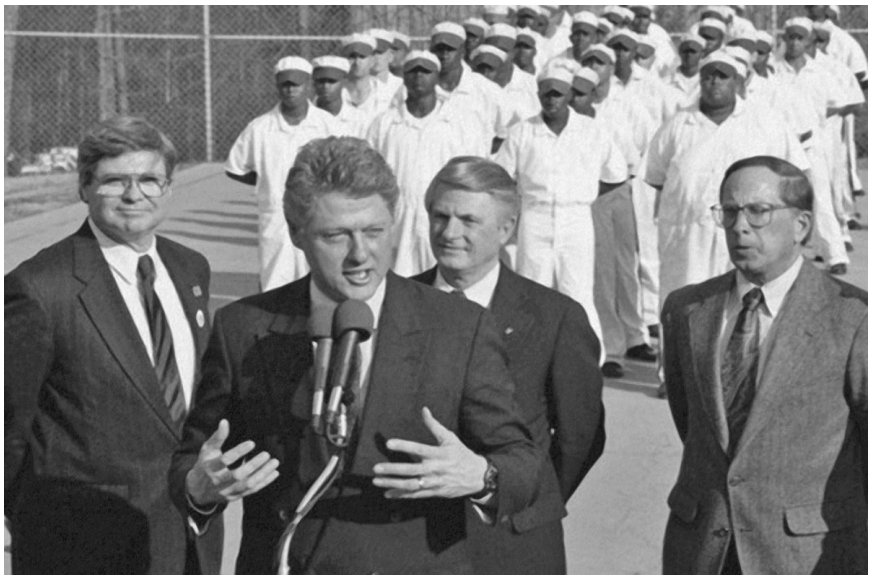
[132] The Associated Press, *Fraternal Order of Police to Endorse Clinton*, N.Y. TIMES (Sept. 16, 1996), https://www.nytimes.com/1996/09/16/us/fraternal-order-of-police-to-endorse-clinton.html [https://perma.cc/ZD95-S3A4]; Russell L. Riley, *Bill Clinton: Campaigns and Elections*, MILLER CENTER (n.d.), https://millercenter.org/president/clinton/campaigns-and-elections [https://perma.cc/D9DR-EPU4].

[133] Nathan J. Robinson, *The Death of Ricky Ray Rector*, JACOBIN (Nov. 5, 2016), https://jacobinmag.com/2016/11/bill-clinton-rickey-rector-death-penalty-execution-crime-racism [https://perma.cc/NSG6-HE94].

[134] Gwen Ifill, *Clinton in Houston Speech, Assails Bush on Crime Issue: The Democrats*, N.Y. TIMES (Jul. 24, 1992) https://www.nytimes.com/1992/07/24/us/1992-campaign-democrats-clinton-houston-speech-assails-bush-crime-issue.html [https://perma.cc/F6QK-UMAG].

[135] Jess Engebretson, *How the Birthplace of the Modern Ku Klux Klan Became the Site of America's Largest Confederate Monument*, KQED (Jul. 24, 2015), https://www.kqed.org/lowdown/19119/stone-mountains-hidden-history-americas-biggest-confederate-memorial-and-birthplace-of-the-modern-ku-klux-klan [https://perma.cc/BW5M-BTRR].

[136] Greg Gibson, *Bill Clinton at Stone Mountain Correctional Facility* ASSOCIATED PRESS (1992).



Once elected, President Clinton retreated briefly on crime to focus instead on his ultimately unsuccessful battle for healthcare reform. Yet, as internal memoranda reveal, close advisors saw an opportunity in shifting the administration's attention more permanently to "the crime issue." White House Director of Political Affairs Rahm Emanuel and Domestic Policy Advisor Bruce Reed counseled the President on a "crime strategy with passage of the Crime Bill as the central vehicle," arguing that "cement[ing] public perception of [him] as tough on crime" would not only benefit his image, "but also that of the Democratic Party which lost almost every major race in 1993 on the crime issue."[137] Reed and another advisor, Jose Cerda, drafted a memorandum arguing that crime was one of two of the "most powerful realignment issues" the president could "seize," and "at a time when public concern about crime is the highest it has been since Richard Nixon stole the issue from the Democrats in 1968."[138] If he did indeed seize the opportunity, he could harken back to the era of Robert Kennedy, when "crime was a linchpin that helped hold the Democratic majority together across racial and class lines."[139]

Key to this strategy was an intensification of the criminalization of public housing residents.[140] One prominent example of this occurred in 1993 in

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[137] Memorandum from Rahm Emanuel and Bruce Reed to Bill Clinton (Feb. 18, 1994) ("Crime Bill Communications," Box 7, Rahm Emanuel, William J. Clinton Presidential Library, hereinafter "WJCPL").

[138] Draft Memorandum from Bruce Reed and Jose Cerda to Bill Clinton (Oct. 27, 1993) ("1994 Crime Bill - Memos to POTUS," Box 85, Domestic Policy Council, Bruce Reed, and Crime Series, WJCPL).

[139] *Id.*

[140] This occurred despite a lack of sound data on the problem—one HUD official asserted in a memorandum to the Clinton Administration that "[t]here are no national figures on crime

Chicago when the Chicago Housing Authority and its police department engaged in "Operation Clean Sweep,"[141] a series of paramilitary raids that involved "pre-dawn surprise [warrantless] searches of buildings leading to mass arrests in violation of basic constitutional rights quite similar to the periodic 'shakedowns' intended to rid prison wards of shanks and other contraband."[142] The sweeps garnered the attention of the Clinton Administration, so much so that mere hours after the sweeps were ruled unconstitutional,[143] Clinton ordered Attorney General Janet Reno and HUD Secretary Henry Cisneros "to develop—within the next 10 days—a search policy for public housing that is both constitutionally permissible and effective, and that can be implemented on a nationwide basis."[144] In response, the Department of Justice drafted a proposal that included seven steps PHAs should take to combat crime, the majority of which related to searches.[145] This move was described by one Congressman as a "shocking directive" to find a "way around the Constitution" with Clinton acting "almost alarmingly in respect to the residents' fourth amendment privacy protection."[146]

In addition to Operation Clean Sweep and similar efforts that followed across the country, a primary driver of the criminalization of public housing

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in public housing." Memorandum from David Shipley to Bruce Katz and Amy Liu (Mar. 27, 1996), https://clinton.presidentiallibraries.us/items/show/14483) [https://perma.cc/3DHC-V48V] ("FOIA 2006-1734-F - David Shipley, Speechwriter").

[141] The first CHA searches began in 1988 as a response to increased levels of violence in CHA housing. The ACLU filed a class action suit on behalf of residents. The ACLU and CHA negotiated for several months, agreeing to terms of a consent decree that a federal judge approved in August 1989. CHA engaged in searches over the next several years that complied with the consent decree until a series of searches in 1992, and then another in 1993 (the subject of Pratt). For more on the earlier history of these searches, *see* Charles Hellman, *Secure in Their Houses? Fourth Amendment Rights at Public Housing Projects*, 40 N.Y.L. SCH. L. REV. 189 (1995).

[142] Loïc Wacquant, "Deadly Symbiosis: When Ghetto and Prison Meet and Mesh" *in* MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 94 (David Garland ed., 2001).

[143] *See* Pratt v. Chicago Hous. Auth., 848 F. Supp. 792 (N.D. Ill. 1994).

[144] President William J. Clinton, Statement of the President on the Court Decision Regarding the Chicago Housing Authority's "Operation Clean Sweep," (n.d.) ("Public Housing - Sweeps," Box 78, Domestic Policy Council, Bruce Reed, Crime, WJCPL).

[145] Draft Proposals for Restoring Safety to Public Housing (n.d.) ("Public Housing - Sweeps," Box 78, Domestic Policy Council, Bruce Reed, Crime, WJCPL). The proposal included the following: (1) Public housing agencies (PHAs) should include in their lease agreements a provision banning the possession of firearms; (2) Public housing lease agreements should be amended to allow periodic administrative inspections for firearms; (3) PHAs should rely on their ability to obtain warrants to conduct administrative inspections of their buildings; (4) PHA tenant associations should adopt resolutions approving lease agreement provisions banning weapons and providing consent for firearms inspections; (5) PHAs should take steps to secure buildings through use of metal detectors, identification cards, and effective security guards; (6) Police patrolling public housing should attempt to take weapons from violent criminals by aggressively using their authority to stop and frisk suspicious individuals; and (7) Public housing authorities should rely on the exigent circumstances doctrine to conduct warrantless searches of individual units where there is probable cause to believe that evidence of a crime will be found in that unit or when emergency conditions require immediate action such as to pursue persons fleeing from the scene of a crime or to investigate a possible medical emergency resulting from a shooting incident.

[146] 103 CONG. REC. S12567 (daily ed. Aug. 25, 1994) (statement of Sen. Craig).

and its residents was Operation Safe Home (OSH).[147] Tapping into the deep fear about crime and public housing, Secretary Cisneros remarked at a 1994 OSH press briefing:

> Public housing residents literally live under the gun. Gangs control the stairwells of their buildings; they have to put their children to bed in bathtubs at night to protect them from stray bullets, keep them inside during the day for fear they'll be caught in somebody's crossfire. They live in places where the police themselves won't even go . . . Operation Safe Home will bring the law enforcement resources of the federal government, in cooperation with state and local authorities, to bear on violent crime in public and assisted housing.[148]

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[147] Just two years later, and nearly a decade after Congress enacted the eviction provision in the Anti-Drug Abuse Act of 1988, President Clinton announced in his State of the Union address his own "One Strike" policy, codified in the Housing Opportunity Extension Act of 1996. One year later, newly appointed HUD Secretary Andrew Cuomo said of the law: "Make no mistake about it; in public housing, drugs are public enemy number one. We must have zero tolerance for people who deal drugs. They are the most vicious, who prey on the most vulnerable. They are the jailers, who imprison the elderly. They are the seducers, who tempt the impressionable young. They must be stopped. 'One Strike and You're Out' is doing just that." U.S. DEP'T OF HOUS. & URB. DEV., MEETING THE CHALLENGE: PUBLIC HOUSING AUTHORITIES RESPOND TO THE "ONE STRIKE AND YOU'RE OUT" INITIATIVE (1997). In 2002, the Supreme Court upheld the policy, strengthening the criminalization of public housing residents as part of the federal War on Drugs. Dep't of Hous. and Urb. Dev. v. Rucker, 535 U.S. 125 (2002). Although the one strike eviction policy remains in effect, during the Obama Administration, HUD "softened its position" as part of the administration's criminal justice reform efforts, even encouraging PHAs to exercise discretion by not strictly enforcing the policy. Michelle Y. Ewert, *One Strike and You're Out of Public Housing: How the Intersection of the War on Drugs and Federal Housing Policy Violates Due Process and Fair Housing Principles*, 32 HARV. J. ON RACIAL & ETHNIC JUST. 58, 58–60 (2016); Letter from Shaun Donovan to Public Housing Authority Executive Directors (Jun. 17, 2011), http://usich.gov/resources/uploads/asset_library/Rentry_letter_from_Donovan_to_PHAs_6-17-11.pdf [https://perma.cc/C2DH-K7G9]. In its capacity as an active member of the Federal Interagency Reentry Council, HUD issued guidance in late 2015 that highlighted the discriminatory impact of criminal history-based occupancy restrictions in HUD-subsidized housing. "This Council, made up of more than 23 Federal Agencies, meets on a regular basis to act on issues that affect the lives of those released from incarceration. An important aspect of the Reentry Council's work has been to have each Federal Agency identify and address 'collateral consequences' that individuals and their families may face because they or a family member has been incarcerated or has had any involvement with the criminal justice system." U.S. DEP'T OF HOUS. & URB. DEV., HUD NOTICE PIH 2015-19: GUIDANCE FOR PUBLIC HOUSING AGENCIES (PHAS) AND OWNERS OF FEDERALLY-ASSISTED HOUSING ON EXCLUDING THE USE OF ARREST RECORDS IN HOUSING DECISIONS (2015), http://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf [https://perma.cc/TP9C-G6FX]. The following year, in a separate guidance HUD outlined the discriminatory impact of these restrictions more explicitly: "Because of widespread racial and ethnic disparities in the U.S. criminal justice system, criminal history-based restrictions on access to housing are likely disproportionately to burden African Americans and Hispanics." U.S. DEP'T OF HOUS. & URB. DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS (2016), https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF [https://perma.cc/Z7MW-2HYY].

[148] Press Briefing by Henry Cisneros (Feb. 4, 1994) ("2/94 Operation Safe Home," Box 4, Office of Speechwriting and Jonathan Prince, WJCPL).

In later campaign materials, the connection between OSH and Black communities was clear. Asserting that "[t]he Clinton Administration is committed to working with African Americans to build a better future for all of our children," the campaign highlighted several efforts backed by the administration to purportedly aid black communities, including "[i]ntroducing Operation Safe Home to fight crime in public housing."[149]

As efforts escalated to police public housing residents, Emanuel and other close advisors to the president shifted focus to the Crime Bill, pushing to "define the bill as the Clinton Crime Bill."[150] In both the House and the Senate, the Sentencing Commission's 1991 report on racial disparities in drug-related sentencing, as well as other findings on racial discrimination in capital punishment, became central to the legislative process. The Congressional Black Caucus (CBC) seized on the Commission's findings and characterized the Crime Bill as overly punitive from the start. Stressing the structural causes of crime on the floor of the House and in op-eds, the CBC pushed for more funding for prevention efforts and programs like Head Start, an assault rifles ban, and a narrowing of the "three strikes" provision so that people who needed second chances could have them. In its 280-page alternative bill introduced to the House, the CBC pointed out that federal crime bills "do nothing to reduce crime and polarize and shift the focus and resources away from strategies that have proven to be more effective in addressing crime and violence."[151] The CBC found entirely different solutions, in "crime prevention measures that include drug treatment, early childhood intervention programs, full funding for Head Start programs and the Women, Infants and Children program, rehabilitation and alternatives to incarceration, community policing, and family support programs, as well as in programs to rebuild communities through education, employment, and housing."[152] Indeed, compared to the Senate version, the CBC's bill devoted $2 billion more to drug treatment, $3 billion more to early intervention crime prevention programs for youth, and unlike the Senate bill, scrapped mandatory minimum sentences and money for regional prisons.[153] The CBC bill received little traction or support in the House.

Once its alternative bill was stymied, the CBC continued its efforts to mitigate the worst aspects of the Crime Bill. The Racial Justice Act (RJA) that the CBC introduced would have made it possible to use statistical evidence of racial bias to make habeas corpus appeals to overturn sentences of death. These provisions followed a study commissioned by Congress in which the United States General Accounting Office found "[a] pattern of

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[149] Clinton/Gore campaign materials (June 24, 1996) ("African Americans for C/G [Clinton/Gore] '96," Box 8, Office of Speechwriting and James (Terry) Edmonds, WJCPL).

[150] Memorandum from Rahm Emanuel to Carol Rasco, David Gergen, Mark Gearan, George Stephanopoulos, Dee Dee Myers (Jun. 24, 1993) ("Crime Poll," Box 8, Rahm Emanuel, WJCPL).

[151] Crime Prevention and Criminal Justice Reform Act, H.R. 3315, 103d Cong. (1994). .

[152] *Id.*

[153] Elizabeth Hinton, Julilly Kohler-Hausmann, and Vesla Weaver, *Did Blacks really endorse the 1994 Crime Bill?*, N.Y. TIMES (Apr. 13, 2016), at A25.

evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty."[154] CBC Chairman Kweisi Mfume (D-MD) argued on the House floor that "[t]he death penalty has proven to be the most atrocious display of government sanctioned racism that exists today in America . . . . History shows that minorities have received a disproportionate share of society's harshest punishments, from slavery to lynchings."[155] Given the sixty new offenses the Crime Bill made eligible for the federal death penalty, the sense of urgency to act was great. Many referenced Justice Blackmun's dissent from earlier that year in which he asserted that "the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake."[156] As Washington DC's representative Eleanor Holmes Norton put it at the time, prosecutors essentially "chose blacks for death."[157] Time and time again, the pleas of Holmes Norton and other Black leaders were shouted and voted down.

Citing "black-on-black crime," those in opposition to the RJA argued that the result of the measure "might be more executions of blacks if we harshly impose a rigid quota system,"[158] an argument wholly unsubstantiated by facts. Moreover, many policymakers claimed that the RJA was a "death penalty abolition act," although all the measure aimed to abolish was the disproportionate targeting of Black people for the death penalty, not an end to capital punishment.[159]

Still, members of the CBC went so far as to "offer[ ] to make major changes in the language that would substantially deal with the concerns of those who have been opposed to the measure."[160] This was to no avail. The Clinton Administration quickly went on the offensive, charging Black staffers to aggressively lobby members of the CBC. Confronted with the refusal of Republican legislators (and some Democrats) to support a crime bill that included the RJA, Democratic leadership withdrew the provision, a move that Representative Louis Stokes (D-OH) asserted was "for reasons of racism."[161] This move, and the fact that the Crime Bill authorized the death penalty for dozens of new crimes, drew strong opposition. In the words of Representative William Lacy Clay (D-MO), it was "one step removed from endorsing lynch mobs."[162] The failure of the CBC's Racial Justice Act represents a lost opportunity in our history, when the racial disparities in the criminal legal system could have been better studied and addressed.

The CBC's strong objections to many of the Crime Bill's punishment provisions were not out of step with contemporary Black opinion on crime

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[154] U.S. GEN. ACCT. OFF., 101 CONG., REPORT ON DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990).
[155] 140 CONG. REC. 23,611. (Aug. 21, 1994) (statement of Rep. Mfume).
[156] Callins v. Collins, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting).
[157] MURAKAWA, THE FIRST CIVIL RIGHT, *supra* note 11, at 144.
[158] 140 CONG. REC. 13,211 (Jun. 16, 1994) (statement of Rep. McCollum).
[159] 140 CONG. REC. 23,663 (Aug. 22, 1994) (statement of Sen. Hatch).
[160] 140 CONG. REC. 23,611 (Aug. 21, 1994) (statement of Rep. Mfume).
[161] 140 CONG. REC. 21,562 (Aug. 11, 1994) (statement of Rep. Stokes).
[162] 140 CONG. REC. 21,562 (Aug. 11, 1994) (statement of Rep. Clay).

and violence. Although African Americans are far more likely to be victimized by street crime, they are consistently less punitive in public opinion measures and tend to support the kinds of crime prevention programs the CBC brought to the policy table.[163] Moreover, Black journalists, city leaders, civil rights groups, and prominent ministers attacked the Bill vociferously.

Repeatedly, however, the Crime Bill's proponents endorsed a misleading narrative that the Black community was in favor of harsh, punitive policies, cherry-picking statements of support or outright misrepresenting the position of African American leaders. In one notable example, speaking against the RJA, Representative Bob Dornan (R-CA) stated:

> What disturbs me most about this provision, which is adamantly supported by the Congressional Black and Hispanic Caucuses, is that minorities—especially African-Americans—are overwhelmingly more likely to be victims of violent crime. Let us not forget the words of the Rev. Jesse Jackson who said, "there is nothing more painful to me * * * than to walk down the street and hear footsteps and start thinking about robbery — then look around and see somebody white and feel relieved." This statement reveals a great deal about crime in America—especially in our inner cities. And it is just outrageous that anyone would prioritize discrimination over victimization. How do these people sleep at night?[164]

In other words, Republican lawmakers used the cover of Jackson's statement to argue that African Americans were largely responsible for crime, suggesting that punitive approaches enjoyed Black support (when in fact Jackson and other Black leaders opposed the Crime Bill).

The Crime Bill did contain a provision directing the Sentencing Commission to study the 100-to-1 crack cocaine sentencing disparity and report "on the current federal structure of differing penalties for powder cocaine and crack cocaine offenses and to provide recommendations for retention or modification of these differences."[165] The original amendment proposed by Representative William Hughes (D-NJ), the author of the Cocaine Penalty Study provision, would have equalized mandatory minimum penalties for crack cocaine and powder cocaine. He offered the modified amendment and spoke from the House floor about why this study was needed and why the original amendment would have been justified:

> The information is before us now that there is no difference pharmacologically between crack cocaine and powder cocaine. In addition to that, crack cocaine is no more addictive than powder

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[163] Pew Research Center, King's Dream Remains an Elusive Goal; Many Americans See Racial Disparities (2013), https://www.pewsocialtrends.org/files/2013/08/final_full_report_racial_disparities.pdf [https://perma.cc/PKY8-XVVN].

[164] 140 Cong. Rec. 8,131 (Apr. 21, 1994) (statement of Rep. Dornan).

[165] U.S. Sent'g Comm'n, Special Report to Congress: Cocaine and Federal Sentencing Policy (as directed by section 280006 of Public Law 103-322) iii (1995).

> cocaine. The bottom line is that poor people are the ones that use crack cocaine and mostly minorities. It is interesting that about 95 percent of those that are charged with crack cocaine violations are black and other minorities. Compared to coke, powder cocaine is used by the more affluent in our society. I think most people understand that it is a gross inequity and we need to rectify it. I think even my colleagues on the Republican side understand that there is a gross disparity, and we need to do something about it.[166]

Representative Walter Tucker (D-CA) commented, "I believe that the information will come back to corroborate what most of us already know, and that is that there is a gross disparity between the sentencing between powder cocaine and crack cocaine."[167] Representative John Conyers (D-MI) added, "to no one's surprise—91 percent of those sentenced for crack are African-American. Yet the majority of people who use crack every day are white—64.4 percent . . . . The impact of this on the black community is enormous."[168] Not all legislators agreed that a study was the best course of action, advocating instead for immediate measures given that the result of the status quo was that "our prisons are full of black males who have used crack cocaine, and the more affluent white boys in the community who have used the powder cocaine are on probation."[169]

The amendment calling for the Sentencing Commission's study enjoyed bipartisan support, counting among its Republican backers the author of the House amendment establishing the 100-to-1 sentencing scheme, Representative Clay Shaw (R-FL). Similarly, Representative Bill McCollum (R-FL) endorsed the study and acknowledged the sentencing disparity from the House floor. However, rather than advocating that the penalties for crack-cocaine be lessened, hence eliminating the grossly unjust disproportionate impact on Black people, McCollum argued that "we ought to be *raising* the penalties for the powder cocaine."[170] Shaw, McCollum, and other congressional Republicans consistently urged that the unfairness of the sentencing scheme could be addressed by raising penalties for powder cocaine. And yet no such proposal was included in the 1994 Bill. Put another way, policymakers were well aware of the racial disparity in the crack and powder cocaine sentencing scheme, systematically rejected a number of alternative solutions to address the law's impact on Black people, and yet refused to address the disparity *even with a thoroughly punitive approach*, which would have punished drugs associated with the white community more harshly.

Even beyond the debates about the 100-to-1 crack cocaine sentencing disparity, policymakers often used racially coded language when alleging associations between race and criminality or when objecting to provisions de-

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[166] 140 CONG. REC. 8,121 (Apr. 21, 1994) (statement of Rep. Hughes).
[167] 140 CONG. REC. 8,121 (Apr. 21, 1994) (statement of Rep. Tucker).
[168] 140 CONG. REC. 8,122 (Apr. 21, 1994) (statement of Rep. Conyers).
[169] 140 CONG. REC. 8,122 (Apr. 21, 1994) (statement of Rep. Rose).
[170] 140 CONG. REC. 8,121 (Apr. 21, 1994) (statement of Rep. McCollum) (emphasis added).

signed to alleviate racial discrimination in the criminal legal system. Senator Biden, for example, described the targets of the legislation as "predators" who were "beyond the pale," and argued in a floor speech that would later become the subject of controversy in the 2020 presidential campaign:

> It doesn't matter whether or not the person that is accosting your son or daughter, or my son or daughter, my wife, your husband, my mother, your parents–it doesn't matter whether or not they were deprived as a youth. It doesn't matter whether or not they had no background that would enable them to have . . . become socialized into the fabric of society. It doesn't matter whether or not they're the victims of society. The end result is they're about to knock my mother on the head with a lead pipe, shoot my sister, beat up my wife, take on my sons . . . .[171]

At times, the racially coded language of senators' arguments bordered on explicit references to race. In an appeal to Republicans, Senator John Kerry (D-MA) urged passage of the Bill by evoking the earlier rhetoric of James Q. Wilson and others who linked Black family dysfunction to crime. He argued that in certain segregated Black and Latino communities, "you will find a rate of illegitimate birth at 70 to 80 percent." He argued that in these communities, one saw "crack houses replacing some communities as the focus of life" and young Black men "dying at a rate that exceeds any American war in history."[172] In another instance, Senator Bob Dole (R-KS) declared:

> Unfortunately, the American family today is in tatters. More than two-thirds of all black children, and nearly 25 percent of all white children, are born to unwed mothers. In some inner-city communities, the illegitimacy rate is a staggering 80 percent, as thousands of children are born each year into a world without fathers and to mothers who are simply unprepared for the responsibilities of Motherhood.[173]

In a later debate, Dole, who would soon become the Republican Party's next nominee for the presidency (Kerry would of course be the Democrats' nominee in 2004), entered into the record and recommended to his colleagues an "important" article authored by controversial social scientist Charles Murray, who the following year gained notoriety for authoring *The Bell Curve*, an argument for the innate inferiority of African American intelligence. In the article, Murray asserted that "the brutal truth is that American society as a whole could survive when illegitimacy became epidemic within a comparatively small ethnic minority. It cannot survive the same

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[171] Andrew Kaczynski, *Biden in 1993 speech pushing Crime Bill warned of 'predators on our streets' who were 'beyond the pale,'"* CNN (Mar. 7, 2019), https://www.cnn.com/2019/03/07/politics/biden-1993-speech-predators/index.html [https://perma.cc/GV25-UZYV].

[172] 103 CONG. REC. S12,324 (daily ed. Aug. 23, 1994) (statement of Sen. Kerry).

[173] 103 CONG. REC. S16,272 (daily ed. Nov. 18, 1993) (statement of Sen. Dole).

epidemic among whites."[174] Murray's arguments have since been debunked, but in the mid-1990s they had a profound influence on policymakers and the American public.

In a speech that is surprisingly explicit in its discussion of the racial subtext of the legislation, Senator Bradley reintroduced his provision to the Crime Bill that provided for enhanced penalties for drug dealing in or near housing facilities owned by a public housing authority.[175] Speaking in support of the Crime Bill generally and the public housing provision specifically, Bradley gave a floor speech stoking such racialized fear of crime:

> We have all heard the stories: a child killed in a drive-by shooting, an elderly woman afraid to walk out of her home for fear of being robbed in broad daylight by some drugged up young thug, a businessman driving in his car, the random victim of a car-jacking. These are the headlines. They disgust us, enrage us, frighten us, and then fade from our memories once another outrage is committed. We have become hardened to this senselessness. We turn on the nightly news expecting it.[176]

In this context, Bradley explicitly referred to "young, black, and Hispanic men" as meeting the "*profile of the threatening person*" and acknowledged their already "disproportionate presence in our prisons[:]"

> But every day, in ways that have become part of our normal routine, we do little things to avoid becoming victims of crime. We lock our doors. Some people might laugh at this, but there was a

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[174] Charles Murray, *The Coming White Underclass*, WALL ST. J., Oct. 29, 1993; entered into the record by Sen. Dole, 103 CONG. REC. S15316 (daily ed. Nov. 8, 1993).

[175] Bradley's provision became federal law in the 1994 Crime Bill. Although the overall Bill was the product of the extensive debate discussed above, virtually no discussion (and no sustained study) accompanied the adoption of the public housing provision. Our research reveals, however, that the driving force behind the 1994 push for amending Section 615 of the Senate bill to include public housing in its list of drug-free zones came directly from HUD. In an April 1994 memorandum to members of the President's domestic policy council, HUD officials named the provision as one of the proposals for which HUD requested support and assistance as the bill moved through conference negotiations. In this memorandum, HUD included this sentencing enhancement as one of "a few items within our joint efforts under Operation Safe Home that we would suggest as additional eligible activities under certain provisions in the crime bill." Memorandum from Bruce Katz, Bill Gilmartin, and Liz Arky to Rahm Emanuel, Bruce Reed, Ron Klain, and Chris Edley (Apr. 12, 1994) ("Crime Bill - Prevention," Box 74, Domestic Policy Council, Bruce Reed, and Crime Series, WJCPL). In a June 1994 letter to Representative Jack Brooks (D-TX), the lead sponsor of the House bill, Attorney General Reno included this provision in her "recommendations of the Administration concerning the reconciliation of the final House and Senate versions" of the Crime Bill but tied it directly to "[m]easures to combat youth gangs and facilitate gang prosecutions." Letter from Janet Reno to Jack Brooks (Jun. 13, 1994) ("Conference Report," Box 70, Domestic Policy Council, Bruce Reed, and Crime Series, WJCPL). It could not have been lost on policymakers that this would most clearly impact Black youth. A 1992 Congressional Research Service Report for Congress on youth gangs found that "[c]urrent studies indicate that gang members are predominantly black or Hispanic." SUZANNE CAVANAUGH & DAVID TEASLEY, CONG. RESEARCH. SERV., YOUTH GANGS: AN OVERVIEW 4 (1992).

[176] 139 CONG. REC. S15958-04.

> time when we did not lock our doors. We hold our possessions closely as we walk through crowded areas. We do not walk out alone at night. We take quick glances behind ourselves when we take money out of ATM machines. We cross the street in an effort to avoid people that we think are threatening. Increasingly, the profile of the threatening person at least as depicted by the media and suggested by their disproportionate presence in our prisons, are *young, black, and Hispanic men. We don't like to talk about that perception, but it is there*.[177]

Without disabusing this stereotype, Senator Bradley went on to say that "many people" rely on this perception—i.e., fear of "young, black, and Hispanic men"—when taking steps to protect themselves when local law enforcement fails:

> Regardless of how much the statistics show that most victims of crime share the same race as their victimizers, we have to acknowledge that many people take subtle and not-so-subtle actions based on their fears about who is committing crime. We buy guns under the mistaken impression that we can protect ourselves, even if our local police force cannot, and even if we know that for every intruder shot in self-protection there are 43 murders, suicides, and accidental killings, often a family member. This crime bill attempts to respond to some of these concerns. It attempts to give people the ability to regain control of their communities.[178]

In other words, Bradley acknowledged that the Bill was designed, at least in part, to respond to these race-based fears. It was in this context that he highlighted the public housing provision as among certain provisions that would be "particularly helpful in making our communities safer" and "effective in shoring up public confidence in our criminal justice system."[179]

Despite sustained public concern about the crime issue, "the crime wave of the late 1980s and early 1990s had already begun to recede by the time Clinton and Congress acted in 1994."[180] After years of debates and multiple iterations, the final version of the 1994 Crime Bill was the most expansive crime control legislation in the history of the United States.[181] It authorized the expenditure of $30.2 billion, including funding to hire 100,000 more cops, $9.7 billion for prison construction, and $6.1 billion for crime prevention. Moreover, it included a ban on certain semi-automatic assault weapons,

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[177] *Id.* (emphases added).
[178] *Id.*
[179] *Id.*
[180] MICHAEL W. FLAMM, LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S 184 (2005).
[181] Lauren-Brooke Eisen, *The 1994 Crime Bill and Beyond: How Federal Funding Shapes the Criminal Justice System*, BRENNAN CTR. FOR JUST. (Sept. 9, 2019), https://www.brennancenter.org/our-work/analysis-opinion/1994-crime-bill-and-beyond-how-federal-funding-shapes-criminal-justice [https://perma.cc/3CK2-CR2T].

made sixty federal crimes eligible for the death penalty, tied federal funding to states' adoption of truth-in-sentencing laws, and mandated life sentences for defendants charged with their third "strike."[182] As the Bill went through the legislative process, Clinton sacrificed the interests of the CBC and their allies in order to concede to the Republican Party's demands to limit the prevention aspects of the legislation.[183] As a result of its passage, prisons and police departments ballooned and the Democratic Party fully committed to the tough-on-crime approach that had long been a hallmark of Republicans.

During the debates, CBC Chair Mfume had "implore[d]" his colleagues to retain the prevention measures in the Bill. He asked that they "[p]lease permit those of us facing the worst of the problem—those of us who have grown up and lived amid the crime, the drugs and the violence—some input on how we should address the situation."[184] This plea largely went unanswered. Mfume led twenty-six of thirty-eight members of the CBC to support the legislation. But Mfume and others did so in order to get the relatively limited prevention measures that were included in the Crime Bill to their constituents. This was hardly a full endorsement. In fact, a sizable number of Black Democrats voted against the Bill in its final passage vote because of their opposition to its punitive features and lack of mechanisms for addressing racial impacts. As Representative Bobby Scott (D-VA) explained: "You wouldn't ask an opponent of abortion to look at a bill with the greatest expansion of abortion in the history of the United States and

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[182] *Violent Crime Control and Law Enforcement Act of 1994: U.S. Department of Justice Fact Sheet*, NAT'L CRIM. JUST. REFERENCE SERV., https://www.ncjrs.gov/txtfiles/billfs.txt [https://perma.cc/VV8Y-H3S4].

[183] In the White House, despite the Clinton Administration also publicly advocating for some of the non-punitive, prevention measures of the Crime Bill—provisions that Senator Dole and many others on the political Right classified as "pork"—some high-level members of the President's domestic policy council were less enthused. In a January 1994 memorandum for circulation, Rahm Emanuel and Michael Waldman asserted: "The President has succeeded in redefining the debate on crime. No longer is it prevention vs. punishment. Instead, the issue of crime and violence has been changed to punishment and values (learning the difference between right and wrong.) Polls show that the issue of crime, along with health care and the economy, tops the public's list of concerns. In addition, polls show that a majority of Americans feel that the moral fabric of our society is disintegrating. Therefore, by redefining the issue of crime in terms of punishment and values, we get the best of both worlds." Memorandum from Rahm Emanuel and Michael Waldman (Jan. 27, 1994) ("Strategy," Box 79, Domestic Policy Council, Bruce Reed, and Crime Series, WJCPL). Writing to Bruce Reed in April 1994, Jose Cerda referred to the prevention program proponents as the "hug-a-thug crowd." Memorandum from Jose Cerda to Bruce Reed (Apr. 26, 1994) ("Crime Bill - Prevention," Box 74, Domestic Policy Council, Bruce Reed, and Crime Series, WJCPL). In July 1995, Rahm Emanuel echoed this view in a memorandum to the President in which he advocated for a revamping of the administration's drug strategy based on public opinion, not prevention. He wrote: "People fundamentally believe that hard core drug users drive crime and violence in this country, and this should be the basis of any strategy to address this problem. In essence, we need to change our focus on fighting hard core drug use away from rehabilitation and more towards fighting crime and violence, so that it is consistent with our overall crime message." Memorandum from Rahm Emanuel to Bill Clinton and Leon Panetta (Jul. 10, 1995) ("Talking Points [4]," Box 126, Domestic Policy Council, Carol Rasco, and Issues Series, WJCPL).

[184] 140 CONG. REC. 23,610 (Aug. 21, 1994) (statement of Rep. Mfume).

argue that he ought to vote for it because it's got some highway funding in it."[185]

Ultimately, federal policymakers did virtually nothing to address the racial discrimination in the criminal legal system as they set out to expand prisons, foot patrol, and surveillance in low-income communities. Thus, Clinton's celebration of the Crime Bill as "a big step towards bringing the laws of the land back into line with the values of our people," essentially brought criminal legal policy in line with one value: locking up more people of color. Although the contribution of the Crime Bill to the policing and incarceration of Black communities is difficult to estimate (the trend had been underway well before the Clinton Administration), the Bill and surrounding debates further entrenched the notion that crime in urban cores was a problem best managed through harsh punishment. In 1994, the incarceration rate was 564 per 100,000 citizens, rising to 601 in the year after the 1994 Crime Bill and steadily thereafter until hitting 684 during Clinton's last year in office (it is 655 today).[186] Building the largest and most expensive penal system in world history appeared to be more politically feasible than ensuring minimal levels of material security to the most marginalized populations. The aftershocks of these policy choices can still be felt today.

Conclusion: Lessons for Defense Attorneys and Policymakers

The foregoing makes clear that the rationales deployed by the circuit courts in the 1990s missed the mark on both law and history. They failed to account for the Supreme Court's more nuanced approach to evidence of discriminatory purpose as articulated in *Feeney*. They mischaracterized lawmakers' awareness of disparate racial impact as mere "race consciousness," which they erroneously maintained contradicts allegations of discriminatory intent. And they misconstrued the role of opposition voices like the Congressional Black Caucus as approving the ultimate sentencing policies without acknowledging the nuance of the bargains made to arrive at those policies. Presented with the full picture of the history of these policies, courts would be hard-pressed today to brush aside such powerful evidence of their discriminatory purpose.

In Kendall Johnson's case, the defense presented this evidence in a motion to dismiss the 21 U.S.C. § 860(a) count pursuant to Rule 12 of the Federal Rules of Criminal Procedure.[187] The prosecution, which had previously expressed confidence and welcomed the opportunity to defend the

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[185] Allan Smith, *Fact Check: Why Are Trump and the Democrats Talking About the 1994 Crime Bill*, NBC News (May 28, 2019, 3:49 PM), https://www.nbcnews.com/politics/2020-election/fact-check-why-are-trump-democrats-talking-about-1994-crime-n1010691 [https://perma.cc/MVA5-G8VR].

[186] Bureau of Just. Stat., Correctional Populations in the United States (1994, 1995, 2000, 2019).

[187] United States v. Johnson, 19-CR-284 (RJD) (E.D.N.Y. May 26, 2020), ECF No. 98.

statute, withdrew the charge before its deadline to file an opposition to the motion. The government initially superseded the indictment with separate charge under § 860(a) of distributing narcotics within 1,000 feet of a school, having located an elementary school in the vicinity of the Bushwick Houses.[188] When Mr. Johnson requested a briefing schedule to examine the racial history of that provision, however, the government proposed a plea agreement with no § 860(a) count and no mandatory minimum. Mr. Johnson pleaded guilty pursuant to this agreement on August 20, 2020.[189]

The government's reticence to test the constitutionality of the public housing provision in the face of the statistical evidence of disparate impact and historical record of discriminatory purpose suggests the renewed power of these arguments, especially in the current era of widespread consciousness of racial justice issues (Mr. Johnson's motion to dismiss was filed on May 26, 2020, the day after George Floyd was murdered and just before his death sparked massive protests nationwide). But the outcome in the Johnson case is not entirely a happy one: Mr. Johnson pleaded guilty to narcotics conspiracy, which, although carrying no mandatory minimum, does mandate remand to detention if the defendant is out on bail prior to the plea.[190] While some courts have found that the ongoing COVID-19 pandemic constitutes extraordinary circumstances permitting defendants to stay at liberty pending sentencing, Mr. Johnson's persistent housing insecurity—caused by his inability to reside in public housing due to prior drug convictions—led him to self-surrender rather than wait indefinitely for his sentencing date, which, due to the pandemic, could not occur in person until late-April 2021.

Mr. Johnson was housed in two federal detention centers—the Metropolitan Detention Center (MDC) in Brooklyn and Metropolitan Corrections Center (MCC) in Manhattan—while he awaited sentencing. During that time, both facilities experienced a COVID-19 outbreak and one person incarcerated at the MDC died from the virus four days after that individual was given the first dose of the vaccine.[191] Mr. Johnson was housed at the MCC in a cell with a person who had tested positive for COVID-19, and jail facilities refused to give his cellmate medical attention or to move Mr. Johnson to another cell for weeks. Luckily, Mr. Johnson managed to avoid contracting the virus, but as a result of lockdown procedures instituted by the Bureau of Prisons to try to contain the virus, he has spent the vast majority of his detention in a cell 24 hours a day. Mr. Johnson's harrowing experi-

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[188] *Id.*, ECF No. 107.

[189] The ultimate plea agreement also did not include any sentencing enhancement based on a "protected location" pursuant to U.S.S.G. § 2A1.2.

[190] *See* 18 U.S.C. § 3143(a).

[191] *See* Noah Goldberg, *First Inmate to Die of COVID at Brooklyn Federal Jail Was Vaccinated Days Before Testing Positive for the Virus*, N.Y. DAILY NEWS (Feb. 8, 2021, 5:54 PM), https://www.nydailynews.com/new-york/ny-edwin-segarra-inmate-mdc-brooklyn-covid19-dead-vaccinated-20210208-ovtvqfmwfzcd7drjoyq6zqluyq-story.html [https://perma.cc/F9KS-KHQL]. For statistics on COVID infections at BOP facilities, including the MDC and MCC, *see COVID-19 Coronavirus*, FED. BUREAU OF PRISONS (2021) www.bop.gov/coronavirus [https://perma.cc/NEV8-5WNC].

ence—stemming from his sale of less than a gram of crack-cocaine and less than one tenth of a gram of heroin—shows that a much broader, wholesale correction is needed to policies of the 1980s and 90s that have made a story like his tragically commonplace. The history of these policies thus presents not only an avenue of legal challenge in individual criminal cases, but a demand for systemic reform at the congressional level.

The Biden Administration has a new opportunity to right the wrongs of history, many of which were exacerbated by the policies President Biden himself introduced and spearheaded through Congress during his Senate career. Recognizing that the current system of mass incarceration "does not make us safer," President Biden began to phase out federal contracts with private prison companies such as GEO Group and CoreCivic, which net about $2.5 and $2 billion annually in revenue, respectively, a quarter of which is derived from the federal government.[192] Additionally, his administration has begun escalating "pattern or practice" investigations, a mechanism by which the Justice Department can intervene when police departments appear to violate constitutional protections against excessive force, unreasonable stops and searches, and arrests without warrant or sufficient cause.[193] "Pattern or practice" inquiries often lead to consent decrees, or court-ordered agreements that mandate police reforms, and can make vulnerable communities safer. Moreover, then-Acting Attorney General Monty Wilkinson rescinded the "Sessions Memo" requiring federal prosecutors to bring the most severe charges available and has called for prosecutors to make an "individualized assessment" of each defendant and case until "longer-term policy is formulated."[194] Attorney General Merrick B. Garland has announced a moratorium on the federal death penalty pending a study of its fairness and efficacy.[195] Biden has also proposed ending at least some mandatory minimums in federal sentencing policy (such as the statute that led to the charges against Mr. Johnson) and eliminating the disparity be-

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[192] *See* GEO GROUP, 2019 ANN. REP. PART II 4 (2019), https://s25.q4cdn.com/995724548/files/doc_financials/2019/ar/Annual-Report-2019.pdf [https://perma.cc/BPE5-E6AS]; CORE CIVIC, 2019 ANN. REP. (2019), http://ir.corecivic.com/static-files/78f48d3d-5df1-44e2-ba20-fce435193496 [https://perma.cc/N269-4A5Y]; Alyce McFadden, *Biden Phases out Private Prisons, Which Spent Big Backing of Trump*, OPEN SECRETS (Feb. 2, 2021) https://www.opensecrets.org/news/2021/02/biden-phases-out-private-prisons/ [https://perma.cc/4THS-56ZX].

[193] *See, e.g.*, *Attorney General Merrick B. Garland Delivers Remarks at Announcement of Pattern or Practice Investigation into the Louisville Police Department*, U.S. DEP'T OF JUSTICE (Apr. 26, 2021), https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-announcement-pattern-or-practice-1 [https://perma.cc/TKM3-6SSF].

[194] Memorandum from Acting Attorney General Monty Wilkinson, Interim Guidance of Prosecutorial Discretion, Charging, and Sentencing (Jan. 29, 2021).

[195] Pete Williams, *Attorney General Merrick Garland Suspends Federal Executions*, NBC NEWS (July 1, 2021, 8:43 PM), https://www.nbcnews.com/politics/justice-department/attorney-general-merrick-garland-orders-pause-federal-executions-n1272951 [https://perma.cc/9SQR-JCVC].

tween crack and powder cocaine—injustices within the criminal legal system that were partly of his own making.[196]

Despite these measures, the legacy of the 1994 Crime Bill continues in new proposals from the Biden Administration and members of Congress. Doubling down on the failed policies of the past, Biden's fiscal year 2022 budget requests $388 million in funding to hire additional police officers through the Office of Community Oriented Policing Services (COPS), an office established by a provision of the 1994 Crime Bill.[197] Additionally, in June President Biden announced that his administration's gun crime prevention strategy would include allowances for "cities experiencing an increase in gun violence" to use part of the $350 billion American Rescue Plan "to hire police officers needed for community policing and to pay their overtime."[198] Even with an already growing federal prison population,[199] in July Biden's legal team determined that those people released from prison due to COVID must return when the public health emergency ends.[200] And finally, the efforts by members of Congress to expand the carceral state continue in a recent nonbinding budget resolution that included an amendment that would block federal funds to any municipality that defunds its police department as well as a measure to fund the hiring of 100,000 cops. The latter amendment is markedly similar to Clinton's campaign promise to bolster policing, a promise that was ultimately achieved through the COPS program and the 1994 Crime Bill.[201]

Biden must reverse course on these most recent measures that expand the carceral state while also continuing to reform the criminal legal system through Executive Orders and Justice Department policies. However, the real challenge will be securing widespread congressional approval for these

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[196] *What Biden's Win Means for the Future of Criminal Justice*, THE MARSHALL PROJECT (Nov. 8, 2020), https://www.themarshallproject.org/2020/11/08/what-biden-s-win-means-for-the-future-of-criminal-justice [https://perma.cc/B9LQ-XRTW].

[197] Michael Crowley, *Biden's Budget Steps up Spending for Criminal Justice Reform*, BRENNAN CTR. FOR JUST. (Jun. 25, 2021), https://www.brennancenter.org/our-work/analysis-opinion/bidens-budget-steps-spending-criminal-justice-reform [https://perma.cc/EP84-25W5]. His budget also includes funding for incarceration alternatives and reform efforts, but it is important to consider this increase in police funding in light of the moment and its direct connection to the 1994 Crime Bill.

[198] Remarks by President Biden and Attorney General Garland on Gun Crime Prevention Strategy (June 23, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/06/23/remarks-by-president-biden-and-attorney-general-garland-on-gun-crime-prevention-strategy/ [https://perma.cc/N4G3-K9UD].

[199] Samantha Michaels, *Biden Said He'd Cut Incarceration in Half. So Far, the Federal Prison Population Is Growing*, MOTHER JONES (Jul. 21, 2021), https://www.motherjones.com/crime-justice/2021/07/biden-said-hed-cut-incarceration-in-half-so-far-the-federal-prison-population-is-growing/ [https://perma.cc/5YGE-4JS6].

[200] Charlie Savage & Zolan Kanno-Youngs, *Biden Legal Team Decides Inmates Must Return to Prison After Covid Emergency*, N.Y. TIMES (Jul. 19, 2021), https://www.nytimes.com/2021/07/19/us/politics/biden-prisoners-covid.html [https://perma.cc/5MTD-X8TE].

[201] *Senate "Vote-a-Rama" on $3.5 Trillion Infrastructure Resolution Stretches into Wee Hours,* CBS NEWS (Aug. 11, 2021, 3:13 AM). https://www.cbsnews.com/news/senate-vote-a-rama-on-3-5-trillion-infrastructure-resolution-stretches-into-wee-hours/ [https://perma.cc/G6CH-Y29D].

necessary changes. Despite the obstacles, the Biden Administration must be bold in its quest to build a more equitable and fair legal system. To do so, however, the Administration must take a clear-eyed look at what occurred during the debates over the 1994 Crime Bill. Even as he has pledged to reform the criminal legal system, Biden has continued to defend his record in Congress by pointing to purported support for the 1994 Crime Bill by Black members of Congress, including the CBC.[202]

As our research shows, however, the actual historical record tells a very different story. While Black and Latino communities have historically demanded increased policing and more accountable sentencing policies at times, they have also featured a host of imaginative approaches to both responding to and preventing crime.[203] Lawmakers from both parties, seeking to justify tough-on-crime policies that played to a white base, have often engaged in what has been termed "selective hearing" of Black and Latino community concerns, highlighting requests for more policing while drowning out broader, more systemic (and less harshly punitive) responses to crime.[204] When Black residents, elected officials, and prominent Black pastors have sought more aggressive policing and sometimes stiffer punishments, these calls have almost always been accompanied by urgent—and often unrequited—requests for full employment, educational access, and decent housing. Moreover, Black activists and civil rights groups have qualified demands for police and responsiveness with urgent opposition to brutality and greater influence in the form and function of law enforcement. But "when blacks ask for *better* policing, legislators tend to hear *more* instead."[205]

Ending mandatory minimums at the federal level may be the first step in this respect. National reforms can inspire or entice states to adopt similar measures, just as the federal government led states in enacting mandatory minimums in the first place. But mandatory minimums are not the only sentencing regimes being deployed in a discriminatory manner; if that were true, the national prison population would look far more like the country itself. The Biden Administration could propose legislation that mandates that the Sentencing Commission and federal judges consider such disparities in making their respective determinations in both system-wide structures and individual sentencing proceedings. This could be parallel to the manner in which courts have continued to consider disparate impact on its own to

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[202] *See* Quint Forgey, *How Joe Biden Would Address Criminal Justice Reform*, POLITICO (Jul. 23, 2019, 3:39 PM), https://www.politico.com/story/2019/07/23/joe-biden-criminal-justice-reform-1428017 [https://perma.cc/EJ3R-FG3M]; Kirsten West Savali, *Biden Defends 1994 Crime Bill: 'Every Black Mayor Supported It,' Still Opposes Defunding Police*, ESSENCE (Oct. 19, 2020), https://www.essence.com/news/in-defense-of-black-lives/biden-defends-1994-crime-bill-opposes-defunding-police/ [https://perma.cc/5JZR-62R3].

[203] *See* JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017); *see also* Forman, *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21 (2012); MICHAEL JAVEN FORTNER, BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT (2015).

[204] Hinton et al., *supra* note 155.

[205] *Id.*

show discrimination under the Civil Rights Act even as *Davis* erected the intent standard for constitutional claims. In addition, Congress could amend the Federal Rules of Criminal Procedure to allow for a challenge to convictions tainted by racially discriminatory statutes—a Racial Justice Act for the federal criminal system writ large, in addition to the death penalty.

If armed with such changes in federal law—but even under current law—it is up to lawyers to continue to challenge the policies that have exacerbated the criminalization and incarceration of people of color since the 1960s.[206] In this respect, uncovering the previously hidden histories of how these policies came to be can function as an important new legal tool in reversing discriminatory trends and undoing the harms of the past.

[206] Scholars of Latinx-American history and immigration have been instrumental in the last year in supporting challenges to Sections 1325 and 1326 of the Immigration and Nationality Act, which criminalize reentering the United States after an order of deportation. In August 2021, Chief Judge Miranda Du of the United States District Court for the District of Nevada struck down the law on equal protection grounds, citing the work of UCLA historian Kelly Lytle Hernandez, among others. *See* United States v. Carrillo-Lopez, No. 3:20-cr-00026-MMD-WGC, 2021 WL 3667330, at *1 (D. Nev. Aug. 18, 2021).

Geographic Gerrymandering*

*Benjamin Plener Cover*** & *David Niven****

The leading measures of gerrymandering reflect a party-centric theory of representation based on the statewide relationship between seats and votes. But electoral districting, a traditional practice that still predominates, reflects a geographic theory of representation focused on the district-based relationship between a representative and her constituents. We propose a new approach to gerrymandering that takes electoral districting on its own terms and defines fairness geographically without reference to the seats-votes relationship. Scholars, courts, and mapmakers recognize the representational interests advanced by geographic criteria, such as preservation of local political boundaries. We ask whether an electoral map fairly distributes these benefits. Under this approach, "geographic gerrymandering" occurs when a map unjustifiably distributes geographic impacts on the basis of race or party. This approach offers new methodological and conceptual possibilities, and a new way for courts to adjudicate gerrymandering claims that may avoid the justiciability problems the Supreme Court identified in Rucho v. Common Cause.[1] *To demonstrate this approach in action, we analyze unnecessary county splits in congressional maps of the thirty-five states with four or more representatives. Overall, mapmakers differentially impose the burden of county splits on Black residents and Democrats. But the effect depends on who draws the lines. When a neutral actor draws the lines, the disparities disappear. When Democrats draw the lines, Black residents are slightly favored but Democrats are disfavored. When Republicans draw the lines, both Black residents and Democrats are significantly disfavored. And when both parties draw the lines, both Black residents and Democrats are disfavored even more. These results demonstrate the value of a geographic approach and suggest further research.*

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[1] 139 S. Ct. 2484 (2019).

INTRODUCTION

In this Article, we offer a new way to conceptualize and measure fairness in geographic electoral districting. Most leading measures of partisan fairness focus on how an electoral map translates votes into seats, *i.e.* the statewide relationship between popularity and power that a map produces. By contrast, our approach focuses on the district-specific relationship between constituents and representatives that a map produces. We take seriously the premise that geographic electoral districting confers meaningful representational benefits. And we ask whether those benefits are fairly distributed. This inquiry produces geographic measures of partisan and racial gerrymandering that make no reference to electoral outcomes. Our approach offers new tools to academics, mapmakers, litigants, and courts in their efforts to study, avoid, challenge, and adjudicate the unfairness of gerrymandering.

This is an opportune time to think outside the seats-votes box. With the 2020 census process almost complete, the United States approaches a new decennial redistricting cycle at a dynamic moment in American politics generally and for districting reform in particular. The political moment is marked by increased partisan polarization, challenges to institutional norms, and pressure on our electoral systems.[2] The new era in districting reform is marked by the Supreme Court's recent announcement in *Rucho* that partisan gerrymandering, unlike malapportionment or racial gerrymandering, presents a nonjusticiable political question.[3] Closing the door to the federal

[2] These challenges to our political and electoral systems are compounded by public health and economic crises and a national reckoning with race relations at a time of pronounced "conjoined polarization" defined by strong correlation between race and party. *See* Justin Levitt, *The List of COVID-19 Election Cases*, ELECTION L. BLOG (June 11, 2020, 5:34 PM), https://electionlawblog.org/?p=111962 [https://perma.cc/NC52-QGSQ] (identifying 335 COVID-19 election-related lawsuits in forty-five states, D.C., and Puerto Rico as of December 23, 2020); Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 OHIO ST. L.J. 867, 869 (2016); Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. 1837, 1840 (2018); Richard H. Pildes, *Participation and Polarization*, 22 U. PA. J. CONST. L. 341, 349 (2020); Richard L. Hasen, *Deep Fakes, Bots, and Siloed Justices: American Election Law in a "Post-Truth" World*, 64 ST. LOUIS L.J. 535, 539 (2020); Anthony J. Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration*, 12 DUKE J. CONST. L. & PUB. POL'Y 57, 59 (2017); James A. Gardner, *Illiberalism and Authoritarianism in the American States*, 70 AM. UNIV. L. REV. 829, 863 (2021) (suggesting the term "polarization" may downplay the philosophical differences between the two major parties).

[3] *Rucho*, 139 S. Ct. at 2506.

courthouse left ajar three decades prior in *Davis v. Bandemer*,[4] the *Rucho* majority urged reformers to shift focus to state courts, direct democracy, and Congress.[5] Shortly thereafter, one of North Carolina's state courts struck down, on state law grounds, the same congressional map the Supreme Court upheld in *Rucho*.[6] The year prior, two more states adopted, via ballot initiative, independent commissions with primary redistricting authority, bringing the total to thirteen.[7] After regaining the House, Democrats passed an omnibus electoral reform bill that requires each state to draw its congressional map through an independent commission.[8] With the new round of decennial redistricting approaching, the movement for fair districts is robust, and gerrymandering is the focus of considerable attention, both scholarly[9] and popular.[10]

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[4] 478 U.S. 109, 125 (1986), abrogated by *Rucho*, 139 S. Ct. 2484 (2019).

[5] *Rucho*, 139 S. Ct. at 2499–2500, 2507–08.

[6] Common Cause v. Lewis, No. 18 CVS 014001, 2019 WL 4569584, at *2 (N.C. Super. Ct. Sept. 3, 2019); *see also* League of Women Voters v. Commonwealth, 178 A.3d 737, 821 (Pa. 2018) (striking down state's congressional map for violating guarantee in PA. CONST. art. I, § 5 that "elections shall be free and equal" and no power shall "interfere to prevent the free exercise of the right of suffrage"); League of Women Voters v. Detzner, 172 So. 3d 371 (Fla. 2015) (striking down state's congressional map for violating state's "Fair Districts Amendment," FLA. CONST. art. III, § 20(a), which provides that no districting plan "shall be drawn with the intent to favor or disfavor a political party").

[7] Colorado and Michigan adopted commissions to draw both congressional and state maps. *See* COLO. CONST. art. V, § 44; MICH. CONST. art. IV, § 6. Utah adopted an advisory commission. *See* UTAH CODE ANN. §§ 20A-20-101 – 303 (West 2021). Missouri created the office of state demographer in 2018 for its state legislative maps, which was later repealed in 2020. *See* MO. CONST. art. III, §§ 3, 7 (awaiting current legislation). Missouri uses a bipartisan commission for state maps, and the state legislature for congressional maps. *Id.*; *Id.* at § 45.

[8] For the People Act, H.R. 1, 116th Cong. §§ 2411–15 (2019). The House passed the bill, but the Senate did not consider it. 165 Cong. Rec. H2602 (daily ed. Mar. 8, 2019) (Roll Call Vote No. 118) (House vote: 234 to 193); 165 Cong. Rec. S1611 (daily ed. Mar. 4, 2019) (statement of Sen. McConnell) ("[O]f course, this sprawling, 622-page doorstop is never going to become law. I certainly don't plan to even bring it to the floor here in the Senate.").

[9] *See e.g.*, Jonathan N. Katz, Gary King & Elizabeth Rosenblatt, *Theoretical Foundations and Empirical Evaluations of Partisan Fairness in District-Based Democracies*, 114 AM. POL. SCI. REV. 164, 164 (2020) (recent public outrage, court challenges, and new legislation have led to "a resurgence of scholarly interest" in partisan gerrymandering); Michael S. Kang, *Hyperpartisan Gerrymandering*, 61 B.C. L. REV. 1379, 1380 (2020); Jacob Eisler, *Partisan Gerrymandering and the Constitutionalization of Statistics*, 68 EMORY L.J. 979, 1024 (2019) ("Given the recent prominence of partisan gerrymandering, it is unsurprising that it has received diverse scholarly attention.").

[10] *See e.g.*, Miles Parks, *Expert Warns of 'Real Festival of Partisan Gerrymandering' in 2021*, NPR (Apr. 29, 2020, 11:50 AM), https://www.npr.org/2020/04/19/836260800/expert-warns-of-real-festival-of-partisan-gerrymandering-in-2021 [https://perma.cc/7WVA-V4A5]. Efforts to educate and engage average citizens include Dave's Redistricting App, DistrictR, JudgeIt, Draw the Lines, PlanScore, and the Princeton Gerrymandering Project's new tool "Representable." DAVE'S REDISTRICTING, https://davesredistricting.org/maps#home [https://perma.cc/4NNG-894G]; Metric Geometry & Gerrymandering Grp., DISTRICTR, https://districtr.org/ [https://perma.cc/Y497-HFEY]; Andrew Gelman, Gary King & Andrew C. Thomas, *JudgeIt II: A Program for Evaluating Electoral Systems and Redistricting Plans*, GARY KING, https://gking.harvard.edu/judgeit [https://perma.cc/YU6H-YHL7]; DRAW THE LINES PA, https://drawthelinespa.org/ [https://perma.cc/327Z-2VXK]; *What is PlanScore?*, PLANSCORE https://planscore.org/about/ [https://perma.cc/YGC4-PNBH]; REPRESENTABLE, https://representable.org/ [https://perma.cc/D66A-QZBQ]; *see also* MICHAEL P. MCDONALD & MICAH ALTMAN, THE PUBLIC MAPPING PROJECT: HOW PUBLIC PARTICIPATION CAN

But fairness in electoral districting, while easy to support in theory, is hard to achieve in practice. Courts, mapmakers, and scholars have long struggled to identify objective, quantifiable measures of fairness—and its opposite, gerrymandering. In the 1960s, the Court imposed the quantitative constraint of substantial population equality,[11] but one-person-one-vote is necessary, not sufficient, for fair districts.[12] What's needed is a more general quantitative measure of fairness, one that assigns a map a "gerrymandering score" the way maximum population disparity assigns a map a "malapportionment score." If such a measure could be developed, courts could use it jurisprudentially to adjudicate partisan gerrymandering claims, reformers could use it legislatively to codify partisan fairness criteria in positive law (federal or state; constitutional or statutory), mapmakers could use it operationally to draw fairer maps, and academics could use it methodologically to measure and study gerrymandering. For these reasons, a definitive measure of partisan gerrymandering has long been the "holy grail,"[13] and adjudication of partisan gerrymandering claims has long been a dialectic between courts demanding and academics striving to provide quantitative measures of increasing sophistication.[14]

This dialectic has spurred a proliferation of such measures and techniques. Some of the leading ones include partisan bias,[15] the efficiency gap,[16]

REVOLUTIONIZE REDISTRICTING (2018). Retired Justice Stevens proposed a constitutional amendment to proscribe gerrymandering. JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION (2014).

[11] Gray v. Sanders, 372 U.S. 368, 381 (1963); Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964); Reynolds v. Sims, 377 U.S. 533, 560–61 (1964).

[12] As the Justices themselves soon acknowledged, mapmakers can draw extreme gerrymanders with perfect population equality. Wells v. Rockefeller, 394 U.S. 542, 551 (1969) (Harlan, J., dissenting) ("[T]he rule of absolute equality is perfectly compatible with 'gerrymandering' of the worst sort."); Fortson v. Dorsey, 379 U.S. 433, 439 (1965) (noting possibility that equipopulous multi-member districting scheme may "operate to minimize or cancel out the voting strength of racial or political elements of the voting population"); Bertrall Ross, *Partisan Gerrymandering, the First Amendment, and the Political Outsider*, 118 COLUM. L. REV. 2187, 2206 n.103 (2018) ("While equally apportioned legislative districts were necessary to satisfy the equal protection standard, they were not sufficient.").

[13] Daniel P. Tokaji, *Gerrymandering and Association*, 59 WM. & MARY L. REV. 2159, 2160 (2018) ("A legal standard for partisan gerrymandering is the holy grail of election law."); *see also* Sam Kean, *The Flaw in America's 'Holy Grail' Against Gerrymandering*, THE ATLANTIC (Jan. 26, 2018), https://www.theatlantic.com/science/archive/2018/01/efficiency-gap-gerrymandering/551492/ [https://perma.cc/4C84-ZD7U]; Whitford v. Gill, 218 F. Supp. 3d 837, 965 (W.D. Wis. 2016) (Griesbach, J., dissenting) ("Plaintiffs' claim that they had discovered the holy grail of election law jurisprudence—the long sought after 'judicially discernable and manageable standard' by which political gerrymander cases are to be decided.").

[14] *See* Eric McGhee, *Partisan Gerrymandering and Political Science*, 23 ANN. REV. POL. SCI. 171, 173 (2020).

[15] *See* Gary King & Robert X. Browning, *Democratic Representation and Partisan Bias in Congressional Elections*, 81 AM. POL. SCI. REV. 1251, 1251 (1987); Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after* LULAC v. Perry, 6 ELECTION L.J. 2, 3 (2007); Katz et al., *supra* note 9.

[16] *See* Eric McGhee, *Measuring Partisan Bias in Single-Member District Electoral Systems*, LEGIS. STUD. Q. 55, 55 (2014) [hereinafter McGhee, Measuring Partisan Bias]; Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 834 (2015); Eric McGhee, *Measuring Efficiency in Redistricting*, 16 ELECTION L.J. 417, 418 (2017) [hereinafter McGhee, Measuring Efficiency in Redistricting]; Ben-

the declination,[17] the mean-median difference,[18] the lopsided-outcomes test,[19] and ensemble methods.[20] A fast-growing literature compares and contrasts them.[21] But they all share a party-centric conceptual foundation: they quantify how an electoral map allocates power to rival parties based on their popularity, and they define partisan gerrymandering as misallocation of party power. Under this approach, the relevant representational relationship is between voter and party, the relevant purpose of an electoral map is to translate votes into seats, and the relevant question is whether the map produces a fair seats-votes relationship.

In this Article, we offer a new approach that is different in kind. Our approach is based on geographic fairness rather than seats-votes fairness. Under this geographic approach, the relevant representational relationship is between a legislator and the territorial community she represents; the purpose of an electoral map is to facilitate that geographic district-based representational relationship; and the relevant question is whether the map fairly distributes the representational benefits of geographic electoral districting. Our approach accords with those of others who have endeavored to conceptualize and measure the representational benefits conferred by geographic electoral districting.[22] But while others have used this geographic framework to assess the absolute value of an electoral map, we ask whether the map distributes these benefits fairly across individuals and groups. A map that squanders the representational benefits that geographic electoral districting may confer represents bad policy. A map that unfairly distributes these benefits on the basis of party or race constitutes a partisan or racial gerrymander.

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jamin Plener Cover, *Quantifying Partisan Gerrymandering: An Evaluation of the Efficiency Gap Proposal*, 70 STAN. L. REV. 1131, 1167 (2018); Nicholas O. Stephanopoulos & Eric M. McGhee, *The Measure of a Metric: The Debate Over Quantifying Partisan Gerrymandering*, 70 STAN. L. REV. 1503, 1505 (2018); Ellen Veomett, *The Efficiency Gap, Voter Turnout, and the Efficiency Principle*, 17 ELECTION L.J. 249, 250 (2018).

[17] *See* Gregory S. Warrington, *Introduction to the Declination Function for Gerrymanders*, 1 (Mar. 13, 2018), https://arxiv.org/pdf/1803.04799.pdf [https://perma.cc/S7Y4-M5SW]; Gregory S. Warrington, *Quantifying Gerrymandering Using the Vote Distribution*, 17 ELECTION L.J. 39, 40 (2018); Marion Campisi, Andrea Padilla, Thomas Ratliff & Ellen Veomett, *Declination as a Metric to Detect Partisan Gerrymandering*, 18 ELECTION L.J. 371, 372 (2019).

[18] *See* Michael D. McDonald & Robin E. Best, *Unfair Partisan Gerrymanders in Politics and Law: A Diagnostic Applied to Six Cases*, 14 ELECTION L.J. 312, 312–13 (2015); Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 STAN. L. REV. 1263, 1304 (2016) [hereinafter Wang, Three Tests]; Samuel S.-H Wang, *Three Practical Tests for Gerrymandering: Application to Maryland and Wisconsin*, 15 ELECTION L.J. 367, 372 (2016) [hereinafter Wang, Three Tests Applied to Maryland and Wisconsin]; Jonathan Krasno, Daniel B. Magleby, Michael D. McDonald, Shawn Donahue & Robin E. Best, *Can Gerrymanders Be Detected? An Examination of Wisconsin's State Assembly*, 47 AM. POL. RSCH. 1162, 1164 (2019); McGhee, *Measuring Efficiency in Redistricting*, *supra* note 16, at 421; Katz et al., *supra* note 9, at 174 (showing that the mean-median difference is a valid estimator of "vote-denominated" partisan bias).

[19] Wang, *Three Tests*, *supra* note 18, at 1306; Wang, *Three Tests Applied to Maryland and Wisconsin*, *supra* note 18, at 376.

[20] *See infra* note 41.

[21] *See infra* note 43.

[22] *See infra* Sections I.A.1 and I.B.1.

We propose a straightforward three-step process. First, identify features of electoral maps that confer meaningful representational benefits, the significance of which is recognized by prevailing districting criteria, judicial precedent, and political science literature. Second, quantify the extent to which an electoral map confers such a representational benefit (or conversely, a burden) on a geographically identifiable individual or group. Third, assess whether a map differentially distributes this representational impact on the basis of a suspect characteristic like race or an expressive activity like party affiliation. Under this approach, unfairness occurs when a mapmaker unjustifiably distributes geographic representational impacts on the basis of race or party. We call such unfairness "geographic gerrymandering."

While many geographic features warrant consideration, we focus here on one of the most obvious: the preservation of county boundaries. Almost every state in the nation is partitioned into counties. Counties have remarkably stable boundaries and play an important role in organizing local political life. Before the reapportionment revolution, many states used counties as representational units for purposes of apportionment: counties were electoral districts; electoral lines were county lines. Today, electoral boundaries must sometimes depart from county boundaries to achieve population equality, but many mapmakers still try to limit the number of county splits. The United States Supreme Court has recognized the importance of county preservation, identifying it as one of the few valid justifications for some departure from population equality in state legislative maps, so long as this criterion is consistently applied.[23] 27 states explicitly codify a county preservation criterion for congressional districting.[24] 40 states explicitly codify a county preservation criterion for state legislative districting.[25] State courts sometimes strike down maps for splitting too many counties.[26] And the benefits of county preservation are well documented in the political science literature.[27] County splits confuse voters, frustrate electoral administration, and undermine the mobilization and representational efforts of voters, candidates, organizers, campaigns, and elected officials. In short, county preservation confers meaningful geographic representational benefits, and county splits impose meaningful geographic representational burdens.

Some burden is necessary because the command of population equality sometimes requires county splits. But some counties are subject to unnecessary splits—more splits than needed to achieve population equality.[28] Per-

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[23] This produces an anomaly: the mapmaker must apply this criterion consistently when the result departs from population equality but may apply this criterion inconsistently when the result comports with population equality.

[24] Yunsieg Kim & Jowei Chen, *Gerrymandered by Definition: The Distortion of "Traditional" Districting Criteria and a Proposal for Their Empirical Redefinition*, 2021 WIS. L. REV. 101, 150 (2021) (Table 2).

[25] *Id.* at 149 (Table 1).

[26] *See infra* note 87 and accompanying text.

[27] *See infra* Section II.A.2.

[28] For the technical definition of an extra county split, s*ee infra* notes 175–80 and accompanying text.

haps some unnecessary splits are justified to achieve other legitimate districting goals. But is the burden of unnecessary county splits fairly distributed? To answer this question, we examine the congressional maps of the thirty-five states with four or more congressional districts. The maps account for 2,598 of the country's 3,143 counties, and 292.1 million of the country's 328.2 million residents.[29] We consider the race and party affiliation of county residents, based on the 2010 census demographic figures and the two preceding (2004 and 2008) presidential election results. We also categorize each map by who drew the lines: Democrats, Republicans, both parties, or an independent body.[30]

We find the burden of unnecessary county splits is both significant and non-uniform. A slight majority (154.8 million, *i.e.*, 53%) of people in the states considered live in a county subject to a least one unnecessary split, which we refer to as a *fractured* county.[31] But the likelihood of living in such a county depends on both race and party. And the magnitude and statistical significance of the racial and partisan disparities depend on who drew the lines. About 51% of White residents live in an unnecessarily split county. But about 61% of Black residents live in an unnecessarily split county. Thus, Black residents are subject to a 20% higher risk than White residents of living in an unnecessarily split county. Similarly, counties subject to more unnecessary splits are relatively less White and more Black—in a nation where the mean county is 86% White and 9.1% Black,[32] the average county with no extra split is similarly 86% White and 10% Black; the average county with one extra split, however, is 82% White and 13% Black; and the average county with multiple extra splits is 77% White and 15% Black. The mean number of extra splits is 0.10 for the Whitest counties (at least 90% White), 0.29 for less White counties (80% to 89.8%), and 0.33 for the least White counties (70% to 79.8%). In other words, for the least White counties, for every county with an extra split, about two others had no extra split; but for the Whitest counties, for every county with an extra split, about nine others had no extra split.

The extent and statistical significance of these racial disparities depend critically on who draws the lines. When independent bodies draw the lines, Black residents are slightly (5%) more likely to live in a fractured county; when Democrats draw the lines, Black residents are slightly (4%) less likely to live in a fractured county; and either disparity may be due to chance. But when Republicans draw the lines, Black residents are 25% more likely to live in a fractured county, to a high degree of statistical significance, with about 56% of Black residents but only 45% of White residents in a fractured

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[29] *County Population Totals: 2010–2019: Annual Estimates of the Resident Population for Counties: April 1, 2010 to July 1, 2019*, U.S. CENSUS BUREAU (March 2020), https://www.census.gov/data/tables/time-series/demo/popest/2010s-counties-total.html [https://perma.cc/W6JV-GMN7] [hereinafter *County Population Totals: 2010–2019*].

[30] *See infra* note 193 and accompanying text.

[31] *See* table, *infra* Subsection II.B.1.

[32] Mean calculated from U.S. Census data from all U.S. counties and county equivalents. *County Population Totals: 2010–2019*, *supra* note29.

county. And when both parties draw the lines, Black residents are 43% more likely to live in a fractured county, to an extreme degree of statistical significance, with over 70% of Black residents but only 49% of White residents in a fractured county. Similarly, counties with large (over 25%) Black populations are subject to slightly fewer extra splits than counties with small (under 25%) Black populations when Democrats draw the lines, slightly more extra splits when Republicans draw the lines, but more than eight times as many extra splits when both parties draw the lines.

A similar story emerges in terms of party. When one party controls the districting process, a county is generally subject to more extra splits as its proportion of "out-party supporters" increases: counties with no extra splits are 41.2% out-party supporters on average, while counties with at least three extra splits are 48.5% out-party supporters on average. But the burden of extra county splits is imposed more on Democrats specifically than the out-party more generally. The bluer the county, the more extra splits: the average Democratic vote is 39.8% in counties with no extra splits; 45.6% in counties with one extra split; 53.7% in counties with two extra splits; and 55.8% in counties with three or more extra splits. Democrats are subject to more extra county splits whether the lines are drawn by the Republicans, the Democrats, or both parties, but the disparity is most pronounced when both parties draw the lines. Only when independent bodies draw the lines is there no statistically significant disparity. Similarly, Democratic strongholds (more than 70% Democratic vote) are subject to more extra splits on average than Republican strongholds (more than 70% Republican vote), whether the lines are drawn by the Republicans, the Democrats, or both parties. The disparity is most pronounced when both parties draw the lines, in which case Republican strongholds are subject to no extra splits while the mean extra split for Democratic strongholds is greater than one. Again, there is no statistically significant disparity only when an independent body draw the lines.

In short, the burden of extra county splits falls disproportionately on Black residents and Democrats. The racial disparity disfavoring Black residents is significant overall, greater when Republicans draw the lines, greatest when both parties draw the lines, slightly reversed when Democrats draw the lines, and nonexistent when an independent body draws the lines. The partisan disparity disfavoring Democrats is significant overall, marked when Democrats themselves draw the lines, greater when Republicans draw the lines, greatest when both parties draw the lines, and nonexistent when an independent body draws the lines. Neutral districting imposes no geographic unfairness. Bipartisan gerrymandering imposes the greatest geographic unfairness, disproportionally burdening both Black residents and Democrats. Democrats pursue partisan seats-votes advantage by imposing disproportionate county splits on Democrats, but not on Black Americans. Republicans pursue partisan seats-votes advantage by imposing disproportionate county splits on both Democrats and Black Americans.

These results suggest additional research questions that we encourage others, and hope ourselves, to explore in the future. The objective of this

Article is to present the general concept of geographic gerrymandering and to demonstrate how and why this approach matters. We do not suggest that we have discovered the "holy grail" of gerrymandering measures, *i.e.*, that which reduces to a unique real number anything worth knowing about an electoral map. We do not think such a measure exists, because fairness in electoral districting implicates multiple values and considerations. Indeed, our approach is based on the notion that districting is dual, simultaneously implicating two sets of representational interests, one statewide and party-centric, the other district-specific and geographic. Our central claim is more modest: that this geographic approach provides sufficient insight that its inclusion in the methodological toolkit would offer value added to litigants, jurists, policymakers, academics, and citizens in their efforts to conceptualize, quantify, understand, and curb gerrymandering. The geographic approach complements the seats-votes approach. Together, they offer a fuller picture of the representational interests at play.

The Article proceeds in three parts. Part I presents the theory of the geographic approach. While the seats-votes approach resists the geographic theory of representation underlying electoral districting, the geographic approach embraces it as the basis for a fairness principle. By taking seriously the representational benefits of electoral districting, the geographic approach facilitates judicial intervention and justiciability. Specifically, *Rucho* is best read narrowly to foreclose only partisan gerrymandering claims based on the seats-votes framework, leaving the federal courts open to gerrymandering claims based on geographic fairness. Under this reasoning, the Court could strike down an electoral map as a "geographic" partisan gerrymander without overruling *Rucho*, and without relying on a seats-votes theory when adjudicating liability or crafting relief. But even if *Rucho* is read broadly to foreclose the geographic claim we propose, a geographic approach may still help litigants and jurists in state courts adjudicating gerrymandering claims under state constitutional provisions. Beyond the courtroom, the geographic approach offers value to scholars, with new conceptual insights and methodological possibilities. An electoral map often reflects a trade-off between different types of fairness. As our empirical study suggests, the mapmaker may pursue seats-votes fairness by burdening the geographic representational interests of Democrats and racial minorities.

Part II applies this geographic theory by examining how electoral maps split counties. Part II.A explains why county splits matter. First, it traces the historical development of the American county, its significance in political life, and its role in electoral districting. It then reviews the political science literature confirming the representational benefits of county preservation, and the representational burdens of county splits. Part II.B presents an analysis of unnecessary county splits of the congressional maps drawn by each state with four or more districts following the 2010 census. A majority of residents live in a county subject to at least one extra split. But this burden is not borne equally. It falls disproportionately on Black residents and Democrats. When independent bodies draw the lines, these disparities disappear.

But they are significant when lawmakers draw the lines, particularly when the mapmaking process is controlled by Republicans or both parties. Notably, both Democrats and Republicans tend to disproportionately split blue counties. And the bipartisan gerrymanders produced by split legislative control impose the most significant disparities, both racial and partisan.

Part III concludes with a summary of the implications of our conceptual proposal and empirical findings for scholars, mapmakers, and courts.

I. Theory: Reconceptualizing Gerrymandering As Geographic Unfairness

Efforts to measure gerrymandering are generally party-centric. They quantify how an electoral map translates party popularity into power. And they define a partisan gerrymander as a map that gives one party more power than its popularity warrants. This framework operates within a "seats-votes" box—literally. Analysts conceptualize "seats-votes space" as the unit square in the first quadrant of the x-y plane, with horizontal and vertical axes respectively denoting a party's statewide vote share and statewide seat share.[33] Each dot in the box represents an (observed or hypothetical) electoral outcome: in the NE and SW corners, one party wins all the seats with all the votes; in the center of the box, the two rival parties equally split both votes and seats. As vote share shifts, these electoral outcomes trace out a smooth "seats-votes" curve. Under this party-centric approach, the gravamen of a gerrymandering claim is that the challenged map produces an unfair seats-votes curve, one that allocates to one party more power than it deserves. In recent decades, this seats-votes conceptualization has dominated the academic debate about how to measure fairness in electoral districting, the popular debate about how to draw fair maps, and the judicial debate about whether and how to curb partisan gerrymandering.

The seats-votes framework has played such a dominant role because it so powerfully captures why mapmakers gerrymander, why gerrymanders offend prevailing norms of fairness, and why gerrymandering distorts the operation of representative democracy. Consider the North Carolina congressional map before the Court in *Rucho*. That map was the product of the sort of extreme hyperpartisan mapmaking process that has come to characterize redistricting in many states. It was approved on a party-line vote by a joint redistricting committee with a supermajority of Republican legislators, co-chaired by Representative David Lewis, who explicitly supported "drawing the map to give a partisan advantage to 10 Republicans and 3 Democrats" because he "[did] not believe it possible to draw a map with 11

[33] Technically, the relevant quantity in the general case of differential voter turnout is average district vote share, which is equal to statewide vote share under uniform voter turnout. *See* Katz et al., *supra* note 9, at 165.

Republicans and 2 Democrats."[34] This map, and its predecessor, operated precisely as intended, giving Republicans supermajority seat share with a slim majority of vote share (ten of thirteen seats or about 77% seat share, with 55% of the vote in 2014 and 52% in 2016), or even a minority of vote share (nine of thirteen seats or 69% seat share, with 49% vote share). And that is precisely why so many consider it unfair: a map violates an intuitive and widely shared principle of equality when it permits one party, but not the other, to translate 49% vote share into 69% seat share or 52% vote share into 77% seat share.[35] The critique reflects a simple premise: a party's strength in the legislature should reflect its popularity with the electorate; partisan gerrymandering is unfair because it misallocates seats to parties.

Translating this intuition into a rigorous analytical approach, the seats-votes framework makes explicit the understanding that an electoral map is fundamentally a device that converts input into output, popularity into power, vote share into seat share. McGhee has proposed what he calls the efficiency principle: Any measure of efficiency must indicate a greater advan-

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[34] Common Cause v. Rucho, 318 F. Supp. 3d 777, 808 (M.D.N.C. 2018). Representative Lewis further explained: "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country." *Id.* at 809. After the desired map had already been designed, the committee met for the first time, and explicitly approved, on a party-line vote, a "Partisan Advantage" criterion, promising "reasonable efforts . . . to maintain the current partisan makeup." *Id.* at 807, 880. That makeup was achieved by a previous map, ultimately struck down as a racial gerrymander, drawn after Republicans captured both legislative chambers (and thus the districting process) for the first time in more than a century, pursuant to explicit instructions to "create as many districts as possible in which GOP candidates would be able to successfully compete for office." *Id.* at 803, 880. Both maps were designed by Republican operative Dr. Thomas Hofeller, who had previously served as redistricting coordinator for the Republican National Committee and concurrently worked on a "redistricting team" established by REDMAP, the Republican State Leadership Committee's Redistricting Majority Project. REDMAP was established to "strengthen Republican redistricting power by flipping [state legislatures] from Democrat to Republican control" and thereby "maintain a Republican stronghold in the U.S. House of Representative for the next decade." *Id.* at 803, 880. Hofeller, known as the "Michelangelo of gerrymandering," would subsequently play an instrumental role in recent efforts to add a citizenship question to the 2020 Census, which he predicted would ultimately benefit both Whites and Republicans. Michael Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. TIMES (May 30, 2019), https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html [https://perma.cc/CQZ2-8FSJ].

[35] Other alleged gerrymanders are attacked for precisely the same reason: turning too little vote share into too much seat share: the congressional map challenged in *Davis v. Bandemer* turned 48.1% vote share into 57% seat share, Davis v. Bandemer, 478 U.S. 109, 134 (1986) (plurality opinion); the congressional map challenged in *Vieth* turned 49.4% vote share into 68.4% seat share, Vieth v. Pennsylvania, 188 F. Supp. 2d 532, 536 (M.D. Pa. 2002); the congressional map challenged in *Gill v. Whitford* turned 52% vote share into 63% seat share, Gill v. Whitford, 138 S. Ct. 1916, 1923 (2018); the congressional map challenged in *League of Women Voters v. Commonwealth* turned 54.1% vote share into 72.2% seat share, League of Women Voters v. Commonwealth, 178 A.3d 737, 764 (Pa. 2018); the legislative map challenged in *League of Women Votes of Michigan v. Benson* turned 50.4% vote share into 71.1% seat share, League of Women Voters v. Benson, 373 F. Supp. 3d 867, 892 (E.D. Mich. 2019); and the congressional map challenged in *Householder* turned a range of 51% to 59% vote share to a 75% seat share between 2012 and 2018, Ohio A. Philip Randolph Inst. v. Householder, 373 F. Supp. 3d 978, 1155 (S.D. Ohio 2019).

tage for (against) a party when the seat share for that party increases (decreases) without any corresponding increase (decrease) in its vote share.[36] Cover has demonstrated that any measure satisfying this principle is equivalent to a seats-votes curve.[37] For example, the efficiency gap, a leading measure developed by McGhee and Stephanopoulos,[38] is equivalent to an ideal seats-votes curve that is a straight line passing through the equal split point (V,S) = (0.5,0.5) with a slope of two.[39] Other leading measures, including partisan symmetry, the mean-median difference, and the declination, similarly conceptualize fairness in terms of seats and votes.[40]

The cutting-edge of the seats-votes approach is recent work that uses politics-blind algorithms to produce a large ensemble of maps that satisfy neutral criteria like contiguity, compactness, and population equality.[41] We can predict how many seats each party wins under each hypothetical map and aggregate these outcomes into a probability density function for the entire ensemble. The result is a bell curve indicating the likelihood of various seat allocations under neutral mapmaking. We can then check whether the seat allocation produced by the enacted map is an extreme outlier compared to this probability curve. In *Rucho*, an expert witness used this method and concluded that the 10-3 partisan advantage produced by Hofeller's map favored Republicans more than over 99% of the almost 25,000 maps drawn by a neutral algorithm.[42]

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[36] Cover, *supra* note 16, at 1167 n.127. The measure simply reports the extent to which an electoral outcome (a point) lies above (or below) some ideal seat-vote relationship (a curve).

[37] *See id.*

[38] The efficiency gap is designed to measure relative "wasted votes," where a vote is wasted when it is cast for a losing candidate (lost vote) or for a victorious candidate who would have won anyway (surplus or excess vote). *See* Stephanopoulos & McGhee, *supra* note 16, at 851.

[39] As originally defined, this equivalence requires the simplifying assumption that R-won and D-won districts have the same average turnout. Cover, *supra* note 16, at 1156; Veomett, *supra* note 16, at 261. But McGhee subsequently proposed a modified definition based on average district turnout, which guarantees this equivalence in all cases. *See* McGhee, *Measuring Partisan Bias*, *supra* note 16, at 1522.

[40] The declination is defined in terms of a related analytical framework called a rank-vote curve. Like seats-votes space, rank-vote space is the unit square in the positive quadrant with the vertical axis measuring one party's vote share. But rank-vote space arranges electoral districts in ascending order of one party's vote share and uses the horizontal axis to indicate a district's rank in that ordered sequence. Cover has demonstrated that interpolation methods can be used to draw a smooth, monotonically increasing rank-vote curve through these points, and leading measures of partisan gerrymandering correspond to various aspects of this rank-vote curve. Benjamin Plener Cover, Gerrymandering as Jerk: Measuring Partisan Fairness Using a Rank-Vote Curve (unpublished manuscript) (on file with author); *see* John F. Nagle & Alec Ramsay, *On Measuring Two-Party Partisan Bias in Unbalanced States* (2020), https://arxiv.org/pdf/2006.14067.pdf [https://perma.cc/Y9SL-CEBF] (demonstrating how other measures correspond to properties of rank-vote and seat-vote curves).

[41] Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q.J. POL. SCI. 239 (2013); Andrew Chin, Gregory Herschlag & Jonathan Mattingly, *The Signature of Gerrymandering in* Rucho v. Common Cause, 70 S.C. L. REV. 1241 (2019).

[42] Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (citing *Rucho*, 318 F. Supp. 3d at 893-894) ("Over 99% of that expert's 24,518 simulations would have led to the election of at least one more Democrat, and over 70% would have led to two or three more."); *see also League*

A fast-growing literature compares and contrasts these alternative measures and techniques.[43] But this rich debate is taking place internal to the seats-votes framework, asking which seats-votes measure is best, or whether any is good enough, rather than whether to operate within or outside the "seats-votes box." This proliferation of seats-votes measures and techniques reflects a dialectic between courts demanding and academics striving to provide quantitative measures of increasing sophistication. Justice Kennedy flirted with, but never embraced, an approach based on partisan symmetry.[44] The three-judge panel ultimately reversed by the Supreme Court in *Gill v. Whitford* relied on the efficiency gap.[45] The three-judge panel that invalidated the North Carolina congressional map at issue in *Rucho* referred to multiple seats-votes measures.[46] In her *Rucho* dissent, Justice Kagan favored ensemble techniques.[47] Every jurist eschewed a requirement of strict proportionality, and skeptics of judicial intervention warned that any seats-votes approach would ultimately boil down to such a requirement.[48] Justice Roberts dismissed these various seats-votes measures as "sociological gobbledygook,"[49] and, writing for the *Rucho* majority, concluded that none of them offered a judicially discernible and manageable standard adequate to support federal court adjudication of partisan gerrymandering claims.[50] As action has

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of Women Voters, 178 A.3d at 776 (Pa. 2018) (Of "1 trillion computer-generated [maps] . . . , 99.999999% of them had less partisan bias than [Pennsylvania's 2011 congressional map].").

[43] Nagle & Ramsay, *supra* note 39; Katz et al., *supra* note 9; Gregory S. Warrington, *A Comparison of Partisan-Gerrymandering Measures*, 18 ELECTION L.J. 262 (2019); *see generally* Stephanopoulos & McGhee, *supra* note 16.

[44] *See* Vieth v. Jubelirer, 541 U.S. 267, 316–17 (2004) (Kennedy, J., concurring) (concluding that partisan symmetry means if the parties switched vote shares, their seat shares should switch too). Formally, it means that for any value of vote share V ? 0, 1, the following equation applies: SV= 1- S(1-V). Visually, it means the seats-votes curve need not lie on the diagonal line of strict proportionality, SV= V, but it should be symmetric about this line. Associated with this principle is a measure of partisan gerrymandering, called partisan bias and denoted â(V), that quantifies the extent of deviation from partisan symmetry. Formally, partisan bias is defined as V=&SV-[1- S1- V]}/2. Its sign indicates which party the map favors, and its magnitude indicates how much seat share the parties would have to swap to achieve partisan symmetry. Often this measure is evaluated at equal vote share V=0.5, in which case it simply indicates how far above (or below) the seat-vote curve passes the equal split point V,S=0.5,0.5. *See* Katz et al., *supra* note 9, at 165–166; Anthony J. McGann, Charles A. Smith, Michael Latner & Alex Keena, *A Discernable and Manageable Standard for Partisan Gerrymandering*, 14 ELECTION L.J. 295 (2015); Grofman & King, *supra* note 15.

[45] *See* Whitford v. Gill, 218 F. Supp. 3d 837, 910 (W.D. Wis. 2016).

[46] Common Cause v. Rucho, 279 F. Supp. 3d 587, 658 (M.D.N.C. 2018) (discussing testimony of expert Dr. Simon Jackson, who analyzed the map using the efficiency gap, partisan bias, and the mean-median difference).

[47] *Rucho*, 139 S. Ct. at 2519 (Kagan, J., dissenting).

[48] *Id.* at 2499; *id.* at 2515 (Kagan, J., dissenting); Davis v. Bandemer, 478 U.S. 109, 130 (1986) (plurality opinion); *id.* at 155 (O'Connor, J., concurring in the judgment); *id.* at 168 (Powell, J., dissenting); Vieth v. Jubelirer, 541 U.S. 267, 288 (2004); ; *id.* at 308 (Kennedy, J., concurring); *id.* at 338 (Stevens, J., dissenting); *id.* at 351–52 (Souter, J., dissenting); *id.* at 357–58 (Breyer, J., dissenting); League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 419 (2006).

[49] Oral Argument at 35:21, Gill v. Whitford, 138 S. Ct. 1916 (2018) (No. 16-1161), https://www.oyez.org/cases/2017/16-1161 [https://perma.cc/3PZ6-H3H7].

[50] *See Rucho*, 139 S. Ct. at 2506–07.

recently shifted to state courts and ballot initiatives, these various seats-votes measures continue to play a leading role.[51] And the scholarly debate about the comparative strengths of alternative measures continues.

Our approach is different in kind. Whereas the seats-votes approach focuses on the statewide relationship between the electorate and the body of legislative representatives, the geographic approach focuses on the district-specific relationship between an individual representative and her geographically defined constituency. We do not dispute the power of the seats-votes approach. Nor do we claim that fairness in districting should be conceptualized in terms of geography *instead* of seats-votes. Rather, we suggest that fairness in districting should be analyzed *both* in seats-votes terms *and* geographic terms, and we argue that this dual conception of fairness offers benefits over an approach that focuses exclusively on seats-votes and ignores geography. There are conceptual, jurisprudential, and methodological advantages to an approach that complements the seats-votes framework with independent consideration of geographic fairness. The seats-votes framework is powerful because it gives laser focus to an important quantity of interest. But laser focus misses anything outside its narrowed field of vision. By thinking outside the seats-votes box, our geographic approach offers new insights and possibilities.

For many, the seats-votes approach may appear to fully capture the representational interests at stake in our system of geographic electoral districting with plurality voting. But this raises a fundamental question: why do we use this system in the first place? Note that this system involves two fundamental design choices that combine to enable gerrymandering: electoral formula and district magnitude.[52] Our predominant approach has been single-member geographic districts (one per representative) with a plurality voting rule (whoever gets the most district votes wins the district election). Of all the long-established democracies, the United States is one of the few that uses single-member districts to elect its national legislature.[53] Dozens of countries, including twenty-nine of the world's thirty-five major democra-

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[51] MO. CONST. art. III, § 3 ("Districts shall be drawn in a manner that achieves both partisan fairness and, secondarily, competitiveness . . . 'Partisan fairness' means that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency . . . [T]he total number of wasted votes for each party, summing across all of the districts in the plan shall be calculated. 'Wasted votes' are votes cast for a losing candidate or for a winning candidate in excess of the threshold needed for victory. In any redistricting plan and map of the proposed districts, the difference between the two parties' total wasted votes, divided by the total votes cast for the two parties, shall not exceed fifteen percent.").

[52] John T. Ishiyama, Comparative Politics: Principles of Democracy and Democratization 159 (2011) (citing David M. Farrell, Electoral Systems: A Comparative Introduction (1st ed. 2001)) ("In general, we can think of electoral systems as being made up of a set of choices, which include: the electoral formula, the district magnitude, ballot structure, and electoral thresholds.").

[53] The others are Australia, Canada, France, and Great Britain. *See* Paul L. McKaskle, *Of Wasted Votes and No Influence: An Essay on Voting Systems in the United States*, 35 HOUS. L. REV. 1119, 1123 (1998).

cies, use alternative systems based on proportional representation.[54] Whereas geographic electoral districting indirectly produces a seats-votes curve, often deemed undesirable, proportional representation, by construction, awards each party seats based on its statewide vote share, and thereby directly establishes a specified relationship between seats and votes.[55] For example, the Netherlands elects its 150-member legislature with a single national voting district, so a party earns one seat for every 1/150 vote share.[56] With no electoral districts, there can be no gerrymandering, and no distortion of the seats-votes relationship.

So the question remains: if the only function of an election is to produce a fair allocation of power to rival parties, then why do we use geographic electoral districting at all? Why not simply adopt a proportional representation system designed to produce the desired votes-seats relationship?[57] If the only objective is the right votes-seats relationship, proportional

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[54] For this statistic, a "major democracy" is defined as a country with at least two million people and a 2012 Freedom House Average Freedom Ranking of one or two. *Electoral Systems Around the World*, FAIRVOTE, https://www.fairvote.org/research_electoralsystems_world [https://perma.cc/Z4WY-2ED8] ("Internationally, proportional representation is the most common type of electoral system with 89 of the 195 countries below using it."). *Electoral System Family*, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, https://www.idea.int/data-tools/question-view/130357 [https://perma.cc/SBQ5-PU8S] (84 of 217 countries); Comparative Data, *What Is the Electoral System for Chamber 1 of the National Legislature? Mixed Member Proportional*, ACE PROJECT, http://aceproject.org/epic-en?question=es005&f=H [https://perma.cc/YRS2-WBX7] (86 of 234 countries). Countries using proportional representation include New Zealand, Japan, Israel, and every Western European country other than Great Britain and France. McKaskle, *supra* note 53, at 1123–24 & nn.15–17; *Alternative Voting Systems*, NAT'L CONF. STATE LEGISLATURES (June 25, 2020), https://www.ncsl.org/research/elections-and-campaigns/alternative-voting-systems.aspx [https://perma.cc/V4UP-BAEB] ("Party list forms of proportional representation [are] used by many countries throughout Africa, Asia, Australia, South America and Europe.").

[55] JAMES A. GARDNER & GUY-URIEL CHARLES, ELECTION LAW IN THE AMERICAN POLITICAL SYSTEM 33 (2d ed. 2017) ("Under PR, each party wins seats in the legislature in proportion to its popular electoral support."). That relationship could be strict proportionality, where each party's seats share is simply its vote share and the seats-votes curve is a straight line with slope one through the equal split point. *See* Adam Cox, Commentary, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 765 (2004) ("[I]n [a pure proportional representation] system . . . by definition . . . the seats-votes relationship is linear."). The degree to which a system achieves strict proportionality depends on the number of seats, because intermediate seat share values must be rounded up and down. *See* McKaskle, *supra* note 53, at 1149. But the relationship could also be a looser form of proportionality that gives some seat bonus to a party that wins majority vote share and only awards seats to parties that achieve some threshold vote share. For example, Germany uses a party-list system where a party gets no seat unless it earns at least 5% vote share. *Id.* at 1150 n.127. A party can also earn a seat by winning at least three single-member constituency seats. *Id.*

[56] McKaskle, *supra* note 53, at 1150 n.127.

[57] Another alternative is the winner-take-all at-large system, which was used for congressional elections in many states in the nation's first half century. *See* Karcher v. Daggett, 462 U.S. 725, 745 & n.3 (1983) (Stevens, J., concurring); *Wesberry*, 376 U.S. at 8 n.11 (citing Joel Francis Paschal, *The House of Representatives: "Grand Depository of the Democratic Principle"?*, 17 L. & CONTEMP. PROBS. 276, 281 (1952)) ("As late as 1842, seven States still conducted congressional elections at large."). But at-large elections are worse than districted elections in terms of partisan fairness, because a party with just over half the votes captures all the seats. *See* Davis v. Bandemer, 478 U.S. 109, 159 (1986) (O'Connor, J., concurring in the judgment)

representation is a much more sensible way to achieve it than geographic electoral districting with maps constrained to indirectly produce what proportional representation directly provides. Political theorists have long favored proportional representation over geographic electoral districting for this reason.[58] In this sense, the seats-votes framework is in tension with the very idea of geographic electoral districting.[59] Its underlying theory of representation aligns better with a system of proportional representation than one of geographic electoral districting with plurality voting. Yet the American electoral system has long rejected the former and embraced the latter.

For this reason, the seats-votes approach is vulnerable to the critique that it imposes a norm inconsistent with our institutional commitments and that it would radically remake our electoral system according to a political theory embraced in Europe, and by liberal elites, but long rejected in the United States. In the legal context, the critique is framed as a conceptual question: how could the Constitution contain a requirement of seats-votes fairness at odds with the system of geographic electoral districting the Founders embraced? Instead of mandating a particular electoral system, the Founders adopted the Elections Clause, which leaves that decision to the states and to Congress.[60] Since the Founding, states have apportioned their legislatures on a geographic basis. And since 1842, Congress has mandated single-member electoral districts for congressional elections. Related to this conceptual question is a practical one: if courts embrace a legal standard based on a seats-votes conception of fairness in tension with geographic electoral districting, would it be a trojan horse that ultimately replaces geographic electoral districting with proportional representation, or takes away the traditional role of state legislatures in drawing the lines, or perpetually necessitates intensive federal judicial superintendence of the districting process? Invoking Justice O'Connor's concurrence in the judgment in *Bandemer*, Justice Roberts' majority opinion in *Rucho* critiques partisan gerrymandering claims for relying on a statewide party-based seats-votes framework inconsistent with the American tradition of geographic electoral districting:

("Districting itself represents a middle ground between winner-take-all statewide elections and proportional representation for political parties."). This is why Congress has mandated geographic electoral districting for the House of Representatives since 1842. *See* Apportionment Act of June 25, 1842, ch. 47, §§ 1–2, 5 Stat. 491 (codified as amended at 2 U.S.C. § 2c (1967)); *see* ROYCE CROCKER, CONG. RSCH. SERV., CONGRESSIONAL REDISTRICTING: AN OVERVIEW 3–4 (2012).

[58] JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 144–68 (1861) (strongly advocating proportional representation as "True Democracy" while critiquing districted elections with plurality voting as "False Democracy") (Chapter VII—Of True and False Democracy; Representation of All, and Representation of the Majority Only); GARDNER & CHARLES, *supra* note 55, at 33 ("Few political scientists favor plurality decision rules, or even majority decision rules, both of which are winner-take-all electoral systems. Most political scientists tend to favor proportional representation . . . .").

[59] *See Bandemer*, 478 U.S. at 159 (O'Connor, J., concurring in the judgment) ("If there is a constitutional preference for proportionality, the legitimacy of districting itself is called into question.").

[60] U.S. CONST. art. I, § 4.

> Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. Explicitly or implicitly, a districting map is alleged to be unconstitutional because it makes it too difficult for one party to translate statewide support into seats in the legislature. But such a claim is based on a "norm that does not exist" in our electoral system—"statewide elections for representatives along party lines."[61]

The efficiency gap measure illustrates how difficult it is to navigate the inherent tension between seats-votes fairness and geographic electoral districting. Strict seats-votes proportionality entails a responsiveness of *one*, *i.e.*, one percent more vote share yields one percent more seat share. But political scientists have long known that geographic electoral districting often obeys something like a "cubic law" with a responsiveness of *three*, *i.e.*, one percent more vote share yields three percent more seat share.[62] This large winner's bonus deviates substantially from strict proportionality. One of the most interesting features of the efficiency gap measure is that each party wastes equal votes when there is a responsiveness of *two*, *i.e.*, one percent more vote share yields two percent more seat share.[63] This approach is more flexible than strict proportionality but more constrained than the cubic law. It lets the majority party enjoy some winner's bonus, but not too much. In this way, the efficiency gap splits the difference between the ideal of strict proportionality and the natural operation of geographic electoral districting. The measure's proponents framed this as a desirable feature to facilitate limited judicial intervention, curbing the most extreme seats-votes unfairness without constraining too much the operation of geographic electoral districting or the traditional discretion exercised by state legislatures in the mapmaking process. But, of course, the efficiency gap was simply attacked by both Scylla and Charybdis: some critiqued it for operating too much like strict proportionality; others for operating not enough like strict proportionality.[64] This problem cannot be solved by simply developing a "better" seats-votes measure. The fundamental problem is not the efficiency gap itself, but the tension between the norm of seats-votes fairness and the system of geographic electoral districting we seek to tame but not destroy.

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[61] *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2499 (2019) (quoting *Bandemer*, 478 U.S at 159 (O'Connor, J., concurring in the judgment)).

[62] Edward R. Tufte, *The Relationship Between Seats and Votes In Two-Party Systems*, 67 AM. POL. SCI. REV. 540 (1973).

[63] *See supra* note38.

[64] *Compare* Whitford v. Gill, 218 F. Supp. 3d 837, 934 (W.D. Wis. 2016) (Griesbach, J., dissenting) ("[T]he efficiency gap . . . is little more than an enshrinement of a phantom constitutional right, namely, the idea that voters for one party are entitled to some given level of representation proportional to how many votes that party's candidates win in every assembly district throughout the state as a whole."), *with* Cover, *supra* note 16, at 1232 ("To the extent that normative intuitions support a system in which vote share and seat share should be roughly equal, the efficiency gap undermines that norm - and not only in extreme scenarios.").

Our approach avoids this problem altogether by taking geographic electoral districting on its own terms. It goes with, rather than against, the logic of geographic electoral districting. It takes seriously the idea that geographic electoral districting confers meaningful representational benefits unattainable through proportional representation. But it then demands that geographic electoral districting align with its rationale. If the representational benefits of geographic electoral districting warrant the risk of a distorted seats-votes relationship, then these benefits matter and should be distributed fairly. Thus, our approach does not presuppose "a norm that does not exist."[65] It is not a trojan horse intended to remake our electoral system. It accepts that geographic electoral districting, at least for state legislatures and the House of Representatives, predominates: it has been our historical tradition; it characterizes our present institutional commitments; and it appears likely to persist, at least for the foreseeable future.[66] "Central to American politics is the notion that representation should be based on geographically defined districts."[67] While calls for proportional representation persist,[68] the national reform movement's primary demand is fair maps, not no maps.[69]

Of course, *is* does not mean *ought*, and the predominance of geographic electoral districting over proportional representation does not necessarily mean that geographic electoral districting confers distinct representational benefits. Geographic electoral districting may persist in part precisely because it is a powerful instrument of partisan advantage. Or geographic electoral districting may be an anachronism. A cynic may attribute its persistence exclusively to elite preference for gerrymandering, perhaps combined with historical accident, path dependence, and institutional inertia. If geographic electoral districting today is pure historical anachronism, nothing more than an instrument of seats-votes unfairness, the first-best solution is to replace it with proportional representation, and the second-best solution is to constrain districting so that it better approximates proportional representation. In this case, anything worth saying about fair districting lies within the seats-votes conception of fairness. We do not make the strong claim that the predominance of geographic electoral districting is exclusively attributable to its representational benefits. But we likewise reject the equally strong claim that the predominance of geographical electoral districting is exclusively attribu-

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[65] *See Bandemer*, 478 U.S. at 159 (O'Connor, J., concurring in the judgment) ("[E]fforts to determine party voting strength presuppose a norm that does not exist—statewide elections for representative along party lines.").

[66] McKaskle, *supra* note 53, at 1124.

[67] Bernard Grofman, *Would Vince Lombardi Have Been Right if He Had Said: "When It Comes to Redistricting, Race Isn't Everything, It's the Only Thing"?*, 14 CARDOZO L. REV. 1237, 1262 (1993).

[68] *See, e.g.*, DOUGLAS J. AMY, PROPORTIONAL REPRESENTATION: THE CASE FOR A BETTER ELECTION SYSTEM (1997); Matthew Yglesias, *Proportional Representation Could Save America*, VOX (Oct. 15, 2018, 1:00 PM), https://www.vox.com/policy-and-politics/2018/10/15/17979210/proportional-representation-could-save-america [https://perma.cc/RE6T-8GKM].

[69] *See, e.g.*, *What We Want*, FAIR ELECTIONS PROJECT, https://www.fairelectionsproject.org/what-we-want/ [https://perma.cc/6LYV-5WM2].

table to cynical reasons unrelated to any representational benefits. Instead, we argue that the persistence of geographic electoral districting suggests, at least in part, that Americans find something meaningful in it, something that would be lost if we abandoned it for proportional representation. If so, that something cannot be captured by a seats-votes approach.

What precisely are the representational benefits of geographic electoral districting? They involve what a lawyer would call First Amendment activity and what a political scientist would call informational symmetry. By facilitating a geographic-based set of representational relationships amongst constituents, representatives, candidates, organizers, and media, geographic electoral districting promotes a rich array of core First Amendment activity: speech, press, assembly, petition, and expressive association.[70] To petition the government, or to access constituent services, a voter can visit (or contact) her representative in a local district office, rather than a party bureaucracy in the state capital.[71] Closer to her constituents, the representative can better understand and more effectively represent her constituents' interests in the legislature. And the campaign invites neighbors to engage one another in a debate about shared values, interests, and issues. Many government services are place-based in a way that unites neighbors in common concern regarding their delivery: roads, schools, transportation, parks, law enforcement, utilities, and economic development. Political science and election law scholarship recognizes the value of geographic representation.

Many of the districting criteria codified in state law reflect an effort to enhance geographic representation. This makes sense: if a geographic conception of representation justifies the choice to draw electoral districts in the first place, it should also inform the subsequent decision-making about how to draw the lines. If the goal is to facilitate representative relationships and democratic participation through territorial community, an electoral district should correspond to a coherent, identifiable constituency with shared place-based interests, values, and issues of legislative concern. The stronger the connection, the more coherent the constituency, the tighter the correspondence between electoral district and territorial community, the more the map advances or promotes constituents' geographic representational interests. And the converse is true: the weaker the connection, the less coherent the constituency, the looser the correspondence between district and community, the more the map burdens or disserves constituents' geographic representational interests.

How would we draw the lines if the objective was to maximize an electoral map's geographic representational benefits? One criterion is

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[70] U.S. CONST. amend. I; NAACP v. Button, 371 U.S. 415, 431 (1963) ("[T]he right to engage in political expression and association . . . was enshrined in the First Amendment.") (internal citation omitted); Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989) (noting that the First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office").

[71] David Niven, Benjamin Plener Cover & Michael Solomine, *Are Individuals Harmed by Gerrymandering? Examining Access to Congressional District Offices*, 102 SOC. SCI. Q. 29 (2021).

cognizability, which Grofman defines in terms of the ease with which the average voter could explain and understand district boundaries "in commonsense terms based on geographical referents."[72] Cognizable districts promote geographic representation; non-cognizable districts frustrate it.

> [T]he cognizability of district boundaries that results when boundaries can be clearly identified in terms of proximate geography, facilitates voter identification of and with the district. Permitting the construction of districts, whose boundaries are simply not definable in commonsense terms, vitiates the principle that representatives are to be elected from geographically defined districts and vitiates the advantages of such districts as the basis of electoral choice. Also, when districts are not cognizable, it is especially hard to dislodge incumbents; there is no straightforward geographical basis of electoral organization for change, and the costs of campaigning are increased.[73]

Some districting criteria codified in state law can be understood as efforts to promote cognizability. Kansas and Nebraska explicitly provide that electoral districts should be "easily identifiable" and "easily understandable" to voters.[74] Alaska requires the mapmaker to describe district boundaries in terms of drainage and other geographic features.[75] Other states direct the mapmaker to start with a grid-like pattern or number districts consecutively.[76] Some states have explicit criteria regarding irregular district shapes.[77]

A related criterion is *traversability*, which refers to the ease with which a representative and her constituents can travel throughout the district. This promotes geographic representation by facilitating face-to-face interactions. Minnesota, New York, and Washington call for "convenient" electoral districts.

Cognizability and traversability are necessary, but not sufficient, for effective geographic representation. Districts must also capture coherent, meaningful territorial communities with shared place-based interests. Ver-

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[72] Grofman, *supra* note 67, at 1262.

[73] *Id.* at 1262–63.

[74] *Guidelines and Criteria for 2012 Kansas Congressional and Legislative Redistricting*, Kan. Leg. Rsch. Dep't (Jan. 9, 2012), http://www.kslegislature.org/li_2012/b2011_12/committees/misc/ctte_h_redist_1_20120109_01_other.pdf [https://perma.cc/E3G3-LNTB]; L.R. 102, 102nd Leg., 1st Sess. (Neb. 2011).

[75] ALASKA CONST. art. VI, § 6.

[76] ARIZ. CONST. art. IV, pt. 2, § 1 ("districts of equal population in a grid-like pattern across the state"); CAL. CONST. art. XXI, § 2(f) (districts "shall be numbered consecutively commencing at the northern boundary of the State and ending at the southern boundary"); MINN. CONST. art. IV, § 3 ("The senate districts shall be numbered in a regular series."); WIS. CONST. art. IV, § 5 ("The senate districts shall be numbered in the regular series . . . ."); MICH. COMP. LAWS § 3.63(c)(ix) ("Each congressional district shall be numbered in a regular series . . . .").

[77] Idaho Code § 72-1506; *see* Guy v. Miller, No. 11 OC 00042 1B, 2011 Nev. Dist. LEXIS 31 (Nev. Dist. Ct. Sept. 21, 2011); S.C. House of Representatives Judiciary Comm., Election L. Subcomm., 2011 Guidelines and Criteria for Congressional and Legislative Redistricting (2011).

mont calls for "recognition and maintenance of patterns of geography, social interaction, trade, political ties, and common interests."[78] Alaska strives to capture "a relatively integrated socio-economic area."[79] In all, 19 states use community of interest as a districting criterion for congressional maps, 23 for state legislative maps.[80]

Some districting criteria promote cognizability, traversability, and correspondence to a coherent territorial community. One is contiguity, which is satisfied when "every part of the district is reachable from every other part without crossing the district boundary."[81] It is easier to understand, traverse, and engage with a contiguous district. And if geographic communities of interest are contiguous, electoral districts should be too. Every state identifies contiguity as a districting criterion.[82] Some states use more restrictive definitions of contiguity, which exclude districts featuring areas that can only be connected via water crossing, a point connecting adjacent corners, a bridge, or a route by road that crosses the district boundary.[83]

Another criterion is compactness, which measures how spread out a district is.[84] The relevance of compactness is instrumental, not constitutive. It is easier for a voter to understand and engage with her district if her district is relatively compact. It is easier for a representative and her staff to travel across her district, or for a constituent to visit her representative's office, or attend a district town hall, if the district is relatively compact. Given the complexities of transportation networks and residential patterns, com-

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[78] 17 Vt. Stat. Ann. tit. 17, § 1903.

[79] ALASKA CONST. art. VI, § 6.

[80] Chen and Kim, *supra* note 24, at 149–150 (Tables 1 & 2).

[81] Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 84 (1985).

[82] 29 states require contiguity for congressional maps, 49 for state maps. Chen and Kim, *supra* note 24, at 149-150 (Tables 1 & 2). Congress required contiguity for congressional districts from the mid-nineteenth century to the early twentieth century. Emanuel Celler, *Congressional Apportionment—Past, Present, and Future*, 17 L. & CONTEMP. PROBS. 268, 272–73 (1952). The Apportionment Act of 1842 first required that states with multiple House Representatives elect them through contiguous single-member districts. *Id.* These requirements were dropped in the 1850s but reinstated in 1862 and every subsequent reapportionment act until 1911. *Id.* The 1929 Act made no mention of these requirements, and the Court held that the 1911 Act no longer applied. *See* Wood v. Broom, 287 U.S. 1, 8 (1932).

[83] Grofman, *supra* note 81, at 84 n.37; *see* MICH. CONST. art. IV, § 3 (excluding water crossing); IOWA CODE § 42.4(3) (excluding point contiguity); IDAHO CODE § 72-1506 ("When a legislative district contains more than one (1) county or a portion of a county, the counties or portion of a county in the district shall be directly connected by roads and highways which are designated as part of the interstate highway system."); ME. REV. STAT. ANN. tit. 21-a, § 1206-A ("[A] 'functionally contiguous and compact territory' is one that facilitates representation by minimizing impediments to travel within the district. Impediments to travel include, but are not limited to, physical features such as mountains, rivers, oceans and discontinued roads or lack of roads.").

[84] Compactness has been studied extensively and defined in many different ways. Michael McDonald, *The Predominance Test: A Judicially Manageable Compactness Standard for Redistricting*, 129 YALE L.J.F. 18 (2019); Aaron Kaufman, Gary King & Mayya Komisarchik, *How to Measure Legislative District Compactness If You Only Know It When You See It*, AM. J. POL. SCI. (forthcoming 2021), https://gking.harvard.edu/files/gking/files/compact.pdf [https://perma.cc/BR4W-MWG5].

pactness does not logically entail traversability and cognizability, but correlations are plausible. And while geographic communities rarely come in "squares or circles," and such shapes are not "desirable per se,"[85] to the extent geographically communities are reasonably compact, electoral districts should be too. Thirty-nine states identify compactness as a criterion.[86] "[F]ederal courts have frequently referred to the desirability of compact districts."[87]

These are just some of the geographic districting criteria adopted by states.[88] All these criteria demonstrate the value states accord to geographic representation. Our approach uses the geographic criteria states mandate and asks whether they are applied fairly. This may help facilitate judicial intervention and offer both methodological and conceptual benefits. We now demonstrate this theory in action, by applying it to the geographic districting criterion that has arguably played the greatest role historically in American electoral districting: the preservation of local boundaries, specifically counties.

II. Application: Unfairness in County Splits

This Part examines unfairness in county splits. Section A explains why county splits matter. Section B presents results regarding how the burden of county splits is distributed.

A. County Splits

This Section explains why county splits matter. Subsection 1 briefly summarizes the evolving role American counties have played in political life and electoral districting. Subsection 2 surveys the political science literature on the representational burden of county splits.

1. American Counties in Electoral Districting

The origins of the modern American county can be traced back a millennium to the English shire, an administrative unit that William the Conqueror retained after the Norman Conquest of 1066.[89] From the start, the

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[85] Grofman, *supra* note 81, at 89–90.

[86] 38 states codify a compactness criterion for state legislative districting. Chen and Kim, *supra* note 24, at 149 (Table 1). 26 states codify a compactness criterion for congressional districting. *Id.* at 150 (Table 2). Congress added a compactness requirement for congressional districts in 1901 and renewed it in 1911, but the 1929 apportionment act made no references to such requirements, and the Court held in 1932 that the 1911 act requirements no longer apply. Celler, *supra* note 82, at 271; *Wood*, 287 U.S. at 8.

[87] Grofman, *supra* note 81, at 85.

[88] The conclusion discusses additional geographic districting criteria.

[89] Tanis J. Salant, *Overview of County Governments*, *in* How American Governments Work: A Handbook of City, County, Regional, State, and Federal Operations 117 (Roger L. Kemp ed., 2002). The term sheriff, or "shire-reeve", means "protector of the

county had a dual identity as both a top-down administrative arm of the state and a bottom-up mechanism of local control.[90] For centuries before the American Revolution, geographic representation prevailed throughout Europe, and the English Parliament allocated representatives to counties or boroughs, irrespective of population.[91] British colonists brought these practices with them to North America, and colonial assemblies allocated representatives to counties and other local government units.[92] Several models of county government, each adapting traditional forms to new circumstances, spread in the British colonies: Massachusetts's weaker county form, with more limited service provision, throughout New England;[93] Virginia's strong county form throughout the South;[94] and an intermediate New York/New Jersey county supervisor model throughout Illinois, Michigan, and Wisconsin.[95] These distinctive models of county government, and associated systems

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shire or county." James Tomberlin, *"Don't Elect Me": Sheriffs and the Need for Reform in County Law Enforcement*, 104 VA. L. REV. 113, 116–17 (2018). The term county derives from the Late Latin *comitatus*, which means "jurisdiction of a count." *County*, ONLINE ETYMOLOGY DICTIONARY, https://www.etymonline.com/search?q=county [https://perma.cc/B8FZ-BYJU].

[90] Early county government consisted of justices of the peace, appointed by the King, and performed judicial, military, and public works functions. *See* Salant, *supra* note 89, at 117.

[91] *See* ROBERT LUCE, LEGISLATIVE PRINCIPLES: THE HISTORY AND THEORY OF LAWMAKING BY REPRESENTATIVE GOVERNMENT 331 (1930). Each Welsh county elected a single representative, while each English county elected two, known as "knights of the shire." Whereas counties were large areas, generally rural, boroughs included villages and large industrial towns. Cambridge and Oxford were also granted representation in parliament. CHARLES SEYMOUR, ELECTORAL REFORM IN ENGLAND AND WALES 46 (1915); *see* McKaskle, *supra* note 52, at 1138–39 & n.83 ("Even after Parliament became the dominant political force in Great Britain, the method of selecting members of the House of Commons remained, until 1832, on the same geographical basis that existed continuously from the Middle Ages.").

[92] Victor S. DeSantis, *County Governments and Change*, *in* HOW AMERICAN GOVERNMENTS WORK: A HANDBOOK OF CITY, COUNTY, REGIONAL, STATE, AND FEDERAL OPERATIONS 123–24 (Roger L. Kemp ed., 2002) ("Tradition of county government was well ingrained . . . ."); ELMER CUMMINGS GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 23 (1907) ("The unit of representation was usually the county, town, or parish. Most frequently the political unit employed for election purposes was the county.").

[93] In early colonial New England, "the county operated in the background of the town." DeSantis, *supra* note 92, at 124. Towns, with their annual town meetings, were the "heart" of local decision-making, but counties were established to perform various functions not performed by smaller towns, such as judicial, military, and fiscal administration. *Id.* Today, three of the four states not fully partitioned into county governments are Massachusetts, Connecticut, and Rhode Island. *2017 Census of Governments, Individual State Descriptions: 2017*, U.S. CENSUS BUREAU 3–4 (2019), https://www.census.gov/content/dam/Census/library/publications/2017/econ/2017isd.pdf [https://perma.cc/K6NM-THGV].

[94] Virginia adopted a more robust model of county government better suited to a predominantly agricultural society with a rural population widely dispersed over a much larger geographic area. Here, the county was the primary unit of local government, providing broader service delivery, far more significant than smaller units of municipal government. DeSantis, *supra* note 92, at 124; *see* Salant, *supra* note 89, at 118.

[95] The "middle colonies" that would become the Middle Atlantic states, including New York and New Jersey, divided their states into counties, but elected township officials automatically served as members of the county board of supervisors. Salant, *supra* note 89, at 118. These colonial counties provided road construction and maintenance, welfare programs for the poor, and law enforcement, with the county sheriff as the "primary focal point." DeSantis, *supra* note 92, at 124. This reflects a scope of colonial service provision less than that in the South but greater than that in New England. Rick Su, *Democracy in Rural America*, 98 N.C. L. REV. 837, 853 (2020); *see* Salant, *supra* note 89.

of geographic, often county-based, representation, were well established by the time of the Founding.

Just as the nation adopted a state-based system of national representation, most states adopted a county-based system of state representation, establishing a pattern that would continue in various forms for almost two centuries until the reapportionment revolution of the 1960s subordinated such geographic considerations to the constitutional mandate of population equality. Between 1776 and 1785, eleven of the thirteen original states adopted new constitutions, nine with bicameral legislatures, for a total of twenty legislative chambers.[96] Eight of them used counties or county groupings as the exclusive units of apportionment. Another six used both counties and other local units (like cities and towns) as units of apportionments. The remaining six chambers used other local units (like towns or parishes) or electoral districts that were initially, but not necessarily permanently, composed of counties. These county-based systems of representation were reinforced by county-based durational residency and property ownership requirements for electors and candidates. These county-based systems persisted for decades.[97]

Counties also served as the "building blocks" of early congressional districts.[98] For congressional districting, county preservation was not a requirement of positive law, but a traditional practice.[99] County splits occasionally

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[96] Del. Const. of 1776; Ga. Const. of 1777; Mass. Const. of 1780; Md. Const. of 1776; N.C. Const. of 1776; N.H. Const. of 1784; N.J. Const. of 1776; N.Y. Const. of 1777; Pa. Const. of 1776; S.C. Const. of 1778; Va. Const. of 1776. Connecticut and Rhode Island remained governed by royal charter until 1818 and 1843, respectively. Georgia and Pennsylvania originally used unicameral state legislatures, which were subsequently made bicameral in 1789 and 1790, respectively. Pa. Const. of 1790, art. I, §§ 4–6; Ga. Const. of 1789, art. I, §§ 2–6. South Carolina and New Hampshire adopted provisional constitutions in 1776 which were superseded by permanent constitutions respectively adopted in 1778 and 1784. S.C. Const. of 1776; N.H. Const. of 1776. Vermont adopted a constitution in 1777 with a town-based system of legislative apportionment, but Congress refused to recognize it, New York claimed that area as part of its own territory into the 1780s, and Vermont did not attain statehood until 1791. *See generally* Peter S. Onuf, *State-Making in Revolutionary America: Independent Vermont as a Case Study*, 67 J. Am. Hist. 797 (1981).

[97] James A. Gardner, *Foreword: Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 900 (2006) ("Until about 1845, state constitutions overwhelmingly designated the county as the primary unit of representation in the house of representatives, or lower chamber, of the state legislature; that is, representatives were by constitutional direction elected from counties rather than from other territorial divisions of the state.")

[98] Engstrom, Erik J., *Partisan Gerrymandering and the Construction of American Democracy*, University of Michigan Press, 2013. p. 89 ("[C]ounties were the building blocks of most [congressional] districts. . ."); Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 U. PA. L. REV. 1379, 1387–88 (2012) ("[T]he county was typically the building block for the congressional district."); Micah Altman, *Districting Principles and Democratic Representation* 1, 162-63 (1998) (Ph.D. dissertation, California Institute of Technology) 21 (1998) ("Historical Congressional districts were, generally. . .composed of entire counties").

[99] Altman, *supra* note 98, at 163, n. 112 ("Although Congressional districts were never required to be composed of whole counties, the vast majority of these districts did not, in fact, split such boundaries.")

occurred,[100] but they were the exception to the rule.[101] From the Founding to the Civil War, county preservation generally prevailed in congressional districting.[102]

As congressional districting and legislative apportionment schemes evolved, the predominant theme was a struggle to reconcile geographic and demographic theories of representation and the competing interests in county preservation and population equality. The result of this struggle was not the wholesale abandonment of county-based systems, but rather an incremental process of modification intended to achieve some accommodation between the two goals. Others have exhaustively documented the evolution of state apportionment schemes and the various mechanisms developed to accomplish this accommodation between geography and demography.[103] States would give more representatives to more populous counties, but not enough to achieve strict population equality: chamber size was limited; small counties were guaranteed some minimum representation, even when population alone would dictate less; large counties were limited to some maximum number of representatives, even when population alone would dictate more; a "weighted ratio" formula would allocate additional seats based on a "progressively higher ratio of population requirement."[104] Even when states drew electoral districts, their boundaries corresponded closely to those of local units such as counties, often because mapmakers were directed to avoid

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[100] Altman, *supra* note 98, at 22 ("Even in the early Congresses it is easy to find districts that. . .split counties. . .Higher levels of. . .splits in county lines, and ill-compactness occurred regularly in postbellum cities, where concentrated populations made it difficult to justify the use of entire counties as building blocks, and redistricters split counties and other political subdivisions.").

[101] Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 U. PA. L. REV. 1379, 1407 (2012) ("[C]ongressional districts in the 1800s typically were composed of whole towns and counties and rarely crossed their boundaries."); Bowen, Daniel Christopher, *District Characteristics and the Representational Relationship*, Diss., The University of Iowa, 55-56 (2010) ("Thus throughout the first half of American history, district boundaries followed political units like towns and counties (especially counties)."); Stephen Ansolabehere & Maxwell Palmer, *A Two-Hundred Year Statistical History of the Gerrymander*, 77 OHIO ST. L.J. 741, 753 (2016) ("Before [*Baker*] congressional districts. . .were often drawn using town or county lines.").

[102] Micah Altman, *Traditional Districting Principles: Judicial Myths vs. Reality*, 22 SOC. SCI. HIST. 159, 180 (1998) ("Very few [congressional] districts divided town and county boundaries; most were composed of whole counties and towns, or of whole counties subtracting only towns. Districts do begin to divide towns and counties following the Third Congress, but through the 38th Congress [1863-1965] the only deviations from this trend were for entire wards and other similarly sized units in urban areas.").

[103] *See generally* ROBERT B. MCKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION (1965); Douglas Keith & Eric Petry, *Apportionment of State Legislatures, 1776–1920*, BRENNAN CTR. FOR JUST. (2015), https://www.brennancenter.org/our-work/research-reports/apportionment-state-legislatures-1776-1920 [https://perma.cc/X57D-6LPW]. Justices Frankfurter and Harlan recounted this evolution in state legislative apportionment as compelling evidence that a mandate of population equality is inconsistent with both Founding-era and Reconstruction-era historical practice. *See* Baker v. Carr, 369 U.S. 186, 302–11 (1962) (Frankfurter, J., dissenting); Reynolds v. Sims, 377 U.S. 533, 602–11 (1964) (Harlan, J., dissenting).

[104] MCKAY, *supra* note 103, at 290.

county splitting or joinder. In this way, states tried to reconcile geographic and demographic considerations through county-based systems of legislative apportionment, much like the nation's founders accommodated competing interests through the "Great Compromise" of a state-based system of national legislative apportionment, with an upper house apportioned among the states on the basis of state equality and a lower house apportioned among the states on a modified population basis.

Between the Civil War and World War I, this effort to reconcile geography and demography moderately weakened county preservation in congressional districting.[105] In 1902, over three quarters of congressional districts reflected county and municipal boundaries.[106] In the first half of the twentieth century, industrialization, urbanization, and population growth increased service demand for both cities and counties.[107] This massive demographic change also produced extreme disparities in county populations and thus extreme malapportionment in congressional and state legislative maps based on county lines. For example, the congressional map challenged in *Wesberry v. Sanders*, which featured one district with more than double the population of another, was produced by grouping counties into congressional districts.[108]

Ultimately the United States Supreme Court intervened, confronted the tension between demographic and geographic theories of representation, and chose the former over the latter. Through a series of cases in the 1960s, the Court established a constitutional requirement of substantial population equality, launching the so-called "reapportionment revolution," and remaking democratic institutions across the nation. In so doing, the Court rejected the "federal analogy," and the primacy of geographic representation, insisting that the "Great Compromise" was *sui generis*, that counties were subordinate political subdivisions not analogous to sovereign states, and that geographic considerations could not justify substantial departures from population equality. This equal population mandate necessarily limited the role that

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[105] Altman, *supra* note 102, at 180("Between the 40th Congress and the 62d there were some splits even of these subunits, but only in a handful of major cities (New York, Boston, Philadelphia, St. Louis, Baltimore, New Orleans, Chicago)."); Altman, *supra* note 98, at 162-63 ("Districts split larger boundaries with increasing frequency after the 43rd congress. . ."); Stephanopoulos, *supra* note 101, at 1407-08 ("Most congressional districts also continued to respect the boundaries of political subdivisions (though the number of infractions inched higher).").

[106] Bowen, *supra* note 101, at 55 ("In fact, 303 of the 386 House districts in 58th Congress (1903-1905) were determined entirely by county boundaries or were exactly coterminous with entire cities.")

[107] In the antebellum period, industrial growth and urbanization increased service demand for counties and cities alike. Salant, *supra* note 89.

[108] Wesberry v. Vandiver, 206 F. Supp. 276, 279 (N.D. Ga. 1962), rev'd sub nom. Wesberry v. Sanders, 376 U.S. 1 (1964) ("[I]n 1931. . .the General Assembly divided the state into ten congressional districts on the basis of allocating the several counties to the respective districts, and there have been no changes in the allocations to date."); *see id.* at 228 (citing the population disparities produced by Florida's contemporaneous congressional map as a sharp example of the variance in population per district if counties are to continue as a basis for districts).

counties could play in congressional and state legislative districting.[109] In the wake of the reapportionment revolution, county splits in congressional districts "skyrocket[ed]."[110] After the reapportionment revolution, county preservation cannot be the lodestar of congressional districting.

The one-person-one-vote cases were controversial and nonunanimous in part because of the predictable adverse impact an equal population mandate would have on county preservation in electoral districting. One lower court feared that strict population equality might cause "an increase in the size of districts to such an extent that contacts between the individual legislator and his constituents may become impracticable."[111] Another concluded that Colorado's plan reflected a reasonable compromise between demographic and geographic factors, including county lines, and "a proper diffusion of political initiative as between a state's thinly populated counties and those having concentrated masses."[112] Justice Stewart endorsed these views in a strident dissent.[113]

The majority rejected the primacy, but not the normative and legal significance, of county lines in electoral districting. It recognized the relevance and legitimacy of geographic considerations like contiguity, compactness, and county preservation.[114] The Court further recognized that "[i]ndiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering."[115] States could not continue systems of

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[109] Altman, *supra* note 98, at 24 ("By demanding that apportionment of population be unhistorically equal, the Court weakened the principles of county integrity, compactness, and contiguity.").

[110] Altman, *supra* note 98, at 22 ("Following *Wesberry* and *Reynolds*, the number of districts splitting county lines skyrocketed."); *Id.* at 107 ("After *Reynolds* and *Wesberry* the number of districts that split even political subunits of counties and cities triples, and such splitting becomes widespread outside major urban areas."); Bowen, *supra* note 101, at 59 ("By 1973, the number of congressional districts splitting counties or cities without following other boundaries such as state legislative districts more than doubled the 1963 amount; over 40% of all congressional districts failed to be coterminous with county or place boundaries.").

[111] WMCA, Inc. v. Simon, 208 F. Supp. 368, 379 (S.D.N.Y. 1962), *rev'd sub nom.* WMCA, Inc v. Lomenzo, 377 U.S. 633, 640 (1964).

[112] Lisco v. Love, 219 F. Supp. 922, 932 & n.34 (D. Colo. 1963) (quoting W.M.C.A., Inc. v. Simon, 208 F. Supp. 368, 379 (S.D.N.Y. 1962)).

[113] Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 757 (1964) (Stewart, J., dissenting) ("[C]ounties having small populations would have to be merged with larger counties having totally dissimilar interests. Their representatives would not only be unfamiliar with the problems of the smaller county, but the interests of the smaller counties might well be totally submerged by the interests of the larger counties with which they are joined."); *id.* at 762–63 ("A policy guaranteeing minimum representation to each county is certainly rational, particularly in a State like New York. It prevents less densely populated counties from being merged into multi-county districts where they would receive no effective representation at all. . ..it may be only by individual county representation that the needs and interests of all the areas of the State can be brought to the attention of the legislative body. The rationality of individual county representation becomes particularly apparent in States where legislative action applicable only to one or more particular counties is the permissible tradition.").

[114] *Id.* at 578 ("A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims.").

[115] *Id.* at 578–79.

county-based representation when that would entail "a total subversion of the equal-population principle," which was particularly likely when a state had a large number of sparsely populated counties and the number of counties was not much less than the number of seats in the legislative chamber.[116] But geographic factors like county boundaries could justify "some deviations from the equal-population principle" in state legislative apportionment.[117] And the Court noted that "it may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting" because there are almost always more members in a state's legislative chamber than in its congressional delegation.[118] The Court also recognized that county preservation may confer distinct representational benefits in state legislative districting.[119]

After the Court established the equal population mandate, states did not abandon their historical commitment to county preservation in state and congressional districting. Instead, states tried to preserve the role of counties to the extent possible while achieving substantially equal population. One of the key techniques to thread the needle and make the numbers work was multi-member districting, where multiple representatives were assigned to a single electoral district, which was often a single county or a grouping of contiguous counties.[120] The Court recognized that multi-member districting with district-wide winner-takes-all elections could "operate to minimize or cancel out the voting strength of racial or political elements of the voting population."[121] But it refused to hold multi-member districts *per se* invalid on that basis, noting that *Reynolds* itself called for flexibility so states could try

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[116] *Id.* at 581.

[117] *Id.* at 579.

[118] *Id.* at 578.

[119] *Id.* at 580-81. ("A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions, as political subdivisions. Several factors make more than insubstantial claims that a State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained. Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions.").

[120] Whitcomb v. Chavis, 403 U.S. 124, 156–57 & n.37 (1971) ("[T]here is no doubt that some States switched to multi-member districts as a result of [the reapportionment] decisions. Prior to the decisions, for example, Vermont's lower house was composed entirely of single-member districts. . . . Reapportioned and redistricted in light of Reynolds, Vermont's lower house now has 36 multi-member and 36 single-member districts . . . Reapportionment has also been credited with abolishing Maryland's tradition of single-member districts in its senate."); *see also* Kilgarlin v. Hill, 386 U.S. 120, 124 n.2 (1967) (quoting Kilgarlin v. Martin, 252 F. Supp. 404, 455–56 (S.D. Tex. 1966)) (guidance from state attorney general on how legislature could reconcile the federal mandate of population equality with the state constitutional prohibition on splitting counties: "Should the keeping of counties intact result in a violation of the Supreme Court 'one man, one vote' rule, then the county lines must be violated but only to the extent necessary to carry out the mandate of the Supreme Court. In all other instances, county lines must remain intact and multi-county districts or floterial districts be formed by the joining of complete and contiguous counties.").

[121] Fortson v. Dorsey, 379 U.S. 433, 439 (1965). .

to preserve the role of counties in an equipopulous way.[122] And it repeatedly rejected as-applied challenges to multi-member districts.[123]

In states' efforts to preserve counties, they departed from perfect population equality, sometimes a little, sometimes a lot. The Court struggled to determine whether to accommodate or circumscribe these efforts. The Court maintained that "variations from a pure population standard might be justified by such state policy considerations as the integrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts or the recognition of natural or historical boundary lines."[124] The Court insisted that states bear the burden of justifying population deviations.[125] And conclusory declarations would not suffice: the state had to demonstrate that legitimate criteria, consistently applied, necessitated particular deviations.[126] But the Court consistently recognized the preservation of local units as one

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[122] *Id.* at 436 (quoting *Reynolds*, 377 U.S. at 579) ("[I]n holding that a State might legitimately desire to maintain the integrity of various political subdivisions, such as counties, we said: 'Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multimember or floterial districts.'"); Burns v. Richardson, 384 U.S. 73, 88 (1966) (citations to *Forston* omitted) ("[T]he Equal Protection Clause does not require that at least one house of a bicameral state legislature consist of single-member legislative districts. Where the requirements of [equal population] are met, apportionment schemes including multi-member districts will constitute an invidious discrimination only if it can be shown that 'designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.'").

[123] *Fortson*, 379 U.S. at 439; *Burns*, 384 U.S. at 88; Mann v. Davis, 245 F. Supp. 241, 245 (E.D. Va. 1965), *aff'd sub nom;* Burnette v. Davis, 382 U.S. 42 (1965) (affirming the validity of multi-county multi-member districts, county-city multi-member districts, and "adherence to municipal boundaries in establishing legislative districts"); Schaefer v. Thomson, 251 F. Supp. 450, 452 (D. Wyo. 1965), *aff'd sub nom*. Harrison v. Schaefer, 383 U.S. 269 (1966) (reapportioning Wyoming Senate into a combination of single and multi-member districts that "[w]henever possible . . . preserves the established county boundaries . . . [and] combined only contiguous counties"); *Kilgarlin*, 386 U.S. at 121 (rejecting claim that combination of "single-member, multi-member and floterial districts [produced] an unconstitutional 'crazy quilt'"); *Whitcomb*, 403 U.S. at 142 n.22; Abate v. Mundt, 403 U.S. 182, 184 n.2 (1971).

[124] Swann v. Adams, 385 U.S. 440, 444 (1967).

[125] *Id.* ("[N]one of our cases suggests that differences of this magnitude will be approved without a satisfactory explanation grounded on acceptable state policy."); *Kilgarlin*, 386 U.S. at 122 ("[U]nless satisfactorily justified . . . [significant] population variances . . . are sufficient to invalidate an apportionment plan."); *cf. Swann*, 385 U.S. at 447 (Harlan, J., dissenting) ("This holding seems to me to stand on its head the usual rule governing this Court's approach to the validity of legislative enactments. . . .").

[126] *Swann*, 385 U.S. at 445 ("[Florida] suggested . . .that its plan comes as close as 'practical' to complete population equality and [it] was attempting to follow congressional district lines . . . [but made] no attempt to justify any particular deviations, even the larger ones, with respect to either of these considerations . . . only . . . followed 'in most instances' the congressional boundaries, and [Florida] could have come much closer to providing districts of equal population than it did."); *Kilgarlin*, 386 U.S. at 124 ("[T]he [lower court] did not relate its declared justification to any specific inequalities among the districts, nor demonstrate why or how respect for the integrity of county lines required the particular deviations . . . . Nor did the [lower court] articulate any satisfactory grounds for rejecting at least two other plans presented to the court, which respected county lines but which produced substantially smaller deviations . . . .").

of the few state interests justifying some departure from population equality for state and local districts.[127]

2. The Representational Burden of County Splits

This Subsection surveys the political science literature demonstrating the representational significance of county preservation in electoral districting.

The election process begins and ends at the county level.[128] That is, counties are responsible for the administration and implementation of elections for local, state, and national races. Beyond that pertinent administrative reality, though, an array of political science scholars have long championed the value of respecting county and other natural political boundaries during the redistricting process.[129] Geographic units like counties are "natural communities of interest,"[130] comprised of people with an array of geographic and economic commonalities.[131] As such, districts can be "meaningful entities which have legitimate collective interests" if they are built from the existing boundaries of cities and counties.[132]

Making congressional district lines congruent with county and other existing political boundaries benefits both members of Congress and voters. Stokes notes that his "interview studies. . .show how much more salient to his voters is the congressman whose district comprises a 'natural' community. . .than the congressman whose district is a fraction of a great metropolitan complex."[133] Meanwhile, voter confusion is the natural byproduct when "congressional boundaries cut across geographical and political subdivisions in crazy-quilt fashion."[134] While the rhetoric in favor of respecting county boundaries is strong, these assertions are also backed by mounting statistical evidence. Several studies offer compelling data linking boundary incongruency with infirmities in the very building blocks of representation, like

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[127] *Abate*, 403 U.S. at 183 (permitting a 12% deviation based on long-standing tradition of respecting sub-county political boundaries); Mahan v. Howell, 410 U.S. 315, 333 (1973) (permitting a 16% deviation in state legislative apportionment based on state interest in preserving cities and counties).

[128] As described by the National Association of Counties: "In the United States, the nation's 3,069 counties traditionally administer and fund elections at the local level, including overseeing polling places and coordinating poll workers for federal, state and local elections." Eryn Hurley, *All Elections Are Local: The County Role in the Elections Process*, NAT'L ASS'N OF CTYS. (Nov. 6, 2018), https://www.naco.org/resources/featured/all-elections-are-local-county-role-elections-process [https://perma.cc/PPB8-WTTQ].

[129] DAVID BUTLER & BRUCE E. CAIN, CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES (1992).

[130] Daniel C. Bowen, *Boundaries, Redistricting Criteria, and Representation in the U.S. House of Representatives*, 42 AM. POL. RSCH. 856, 864 (2014).

[131] BUTLER & CAIN, *supra* note 129.

[132] Richard L. Morrill, *Redistricting, Region and Representation*, 6 POL. GEOGRAPHY Q. 241, 253 (1987).

[133] Donald E. Stokes, *Parties and the Nationalization of Electoral Forces in the American Party Systems*, *in* THE AMERICAN PARTY SYSTEMS: STAGES OF POLITICAL DEVELOPMENT 197 (William Nisbet Chambers & Walter Dean Burnham eds., 1967).

[134] Richard G. Niemi et al., *The Effects of Congruity Between Community and District on Salience of U.S. House Candidates*, 11 LEGIS. STUD. Q. 187, 189 (1986).

electoral accountability and the relationship between members and constituents.[135]

3. Recall and Accountability

Researchers have posited that when district lines diverge from county and city lines, the task of the voter becomes harder.[136] It is harder to know what district one resides in when a community is split into pieces and divided into multiple districts. It is harder for political and community groups to engage in congressional politics and spread information in an incongruent district since groups are typically formed around cities, counties, or larger regions rather than adhering to the often-jagged contours of a congressional district. In short, districts that respect political boundaries facilitate using the "community's potential as an information pathway."[137]

Consistent with this view, studies have found that voters in incongruent districts have a harder time identifying their member of Congress.[138] Even while accounting for the influence of various measures of member prominence and voter interest, Niemi, Powell, and Bicknell find that respondents in congruent districts were 8% more likely to recall the name of their incumbent member of Congress, and 13% more likely to recall the name of the challenger candidate.[139] Winburn and Wagner focus on voters placed in what they call the "short end of the split," that is, voters in divided counties where the majority of the county has been placed in another district.[140] They find such voters are about 12% less likely to correctly name their House candidates.[141] This effect persists even as the researchers account for the influence of personal factors (knowledge, political activism, demographics) and district/media conditions (like media market congruency).

Impaired recall of candidates has enormous consequences for voting. In their study on redistricting's effect on election outcomes, Hood and McKee found that candidate awareness was a primary driver of voter decisions such that respondents who could not recall a candidate were quite unlikely to vote for that candidate.[142] Meanwhile, as Winburn and Wagner warn, incongruency is associated with lower awareness of House candidates but not lower voter participation.[143] Which is to say, residents of incongruent dis-

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[135] Bowen, *supra* note 130, at 867.

[136] BUTLER & CAIN, *supra* note 129.

[137] Richard Neal Engstrom, Electoral District Structure and Political Behavior 18 (May 2001) (Ph.D. dissertation, Rice University) (ProQuest).

[138] Niemi et al., *supra* note 134, at 193; Jonathan Winburn & Michael W. Wagner, *Carving Voters Out: Redistricting's Influence on Political Information, Turnout, and Voting Behavior*, 63 POL. RSCH. Q. 373, 376 (2010); John A. Curiel & Tyler Steelman, *Redistricting Out Representation: Democratic Harms in Splitting Zip Codes*, 17 ELECTION L.J. 328, 340–41 (2018).

[139] Niemi et al., *supra* note 134, at 193.

[140] Winburn & Wagner, *supra* note 138, at 373.

[141] *Id.* at 379.

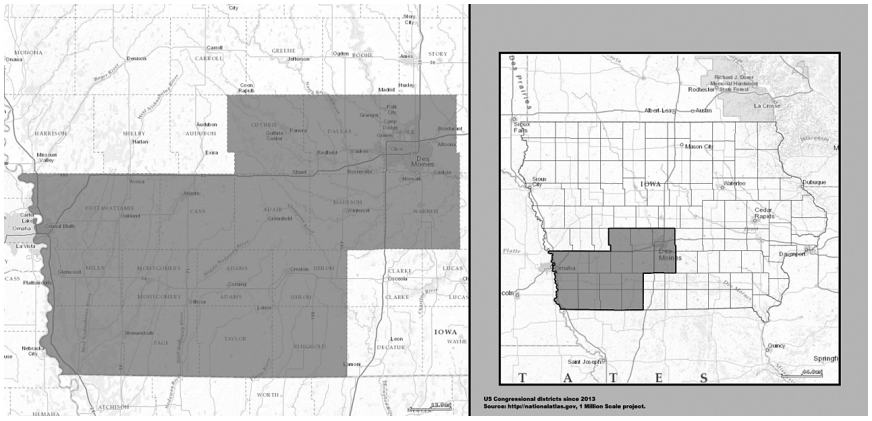
[142] M. V. Hood III & Seth C. McKee, *Stranger Danger: Redistricting, Incumbent Recognition, and Vote Choice*, 91 SOC. SCI. Q. 344, 347 (2010).

[143] Winburn & Wagner, *supra* note 138, at 380.

tricts are left to cast their ballots with less access to information about whom they are voting for or against.

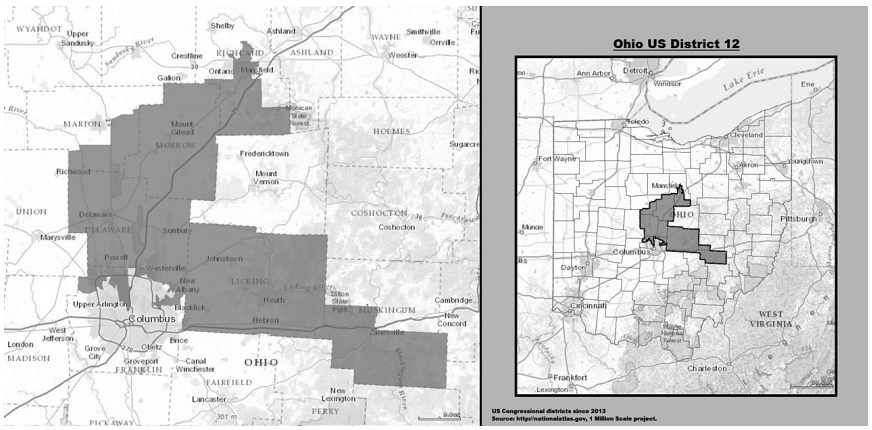
The recall evidence affirms a view advanced by many scholars that congressional districts with lines bearing little or no resemblance to natural and existing boundaries are inherently confusing to voters. Grofman discusses the notion of whether a district is *cognizable*, that is, affording "the ability to characterize the district boundaries in a manner that can be readily communicated to ordinary citizens of the district in commonsense terms based on geographic referents."[144] If a district looks like an existing place, made up of towns or counties, then that district can likely be conjured in the minds of voters. If it is composed of a series of zig-zagging lines and a collection of distant outposts, however, it cannot be as readily understood, expressed, or even recognized.[145]

FIGURE 1. 3RD DISTRICT OF IOWA.



[144] Grofman, *supra* note 67, at 1262.
[145] *Id.* at 1262–63.

FIGURE 2. 12TH DISTRICT OF OHIO



Consider the contrast between Iowa's 3rd district (Figure 1) and Ohio's 12th district (Figure 2). Iowa's 3rd district could reasonably be described as southwest Iowa. The district's borders correspond to the boundaries of Iowa counties and the towns within them. Ohio's 12th district, by contrast, is more difficult to plainly characterize. It includes the entirety of three counties, and bits of four others, including what appears to be pincer claws that reach down to claim parts of Franklin County. Grofman questions whether districts so difficult to meaningfully characterize, built with disregard for political boundaries, ultimately undermine the very purpose of having districts (rather than simply holding at-large elections) because they so readily thwart the relationships that districts are meant to foster.[146]

Winburn and Wagner assert that voters like those Franklin County residents placed in the 12th district endure an "informational asymmetry"[147] that makes it more difficult to follow news of the district and its representative. Indeed, this dynamic was in stark display in the 2018 election. On August 7, 2018, a special election was held in Ohio's 12th district to fill the seat left open when the incumbent resigned earlier in the year. The Franklin County Board of Elections later revealed that more than 4,000 people called the board in various states of alarm and confusion to ask why their local polling place had failed to open on the date of the special election.[148] There was a simple explanation—the callers did not live in the 12th district.

The confusion on the part of those voters was understandable given the odd shapes of the county's districts. Indeed, not only is the county split into pieces, but within the county municipal boundaries are such an afterthought

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[146] *Id.* at 1262.

[147] Winburn & Wagner, *supra* note 138, at 374.

[148] Jack Torry & Jessica Wehrman, *Eager Voters Turned Away—Because They Don't Live in the 12th Congressional District*, COLUMBUS DISPATCH (Aug. 11, 2018, 5:01 PM), https://www.dispatch.com/news/20180811/eager-voters-turned-away—-because-they-dont-live-in-12th-congressional-district [https://perma.cc/ME3V-8H7S].

that fourteen out of sixteen cities in Franklin County are split between multiple districts.[149] The difficulty in understanding the precise boundaries of the district was such that even election officials were not equal to the task. The Franklin County Board of Elections revealed that from 2012 through the 2018 primary election, 2,000 county voters had been assigned to the wrong congressional districts in county election files.[150] For six years, the county gave those voters the wrong ballot and counted those votes for the wrong candidates. When the mistake was finally recognized, the board was forced to tell hundreds of voters that they were no longer in the 12th district, or more precisely, they had never been in the 12th district and would now be reassigned to the correct congressional district. Meanwhile, hundreds of other voters had to be reassigned into the 12th district.[151]

Residents of Iowa's 3rd district, by contrast, could depend on having the same congressional district as every neighbor in their town—the same district as every neighbor in their county. And in some places like Montgomery and Adams Counties, every resident of those counties and every resident of any contiguous county shared the same congressional district. Knowing your district, who serves it, and who seeks office there is a more straightforward proposition in such circumstances.

For the purposes of electoral accountability, then, districts crossing community lines are "generally an undesirable feature . . . for citizen understanding of their contacts with government."[152] Given voters' familiarity with the cities and counties in which they live, "it is less disruptive or confusing to respect those boundaries" when constructing congressional districts.[153] Districts based on real boundaries have "real meaning in everyday life for voters," and thus "the district becomes grounded in pre-existing understandings of politics and community structure."[154] Ultimately, districts that imperil voters' ability to recall who serves them in Congress and hamper their ability to identify challenger candidates dampen the mechanisms of accountability.

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[149] Local government alignment with Congressional districts based on U.S. Census data. STAT. ATLAS, *Overview of Ohio*, https://statisticalatlas.com/state/Ohio/Overview [https://perma.cc/5HE3-WDC9].

[150] Jeremy Pelzer, *More Than 2,000 Franklin County Voters Were Assigned to Wrong Congressional District, Election Officials Say*, CLEVELAND.COM (June 29, 2018), https://www.cleveland.com/open/index.ssf/2018/06/2000_franklin_county_voters_we.html [https://perma.cc/QTS9-QK3B].

[151] *Id.* None of the impacted races had close victory margins. Had there been a close election, it might have been contested, and the relevant ballots might have been declared invalid and excluded from the official tally. OHIO REV. CODE ANN. §§ 3515.08, 3515.13. To the extent county splits exacerbate the risk of such electoral maladministration, it undermines an eligible voter's legally cognizable interest in casting her ballot and having it count. United States v. Saylor, 322 U.S. 385, 388 (1944) (quoting United States v. Mosley, 238 U.S. 383, 386 (1915) ("[T]he right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box.")).

[152] Charles H. Backstrom, *Problems of Implementing Redistricting*, *in* REPRESENTATION AND REDISTRICTING ISSUES 43, 50 (Bernard Grofman et al. ed., 1982).

[153] RICHARD L. MORRILL, POLITICAL REDISTRICTING AND GEOGRAPHIC THEORY 25 (1981).

[154] Bowen, *supra* note 130, at 867.

That is, it is hard to reward and punish candidates without knowing who they are, what they have done, or that they represent you.

4. Responsiveness and Relationships

In an effort to understand how members of Congress function in their home districts, political scientist Richard Fenno spent years observing members in what he called "their natural habitats."[155] What he saw, with remarkable consistency, was the degree to which members were affected by the nature and structure of their districts. "Members thrive where some sense of community already exists," Fenno wrote. "They are products of it, they identify with it, they celebrate it, they even legitimate it; but they do not create it."[156] Fenno's point is essential to understanding a member's relationships to their district. Where there are communities of interest, members seek them out. Where there are widespread economic or cultural touchstones, members situate themselves within them. But—importantly—where districts lack coherence, members are hard-pressed to cobble together commonalities and connections that are not already there.

While a House district might have 700,000 or so residents, those individuals are not equally central to a member's thinking.[157] The district a member sees—in a practical sense—does not encompass every town or every person. Nor is it a representative sample of the whole. Fenno finds that, in a practical sense, the district that a representative experiences is something closer to what we might call "the base" vote.[158] The supporters essential to staying in office are top of mind and literally seen, as the representative seeks out speaking opportunities before such friendly audiences. As Fenno describes the dynamic, the farther one is from the center of a representative's radar, the less a representative sees or hears such people's views, and the less influence one likely enjoys over the representative's thinking.

Systematic studies support Fenno's depiction of representation. For example, a study comparing the constituent comments a representative directly encounters with the views of a full sample of the district found huge inconsistencies between the two.[159] In other words, the district's thinking as the representative encounters it can bear little resemblance to the district's thinking as it actually exists.

The deleterious effect of incongruent districts on this very relationship has been documented in multiple studies. Bowen found that residents in congruent districts are more likely to have positive evaluations of their member of Congress's constituent service.[160] Curiel and Steelman found that re-

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[155] RICHARD F. FENNO, JR., HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS 250 (1978).

[156] *Id.* at 236.

[157] *Id.*

[158] *Id.* at 236–37.

[159] John S. Stolarek et al., *Measuring Constituency Opinion in the U.S. House: Mail Versus Random Surveys*, 6 LEGIS. STUD. Q. 589, 591 (1981).

[160] Bowen, *supra* note 130, at 858.

sidents in divided districts were less likely to contact their member of Congress to seek assistance or to share their views.[161] Members of Congress have acknowledged this dynamic at work. Ralph Regula, who served 18 years in the House, warned that the district map put in place in Ohio in 2011 would deter people from contacting their member because of the confusion it would produce. "One of the key elements of a congressional district is that people have to know where to go when they need help," Regula said.[162]

Like the evidence showing incongruity dampens voter recall of the candidates, the effect on constituent contact again suggests incongruency comes at a "clear representational cost."[163] In fact, analyzing the responses of tens of thousands of survey respondents, Curiel and Steelman also find incongruent districts are likely to foster more ideological distance between constituents and their members of Congress.[164] Much as Fenno warned that members can represent a community but cannot create one, Curiel and Steelman find it is simply harder to represent a district that scrambles boundaries because one is left to make sense of disparate interests. "Districts that unify proximate voters into the same district" make it easier for members of Congress to be responsive to district interests because it is easier to identify those interests in the first place.[165]

Members of Congress quite often build their careers on delivering projects for their districts.[166] Members boast of the resources they bring home from Washington and the transformative effects of investments in infrastructure and other projects. And yet, as widespread as this transactional form of representation is, here again the effect of district congruency is considerable. Bowen finds that residents in incongruent districts are less likely to recall their member of Congress advancing a local project than are residents of congruent districts.[167] Whether this dynamic exists because members legitimately deliver less to incongruent districts, or because residents are less aware of the local projects the member delivered, this discrepancy represents yet another burden on the residents of incongruent districts because, given the confusing nature of their district's boundaries, they must work harder to find out if their member is actually delivering for the district.

In sum, political science research suggests that incongruent districts produce "informational and representational disadvantages."[168] The confusion engendered by incongruent districts inhibits recall, relationships, and

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[161] Curiel & Steelman, *supra* note 138, at 13–14.

[162] Jim Siegel, *His Car Can Handle Miles of Redrawn District, Says Stivers*, COLUMBUS DISPATCH (Sept. 21, 2011, 12:01 AM), http://www.dispatch.com/article/20110921/NEWS/309219702 [https://perma.cc/NUD4-9VYG].

[163] Bowen, *supra* note 130, at 856.

[164] Curiel & Steelman, *supra* note 138, at 28.

[165] Bowen, *supra* note 130, at 859.

[166] DIANA EVANS, GREASING THE WHEELS: USING PORK BARREL PROJECTS TO BUILD MAJORITY COALITIONS IN CONGRESS 5 (2004).

[167] Bowen, *supra* note 130, at 880.

[168] Winburn & Wagner, *supra* note 138, at 383.

representation.[169] Political scientists are left to call for a renewed commitment to creating districts which preserve counties and other governing units: "Too often ignored, in our view, is how the cartographers of redistricting draw some voters out of their natural community of interest, the county in which they live, and into a district of strangers."[170]

B. Data Analysis

In this Section, we use demographic data drawn from the 2010 U.S. Census and political data drawn from the U.S. Election Atlas.[171] We focus on congressional maps rather than state legislative maps. As discussed supra, county splits matter for both congressional maps and state legislative maps. County splits implicate a series of normative and practical considerations, some of which apply similarly in both contexts, some of which apply differently in one context or the other. For example, congressional maps generally require fewer county splits because congressional districts are much larger than state legislative districts. Moreover, the size of congressional districts varies less across states than the size of state legislative districts. Our focus on congressional districts similarly avoids complexity related to other characteristics of legislative bodies that vary across states. On the other hand, county preservation may confer distinct representational benefits, and county splits may impose distinct burdens, in the context of state legislative maps.[172] For this reason, while we focus on congressional maps in this Article, we encourage others and hope ourselves to examine differential county splits in state legislative maps in future work.

We focus on the thirty-five states with four or more congressional representatives in the 2010 reapportionment.[173] These thirty-five states have 2,598 counties. Most states have used one congressional map throughout the 2010 cycle. In those states with mid-cycle map changes, we analyze the first congressional map of the cycle. Our analysis considers only the original legislature-drawn map that was struck down, not the subsequent court-drawn map that replaced it.

Our analysis focuses on unnecessary or extra county splits, recognizing that the equal population mandate requires some splits. For each state, we use 2010 census data for its total population and the number of districts in

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[169] Pildes and Niemi expand on the point to consider the effect on voters' outlook, positing that when they see the bizarre shapes of their districts, they are likely to realize they have been the subject of a manipulation that devalues their input. Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 525–26 (1993).

[170] Winburn & Wagner, *supra* note 138, at 381.

[171] *2016 Presidential General Election Results*, DAVE LEIP'S ATLAS OF U.S. ELECTIONS, https://uselectionatlas.org/RESULTS/ [https://perma.cc/BX9K-KAD7]

[172] *See supra* note 119.

[173] To maximize mathematical variation necessary for analysis, numerous researchers exclude from analysis states with seven or fewer districts. Veomett, for example, includes only states with eight or more districts. Veomett, *supra* note 16, at 253–54. By including states with four to seven districts, we create a more difficult test to demonstrate disparities.

its congressional map.[174] A state's ideal district population is the state's total population divided by the number of districts in the state's congressional map.[175] We then define a county's population ratio as the county's 2010 population divided by the state's ideal district population.[176] A county's population ratio tells us how many county splits a mapmaker must impose to satisfy the equal population mandate. If a county's ratio is less than one, no split is required; if the ratio is between one and two; one split is required. More generally, the number of splits a county requires is the county's population ratio rounded down to the nearest integer, *i.e.* the largest integer equal to or less than the county's population ratio. The number of extra splits imposed on a county is the difference between the number of splits actually imposed and the number of required splits.

To see this approach in action, consider Los Angeles County, California. In 2010, California had 53 representatives for a total state population of 37,341,989.[177] Thus, California's ideal district size was 704,566 (37,341,989/53). Los Angeles County had a 2010 population of 9,818,605,[178] and thus a population ratio of approximately 13.9 (9,818,605/704,566). Thus, to satisfy the equal population mandate, Los Angeles County had to be split across 14 districts. But it was actually split across 18 districts.[179] This means that Los Angeles County was subject to 4 unnecessary or extra splits.

1. County Splits Overall

To simplify our discussion, we use the following notation:

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[174] Congress has required since 1969 that each state elect Representatives from single-member districts, PL 90-196, 81 Stat. 581., so for each state, the number of districts in its congressional map equals the number of Representatives it is apportioned.

[175] The ideal district population is the number of people that would reside in each district if each district contained an identical number of people. All population figures come from census data for 2010. We assume that the relevant denominator for purpose of the equal population mandate is total population, rather than citizen voting age population (CVAP). While some have suggested that a state should and may use CVAP as the relevant dominator, states have consistently used total population and the Court has expressly approved this practice. Evenwel v. Abbott, 577 U.S. 937, 1122 (2016); Nicholas Stephanopoulos & Jowei Chen, *Democracy's Denominator*, 109 CAL. L. REV. 1011 (2021); Crum, *infra* note 188.

[176] Again, we use census data. *See* County Population Totals, *supra* note 29.

[177] *2010 Census Apportionment Results*, United States Census Bureau, Table 1, https://www.census.gov/data/tables/2010/dec/2010-apportionment-data.html [https://perma.cc/UHK8-37LR].

[178] County Population Totals, *supra* note 29.

[179] *Maps: Final Certified Congressional Districts*, CA.GOV, https://wedrawthelines.ca.gov/maps-final-draft-congressional-districts/ [https://perma.cc/VH3J-YH8W].

Term	Definition
A *preserved* county	A county subject to no splits
A *split* county	A county subject to at least one split
A *respected* county	A county subject to no extra splits
A *fractured* county	A county subject to at least one extra split
A *splintered* county	A county subject to at least two extra splits

The range of fractured counties is quite vast. Van Buren County, Tennessee, for example, with a 2010 population of 5,548 residents, could have fit inside one Tennessee congressional district 127 times.[180] Instead, it was split into two districts.[181] Will County, Illinois, with a 2010 population of 677,560, could have been preserved intact within a single Illinois district.[182] Instead, Will County was split into six congressional districts.[183] As discussed above, Los Angeles County, California, with almost 10 million residents, required fourteen districts, but was split into eighteen districts. Using the definition described above, congressional mapmakers imposed one extra split on Van Buren County, four extra splits on Los Angeles County, and five extra splits on Will County.

Respected counties are diverse, too. Loving County, Texas (population 82) was accommodated within one district.[184] San Diego County, California, with a population of 3,095,313, required five districts by population, and was in fact split into five districts.[185]

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[180] County Population Totals, *supra* note 29. In 2010, Tennessee was apportioned nine representatives for a total state population of 6,375,431. *2010 Census Apportionment Results*, *supra* note 177, at Table 1. Thus, Tennessee's ideal congressional district population was 708,381 (*i.e.*, 6,375,431/9), and Van Buren's county population ratio is approximately 127.7 (*i.e.*, 708,381/5,548).

[181] Van Buren County was split between Tennessee's Fourth and Sixth congressional districts. TENN. CODE ANN. § 2-16-103(a)(2) ("each district is described county by county in alphabetical order and, if a county is split, by the portion of such split county. Split counties are described by VTDs and, if further divided, by census blocks."); TENN. CODE ANN. § 2-16-103(b) (The state of Tennessee is divided into the following nine (9) congressional districts composed as follows: . . . (4) District 4: . . . Van Buren County [enumeration of VTDs and census blocks]. . .(6) District 6:. . . Van Buren County [enumeration of VTDs and census blocks]"). This county split is also reflected in the district maps available at https://www.capitol.tn.gov/districtmaps/Congress12.html.

[182] County Population Totals, *supra* note 29. In 2010, Illinois was apportioned 18 representatives for a total state population of 12,864,380. *2010 Census Apportionment Results*, *supra* note 177, at Table 1. Thus, Illinois's ideal congressional district population was 714,688 (*i.e.*, 12,864,380/18), which exceeds the population of Will County.

[183] *See* Illinois Congressional Redistricting Act, Public Act 097-0014, available at https://www.ilga.gov/legislation/billstatus.asp?DocNum=1178&GAID=11&GA=97&DocTypeID=SB&LegID=56011&SessionID=84.

[184] County Population Totals, *supra* note 29. Loving County was contained entirely in Texas's 25th District. See SB4, available at https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=821&Bill=SB4.

[185] County Population Totals, *supra* note 29; *Maps: Final Certified Congressional Districts*; *supra* note 180.

The full scope of county splitting is perhaps most easily illustrated with a simple count. Across the thirty-five states under study, 137.3 million Americans live in respected counties. The majority of residents in the states under study, however, totaling some 154.8 million people, live in fractured counties that were unnecessarily split.

That 53% of the residents of these states are subject to extra splitting of their counties speaks to the ubiquity of gerrymandering and the compromised nature of the districting process. In total, more than 150 million Americans must deal with the confusion and representational burdens associated with living in a fractured county.[186] Perhaps more to the point, though, Americans do not equally bear the burden of extra county splits.

2. County Splits and Race Overall

We consider the relationship between county splits and racial demographics, relying on aggregate census data (based on which racial descriptors survey respondents self-select).[187] Throughout, we use the capitalized racial descriptors "Black" and "White."[188]

Table 1 shows the overall percentage of the population by race living in fractured counties. Among Whites, just over half are living in fractured counties. Among Black residents, however, this proportion is almost 61 percent. For ease of comparison, a ratio is calculated showing the likelihood of Black residents living in a fractured county relative to Whites. The ratio here is 1.2, meaning that Black residents are 1.2 times as likely to be living in a fractured split county. Statistical significance, akin to a measure of how likely this relationship is to have occurred by chance alone, is represented by the p value 0.0000000000227. In layperson's terms, the likelihood of this disparity happening by chance alone is less than one in a trillion.

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[186] *See* Winburn & Wagner, *supra* note 138, at 373–74.

[187] Charles Hirschman, Richard Alba, and Reynolds Farley, *The Meaning And Measurement Of Race In The US Census: Glimpses Into The Future*, 37 DEMOGRAPHY 381 (2000).

[188] *See* Travis Crum, *Deregulated Redistricting*, 107 CORNELL L. REV. __, 10 n.40 (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3847829 [https://perma.cc/GR2M-YKE3] (quoting Kwame Anthony Appiah, *The Case for Capitalizing the B in Black*, ATLANTIC, https://www.theatlantic.com/ideas/archive/2020/06/time-to-capitalize-blackandwhite/613159/ [https://perma.cc/T3YT-AY4D]; *see also* I.M. Nick, *Black Rising: An Editorial Note on the Increasing Popularity of a US American Racial Ethnonym*, 68 NAMES 131 (2020).

TABLE 1. LIKELIHOOD OF RESIDING IN A FRACTURED COUNTY BY RACE[189]

Proportion of Whites residing in fractured counties	50.7%
Proportion of Black residents residing in fractured counties	60.9%
Proportion of Non-Whites residing in fractured counties	61.1%
Ratio, White to Black	1.20
Ratio, White to Non-White	1.21

p value = 0.0000000000227

Another way to consider the question is to look at the racial makeup of counties based on the number of extra splits (shown in Table 2). That is, we calculate the racial makeup for counties subject to no extra splits, *i.e.*, what percentage is White and what percentage is Black. We then calculate those same percentages for counties subject to one extra split, and for counties subject to two or more extra splits.

Again, the data offer a simple illustration of the racial imbalance in county splits. Whites comprise more than 86% of the population of respected counties (no extra splits), dropping to just under 82% of counties split one extra time, and 77% of counties split two or more extra times. Conversely, Black residents comprise less than 10% of the population of respected counties (no extra splits), rising to 13% of counties split one extra time and 15% of counties split two or more extra times. Again, the p value suggests the odds of this pattern occurring by chance alone are quite remote.

As previous research finds, splitting counties imposes representational burdens on residents, and this is particularly the case in counties split multiple times. In such cases, residents are more likely to, as Winburn and Wagner put it, be placed among "strangers" in their own districts.[190] As both Table 1 and Table 2 show, this is a treatment disproportionately imposed on Black residents.

[189] Considering the entire non-White population, 61.1% reside in unnecessarily split counties.

[190] Winburn & Wagner, *supra* note 138, at 381.

TABLE 2. COUNTY RACIAL MAKEUP BY NUMBER OF EXTRA SPLITS[191]

Extra Splits	Percent White	Percent Black
0	86.3	9.9
1	81.7	13.1
2 or more	77.4	15.3

p value = 0.000000000018

Considering the racial characteristics of the counties offers yet another way to view the racial imbalance in county splits. Here, we determine how many extra splits are imposed on counties with a population of 90% or more White residents, counties with an 80 to 89% White population, and counties with a 70 to 79% White population.

The resulting pattern, shown in Table 3, is familiar. For counties with the highest percentage of White residents, the mean number of extra splits imposed is 0.10. Another way to think of that result: for every such county with one extra split imposed, nine more were left without any extra splits. For counties with 80 to 89% White population, the mean number of extra splits is 0.29. In other words, for every such county with one extra split, roughly four were respected. For counties with 70 to 79% White population, the mean rises a bit more to 0.33. Again, the p value suggests a highly statistically significant relationship.

TABLE 3. EXTRA SPLITS IMPOSED BY PREVALENCE OF WHITE RESIDENTS

Percent White	Extra Splits (mean)
90 or above	0.10
80 – 89.9	0.29
70 – 79.9	0.33

p value = 0.00000046

Taken as a whole, the data show that Whites are less likely to reside in fractured counties, while Black residents are considerably more likely to reside in fractured counties. This conclusion is supported regardless of whether one examines the likelihood of living in a fractured county by race, the racial makeup of counties by the number of extra splits, or the proportional imposition of extra splits by racial prevalence. In all cases, there is a strong association between a concentration of White residents and a reduced imposition

[191] For the entire non-White population, the percentages are: no extra split, 13.7; one extra split, 18.3; two or more extra splits, 22.6.

of extra county splits and a concomitant association between a concentration of Black residents and an increased imposition of extra county splits.

3. County Splits, Race, and Mapmaker

Tables 1-3 demonstrate a correlation between race and county splits, but they do not explain why this correlation arises. Perhaps there is a benign explanation for this correlation, such as efforts to create majority-minority districts or otherwise comply with the Voting Right Act (VRA). Perhaps residential patterns necessarily produce this correlation no matter how one draws the lines.

To better understand what produces this correlation, we consider who draws the lines in each state. We draw on the classification scheme used by Professor Justin Levitt in his website, All About Redistricting.[192] Arizona and California both use independent redistricting commissions. Iowa relies primarily on its Legislative Services Agency, a nonpartisan advisory body of civil servants. For these three states, we use the term independent to describe the mapmaking process and the resultant map. In the other 32 states we study, the legislature itself draws the congressional map. In those states where the legislature draws the lines, we distinguish between those where one party controls the process and where both major parties play a role. Table 4 shows how we categorize the 35 states into four groups based on whether the mapmaking process that produced the congressional map was Bipartisan (B), Republican (R), Democratic (D), or Independent (I).[193]

[192] Justin Levitt, *All About Redistricting*, LOY. L.A. L. SCH., https://redistricting.lls.edu/ [https://perma.cc/57T8-E5WF] (last visited Aug. 24, 2020).

[193] Democratic and Republican states are classified by unified control of the political offices responsible for redistricting. Bipartisan states indicate that one house of the legislature was in the opposite party hands from the other house, or from the governor, or that one house was itself split equally between the parties. We also include in that category states where a bipartisan political committee draws the lines. For information on the redistricting process in each state, we utilize Professor Justin Levitt's database. Levitt, *supra* note 192. In states with mid-cycle map changes, we analyze the original map, and thus we categorize based on partisan control of the process that produced that original map.

TABLE 4. PARTISAN CONTROL OF MAPMAKING PROCESS

Bipartisan (B) [11]	Republican (R) [17]	Democratic (D) [4]	Independent (I) [3]
1. Colorado (CO)	1. Alabama (AL)	1. Arkansas (AR)	1. Arizona (AZ)
2. Connecticut (CT)	2. Florida (FL)	2. Illinois (IL)	2. California (CA)
3. Kentucky (KY)	3. Georgia (GA)	3. Massachusetts (MA)	3. Iowa (IA)
4. Minnesota (MN)	4. Indiana (IN)	4. Maryland (MD)	
5. Missouri (MO)	5. Kansas (KS)		
6. Mississippi (MS)	6. Louisiana (LA)		
7. New Jersey (NJ)	7. Michigan (MI)		
8. Nevada (NV)	8. North Carolina (NC)		
9. New York (NY)	9. Ohio (OH)		
10. Oregon (OR)	10. Oklahoma (OK)		
11. Washington (WA)	11. Pennsylvania (PA)		
	12. South Carolina (SC)		
	13. Tennessee (TN)		
	14. Texas (TX)		
	15. Utah (UT)		
	16. Virginia (VA)		
	17. Wisconsin (WI)		

If VRA compliance or residential patterns explain the correlation we've identified between extra splits and race, we would expect to see similar racial disparities regardless of who drew the district lines. Instead, as we see in Table 5, the racial imbalance varies widely, turning critically on who draws the lines.

Much like Table 1, Table 5 again shows the overall percentage of the population by race living in splintered counties. Here the data are further broken down by partisan control of the mapmaking process that produced the congressional map. In the last two columns of data, we see that, in contrast to the overall relationship demonstrated *supra*, in states where Democrats drew the lines a slightly smaller proportion of Black residents than Whites reside in splintered counties, whereas in states where an independent body drew the lines Black residents were only slightly more likely than Whites to live in splintered counties. In both these cases, however, the ratio is close to one and the possibility that chance alone could account for the slight differences cannot be dismissed.

The disparity widens considerably in those states where Republicans drew the lines. Here, less than 45 percent of White Americans reside in splintered counties, while almost 56 percent of Black Americans live in splintered counties. The ratio indicates Black Americans are 1.25 times more likely to reside in splintered counties when Republicans draw the lines. The p value suggests the odds of this disparity occurring by chance are vanishingly small.

TABLE 5. LIKELIHOOD OF RESIDING IN A FRACTURED COUNTY BY RACE AND PARTISAN CONTROL[194]

Partisan Control	(B)	(R)	(D)	(I)
Percent of Whites residing in fractured counties	49.1	44.6	69.0	62.8
Percent of Black residents residing in fractured counties	70.4	55.9	66.4	65.9
Ratio	1.43	1.25	0.96	1.05
p value	0.00000000000000000000756	0.000003	0.127	0.158

Notably, the disparity in treatment between White and Black residents is sharpest when the map is bipartisan, *i.e.*, when both parties have some power over the redistricting process. Here, about 49% of Whites reside in fractured counties, while the corresponding figure for Black residents is above 70 percent. When both parties draw the lines, a Black resident is 1.43 times more likely than a White resident to reside in a fractured county. The odds of this disparity occurring by chance are far beyond the odds of choosing a winning Powerball number; indeed, they are a hundred trillion times more remote than choosing a winning Powerball number.[195] The fact that the relative treatment of White and Black residents varies by who drew the lines suggests that these disparities are driven by political considerations and not by residential patterns or an effort to achieve some standard of legal compliance.

To examine the effect of party control of the redistricting process from another angle, we calculated the number of extra splits imposed in counties where Black residents are more or less than 25% of the population (Table 6). Here, we find patterns remarkably consistent with the previous results. Once again, where the Democratic Party drew the lines, slightly *fewer* extra splits were imposed on areas with a large Black population. Where Republicans drew the lines, areas with a large Black population were subject to slightly more extra splits. It is, once again, where both parties drew the lines that the distinction is greatest. Here, in counties where Black residents are less than

[194] For the entire non-White population, the proportion residing in an unnecessarily split county is 73.1 (Democratic Party), 56.1 (Republican Party), 69.6 (Both Parties), 66.6 (Independent Body).

[195] The p value for this relationship is 0.00000000000000000000756. According to the Florida Lottery website, the odds of any set of numbers being the winning combination in the Powerball lottery are one in 292,201,338. In other words, one would expect to randomly choose the winning Powerball number approximately 258,700,000,000,000 times more often than arriving at this level of racial disparity by chance. *See How to Calculate the Probabilities of Winning the Nine PowerBall Prize Levels*, FLA. LOTTERY, http://www.flalottery.com/exptkt/pwrball-odds.pdf [https://perma.cc/CG72-WKMW].

25% population, 0.166 extra splits were imposed per county. In counties where Black residents were more than 25% of the population, 1.4 extra splits were imposed. In other words, where both parties drew the lines, eight times as many extra splits were imposed on counties with a large Black population. (The final column is incomplete owing to a lack of a counties with a large Black population in states with independent mapmakers.)

TABLE 6. MEAN EXTRA SPLITS BY PREVALENCE OF BLACK RESIDENTS AND PARTISAN CONTROL

Partisan Control	(B)	(R)	(D)	(I)
Smaller Black population (< 25%)	0.166	0.181	0.318	0.186
Larger Black population (> 25%)	1.4	0.223	0.242	*
Ratio	8.43	1.23	0.761	--
p value	0.0000000104	0.181	0.60	--

*Insufficient cases.

In sum, the data suggest that as a direct consequence of redistricting procedures, on balance, and across the nation, Black residents are less likely to have access to the representational advantages associated with respected counties. Those advantages, according to the research literature reviewed here, include greater accountability of members, access to members, ideological symmetry with members, and even the delivery of projects. This dynamic is concentrated, however, under two conditions: states where Republicans drew the lines, and states where both parties held some measure of power in the redistricting process.

The origins and parameters of the relationship between party control and racial disparities are subjects no doubt worthy of comprehensive study in their own right. For now, based on the data, we assert only that race has been employed for political considerations, and that equity in district drawing appears to be a gerrymandering casualty in Republican-drawn maps and when both parties draw maps together. Maps drawn by an independent body, conversely, suggest that it is possible to construct maps without imposing a disparate representational burden on Black residents.

4. County Splits and Party

We next examine the data in the same states and counties to consider differences in treatment of party supporters. Given that the maps in question were drawn in 2010, we measure partisan support by combining the results from the two preceding presidential elections (2004 and 2008).

In Table 7, we analyze only those 21 states where one party controlled the redistricting process. We calculate the vote for the out-party—the party

that did not draw the lines—in counties that were not subject to an unnecessary split, and those unnecessarily split one, two, and three or more times.

TABLE 7. OUT-PARTY SUPPORT BY SPLITTING OF COUNTIES

Extra Splits	Out Party Vote
0	41.2
1	45.0
2	46.6
3+	48.5
p value	0.0001

We find a clear relationship such that each additional extra county split is associated with greater support for the out-party. In respected counties, the mean support for the party that did not draw the lines was 41.2% of the vote. By contrast, in counties with at least three extra splits, the out-party received 48.5% of the vote. In other words, respected counties voted nearly 59% for the party that drew the lines, while counties with at least three extra splits offered about 51% support. This relationship is statistically significant ($p = 0.0001$).

The capacity or inclination of parties to split the other party's supporters, however, is not straightforward. As Tables 8 and 9 show, the underlying relationship does not appear to be treatment of in-party relative to out-party supporters, but rather treatment of Democrats relative to Republicans. That is, regardless of whether Democrats, Republicans, or both parties drew the lines, Democratic supporters are more likely to reside in fractured counties.

TABLE 8. DEMOCRATIC VOTE BY SPLITTING OF COUNTIES

Extra Splits	Democratic Vote
0	39.8
1	45.6
2	53.7
3+	55.8
p value	0.00000000000000000000000000000122

Table 8 provides the mean Democratic Party support in counties not subject to an extra split, and counties subject to one, two, and three or more extra splits. The pattern is remarkably clear. Each additional extra split imposed is associated with greater support for the Democratic Party, with respected counties providing just under 40% of their votes to Democrats and counties unnecessarily split three or more times voting almost 56% for Dem-

ocrats. The p value suggests the odds of this relationship occurring by chance are infinitesimally small.

When the results are broken down by who drew the lines, it becomes clear that Democratic supporters are subject to additional county splits when Republicans draw the lines and when Democrats draw the lines. As shown in Table 9, in states where Democrats, Republicans, or both parties drew the lines, fractured counties were more supportive of the Democratic Party. In each of these three situations, the difference is statistically significant. When an independent body drew the lines, fractured counties were slightly more supportive of Democrats, but the difference is not statistically significant.

TABLE 9. SUPPORT FOR THE DEMOCRATIC PARTY BY SPLITTING OF COUNTIES AND PARTY CONTROL

	(B)	(R)	(D)	(I)
No Extra Split	41.4	38.9	44.1	48.4
Extra Split	52.6	45.1	52.7	51.3
p value	0.00000000000000129	0.00000000000232	0.000002	0.207

Table 10 considers the treatment of counties by the relative strength of the parties. Here, counties are labeled "Strong Republican" if at least 70% support Republicans, "Strong Democratic" if at least 70% support Democrats, and "Competitive" if neither party enjoys 70% support.

We find, once again, a pervasive tendency to treat blue counties differently. By wide margins, lines drawn by Democrats, Republicans, and both parties subject strong Democratic counties to more extra splits. In all three cases, the differences are statistically significant. Perhaps especially stark is the disparity between Republican and Democratic counties when both parties drew the lines. In that case, strong Republican counties were not subject to any unnecessary splits, while the mean extra split imposed on strong Democratic counties was more than one. Once again, there was a smaller difference in treatment of the parties by independent maps, and again the difference that emerges did not reach statistical significance.

TABLE 10. MEAN EXTRA COUNTY SPLITS BY PARTY ELECTORAL STRENGTH AND PARTY CONTROL

	(B)	(R)	(D)	(I)
Strong Republican	0.000	0.068	0.167	0.000
Competitive	0.169	0.22~	0.297	0.185
Strong Democratic	1.23~	0.32~	1.66~	0.33~
p value	0.0000000000000001385	0.00000001917	0.001	0.596

One constant across each result here is a finding of political disparity. While Table 7 suggests in-party supporters were treated differently than out-party supporters, the far stronger and underlying relationship is the difference between the treatment of Democrats and Republicans. We see in Table 8 that, overall, there is a distinct relationship such that each additional extra split imposed on a county is associated with a higher level of Democratic support (or, concomitantly, a lower level of Republican support). We see in Tables 9 and 10 that this disparity is not necessarily or entirely a function of adversarial politics, as lines drawn by Republicans, Democrats, and both parties all imposed greater county splits on Democrats. Whether measured by the mean vote of split counties or the mean splits of Democratic counties, the disparity is unmistakable. The exception to this finding is the treatment of partisanship by states with independent mapmaking bodies. Here the distinctions in party support do not rise to the level of statistical significance.

Why would both Republicans and Democrats split Democratic voters more? It is a subject surely worthy of in-depth study. For our purposes, whether the parties split Democrats because of opposing strategies of how to maximize their seats won or for other reasons, what is notable to this inquiry is the strength of the evidence here that citizens, based on their political views, suffered the representational burden of living in fractured counties.

5. County Splits and the Nature of Gerrymandering

Who is affected by gerrymandering? It is a contentious question for the courts, litigants, and academics. These data offer one straightforward response. Approximately 154.8 million Americans, the majority of the residents of thirty-five states, live in a county that has been unnecessarily split into extra congressional districts. They are affected by gerrymandering.

But the ubiquity of this representational burden does not mean Americans are equally likely to have their county unnecessarily split into pieces. In statistically unlikely patterns, suggesting purposefulness and not happenstance, we find that Black residents are more likely to have their home counties unnecessarily split into pieces. We find this relationship in overall numbers and in states where Republicans or both parties drew the lines.

We find too that Democrats are more likely to have their home counties unnecessarily split into pieces. We find this relationship in the overall numbers, and, curiously, in states where Republicans, both parties, and Democrats themselves drew the lines.

The potential for building upon this simple measure—the unnecessary splitting of counties—to better understand gerrymandering is suggested not only in these patterns but also in the complementary nature of this measure with other indicators of gerrymandering currently in use. When we calculated the correlation between the mean number of unnecessary county splits

imposed per state and compactness (r = -0.359)[196] and the efficiency gap (r = 0.417)[197] we found stronger relationships between our measure and those traditional indicators than exist between compactness and the efficiency gap themselves (r = -0.139). In other words, while compactness and the efficiency gap offer two very different means and often conflicting assessments of gerrymandering, county splits represent a measure tied to both results.

III. Implications & Conclusion

Any proposal for measuring gerrymandering has at least three distinct potential applications: a policy prescription for mapmakers, an analytical tool for scholars, and a legal test for litigants and jurists. We aspire to develop a theory of geographic gerrymandering that can be useful in all three respects. Below we briefly discuss the value of our approach in these various areas.

Our approach offers a new tool for scholars in the field of electoral districting analysis. Grofman and Cervas predict that "[t]he concept of community of interest will be of even greater relevance in the 2020 round of districting than in the past,"[198] because more states have codified this geographic criterion.[199] And so they emphasize the "need to put operational content into the abstract and multivocal concept of community of interest, a concept which still is undertheorized, especially in the legal context."[200] Our approach contributes to this effort by thinking about the geographic distribution of the representational benefits associated with districts that correspond to cognizable and coherent territorial communities of interest.

The value of geographic representation has been recognized in scholarship, districting criteria, and legal doctrine.[201] But the traditional geographic approach considers the absolute value of geographic representation: does this map, overall, enhance or frustrate geographic representation? We ask a different question: how does this map distribute geographic impacts? A map that uniformly frustrates geographic representation statewide represents bad

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[196] Compactness scores were derived from an analysis created by the consulting firm Azavea by calculating the mean result produced by several scholarly formulas for calculating compactness. *See* Azavea, *Redrawing the Map on Redistricting* (2012), https://cdn.azavea.com/com.redistrictingthenation/pdfs/Redistricting_The_Nation_Addendum.pdf [https://perma.cc/2XH6-HBK7].

[197] Efficiency gap scores by state were derived from an analysis published by the Brennan Center for Justice. *See* Laura Royden & Michael Li, *Extreme Maps*, Brennan Ctr. for Justice (2017), https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16_0.pdf [https://perma.cc/W8ZL-AALG].

[198] Bernard Grofman & Jonathan Cervas, *ZIP Codes as Geographic Bases of Representation*, Election L.J., 14 (forthcoming 2020) (emphasis omitted), http://jonathancervas.com/2020/zipcodes/ZIP.pdf [https://perma.cc/3YX7-458F].

[199] *Id.* at 14–15 n.25–26 (emphasis omitted) (citing Grofman, *supra* note 81, at 177; Nat'l Conf. of State Legislatures, *Redistricting Law 2020* (2019) (the number of states with an explicit "community of interest" criterion has increased from eight in 1985 to twenty-six today)).

[200] *Id.* at 1 (emphasis omitted).

[201] *See supra* Section II.A.2.

policy.[202] A map that selectively frustrates geographic representation for groups defined by race or party represents something worse: a fairness problem, potentially of constitutional dimension.[203]

Our focus on geographic unfairness, rather than seats-votes unfairness or absolute satisfaction of geographic criteria, provides both methodological and conceptual benefits. The seats-votes framework depends on a series of assumptions: that each district race is a head-to-head contest between one candidate from each of the two major political parties; that district-based candidate contests are essentially statewide party contests; that vote swings occur in a uniform or proportional way. It also requires a series of methodological choices: whether to use data from legislative or statewide elections; how to account for uncontested or lightly contested districts; whether to use uniform or proportional swing; whether to use all-or-nothing or fractional seats; whether to measure bias, responsiveness, or both; how to produce an ensemble of neutral maps. The geographic approach is less reliant on these assumptions and choices, which makes it easier to apply in a broad range of contexts. For example, many districted elections for local bodies like city councils, county commissions, and school boards are non-partisan, feature successful independent or third-party candidates, or involve multiple candidates with the same party affiliation. It is hard to apply the seats-votes framework in this context. But the geographic approach can still provide guidance and insights.

And the geographic approach offers conceptual insights that lie outside the seats-votes framework, as our data analysis demonstrates. Within the seats-votes framework, a bipartisan gerrymander is fair because it carves up the state into an appropriate number of red and blue districts. But our geographic analysis demonstrates that this seats-votes fairness may be achieved through geographic unfairness, like disproportionate extra county splits for

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[202] Consider two conceptual extremes. First imagine a state whose residents live exclusively in ten equipopulous areas with consolidated city-county governments. Suppose the state made each such area a single-member congressional district. In terms of geographic representation, this would be great for everyone. On the other end of the spectrum, imagine a state that divided its population into ten noncontiguous "crazy-dust" districts, assigning voters to district by birthdate. *Compare* Baker v. Carr, 369 U.S. 186, 254 (1962) (Clark, J., concurring) (contending that "Tennessee's apportionment is a crazy quilt without rational basis"), *with* Ljubiša M. Kociæ & Alba C. Simoncelli, *Cantor Dust by AIFS*, 15 FILOMAT 265, 271 (2001) (defining "dust" mathematically as "a totally disconnected" set of points). In terms of geographic representation, this would be horrible for everyone. In real-world examples, an electoral map achieves some intermediate level of success in terms of geographic representation, but the geographic benefits and burdens of the map may not be uniformly distributed.

[203] Note that the distinction between the absolute extent and the fair distribution of geographic representational benefits reflects a distinction between the seats-votes framework and geographic representation. The seats-votes framework is inescapably distributional, a zero-sum game where one party's gain is the other's loss. An electoral map cannot give everyone a high level of partisan power, or everyone a low level of partisan power. The map can only reallocate power from one party (or racial group) to the other. But geographic representation need not be a zero-sum game. Better geographic representation in one district does not require worse geographic representation in another. An electoral map can uniformly enhance geographic representation, or uniformly frustrate it.

Black residents and Democrats. While partisan fairness does not guarantee geographic fairness, geographic fairness may limit partisan unfairness. Note that Hofeller, while drawing the 2016 North Carolina congressional map challenged in *Rucho*, used a partisan index to determine when and where to split counties. Specifically, Hofeller used an aggregate partisanship variable for each census block, based on seven statewide races between 2008 and 2014, to color-code the "two-party partisan characteristics" of counties, precincts, and census units called VTDs, and to make the nitty-gritty decisions: "to assign a VTD to one congressional district or another," "whether and where to split VTDs or counties," and the "placement of district lines within split counties."[204] This suggests that partisan mapmakers use geographic unfairness instrumentally to achieve the constitutive goal of seats-votes unfairness. Limits on geographic unfairness may also limit seats-votes unfairness. But we do not propose geographic fairness as a purely instrumental tool to achieve seats-votes fairness. Rather, we view both geographic fairness and seats-votes fairness as important values. Thinking of fairness in two-dimensional terms provides a richer understanding of representational interests.

Our approach suggests straightforward policy prescriptions. Many districting criteria proposed by scholars and used by states are geographic: cognizability; traversability; coherence; contiguity; compactness; coterminality with other electoral district boundaries; congruence with local boundaries, census boundaries, and communication units (like zip code areas and media markets); and district office access.[205] Some of these criteria, like contiguity, can be satisfied completely. For other criteria, like congruence with local boundaries, only partial satisfaction is possible, because complete satisfaction is inconsistent with superseding criteria like population equality. For geographic criteria that can only be partially satisfied, the focus is usually on the absolute degree of satisfaction statewide. For example, Colorado directs it redistricting commission to preserve counties "[a]s much as is reasonably possible."[206] This focus on the absolute degree of statewide satisfaction of aspirational geographic criteria seeks to maximize the total representational benefit associated with the criteria. But this focus on benefit maximization ignores the question of benefit distribution. Our approach encourages mapmakers to draw maps that distribute geographic representational benefits fairly. Districting criteria can and should reflect this. Specifically, districting law can instruct the mapmaker that any departure from districting

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[204] Common Cause v. Rucho, 318 F. Supp. 3d 777, 808 (M.D.N.C. 2018), *rev'd*, 139 S. Ct. 2484 (2019). VTD standards for Voting Tabulation District, which is defined by the Census Bureau as "[a]ny of a variety of areas, such as election districts, precincts, or wards, established by states and local governments for purposes of conducting elections." *Glossary: Voting District (VTD)*, U.S. CENSUS BUREAU, https://www.census.gov/glossary/#term_VotingDistrictVTD [https://perma.cc/A4R4-76LB].

[205] *See supra* notes 72–88 & accompanying text.

[206] COL. REV. STAT. 44.3(2)(a) ("As much as is reasonably possible, the commission's [congressional redistricting] plan must preserve. . .whole political subdivisions, such as counties. . .").

criteria requires two factual determinations: (1) that the departure is necessary to comply with superseding criteria; and (2) that the departure does not unnecessarily impose a disparate adverse impact on any group defined by race or party. These factual determinations could be subject to appropriate judicial review.

Our approach's potential legal application warrants clarification, given the Supreme Court's recent decision in *Rucho* on the non-justiciability of partisan gerrymandering claims in federal courts. Measures of geographic fairness can support a legal theory of racial or partisan gerrymandering based on equal protection or First Amendment principles. Under this theory, an electoral map is unlawful when it unjustifiably distributes geographic representational impacts on the basis of a protected characteristic like race or an expressive activity like party affiliation.[207] The *Reynolds* Court spoke of a right to "fair and effective" representation.[208] The fairness piece of this equation is better suited to legal adjudication than the effectiveness piece. Decades ago, Grofman suggested that a map violated substantive due process when it reached an extreme level of non-cognizability.[209] But Grofman himself observes that this proposal has not caught on.[210] More generally, Grofman has noted the limited success of legal challenges based on a map's departure from geographic criteria like compactness, preservation of local political boundaries, and correspondence with a community of interest. Given interpretive ambiguities and the tradeoffs districting entails, courts generally defer to the mapmaker absent an extreme departure.[211] In *Vieth*, the Court rejected the plaintiffs claim that the Pennsylvania legislature violated the Constitution when it "ignored all traditional redistricting criteria, includ-

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[207] We are presently agnostic about whether this legal standard should have an intent element independent of a justification element. Actors generally intend the predictable effects of their choices unless such effects are unavoidable in the sense that independent objectives cannot be accomplished without them. Nagle & Ramsay, *supra* note 39, at 2 ("[U]nintentional bias is no longer unintentional if it can be reliably demonstrated that it occurs."); *Rucho*, 139 S. Ct. at 2504 (suggesting intent and justification elements are duplicative). For this reason, a mapmaker intends a map's predictable distribution of geographic representational impacts unless other sufficient weighty districting criteria necessitate the distribution.

[208] Reynolds v. Sims, 377 U.S. 533, 566 (1964).

[209] Grofman declaration in Pope v. Blue, 809 F. Supp. 392 (W.D.N.C. 1992); Grofman, *supra* note 66.

[210] Grofman & Cervas, *supra* note 198, at 3–4 ("A clear operational test for cognizability has yet to be developed and unfortunately, in our view, the concept of non-cognizability never gained any legal traction in federal case law."). The trial court dismissed the complaint, and implicitly Grofman's theory of non-cognizability, but the same district was struck down by the Supreme Court as a racial gerrymander shortly thereafter. *Compare* Pope v. Blue, 809 F. Supp. 392 (W.D.N.C. 1992), *with* Shaw v. Reno, 509 U.S. 630 (1993).

[211] Grofman, *supra* note 80, at 86 & n.43 ("Courts have generally required dramatic departures from compactness in a number of districts before invalidating a plan for noncompliance with a compactness standard."); *id.* at 86–87 & n.45 ("[C]ourts have generally allowed legislatures wide latitude in determining what is reasonable . . . ."); *id.* at 87 & n.49 ("In practice, provisions which require preservation of communities of interest are hard to enforce because they are hard to interpret.").

ing the preservation of local government boundaries," to favor Republicans.[212]

Courts have been reluctant to adjudicate traditional claims of partisan gerrymandering based on a seats-votes conception of fairness. In *Rucho*, the Supreme Court decided, five to four, that such claims present non-justiciable political questions beyond the reach of the federal courts. As litigation has shifted to state courts, courts have encountered some of the same justiciability problems identified by the *Rucho* majority. The legal claim we propose is similar to the vote dilution theory the Court rejected in *Rucho*. However, traditional vote dilution theory frames in seats-votes terms the harm alleged (too few seats) and the relief sought (more seats). Our approach frames in geographic terms the harm alleged (*e.g.*, disproportionate county splits) and the relief sought (*e.g.*, more equitable county splits). This geographic framing avoids many of the justiciability problems the *Rucho* majority attributes to traditional seats-votes dilution claims. For this reason, one of us recently argued that *Rucho* is best read narrowly to foreclose only partisan gerrymandering claims based on a seats-votes dilution theory, leaving the federal courts open to other claims like those based on geographic unfairness.[213] The entire thrust of the *Rucho* majority opinion, the very logic of its justiciability analysis, applies to seats-votes measures but not geographic ones. Consider how Chief Justice Roberts described a partisan gerrymandering claim in his opinion for the *Rucho* majority. It "rest[s] on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence."[214] It deems "a districting map . . . unconstitutional because it makes it too difficult for one party to translate statewide support into seats in the legislature."[215] It reflects a "'norm that does not exist' in our electoral system—'statewide elections for representatives along party lines.'"[216] It asks the federal courts to "apportion political power"[217] by "tak[ing] the extraordinary step of reallocating power and influence between political parties."[218] It is based on the principle "that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support"[219] and that "each party must be influential in proportion to its number of supporters."[220]

All of these assertions describes a seats-votes dilution claim to a tee and a geographic unfairness claim not at all. Under the geographic theory we

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[212] Vieth v. Jubelirer, 541 U.S. 267, 3272–73 (2004) (plurality opinion) (alteration incorporated).

[213] Benjamin Plener Cover, Rucho *for Minimalists*, 71 MERCER L. REV. 695 (2020).

[214] *Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019)

[215] *Id.*

[216] *Id.* (quoting Davis v. Bandemer, 478 U.S. 109, 159 (1986) (O'Connor, J., concurring in the judgment)).

[217] *Id.*

[218] *Id.* at 2502.

[219] *Id.* at 2501.

[220] *Id.*

propose, a court can adjudicate the claim and craft relief without saying a word about the relationship between seats and votes. Geographic representation cannot be rejected as a subjective norm inconsistent with the theoretical underpinnings and traditional practices of the American electoral system. Geographic representation reflects the traditional practices and the representational theory underlying the American electoral system. The predominance of electoral geographic districting, both historically and today, indicates its significance. The states themselves demonstrate the value they accord to geographic representation by adopting districting criteria designed to promote it. The geographic theory does not seek to impose geographic norms on states that reject them. The geographic theory defers to the judgments of states that geographic districting confers meaningful representational benefit and simply demands that the state fairly distribute the benefits it values without intentionally discriminating on the basis of race or party.

For these reasons, *Rucho* is best read narrowly to foreclose only seats-votes claims, leaving the federal courts open to the geographic claim we propose. Under this reasoning, the Court could strike down an electoral map as a "geographic" partisan gerrymander without overruling *Rucho*, and without relying on a seats-votes theory when adjudicating liability or crafting relief. But even if *Rucho* is read broadly to foreclose the geographic claim we propose, our geographic approach may still help litigants and jurists in state courts adjudicating gerrymandering claims under state constitutional provisions.

This proposed legal standard differs from the traditional seats-votes dilution standard in one other notable respect. The two standards swap the respective roles of seats-votes and geographic considerations. Under the traditional standard, seats-votes unfairness is the plaintiff's complaint, and geographic considerations may be the mapmaker's defense. Under our geographic standard, geographic unfairness is the plaintiff's complaint, and seats-votes considerations may be the mapmaker's defense. This distinction is significant for at least two reasons. First, a mapmaker could respond to a claim of seats-votes gerrymandering by invoking geography itself, arguing that the seats-votes relationship is a product of the underlying political geography (like the clustering of Democrats in urban areas) and the consistent application of legitimate criteria (including geographic criteria like contiguity, compactness, and congruence with local boundaries).[221] In contrast, it is harder for the mapmaker to invoke geography as a defense against a claim of geographic gerrymandering, because the gravamen of the claim is that important geographic districting criteria were applied inconsistently.[222]

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[221] Nagle & Ramsay, *supra* note 39, at 3 ("Political geography, such as high density of Democrats in cities, can also create unfair and unresponsive maps when conventional redistricting criteria such as compactness and not splitting political subdivisions are adhered to.").

[222] Harder, but not impossible. The mapmaker could attribute the inconsistent application itself to the underlying political geography and a reasonable, good-faith attempt to reconcile competing districting criteria.

The mapmaker could instead respond to a claim of geographic gerrymandering by invoking political districting criteria. This leads to the second reason why the role reversal of geographic and seats-votes considerations is significant. In *Gaffney*, the Court concluded that the Connecticut legislature properly relied on political considerations when it drew a bipartisan gerrymander based on principles of partisan fairness and rough seats-votes proportionality.[223] Relying on *Gaffney*, the *Rucho* majority claimed that partisan advantage is a constitutionally permissible districting criterion, so long as it is not pursued excessively.[224] In doing so, the *Rucho* majority elided the obvious difference between an objective of partisan fairness and an objective of partisan advantage, and dismissed powerful arguments that the latter supplies no legitimate basis for official action.[225] Our geographic approach would invite the Court to revisit the distinction between partisan fairness and partisan advantage in a new doctrinal setting. The question would not be whether a motivation is itself so illicit that it renders a map unconstitutional without any showing of adverse effect. Instead, the question would be whether that motivation can justify a demonstrated adverse effect in the form of disparate treatment on the basis of race or party in the distribution of geographic representational impacts. The distinction between partisan fairness and partisan advantage may matter for this new doctrinal question, even if the *Rucho* majority elided it when answering the first doctrinal question.[226]

This Article was designed to present the concept of geographic districting and demonstrate its significance by showing how current congressional maps distribute the burden of extra county splits on the basis of race and party. These results suggest additional research questions that we encourage others, and hope ourselves, to explore in the future. One avenue is to analyze other geographic burdens. Recently, scholars have suggested other districting criteria worthy of exploration, based on such geographic factors as zip codes, homeowners' associations, school catchment areas, and media markets.[227]

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[223] Gaffney v. Cummings, 412 U.S. 735, 753 (1973).

[224] *Rucho*, 139 S. Ct. at 2503.

[225] *Id.* at 2517 (Kagan, J., dissenting); *see also*, Karcher v. Daggett, 462 U.S. 725, 748 (1983) (Stevens, J., concurring); Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351 (2017); Justin Levitt, *Intent Is Enough: Invidious Partisanship in Redistricting*, 59 WM. & MARY L. REV. 1993 (2018); Michael Parsons, *Clearing the Political Thicket: Why Political Gerrymandering for Partisan Advantage Is Unconstitutional*, 24 WM. & MARY BILL RTS. J. 1107 (2016).

[226] If instead the Court concludes that neither partisan fairness nor partisan advantage supplies adequate justification for disparate geographic treatment, then a so-called bipartisan gerrymander, which carves the state up into safe red and safe blue districts, may be challenged if it unfairly distributes geographical representational impacts on the basis of party or race.

[227] *Compare* Curiel & Steelman, *supra* note 138, and John A. Curiel & Tyler Steelman, *A Response to "Tests for Unconstitutional Partisan Gerrymandering in a Post-*Gill *World" in a Post-*Rucho *World*, 19 ELECTION L.J. 101 (2020), *with* Bernard Grofman, *Tests for Unconstitutional Partisan Gerrymandering in a Post-*Gill *World*, 18 ELECTION L.J. 93 (2019), and Grofman & Cervas, *supra* note 198; s*ee also*, *e.g.*, *id.* at 6 n.12 (homeowner's association); *id.* at 6 n.14 (school catchment area); *id.* at 12 (media markets).

Along with co-author Michael Solimine, we recently analyzed the distance between a voter's residence and a congressional representative's district office.[228] Another inquiry concerns the relationship between geographic and seats-votes measures. Most important is the project of translating the insights of the geographic approach into tools that assist scholarly, policy, and legal efforts

[228] Niven et al., *supra* note 70.

Mistaking a Backdoor for No Door at All: Sentencing and the Exclusionary Rule

*Brian Beaton**

"So the victim anticipates no compensation, the offender no deterrence. Serious inroads on the exclusionary rule mean, as a practical matter, serious inroads on the fourth amendment." United States v. Jewel, 947 F.2d 224, 239 (7th Cir. 1991) (Easterbrook, J., concurring).

INTRODUCTION

Since *Williams v. New York*,[1] and its corresponding expansion and codification in 18 U.S.C. § 3661,[2] federal courts have been free to consider any evidence at sentencing without reference to rules of evidence, constitutional trial principles (e.g. the Due Process Clause), or other relevant constraints. This Article seeks to explore one aspect of evidentiary rules at sentencing: the admissibility of evidence seized in violation of the Fourth Amendment, an issue which has remained contentious in the courts across time and space. I will trace courts' treatment of the exclusionary rule—the primary remedy for Fourth Amendment violations—at sentencing, ultimately arguing that under traditional exclusionary rule principles the rule will serve its deterrent function even after trial. As a result, I will argue, it should be generally ap-

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[1] 337 U.S. 241 (1949).

[2] "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

plied. While many avenues exist for further argument—including questioning courts' assumption that police are not interested in increasing defendants' sentences, contesting the notion that deterrence is the proper way to assess the exclusionary rule at sentencing, and contesting general principles within the exclusionary rule jurisprudence—this Article will take the exclusionary rule's deterrence rationale as given and also accept the general contention that police seek evidence for the purpose of conviction, not with an eye toward increasing a defendant's sentence. This Article argues that under that logic precisely, exclusion at sentencing will generally be appropriate.

The Article proceeds in three Parts. From the outset, I presume that the reader has a working knowledge of the exclusionary rule and Fourth Amendment law generally.[3] Part I traces courts' consideration of the question of exclusion of unconstitutionally seized evidence at sentencing. This Part covers numerous courts' treatment of the exclusionary rule at sentencing across time and statutory change. Prior to the imposition of mandatory Federal Sentencing Guidelines, some courts found reason to exclude illegally obtained evidence at sentencing. But the majority did not. Similarly, under the mandatory Guidelines system that existed prior to *United States v. Booker*,[4] the question of exclusion received some academic attention. However, in the years since *Booker*, a dearth of scholarship has left unchallenged the assumptions underlying courts' decisions not to apply the exclusionary rule to illegally obtained evidence at sentencing.

Part II argues that under the logic expounded by courts regarding police motivations, exclusion is a proper remedy for illegally obtained evidence at sentencing. This Part offers two theoretical bases for why exclusion is proper: a broad theory focused on the fact that the difference between an "increase in sentence" and "conviction" is merely semantic, and a narrow theory focused on the effects of illegally obtained evidence on plea-bargaining.

Finally, Part III offers thoughts for courts and legislatures to implement the exclusionary rule at sentencing.

I. A History of the Exclusionary Rule at Sentencing: from *Verdugo* to *Jewel* to *Booker*

The question of applicability of the exclusionary rule at sentencing has existed for as long as the rule itself. The Supreme Court has never spoken to the issue, leaving lower federal courts to consider the question. Today, most circuit courts agree that the exclusionary rule is generally inapplicable at sen-

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[3] For background, *see, e.g.*, Todd Flaming, *Laundering Illegally Seized Evidence Through the Federal Sentencing Guidelines*, 59 U. Chi. L. Rev. 1209, 1225 (1992); Victor Jay Miller, *An End Run Around the Exclusionary Rule: The Use of Illegally Seized Evidence Under the Federal Sentencing Guidelines*, 34 Wm. & Mary L. Rev. 241, 274 (1992). *See generally* Clinton R. Pinyan, *Illegally Seized Evidence at Sentencing: How to Satisfy the Constitution and the Guidelines with an "Evidentiary" Limitation*, 1994 U. Chi. L. F. 523 (1994).

[4] 543 U.S. 220, 261 (2005).

tencing.[5] But the process for arriving at this general consensus was not straightforward; disagreement has existed within the federal courts, due to both factual differences in cases and changing statutory regimes. While this history of disagreement is legally insignificant today, the lessons to be drawn from it remain noteworthy.

The use of the exclusionary rule at sentencing begins where any evidentiary question at sentencing must: *Williams v. New York*. *Williams* held that the Fourteenth Amendment's Due Process Clause does not bar a sentencing judge from considering extra-record evidence when imposing a sentence, including possible crimes committed by the defendant for which he was not actually charged.[6] In reaching this decision, the Supreme Court relied on the general rehabilitative function that a sentence is intended to achieve; once a guilty verdict is rendered, the judge is "not confined to the narrow issue of guilt," but instead must consider a holistic view of a defendant to craft an appropriate sentence.[7] Taking account of the fullest information available about a defendant necessarily means eschewing "rigid adherence to restrictive rules of evidence properly applicable to the trial."[8] Notably, the Supreme Court did not *compel* courts to take account of all available information nor entirely disregard traditional evidentiary constraints. Rather, courts simply were not barred from considering such information where appropriate.[9]

The seed that the *Williams* court planted blossomed into an entire sentencing regime mandating the use of full information about a defendant with the Organized Crime Act of 1970.[10] Most clearly, one particular provision of the Act, codified as 18 U.S.C. § 3577[11] as general requirements for sentencing, simply reads: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[12] If there was any doubt in *Williams* as to what information judges were to consider at sentencing, congressional intervention ostensibly put that doubt to rest.

The expansion of *Williams*'s holding was not an accident according to the legislative history of the Organized Crime Act of 1970. Part of the end

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[5] *See, e.g.*, United States v. McCrory, 930 F.2d 63, 69 (D.C. Cir. 1991); United States v. Torres, 926 F.2d 321, 325 (3d Cir. 1991); United States v. Graves, 785 F.2d 870, 873 (10th Cir. 1986); United States v. Butler, 680 F.2d 1055, 1056 (5th Cir. 1982); United States v. Schipani, 435 F.2d 26, 28 (2d Cir. 1970); Del Vecchio v. Illinois Dep't of Corr., 31 F.3d 1363, 1388 (7th Cir. 1994).

[6] *Williams*, 337 U.S. at 245.

[7] *Id.* at 247.

[8] *Id.*

[9] *See* Claire McCusker Murray, *Hard Cases Make Good Law: The Intellectual History of Prior Acquittal Sentencing*, 84 ST. JOHN'S L. REV. 1415, 1447 (2010) ("*Williams's* minimalist holding . . . required judges to reason through the logic underlying prior acquittal sentencing.").

[10] *See id.* at 1444–47.

[11] Later renumbered 18 U.S.C. § 3661.

[12] 18 U.S.C. § 3661.

goal of the Organized Crime Act—per Representative Richard Poff of Virginia, the bill's architect—was delivering harsh sentences to "dangerous special offender[s]": members of organized crime, like La Cosa Nostra.[13] But this goal was complicated by developments in the preceding decade. The Warren Court's Criminal Procedure Revolution had created new evidentiary rules—most notably, the exclusionary rule—that often kept evidence out of court. Poff was concerned about the ability of sophisticated criminals to avoid lengthy sentences through gaming these rules.[14] He justified § 3577, in part, on a commitment to delivering justice to these offenders by separating sentencing entirely from any evidentiary constraints.[15]

Section 3577 is not limited to particular crimes or affiliations. The broad coverage of the section reflects Poff's intent to overrule completely the exclusionary rule within the context of sentencing. Poff's rationale for so doing was multifaceted, according to one commentator:

> Poff worried that the need to deter police abuse, a rationale underlying the Exclusionary Rule, would be allowed to limit sentencing judges in the information available to them at sentencing just as juries were limited. The Exclusionary Rule introduced into trials a significant non-truth-seeking aim. In so doing, it widened the gap between the aims of trial and the aims of sentencing—and, concomitantly, the gap between acquittal and innocence—even more. Representative Poff, and ultimately Congress, reacted to the specter of an extension of the Exclusionary Rule's non-truth-seeking principle into sentencing in part by passing § 3577. This statute embodied a novel approach to the use of out-of-court evidence at sentencing—one whose categorical, affirmative language contrasted sharply with the previously regnant holding of the Williams Court.[16]

Representative Poff had a particular target case in mind when drafting the broad language of the Organized Crime Act of 1970[17]: *Verdugo v. United States*.[18] Written only two years before the passage of the Act, *Verdugo* held that the exclusionary rule was an appropriate remedy for unconstitutionally seized evidence at sentencing in certain circumstances.[19] In that case, officers obtained an arrest warrant after the defendant dealt approximately three

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[13] Murray, *supra* note 9, at 1435.
[14] *See id.*
[15] *See id.* at 1437–41.
[16] *Id.* at 1443.
[17] Murray, *supra* note 9, at 1441 ("Poff's citation to *Verdugo* and *Armpriester* sheds significant light on his reasons for expanding *Williams*'s holding into the text of § 3577. The portions of the two cases he cites are parallel in their reasoning. Both hold that evidence obtained illegally and suppressed at trial under the Exclusionary Rule should also be excluded from sentencing.").
[18] 402 F.2d 599 (9th Cir. 1968).
[19] *Id.* at 613; *see also* Murray, *supra* note 9, at 1441.

grams of heroin to an undercover officer.[20] Officers waited for Verdugo to arrive at his home the next day to execute the warrant.[21] Once Verdugo arrived, officers placed him under arrest.[22] To this point, the officers had acted in accord with the Constitution. But the same could not be said of what followed. Verdugo was handcuffed to a chair while the officers searched the entirety of his home for two and a half hours.[23] He was then taken to the police station, although the searching did not stop. A team of five to seven officers ransacked the Verdugo home, searching drawers, cabinets, and luggage, overturning furniture, removing covers from all of the house light switches, and punching holes in the wallboard.[24] The government did not argue that the search was constitutional nor that it fell within an exception to the exclusionary rule. In fact, it admitted that Verdugo had been under investigation for months prior to the arrest and that the warrantless "siege of his home. . .in search of [a] 'stash'" was consciously planned.[25] As such, the evidence obtained from this search was suppressed before trial, leaving Verdugo charged with only the three grams of heroin.[26]

Sentencing proved a different story. The government re-introduced the unconstitutionally seized evidence with the goal of drastically increasing Verdugo's sentence from a minimum of five years to a maximum of 20.[27] And the district court followed the government's lead, taking full account of the increased amount of heroin in giving the Verdugo a higher sentence.[28] However, the Ninth Circuit found the exclusionary rule applicable, reversing Verdugo's sentence and requiring sentencing to proceed without the unconstitutionally seized evidence.[29] Although by the court's own words, police are generally motivated by seeking convictions, not with increasing the sentences imposed on defendants, that was not the case here.[30] A specialized police narcotics unit conducted much of the search after Verdugo's arrest with the specific goal of obtaining a lengthy sentence for a repeat offender.[31] Still, the court fashioned a narrow holding, taking into account the "public interest in the imposition of a proper sentence"[32] based on a holistic account of the defendant.[33] Exclusion was only proper where police acted with the specific intent to increase the defendant's sentence and the use of the evi-

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[20] *See Verdugo*, 402 F.2d at 609.
[21] *Id.* at 610.
[22] *Id.*
[23] *Id.*
[24] United States v. Verdugo, 240 F.Supp. 497, 499 (N.D. Cal. 1965).
[25] *Id.* at 500.
[26] *Id.* at 501.
[27] Verdugo, 402 F.2d at 612.
[28] *Id.* at 613.
[29] *Id.* at 610–11 (citing Mapp v. Ohio, 367 U.S. 643 (1961)).
[30] *See id.* at 612.
[31] *Id.*; *see also* Lloyd E. Ohlin & Frank J. Remington, *Sentencing Structure: Its Effect upon Systems for the Administration of Criminal Justice*, 23 L. & CONTEMP. PROBS. 494, 501 (1958).
[32] *Verdugo*, 402 F.2d at 611.
[33] *Id.*

dence at sentencing created a "substantial incentive for unconstitutional searches and seizures."[34]

The passage of § 3577 would seem to have ended the *Verdugo* rule and anything more expansive. Despite the section's seemingly decisive language, however, courts have nonetheless grappled with applying the exclusionary rule at sentencing. This is likely compelled by the fact that the exclusionary rule is a *constitutional* principle; it cannot be overruled by statutory enactments.[35] Thus, courts have engaged in the same analysis they always must when deciding whether exclusion of evidence is an appropriate remedy: whether the benefits of exclusion—deterrence of the police from engaging in unconstitutional searches and seizures—outweigh the costs.[36]

The majority of federal courts have answered the question of exclusion clearly: the exclusionary rule does not apply at sentencing. This has been the case for as long as the rule has existed through the present, other than *Verdugo*. The facts of the cases reaching this decision of course vary. For instance, in *United States v. Lee*,[37] the Fourth Circuit found that a sentencing judge did not impermissibly rely on unconstitutionally seized evidence from a prior conviction four years before the instant case when sentencing the defendant. In *United States v. Schipani*,[38] decided the same year of the passage of Section 3577, the Second Circuit allowed the consideration of evidence from a wiretap which was excluded at trial but relied on by the sentencing judge. In *United States v. Vandemark*,[39] the Ninth Circuit allowed drugs seized in the course of an unlawful *Terry* stop to be considered in a defendant's revocation of probation and consequent sentencing for a prior conviction. In so doing, the court noted that *Verdugo* created a narrow rule essentially triggered only by "searchers whose sole object is to obtain evidence of a single offense with which the defendant is charged."[40]

Despite these factual differences, the rationale for not applying the rule is substantially the same across circuits. In determining whether the exclusionary rule should apply, courts invoke the deterrence-based rationale of the exclusionary rule and engage in a balancing analysis.[41] On the costs side of

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[34] *Id.* at 613.

[35] *See* United States v. Jewel, 947 F.2d 224, 239 (7th Cir. 1991) (Easterbrook, J., concurring) ("Congress answered it in favor of using the evidence, but that cannot be dispositive, else Congress could abolish the exclusionary rule without putting anything in its place.").

[36] *See, e.g.*, United States v. Calandra, 414 U.S. 338, 349 (1974) ("In deciding whether to extend the exclusionary rule to grand jury proceedings, we must weigh the potential injury to the historic role and functions of the grand jury against the potential benefits of the rule as applied in this context.").

[37] 540 F.2d 1205, 1211 (4th Cir. 1976).

[38] 435 F.2d 26, 28 (2d Cir. 1970).

[39] 522 F.2d 1019, 1025 (9th Cir. 1975).

[40] *Id.* at 1024. Other examples of cases applying this principle include United States v. Graves, 785 F.2d 870, 873 (10th Cir. 1986), and United States v. Butler, 680 F.2d 1055, 1056 (5th Cir. 1982).

[41] *See, e.g.*, United States v. Lee, 540 F.2d 1205, 1210 (4th Cir. 1976); *Schipani*, 435 F.2d at 28 ("It is quite unlikely that law enforcement officials conduct illegal electronic auditing to build up an inventory of information for sentencing purposes, although the evidence would be inadmissible on the issue of guilt.").

the equation, the language of *Williams* reigns supreme: "exclusion of reliable evidence hampers the ability of sentencing courts to consider all relevant information about the defendant in selecting an appropriate sentence."[42] Unlike coerced confessions (in the Due Process sense),[43] there is nothing fundamentally unreliable about unconstitutionally seized evidence. This is partially why courts resist application of the exclusionary rule as a general matter.[44] And while the costs of exclusion may be higher as it pertains to trial—given the defendant may walk as a result[45]—depriving courts of such evidence at sentencing contravenes the ability of courts to render a sentence in line with the principles of retribution, deterrence, and rehabilitation. The ability to render such a sentence was the motivation behind Section 3577,[46] and courts frequently invoke the statute, providing additional cover to allow consideration of unconstitutionally seized evidence.

As to benefits, *Calandra* almost exclusively suggests that courts only consider the deterrent effect exclusion would have on the police from committing unconstitutional searches and seizures.[47] Subsequent cases have clarified that the relevant metric for assessing deterrence is not whether exclusion will deter in an absolute sense, but rather whether meaningful *marginal deterrence* of the police will be achieved. Courts determine the potential deterrent effect by considering the police actions implicated in the illegal seizure, other potential sanctions, and the stage of the proceeding.[48] It is here where federal circuit courts developed the doctrine of the exclusionary rule within the context of sentencing. In nearly every decision affirming the use of unconstitutionally seized evidence, courts have invoked the same general principle to explain why meaningful deterrence of the police through exclusion at sentencing would not be accomplished. That principle holds that "law enforcement officers conduct searches and seize evidence for purposes of prosecution and conviction—not for the purpose of increasing a sentence in a prosecution already pending or one not yet begun."[49] As a result, exclusion

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[42] *See, e.g.*, United States v. Nichols, 438 F.3d 437, 444 (4th Cir. 2006).

[43] *See, e.g.*, Brown v. Mississippi, 297 U.S. 278, 287 (1936) ("In the instant case, the trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner.").

[44] *See, e.g.*, Davis v. United States, 564 U.S. 229, 237 (2011) ("It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence.").

[45] *See, e.g.*, *id.* ("[I]ts bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment."); *see also* Herring v. United States, 555 U.S. 135, 141 (2009).

[46] *See* Murray, *supra* note 9, at 1441.

[47] *See* United States v. Calandra, 414 U.S. 338, 348 (1974).

[48] *See, e.g.*, Alderman v. United States, 394 U.S. 165, 174 (1969); New York v. Harris, 495 U.S. 14, 21 (1990); Illinois v. Krull, 480 U.S. 340, 347 (1987); United States v. Leon, 468 U.S. 897, 910 (1984); United States v. Hunt, 505 F.2d 931, 935 (5th Cir. 1974); *see also Calandra*, 414 U.S. at 347–48.

[49] United States v. Lynch, 934 F.2d 1226, 1236 (11th Cir. 1991) (citing United States v. Vandemark, 522 F.2d 1019, 1022 (9th Cir. 1975)).

would not deter officers above and beyond its typical application at trial. By the 1970s and 1980s—following *Verdugo* and the passage of Section 3577—nearly all circuits were in agreement about this costs-benefits balancing and the general inapplicability of the exclusionary rule at sentencing.[50]

Despite this unanimity across the circuits, the enactment of the Federal Sentencing Guidelines in 1987 revamped judicial discussion of applying the exclusionary rule at sentencing. The passage of the Guidelines in 1987 caused a seismic change in the world of sentencing. Whereas federal judges once sentenced within broad ranges of years prescribed by statute,[51] federal law now mandated[52] that judges sentence within a narrow range under Guidelines crafted by the newly-created United States Sentencing Commission.[53] The Guidelines mandated that judges sentence based on any fact—about both the offender himself (e.g. criminal history) and the offense—proven beyond a preponderance of the evidence at sentencing.[54] This was required regardless of the conduct for which the defendant was convicted.[55] For example, if proven by a preponderance of the evidence that a firearm was used in the commission of a drug trafficking offense, the Guidelines required that judges impose an "enhancement" which directly translated to a higher sentence.[56] Notably, for certain offenses like drug crimes, judges were mandated to sentence according to the total amount of drugs connected to the defendant, notwithstanding what was actually charged.[57] Though the intricacies of the Guidelines are complicated, the fact that judges were to sentence according to a predetermined range based on a sentencing table[58]—taking into account all information proven beyond a preponderance at sentencing—

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[50] *See* Miller, *supra* note 3, at 274.

[51] *See generally* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1974).

[52] *See* Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1939 (1988).

[53] 28 U.S.C. § 994.

[54] *See, e.g.*, United States v. Booker, 543 U.S. 220, 227 (2005).

[55] *See id.*

[56] U.S. SENT'G GUIDELINES MANUAL § 2D1.1(b)(1) (U.S. SENT'G COMM'N 2018).

[57] *See Id.* § 1B1.3(a)(2) cmt. background ("Subsection (a)(2) provides for consideration of a broader range of conduct with respect to one class of offenses, primarily certain property, tax, fraud and drug offenses for which the guidelines depend substantially on quantity, than with respect to other offenses such as assault, robbery and burglary. The distinction is made on the basis of § 3D1.2(d), which provides for grouping together (i.e., treating as a single count) all counts charging offenses of a type covered by this subsection. However, the applicability of subsection (a)(2) does not depend upon whether multiple counts are alleged. Thus, in an embezzlement case, for example, embezzled funds that may not be specified in any count of conviction are nonetheless included in determining the offense level if they were part of the same course of conduct or part of the same scheme or plan as the count of conviction. Similarly, in a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction. On the other hand, in a robbery case in which the defendant robbed two banks, the amount of money taken in one robbery would not be taken into account in determining the guideline range for the other robbery, even if both robberies were part of a single course of conduct or the same scheme or plan. (This is true whether the defendant is convicted of one or both robberies.).")

[58] U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. A (U.S. SENT'G COMM'N 2018).

meant that every new piece of evidence at sentencing had the potential to increase the defendant's ultimate sentence.

Some judges began taking notice of the fact that mandatory sentencing under this scheme presented new problems. Two concurrences—from Judge Silberman on the D.C. Circuit in *United States v. McCrory*, and from Judge Easterbrook on the Seventh Circuit in *United States v. Jewel*[59]—vociferously argued that not applying the exclusionary rule at sentencing under the mandatory Guidelines regime constituted a "patent end-run around the exclusionary rule."[60] Prior to the mandatory regime, the effect of unconstitutionally seized evidence on sentences was uncertain.[61] While judges may have taken it into consideration, there was no direct causation between the evidence and a possible increase in sentence.[62] The Guidelines changed everything, particularly in the drug context. The Guidelines prescribed that courts sentence according to any conduct, like possession of additional drugs, that was "part of the same course of conduct or common scheme or plan as the offense of conviction."[63] Additionally, sentencing enhancements gave direct sentencing consequences to other facts, like possession of a firearm.[64] So long as such facts were proven by a preponderance of the evidence, the judge had to increase the defendant's sentence in line with pre-determined Guidelines.

What this meant was that sentencing became a new trial itself. And not one subject to any of the typical constraints, like the exclusionary rule.[65] Police and prosecutors alike now had a fool-proof mechanism for curing unconstitutionally seized evidence through a sentencing backdoor. In a case where at least one count already rested on constitutionally obtained evidence, prosecutors would charge based only on that evidence.[66] They would then introduce the unconstitutionally seized evidence at sentencing, which created

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[59] *See* United States v. McCrory, 930 F.2d 63, 70 (D.C. Cir. 1991) (Silberman, J., concurring); United States v. Jewel, 947 F.2d 224, 227 (7th Cir. 1991) (Easterbrook, J., concurring). Judge Easterbrook concurred in the judgment given the sentences were vacated on other grounds. Judge Silberman, though making his own view clear that "we are taking a big bite out of the exclusionary rule," concurred with the majority's opinion not applying the exclusionary rule, given Congress' apparent intent and the Supreme Court's hesitancy to extend the exclusionary rule.

[60] *McCrory*, 930 F.2d at 70 (Silberman, J., concurring). The conduct of the police and the unconstitutionally seized evidence implicated in the two cases are substantially different. In *Jewel*, the district court relied on a seized—likely unconstitutionally—videotape implicating the defendants. The majority did not reach the merits of exclusion because it vacated the sentences on other grounds. In *McCrory*, the police executed a controlled buy from the defendant and then called on a full SWAT team to search the defendant's home without a warrant, where large amounts of drugs and guns were discovered. The district court enhanced the defendant's sentence in line with the unconstitutionally seized evidence from this search.

[61] *See id.* at 71.

[62] *See id.*

[63] U.S. SENT'G GUIDELINES MANUAL § 1B1.3(a)(2) (U.S. SENT'G COMM'N 2018).

[64] *See id.* § 2D1.1(b)(1).

[65] *See* Cheryl G. Bader David, *Where to Draw the Guideline: Factoring the Fruits of Illegal Searches into Sentencing Guidelines Calculations*, 7 TOURO L. REV. 1, 35 (1990).

[66] *See* United States v. Jewel, 947 F.2d 224, 239 (7th Cir. 1991) (Easterbrook, J., concurring).

the same sentencing effect *as if it were charged*.[67] Functionally, there was no sentencing penalty for the unconstitutional seizure. Judge Easterbrook succinctly characterized the problem:

> So if the police seize a smidgen of cocaine legally, the suspect can be locked up for 20 years if the police seize another 1500 grams of rock cocaine, or 150 kilograms of powdered cocaine, in violation of the fourth amendment. By any account that would be a serious inroad on the exclusionary rule.[68]

In order to protect the Fourth Amendment ban on unreasonable searches and seizures from becoming a "parchment barrier" under this regime, some judges began suggesting exclusion at sentencing be considered.[69] But despite these protestations, no circuit court actually went so far as to exclude unconstitutionally obtained evidence at sentencing under the mandatory Guidelines. And with the Supreme Court's decision in *United States v. Booker* in 2005 striking down the mandatory implementation of the Guidelines—but still maintaining the Guidelines' hegemony in sentencing[70]—circuits have abandoned the exclusionary rule at sentencing altogether.

A trilogy of cases in the Seventh Circuit—often with the same judges sitting on the panels—demonstrates an evolution common across circuits.[71] In *United States v. Brimah*[72]—a pre-*Booker*, mandatory Guidelines case—the Seventh Circuit held that exclusion of unconstitutionally seized evidence was not required at sentencing. In *Brimah,* the police executed a controlled purchase of heroin from the defendant.[73] They then obtained a warrant specifying the scope of a subsequent search of his home, but disregarded its limits en route to securing 443 additional grams of heroin.[74] The defendant was only charged with the 100 grams implicated in the controlled buy, but the illegally-seized drugs still directly factored into his sentence.[75] Invoking the fact that by 2000 nine circuits had held the rule was generally inapplicable at

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[67] *See id.*
[68] *Id.* at 240.
[69] *See id.*
[70] *See generally* Judge Nancy Gertner, *Rita Needs Gall – How to Make the Guidelines Advisory*, 85 DENV. U. L. REV. 63 (2007).
[71] To see further examples of this evolution across circuits, *compare* the limited holding in United States v. Acosta, 303 F.3d 78, 86 (1st Cir. 2002) ("Given the great weight of the precedent and following the unanimous, reasoned approach of our sister circuits, we hold that the exclusionary rule does not bar the use of evidence seized in violation of a defendant's Fourth Amendment rights in sentencing. We leave open the question of whether the exclusionary rule would bar the use of evidence when police intentionally act in violation of the Fourth Amendment in order to increase a defendant's sentence."), *with* the absolute holding in United States v. Larios, 593 F.3d 82, 87 (1st Cir. 2010) ("The [district] court overruled his objection, correctly concluding that the exclusionary rule ordinarily does not bar the use of evidence obtained in violation of a defendant's Fourth Amendment rights in sentencing.").
[72] 214 F.3d 854, 859 (7th Cir. 2000).
[73] *See id.* at 855.
[74] *See id.*
[75] *See id.*

sentencing[76] and that there is only "a small risk that . . . law enforcement officials will intentionally violate a defendant's Fourth Amendment rights in order to increase a sentence,"[77] the court blessed the district court's use of the evidence. But the court caveated its decision. Tucked away in a footnote, the court noted that it may have reached a different decision if "it is shown that the police acted egregiously"—that is, if they intentionally violated the Constitution with an eye toward increasing the defendant's sentence.[78] Evidently cognizant of the concern expressed in *Jewel*—that allowing this evidence under mandatory Guidelines was an end-run around the exclusionary rule—the Seventh Circuit appeared to keep the door open to future applications of the exclusionary rule at sentencing.

The *Booker* decision making Guidelines non-mandatory ostensibly allayed the concerns identified in *Jewel*. So it is not surprising that in 2009, four years after the *Booker* decision, the Seventh Circuit in *United States v. Perez* similarly held that the exclusionary rule was not required.[79] Perez pleaded guilty to possession with intent to distribute in excess of 500 grams of cocaine.[80] The count stemmed from a valid search of the defendant's car.[81] After the defendant's arrest, police searched the defendant's home and exceeded the limited consent given by his wife.[82] In so doing, the police found more drugs, trafficking equipment, and illegally possessed firearms.[83] None of this evidence was charged in the indictment—likely to avoid a constitutional challenge—but the judge nonetheless chose to rely on all of the information in sentencing the defendant.[84] The Seventh Circuit affirmed, in spite of the conscious decisions of law enforcement to search the home *after* the discovery of drugs in Perez's car and his arrest. Applying the *Brimah* framework, the court found that the record was "devoid of any evidence that the police deliberately violated Perez's Fourth Amendment rights in seizing the drugs from his home with the intent to gather evidence to increase his sentence."[85] While nominally adhering to the safety valve in footnote four of *Brimah*, the court's logic was already unraveling.

By 2014—years after being fully freed from mandatory Guidelines—the Seventh Circuit arrived at its ultimate conclusion: the exclusionary rule

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[76] *See, e.g.*, United States v. Tauil-Hernandez, 88 F.3d 576, 580–81 (8th Cir. 1996); United States v. Montoya-Ortiz, 7 F.3d 1171, 1181 (5th Cir. 1993); United States v. Jenkins, 4 F.3d 1338, 1345 (6th Cir. 1993); United States v. Tejada, 956 F.2d 1256, 1263 (2d Cir. 1992); United States v. Jessup, 966 F.2d 1354, 1356–57 (10th Cir. 1992); United States v. McCrory, 930 F.2d 63, 70 (D.C. Cir. 1991) (Silberman, J., concurring); United States v. Torres, 926 F.2d 321, 325 (3d Cir. 1991); United States v. Lynch, 934 F.2d 1226, 1234–37 (11th Cir. 1991).

[77] *Brimah*, 214 F.3d at 859.

[78] *Id.* at 858 n.4.

[79] 581 F.3d 539, 544–45 (7th Cir. 2009).

[80] *Id.* at 543.

[81] *See id.* at 542.

[82] *Id.* at 543.

[83] *Id.*

[84] *Id.* at 543–44.

[85] *Id.* at 544.

simply does not apply at sentencing in any circumstance.[86] In *United States v. Sanders*,[87] Judge Easterbrook—once on the forefront of judicial opposition to allowing consideration of unconstitutionally seized evidence—put the discussion to rest. While the evidence seized illegally in *Sanders* was pursuant to a defective warrant, thus falling within an established good-faith exception to the exclusionary rule, the panel did not limit its holding to such facts.[88] Instead, it reached the conclusion that the exclusionary rule could never be applied at sentencing for three reasons. First, application of the exclusionary rule is an absolute question: it either applies at a certain stage of a proceeding always, or never at all.[89] Second, attempting to parse when a violation is "egregious" per the *Brimah* dicta is not judicially administrable.[90] Third, an egregious violation is not necessary to achieve deterrence where other remedies, like damages, would be appropriate.[91] The court remarked that to suppress evidence at sentencing—no matter how egregious the violation—would mean deeming Section 3661 (formerly Section 3577) unconstitutional as applied, an action no circuit could had taken.[92]

Decades after Representative Poff made his intent clear, he finally achieved his goal: the exclusionary rule would never apply at sentencing, in any circumstance.

II. Two Theories of Deterrence Justifying Exclusion at Sentencing in the Post-*Booker* Era

A fleeting period of judicial reconsideration of applying the exclusionary rule at sentencing ended with the Supreme Court's *Booker* decision.[93] As the evolution of cases in the Seventh Circuit demonstrates, we now find ourselves essentially back where the rule started in the sentencing context, if not worse. Although *Booker* may have facially fixed the problem identified by Judge Easterbrook brought on by mandatory sentencing guidelines, because

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[86] United States v. Sanders, 743 F.3d 471, 475 (7th Cir. 2014).
[87] *Id.*
[88] *See id.*
[89] *Id.* at 473.
[90] *Id.*
[91] *Id.* at 474.
[92] *Id.* at 473.
[93] The only scholarly discussion of applying the rule at sentencing—mostly inspired by Judge Easterbrook's *Jewel* opinion—also ended with *Booker*. *See, e.g.*, Pinyan, *supra* note 3, at 543–44 ("This Comment argues that the best way to distinguish between these situations is through an 'evidentiary' limitation, suggested in *Verdugo*, which would exclude evidence acquired in illegal searches only if the officers already have secured 'sufficient evidence to convict' the defendant of a related offense. Such a limitation would provide, by reference to objective criteria, the deterrence against illegal seizure of evidence that commentators fear is now lacking in the post-Guidelines world. Such a limitation would best approximate, in an objective manner, those cases in which 'substantial incentives' exist for illegal searches. This test would not only deter searches but would also be relatively easy to administer: judges would only need to examine the amount of physical evidence the officers had in hand at the time of the search in question to determine whether the illegally seized evidence should be excluded.").

courts can and do still consider unconstitutionally seized evidence, the sentencing backdoor continues to exist in practice.

Courts argue that there is no meaningful deterrence from the exclusionary rule at sentencing. But this Article argues that these courts are wrong: under their own logic that police do not fixate on increasing defendants' sentences, but rather on securing convictions,[94] meaningful deterrence will likely still be achieved by applying the exclusionary rule at sentencing in the post-*Booker* era. This section offers two theoretical justifications for why, under the theory of policing relied on by federal circuit courts, meaningful deterrence will come about through exclusion at sentencing.

A. The Broad Theory: There is No Difference Between an Increase in Sentence and Securing an Additional Conviction

When sentencing under the Federal Sentencing Guidelines—even after they became advisory—there is no meaningful difference between factoring in an additional conviction or just an increase in a defendant's sentence, such that an increase in sentence can be seen as a *de facto* conviction. Because this is the case, courts' own logic for not applying the exclusionary rule at sentencing—that police are concerned only with convictions, not increasing sentences—should in fact encourage the use of the rule to deter police from violating the Fourth Amendment.

The structure of the Guidelines makes this self-evident. As noted above, the Guidelines' structure for considering evidence introduced at sentencing either makes such evidence as relevant *as if the defendant were charged with it*[95] or directly factors such evidence into an enhancement.[96] For most crimes, then, unconstitutionally seized evidence need not support an additional charge pre-conviction to get the exact same result post-conviction at sentencing.[97] An average police officer cannot care at what stage evidence is considered as part of a defendant's conviction. As Judge Easterbrook pointed out, the sentencing backdoor allows police and prosecutors alike to obtain *de facto* convictions for additional crimes based on illegal evidence. And "[i]n proving such additional crimes, illegally seized evidence may play a central role—the same sort of role it used to play in supporting convictions on addi-

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[94] As a general matter, this conclusion is, of course, a shaky one. The question of what police are concerned with in seeking out evidence is an empirical one, and no court has offered any sort of statistical backing for this assertion. As Judge Easterbrook noted in *Jewel*, "[p]olice do not mull over the potential uses of evidence, fix on *a* use, and then seize the evidence for that purpose. Officers have multiple purposes—they want to close down drug operations (even if no prosecution ensues), they want to get the goods that will help turn a dope peddler against his supplier, they want to facilitate convictions, they want to maximize sentences when convictions occur. It is inconceivable that any defendant will be able to show that the police had only one of these purposes in mind when making a seizure." United States v. Jewel, 947 F.2d 224, 238 (7th Cir. 1991) (Easterbrook, J., concurring). This Paper, though, accepts the premise that police are only concerned with seeking convictions.

[95] *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.3(a)(2) (U.S. SENT'G COMM'N 2018).

[96] *See Id.* § 2D1.1.

[97] *Jewel*, 947 F.2d at 240.

tional counts."[98] The difference between an increase in sentence and a conviction on an additional count thus becomes semantic; without the exclusionary rule playing a role in sentencing, the Fourth Amendment offers no protection for a defendant already implicated in any crime.

Further, if under courts' logic, police are only concerned with getting convictions, then they should be equally concerned with *losing convictions*—that is, losing the *de facto* convictions that are obtained at sentencing through admission of illegally obtained evidence. The entire logic of the exclusionary rule since *Calandra*[99] has counted lost convictions as the chief "cost" of the rule, cautioning against wider application. But this is precisely how police officers are deterred from making unconstitutional searches and seizures, insofar as cases resting on illegal evidence are likely to be dismissed.[100] The inapplicability of the rule at sentencing functions as a type of judicial conviction-laundering—illegal evidence is cleaned by marshalling it through a sentencing process that counts it as perfectly legal, allowing these "convictions" to stand. This will not work when all evidence in a case was unconstitutionally seized, given the traditional exclusionary rule will bar a conviction.[101] But as soon as any minimal hook exists—any single potential conviction resting on good evidence—the mechanism for cleaning bad evidence at sentencing is available, and additional *de facto* convictions become available to the government.

The availability of these *de facto* convictions has two major effects. First, a "big bite" is taken out of the exclusionary rule as traditionally understood.[102] When police are able to obtain *de facto* convictions from illegal evidence, the exclusionary rule does less work. Prosecutors simply structure their indictments to obfuscate the constitutional violation by charging the bare minimum.[103] The only way an officer could potentially lose a conviction is if the prosecutor errs in charging *too much*, thus subjecting the unconstitutional evidence to the exclusionary rule at trial.[104] Even then, the prosecutor can just dismiss the count and reintroduce the evidence at sentencing.[105] If courts still believe in the efficacy of the exclusionary rule as a deterrent in the traditional sense, they must also guard against the complete vitiation of the rule through the sentencing backdoor.

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[98] *Id.*

[99] *See, e.g.*, Herring v. United States, 555 U.S. 135, 141–42 (2009) ("The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that offends basic concepts of the criminal justice system.") (citation omitted); Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357 (1998); United States v. Havens, 446 U.S. 620, 626–627 (1980); United States v. Payner, 447 U.S. 727, 734 (1980).

[100] Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1018 (1987).

[101] See, e.g., Mapp v. Ohio, 367 U.S. 643, 655 (1961).

[102] United States v. McCrory, 930 F.2d 63, 72 (D.C. Cir. 1991) (Silberman, J., concurring).

[103] *Jewel*, 947 F.2d at 240 (Easterbrook, J., concurring).

[104] *See id.*

[105] *See, e.g.*, Verdugo v. United States, 402 F.2d 599, 610 (9th Cir. 1968)

Second, police are actively incentivized to exceed the bounds of the Constitution once any minimal hook exists. And the egregiousness of the violation committed by the police is irrelevant under the current doctrine.[106] Deterrence of the police fundamentally works through police—as institutional actors—internalizing the rules that courts impose on them.[107] As officers over time lose convictions, the exclusionary rule works by teaching them that their actions will be for naught when they violate the Fourth Amendment.[108] Concomitantly, police offices design protocols to ensure compliance with constitutional rules and to sanction officers when the exclusionary rule has applied to an officer's violation. Where an exception to exclusion has been created, officers and offices alike should be expected to internalize such exceptions and shift their operations to be more in line with the exception.[109]

These two effects go hand-in-hand, and they are precisely what contributed to the police conduct in both *Verdugo* and *McCrory*. In both cases, the police had ample evidence to convict the defendant prior to Fourth Amendment violations. Knowing full-well that any additional evidence would support a *de facto* conviction not subject to the exclusionary rule at sentencing, they then go further. Consider the facts from *McCrory*, after evidence supporting the defendant's arrest and subsequent conviction had already been discovered:

> Outside, the officers field-tested the contents of the plastic bag and determined that the substance was 792 milligrams of 70 percent pure cocaine base. Then, the officers broadcast McCrory's description and precise location to an awaiting arrest team. Sergeant James Vucci, a member of the responding arrest team, forcibly entered Apartment 204 and detained McCrory, who matched the broadcast description. Vucci searched appellant's person, removing a gold nugget ring inscribed with the name "Keith" in diamonds, a Seiko watch with a gold leather band, and several gold chains. After Rollins and Jones identified McCrory as the person from whom they had purchased the crack cocaine ten minutes earlier, Vucci arrested him and charged him with cocaine distribution.[110]

This was no accident, but instead a conscious decision by the police to seek further evidence—without a warrant—knowing, regardless of its constitutionality, that it would support what is the equivalent of a conviction. In this circumstance, traditional Fourth Amendment protections are meaningless.

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[106] United States v. Sanders, 743 F.3d 471, 472 (7th Cir. 2014).

[107] *See, e.g.*, Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1082 (2011).

[108] Orfield, *supra* note 100, at 1052.

[109] The examples of this are myriad. For one particularly notable example, *see F.B.I, Memorandum,* N.Y. TIMES (Mar. 25, 2011), https://www.nytimes.com/2011/03/25/us/25miranda-text.html [https://perma.cc/J2Q6-MMAU].

[110] United States v. McCrory, 930 F.2d 63, 65 (D.C. Cir. 1991).

There is no warrant requirement once a good conviction exists.[111] There is no limited scope prescribed by a warrant.[112] And there is nothing constraining the police from, for instance, fully searching down a defendant,[113] ransacking his bedroom,[114] and tracking his every movement.[115]

Despite these institutional incentives, this strong-form of the consequences of non-application of the exclusionary rule at sentencing need not be dispositive of why exclusion is generally warranted. It should be generally applied—regardless of officer intent[116] or institutional policy—simply due to the nature that *de facto* convictions at sentencing are functionally the same as *de jure* convictions. Absent a good faith exception[117] to exclusion, the courts do not bless the admission of unconstitutionally seized evidence by police.

Some courts appear to believe that *Booker* fixed this fundamental flaw.[118] But even post-*Booker* police and prosecutors have good reason to think that unconstitutionally seized evidence will still be treated like a *de facto* additional conviction. Empirical research from the United States Sentencing Commission demonstrates the limits of *Booker* in reshaping the federal sentencing landscape. Fifteen years after the end of mandatory Guidelines, federal courts continue to sentence in line with the sentences that would have prevailed under the pre-*Booker* regime.[119] While within-range sentencing has fallen since 2005, federal courts continue to impose the Guidelines sentence at least fifty percent of the time.[120] And even where courts depart to impose a lower-than-Guidelines sentence today, approximately forty percent of the time they depart according to factors identified by the Sentencing Commission, which do not take into account constitutional violations.[121] This leaves thirty percent of cases overall in which courts vary from the Guidelines not according to factors identified by the Commission. Cases falling into this category *might be* taking into account unconstitutionally seized evidence. But this is unlikely to be the norm, given the Guidelines continue to be "the lodestone of sentencing" in federal court.[122]

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[111] *See, e.g.*, Katz v. United States, 389 U.S. 347, 357 (1967).

[112] *Id.*

[113] *See* Chimel v. California, 395 U.S. 752, 763 (1969).

[114] *See* Maryland v. Buie, 494 U.S. 325, 334 (1990).

[115] *See* Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018).

[116] Administration of the exclusionary rule is based on an objective test, not subjective intent. *See, e.g.*, Graham v. Connor, 490 U.S. 386, 397 (1989); Maryland v. Macon, 472 U.S. 463, 470–71 (1985); Scott v. United States, 436 U.S. 128, 136–38 (1978).

[117] *See, e.g.*, United States v. Leon, 468 U.S. 897, 920–21 (1984).

[118] *Compare* United States v. Jewel, 947 F.2d 224 (7th Cir. 1991) (Easterbrook, J., concurring), *with* United States v. Sanders, 743 F.3d 471, 472 (7th Cir. 2014). Judge Easterbrook wrote both opinions.

[119] United States Sent'g Comm'n, Federal Sentencing: The Basics 1, 3, (Aug. 2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201510_fed-sentencing-basics.pdf [https://perma.cc/9DU7-YD5Q].

[120] *Id.*

[121] *Id.*

[122] *Id.*

Moreover, the *Booker* decision was limited by its own terms. The Supreme Court struck down the mandatory imposition of the Federal Sentencing Guidelines on a jury trial right theory, rather than on grounds attacking the Guidelines' efficacy and logic.[123] And Justice Breyer's remedial opinion in the case—proposing that courts use "a practical standard of review already familiar to [them]: review for unreasonableness"[124]—has all but ensured that the Guidelines maintain their hegemony in federal sentencing. Federal appellate courts, aided by some limited guidance from the Supreme Court, have effectively interpreted *Booker* to mean that within Guidelines sentences are presumptively reasonable. In the words of a former federal judge:

> Recent appellate court decisions announcing that a Guideline sentence is presumptively reasonable bear an uncanny resemblance to pre-*Booker* decisions. They hold that deviation from Guideline ranges is rarely appropriate and only for reasons that are based on the same faulty premises that undergirded the mandatory regime. Appellate courts have insisted that district court judges begin with—effectively, "anchor" their decisions—in the Guidelines before considering anything else. After years of pointed criticism by scholars and some judges, the Sentencing Commission has suddenly become the fount of all sentencing wisdom, subject to a deference far beyond that given to any other administrative agency. Even the appellate courts that have not labeled the Guidelines presumptively reasonable have acted no differently from those that have. With one exception, no within-Guideline sentence has ever been reversed. Only departures, or the new "variances" under *Booker*, are.[125]

Further, recent studies of the federal courts suggest that judges experience significant "anchoring bias" under the Guidelines.[126] That is, the Guidelines range calculated by the presentence report and argued for by the prosecutor likely prevails; at a minimum it constrains the exercise of judicial discretion.[127] Accordingly, judges may still be disinclined to depart even when they consider whether unconstitutionally seized evidence should factor into a defendant's sentence.

One need not look beyond post-*Booker* case law to realize this remains a problem that could be deterred. Across the circuits and federal district

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[123] *See* Apprendi v. New Jersey, 530 U.S. 466, 492 (2000).

[124] United States v. Booker, 543 U.S. 220, 261 (2005) (citation omitted).

[125] Nancy Gertner, *What Yogi Berra Teaches About Post-Booker Sentencing*, 115 YALE L.J. POCKET PART 137, 140 (2006).

[126] *See, e.g.*, Mark W. Bennett, *A Judge's Attempt at Sentencing Inconsistency After Booker: Judge (Ret.) Mark W. Bennett's Guidelines for Sentencing*, 41 CARDOZO L. REV. 243, 254 (2019); *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489 (2014); Sarah M. R. Cravens, *Judging Discretion: Contexts for Understanding the Role of Judgment*, 64 U. MIAMI L. REV. 947, 962 (2010).

[127] *Id.*

courts, prosecutors continue to successfully marshal illegally seized evidence through the sentencing backdoor.[128] And police continue executing illegal searches and seizures after securing enough evidence to convict defendants on a minimum charge in order to secure additional *de facto* convictions at sentencing.[129] What the multitude of federal circuit court appeals grappling with the effect unconstitutionally seized evidence ought to have at sentencing represent is that trial court judges frequently rely on such evidence for sentencing. Where that remains the case, police will continue to engage in behavior that could be deterred.

This problem would likely still persist even if, in the future, the Guidelines lose their salience. Under today's doctrine, the exclusionary rule does not apply at sentencing as an absolute matter.[130] Again, the police as institutional actors are thus likely to structure their operations in line with such a broad exception to Fourth Amendment protections. Even in a non-Guidelines world, the effect of using unconstitutionally seized evidence at sentencing is a *de facto* additional conviction, just a less visibly apparent, less predetermined, and less direct one. Which is to say, the early circuit cases—those prior to the Guidelines—not applying the exclusionary rule at sentencing[131] should have suppressed unconstitutionally seized evidence, too. Federal sentencing ranges are notoriously broad. For instance, the sentence for a person convicted of possession of at least 100 grams of heroin ranges from a minimum of five years to a maximum of forty.[132] Police cannot be sure *exactly* what sentence a defendant will receive when faced with such ranges.

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[128] *See, e.g.,* United States v. Perez, 581 F.3d 539, 543 (7th Cir. 2009) ("The Lake County officers then notified the Illinois State Police Narcotics Unit of the arrest. The ISP officers subsequently went to Perez's home in Cicero, Illinois and received consent to search the home from Perez's wife, Ana Perez. Once inside, the officers retrieved a variety of narcotics including 425.1 net grams of heroin, 985.9 net grams of powder cocaine, 930.0 net grams of marijuana, and 227.7 net grams of methamphetamine. The drugs were mostly found in an east storage room but some were found in the garage. Also in the garage, the officers retrieved two large hydraulic presses suitable for packaging kilograms of cocaine. One of the presses was equipped with a wooden plate with the silhouette of a lizard on it—the exact lizard design pressed onto the brick of cocaine retrieved from Perez's vehicle earlier that day."); United States v. Warwick, No. 16-CR-4572-WJ, 2018 WL 3056049, at *10 (D.N.M. June 20, 2018) ("Defendant argues that he should not receive the sentencing enhancement pursuant to USSG § 2K2.1(b)(1)(A), which provides for a two-point increase if the offense involved three to seven firearms. Defendant asserts that under United States v. Jessup, 966 F.2d 1354 (10th Cir. 1992), the exclusionary rule may be applied at sentencing in an effort to deter Fourth Amendment violations by law enforcement. Doc. 138 at 2. The Government and the Probation Officer contend that although the two firearms recovered on November 7 were suppressed for the purposes of trial, the relevant conduct standards provide that the firearms should be considered for sentencing . . . The Court agrees with the Government . . ."); United States v. Hoang, 285 F. App'x 133, 137 (5th Cir. 2008) ("Tinh next argues that the district court erroneously enhanced his offense level based on two firearms that had been suppressed, and he urges us to follow a Sixth Circuit case to find reversible error. We have previously held, however, that the exclusionary rule does not apply to the district court's consideration of evidence at sentencing. . . . We are bound by our precedent."). United States v. Sanders, 743 F.3d 471, 475 (7th Cir. 2014).

[129] *Id.*

[130] *Sanders*, 743 F.3d at 475.

[131] *See supra* Part I.

[132] 21 U.S.C. § 841.

Charging decisions are outside their control. So is plea-bargaining. And so are myriad other intervening decisions and events, including the exercise of judicial discretion in imposing the ultimate sentence. If some additional, unconstitutionally seized evidence is considered at all and has a tangible effect—as is particularly the case where the judge articulates reliance on the additional evidence—it still functions as an additional *de facto* conviction. The distinction between an increase in sentence and a *de facto* conviction remains thin.

The uncertainty of sentences in such a regime certainly affects the analysis. Yet, if non-application of the exclusionary rule at sentencing means unconstitutionally seized evidence will at least *sometimes* be considered to increase the defendant's sentence, police should be expected to violate the Constitution once any facts supporting a conviction have been discovered if they consider the possibility of additional *de facto* convictions higher than potential loss of *de facto* convictions. How often this would actually be the case is an empirical question beyond the scope of this Article. Under the balancing test proposed by the Supreme Court in *Calandra*[133] and its progeny, the deterrence achieved via exclusion must be meaningful marginal deterrence. As such, if such occurrences were infrequent, perhaps exclusion at sentencing would be an inappropriate remedy under current Supreme Court law.

But the sorry state of ancillary Fourth Amendment remedies suggests that there would be instances in which such a situation would arise. Beyond the exclusionary rule, the greatest potential deterrent to police is § 1983 actions for damages.[134] However, the actual effect of § 1983 in deterring the police specifically from violating the Constitution is limited at best.[135] This is due in large part to the doctrine of qualified immunity, which "provides ample protection [from civil liability under § 1983] to all but the plainly incompetent or those who knowingly violate the law."[136] As a general matter, then, the only cost to the police of introduction of unconstitutional evidence at sentencing is the potential loss of a *de facto* conviction, whereas the potential windfall—additional, though uncertain, *de facto* convictions—may be

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[133] *See, e.g.*, United States v. Calandra, 414 U.S. 338, 350 (1974) ("[I]t does not follow that the Fourth Amendment requires adoption of every proposal that might deter police misconduct.").

[134] 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.").

[135] *See, e.g.*, Matthew V. Hess, *Good Cop-Bad Cop: Reassessing the Legal Remedies for Police Misconduct*, 1993 UTAH L. REV. 149, 158 (1993).

[136] Malley v. Briggs, 475 U.S. 335, 341 (1986).

potentially large. How many officers would engage in such behavior in a non-Guidelines system must necessarily remain unanswered for now.

B. The Narrow Theory: Lack of Exclusion Secures Easier Convictions at the Plea-Bargaining Stage

An additional *de facto* conviction—a pre-determined increase in sentence, in other words—is the most visible, but not necessarily the most consequential, result of the use of illegally obtained evidence during sentencing. By allowing prosecutors to marshal illegal evidence through the sentencing backdoor, courts enable prosecutors to secure easier convictions through plea deals. If the oft-invoked purpose of searches and seizures by police is to secure convictions, then this too justifies exclusion at sentencing.

Today, over ninety-seven percent of federal criminal cases are settled through guilty pleas.[137] The proliferation of guilty pleas in the federal system is caused by many factors. Prosecutors seek convictions as a foremost goal on the path toward trial. But, securing it at the lowest possible cost to the state—in terms of time, resources, and possible risk of losing at trial— is similarly important.[138] This latter point underlies the benefits of plea-bargaining from the prosecutor's perspective; he or she can minimize all of the costs of potentially taking a case to trial by inducing a defendant to plea.[139] In some circumstances, prosecutors may simply deem getting a conviction—even if not the highest possible sentence—at little cost to the office a sufficient goal, particularly if the conduct pled to carries with it a lengthy mandatory minimum sentence.[140]

From the defendant's perspective, pleading guilty may come with some benefit, too. The most obvious benefit is avoiding the so-called "trial penalty" that occurs from refusing to plead guilty.[141] Where a defendant does not plead, prosecutors may issue a superseding indictment charging the defendant with more counts based on his actual conduct.[142] With this comes greater exposure to criminal liability and a potentially higher sentence.[143] Moreover, under the Sentencing Guidelines especially, defendants may receive a tangible benefit—in the form of a offense level reduction—by appearing to "accept responsibility."[144] in the form of a guilty plea or by offering

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[137] Nat'l Ass'n of Crim. Def. Laws., *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, 31 FED. SENT. REP. 331, 333 (2019),

[138] *See, e.g.*, Inga Ivsan, *To Plea or Not to Plea: How Plea Bargains Criminalize the Right to Trial and Undermine Our Adversarial System of Justice*, 39 N.C. CENT. L. REV. 135, 148 (2017) (footnote omitted).

[139] *Id.*

[140] *See, e.g.*, H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 82 (2011).

[141] Nat'l Ass'n of Crim. Def. Laws., *supra* note 137, at 331.

[142] *See id.* at 341.

[143] *See id.*

[144] *See, e.g.*, U.S. SENT'G GUIDELINES MANUAL § 3E1.1(a) (U.S. SENT'G COMM'N 2018) ("If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.").

"substantial assistance" to another law-enforcement investigation.[145] Of course, the Guidelines did not invent this benefit to the defendant, but instead made it more tangible. Because judges have traditionally been called on to exercise broad discretion in assessing the totality of the defendant's character at sentencing, pleading guilty has often been associated with a reduction in sentence due to the apparent "repentance" shown by the defendant.[146]

Plea bargaining is necessarily contextualized and driven by the leverage both sides have and the benefits that each side seeks. For the prosecutor, a charging decision is the quintessential form of leverage. This is just the other side of the coin of the benefit of avoidance of the trial penalty sought by the defendant.[147] Prosecutors may "stack" charges—multiple counts associated with the same underlying conduct—to induce defendants to plea in exchange for dropping counts.[148]

The sentencing backdoor only adds to prosecutors' leverage, creating a simple and effective means to secure a guilty plea in a minimum amount of time. The threat of the use of unconstitutionally seized evidence is an impactful form of prosecutorial leverage. The mechanism is straightforward. Because unconstitutionally seized evidence faces the prospect of exclusion pre-trial, but no prospect of exclusion at sentencing generally, the prosecutor only brings charges based on the good evidence—a "smidgen" of the total evidence seized by the police, in Judge Easterbrook's words.[149] The prosecutor can now plea bargain in the shadow of this illegally seized evidence,[150]

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[145] *Id.* § 5K1.1.

[146] *See, e.g.*, Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204, 209–10 (1956) ("The predominant basis for a court's considering a defendant pleading guilty less culpable than one denying guilt is the belief that a guilty plea demonstrates the readiness of the accused to accept responsibility for his criminal acts. Judges feel that such a confession of wrongdoing evinces a repentant attitude, and thus represents an important step toward rehabilitation of the accused. A few judges added the qualification that a guilty plea would not be considered evidence of reformation unless the accused had no prior criminal record.").

[147] *See* Caldwell, *supra* note 140, at 83.

[148] *See id.*

[149] United States v. Jewel, 947 F.2d 224, 240 (7th Cir. 1991) (Easterbrook, J., concurring).

[150] In the absence of the exclusionary rule, defendants need to consider more than the *possibility* of admission of illegally seized evidence at sentencing; indeed, they should prepare for the admission of such evidence. For context on plea-bargaining in the context of Fourth Amendment violations, see Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 937 (1980) ("In a plea bargaining situation, the bargaining advantage enjoyed by the prosecution as a result of an illegal search is the risk to the defendant that the fruits of the search will be admissible at trial. The defendant bases his estimation of chances of acquittal at trial, and thus the attractiveness of the proffered plea bargain, upon the state's evidence. If some of that evidence appears to have been illegally seized, the defendant will discount its value because it might be inadmissible at trial. However, he will never be completely certain that a motion to suppress would succeed; he must, therefore, give some weight to the illegally obtained evidence. Hence, the defendant will be choosing his plea based in part upon evidence that might have been found inadmissible at trial. The prosecution, therefore, profits from the violation of the fourth amendment by procuring a guilty plea from a defendant who might have demanded either a trial or a greater sentencing concession had he been certain that the evidence was inadmissible. These advantages gained by the prosecution from violating the fourth amendment would seem sufficient to encourage future violations.").

given the looming prospect of a *de facto* additional conviction—equally as impactful as a charged count—at sentencing.[151] Just like charges that were stacked, then, prosecutors can effectively "drop" the *de facto* count from their indictment. They might offer to refrain from arguing that unconstitutionally seized evidence factor into the defendant's sentence or refrain from seeking a sentence enhancement under the Guidelines. And the defendant may swiftly plead to avoid a lengthy sentence. The result of all of this is that allowing evidence in at sentencing provides further leverage to prosecutors, and easier convictions—an incentive to police to continue violating the Fourth Amendment, in other words.

For the exclusionary rule to apply, the actors whose conduct is subject to judicial regulation must be impacted. In other words, the police must be affected.[152] Once established that illegally seized evidence provides for easier convictions for prosecutors, tying the operation of this dynamic back to the police is simple. As an initial matter, police may be aware of the fact that prosecutors can bargain in the shadow of illegally seized evidence. This might incentivize them to execute unlawful searches and seizures to ensure that the defendant pleads to the charged conduct. And this alone creates the possibility that police can be deterred from violating the Fourth Amendment, given that the prospect of a concrete conviction is on the line.

There is no need to speculate, however. Police and prosecutors often work hand-in-hand to tackle crime.[153] For example, since at least the mid-1980s, many police and prosecutors' offices have moved toward a "community prosecution model" whereby the two offices intimately cooperate with one another within a jurisdiction as a means of efficaciously obtaining convictions.[154] Where this is the case, the "prosecutor assumes a leadership role in working closely with . . . other criminal justice agencies in the community," and "boundaries demarcating the prosecutor's office from other justice, public/governmental and private agencies are increasingly permeated as they become partners."[155] The nature of these relationships has generated much scholarly work on the inherent conflict of interest that exists when prosecutors are tasked with seeking convictions of police officers.[156] In the case of using unconstitutionally seized evidence to obtain convictions against ordinary defendants, however, there is a harmony of interests between police and

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[151] This situation is closely analogous to the pattern of overcharging that occurs during plea bargaining. *See* Caldwell, *supra* note 140, at 83.

[152] *See, e.g.*, United States v. Leon, 468 U.S. 897, 926 (1984).

[153] *See, e.g.*, Alexandra Hodson, *The American Injustice System: The Inherent Conflict of Interest in Police-Prosecutor Relationships & How Immunity Lets Them 'Get Away with Murder'*, 54 IDAHO L. REV. 563, 586 (2018).

[154] *Id.* at 585–86.

[155] Catherine M. Coles, *Community Prosecution, Problem Solving, and Public Accountability: The Evolving Strategy of the American Prosecutor* 26 (Harv. Univ. Malcolm Wiener Ctr. For Soc. Pol'y Program in Crim. J. Pol'y & Mgmt., Working Paper No. 00-02-04, 2000), https://www.innovations.harvard.edu/sites/default/files/community_prosecution.pdf [https://perma.cc/X3NE-ZRYD].

[156] *See, e.g.*, Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1489 (2016).

prosecutors. Both offices can count a conviction as a win. The result? Allowing the evidence in benefits police officers in that their illegally seized evidence allows easier convictions. And vice versa: not allowing the evidence in at sentencing would remove that "benefit" and further deter police from violating the Fourth Amendment.

If the analysis ended here, there would still likely be meaningful deterrence from applying the exclusionary rule at sentencing. But it does not end here: this process does not capture all of the benefits to prosecutors and police alike from the existence of the sentencing backdoor. Prosecutors may also be motivated to secure a minimum desired sentence.[157] And this goal may complicate securing an initial conviction in the first place. If prosecutors must offer a defendant a deal to induce his plea—such as agreeing not to argue for the highest sentence or dropping a charge—then they necessarily cannot seek the highest available sentence. If prosecutors want to capture the "actual conduct" of the defendant and seek a sentence commensurate with such conduct, then they may charge more from the outset. This in turn will either force the prosecutor to bargain more or force him to forego the benefits of plea bargaining altogether. Indeed, a defendant may seek further concessions from the prosecutor in light of the higher potential criminal liability or just test his case at trial knowing the severe sentence he may receive.

In many cases, the mechanism through which unconstitutionally seized evidence becomes a *de facto* conviction at sentencing offers prosecutors a panacea to securing both a quick guilty plea and the highest possible sentence. Again, because prosecutors cannot generally successfully charge unconstitutionally seized evidence in an indictment, their charging decisions are simplified. Indictments become inherently lighter and less contentious where only a count resting on a solid evidentiary ground is charged—the minimum "hook" to get prosecutors to sentencing.[158] So while in some instances the prosecutor may have to forego seeking the highest possible sentence for the defendant in order to induce the defendant to plea—perhaps by promising not to introduce the illegally obtained evidence at sentencing or argue it to the judge[159]—this will not always be the case. Often, there may be simply nothing left to dispute from the perspective of the defendant. And he may just plead to show that he accepts his punishment in order to salvage *some* benefit, like a potential reduction in sentence.[160] In this scenario, too, the effect of unconstitutionally seized evidence in securing an easier conviction—this time with an eye toward a higher sentence—is manifest. And so exclusion promises deterrence of the police.

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[157] *See, e.g.*, Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 86 (1995).

[158] *See, e.g.*, United States v. Jewel, 947 F.2d 224, 240 (7th Cir. 1991) (Easterbrook, J., concurring).

[159] *See, e.g.*, Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 802 (2003).

[160] *See, e.g.*, U.S. SENT'G GUIDELINES MANUAL § 3E1.1(a) (U.S. SENT'G COMM'N 2018) ("If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.").

III. Moving Forward: Possible Approaches from the Courts, the Sentencing Commission, and Congress

Since the Supreme Court's decision in *Booker*, federal sentencing has been in a place of purgatory: Guidelines have lost their mandatory thrust, but the sentences calculated under them affect each sentencing decision and often prevail without question.[161] In light of this state of flux, judges do have options, although legislative—or quasi-legislative, from the perspective of the Sentencing Commission—action is sorely needed.

Foremost, federal district court judges hold more power today post-*Booker* and should exercise it in excluding unconstitutionally seized evidence where appropriate. Although not "free at last" from the Sentencing Guidelines[162] and constrained for all of the aforementioned reasons, federal district courts now have the power to issue "variances" from the Guidelines when they disagree with the Guidelines sentence.[163] In order to exclude unconstitutionally seized evidence from factoring into the defendant's Guidelines calculation, courts must "vary," rather than depart, given that the Sentencing commission has not issued a valid departure in this case.[164] When courts issue variances, they generally look to the sentencing factors elaborated in 18 U.S.C. § 3553(a)[165] to explain how the sentence calculated by the Guidelines is inapposite in the case at hand. In theory, then, district courts could

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[161] *See supra* Part II.

[162] United States v. Jaber, 362 F.Supp.2d 365, 370 (D. Mass. 2005).

[163] *See* U.S. Sent'g Comm'n, Primer: Departures and Variances 1 (2020), https://www.ussc.gov/sites/default/files/pdf/training/primers/2020_Primer_Departure_Variance.pdf [https://perma.cc/GZC8-PVVA].

[164] *Id.*

[165] Factors to Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

apply sentencing variances under the Guidelines as a means of applying the exclusionary rule.

This approach has its problems. Federal sentencing decisions still remain subject to appeal. With its decision in *Gall v. United States*, the Supreme Court clarified that out-of-Guidelines sentences may not be subjected to a standard of review of presumptive unreasonableness, but nonetheless remain subject to abuse-of-discretion review.[166] Given how strongly circuit courts have disagreed with application of the exclusionary rule at sentencing, the possibility that a district court could be reversed for varying downwards from a Guidelines-based sentence is high. And based on the Supreme Court's reluctance to speak to the issue of exclusion at sentencing, let alone expand the exclusionary rule, the chance that a circuit court's reversal would be reviewed is low.[167]

Operating under this framework, district courts seeking to exclude unconstitutionally seized evidence introduced at sentencing would need to do so inconspicuously. 18 U.S.C. § 3553(a) provides broad cover for courts to explain why they are varying.[168] In the same way that district courts cannot simply eschew the Guidelines calculation as a general matter,[169] appellate courts might reverse on account of legal error where a district court explicitly applies the exclusionary rule under the Guidelines. What's left is a narrow space for judicial maneuvering—apply the exclusionary rule to unconstitutionally seized evidence at sentencing but justify the variance on other grounds.

While the defendant in any case would be pleased with such a result, it provides little to no systemic value. Again, exclusion—as currently formu-

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(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

[166] 552 U.S. 38, 51 (2007).

[167] *See, e.g.*, United States v. McCrory, 930 F.2d 63, 72 (D.C. Cir. 1991) (Silberman, J., concurring in part and concurring in the judgment) ("Nevertheless, I do not dissent. The Supreme Court in recent years has been extremely hesitant to extend the exclusionary rule . . . , and particularly to extend it to non-trial proceedings.").

[168] *See, e.g.*, U.S. SENT'G COMM'N, *supra* 163, at 1.

[169] *See, e.g.*, United States v. Jaber, 362 F.Supp.2d 365, 370 (D. Mass. 2005); United States v. Bruce, 413 F.3d 784, 785 (8th Cir. 2005) ("[I]t is clear that the district court erred by not consulting the guidelines and taking them into account during Bruce's sentencing.").

lated—is a means to an end, not an end itself. That end goal is deterrence of the police,[170] which is unlikely to be meaningfully achieved with one-off judicial decisions obscuring the true rationale for non-reliance on the Guidelines.[171] Further, judicial invention of this sort requires extensive motivation and judicial will. Adhering to the Guidelines is still overwhelmingly the norm, and courts may tread lightly where reversal looms large. And the Guidelines have been the dominant sentencing paradigm for years. As a federal judge, Judge Nancy Gertner once wondered: "What does it take to restore judicial sentencing authority after nearly twenty years of passivity, after the judicial culture has fundamentally changed, not to mention the political atmosphere, and after judicial sentencing expertise, to the extent it existed at all, has become vestigial?"[172]

The most obvious remedy—if the Guidelines are to endure—is promulgation of a departure by the Sentencing Commission related to exclusion of unconstitutionally seized evidence at sentencing.[173] This approach comes with its benefits, namely that a clear message is sent to police officers and prosecutors alike regarding the availability of *de facto* convictions based on unconstitutionally seized evidence introduced at sentencing. Such a quasi-statutory provision may well achieve some level of deterrence of the police, much like a Supreme Court case holding exclusion a proper remedy for a constitutional violation.[174]

What form such a departure would take is left open. Pre-*Booker*, some scholars suggested that the Sentencing Commission promulgate a departure to implement the exclusionary rule in a limited fashion, only excluding unconstitutionally seized evidence where the police had violated the Constitution following obtaining enough evidence to convict, or acted with the specific intent of increasing the defendant's sentence.[175] But this approach runs directly counter to the doctrine of the exclusionary rule generally, insofar as courts are commanded not to examine the subjective intent of officers.[176] Moreover, it may be "inconceivable" that defendants could make the required showing about the inner mind of a police officer under such a rule.[177] Because this Paper has argued that unconstitutionally seized evidence introduced at sentencing is both a *de facto* conviction and has a tangible effect on obtaining concrete convictions during plea bargaining from an ob-

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[170] *See supra* Part II.

[171] Again, for exclusion to achieve deterrence, police officers and offices must internalize the rules. Although officers may be able to deduce why a district court judge varied where unconstitutionally seized evidence is implicated, we are left to speculate if that would have any true effect on police practices. See *supra* Part II.

[172] Judge Nancy Gertner, *Thoughts on Reasonableness*, 19 FED. SENT. R. 165, 165 (2007).

[173] *See, e.g.*, U.S. SENT'G COMM'N, *supra* 163, at 1.

[174] It would be part of the Guidelines, not the Federal Code.

[175] Pinyan, *supra* note 3, at 524–25.

[176] *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 587 (2006); United States v. Leon, 468 U.S. 897, 919–20 (1984).

[177] United States v. Jewel, 947 F.2d 224, 238 (7th Cir. 1991) (Easterbrook, J., concurring).

jective point of view, action by the Sentencing Commission would need to be absolute. Objective incentives demand objective deterrence. The exclusionary rule—perhaps subject to the usual good faith[178] and causation[179] exceptions—must apply to such evidence, or it must not.[180]

Beyond questions of implementation, this approach, too, is imperfect. Federal courts would remain free to apply variances—in this case, upwards—under today's sentencing regime, meaning compliance with such a rule would not be universal.[181]

So, we are left where we began: the Supreme Court and Congress. A Supreme Court rule barring the admission of unconstitutionally seized evidence at sentencing would undoubtedly deliver deterrence to police officers. Again, we are left with the same questions of form and scope noted above. And whether a Supreme Court that has incrementally chipped away at Fourth Amendment protections would render such a rule—especially in light of needing to declare a statute unconstitutional as applied—is a matter of speculation. Congress, too, could act to amend Section 3566 to reflect the need for an exclusionary rule at sentencing. Perhaps congressional sentiment toward the exclusionary rule has changed since 1970, though it is unlikely that is the case. There are likely myriad other areas the rule could be expanded to before sentencing which would have more impact.[182] Congress' failure to promulgate such rules—indeed its failure to ever expand the protections of the exclusionary rule—reflects legislative indifference at best, and animosity toward the exclusionary rule at worst.

The systemic problems associated with non-exclusion of evidence at sentencing will continue until there is a systemic solution. Until then, judges—acting in their individual capacities—should apply it as appropriate. A "spigot-like" approach may not deliver the meaningful deterrence warranted by this problem, but it may send a message.

Conclusion

This Paper has argued that the exclusionary rule is an appropriate remedy for unconstitutionally seized evidence at sentencing. The judicial assertion that police are primarily motivated by seeking convictions, not increasing defendants' sentences, does not undercut this conclusion. Because unconstitutionally seized evidence leads to convictions—both *de facto* in the

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[178] *See, e.g.*, *Leon*, 468 U.S. at 908.

[179] *See, e.g.*, *Hudson*, 547 U.S. at 594.

[180] *Jewel*, 947 F.2d at 239 (Easterbrook, J., concurring) ("In the end we will have a simple answer: the exclusionary rule applies to sentencing, or it does not.").

[181] *See, e.g.*, U.S. Sent'g Comm'n, *supra* 163, at 1.

[182] *See, e.g.*, Herring v. United States, 555 U.S. 135, 144 (2009) (holding that the exclusionary rule applies only to "deliberate, reckless, or grossly negligent conduct," not merely negligent conduct).

form of tangible increases in sentences and concretely through plea bargaining—meaningful deterrence of the police will be achieved through exclusion.

Lawyers and judges alike must often work within the current legal framework—no matter the issue—to achieve their goals. Where the goal is suppression of unconstitutionally seized evidence at sentencing to avoid a lengthy increase in sentence, they must speak in the language of deterrence. But the legal community would do well to remember that a "more majestic conception" of the Fourth Amendment and the exclusionary rule existed in the not-so-distant past.[183] A conception of the exclusionary rule that considered it "part and parcel" of the Fourth Amendment—a right, not a mere tool of regulation.

There is a special indignity imposed on a defendant where the police and prosecutor alike brazenly profit from their own constitutional violations. Sentences serve many functions. They punish. They deter. They incapacitate. But they also teach. They teach the offender that he must adhere to the rule of law. And they teach those looking on that there is a price to pay when one runs afoul of the law. When law enforcement violates these same rules, lessons are also drawn. Justice Brandeis took note of this nearly a century ago when he wrote:

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means-to declare that the government may commit crimes in order to secure the conviction of a private criminal-would bring terrible retribution.[184]

We should not be left to wonder whether an offender can learn respect for the law while locked behind bars for an additional five, or ten, or twenty years as a direct consequence of government malfeasance. Judges at all levels of the federal system must remain vigilant in guarding the integrity of our system.

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[183] Arizona v. Evans, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting).
[184] Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

One Bad Apple May Spoil the Bunch: Title VII Mixed-Motives Claims and Groupthink

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INTRODUCTION

In 2014, biochemist Beverly Emerson was elected to the post of faculty chairwoman of the Salk Institute for Biological Studies.[1] From this position, Emerson pushed to include more women in leadership, but she was met with resistance from her male counterparts.[2] Indeed, at one point, a male coworker told her: "[B]oys run committees and boys choose boys."[3] Salk relied on the faculty committee for major employment decisions, including hiring and allocating research funds to scientists.[4] Due to the discriminatory views of male counterparts, the female researchers of Salk struggled to be elevated to leadership positions and to receive the funds necessary to pursue their research agendas.[5] Multiple forms of discrimination—involving decisions to hire, promote, and fire diverse employees—persist in some workplaces today, and courts are repeatedly called upon to address these issues.

New corporate structures have complicated the legal analysis in employment discrimination cases. Today, it is common practice among institutions, large and small, to use groups or committees to hire and promote employees.[6] Under such a decision-making structure—referred to hereinafter as horizontal decision-making—the bias of even a single member of a hiring committee may impact the decision of the group acting on behalf of an organization. Such bias can lead to discriminatory employment decisions and, ultimately, Title VII litigation. Horizontal decision-making cases, however, do not fit easily into the current jurisprudence. Existing Supreme Court precedent only addresses vertical decision-making cases, where the discriminatory animus rests with other members of the organization—often a supervisor—and not the ultimate decision maker.[7]

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[1] Mallory Pickett, *'I Want What My Male Colleague Has, and that Will Cost a Few Million Dollars,'* N.Y. TIMES (April 18, 2019), https://www.nytimes.com/2019/04/18/magazine/salk-institute-discrimination-science.html [https://perma.cc/25PM-PL45].

[2] Ultimately, Emerson and her fellow senior female professors settled in a trio of lawsuits. Meredith Waldman, *Salk Institute Settles Last of Three Gender Discrimination Lawsuits*, SCI. MAG. (Nov. 21, 2018), https://www.sciencemag.org/news/2018/11/salk-institute-settles-last-three-gender-discrimination-lawsuits [https://perma.cc/W9S7-YSQV].

[3] Pickett, *supra* note 1.

[4] *Id.*

[5] *Id.*

[6] *See, e.g.*, Atta Tarki, *How to Avoid Groupthink When Hiring*, HARV. BUS. REV. (Aug. 13, 2019), https://hbr.org/2019/08/how-to-avoid-groupthink-when-hiring [https://perma.cc/GRY5-549D]; HARV. UNIV., FAC. OF ARTS & SCIS., 2018–2019 TENURE-TRACK HANDBOOK (2018), https://facultyresources.fas.harvard.edu/files/facultyresources/files/final_2018_2019_tenure_track_hbk_for_website.pdf [https://perma.cc/59XD-TQAN].

[7] For the purposes of this Note, vertical decision-making refers to circumstances in which a lower-level supervisor—for discrimination cases, harboring discriminatory animus—recommends an adverse employment action to the ultimate decision maker. *See* Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision-making*, 61 LA. L. REV. 495, 496 (2001) (coining the terms "vertical" and "horizontal" decision-making). Notably, in vertical decision-making cases, the ultimate decision maker may be unaware of the discriminatory animus. *See also* Staub v. Proctor Hospital, 562 U.S. 411, 421 (2011) (holding that "if the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action[—]by the terms of

This Note explores the development of jurisprudence concerning Title VII employment discrimination cases since the adoption of the 1991 amendments to Title VII contained in § 703(m)[8] and § 706(g)(2)(B).[9] This Note argues that since the adoption of the 1991 amendments, lower courts have struggled with how to apply those provisions in horizontal decision-making cases.[10] Currently, neither Congress nor courts have established a definitive standard for what constitutes a "motivating factor,"[11] which is the legal standard under § 703(m) to prove a Title VII discrimination claim. Likewise, there is no guidance addressing what evidence is sufficient for a defendant to carry its "but-for" defense by proving it "would have taken the same action in the absence of the impermissible motivating factor" pursuant to § 706(g)(2)(B).[12] Importantly, in horizontal decision-making cases in which one or a few, but not all, members of a committee may have harbored discriminatory animus, it can be very difficult for a plaintiff to overcome the defendant's "but-for" § 706(g)(2)(B) defense, as the employer can present the testimony of other, non-biased committee members.

This Note argues for a new interpretation of and approach to § 703(m) cases by proposing a definition of "motivating factor," as well as an approach for courts to use in considering new types of evidence under § 703(m) and § 706(g)(2)(B) in horizontal decision-making cases. Guiding courts with a clearer definitions and standards for § 703(m) and § 706(g)(2)(B) would potentially animate those provisions in a manner consistent with Congressional intent in the Civil Rights Act of 1991.[13] Clarifying the evidentiary practices could also have important practical implications. Current jurisprudential ambiguity concerning horizontal decision-making cases has arguably had a chil-

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USERRA it is the employer's burden to establish that[—]then the employer will not be liable. But the supervisor's biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified.").

[8] 42 U.S.C. § 2000 e-2(m) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.").

[9] *Id.* -5(g)(2)(B) ("On a claim in which an individual proves a violation under section 2000e-2(m) of this title [section 703(m)] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court- (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title [section 703(m)]; and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).").

[10] *See* LEX K. LARSON, LARSON'S EMPLOYMENT DISCRIMINATION, § 8.04 (2d. 2003) (stating that "it may be difficult or impossible to show intentional discrimination when more than one decision maker is involved"). *See also* Austin v. City of Chicago, No. 14-cv-9823, 2018 WL 1508484, at *12 (N.D. Ill. Mar. 27, 2018) (observing that the "presence of multiple decision-makers often makes it 'difficult' to prove that an employer's action is discriminatory").

[11] 42 U.S.C. § 2000e-2(m).

[12] 42 U.S.C. § 2000e-5(g)(2)(B).

[13] *See* Pub L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C).

ling effect on legal actions, as plaintiffs and their lawyers are confused and uncertain of the risks of bringing a Title VII case under § 703(m).[14]

In considering the evidence that could be admissible under § 703(m) and the § 706(g)(2)(B) "but-for" standard, this Note looks to academic research on groupthink[15]—or extreme consensus tendencies in decision-making groups—and discuss how courts can use such research in discrimination cases, particularly those involving horizontal decision-making. Using this literature, this Note develops a framework for assessing when evidence of animus in a group context is sufficient to overcome the burden of § 703(m) and § 706(g)(2)(B).[16] Psychological and sociological concepts are increasingly taken into account in the law, albeit most often today in criminal proceedings.[17] This Note examines the opportunity to effectively incorporate such concepts in Title VII § 706(g)(2)(B) cases as well.

Finally, this Note addresses the implications of the Supreme Court's 2011 *Staub v. Proctor Hospital*[18] decision. As more fully described, *Staub* is a vertical decision-making case. This Note accepts *Staub* as binding precedent in such cases but argues that it need not be followed in horizontal decision-making cases. Thus, in the absence of Supreme Court precedent addressing horizontal decision-making, courts are not bound by *Staub*. Litigants and the judiciary can look to groupthink concepts as an evidentiary tool in horizontal decision-making employment cases. Given the heightened focus on discrimination in the United States,[19] this Note is timely and has the potential to impact future workplace discrimination jurisprudence.

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[14] Wendy Parker, *Juries, Race, and Gender: A Story of Today's Inequality*, 46 WAKE FOREST L. REV. 210–11 (2011) (footnotes omitted).

[15] *See* KEITH SAWYER, GROUP GENIUS: THE CREATIVE POWER OF COLLABORATION, 71 (2008); Marlene E. Turner and Anthony R. Pratkanis, *Twenty-Five Years of Groupthink Theory Research: Lessons from the Evaluation of a Theory*, 73 ORG. BEHAV. & HUM. DECISION PROCESSES 105, 107–08 (1998) (tracing the history of groupthink research); IRVING LESTER JANIS & LEON MANN, DECISION MAKING: A PSYCHOLOGICAL ANALYSIS OF CONFLICT, CHOICE, AND COMMITMENT, 131 (1997).

[16] 42 U.S.C. § 2000e-2; *id.* -5(g)(2)(B).

[17] *See* Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1962, 1972 (2019); Rebecca E. Hollander-Blumoff, *Crime, Punishment, and the Psychology of Self-Control*, 61 EMORY L.J. 501, 523 (2012); Dora Klein, *The Mentally Disordered Criminal Defendant at the Supreme Court: A Decade in Review*, 91 OR. L. REV. 207, 208 (2012); Reid Griffith Fontaine, *Disentangling the Psychology and Law of Instrumental and Reactive Subtypes of Aggression*, 13 PSYCH., PUB. POL'Y, L. 143, 145 (2007); Branden D. Jung, *Criminal Law's Folk Psychological Dilemma: Resolving Neuroscientific and Philosophical Challenges to the Voluntary Act Requirement*, 122 W. VA. L. REV. 561, 564 (2019); Astrid Birgden & Tony Ward, *Jurisprudential Considerations: Pragmatic Psychology Through a Therapeutic Jurisprudence Lens: Psycholegal Soft Spots in the Criminal Justice System*, 9 PSYCH., PUB. POL'Y, L. 334, 335 (2003); Ziv Bohrer, *Is the Prosecution of War Crimes Just and Effective? Rethinking the Lessons from Sociology and Psychology*, 33 MICH. J. INT'L L. 749, 756 (2012); Side Liu, *Law's Social Forms: A Powerless Approach to the Sociology of Law*, 40 LAW & SOC. INQUIRY 1, 8 (2015); Calvin Morrill, John Hagan, Bernard Harcourt, Tracey Meares *Punishment and Crime: Seeing Crime and Punishment Through a Sociological Lens: Contributions, Practices, and the Future*, 2005 U. CHI. LEGAL F. 289, 307 (2005).

[18] 562 U.S. 411 (2011).

[19] *See* Larry Buchanan, Quoctrung Bui, & Jugal K. Patel, *Black Lives Matter May Be The Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/inter-

I. BACKGROUND

In 1991, Congress enacted § 703(m)[20] of Title VII to create greater opportunities for redress by victims of workplace discrimination.[21] Section 703(m) provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even if other factors also motivated the practice."[22] Notably, while § 703(m) ensures that prevailing plaintiffs receive at least some relief, Congress added section, § 706(g)(2)(B),[23] which specifies that if "a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor the court . . . may grant declaratory relief, injunctive relief . . . and attorney's fees and costs" but "shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment."[24] In other words, § 706(g)(2)(B) established a but-for standard for defendants to limit their liability to declaratory relief, injunctive relief, attorney's fees and costs. If an employer can show that it would have taken adverse employment action against the plaintiff regardless of "the impermissible motivating factor," it will be found to have engaged in an unlawful employment practice under § 703(m), yet will not be required to grant the plaintiff compensatory relief (e.g. backpay, compensatory or punitive damages, rehiring, reinstating, or promoting).

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active/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/EN52-YYJ3]; Ailsa Chang, Rachel Martin, & Eric Marrapodi, *Summer of Racial Reckoning*, NPR (Aug. 16, 2020), https://www.npr.org/2020/08/16/902179773/summer-of-racial-reckoning-the-match-lit [https://perma.cc/NSG5-MZCX]; John Eligon & Audra D.S. Burch, *After a Summer of Racial Reckoning, Race Is on the Ballot*, N.Y. TIMES (Oct. 30, 2020), https://www.nytimes.com/2020/10/30/us/racial-justice-elections.html [https://perma.cc/WL98-QHKU]; Nicole Hong & Jonah E. Bromwich, *Asian-Americans Are Being Attacked. Why Are Hate Crime Charges So Rare?*, N.Y. TIMES (March 18, 2021), https://www.nytimes.com/2021/03/18/nyregion/asian-hate-crimes.html [https://perma.cc/4BLR-WK9K]; Jessica Bennett, *The #MeToo Movement: The Year in Gender*, N.Y. TIMES (Dec. 30, 2017), https://www.nytimes.com/2017/12/30/us/the-metoo-moment-the-year-in-gender.html [https://perma.cc/7LRP-4P9L].

[20] 42 U.S.C. § 2000e-2(m).

[21] *See* Pub. L. No.102-166, 105 Stat. 1071 (1991) ("The Congress finds that—(1) additional remedies under federal law are needed to deter unlawful harassment and intentional discrimination in the workplace.").

[22] 42 U.S.C. § 2000e-2(m) (emphasis added).

[23] *See* Sheppard v. Riverview Nursing Ctr., 870 F. Supp. 1369, 1384 (D. Md. 1994) ("As part of the same Act, these remedies, as well as backpay, were explicitly denied to Title VII plaintiffs who succeed in proving illegal discrimination, but fail to prove that the employer would have made a different decision in the absence of the illegal motivation. In order to assure vigorous enforcement of Title VII, even in cases where an employer may have acted with mixed motives, Congress had to ensure that such plaintiffs would be able to hire competent counsel to pursue their claims. Because no monetary damages are available where section 2000e-5(g)(2)(B) applies, if post-offer attorney's fees were also potentially cut off, few attorneys would be willing to handle mixed-motive cases at all. By deliberately and significantly altering the verbal formulation in section 2000e-5(g)(2)(B) to separate attorney's fees from "costs," Congress has steered a middle course. Plaintiffs will recover no damages, but will be fully compensated for their costs in enforcing Title VII.").

[24] 42 U.S.C. § 2000e-5(g)(2)(B).

As victims of employment discrimination seek relief for such unlawful practices through the recovery of monetary damages beyond attorney's fees, this but-for causation provision can impair a plaintiff's opportunity for monetary relief or equitable redress. By not allowing plaintiffs to show how discriminatory animus actually animated or drove an employment decision, current practices have a chilling effect on the use of § 703(m) as a cause of action.

The history of Title VII, first within the Civil Rights Act of 1964[25] and then in its modified form in the Civil Rights Act of 1991,[26] shows Congress's intent to use Title VII as a meaningful tool to address employment discrimination.

A. History of Title VII

Following President John F. Kennedy's assassination, President Lyndon B. Johnson urged Congress to honor President Kennedy's memory by passing a civil rights bill aimed at ending racial discrimination. Addressing a joint session of Congress, President Johnson stated, "[W]e have talked long enough in this country about equal rights. We have talked for one hundred years or more. It is time now to write the next chapter, and to write it in the books of law."[27] Heeding his call, Congress passed the Civil Rights Act of 1964 on July 2 of that year. Title VII, on which this Note focuses, prohibited "discrimination by covered employers on the basis of race, color, religion, sex or national origin."[28] For its part, however, the Supreme Court, following the enactment of the Civil Rights Act of 1964, handed down decisions that interpreted Title VII narrowly.

B. Pre- § 703(m) Jurisprudence

In the mid to late 1980s, the Supreme Court decided a number of cases that addressed standards for plaintiffs to prevail that are directly applicable to Title VII cases involving discriminatory employment practices.[29] In the Court's 1989 decision, *Price Waterhouse v. Hopkins*, the justices specifically addressed how a plaintiff could prevail in a Title VII case at the time.[30]

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[25] Civil Rights Act of 1964, Pub L. No. 88-325 (codified at 42 U.S.C. § 2000e-5).

[26] Civil Rights Act of 1991, Pub L. No. 102-166, 105 Stat. 1071.

[27] President Lyndon B. Johnson, Address to a Joint Session in Congress Regarding President John F. Kennedy's Assassination, *in* H.R. Doc. No. 12009378 (1963).

[28] 42 U.S.C. § 2000e–2.

[29] *See* Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (making it easier under Federal Rule of Civil Procedure 56 to shift the burden to the non-moving party—the plaintiff in this case—to produce evidence in support of discrimination); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (holding that the trial court must take all factual inferences in the movant's favor); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (raising the standard for surviving a summary judgment motion to require unambiguous evidence of illegal activity).

[30] *See* 490 U.S. 228, 246-47 (1989).

Price Waterhouse was a lawsuit by Ann Hopkins, a senior manager at the accounting firm Price Waterhouse. At the time of Hopkins's employment, Price Waterhouse was male-dominated.[31] The firm considered Hopkins for partnership, given "her successful 2-year effort to secure a $ 25 million contract with the Department of State."[32] In fact, the district court judge, Judge Gesell, found that "[n]one of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for partnership."[33] Despite her impressive record at the firm, Hopkins was not promoted to partner.[34] At the time of the suit, Price Waterhouse followed a specific process for promoting an employee to partner in which the partners at the firm wrote comments on each candidate, and the firm's Admission Committee read the comments and made recommendations to the Policy Board. In turn, the Policy Board made employment decisions including which employees to promote.[35] In this case, several partners encouraged the Policy Board not to promote Hopkins.[36] These suggestions appeared to be driven by her gender: the Court found that "[t]here were clear signs . . . that some of the partners reacted negatively to Hopkins's personality because she was a woman. One partner described her as 'macho'; another suggested that she 'overcompensated for being a woman'; a third advised her to take 'a course at charm school.'"[37]

Despite Hopkins showing "that Price Waterhouse invited partners to submit comments; that some of the comments stemmed from sex stereotypes; that an important part of the Policy Board's decision on Hopkins was an assessment of the submitted comments; and that Price Waterhouse in no way disclaimed reliance on the sex-linked evaluations,"[38] the plurality in *Price Waterhouse* gave the company a way of absolving itself of liability. Though the Court altered the standard that existed prior to *Price Waterhouse*, which kept the burden of persuasion throughout the case on the plaintiff to prove but-for causation, it nevertheless held that "once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability by proving that it would have made the same decision even if it had not allowed gender to play such a role."[39] In remanding the case to the lower court to apply this new standard, the Court gave a defense to employment discrimination claims. If employers

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[31] *See id.* at 233 ("Of the 662 partners at the firm at the time, 7 were women. Of the 88 persons proposed for partnership that year, only one—Hopkins—was a woman.").

[32] *Id.*

[33] *Id.* at 234 (quoting Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1112 (D.D.C. 1985)).

[34] *Id.* at 233 (stating that "20 [candidates]—including Hopkins—were 'held' for reconsideration the following year").

[35] *Id.*

[36] *Id.* at 228.

[37] *Id.* at 235 (internal citations omitted).

[38] *Id.* at 251.

[39] *Id.* at 244–45.

could show that the employment decision would have happened absent such discrimination, the company would not be liable under Title VII.

Even after Hopkins made a prima facie case that discrimination motivated the decision through her strong evidence of discriminatory comments, Price Waterhouse was given the opportunity to rebut the claim and absolve itself of liability. In fact, Justice Brennan postulated that in most cases, the employer should be able to present some objective evidence that rebuts claims of discrimination: "As to the employer's proof, in most cases, the employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive."[40] As such, while a plaintiff must show evidence of discrimination, defendants need to present evidence that would convince the trier of fact that it is more likely true than not that it would have made the same employment action in order to avoid liability.

Interestingly, *Price Waterhouse* was in some ways a pro-plaintiff case. For the first time, the Court introduced a "motivating factor"-type standard[41] later seen in § 703(m). But in providing the defense with the opportunity to present evidence to absolve itself from all liability, the Court essentially established a "but-for" standard that precluded even nominal relief for the plaintiff.[42] In passing § 703(m) and § 706(g)(2)(B), Congress sought to overturn the new "but-for" standard established under *Price Waterhouse* by providing for nominal liability, but not monetary damages, when a defendant proved that an employment decision was made for reasons beyond discrimination.

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[40] *Id.* at 252.

[41] *Id.* at 244 (using the language "motivating part" not "motivating factor").

[42] *See id.* at 282–83 (Kennedy, J., dissenting) (noting that "the plurality's theory of Title VII causation is ultimately consistent with a but-for standard").

C. Passage of § 703(m) of Title VII

In response to *Price Waterhouse*[43] and other Supreme Court decisions,[44] Congress passed the Civil Rights Act of 1991,[45] in which it sought to overturn the Court's interpretations of Title VII[46] Under the Civil Rights Act of 1991's new § 703(m), Title VII does not require a plaintiff to show that discrimination was the but-for, or determinative, cause of the adverse employment action for liability, but rather requires that the plaintiff show that one of the protected characteristics was a "motivating factor" for "any employment practice, even though other factors also motivated the practice."[47] The exact language of the statute reads:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.[48]

Representative John J. LaFalce, who had sponsored an earlier version of the bill in the House of Representatives,[49] directly addressed the *Price*

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[43] S. 2189, 112th Cong. § 2(a)(4)(B) (2012) ("Congress disagrees with the Supreme Court's interpretation . . . . [It declines] to apply the Supreme Court's ruling in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), a part of which was subsequently approved by Congress, and enacted into law by section 107 of the Civil Rights Act of 1991, as section 703(m) of the Civil Rights Act of 1964, which provides that an unlawful employment practice is established when a protected characteristic was a motivating factor for any employment practice, even though other factors also motivated the practice."); H.R. REP NO. 102-40, pt. 2, at 18 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 549, 586 (statement of Rep. Brooks) ("The Court's holding in Price Waterhouse severely undermines protections against intentional employment discrimination by allowing such discrimination to escape sanction completely under Title VII. Under this holding, even if a court finds that a Title VII defendant has clearly engaged in intentional discrimination, that court is powerless to end that abuse if the particular plaintiff who brought the case would have suffered the disputed employment action for some alternative, legitimate reason. If Title VII's ban on discrimination in employment is to be meaningful, proven victims of intentional discrimination must be able to obtain relief, and perpetrators of discrimination must be held liable for their actions.").

[44] *See* Patterson v. McLean Credit Union, 491 U.S. 164, 171 (1989) (interpreting the language of 42 U.S.C. § 1981 and holding that an employee cannot sue for damages caused by racial harassment on the job because the employer had not denied the employee his employment); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989) (requiring employees to prove that an employer's personnel practice has an unlawful disparate impact on them by showing that the policy or requirement at issue, in isolation, had the discriminatory effect); Martin v. Wilks, 490 U.S. 755 (1989) (permitting white firefighters who had not been party to the litigation that established a consent decree governing the hiring and promoting of Black firefighters to bring suit to challenge the decree).

[45] 42 U.S.C. § 2000 e–2(m).

[46] *See* Jeffrey A. Van Detta, *The Strange Career of Title VII's § 703(M): An Essay on the Unfulfilled Promise of the Civil Rights Act of 1991,* 89 ST. JOHN'S L. REV. 883, 884 (2015) (noting that Congress passed the Civil Rights Act of 1991 to reverse the effects of the Reagan Supreme Court's rulings on Title VII).

[47] 42 U.S.C. § 2000e–2(m).

[48] *Id.*

[49] Civil Rights Act of 1990, H.R. 5385, 101st Cong. (1990).

Waterhouse decision in his statement on the House floor in connection with the passage of § 703(m). Though Rep. LaFalce's own bill was not adopted by Congress, he believed the bill ultimately adopted satisfied his concerns about *Price Waterhouse*:

> In cases of intentional discrimination in which the discrimination was only one factor motivating the employment decision, my bill would have overturned *Price Waterhouse versus Hopkins* by allowing an employee or applicant for employment to establish an unlawful employment practice whenever the discrimination was a major contributing factor to the employment decision. The bill before us today likewise allows a finding of unlawful discrimination if discrimination was one of the motivating factors in the employment decision.[50]

With § 703(m)'s passage, Congress "left it in the hands of a jury to determine whether an adverse employment action taken against [an employee] was in some discernible way motivated by that employee's race."[51] Now, if the plaintiff can convince a jury that an unlawful motivating factor was at least partially present in the decision-making process that led to the adverse employment decision, the employee will be entitled to judgment in his or her favor and to at least some relief.

Congress, however, added an important qualifier. Though a plaintiff receives declaratory judgment and more once he or she proves that unlawful consideration was a "motivating factor" in the employment decision, the plaintiff will not be granted monetary damages, including backpay, nor will be entitled to reinstatement, hiring, promotion, etc., unless the plaintiff can also successfully present evidence to convince a jury that the employer has not proven the affirmative defense under § 706(g)(2)(B).[52]

> On a claim in which an individual proves a violation under section 2000e–2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—
>
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e–2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).[53]

Thus, an employee risks not being awarded all monetary damages if the jury divides its verdict, holding the defendant liable under § 703(m) but not

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[50] 102 CONGR. REC. 30,688 (1991) (Statement of Rep. John J. LaFalce).
[51] Van Detta, *supra* note 46, at 888.
[52] *See* 42 U.S.C. § 2000e–5(g)(2)(B).
[53] *Id.*

responsible for damages under § 706(g)(2)(B). Plaintiffs may be reluctant to rely on § 703(m) for relief in horizontal decision-making instances.[54] Arguably, defendants in horizontal decision-making cases have an easier burden under § 706(g)(2)(B) when the plaintiff has proof of a single decision maker's bias: employers can argue that while one or some committee members harbored unlawful animus, the presence of other committee members who the plaintiff cannot prove harbored animus suggests reliance on factors outside of discrimination to justify the employment decision.[55]

New evidentiary practices in § 703(m) and § 706(g)(2)(B) horizontal decision-making cases could provide courts with more appropriate and targeted means to consider unlawful employment practices.

II. Title VII Jurisprudence After § 703(m)'s Passage

This Section examines the Supreme Court's decision in *Staub v. Proctor Hospital*.[56] Although *Staub* was a Uniformed Services Employment and Reemployment Rights Act[57] (USERRA) case, not a Title VII case, the Court analyzed statutory language identical to that in § 703(m), and the decision has proven influential for courts in the Title VII context. This Note contends that *Staub*'s holding is precedent for vertical decision-making cases, but not horizontal decision-making cases.[58] Thus, the Supreme Court has not spoken on the proper application of a "motivating factor" test in horizontal decision-making cases. As such, plaintiffs may be denied the opportunity to provide evidence that the actions of one or a few of the decision makers may have motivated the decision in a manner that would satisfy the § 703(m) standard of causality and § 706(g)(2)(B)'s rebuttal formulation.[59]

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[54] Plaintiffs retain the option to take on the burden of but-for causation under § 703(a), though.

[55] This Note speaks only of the difficult cases in which the biased decision maker is neither the clear deciding vote nor has the ability to "black ball" a candidate or employee from a desired position.

[56] 562 U.S. 411 (2011)

[57] 38 U.S.C. § 4301.

[58] This Note does not take issue with the Supreme Court's *Staub* decision as it applies to proximate causation in vertical decision-making cases.

[59] It is possible that plaintiffs in horizontal decision-making cases rely on § 703(a)(1) for fear of losing monetary damages at the trial stage, which may happen in a § 703(m) claim in light of § 706(g)(2)(B). This too may cause issues in horizontal decision-making cases, as a plaintiff may struggle to prove that he or she suffered an adverse employment action "because of such individual's race, color, religion, sex, or national origin." *See* 42 U.S.C. § 2000 e–2(a). While a groupthink analysis may similarly work in horizontal decision-making cases brought under § 703(a)(1), this Note focuses on § 703(m).

A. Staub v. Proctor Hospital's Motivating Factor Analysis Using Proximate Causation

Congress passed the Civil Rights Act of 1991[60] in part to ease the burden of persuasion for plaintiffs in discrimination cases that was established in *Price Waterhouse*. The Supreme Court in 2011, however, found that motivating factor language identical to § 703(m)'s required a modified proximate causation analysis.[61] In *Staub*, the Court held that, under the specific facts of the case, the discriminatory animus could not simply be called a "motivating factor" for the ultimate decision reached.[62]

1. The Facts of Staub

In *Staub*, the plaintiff sued under the USERRA for employment discrimination after he was fired.[63] Alleging discrimination based on his involvement in the Army Reserves, he provided evidence to the Court that his supervisors were hostile to him, because his participation in the Reserves required his occasional absence from work.[64] Two of Staub's supervisors, Janice Mulally and Michael Korenchuk, created a record of Staub violating internal rules that appeared specifically intended to justify his termination.[65] Ultimately, the Vice President of the Human Resources Department, Linda Buck, fired Staub, though Buck apparently had no knowledge of the supervisors' discriminatory behavior.[66]

Critically, the statute at issue in *Staub*—the USERRA—contains key language identical to that of § 703(m). It provides that discrimination against uniformed service members shall not be a "motivating factor in the employer's action."[67] Though *Staub* is not a Title VII case, Justice Scalia, writing for the majority, explicitly noted that "[t]he statute is very similar to Title VII . . . . The central difficulty in this case is construing the phrase 'motivating factor' in the employer's action."[68]

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[60] 42 U.S.C. § 2000e–2(m).

[61] *Staub*, 562 U.S. at 411, 416 (reinforcing the "cat's paw" theory of liability, in which employers are still liable under Title VII if they fire an employee based on the recommendation of a racially hostile subordinate).

[62] *Id.* at 422–23.

[63] *Id.* at 415.

[64] *Id.* at 414–15.

[65] *Id.* at 415 ("Staub challenged his firing through Proctor's grievance process, claiming that Mulally had fabricated the allegation underlying the Corrective Action out of hostility toward his military obligations.").

[66] *Id.* ("His contention was not that Buck had any such hostility but that Mulally and Korenchuk did, and that their actions influenced Buck's ultimate employment decision.").

[67] 38 U.S.C. § 4301.

[68] *Staub*, 562 U.S. at 416.

2. The Court's Holding in Staub *Is Limited to Vertical Decision-Making Cases*

In the *Staub* opinion, Justice Scalia explained why the facts of the case call for a proximate causality analysis rather than just a straightforward "motivating factor" analysis:

> The governing text . . . requires that discrimination be "a motivating factor" in the adverse action. [But] when a decision to fire is made with no unlawful animus on the part of the firing agent, but partly on the basis of a report prompted (unbeknownst to that agent) by discrimination, discrimination might perhaps be . . . a "causal factor" in that decision; but it seems . . . a considerable stretch to call it "a motivating factor."[69]

The Court thus applied a proximate causation analysis that also employed a nuanced motivating factor analysis. If the Court were to find liability, according to the opinion, it cannot be based on a straightforward motivating factor test of the decision maker, as the facts would not meet that standard. The Court outlined why the facts do not call for a motivating factor analysis: the firing agent who is the ultimate decision maker has no unlawful animus and is unaware of the unlawful animus of the supervisor. Thus, the logic in *Staub* applies to factually similar cases with similar decision-making structures—where a lower level employee harbors the discriminatory animus, but the ultimate decision maker at the top does not. The Court's analysis required a vertical decision-making structure, arguably making it inapplicable in horizontal decision-making cases.

Although *Staub* relied primarily on a proximate causation analysis to potentially find liability, some have argued that proximate causation has no place in the Title VII context at all.[70] Further, the distinction between the two causation tests—motivating factor and proximate cause—is admittedly blurred and not probed in greater detail by the Court. The *Staub* Court established a modified motivating factor analysis. The Court has yet to provide guidance, however, on how to assess a "motivating factor" in the context of horizontal decision-making. Ultimately, this Note takes the position that *Staub* is the Supreme Court precedent on vertical decision-making and that a different § 703(m) and § 706(g)(2)(B) standard should be applied in horizontal decision-making cases.

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[69] *Id.* at 418.

[70] Professor Sandra Sperino criticizes the tort-like language of *Staub*, arguing that Title VII is not intended to be a proximate causation analysis. *See* Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1, 3 (2013). As Sperino notes, "only weak textual, intent, or purpose-based arguments support courts' use of proximate cause in Title VII." *Id.* She argues that the judiciary, after the *Staub* decision, should have avoided making proximate cause an element within a federal discrimination claim. *Id.* at 2. Sperino contends that proximate causation should be avoided for a few reasons: it limits the reach of federal discrimination law, it makes it easier for a court to grant summary judgment to employers, and proximate causation is a nebulous concept. *Id.* at 3.

3. Staub*'s Proximate Causation Standard Can Be Met with Fewer Than All Decision Makers Harboring Animus*

The Court ultimately held that a straightforward motivating factor test without regard to a proximate causation analysis was inapplicable in *Staub*.[71] Nevertheless, it found the defendant, Proctor Hospital, could be liable under a "cat's paw" theory, which is rooted in tort law's proximate causation analysis within the context of the motivating factor test called for under § 703(m).[72]

The facts show that Proctor Hospital argued that the ultimate decision maker, Buck, "'looked beyond what Mulally and Korenchuk said,' relying in part on her conversation with Day [another Proctor employee who formally expressed disapproval with Staub's workplace behavior to Human Resources] and her review of Staub's personnel file."[73] Thus, Buck considered complaints against Staub from additional employees, such as Day and others mentioned in Staub's personnel file, who were not alleged to have harbored illegal anti-military animus.

Notably, the Court's holding did not expressly require that each supervisor harbored animus. Justice Scalia carefully laid out the requirements of liability under his cat's paw theory: "[I]f a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA."[74] The Court's opinion states that "a supervisor," rather than all supervisors, would suffice to show proximate causation.[75]

The Court found that a plaintiff could establish proximate causation without evidence that all decision makers harbored discriminatory animus. As the Court stated, "it is common for injuries to have multiple proximate causes."[76] The reasons given for the adverse action by those not harboring animus may be a proximate cause as well, but so long as the animus is also a proximate cause—and therefore a motivating factor—without a "superseding cause of harm," the Court held that the employer could be liable under the

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[71] *See Staub*, 562 U.S. at 419 ("[I]t seems to us a considerable stretch to call it 'a motivating factor.'").

[72] The "cat's paw" theory is aptly named after the fable "The Monkey and the Cat" by 17th-century poet Jean de La Fontaine, in which a monkey convinces an unwitting cat to pull chestnuts from a hot fire. *See* AESOP, *The Monkey and the Cat, in* AESOP FOR CHILDREN (1919), http://mythfolklore.net/aesopica/milowinter/61.htm [https://perma.cc/V453-Q2SV]. Like the monkey, the lower-level employee harboring racial animus convinces the ultimate decision maker to fire or refrain from hiring someone. *See also* Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990).

[73] *Staub*, 562 U.S. at 415 (citation omitted) (quoting Staub v. Proctor Hospital, 560 F.3d 647, 659 (7th Cir. 2009)).

[74] *Id.*

[75] *Id.*

[76] *Id.* at 421.

USERRA.[77] Therefore, under *Staub*'s proximate causation analysis, though some decision makers may not harbor discriminatory animus, the decision to fire an employee may still be a proximate cause of the adverse employment decision harming the plaintiff. In other words, discriminatory animus need not be the sole proximate cause for it to violate a discrimination statute—whether the USERRA or Title VII.

B. Courts Set Unclear and Disparate Standards for "Motivating Factor" in Horizontal Decision-Making Cases and for § 703(m) and § 706(g)(2)(B)

Many courts have employed unclear, disparate, and heightened standards for "motivating factor" beyond the plain language of the statute. Without a clear test for § 706(g)(2)(B) and § 703(m), plaintiffs and their lawyers may steer clear of § 703(m) as a legal framework under which to bring cases.

The judge in *O'Toole v. Acosta*[78] aptly stated the challenge facing plaintiffs in horizontal decision-making cases: "Showing that discrimination motivated an employer's action becomes 'difficult' where the action involves multiple decision-makers."[79] Different factors have exacerbated this challenge. First, as the *O'Toole* court notes, applying "a motivating factor" language to group decision-making cases is challenging.[80] Indeed, as this Note discusses, some courts, uncertain of the appropriate test in horizontal decision-making cases, require plaintiffs to provide evidence that more than one decision maker, or in some cases all decision makers, harbored animus while others require that a decision-makers' animus explicitly "infected" an adverse employment action.[81] Finally, and most importantly, reading § 703(m)'s motivating factor standard in horizontal decision-making cases strictly, courts have limited the opportunity for plaintiffs to demonstrate that in a group context the discriminatory animus of one decision maker is sufficient to satisfy a motivating factor test.

In one of the earliest horizontal decision-making cases brought under § 703(m), *Lam v. University of Hawai'i*,[82] the plaintiff, Maivan Lam, sued

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[77] *Id.* at 420 ("A cause can be thought 'superseding' only if it is a 'cause of independent origin that was not foreseeable.'" (quoting Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 837 (1996))).

[78] No. 14-cv-2467, 2018 WL 1469045, at *1 (N.D. Ill. Mar. 3, 2019).

[79] *Id.* at *22.

[80] As *Staub* says, "When the company official who makes the decision to take an adverse employment action is personally acting out of hostility to the employee's membership in or obligation to a uniformed service, a motivating factor obviously exists." *Staub*, 526 U.S. at 417. Once more complex decision-making processes are created, the courts struggle with how to determine what evidence is sufficient to constitute a motivating factor.

[81] *See* Candillo v. N.C. Dep't of Corr., 199 F. Supp. 2d 342, 353 (M.D.N.C. 2002) (holding that Powell—accused of sexism for wanting to promote a woman instead of a man—was but one of three interviewers and that "[a]lthough cooperative decision making does not insulate an employer from liability, the fact[ ] that Powell did not make the decision alone" was important).

[82] 40 F.3d 1551 (9th Cir. 1994).

the University of Hawaii for discrimination on the basis of race, sex, and national origin in denying her a directorship position at its law school.[83] The University established an appointments committee to review applications of possible candidates for the position of Director of the Law School's Pacific Asian Legal Studies Program ("PALS") and later for a position in commercial law teaching.[84] In both searches, Lam provided evidence of discriminatory behavior by a member of the selection committee. In the search for the Director of the Law School's PALS program, the chair of the search committee—called only "Professor A"—was particularly opposed to Lam's appointment: "Professor A, in particular, asserted that Lam was not collegial, was a poor scholar, and had poor administrative ability. He finally stated that in his view Lam was unfit to teach anywhere on the University on [sic] Hawaii campus. He also labelled Lam's in-print criticism of another (white male) faculty member inappropriate."[85] Ultimately, a white male candidate received the highest number of votes.[86] Despite finding that the evidence suggested that Professor A harbored prejudicial feelings towards Asians and women and that another white male professor on the committee had stated that the PALS director should be male, the district court awarded summary judgment for the defendants on the claim.[87]

In the search for a commercial law professor, one male committee member openly stated that "the Law School should not have two women teaching commercial law."[88] In hopes of disciplinary action, the comment was reported to the Dean of the law school, "who said that he recognized that the professor had difficulty dealing with women." The Dean nevertheless took no action to remove the committee member from the committee.[89] Ultimately, Lam was passed over by the committee for that position as well.[90]

The district court found that while "some members of the faculty and administration resented Lam's actions and one committee member had difficulty dealing with women," the discriminatory animus was not a motivating factor in the law school's failure to hire Lam.[91] It justified that ruling, in part, by noting that there was no "concerted action" among committee members to not consider Lam for the positions she sought.[92] As this Note will later argue, a concerted effort is not relevant to determining whether illegal animus was a "motivating factor" in an employment decision. One decision maker's animus in a horizontal decision-making setting is sufficient to constitute a motivating factor in the committee.

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[83] *Id.* at 1554.
[84] *Id.* at 1555–57.
[85] *Id.* at 1556.
[86] *Id.* at 1557.
[87] *Id.* at 1560.
[88] *Id.* at 1557.
[89] *Id.*
[90] *Id.* at 1558.
[91] *Id.* at 1565.
[92] *Id.*

In *Lam*, the Ninth Circuit reviewed the district court's ruling. The circuit court similarly found, as the *O'Toole* Court did, that "it often requires a searching factual inquiry to ascertain the motivations for a hiring decision, a difficult task that is exacerbated when multiple decisionmakers are involved."[93] The court's panel then upheld the lower court's ruling with regard to the second search for the commercial law position. However, regarding the first committee, with Professor A, the panel remanded, requiring the lower court to consider whether the hiring process was insulated from the illegitimate biases of faculty members.[94] As the circuit judges said, "discrimination at any stage of the academic hiring or promotion process may infect the ultimate employment decision. Accordingly, a plaintiff in a university discrimination case need not prove intentional discrimination at every stage of the decision-making process; impermissible bias at any point may be sufficient to sustain liability."[95] This decision in some ways more appropriately applies a motivating factor test, though the concept of "infection" is inapposite in a motivating factor analysis because animus need only be in the mind of a committee member, not the sole or primary factor. Thus, its reference to infection is confusing and unnecessary in the context of § 703(m).

Even when finding liability under § 703(m) and remanding for a determination of damages under § 706(g)(2)(B) in favor of the plaintiff, some courts still employ this concept of "infection" in their consideration of a motivating factor. This may again complicate a "motivating factor" analysis and its "but-for" rebuttal in § 706(g)(2)(B). For example, in *Brown v. East Mississippi Electric Power Association*,[96] the plaintiff, Henry Brown, argued that he was fired in violation of Title VII's § 703(m) in his horizontal decision-making case. The two parties agreed that a group of three white superiors, including General Manager Emmett Murray and supervisor Leon Pippen, decided to reassign Brown from serviceman to line crew, which Brown viewed as a demotion.[97] Later, "it was decided that Brown would take a two-week vacation," after which the parties dispute whether Brown was in fact fired or whether he resigned.[98] As the Fifth Circuit noted, "[a]t the heart of this appeal [was] the significance of Pippen's routine use of the term 'n—.'"[99] The East Mississippi Electric Power Association (EMEPA) did not dispute that Pippen routinely used the word—doing so "basically any time there was a reference to a black."[100] The court, then, not unlike the Ninth Circuit, addressed whether the racism "infected the disciplinary decisions of which Brown complain[ed]. Pippen directly participated in those decisions . . . serving as a member of the triumvirate that decided to remove

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[93] *Id.* at 1566 n.27.
[94] *Id.* at 1560–61.
[95] *Id.*
[96] 989 F.2d 858 (5th Cir. 1993).
[97] *Id.* at 860.
[98] *Id.* at 860–61.
[99] *Id.* at 861.
[100] *Id.*

Brown from his serviceman position."[101] The judges considered how Pippen and Murray worked together regarding Brown's disciplinary problems.

After concluding that Brown successfully alleged that Pippen's racism did, in fact, "infect" the disciplinary decision, the court then shifted the burden pursuant to § 706(g)(2)(B) to EMEPA to prove that it would have made the same decision regardless of Brown's race.[102] The court concluded that EMEPA did not prove that Murray's participation as a member of the three-person committee was not influenced by racial factors.[103] It did so with reference to another series of complaints against Murray for minimizing employee's complaints about Pippen's use of racial slurs.[104] Further, the court stated, "Murray apparently never considered that Pippen's blatantly racist attitudes might explain his criticism of Brown and might undermine the objectivity of his advice with respect to Brown's position with the company."[105] As such, the court required the defendant to show explicit evidence of other decision makers rejecting Pippen's racism or considering how the racism could have infected the ultimate adverse employment decision.

In a more recent case, *Bivings v. Greenville Tech. College*,[106] the plaintiff, Raymond Bivings, filed a § 703(m) complaint against Greenville Technical college for not hiring him for a construction job allegedly due to racism against him as a black man.[107] The court held that Bivings did not establish, through direct or circumstantial evidence, that racial discrimination motivated Greenville's decision not to hire him.[108] Bivings alleged that one of the members of the hiring committee, Jay Pearson, used the "N" word "in a way that made Bivings believe that Pearson exhibited racial animus and did not want Bivings to apply for the position."[109] Relevant to this Note, the court explicitly noted that the hiring committee "was composed of employees from several different departments and included male, female, and minority representation."[110] Further, the court found it noteworthy that the "committee voted unanimously to hire the eventual hire."[111]

These cases serve as examples of the uncertainty that plaintiffs and their lawyers may face when bringing a § 703(m) case alleging discrimination by one decision maker on an employment committee. Courts have not yet established a clear, uniform standard in horizontal decision-making cases for what constitutes a "motivating factor," nor for what is sufficient for a defen-

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[101] *Id.*
[102] *Id.* at 861–62.
[103] *Id.* at 862–63.
[104] *Id.*
[105] *Id.* at 863.
[106] No. 6:11–518–TMC, 2012 WL 2711542 (D.S.C. July 9, 2012).
[107] *Id.* at *3.
[108] *Id.*
[109] *Id.* In this instance, the court decided that the use of the racial slurs outside of the hiring decision was not relevant. These differing rules regarding when the derogatory term is and is not direct evidence of discrimination as a "motivating factor" likely complicates plaintiffs' cases; however, this Note will not focus on this question specifically.
[110] *Id.* at *1 n.2.
[111] *Id.* at *1 n.3.

dant to prove that it would have made the same decision otherwise. Some courts, such as in *Bivings*, have looked at the composition of the hiring committee to decide whether race was a motivating factor. Others have considered concerted efforts or "infection" in the process to determine whether illegal animus motivated the decision, which is arguably not required to satisfy § 703(m).

Since the early 2000s, few plaintiffs have brought horizontal decision-making cases under § 703(m), likely because of this confusing standard to demonstrate influence or concerted efforts.[112] By not establishing a clear standard for motivating factor in § 703(m) cases and not employing evidentiary tools more suitable to sustain a "but-for" analysis under § 706(g)(2)(B), courts have missed an opportunity to apply these sections of Title VII more appropriately in horizontal decision-making cases.

To properly implement § 703(m) and § 706(g)(2)(B), courts need to interpret the meaning of motivating factor and then determine what evidence is admissible to show that discriminatory animus played a role in an employment decision or that a defendant would have made the same decision regardless of such animus. The next Section discusses the fundamental differences between vertical and horizontal decision-making and then suggest an appropriate definition and evidentiary practices under § 703(m) and § 706(g)(2)(B).

III. A Path for Courts to Remain Loyal to Congressional Intent in § 703(m)

As previously noted, *Staub* focuses exclusively on vertical decision-making cases and a different standard of analysis could apply in horizontal decision-making cases. Such an analysis could and should be more loyal to Congress's "motivating factor" language and intent of § 703(m). The decisional structure fundamentally differs in vertical and horizontal decision-making instances. Such distinct decision-making practices necessitate different analysis, opening an avenue for the courts to realize § 703(m)'s potential.

Vertical decision-making cases fall under *Staub*'s cat's paw analysis, as there is a single person making the adverse employment decision who harbors no unlawful animus. Horizontal decision-making cases, on the other hand, include instances where there are multiple decision makers engaging in group dialogue about an applicant or employee. These groups are thus susceptible to the phenomenon of groupthink, which is described in more detail in this Section. A single decision maker's animus may "motivate" the adverse employment decision, and a plaintiff may be better able to refute a defendant's "but-for" defense under § 706(g)(2)(B) through a groupthink analysis.

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[112] *See* Van Detta *supra* note 46, at 899 ("[I]f the cases go down in flames from the beginning, the incentives for vindication of Title VII through the activities of 'private attorneys general' fall nearly to a subminus zero.").

As Judge Smalkin wisely remarked following an award of attorneys' fees without backpay[113]:

> On my office wall, there hangs a nineteenth century English print entitled *The Lawsuit,* showing two farmers fighting over a stationary cow—one pulling her by the horns and the other by the tail—while a bewigged barrister happily milks her. This case certainly demonstrates that nothing much has changed. The plaintiff and the defendant are right where they started, while the lawyers' pails hold all the milk.[114]

This Section suggests a new approach to Title VII workplace discrimination cases that involve horizontal decision-making in order to avoid the all too familiar image depicted in *The Lawsuit* in which plaintiffs and defendants are essentially in the same position that they started in and only the lawyers seem to benefit. Such an approach would permit evidence of groupthink and its effects on the decision of a group when one or more decision makers harbored discriminatory animus. In adopting this approach, courts would both recognize the findings from compelling academic research in this area and more appropriately address the evils of discrimination as Congress intended in adopting § 703(m) and § 706(g)(2)(B). Such a standard may also have the benefit of pushing companies to have more diversity on employment committees.

A. Section 703(m) and § 706(g)(2)(B) as Distinct Legal Standards from Each Other and from Staub

Section 703(m), which establishes a liability standard and supplies a right of action, does not define the term "motivating factor."[115] Therefore, to inform a definition, I turn to the dictionary. The Oxford English Dictionary[116] defines "motivate" as "to provide (a person, etc.) with a motive or incentive to do something."[117] Black's Law Dictionary defines "factor" as "an agent or cause that contributes to a particular result."[118] From these two definitions, this Note defines motivating factor in the § 703(m) context as one or more discriminatory decision makers who incentivize, animate, or influence an adverse employment decision based on a protected characteristic.

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[113] The case was one in which the jury found that discriminatory animus was a motivating factor in the employer's decision to lay off a pregnant woman, but that the employer would have laid her off absent the unlawful motive.

[114] Sheppard v. Riverview Nursing Ctr., 870 F. Supp. 1369, 1384 (D. Md. 1994).

[115] Again, the language of § 703(m) reads "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e–2(m).

[116] Black's Law Dictionary does not define "motivate," so this Note relies on the OED.

[117] *Motivate*, OXFORD ENGLISH DICTIONARY (3rd ed. 2002).

[118] *Factor*, BLACK'S LAW DICTIONARY (11th ed. 2019).

This definition, then, is distinct from *Staub*'s proximate causation analysis in that one or more decision makers harbor unlawful animus, whereas in *Staub*, no decision maker exhibited discriminatory behaviors.

A plaintiff can show that discrimination was a motivating factor using proof of a decision maker's discriminatory animus with regard to the employment decision. This definition would align horizontal decision-making cases with those in which there is just one decision maker. Pursuant to § 703(m), then, if a plaintiff provides direct evidence of unlawful animus on the part of one or more decision makers, that is sufficient to hold the defendant liable.

The question this Note then must turn to is what is sufficient for a plaintiff to rebut defendants' proof that it would have "taken the same action in the absence of the impermissible motivating factor"[119] in order to receive monetary damages and other redress such as reinstatement, promotion, etc. under § 706(g)(2)(B). This is a key question in horizontal decision-making cases, given that an employer could almost always argue that it would have made the same decision without the animus of one decision maker, as Justice Brennan noted in *Price Waterhouse*.[120] This Note proposes that courts permit evidence of groupthink in horizontal decision-making cases in order to prove or rebut § 706(g)(2)(B).

B. Under § 703(m), Courts Should Consider Evidence of the Unlawful Animus of One Member of a Decision-Making Committee Sufficient to Establish that Discrimination Was "a Motivating Factor" in the Committee's Decision

To defend the proposition in this Note that evidence of just one decision maker's animus should be sufficient to entitle a Title VII plaintiff to judgment under § 703(m), this Note considers the legislative history, legal precedent, and other commentary around that section. Through a close reading of the language, one can see that in horizontal decision-making cases, evidence of a single biased decision maker on a committee by itself should be sufficient to establish "a motivating factor" due to the logical inference that such bias had at least some possible influence on the committee's adverse employment decision.[121]

Though Congress may not have considered the presence of multiple decision makers in Title VII employment discrimination cases, the House Report that accompanied the enactment of the Civil Rights Act of 1991 reveals that the intent of the Act was to eliminate any prejudice in employment decisions: "[A]ny reliance on prejudice in making employment deci-

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[119] 42 U.S.C. § 2000e–5(g)(2)(B) (2018).

[120] Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989).

[121] If courts are ultimately not convinced that the mere presence of a biased decision maker is sufficient to constitute a motivating factor, then the plaintiff's evidence of groupthink (discussed in the Section IV.C.) may be relevant in the § 703(m) stage as well as the § 706(g)(2)(B) stage.

sions is illegal."[122] Therefore, Congress made it clear that it intended "a motivating factor" to be read liberally and literally: if prejudicial animus played any role, however small, in the adverse employment action, Title VII has been violated. In the horizontal decision-making context, this implies that the involvement of even one prejudiced decision maker in the committee's deliberations that led to an adverse employment decision should be sufficient to entitle the plaintiff relief under § 703(m) and to shift the burden of persuasion to the defendant to prove the affirmative defense provided in § 706(g)(2)(B). Congress in that same 1991 House Report interpreted the Civil Rights Act of 1964 broadly as well, believing that "[w]hen enacting the Civil Rights Act of 1964, Congress made it clear that it intended to prohibit *all* invidious consideration of sex, race, color, religion, or national origin in employment decisions."[123] By using the words "any" and "all," Congress demonstrated its intent to rid employment decisions of any discriminatory animus so long as such discrimination contributed in any way and to any extent to an adverse employment action.

This expansive reading of "a motivating factor" is generally how the courts have interpreted Title VII employment discrimination claims brought under § 703(m), at least in instances not involving decision-making committees. In *Dominguez-Curry v. Nevada Transportation Department*,[124] for example, a Ninth Circuit panel concluded that the district court had erred in granting summary judgment to the employer because "a reasonable factfinder could conclude that the hiring decision was motivated *at least in part* by her gender."[125] Other circuits have similarly ruled that evidence of any level of discriminatory animus exhibited by an individual who participated in the decision-making process is sufficient to make out a violation of § 703(m) and to prevent the grant of summary judgment to the employer.[126] Accordingly, the case law already demonstrates judges' willingness to consider unlawful animus to be a motivating factor in an adverse employment action even in the absence of explicit evidence that such bias made a determinative impact on the decision.

Legal scholars have similarly interpreted § 703(m)'s "a motivating factor" in line with Congressional intent. In his 2005 article *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglass?*,[127] Michael Zimmer argued, "Using § 703(m)'s 'a motivating factor' level of showing, a preponderance of the evidence must support a reasonable

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[122] H.R. REP No. 102-40(II), at 2 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 694, 695.
[123] *Id.* at 17, *as reprinted in* 1991 U.S.C.C.A.N. at 710 (emphasis added).
[124] 424 F.3d 1027.
[125] *Id.* at 1041 (emphasis added).
[126] *See, e.g.*, Abramson v. William Paterson Coll. of N.J., 260 F.3d 265, 286 (3d Cir. 2001) ("Under our case law, it is sufficient if those exhibiting discriminatory animus influenced or participated in the decision to terminate."); Wells v. New Cherokee Corp., 58 F.3d 233, 237–38 (6th Cir. 1995) (imputing a supervisor's animus to the ultimate decision maker because the evidence showed that the two "worked closely together and consulted with each other on personnel decisions," and they "themselves testified that they acted jointly").
[127] Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887 (2005).

factfinder in drawing the inference of discrimination, that is, discrimination played a role, no matter how small, in the decision."[128] Zimmer therefore echoes the courts and Congress: if discrimination played even a small role in the employment decision, that is sufficient to show that it constituted a motivating factor within the meaning of § 703(m).

While Congress, courts, and scholars have not articulated an explicit rule for what constitutes a motivating factor under § 703(m) in a horizontal decision-making context, the wording from various sources points to the inference of motivation through evidence of even a small amount of animus. Thus, it logically follows that one decision maker on a committee with discriminatory animus is, in fact, a motivating factor in the committee's ultimate adverse decision, thus shifting the burden to the defendant to prove that it would have made the same decisions in the absence of such discrimination.

C. Groupthink: Its Antecedent Conditions, Evidence, and Impact

Groupthink is a phenomenon that occurs when a group of often well-intentioned people makes suboptimal decisions based on a desire to conform or the belief that dissent is impossible or ill-advised.[129] In an effort to achieve harmony, members of a group may seek to agree while overlooking uncertainties and concerns.[130] This often causes groups to minimize conflict and reach a consensus decision without sufficient critical evaluation.[131] Relevant to this Note, evidence of groupthink in horizontal decision-making cases could materially impact the ability of a defendant to successfully argue that it would have made the same adverse employment action regardless of animus.

In *Decision Making: A Psychological Analysis of Conflict, Choice, and Commitment*, Irving Janis laid out a number of antecedent conditions that make the dynamic of groupthink more likely.[132] These conditions include group cohesiveness, group insulation, a lack of methodological procedures, and one clear leader.[133] According to Janis, if the group is too cohesive "each member becomes more psychologically dependent on the group and displays greater readiness to adhere to the group's norms."[134] If the group is insulated in a way that the members have little or no opportunity to discuss certain policy issues outside the group, the group's members "can be expected to show an increased tendency to rely upon the judgment of the group on those issues."[135] Janis argues that the lack of methodological procedures in group decisions leads to greater conformity tendencies within the group, as there

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[128] *Id.* at 1935.
[129] Irving L. Janis, *Groupthink*, PSYCH. TODAY MAG., Nov. 1971, at 84, 84.
[130] *Id.* at 85, 88.
[131] *Id.* at 84.
[132] IRVING L. JANIS & LEON MANN, DECISION-MAKING: A PSYCHOLOGICAL ANALYSIS OF CONFLICT, CHOICE, AND COMMITMENT 131 (1977).
[133] *Id.* at 132.
[134] *Id.* at 131.
[135] *Id.*

are no procedural safeguards to protect against groupthink and the bias of one member influencing others.[136] Finally, one clear leader increases the likelihood that the leader will use his or her power to induce the members to conform to his or her decision.[137] Some researchers also suggest that as the number of antecedent conditions increases, so does the chance of groupthink.[138]

While Janis's list of antecedent conditions provides a helpful starting point, it is not exhaustive. Scholars continue to research the impact of diversity on groupthink. Given this new research, courts might add, for example, a complete lack of diverse perspectives on the hiring or employment committee to the list of antecedent groupthink conditions. Psychology professor and leading expert on creativity and collaboration, Keith Sawyer, observes in his seminal 2008 book, *Group Genius: The Creative Power of Collaboration*,[139] that productive thinking is most effective when certain conditions are met. Most important for this Note, the group should be diverse, not just along lines related to protected classes, but in a whole host of contexts including experiential diversity, etc.[140] As Sawyer says, "If group members are too familiar with each other, interaction is no longer challenging, and group flow fades away. Only by introducing diversity can we avoid the groupthink that results from too much conformity."[141] One business analyst expanded: "Groupthink is a natural human bias that can infect any organization—unless there's enough diversity within the group to counterbalance its effects. Encouraging dissent and disagreement may seem counterproductive, but evidence suggests it's the only way to get closer to the truth—and better decisions overall."[142]

In recent years, scholars have created helpful meta-analyses of the many studies confirming and building off of Janis's initial groupthink research.[143] These meta-analyses show the procedures that researchers have employed, including case studies[144] and empirical studies,[145] to examine groupthink in

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[136] *Id.*

[137] *Id.*

[138] Turner & Pratkanis, *supra* note 15, at 107–08.

[139] KEITH SAWYER, GROUP GENIUS: THE CREATIVE POWER OF COLLABORATION 51 (2008).

[140] *Id.* at 59.

[141] *Id.* at 75.

[142] Anna Johansson, *Why Workplace Diversity Diminishes Groupthink and How Millennials Are Helping*, FORBES (Jul. 20, 2017), https://www.forbes.com/sites/annajohansson/2017/07/20/how-workplace-diversity-diminishes-groupthink-and-how-millennials-are-helping/?sh=7a8449464b74 [https://perma.cc/A69F-RVCD].

[143] *See, e.g.*, James D. Rose, *Diverse Perspective on the Groupthink Theory – A Literary Review*, 4 EMERG. LEAD. JOURNEYS 37, 38 (2011); James K. Esser, *Alive and Well after 25 Years: A Review of Groupthink Research*, 73 ORG. BEHAV. & HUM. DEC. PROC. 116, 117 (1998).

[144] *See* Charles P. Koerber & Christopher P. Neck, *Groupthink and Sports: An Application of Whyte's Model*, 15 INT'L J. CONTEMP. HOSP. MGMT. 20, 21 (2003) (indicating that groupthink can be applicable in larger groups); Thomas R. Hensley & Glen W. Griffin, *Victims of Groupthink: The Kent State University Board of Trustees and the 1977 Gymnasium Controversy*, 30 J. CONF. RES. 497, 497 (1986) (finding significant evidence of groupthink in the Kent State University gymnasium controversy and recommending revising the board selection process); David Ahlstrom & Linda C. Wang, *Groupthink and France's Defeat in the 1940 Cam-*

greater detail over the course of several years.[146] One particularly salient analysis was conducted in 1992.[147] Members of the Institute of Personality and Social Research at the University of California, Berkeley analyzed ten cases that potentially showed the dangers of groupthink in group decision-making: the Bay of Pigs, United States involvement in the Korean War, Pearl Harbor, the Vietnam War, the Marshall Plan, the Cuban Missile Crisis, Watergate, Neville Chamberlain's cabinet, the Mayaguez incident, and the Iran hostage situation.[148] The authors confirmed the importance of structural and procedural faults of an organization as antecedents of groupthink.[149]

More recent studies have found that diversity—specifically, racial diversity—within groups can serve as an antidote to groupthink. After conducting an experiment, researchers concluded that white members of mock juries "cited more case facts, made fewer errors, and were more amenable to discussion of racism when in diverse versus all-White groups."[150] In the experiment, participants were shown a trial of a Black defendant. The researchers then compared the decision-making processes of racially heterogenous and homogenous six-person groups.[151] Other studies have similarly shown the positive impact of group diversity—both race[152] and general "cognitive" diversity[153]—on higher integrative complexity of the thinking of those members in the majority.

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paign, 15 J. MGMT. HIST. 159, 159 (2006) (finding evidence of all symptoms from Janis's initial work and concluding that groupthink was a key factor in France's 1940 World War II defeat).

[145] *See* Ferda Erdem, *Optimal Trust and Teamwork: From Groupthink to Teamthink*, 53 WORK STUDY 229, 232–33 (2003) (finding that a high degree of trust within groups increases risk of groupthink); Marlene E. Turner, Anthony R. Pratkanis, Preston Probasco & Craig Leve, *Threat, Cohesion, and Group Effectiveness: Testing a Social Indemnity Maintenance Perspective on Groupthink*, 63 J. PERS. & SOC. PSYCH. 781, 781 (1992) (finding support for Janis's groupthink theory).

[146] Matie Flowers was the first attempt to demonstrate Janis's theory empirically. Matie L. Flowers, *A Laboratory Test of Some Implications of Janis's Groupthink Hypothesis*, 35 J. PERSONALITY & SOC. PSYCH. 888 (1977). Flowers used a two-by-two factor test (leadership type and group cohesion level) in which he split 120 college students into forty groups consisting of three members and one leader. *Id.* at 890. In half of the groups, Flowers told the leader to assert his or her opinion on the issue at hand at the beginning of the group meeting (the "closed" condition), in the other half of the groups, Flowers told the leader to make their personal opinion known only at the end of the group meeting (the "open" condition). *Id.* Though his experiment did not support Janis's theory on group cohesion, the results showed a strong correlation between leadership action and group decision outcomes. *Id.* at 894–95. Groups with closed leaders saw fewer solutions proposed and fewer facts utilized. *Id.* at 895.

[147] Philip E. Tetlock, Randall Peterson, Charles McGuire & Shi-Jie Chang, *Assessing Political Group Dynamics: A Test of the Groupthink Model*, 63 J. PERS. & PSYCH. 403 (1992).

[148] *Id.* at 408-09.

[149] *Id.* at 406.

[150] Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERS. & SOC. PSYCH. 597, 597 (2006).

[151] *Id.* at 600.

[152] *See* Anthony L. Antonio, Mitchell J. Chang, Kenji Hakuta, David A. Kenny, Shana Levin & Jeffrey F. Milem, *Effects of Racial Diversity on Complex Thinking in College Students*, 15 PSYCH. SCI. 507, 508–09 (2004).

[153] Cognitive team diversity is defined as "perceived differences in thinking styles, knowledge, skills, values, and beliefs among individual team members." Shung J. Shin, Tae-Yeol

Given the broad consensus around the existence of groupthink, many organizations in the business and government sectors have embraced this research and advocate for more diversity to avoid groupthink. Thus, the legal system would not be alone in recognizing this research. In the business context, leaders of many organizations are concerned about the impact of groupthink in the boardroom. Business School Professors Kenneth Merchant and Katharina Pick observed that boardrooms are particularly susceptible to groupthink: "Most [boardrooms] have the antecedent conditions that are necessary and sufficient to create groupthink according to one or more of the groupthink researchers. Board members almost invariably have common social identifications. Many of them come from their similar social backgrounds, their identification as professional board members, and their identification with the group with which they are serving."[154] As many boards are quite homogenous in makeup, Merchant and Pick suspect that boards are susceptible to the impact of groupthink, harming their ability to make smart business decisions.

Various industries, particularly in the financial sector, have focused on issues concerning groupthink. Some regulators recently have proposed changes to address these concerns.[155]

D. The Ripeness for Sociological and Psychological Evidence in Horizontal Decision-Making Cases: Motivating Factor Through Groupthink

Courts should recognize research on groupthink as a legitimate tool in determining whether a defendant would have made the same decision regardless of illegal animus on the part of one or more decision makers. Groupthink concepts provide a meaningful framework to understand the impact of a single dominant committee member who harbors animus can

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Kim, Jeong-Yeon Lee & Lin Bian, *Cognitive Team Diversity and Individual Team Member Creativity: A Cross-Level Interaction*, 55 ACAD. OF MGMT. J. 197, 197 (2012). *See also* C. Chet Miller, Linda M. Burke & William H. Glick, *Cognitive Diversity Among Upper-Echelon Executives: Implications for Strategic Decision Processes*, 19 STRAT. MGMT. J., 39, 39–40 (1998).

[154] KENNETH A. MERCHANT & KATHARINA PICK, BLIND SPOTS, BIASES AND OTHER PATHOLOGIES IN THE BOARDROOM, 57 (2010).

[155] In December 2020, the Nasdaq stock exchange filed a proposal with the U.S. Securities and Exchange Commission to adopt new listing standards related to board diversity. As the proposal states, "Nasdaq is concerned that boards lacking diversity can inadvertently suffer from 'groupthink,' which is 'a dysfunctional mode of group decision-making characterized by a reduction in independent critical thinking and a relentless striving for unanimity among members.' The catastrophic financial consequences of groupthink became evident in the 2008 global financial crisis. . . ." NASDAQ STOCK MARKET, *Form 19b-4: A Proposal to Advance Board Diversity and Enhance Transparency of Diversity Statistics Through New Proposed Listing Requirements* (Dec. 1, 2020), https://listingcenter.nasdaq.com/assets/RuleBook/Nasdaq/filings/SR-NASDAQ-2020-081.pdf [https://perma.cc/MJS3-UB9N] (citing Daniel P. Forbes & Frances J. Milliken, *Cognition and Corporate Governance: Understanding Boards of Directors as Strategic Decision-Making Groups*, 24 ACAD. MGMT. REV. 489, 496 (1999)). *See also* GROUP OF THIRTY, BANKING CONDUCT AND CULTURE: A PERMANENT MINDSET CHANGE 11 (2018), https://group30.org/images/uploads/publications/aaG30_Culture2018.pdf [https://perma.cc/5SM7-VK75].

have on an employment decision.[156] Plaintiffs currently lack the tools to prove that the presence of one biased decision maker is a motivating factor and that, as per § 706(g)(2)(B), the defendant would not have made the same decision regardless. Thus, allowing plaintiffs to rely on the concepts of groupthink may enhance their ability to sustain an award for monetary damages and will align more with scientific understandings of group behavior. Likewise, evidence presented by a defendant that policies and procedures are in place that were reasonably designed to rebut a finding of groupthink could be admissible to evidence that an employment decision would have, in fact, been made regardless of one decision maker's animus.

Given the threat of groupthink in homogenous groups, after a plaintiff has provided compelling evidence of discriminatory animus by one or more decision makers, judges should permit them to show that such animus disproves or makes less credible a defendant's claim that it would have made the same decision. This preserves a plaintiff's ability to win monetary damages in addition to attorney's fees. Discriminatory animus can be a motivating factor under § 703(m) if one decision maker harbors clear animus towards the applicant. Then, a defendant can prove it would have made the same decision under § 706(g)(2)(B) with evidence that refutes groupthink, while a plaintiff can provide evidence that the structural dynamic of the group was such to allow groupthink. Evidence of groupthink based on the makeup, structure, and dynamic of the committee could provide clarity on whether the discriminatory animus was, in fact, a but-for factor in the adverse employment decision. Applying the motivating factor test and the "but-for" rebuttal in this manner would potentially animate § 703(m) and provide meaningful opportunity for not just limited relief but also financial redress as intended by Congress.

Defendants could dispute claims of groupthink through evidence of policies and practices that are designed to have the effect of suppressing groupthink and encouraging healthy dissent. Defendants could provide evidence that antecedent conditions of groupthink were, in fact, not present at the committee. Understanding the proper roles of § 703(m) and § 706(g)(2)(B) could have salutary effects on the structure and makeup of employment committees.

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[156] Some may argue that the courts should resist the use of evidence rooted in social science, but history provides examples of cases in which courts have noted these concepts. *See e.g.* Brown v. Board of Education of Topeka, Kansas, 347 U.S. 483, 494 n.11 (1954) (citing K.B. CLARK, EFFECT OF PREJUDICE AND DISCRIMINATION ON PERSONALITY DEVELOPMENT (1950)); Weiand v. State, 732 So. 2d 1044 (Fla. 1999) (ruling that battered person syndrome could be used to support a claim of self-defense in a murder trial).

E. Permitting Evidence of Groupthink in Motivating Factor Analysis Will Not Uncontrollably Open the Floodgates to Litigation Under Title VII

While this Note contends that courts should apply § 703(m)'s motivating factor test and the but-for rebuttal of § 706(g)(2)(B) in horizontal decision-making cases using a new standard—a decision maker's animus spread through groupthink—critics could raise concerns about the possibility of burdensome litigation. They may fear that allowing evidence of groupthink into a Title VII analysis would result in excessive litigation that would overwhelm an already strained judicial system.[157] This Note's recommendations certainly may increase the number of cases that reach a jury if in fact the requirement of a motivating factor is demonstrated through a single committee member's animus and the plaintiff can establish that there are genuine issues of fact concerning a defendant's affirmative defense. In doing so, however, plaintiffs with compelling evidence of discrimination by at least one member of a decision-making committee will finally get in front of a jury. Thus, some increase in jury trials may be necessary in order to properly realize Congressional intent.

Notably, this Note does not advocate for a change in the standard for establishing discriminatory animus on the part of any individual actor. Clear evidence of discriminatory animus is and would remain necessary for a Title VII claim brought under § 703(m). Rather, this Note suggests a way to demonstrate that discriminatory animus was a § 703(m) motivating factor in horizontal decision-making and was the but-for cause under § 706(g)(2)(B). It advocates that courts should admit evidence of groupthink in circumstances in which fewer than all decision makers are alleged to harbor animus.

Judges will continue to require both evidence of a decision maker's animus to prove liability and then will require equally convincing evidence of groupthink for monetary damages. Each Title VII discrimination claim is heavily fact dependent, and judges are experienced in assessing evidence in the context of summary judgment motions under Federal Rule of Civil Procedure 56.[158] Plaintiffs will continue to bear the burden of providing evidence of discriminatory animus and evidence that such animus was a motivating factor in the adverse action decided by the committee. Once discriminatory intent on the part of at least one actor is established, evidence of groupthink may be necessary to rebut a defendant's claim that discrimination was not the but-for cause of an adverse employment decision.

This Note aligns with the standard that a plaintiff with insufficient proof of discriminatory animus by a decision maker and no clear evidence that such animus influenced others cannot make a successful Title VII claim.

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[157] U.S. District Courts heard 376,762 cases in 2019. *See* UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 2019 (2019).

[158] FED. R. CIV. P. 56.

Conclusion

As the famous idiom goes "one bad apple spoils the bunch." So, too, in certain circumstances, may the animus of one committee member impact a decision-making process. This Note proposes evidentiary analyses that will be more focused and appropriately targeted in Title VII horizontal decision-making cases. By using groupthink in Title VII cases brought under § 703(m), courts will be able to better assess the merits of the arguments on both sides, specifically around the § 706(g)(2)(B) question of whether an employer would have made the same decision regardless of illegal considerations of an employees' characteristic. Further, this Note's recommendation would encourage employers to put in place practices and procedures that are reasonably designed to enhance the diversity of their decision-making bodies in order to protect against Title VII § 703(m) claims. Such a collateral consequence cannot be overstated, as the workforce is becoming more diverse, and that trend will likely continue.[159] If courts adopt this new evidentiary practice, the promise of § 703(m) may finally be realized, as more plaintiffs may achieve redress, both monetary and nominal, in Title VII lawsuits.

[159] *See* U.S. Bureau of Lab. Stat., Labor Force Statistics from the Current Population Survey (2020); U.S. Bureau of Lab. Stat., *Labor Force Projections to 2024*, Monthly Lab. Rev. (Dec.2015), https://www.bls.gov/opub/mlr/2015/article/labor-force-projections-to-2024.htm [https://perma.cc/D7HQ-L8VE].