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ESSAY

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ABSTRACTS

ARTICLES

Sexuality is integral to the human experience. Yet choices related to sexuality—sex, intimate relationships, marriage, pleasure, and childbearing—are often controlled for people with intellectual and developmental disabilities. Discourse on sexuality primarily focuses on acts of sexual violence against this community, emphasizing a victim–perpetrator binary. This binary view directs legal and policy efforts to ameliorate this sexual violence, emphasizing victimhood and protectionism.

But individuals with intellectual and developmental disabilities—like members of the broader population—desire to experience love and intimacy; engage in sexual pleasure and self-expression; and exercise choices around sexuality and reproduction. Legal scholarship has undertheorized how state systems that are central in the lives of people with intellectual and developmental disabilities normalize the subjugation of sexual and reproductive choices.

This Article fills this void by applying a new structural desexualization of disability framework to identify the ways that legal structures and social norms act in concert to harm people with intellectual and developmental disabilities in matters of sexuality. This Article examines three disability systems through this new framework: guardianship, special education, and the Home- and Community-Based Services Waiver program.

This is the first legal Article to situate the structural desexualization of disability as a constitutive element in perpetuating sexual violence against people with intellectual and developmental disabilities. This Article aims to encourage discourse, advocacy, policymaking, and organizing around issues that affect sexuality by reframing the victim–perpetrator binary. It further seeks to reposition sexuality as a community integration priority under the Americans with Disabilities Act.

What kinds of reasons should matter in choosing an approach to constitutional or legal interpretation? Scholars offer different types of reasons for their theories of interpretation: conceptual, linguistic, normative, legal, institutional, and reasons based on theories of law.

This Article argues that normative reasons, and only normative reasons, can justify interpretive choice. This is the "normative choice thesis." This Article formulates the normative choice thesis and offers a systematic analysis of the different kinds of reasons usually canvassed to defend theories of interpretation, showing why each type of non-normative reason cannot justify interpretive choice. In doing this, this Article also offers an account of interpretive choice and its relation to theories of interpretation. All the ways of determining the meaning of a legal source—and all the actions that could be undertaken instead—are alternatives for interpretive choice, regardless of what counts as "interpretation."

If interpretive choice cannot be grounded in some immutable truth about the idea of interpretation or language, but only on normative reasons, then the proper method of constitutional or statutory interpretation is liable to change with circumstances. This questions some well-established features of our legal culture, such as the common practice of committing to a single method of interpretation ("I'm an originalist," "I'm a living constitutionalist"), the expectation that judges be consistent in their approaches to interpretation, and the assumption that some legal provisions should always be interpreted in the same way.

NOTES

The criminal and immigration systems in the United States have increasingly overlapped, adversely affecting noncitizens even distantly involved in criminal activity. Individuals without legal status who have engaged significantly with a criminal organization can cooperate with law enforcement in exchange for formal immigration benefits. There are no formal protections, however, for individuals residing in the country without legal status who have engaged in minor criminal activity—so minor that charges are not brought against them—even when they cooperate with law enforcement to provide information on the larger criminal scheme. This seemingly contravenes the goals of criminal and immigration law by failing to protect vulnerable accomplices who have not been charged with wrongdoing.

This Note proposes shielding such susceptible populations by expanding immigration protections. In the criminal sphere, charged individuals who lack the ability to render the substantial assistance needed for formal cooperation can still be eligible for a "safety valve" if, in good faith, they provide details on the activities that they partook in. Recipients of safety-valve protections receive sentences below the defined statutory minimums for the crimes they have committed. They do not obtain as much of a reduction in sentencing as formal cooperators or informants do but still benefit from engaging honestly with law enforcement. This Note proposes mirroring such a protection—a lesser

This Essay then turns to postratification evidence. The Enforcement Acts did not regulate the use of race during redistricting. During the 1870 and 1880 redistricting cycles, Republican Southern states empowered Black voters whereas Democratic Southern states packed and cracked them.

This Essay argues that, from an originalist perspective, the competing doctrines of vote dilution and racial gerrymandering are improperly grounded in the Equal Protection Clause. This Essay further claims that, under the Fifteenth Amendment, there is some historical evidence in favor of vote dilution doctrine but virtually no historical support for racial gerrymandering doctrine. The upshot is that Section 2 is valid legislation under Congress's Fifteenth Amendment enforcement authority to protect the rights to vote and hold office.

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ARTICLES

THE STRUCTURAL DESEXUALIZATION OF DISABILITY

*Natalie M. Chin**

Sexuality is integral to the human experience. Yet choices related to sexuality—sex, intimate relationships, marriage, pleasure, and childbearing—are often controlled for people with intellectual and developmental disabilities. Discourse on sexuality primarily focuses on acts of sexual violence against this community, emphasizing a victim–perpetrator binary. This binary view directs legal and policy efforts to ameliorate this sexual violence, emphasizing victimhood and protectionism.

But individuals with intellectual and developmental disabilities—like members of the broader population—desire to experience love and intimacy; engage in sexual pleasure and self-expression; and exercise choices around sexuality and reproduction. Legal scholarship has undertheorized how state systems that are central in the lives of people with intellectual and developmental disabilities normalize the subjugation of sexual and reproductive choices.

This Article fills this void by applying a new structural desexualization of disability framework to identify the ways that legal structures and social norms act in concert to harm people with intellectual and developmental disabilities in matters of sexuality. This Article examines three disability systems through this new framework:

* Associate Professor of Law and Director of the Disability Rights and Social Justice Clinic at the City University of New York School of Law; J.D., George Washington University Law School; B.S., Boston University. I am grateful to Rabia Belt, Doron Dorfman, Jamelia Morgan, and Claire Raj for their insights and guidance in earlier drafts of this Article. I would also like to thank Margaret E. Johnson, Sarah Lorr, Kimberly Mutcherson, Prianka Nair, Adam M. Samaha, Britney Wilson, Erika Wilson, the clinical faculty at NYU School of Law, and participants at the Professional Development Committee Workshop at CUNY School of Law, the NYU Clinical Law Review Writers' Workshop, the AALS Clinical Conference Works-in-Progress Workshop, the Lutie Lytle Black Women Law Faculty Writing Workshop, the AALS Disability Law Works-in-Progress Workshop, and the Fordham Law School Faculty Workshop for their guidance and comments on various drafts of this Article. I want to thank my research assistants Rae Ellis, Amina Goheer, Holly Gunder, Kimberly Shannon, and Isabel Tessier. I am grateful to the editors at the *Columbia Law Review* for their insightful and thoughtful editing.

guardianship, special education, and the Home- and Community-Based Services Waiver program.

This is the first legal Article to situate the structural desexualization of disability as a constitutive element in perpetuating sexual violence against people with intellectual and developmental disabilities. This Article aims to encourage discourse, advocacy, policymaking, and organizing around issues that affect sexuality by reframing the victim–perpetrator binary. It further seeks to reposition sexuality as a community integration priority under the Americans with Disabilities Act.

INTRODUCTION

"Sexuality is often the source of our deepest oppression; it is also often the source of our deepest pain. It's easier for us to talk about—and formulate strategies for changing—discrimination in employment, education, and housing than to talk about our exclusion from sexuality and reproduction."

— Anne Finger.[1]

Sexuality is an aspect of one's life that is inseparable from the other complex layers of the human experience. It encompasses sexual self-expression, "sex, gender identities and roles, sexual orientation, eroticism, [sexual] pleasure, intimacy and reproduction."[2] It influences one's actions, self-esteem, behavior, thoughts, feelings of self-worth, and interpersonal interactions.[3] Legal scholarship has undertheorized how state systems that are central in the lives of people with intellectual and developmental disabilities[4] normalize the control and subjugation of

1. Anne Finger, Forbidden Fruit, New Internationalist, July 1992, at 8, 9.

2. Defining Sexual Health, WHO, https://www.who.int/teams/sexual-and-reproductive-health-and-research/key-areas-of-work/sexual-health/defining-sexual-health [https://perma.cc/KK8L-VPHH] (last visited June 29, 2024) (internal quotation marks omitted) (quoting WHO, Defining Sexual Health: Report of a Technical Consultation on Sexual Health 28–31 January 2002, Geneva 5 (2006), https://www.cesas.lu/perch/resources/whodefiningsexualhealth.pdf [https://perma.cc/LCT7-22CG]); see also Shirley Lin, Dehumanization "Because of Sex": The Multiaxial Approach to the Rights of Sexual Minorities, 24 Lewis & Clark L. Rev. 731, 742 (2020) (discussing the fluidity of sexual self-identification and explaining that "for millions of individuals . . . sex cannot be deemed only biologically external, immutable, or dimorphic").

3. Miriam Taylor Gomez, The S Words: Sexuality, Sensuality, Sexual Expression and People With Intellectual Disability, 30 Sexuality & Disability 237, 237 (2012).

4. This Article interchanges between using identity-first and person-first language to reflect the differing views on the use of language when writing about disability. In academia, for example, person-first language is largely the default (i.e., people with a disability) when

intimate, sexual, and reproductive choices and how these systems exact enduring harms.

This Article is the first to apply a *structural desexualization of disability* framework to identify the invisible ways that legal, social, political, historical, and economic structures and norms act in concert within state systems to exact harm on people with intellectual and developmental disabilities in matters of sexuality. These structures and norms then work to create conditions of normalized human suffering.[5] This framework situates the structural desexualization of disability as a constitutive element in maintaining and perpetuating the sexual violence experienced by people with intellectual and developmental disabilities. In doing so, it identifies the structural desexualization of disability as the cumulative root cause of both the interpersonal violence and indirect forms of harm that this community experiences.

Individuals with intellectual and developmental disabilities share the same desire to experience love and intimacy, engage in sexual pleasure and sexual self-expression, and exercise choices around sexuality and reproduction as the broader population.[6] "Desexualization is the process

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discussing disability. Many in the disabled community choose identity-first language. See, e.g., Lydia X.Z. Brown, The Significance of Semantics: Person-First Language: Why It Matters, Autistic Hoya (Aug. 4, 2011), https://www.autistichoya.com/2011/08/significance-of-semantics-person-first.html [https://perma.cc/ZY9N-R4QH] ("In the autism community, many self-advocates and their allies prefer terminology such as 'Autistic,' 'Autistic person,' or 'Autistic individual' because we understand autism as an inherent part of an individual's identity . . . .").

5. The concept of "structural violence" informs the structural desexualization of disability framework. See infra note 230. "Structural violence is a process that works slowly through general misery, diminishing the dignity of human beings . . . ." Bandy X. Lee, Violence: An Interdisciplinary Approach to Causes, Consequences, and Cures 125 (2019) [hereinafter Lee, Violence]. It "occurs through economically, politically, or culturally driven processes that work together . . . to limit [persons] from achieving full quality of life." Id. at 123 (citing Akhil Gupta, Red Tape: Bureaucracy, Structural Violence, and Poverty in India 19–25 (2012)). It encompasses types of violence that are "reworked through the routines of daily life as well as enacted through social relations and social institutions." Linda Green, Comment on Paul Farmer, An Anthology of Structural Violence, Sidney W. Mintz Lecture in Anthropology at Johns Hopkins University (Nov. 27, 2001), *in* 45 Current Anthropology 305, 320 (2004). The concept of structural violence is applied to identify forms of violence that are built into structural systems and manifest to create inequality in the distribution of power, wealth, and resources. Johan Galtung, Violence, Peace, and Peace Research, 6 J. Peace Rsch. 167, 175 (1969) [hereinafter Galtung, Violence, Peace, and Peace Research]; see also Paul Farmer, Pathologies of Power: Health, Human Rights, and the New War on the Poor 29–31 (2003) (discussing the conditions of human suffering that are built within the structures of society and are not often "effectively conveyed by statistics or graphs" but are experienced by those "occupying the bottom rung of the social ladder in inegalitarian societies").

6. See, e.g., Tom Shakespeare, Disabled Sexuality: Towards Rights and Recognition, 18 Sexuality & Disability 159, 164–65 (2000) ("[O]ne of the tasks for us here, and in our work, is to put private desires and personal relationships on the agenda of the disability movement, to make them an arena for change."); see also In re D.D., 19 N.Y.S.3d 867, 875 (Sur. Ct. 2015) ("The right to have a family of one's own is not reserved only for persons

of stripping disabled people of sexual agency and autonomy."[7] It is the loss of self-determination in matters of sexual self-expression and reproduction.[8] It is the erasure of one's "sexual identity or experience."[9] It creates often-insurmountable barriers to engaging in sexual desire or choosing to be the object of sexual desire.[10]

The structural desexualization of disability is experienced through the day-to-day indignities that result from the stripping of: sexual agency; sexual self-determination; and opportunities to engage in sexual self-expression, pleasure, and desire. It is embodied through the erosion of personhood, loss of bodily autonomy, diminishment of self-worth, and other losses of dignity that result from this desexualization. It is felt as a result of the barriers erected that limit opportunities to develop healthy sexual and intimate relationships; make reproductive choices; and access sexual health education, supports, services, and reproductive care. It is experienced through the withholding of knowledge and information on how to protect one's body and how to identify when one's body is violated.

The breadth of what sexuality encompasses in one's life speaks to "[t]he magnitude of damage" that flows from the structural desexualization of disability.[11] Consider the case of Britney Spears. Spears gained nationwide attention following the release of her testimony in court for the removal of the thirteen-year conservatorship[12] to which she was subjected by her father. In her hearing to remove her conservatorship, Spears testified:

> I want to be able to get married and have a baby. I was told right now in the conservatorship I'm not able to get married or have a baby. I have an [IUD] inside of myself right now so I don't get pregnant. I wanted to take the [IUD] out so I could start trying to have another baby, but this so-called team won't let me go to the doctor to take it out because they don't want me to have

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with no disabilities, and the yearning for companionship, love, and intimacy is no less compelling for persons living with disabilities."). The *In re D.D.* court reasoned that "these are choices central to . . . personal dignity and autonomy and [the] pursuit of happiness." *In re D.D.*, 19 N.Y.S.3d at 875.

7. Lydia X.Z. Brown, Ableist Shame and Disruptive Bodies: Survivorship at the Intersection of Queer, Trans, and Disabled Existence, *in* Religion, Disability, and Interpersonal Violence 163, 164 (Andy J. Johnson, J. Ruth Nelson & Emily M. Lund eds., 2017) [hereinafter Brown, Ableist Shame]; see also Elizabeth Emens, Intimate Discrimination: The State's Role in the Accidents of Sex and Love, 122 Harv. L. Rev. 1307, 1338 (2009) (discussing "normative desexualization" as the "utter exclusion of disabled people from the intimate realm—not just relegation or segregation to pairing only within one's group").

8. Brown, Ableist Shame, supra note 7, at 164.

9. Id.

10. Id.

11. Lee, Violence, supra note 5, at 124 ("The magnitude of damage warrants calling [structural violence] violence rather than simply social injustice or oppression.").

12. Conservatorship is also referred to in some states as guardianship. See infra section III.A (discussing the legal process of guardianship).

> children, any more children. So basically this conservatorship is doing me way more harm than good.[13]

To those familiar with conservatorship, Spears's testimony was not a "bombshell"[14] or "stunning assertion[],"[15] as maintained by media outlets and pundits who questioned the legality of whether Spears could be forced to maintain birth control under conservatorship to avoid pregnancy. Rather, Spears's testimony illustrates the normalized sexual and reproductive control that is inflicted through the "coercive function[]" of conservatorship.[16]

As Spears wrote in her 2023 memoir, *The Woman in Me*, "The conservatorship was created supposedly because I was incapable of doing anything at all—feeding myself, spending my own money, being a mother, anything."[17] Through the appointment of a conservatorship, the court determined that Spears lacked "legal mental capacity" to make decisions about her life.[18] Spears's father became the court-appointed conservator of Spears's "person" and of her estate[19] until the court dissolved the guardianship in 2021.[20] Under her conservatorship, Spears reverted to the

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13. Reporter's Transcript of Proceedings at 25, In re the Conservatorship of: Britney Jean Spears, No. BP108870 (Cal. Super. Ct. filed June 23, 2021) (on file with the *Columbia Law Review*).

14. Erin Snodgrass, One of Britney Spears' Co-Conservators Says Her Entire Medical Team Agrees Her Dad Should Be Removed From Guardianship, Bus. Insider (July 26, 2021), https://www.businessinsider.com/britney-spears-medical-team-dad-should-be-removed-guardianship-2021-7 [https://perma.cc/2N7D-36SM].

15. Jan Hoffman, Is the Forced Contraception Alleged by Britney Spears Legal?, N.Y. Times (June 24, 2021), https://www.nytimes.com/2021/06/24/health/britney-spears-forced-IUD.html (on file with the *Columbia Law Review*) (last updated Aug. 12, 2021).

16. Claire Spivakovsky & Linda Roslyn Steele, Disability Law in a Pandemic: The Temporal Folds of Medico-Legal Violence, 31 Soc. & Legal Stud. 175, 177 (2022) (discussing how guardianship laws were used to perpetuate forms of "legal violence" against disabled people during the COVID-19 pandemic in Australia); see also Robyn M. Powell, Disability Reproductive Justice, 170 U. Pa. L. Rev. 1851, 1854–55 (2022) [hereinafter Powell, Disability Reproductive Justice] ("[T]hat people with actual or perceived disabilities—including physical, intellectual, sensory, and psychiatric disabilities—should be denied reproductive autonomy remains a persistent, unrelenting belief plaguing our nation."); Sara Luterman, For Women Under Conservatorship, Forced Birth Control Is Routine, The Nation (July 15, 2021), https://www.thenation.com/article/society/conservatorship-iud-britney-spears/ (on file with the *Columbia Law Review*) (reporting on Spears's testimony and the coercive nature of a conservatorship).

17. Britney Spears, The Woman in Me 173 (2023); see also Cal. Prob. Code § 1800.3 (2024) (outlining the statutory requirements for the appointment of a conservator).

18. Jan Hoffman, Testing Britney Spears: Restoring Rights Can Be Rare and Difficult, N.Y. Times (July 23, 2021), https://www.nytimes.com/2021/07/23/health/britney-spears-conservatorship.html (on file with the *Columbia Law Review*) (last updated Sept. 30, 2021).

19. Spears, supra note 17, at 166–67; see also Cal. Prob. Code § 1800.3.

20. Joe Coscarelli & Julia Jacobs, Judge Ends Conservatorship Overseeing Britney Spears's Life and Finances, N.Y. Times (Nov. 12, 2021), https://www.nytimes.com/2021/11/12/arts/music/britney-spears-conservatorship-ends.html (on file with the *Columbia Law Review*) (last updated Nov. 15, 2021).

legal status of a minor with her father assuming the legal right to make plenary decisions over all aspects of her personal and financial life.[21]

In her memoir, Spears further expressed, "My dad took my boyfriend away and I could not drive. My mom and dad took my womanhood from me."[22] She concluded a chapter of her book by sharing what her father said shortly after he was appointed her conservator: "I just want to let you know, . . . I call the shots. . . . I'm Britney Spears now."[23] Is it viewed as a form of harm and suffering when the guardianship system strips someone of their choices around intimate relationships, marriage, childbearth, and parenting? How would disability law and policy change if the removal of these vital decisions was viewed as harm that is built into the structures of society?[24]

The outrage that swelled through the #FreeBritney movement[25] was arguably propelled by Spears's whiteness, wealth, and international recognition, which still could not shield her from having her sexual and reproductive decisionmaking rights controlled through a state process. Take these privileges away, however, and the outrage disappears. It is well documented that people with intellectual and developmental disabilities[26]—a population that lacks access, privilege, and economic

21. Spears, supra note 17, at 166–68.

22. Id. at 173.

23. Id. at 175 (internal quotation marks omitted) (quoting Britney Spears's father).

24. This Article is not debating whether guardianship should exist. Rather, it is questioning whether the nature of guardianship would change if certain aspects of the power exercised under guardianship were viewed as structural violence. The idea of abolishing guardianship as a system is, however, gaining traction as guardianship reforms expand across the country. See, e.g., Melissa Hellmann, Loss of Autonomy: How Guardianships Threaten People's Rights, Ctr. for Pub. Integrity (June 24, 2022), https://publicintegrity.org/inside-publici/newsletters/watchdog-newsletter/autonomy-guardianships-threaten-rights/ [https://perma.cc/8RLX-2TY3] (discussing types of abuses that have occurred under guardianship while recognizing that a "desire to abolish" guardianship may hinder reform); Sara Luterman, Abolish Guardianship, Preserve the Rights of Disabled People, and Free Britney, The Nation (Mar. 6, 2021), https://www.thenation.com/article/society/guardianship-britney-spears/ (on file with the *Columbia Law Review*) (discussing how guardianship inherently strips disabled people of their humanity and arguing that alternatives to guardianship, such as supported decisionmaking, are necessary to preserve the civil rights of the individual under guardianship).

25. See, e.g., Bianca Betancourt, Why Longtime Britney Spears Fans Are Demanding to #FreeBritney, Harper's BAZAAR (Nov. 12, 2021), https://www.harpersbazaar.com/celebrity/latest/a34113034/why-longtime-britney-spears-fans-are-demanding-to-freebritney [https://perma.cc/XM3H-AHQ6] ("Britney fans have long been wary of the conservatorship terms and have often questioned whether it was in Britney's best interest.").

26. This Article limits its focus to people with intellectual and developmental disabilities. Developmental disability is an umbrella term that includes "a group of conditions due to an impairment in physical, learning, language, or behavior areas." Developmental Disability Basics, CDC (May 16, 2024), https://www.cdc.gov/ncbddd/developmentaldisabilities/index.html [https://perma.cc/EV6R-YRMG]. Autism, Attention-Deficit/Hyperactivity Disorder (ADHD), intellectual disability, and cerebral palsy are examples of developmental disabilities. Id. A diagnosis of intellectual disability is

capital[27]—have long endured control over their intimate, sexual, and reproductive decisionmaking through guardianship and other means. For disabled people who live at the intersection of marginalized identities, such as being Black, Indigenous, transgender, or queer, this control is often rote, exacted through societal processes and norms.[28] But, unlike Spears, these deprivations are not elevated to importance in national dialogue.[29] They remain in the shadows, viewed largely by society as a natural aspect of what is required to protect this population.[30] The

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assessed based on "significant limitations in intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical skills, and age of onset before age 18." Robert L. Schalock et al., Am. Ass'n Intell. & Developmental Disabilities Ad Hoc Comm. on Tech. & Classification, Intellectual Disability: Definition, Classification, and Systems of Supports 28 (11th ed. 2010). A determination of intellectual functioning considers "reasoning, planning, solving problems, thinking abstractly, comprehending complex ideas, learning quickly, and learning from experience." Id. at 31. Adaptive functioning "is the collection of conceptual, social, and practical skills that all people learn in order to function in their daily lives." Adaptive Behavior, Am. Ass'n on Intell. & Developmental Disabilities, https://www.aaidd.org/intellectual-disability/definition/adaptive-behavior [https://perma.cc/F6FM-57RX] (last visited July 28, 2024) (emphasis omitted). Conceptual skills include "language; reading and writing; and money, time, and number concepts." Schalock et al., supra, at 44. Social skills include "interpersonal skills . . . and social problem solving." Id. Practical skills include performing activities of daily living, such as caring for one's health, maintaining a safe environment, managing finances, and using transportation. Id. Though helpful for framing this discussion, this Article also recognizes that precise definitions can fail to capture the full breadth of experiences of people with intellectual and developmental disabilities. See Sarah H. Lorr, Unaccommodated: How the ADA Fails Parents, 110 Calif. L. Rev 1315, 1325 (2022) ("In the context of [intellectual disability] . . . the broad diversity of who is included by the medical definition is not well expressed by rigid listings from a medical manual. The group is a heterogenous one with members having very different strengths and needs for supports.").

27. See Nanette Goodman, Michael Morris & Kelvin Boston, Financial Inequality: Disability, Race and Poverty in America 5–6 (2019), https://www.nationaldisabilityinstitute.org/wp-content/uploads/2019/02/disability-race-poverty-in-america.pdf [https://perma.cc/24KV-JV4E] (explaining the compounding consequences of the relationship between disability and poverty).

28. See, e.g., Nat'l Women's L. Ctr., Forced Sterilization of Disabled People in the United States 8 (Jan. 24, 2022), https://nwlc.org/wp-content/uploads/2022/01/*f*.NWLC_SterilizationReport_2021.pdf [https://perma.cc/F4QG-J83X] ("Black disabled women are more likely to be sterilized than white disabled women."); Amanda Collar, Indigenous Peoples' Limited Access to Reproductive Care, 176 Annals Internal Med. 408, 408 (2023) ("Many people with the capacity for pregnancy have long faced hurdles to control their own bodies and decide to have children, or not, especially Indigenous peoples."); Hannah G. Ginn, Securing Sexual Justice for People With Intellectual Disability: A Systematic Review and Critical Appraisal of Research Recommendations, 35 J. Applied Rsch. Intell. Disabilities 921, 922 (2022) (highlighting that "[a]cross studies, sexual and gender minority people with intellectual disability report experiencing erasure of their [sexual] identity within" the environment where they receive supports and services).

29. See infra Part III (discussing the experiences of intellectually and developmentally disabled people whose sexuality was controlled, minimized, or weaponized to cause harm).

30. See, e.g., Michael Gill, Already Doing It: Intellectual Disability and Sexual Agency 35–36 (2015) ("[T]he concept of intellectual disability assumes that people are unable to adequately advocate for themselves and need constant supervision and support. Individuals

predominant "focus on violence, abuse, victimization, stigmatization, and control" results in, "at best," individuals with intellectual and developmental disabilities "receiving little to no education about sexuality and reproduction and/or having their opportunities for sexual expression taken away, and at worst, contributes to eugenic practices."[31]

When national attention is given to issues of sexuality and people with intellectual and developmental disabilities, the focus is often on stories that sensationalize[32] acts of sexual violence[33] against this community. These stories emphasize a victim–perpetrator binary: There is a victim who experienced identifiable harms and a perpetrator to hold accountable.[34]

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are assumed vulnerable to sexual abuse and exploitation . . . [and as such,] their sexual rights should be protected while their sexual expression should be shunned and silenced.").

31. Carli Friedman, Sexual Health and Parenting Supports for People With Intellectual and Developmental Disabilities, 20 Sexuality Rsch. & Soc. Pol'y 257, 257 (2022) [hereinafter Friedman, Sexual Health and Parenting Supports] (citations omitted); see also Alice Wong, Introduction to Disability Intimacy, at xv, xviii (Alice Wong ed., 2024) (discussing how little public information is available on "disability intimacy," noting that in researching for her book, *Disability Intimacy*, "[a]rticles on stereotypes, stigmas, . . . sexual abuse, and sexual dysfunction abounded").

32. See Brown, Ableist Shame, supra note 7, at 167 (observing that sensationalized news stories that focus on sexual violence against a disabled person are "typically accompanied by an entire panoply of ableist tropes designed to either further accentuate the monstrosity of the perpetrator or to deny any semblance of humanity and personhood to the disabled survivor").

33. Throughout this Article, the term "sexual violence" is used as an umbrella term to include sexual assault and sexual abuse. This Article is informed by the definitions provided by The Arc, a national organization that focuses on "[p]romoting and protecting the human rights of people with intellectual and developmental disabilities and actively supporting their full inclusion and participation in the community throughout their lifetimes." The Arc, https://thearc.org [https://perma.cc/NJF3-NWEZ] (last visited July 15, 2024). As described by The Arc, "Assault is a crime of violence, anger, power and control where sex is used as a weapon against the victim. It includes any unwanted sexual contact or attention achieved by force, threats, bribes, manipulation, pressure, tricks, or violence." Leigh Ann Davis, The Arc, People With Intellectual Disabilities and Sexual Violence (2011), http://www.thearc.org/wp-content/uploads/forchapters/Sexual%20Violence.pdf [https://perma.cc/NTD7-JWEE]. Sexual assault "may be physical or non-physical and includes rape, attempted rape, incest and child molestation, and sexual harassment. It can also include fondling, exhibitionism, oral sex, exposure to sexual materials (pornography), and the use of inappropriate sexual remarks or language." Id. Sexual abuse "is a pattern of sexually violent behavior that can range from inappropriate touching to rape. The difference between the two is that sexual assault constitutes a single episode whereas sexual abuse is ongoing." Id.

34. See, e.g., Daniel Engber, The Strange Case of Anna Stubblefield, N.Y. Times Mag. (Oct. 20, 2015), https://www.nytimes.com/2015/10/25/magazine/the-strange-case-of-anna-stubblefield.html (on file with the *Columbia Law Review*) (documenting the case of Anna Stubblefield, a professor criminally convicted of aggravated sexual assault for having sex with D.J., a twenty-eight-year-old man with an intellectual disability who does not communicate verbally and is described as an adult who wears diapers, scoots on the floor, and chirps when excited); Robert Hanley, Verdict in Glen Ridge; 4 Are Convicted in Sexual Abuse of Retarded New Jersey Woman, N.Y. Times, Mar. 17, 1993, at A1 (discussing a highly publicized case through infantilizing descriptions of the disabled person: "[P]opular high school athletes clustered around a childlike 17-year-old schoolmate who idolized them and

This binary view focuses on an interpersonal, individualized form of harm, which results in a dominant sexual violence narrative. The victim–perpetrator binary consumes and narrows society's view of sexuality for people with intellectual and developmental disabilities. Discourse is confined to the individualized harm, victimhood, and the need for protection, thereby reinforcing a sexual violence narrative.

This view of sexuality attracts media headlines, which often surface fleeting conversations around what protective measures must be taken to safeguard intellectually and developmentally disabled people from this form of violence.[35]

In recent media, NPR reported on the disproportionate rate at which people with intellectual disabilities experience sexual violence, using unreported data from the DOJ.[36] The data showed "people with intellectual disabilities are sexually assaulted at rates more than seven times those for people without disabilities,"[37] with NPR using sensationalized language to describe this violence against the intellectually disabled community: "[T]hese women and men are easy prey for predators . . . ."[38]

Further, laws and policies designed to address sexual violence often focus on the victim–perpetrator binary, thereby limiting possibilities for change that addresses structural harms. This emphasis reifies the ascription that a diagnosis of intellectual or developmental disability is incompatible with exercising the range of choices available and related to one's sexuality—sex, developing and maintaining intimate relationships, marriage, engaging in sexual pleasure, and having children, to name only a few examples.[39] This ascription is reflected through laws that limit the

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coveted their friendship and then" violently sexually assaulted her); Jeff Bonty, Jacklin Sentenced to 18 Years in Sexual Assault Conviction, Daily J. (Jan. 27, 2023), https://www.daily-journal.com/news/crime/jacklin-sentenced-to-18-years-in-sexual-assault-conviction/article_7074974a-9db1-11ed-8fff-7fce2c235490.html (on file with the *Columbia Law Review*) (reporting on a Catholic priest in Illinois who was sentenced to eighteen years in prison after being convicted of sexually assaulting an intellectually disabled resident of a developmental center, who is described as having an IQ of forty-seven and "suffer[ing]" from partial paralysis).

35. See, e.g., Victoria Brownworth, Raped, Abused, and Ignored: Disabled Women Are Invisible Victims, Dame (Jan. 31, 2019), https://www.damemagazine.com/2019/01/31/raped-abused-and-ignored-disabled-women-are-invisible-victims [https://perma.cc/EB8C-8DFY] (discussing the need to include disabled women in the #MeToo conversation).

36. All Things Considered, 'She Can't Tell Us What's Wrong', NPR, at 00:10 (Jan. 10, 2018), https://www.npr.org/transcripts/566608390 (on file with the *Columbia Law Review*).

37. Id. at 02:00.

38. Id. at 00:32.

39. See, e.g., In re Guardianship of Kennedy, 845 N.W.2d 707, 708, 715 (Iowa 2014) (voicing concern regarding the constitutionality of a guardian's action to sterilize her twenty-one-year-old son, who was intellectually disabled, without his consent because he was in a relationship with a woman and admitted to having sex but not overturning a lower court's decision preserving her guardianship of her son); In re Grady, 426 A.2d 467, 486 (N.J. 1981) (finding that if a nineteen-year-old with Down syndrome "can have a richer and

sexual and reproductive choices of people with intellectual and developmental disabilities.[40]

Scholars are looking beyond the interpersonal narrative of violence to think more critically about its unseen impact, structural causes, and lasting consequences. By applying a broader understanding of violence, scholars such as Professor Erika Wilson are capturing the extent of violence's hold on maintaining oppressive systems such as racial segregation in the public education system.[41] Similarly, Professor Allegra McLeod argues for the necessity of "expand[ing] our understanding of violence beyond individualized disorder and the immediate scene of interpersonal harm" to stop gun violence.[42] Professors Stephen Lee and Rabia Belt are further pushing the boundaries of how violence is conceptualized to surface the mounting—but less visible— harms that are a result of incarceration and immigration detention.[43]

Social science scholars in the last half century have also developed new ways to think about violence and its root harms beyond the interpersonal.[44] The structural desexualization of disability framework

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more active life only if the risk of pregnancy is permanently eliminated, then sterilization may be in her best interests").

40. See, e.g., infra section I.C and Part III (discussing the range of laws, policies, and state systems that create and sustain the culture of desexualizing disability); see also Powell, Disability Reproductive Justice, supra note 16, at 1867–81 (describing the current landscape of laws and policies that limit the sexual and reproductive choices of people with disabilities).

41. See, e.g., Erika K. Wilson, White Cities, White Schools, 123 Colum. L. Rev. 1221, 1235–36 (2023) (arguing that adopting a broader definition of racial violence "jettisons the individual-perpetrator-and-intent paradigm that dominates conceptions of racial violence within the law" because the paradigm "limits the scope of what is considered racial violence [and] limits the conception of who is harmed to individuals only, obscuring the [structural] impact").

42. Allegra McLeod, An Abolitionist Critique of Violence, 89 U. Chi. L. Rev. 525, 527 (2022).

43. See Rabia Belt, The Fat Prisoners' Dilemma: Slow Violence, Intersectionality, and a Disability Rights Framework for the Future, 110 Geo. L.J., 785, 827–28 (2022) ("The plight of fat incarcerated people, and indeed, incarcerated people in general, is the embodiment of 'slow violence.'"); Stephen Lee, Family Separation as Slow Death, 119 Colum. L. Rev. 2319, 2326, 2384 (2019) (applying the concept of slow violence as a "useful intervention," which includes gaining a "better understand[ing] [of] how the law contributes to and normalizes immigrant suffering"). For other scholars who are challenging the normative definition of violence, see, e.g., Jill C. Engle, Sexual Violence, Intangible Harm, and the Promise of Transformative Remedies, 79 Wash. & Lee L. Rev. 1045, 1055–57 (2022) (focusing on a transformative justice approach that addresses the "ongoing, intangible harms" in cases of sexual violence); Alice Ristroph, Criminal Law in the Shadow of Violence, 62 Ala. L. Rev. 571, 573–76 (2011) (discussing the need to think more carefully about what is meant by violence in the undertaking of criminal law reform efforts).

44. See, e.g., Patricia Hill Collins, Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment 159 (2d ed. 2000) (discussing how, "[b]y making visible the pain [that sexual violence] survivors feel," scholars of Black feminist literature reframed the normalized misogyny against Black women as violence); Rob Nixon, Slow Violence and the Environmentalism of the Poor 2 (2011) (arguing that there is a need to reframe gradual

builds on this literature by shifting attention away from the victim–perpetrator binary of sexual violence that is most often applied to people with intellectual and developmental disabilities. This framework provides for a deeper inquiry into the causes of sexual violence that are not readily visible through a victim–perpetrator binary lens. In doing so, it exposes the extensive and cascading harms that are committed through systems, structures, and the state by the structural desexualization of disability. It further situates what role the state plays in maintaining—and should play in preventing—these harms.

Specifically, this Article examines three disability systems through the structural desexualization of disability framework: guardianship, special education, and the government-funded service system that provides community-based supports to people with intellectual and developmental disabilities. These systems dictate the level of control that is relegated to the sexual and reproductive choices of individuals with intellectual and developmental disabilities. By examining the disability systems "that shape [the] risk and local reality"[45] of sexual victimization, this Article proposes strategies for ameliorating sexual violence and its cascading harms. It further aims to encourage discourse, advocacy, policymaking, and organizing around the breadth of issues that affect sexuality by reframing the victim–perpetrator binary to reposition sexuality as a community integration priority under Title II of the Americans with Disabilities Act (ADA) for people with intellectual and developmental disabilities.[46]

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and delayed destruction as a form of violence); Lauren Berlant, Slow Death (Sovereignty, Obesity, Lateral Agency), 33 Critical Inquiry 754, 754 (2007) (describing the phrase "slow death" as the "physical wearing out of a population and the deterioration of people in that population"); Nancy Whittier, Carceral and Intersectional Feminism in Congress: The Violence Against Women Act, Discourse, and Policy, 30 Gender & Soc'y 791, 793 (2016) ("[A]n intersectional feminist approach emphasizes how social, economic, and political forces interact to shape different experiences and necessary solutions to violence." (citations omitted)).

45. Barbara Rylko-Bauer & Paul Farmer, Structural Violence, Poverty, and Social Suffering, *in* The Oxford Handbook of the Social Science of Poverty 47, 57 (David Brady & Linda M. Burton eds., 2016).

46. See infra section I.B. Community integration encompasses the right of disabled people under Title II of the ADA and its implementing regulations to receive government-funded supports and services in the community to avert unjustified isolation and segregation. Title II of the ADA is a federal statute the prohibits disability-based discrimination by public entities. 42 U.S.C. § 12131(1) (2018). The relevant federal regulation provides that "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d) (2024). Section 504 of the Rehabilitation Act, the precursor to the ADA, includes a parallel regulatory provision. See 28 C.F.R. § 41.51(d) ("The purpose of this part is to implement Executive Order 12250, which requires the Department of Justice to coordinate the implementation of section 504 of the Rehabilitation Act of 1973."). Section 504 is a federal statute that prohibits discrimination by entities that receive federal funding. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 19 U.S.C. § 794 (2018)) ("No otherwise qualified [disabled] individual . . . shall, solely by reason of [their disability], be excluded from the participation

The use of an expansive definition of sexuality centers the role of interdependence[47] in the application of the structural desexualization of disability framework. In applying this framework, the intellectually and developmentally disabled community is not treated as a monolith. There is a "physical, cognitive, and psychological impact" that emerges from the lived experience of disability, which must be recognized and embraced when examining issues of sexuality and disability.[48] Disability justice advocate Lydia X.Z. Brown explains, "[T]he experience of disability and being disabled is the result of the *interaction* of a person's inherent differences *with* a society and its attitudes and policies."[49] Individuals with intellectual and developmental disabilities need varying degrees of support[50] in making informed choices related to sexuality.[51] Supports

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in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

47. For discussion of interdependence and disability, see Robyn M. Powell, Care Reimagined: Transforming Law by Embracing Interdependence, 122 Mich. L. Rev. 1185, 1190–91 (2024) (reviewing Jennifer Natalya Fink, All Our Families: Disability Lineage and the Future of Kinship (2022)); Mia Mingus, Access Intimacy, Interdependence, and Disability Justice, Leaving Evidence (Apr. 11, 2017), https://leavingevidence.wordpress.com/2017/04/12/access-intimacy-interdependence-and-disability-justice/ [https://perma.cc/89UT-BDBC] ("Access should be happening in service of our larger goals of building interdependence and embracing need, because this is such a deep part of challenging ableism and the myth of independence.").

48. Natalie M. Chin, Centering Disability Justice, 71 Syracuse L. Rev. 683, 694 (2021) [hereinafter Chin, Centering Disability Justice] ("[A] critical racism/ableism consciousness framework demands an examination of disability through the prism of its intersections—race, class, sexual orientation, gender, immigrant status, and others—and further recognizes with equal weight the physical, cognitive, and psychological impact of disability on one's bodymind."); see also Subini Ancy Annamma, David Connor & Beth Ferri, Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/ability, 16 Race Ethnicity & Educ. 1, 7–8 (2013) ("DisCrit seeks to understand ways that macrolevel issues of racism and ableism, among other structural discriminatory processes, are enacted in the day-to-day lives of students of color with dis/abilities.").

49. Lydia Brown, Disability in an Ableist World, Autistic Hoya (Aug. 12, 2012), https://www.autistichoya.com/2012/08/disability-in-ableist-world.html [https://perma.cc/JC6L-24SP]; see also Doron Dorfman, Disability as Metaphor in American Law, 170 U. Pa. L. Rev. 1757, 1795–97 (2022) ("Disability is an interactive process between the individual, the impairment, the person's bodymind, and the environment.").

50. See Natalie M. Chin, Group Homes as Sex Police and the Role of the *Olmstead* Integration Mandate, 42 N.Y.U. Rev. L. & Soc. Change 379, 396–97 (2018) [hereinafter Chin, Group Homes as Sex Police] ("The literature . . . often fails to distinguish the unique challenges of individuals with intellectual disabilities in accessing sexual rights."); see also Martin Lyden, Assessment of Sexual Consent Capacity, 25 Sexuality & Disability 3, 5 (2007) ("At one point in time, an individual with intellectual disabilities may be found incapable of having sexual relations due to knowledge deficits. Subsequently, if that individual receives sufficient training, education, counseling, and exposure to various social situations it may be possible to remedy the knowledge deficits.").

51. See, e.g., Lucy J. v. State Dep't. of Health & Soc. Servs., Off. Of Child.'s Servs., 244 P.3d 1099, 1115 (Alaska 2010) (noting that law and policy requires "family reunification services [to] be provided in a manner that takes a parent's disability into account"); In re D.D., 19 N.Y.S.3d 867, 870–75 (Sur. Ct. 2015) (denying petitioner guardianship over son

alone, without confronting the systems and structures that maintain the desexualization of disability, will not achieve change.

The structural desexualization of disability framework does not jettison the victim–perpetrator binary. Rather, it suggests that a broader structural framing that examines the roots of sexual violence on the intellectually and developmentally disabled community is necessary. Any amelioration efforts that address sexual violence against people with intellectual and developmental disabilities must first confront the structures that maintain this violence—and identify the complicit role of government systems in exacerbating it. As expressed by political theorist Mathias Thaler, "how we *conceptualize* violence affects what we *do* to contain and mitigate it."[52]

Part I of this Article examines the history and role of the law in desexualizing disability. It explores how the structural desexualization of disability is an unintended consequence of the advocacy movement for community integration under Title II of the ADA, which prohibits disability-based discrimination by state and local governments. Part II discusses the inadequacy of the victim–perpetrator binary of sexual violence. It then introduces the structural desexualization of disability framework. Part III applies this framework to three central disability systems that people with intellectual and developmental disabilities must navigate: guardianship, special education, and the government-funded system that provides community-based supports and services. Part IV concludes by offering strategies to reconceptualize sexuality as a community integration priority through state and other interventions.

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with Down syndrome after finding that, with a network of "family, friends, and supportive services," he could make medical, financial, and other decisions including those around marriage, family, and relationships); Letter from Vanita Gupta, Acting Assistant Att'y Gen., C.R. Div., DOJ, Jocelyn Samuels, Dir., Off. for C.R., HHS, & Susan M. Pezzullo Rhodes, Reg'l Manager, Off. for C.R., Region I, HHS, to Erin Deveney, Interim Comm'r, Dep't of Child. & Fams., Exec. Off. of Health and Hum. Servs., Commonwealth of Mass. (Jan. 29, 2015), https://www.hhs.gov/sites/default/files/mass_lof.pdf [https://perma.cc/Y3SQ-RQ38] (finding that a state agency erroneously assumed a mother couldn't safely parent her newborn daughter because of the mother's disability).

52. Mathias Thaler, Naming Violence: A Critical Theory of Genocide, Torture, and Terrorism 1 (2018); see also Lee, Violence, supra note 5, at 6 ("An updated definition [of violence] should reflect this urgency so that it can capture conceptually significant dimensions of violence to guide our thinking, research, and action."); Longmore Lecture: Context, Clarity & Grounding, Talila A. Lewis Blog (Mar. 5, 2019), https://www.talilalewis.com/blog/archives/03-2019 [https://perma.cc/3UU9-RD6Y] (recognizing that violence is a cause and consequence of disability and arguing that "[v]iolence should be understood broadly" to include the "[d]eprivation of language, food, water, shelter, education, health, economic security, etc.").

I. THE HISTORICAL AND LEGAL FOUNDATIONS FOR CREATING AND SUSTAINING A CULTURE OF DESEXUALIZING DISABILITY

Disability—whether perceived or actual—has been used throughout history to legitimize the social control of bodies. The labels that law and society attach to people deemed disabled often dictate the level of control that individuals have over their own sexual and reproductive choices. As James W. Trent Jr. expressed in *Inventing the Feeble Mind*, "Intellectual disability is a construction whose changing meaning is shaped both by individuals who initiate and administer policies, programs, and practices and by the social context to which these individuals are responding."[53] The justifications for the desexualization of disability are rooted in this history and appear seemingly immovable, as advancements in disability rights laws have done little to recognize sexuality as central to the lives of people with intellectual and developmental disabilities.

A. *The Historical Foundations of the Desexualization of Disability*

Between 1895 and 1920, the theory of eugenics began to take hold in the United States.[54] The fields of law, medicine, philanthropy, and academia began to embrace eugenics as a means to control the sexual and reproductive lives of those relegated to the margins of society.[55] Eugenicists sought to prevent the dilution of a "superior human stock."[56] They believed that the human manipulation of genetics could rid the world of "inefficient human stock."[57] By eliminating the procreation of persons deemed to have "physical and mental hereditary defects that were degrading America's gene pool,"[58] eugenicists sought to create a superior white race.[59] To achieve this goal, supporters of eugenics promoted laws and policies that included marriage restrictions, sex-segregated

53. James W. Trent, Jr., Inventing the Feeble Mind: A History of Intellectual Disability in the United States, at xvii (2d ed. 2016).

54. See Adam Cohen, Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck 55–57 (2017) ("Eugenics and the mania over feeblemindedness arrived at a time when America was particularly receptive. The start of the twentieth century was an era of fast-paced, disruptive change.").

55. Id. at 55–56.

56. Trent, supra note 53, at 134.

57. See Francis Galton, Inquiries Into Human Faculty and Its Development 1–2 (1883); see also Cohen, supra note 54, at 78–79.

58. Cohen, supra note 54, at 5.

59. See, e.g., Khiara M. Bridges, White Privilege and White Disadvantage, 105 Va. L. Rev. 449, 465 (2019) ("[T]he eugenics movement was always about protecting the *white race* from degeneration."); see also Galton, supra note 57, at 307 ("The most merciful form of what I ventured to call 'eugenics' would consist in watching for the indications of superior strains or races, and in so favouring them that their progeny shall outnumber and gradually replace that of the old one.").

institutionalization, and compulsory sterilization to restrict the procreation of people whom they deemed "unfit."[60]

The construction of the labels "feebleminded" and "mentally defective" by eugenicists created nebulous designations that captured a wide net of people whom society viewed as the direct cause of moral degeneracy in society.[61] These labels provided justification for state control over the sexual and reproductive choices of people given these designations.[62] As noted by Professor Jamelia Morgan, while these terms do not "closely trace definitions of disability today," in that time period, "such labels incorporated meanings of disability in that they linked sexual deviance to inherent physiological abnormalities."[63]

Women labeled "feebleminded" were the primary targets of eugenic policies aimed at controlling their sexuality.[64] Women were deemed to require "'permanent and watchful guardianship' during the child-bearing years" due to their "tendency to become 'irresponsible sources of corruption and debauchery.'"[65] Society especially sought to sequester "problem women" from the rest of society, sometimes justifying the lifelong custody of women who were given this designation as "a matter of mere economy."[66]

The designation of feebleminded imputed "notions of immorality, criminality, and/or sexual promiscuity and, in turn, [was] used as justification for institutionalizing women."[67] Once labeled feebleminded, women were often relegated to state institutions where they "could then be forcibly sterilized on the grounds that the state had a legitimate interest in preventing women from reproducing children with 'undesirable traits'

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60. Cohen, supra note 54, at 5.

61. See Allison C. Carey, On the Margins of Citizenship: Intellectual Disability and Civil Rights in Twentieth-Century America 56, 64 (2009) ("As the eugenics movement grew, however, its proponents portrayed feeblemindedness as a *direct cause of* poverty, crime, sexual deviance, and moral degeneracy.").

62. Id. at 62 ("[T]he label 'feeblemindedness' activated the potential not only for medical and legal control but also for a host of other social-control systems, including the education system, social welfare, and the family.").

63. Jamelia Morgan, On the Relationship Between Race and Disability, 58 Harv. C.R.-C.L. L. Rev. 663, 708 (2023).

64. See Cohen, supra note 54, at 25–26 ("The campaign against feeblemindedness was focused on young women, who were deemed both a moral and a demographic threat. . . . Feebleminded women were believed to have unusually strong sex drives and loose morals and, as a result, it was said that they bore more children than other women . . . .").

65. Paul A. Lombardo, Three Generations, No Imbeciles: Eugenics, the Supreme Court, and *Buck v. Bell* 11 (2008) [hereinafter Lombardo, Three Generations].

66. Id. (internal quotation marks omitted) (quoting Walter E. Fernald, The History of the Treatment of the Feeble-Minded, *in* Proceedings of the National Conference of Charities and Correction at the Twentieth Annual Session Held in Chicago, Ill., June 8–11, 1893, at 203, 211–12 (Isabel C. Barrows ed., 1893)).

67. Morgan, supra note 63, at 706 (citing Michele Goodwin, Gender, Race, and Mental Illness: The Case of Wanda Jean Allen, *in* Critical Race Feminism 228 (2d ed. 2003)).

and from supporting disfavored groups that were presumed to be public charges, and strains on the public fisc."[68]

Sentiment swelled among supporters of eugenics that the spread of feeblemindedness must be curtailed to prevent future generations of degeneracy and that "public officials and private reformers" bore the responsibility of segregating these people from society to prevent their procreation.[69] The institutionalization of the feebleminded and mentally defective, however, was proving too expensive—states could not keep up with the demand of eugenics supporters to segregate these unfit populations to prevent them from having children.[70] Forced sterilization soon became the policy priority.[71] It "was completely effective, and it could be carried out on a mass scale."[72]

Justice Oliver Wendell Holmes Jr. emboldened the eugenics movement with the 1927 decision *Buck v. Bell*,[73] further entrenching the labels of "feebleminded" and "mentally defective" as legitimate disability constructs to justify sexual and reproductive control.[74] *Buck v. Bell* held as constitutional a Virginia statute that provided state institutions with the right to sexually sterilize patients who were deemed hereditarily unfit if the institutions determined it to be in the patients' best interest.[75] Once sterilized, these women could freely return to the community.[76] Between

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68. Id. (quoting Alexandra Minna Stern, Eugenic Nation: Faults and Frontiers of Better Breeding in Modern America 107–09 (2d ed. 2015)).

69. Trent, supra note 53, at 73, 79; see also Margaret Sanger, The Pivot of Civilization 82 (1922) ("[T]here is truly, as some of the scientific eugenists have pointed out, a feeble-minded peril to future generations—unless the feeble-minded are prevented from reproducing their kind. To meet this emergency is the immediate and peremptory duty of every State and of all communities.").

70. Cohen, supra note 54, at 5.

71. See Paul A. Lombardo, Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom, 13 J. Contemp. Health L. & Pol'y 1, 1 (1996) ("Between 1900 and 1970, proponents of eugenic theory drafted and endorsed nearly one hundred statutes that were adopted by state legislatures.").

72. Cohen, supra note 54, at 5. Indiana passed the first sterilization statute in 1907 that authorized state institutions to sterilize "confirmed criminals, idiots, rapists and imbeciles" to prevent procreation when medical professionals determined that there was "no probability of improvement of the [individual's] mental condition." Act of Mar. 9, 1907, Ch. 215, Ind. General Acts 377, 378 (permitting states to surgically "prevent procreation of confirmed . . . idiots"). The 1907 Indiana sterilization law set the groundwork for the passage of future sterilization laws, with twelve states implementing similar laws by 1913. Cohen, supra note 54, at 5–6 (noting that these laws "called for sterilizing anyone with 'defective' traits, such as epilepsy, criminality, alcoholism, or 'dependency'—another word for poverty").

73. 274 U.S. 200 (1927).

74. Cohen, supra note 54, at 299.

75. See *Buck*, 274 U.S. at 205–08.

76. Id. at 205–06 ("[T]he Commonwealth is supporting in various institutions many defective persons who if now discharged would become a menace but if incapable of procreating might be discharged with safety and become self-supporting with benefit to themselves and to society . . . .").

1907 and 1937, thirty-two states and Puerto Rico had forced-sterilization laws.[77]

The effects of *Buck* endured long after states repealed sterilization laws.[78] State-sanctioned coercive sterilization programs targeted poor and low-income women of color in the United States well into the 1960s, 1970s, and 1980s.[79] Eugenics practices have continued into the twenty-first century with government-sanctioned sterilizations targeting disabled people, people of color, and other multiply marginalized populations.[80] The social constructs and narratives used in the eugenics era to control sexuality and reproduction remain central today. They contribute to the contemporary stigmatizing treatment of sexuality and reproduction in people with intellectual and developmental disabilities, which is reflected in law, policy, and sociocultural norms.[81]

B. *The Promise of* Olmstead *and Community Integration*

Historically, people labeled as "cognitively challenged" who "failed to be converted into workers" were discarded by society—"left to linger in their squalor or incarcerated into various asylums, workhouses, and jails."[82] Doctors and teachers who "told parents that institutions were the best place" for their child to "live, learn, and be safe" normalized the idea that

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77. Lombardo, Three Generations, supra note 65, app. C at 293–94 (identifying thirty-two states that had sterilization laws in effect between 1907 and 1937 but excluding Puerto Rico, which "passed a [sterilization] law in 1937 and repealed it in 1960").

78. Id. at 294.

79. See Melissa Murray, Abortion, Sterilization, and the Universe of Reproductive Rights, 63 Wm. & Mary L. Rev. 1599, 1618–21, 1627–32 (2022) (discussing how government-sanctioned coercive sterilization programs at both the state and federal level targeted poor and low-income women of color); see also Dorothy Roberts, Fatal Invention: How Science, Politics, and Big Business Re-Create Race in the Twenty-First Century 48 (2011) ("During the eugenics era, a majority of those sterilized were white. But in the program's final decade, the target shifted to poor black women.").

80. See, e.g., Oldaker v. Giles, No. 7:20-cv-00224-WLS-MSH, 2024 WL 1241359, at *3 (M.D. Ga. Mar. 22, 2024) (recounting allegations that officials at a Georgia immigration detention center subjected detained immigrants to "medical and other abuse" such as "unnecessary gynecological procedures that were performed without their consent," which "caused Plaintiffs significant pain and left some Plaintiffs infertile"); Erin McCormick, Survivors of California's Forced Sterilizations: 'It's Like My Life Wasn't Worth Anything', The Guardian (July 19, 2021), https://www.theguardian.com/us-news/2021/jul/19/california-forced-sterilization-prison-survivors-reparations [https://perma.cc/V8GL-RAWU] ("[H]undreds of inmates had been sterilized in prisons without proper consent as late as 2010, even though the practice was by then illegal."); Molly O'Toole, 19 Women Allege Medical Abuse in Georgia Immigration Detention, L.A. Times (Oct. 22, 2020), https://www.latimes.com/politics/story/2020-10-22/women-allege-medical-abuse-georgia-immigration-detention (on file with the *Columbia Law Review*) (last updated Oct. 23, 2022) (covering the forced sterilization of nineteen women by one gynecologist in a south Georgia prison).

81. See, e.g., Powell, Disability Reproductive Justice, supra note 16, at 1859.

82. Laura I. Appleman, Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and Mass Incarceration, 68 Duke L.J. 417, 426 (2018).

children with intellectual or developmental disabilities were unable to learn and thrive in society.[83] As a result, between 1947 and 1967, the number of peope with intellectual disabilities residing in state-run institutions increased by sixty-five percent, from 116,828 to 193,188.[84]

Most of the children who entered institutions at a young age never left.[85] The dehumanizing conditions of state-run institutions for people with intellectual and developmental disabilities mirrored society's view of this population as expendable, uneducable, and unworthy.[86] In 1972, Geraldo Rivera exposed the inhumane treatment of children with disabilities at Willowbrook, a New York State–run institution for children and adults with developmental disabilities.[87] Through a series of investigative reports that aired on national television, Rivera displayed the deplorable conditions of Willowbrook.[88] The reports forced the country to confront many of the horrors taking place in large, state-run institutions.

The overcrowded facility purported to care for its residents, but Rivera's footage showed vivid images of countless emaciated children left unattended and naked—or in soiled rags.[89] Rivera reported on physical and sexual abuse by staff that took place at the institution and broadcast the unsanitary conditions that caused the preventable spread of disease.[90] The exposé roiled the country, precipitating litigation to protect the health, safety, and civil rights of people with intellectual and developmental disabilities.[91]

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83. See Sheryl A. Larson, John Butterworth, Jean Winsor, Shea Tanis, Amie Lulinski & Jerry Smith, Admin. for Cmty. Living, 30 Years of Community Living for Individuals With Intellectual and/or Developmental Disabilities (1987–2017), at 7 (2021), https://acl.gov/sites/default/files/Aging%20and%20Disability%20in%20America/30%20Years%207-13-21.pdf [https://perma.cc/R3X9-7K46].

84. Trent, supra note 53, at 240–41.

85. Larson et al., supra note 83, at 7.

86. See id.; see also Samuel R. Bagenstos, The Disability Cliff, Democracy (2015), https://democracyjournal.org/magazine/35/editors-note-3/ [https://perma.cc/NH9B-TLFW] (noting that "schools often simply excluded children with developmental disabilities as uneducable").

87. See Willowbrook: The Last Great Disgrace at 01:46 (Sproutflix 2010) [hereinafter Geraldo Rivera's 1972 Exposé] (reporting on poor conditions at Willowbrook).

88. Disability Justice, The Closing of Willowbrook, https://disabilityjustice.org/the-closing-of-willowbrook/ [https://perma.cc/4CJC-L5VK] (last visited July 29, 2024).

89. See Geraldo Rivera's 1972 Exposé, supra note 87, at 01:58.

90. See id. at 2:47–3:20 (reporting that "one hundred percent of patients contract hepatitis within six months of being in the institution").

91. See N.Y. State Ass'n for Retarded Child., Inc., v. Rockefeller, 357 F. Supp. 752, 768–70 (E.D.N.Y. 1973) (granting partial relief to plaintiffs in a class action lawsuit that challenged the conditions at Willowbrook); Disability Justice, supra note 88 ("Following the Rivera exposé, parents of Willowbrook residents filed a class action suit in U.S. District Court for the Eastern District of New York on March 17, 1972."). The litigation resulted in an extensive, multiyear consent decree that required "defendant[s] to improve conditions and treatment for [intellectually disabled] persons at Willowbrook State School, as well as deinstitutionalizing residents and placing them in community homes." Lloyd C. Anderson,

Additional court challenges in the 1970s;[92] the creation of the Medicaid Home- and Community-Based Services (HCBS) Waiver program in 1981, which provided states with matching federal funding to administer services, care, and treatment to disabled people outside of institutions;[93] and the passage of the ADA in 1990 foreshadowed the impending change in the role of institutions.[94] Law and policy priorities began shifting focus away from institutional placement and toward community living for people with intellectual and developmental disabilities.[95]

The 1999 Supreme Court case *Olmstead v. L.C. ex rel. Zimring*[96] represented a watershed moment in the deinstitutionalization movement for people with intellectual and developmental disabilities, centralizing the role of states in the transition of disabled people from institutionalized settings to living in the community.[97] *Olmstead* involved two women, Lois

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Implementation of Consent Decrees in Structural Reform Litigation, 1986 U. Ill. L. Rev. 725, 743 n.57.

92. See, e.g., Welsch v. Likins, 373 F. Supp. 487, 502–03 (D. Minn. 1974) (recognizing a constitutional right to adequate care and treatment for people with intellectual or developmental disabilities who are involuntarily committed); Wyatt v. Stickney, 344 F. Supp. 373, 376 (M.D. Ala. 1972) (finding that a consent decree to improve conditions at an Alabama mental hospital established "constitutional minimums" and establishing a standing human rights committee to oversee compliance), aff'd in part, rev'd in part sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). The court in *Welsch* further found that "[e]xcessive use of tranquilizing medication as a means of controlling behavior," the practice of "secluding residents in barren 'isolation' rooms" without supervision or monitoring, and the use of "physical restraints" may violate a disabled person's Eighth Amendment right against cruel and unusual punishment. *Welsch*, 373 F. Supp. at 503. It also determined that the state has a responsibility to make a good faith effort to place involuntarily committed persons in "settings that will be suitable and appropriate to their mental and physical conditions while least restrictive of their liberties." Id. at 502; see also Karen M. Tani, The *Pennhurst* Doctrines and the Lost Disability History of the "New Federalism", 110 Calif. L. Rev. 1157, 1159 (2022) (providing the history of the *Halderman v. Pennhurst State School and Hospital* litigation, which was a class action lawsuit that challenged the "neglect and brutality" that residents with intellectual and developmental disabilities experienced at this state-run institution).

93. See Carol Beatty, Comment, Implementing *Olmstead* by Outlawing Waiting Lists, 49 Tulsa L. Rev. 713, 726–31 (2014) (discussing the 1981 implementation and impact of the HCBS Waiver program on deinstitutionalization for people with intellectual and developmental disabilities).

94. See Larson et al., supra note 83, at 10.

95. See, e.g., id. at 7–12 (providing an overview of the legal and policy advancements that support the community integration of people with intellectual and developmental disabilities).

96. 527 U.S. 581 (1999).

97. See Beatty, supra note 93, at 732–33 (describing *Olmstead* as a "groundbreaking case" that "necessitated massive changes to state and federal government entities"). The deinstitutionalization movement that centered on using *Olmstead* to move people with intellectual and developmental disabilities out of institutions is often contrasted with the failed policies around the deinstitutionalization of people with psychiatric disabilities. For a more complete discussion on the successes and failures of the deinstitutionalization movement for people with psychiatric disabilities, see Rachel E. Barkow, Promise or Peril?:

Curtis and Elaine Wilson, who were each dually diagnosed with a psychiatric disability and an intellectual disability.[98] Each was voluntarily admitted into a state hospital for mental health treatment.[99] After receiving treatment at the hospital, Curtis and Wilson each wished to leave the hospital and receive treatment in the community.[100] The hospital denied their requests, maintaining that they must remain confined in the hospital to receive mental health treatment.[101]

The Court held that the "unjustified isolation" of people with disabilities qualified as disability-based discrimination under Title II of the ADA.[102] *Olmstead* changed the state's role in the care and treatment of disabled people. States could no longer warehouse disabled people in institutions under the guise of protectionism and care.[103] States were now mandated to provide community-based treatment in the most integrated setting appropriate to the needs of the disabled individual as a reasonable modification to avert unjustified isolation.[104] The implementing regulations under Title II of the ADA, commonly referred to as the *Olmstead* integration mandate, provide that a "public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[105] The community placement must be deemed appropriate by a state's

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The Political Path of Prison Abolition in America, 58 Wake Forest L. Rev. 245, 306–18 (2023) (noting that while the deinstitutionalization movement was "especially effective in reducing the institutionalized population of those with intellectual and developmental disabilities," many community mental health centers never got built, "and the ones that were created largely provided services . . . to people who had never been institutionalized"); cf. Liat Ben-Moshe, Why Prisons Are Not "The New Asylums", 19 Punishment & Soc'y 272, 275–78 (2017) (critically examining claims that the deinstitutionalization of people with psychiatric disabilities led to "incarceration via homelessness," pointing to the central role that neoliberal policies played in expanding the prison system, and deprioritizing access to affordable and accessible housing).

98. *Olmstead*, 527 U.S. at 593; see also Celebrating 25 Years of the *Olmstead* Decision, The Arc (June 20, 2024), https://thearc.org/blog/celebrating-25-years-of-the-olmstead-decision/ [https://perma.cc/4JYW-H8YT].

99. *Olmstead*, 527 U.S. at 593.

100. See Celebrating 25 Years of the *Olmstead* Decision, supra note 98 ("Lois and Elaine were forced into the state's mental health hospitals many times, despite wanting to remain at home with the help of community-based services.").

101. See *Olmstead*, 527 U.S. at 594 ("[Curtis] alleged that the State's failure to place her in a community-based program, once her treating professionals determined that such placement was appropriate, violated, *inter alia*, Title II of the ADA. . . . [Wilson] intervened in the action, stating an identical claim.").

102. Id. at 597.

103. Stephanie Woodward, Guest Blog Post: The ADA Is Not Enough, Disability Visibility Project (July 26, 2024), https://disabilityvisibilityproject.com/2014/07/26/guest-blog-post-the-ada-is-not-enough-by-stephanie-woodward/ [https://perma.cc/7UM5-YFJJ].

104. *Olmstead*, 527 U.S. at 592 (quoting 28 C.F.R. §§ 35.130(b)(7), 35.130(d) (1998)).

105. 28 C.F.R. § 35.130(d) (2024). Under Title II of the ADA, a public entity includes "any State or local government" and "any department, agency . . . or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1) (2018).

"treatment professionals."[106] And the person must also agree to the placement.[107]

Olmstead resulted in a shift of government funding away from large-scale state institutional settings in favor of funding programs that provide supports and services in the community.[108] The Medicaid Home- and Community-Based (HCBS) waiver program is now a central fiscal tool used by states to comply with the *Olmstead* integration mandate.[109] The HCBS waiver program, created in 1981, is the joint state and federally funded program under Section 1915(c) of the Social Security Act that "permits a state to waive certain Medicaid requirements in order to furnish an array of home and community-based services that promote community living for Medicaid beneficiaries and, thereby, avoid institutionalization."[110] The HCBS waiver program is "designed to prevent re/institutionalization, promote health and wellbeing, and help people with [intellectual and developmental disabilities] live and thrive in their communities, including to the same degree as nondisabled people who do not receive HCBS."[111]

Today, intellectual and developmental disability is no longer defined as a static condition.[112] The "changes in medical practice, psychology, and a burgeoning legal framework of civil rights"[113] support the notion that

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106. *Olmstead*, 527 U.S. at 587.

107. Id. Public entities may assert an affirmative defense to compliance with Title II of the ADA by arguing that modification to its programs, services, and activities "would fundamentally alter the nature of the [State's] service, program, or activity." Id. at 597 (internal quotation marks omitted) (quoting 28 C.F.R. § 35.130(b)(7)(i) (1998)).

108. See Carli Friedman, Medicaid Home- and Community-Based Services Waivers for People With Intellectual and Developmental Disabilities, 61 Intell. & Developmental Disabilities 269, 269 (2023) [hereinafter Friedman, Medicaid Home- and Community-Based Services Waivers] ("[O]ver the last few decades states have shown a significant decline in institutional Medicaid spending for people with [intellectual and developmental disabilities] in favor of HCBS." (citations omitted)); see also Jessica Schubel, Ctr. on Budget & Pol'y Priorities, Medicaid Is Key to Implementing *Olmstead*'s Community Integration Requirements for People With Disabilities (June 22, 2018), https://www.cbpp.org/blog/medicaid-is-key-to-implementing-olmsteads-community-integration-requirements-for-people-with [https://perma.cc/F8G6-2D57] (noting a shift in Medicaid's spending away from institutional services and toward HCBS).

109. See Friedman, Medicaid Home- and Community-Based Services Waivers, supra note 108, at 269.

110. Ctrs. for Medicare & Medicaid Servs., Application for a § 1915(c) Home and Community-Based Waiver: Instructions, Technical Guide and Review Criteria 1 (2019), https://wms-mmdl.cms.gov/WMS/help/35/Instructions_TechnicalGuide_V3.6.pdf [https://perma.cc/4U9W-95GR] [hereinafter CMS HCBS Instructions].

111. Friedman, Sexual Health and Parenting Supports, supra note 31, at 258.

112. See Karen Andreasian, Natalie Chin, Kristin Booth Glen, Beth Haroules, Katherine I. Hermann, Maria Kuns, Aditi Shah & Naomi Weinstein, Mental Health. Comm. & Disability L. Comm. of the N.Y.C. Bar Ass'n, Revisiting S.C.P.A 17-A: Guardianship for People With Intellectual and Developmental Disabilities, 18 CUNY L. Rev. 287, 294 (2015).

113. Kristin Booth Glen, Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond, 44 Colum. Hum. Rts. L. Rev. 93, 98 (2012).

persons with intellectual and developmental disabilities can thrive in the community with individually tailored supports and services.[114]

The most recent data reveal the impact of *Olmstead*. Approximately 930,356 people with intellectual and developmental disabilities receive supports and services in the community, compared to 22,869 in 1987—a nearly 4,000% increase.[115] Between 1999 and 2019, the number of people with intellectual and developmental disabilities who lived in a residential setting of sixteen or more residents declined by 59% while the number of persons living in community settings with six or fewer people increased by 95%.[116] The steady increase in funding to the HCBS waiver program following the *Olmstead* integration mandate created a new reality for community integration that afforded greater opportunities for disabled people to live fuller lives with supports. With funding totaling $45.1 billion in 2019,[117] the HCBS waiver program is the "largest funding stream"[118] and the primary means for people with intellectual and developmental disabilities—who are also among the nation's poorest residents[119]—to secure services and supports in the community.

The extensive services provided under the HCBS Medicaid waiver signify the modern application of the *Olmstead* integration mandate, reflecting the lived experiences of people with intellectual and

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114. See, e.g., Dilip R. Patel, Maria Demma Cabral, Arlene Ho & Joav Merrick, A Clinical Primer on Intellectual Disability, 9 Translational Pediatrics (Supplemental Issue) S23, S27–28 (2020) (explaining that different levels of support are needed to empower different individuals with intellectual disabilities); Life in the Community Summary, The Arc, https://thearc.org/position-statements/life-community-summary/ [https://perma.cc/9RYY-5QTE] (last visited July 28, 2024) ("People with intellectual and/or developmental disabilities need varying degrees of support to reach personal goals and establish a sense of satisfaction with their lives." (footnote omitted)).

115. Growth in the Number of HCBS Waiver Recipients, Residential Info. Sys. Project, https://publications.ici.umn.edu/risp/infographics/how-did-the-number-of-hcbs-waiver-recipients-change-between-1987-and-2018 [https://perma.cc/4HTT-77ZU] (last visited July 28, 2024).

116. 20-Year Change in Residence Size, Residential Info. Sys. Project, https://publications.ici.umn.edu/risp/infographics/how-have-residence-sizes-changed-in-the-last-20-years [https://perma.cc/S9Q9-ZHM6] (last visited August 19, 2024).

117. Medicaid HCBS Spending in FY 2019, Residential Info. Sys. Project, https://publications.ici.umn.edu/risp/infographics/medicaid-waiver-recipients-and-expenditures [https://perma.cc/4HTT-77ZU] (last visited July 28, 2024).

118. Friedman, Medicaid Home- and Community-Based Services Waivers, supra note 108, at 269. The HCBS waiver program is carried out through a complex scheme of federal statutory and regulatory guidelines. See, e.g., 42 U.S.C. § 1396n (2018). For a more detailed discussion about the HCBS waiver program, see CMS HCBS Instructions, supra note 110, at 1 ("Waiver services complement and/or supplement the services that are available through the Medicaid State plan and other federal, state and local public programs as well as the supports that families and communities provide to individuals. States have flexibility in designing waivers . . . .").

119. See Goodman et al., supra note 27, at 19–20.

developmental disabilities.[120] As this group gains greater access to supports in the community, however, laws and policies remain barriers to exercising choices around intimacy, marriage, and family. These structural barriers result in a forced relinquishment of these choices.

C. *Modern Laws that Affect the Structural Desexualization of Disability*

Despite advancements in disability rights, desexualization is a collateral consequence of moving people with intellectual and developmental disabilities from institutionalized settings into the community. The sexual and reproductive control of disabled people is justified through laws and policies that effectively limit and create often-insurmountable barriers to exercising choices around issues of love, sex, family, and intimacy.

Under state guardianship laws, a third person may restrict a disabled person's right to marry, engage in intimate relationships, and make reproductive choices.[121] Today, thirty-one states and Washington, D.C., maintain laws that allow for the involuntary sterilization of people under guardianship.[122] Some states allow for the involuntary sterilization of disabled children.[123]

These guardianship and sterilization laws are not dormant. In a recent case heard by the Court of Appeals of Michigan, *Morgan ex rel. Ray v. Shah*, a parent sued a doctor for medical malpractice after the doctor performed a vasectomy on her son, Jason, who has Down syndrome.[124] Jason was in his twenties at the time of the surgery.[125] The doctor stated that he

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120. The diversity and extent of the community-based services offered through the HCBS Waivers reflect that people with intellectual and developmental disabilities are integrating in the community and accessing services that allow them to thrive and live more independently. The community-based services offered through the waivers can include the following: "community transition supports; day habilitation; . . . family training and counseling[;] . . . financial support services; health and professional services [such as] crisis, dental, clinical, and therapeutic services[;] . . . recreation and leisure; . . . self-advocacy training and mentorship; specialized medical and assistive technologies; . . . supported employment; supports to live in one's own home (e.g., companion, homemaker, chore, personal assistance, supported living); and transportation." Friedman, Medicaid Home- and Community-Based Services Waivers, supra note 108, at 274. Day Habilitation services "assist people to acquire, retain or improve their self-help, socialization and adaptive skills, including communication, travel and other areas in adult education." Day Services: A Variety of Day Services, N.Y. State Off. for People With Developmental Disabilities, https://opwdd.ny.gov/types-services/day-services [https://perma.cc/N3HZ-WTP7] (last visited July 29, 2024). Waiver services are intended to support the "development of skills and appropriate behavior, greater independence, community inclusion, relationship building, self-advocacy and informed choice." Id.

121. See infra section III.A (discussing the role of the guardianship system in the structural desexualization of disability).

122. Nat'l Women's L. Ctr., supra note 28, at 15.

123. Id. at 34–35.

124. No. 341846, 2019 WL 575371, at *1–2 (Mich. Ct. App. Feb. 12, 2019) (per curiam).

125. Id.

considered Jason "unable to consent to or understand the contemplated surgery" and relied on the father's "representation that he had been appointed Jason's guardian" as providing the "appropriate consent for the procedure."[126] The father did not inform the mother of this decision.[127] The father later stated that he forced his son to be sterilized because "he wanted no more abominations in this world."[128]

Other laws specific to disabled people contain additional barriers to parenting,[129] marriage, and maintaining intimate relationships. Thirty-three states and Washington, D.C., maintain laws that include intellectual and developmental disability as grounds to terminate parental rights.[130] The removal rates of parents with an intellectual disability by the family regulation system[131] range from forty to eighty percent.[132] Further,

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126. Id. at *2.

127. Id. at *1 ("James did not inform Jason's mother, plaintiff Janell Ray, of his intent to have Jason sterilized.").

128. Id. at *2 (internal quotation marks omitted) (quoting Jason's father). Throughout the court's decision, Jason's perspective is absent, effectively silencing his experience. See id. at *1–10.

129. While this Article does not focus on parents with intellectual and developmental disabilities in applying the structural desexualization of disability framework, this issue is often explored through the lens of sexual and reproductive rights. See, e.g., Gill, supra note 30, at 111, 125–44 ("This increased governmentality in the arena of intellectual disability and reproduction makes it difficult for individuals to retain their rights—sexual, reproductive, parental, and otherwise—thus highlighting one way that discourses of sexual ableism are reinforced."); Powell, Disability Reproductive Justice, supra note 16, at 1872 (noting that disabled people "are rarely seen as sexual beings or as potential parents" (internal quotation marks omitted) (quoting Michelle Jarman, Disability Rights Through Reproductive Justice, *in* The Routledge Handbook of Disability and Sexuality 132, 138 (Russell Shutterworth & Linda R. Mona eds., 2020))).

130. Nat'l Rsch. Ctr. for Parents With Disabilities, Map of State Termination of Parental Rights Laws that Include Parental Disability (Oct. 1, 2022), https://heller.brandeis.edu/parents-with-disabilities/map-tpr/index.html [https://perma.cc/N4CX-8VGW].

131. The term "family regulation system" was initially coined by Emma Ruth in her Oberlin College Honors Thesis and later adopted by many legal advocates and academics. Emma Peyton Williams, Thesis, Dreaming of Abolitionist Futures, Reconceptualizing Child Welfare: Keeping Kids Safe in the Age of Abolition 4–5 (2020), https://digitalcommons.oberlin.edu/cgi/viewcontent.cgi?article=1711&context=honors (on file with the *Columbia Law Review*); see also Emma Ruth, Opinion, 'Family Regulation,' Not 'Child Welfare': Abolition Starts With Changing Our Language, The Imprint (July 28, 2020), https://imprintnews.org/opinion/family-regulation-not-child-welfare-abolition-starts-changing-language/45586 [https://perma.cc/697E-PBCZ]. Some advocate for changing the terms "child welfare system" or "child protection system" to "family regulation system." See Ruth, supra; see also Dorothy Roberts, Abolishing Policing Also Means Abolishing Family Regulation, The Imprint (June 16, 2020), https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480 [https://perma.cc/X7AV-VHQ9].

132. Nat'l Council on Disability, Rocking the Cradle: Ensuring the Rights of Parents With Intellectual Disabilities and Their Children 16 (Sept. 27, 2012), https://www.ncd.gov/assets/uploads/reports/2012/ncd-rocking-the-cradle.pdf [https://perma.cc/6R2P-C7KV]; see also Robyn M. Powell, Achieving Justice for Disabled Parents and Their Children: An Abolitionist Approach, 33 Yale J.L. & Feminism 37, 43

disabled people are "effectively barred from marrying or cohabiting with the partners that they love" due to the financial penalties imposed by federal need-based programs on which millions of disabled people rely.[133]

Medicaid and Supplemental Security Income (SSI) are programs administered by the state through federal funding. They provide healthcare and financial support, respectively, to targeted populations who are living at or below the poverty level.[134] Because people with intellectual and developmental disabilities are disproportionately under- or unemployed,[135] SSI often "provides the income that allows them to secure housing in the community and live independently."[136]

Federal needs-based programs are often a lifeline to maintain the health and well-being of people with intellectual and developmental disabilities.[137] If two disabled people marry or cohabitate, however, they risk a reduction or loss of their SSI and Medicaid benefits due to the pooling of their combined assets and resources.[138] The threatened loss of these financial benefits can preclude disabled people from entering romantic cohabitation or marriage. In doing so, these financial barriers effectively foreclose the additional legal benefits that would flow from marriage. Describing this predicament, one woman with a developmental disability said, "I joke around that there should be a show called Married to Medicaid where we all [talk] about our inability to extract ourselves from the long term care system."[139]

(2022) ("[D]espite the increased legislative attention and greater enforcement by the federal government, the number of disabled parents with termination of parental rights cases appears to be growing.").

133. Rabia Belt, Disability: The Last Marriage Equality Frontier 1 (Stanford Pub. L., Working Paper No. 2653117, 2015), https://ssrn.com/abstract=2653117 [https://perma.cc/4PJY-NCER].

134. The Arc, Social Security and SSI for People with I/DD and Their Families 4–10, https://thearc.org/wp-content/uploads/forchapters/NPM-SocialSecurity_SSI_4.pdf [https://perma.cc/SR2U-7BKA] [hereinafter The Arc, Social Security and SSI for People with I/DD and Their Families] (last visited July 28, 2024).

135. See, e.g., Erik Carter, Emily Lanchak, Laura Berry, Elise McMillan, Julie Lounds Taylor & Laurie Fleming, Vanderbilt Univ. & Va. Commonwealth Univ., Barriers to Employment for Individuals With IDD: Insights From Families 2 (2020), https://worksupport.com/documents/RRTC%20Employment%20%2D%20Families%20on%20Barriers%2Epdf [https://perma.cc/99QF-YY75] ("Unfortunately, the majority of individuals with [intellectual and development disabilities] remain unemployed or underemployed.").

136. The Arc, Social Security and SSI for People with I/DD and Their Families, supra note 134, at 9.

137. See id. at 3.

138. Andrew Pulrang, What's Next in 'Marriage Equality' for People With Disabilities?', Forbes (Mar. 31, 2022), https://www.forbes.com/sites/andrewpulrang/2022/03/31/whats-next-in-marriage-equality-for-people-with-disabilities/?sh=1670cace6eb7 (on file with the *Columbia Law Review*) ("[G]etting married can result in one or a combination of: reduced monthly benefits, loss of eligibility for benefits, and loss of Medicaid, Medicare, or both.").

139. Kathleen Downes, Project Shine Narrative Collection, at 00:37:31–00:37:47 (2022) (unpublished video narrative transcript) (on file with the *Columbia Law Review*); see also

D. *Sexuality and the Unmet Promise of* Olmstead

The shift from institutionalization to community integration following *Olmstead* did not address negative attitudes and punitive treatment toward expressions of sexuality. It also failed to consider what services states could provide to support the sexual lives of this newly integrated community. Views that relied on "contradictory stereotypes" of disability and sexuality reinforced harmful sexual policies within institutional settings.[140] As discussed by Professor Michael L. Perlin and disability rights lawyer Alison J. Lynch, these "contradictory stereotypes" included "infantilization" and "demonization."[141]

Institutionalized settings "den[ied] the reality that institutionalized persons with disabilities may retain the same sort of sexual urges, desires, and needs the rest of us have and generally upon which the rest of us act."[142] At the same time, disabled persons were viewed as hypersexual, requiring "correlative . . . protections and limitations to best stop them from acting on these primitive urges."[143]

Bernard Carabello, a survivor of the Willowbrook State School,[144] expressed, "When I was in Willowbrook, sexuality was a crime . . . . If you got caught, you got [beaten] with sticks, belt buckles, metal keychains . . . It took me a long time to come to terms with my sexuality. I used to feel guilty [about sex]."[145] The inhumane treatment of Carabello reflects the punitive view toward acts of sexuality that pervaded the period prior to *Olmstead*.

Today, the repression of sexuality has moved away from this overt, brutal conduct. The punitive view toward expressions of sexuality, however, remains common even as community integration continues as a central

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Dominick Evans, Marriage Equality, Ctr. for Disability Rts., https://cdrnys.org/blog/disability-dialogue/the-disability-dialogue-marriage-equality/ [https://perma.cc/3R4L-89PZ] (last visited July 28, 2024) (discussing the financial penalties imposed by the federal government that disabled people may be subject to if they choose to marry).

140. Michael L. Perlin & Alison J. Lynch, Sexuality, Disability, and the Law: Beyond the Last Frontier? 37 (2016).

141. Id.

142. Id.

143. Id.

144. For more discussion of Willowbrook, see supra notes 87–91 and accompanying text; see also Raga Justin, Former Residents of Willowbrook Recall Its Horrors as Fight for Disability Rights Continues, Times Union (Mar. 27, 2023), https://www.timesunion.com/state/article/a-disgrace-former-willowbrook-residents-17860905.php (on file with the *Columbia Law Review*).

145. Jennifer Smith, Inside the Fight for Developmentally Disabled People's Right to Sex, Vice (Mar. 19, 2019), https://www.vice.com/en/article/7xnad9/developmental-intellectual-disability-sex-education-consent (on file with the *Columbia Law Review*)) (internal quotation marks omitted) (quoting Bernard Carabello).

focus of disability advocacy.[146] The prevailing contradictory stereotypes that embedded institutional policies around sexuality endure. They are baked into the laws, policies, and societal norms that disabled people routinely navigate.

1. *The Economic Gatekeeping of Sexuality Supports and Services.* — Despite the strides made after *Olmstead* in securing services in the community for people with intellectual and developmental disabilities, there remain few opportunities to access supports in areas related to sex, developing and maintaining intimate relationships, marriage, engaging in sexual pleasure, and other related areas. The lack of access to supports and services around issues of sexuality for people with intellectual and developmental disabilities remains the normal course. States are the gatekeepers for the types of community-based services that are provided to people with intellectual and developmental disabilities through its HCBS waiver program. Through HCBS waivers, states have "the flexibility to determine not only who is eligible and how many people are served" by the waiver but also the control over "what benefits" the waiver will cover and "the ways those benefits are provided."[147] As a result, states hold the strings that orchestrate what community-based services are prioritized for waiver funding.

A recent study reflects the inattention of states in providing community-based supports and services focused on issues of sexuality. The study examined 107 HCBS waivers from forty-four states and the District of Columbia and found that only ten percent of those waivers provided sexual health services.[148] The states that did provide sexual health services predominantly focused on reactive services.[149] Reactive services are generally "provided in the form of behavior support for sexually inappropriate behavior."[150] This "reactive model" for providing sexuality

146. See Perlin & Lynch, supra note 140, at 56 (concluding a comparative analysis by observing that "the stagnant, repressive attitudes toward sexuality and sexual expression continue to undermine any great shifts in policy" regarding individuals with disabilities).

147. Friedman, Medicaid Home- and Community-Based Services Waivers, supra note 108, at 269 (citing Victoria Wachino, Andy Schneider & David Rousseau, Henry J. Kaiser Fam. Found., Financing the Medicaid Program: The Many Roles of Federal and State Matching Funds (2004)). The HCBS waiver program is carried out through a complex scheme of federal statutory and regulatory guidelines. See, e.g., 42 U.S.C. § 1396 (2018); see also CMS HCBS Instructions, supra note 110, at 1 (describing the range of flexibility that states have in designing Medicaid waivers).

148. Friedman, Sexual Health and Parenting Supports, supra note 31, at 259. This study describes sexual health services as either "proactive," which "see people with [intellectual and developmental disabilities] as sexual beings, promote sexual expression and opportunities, [and] emphasi[ze] rights and education," or "reactive," which "focus on avoidance, danger, victimization, deviance, control." Id.

149. Id. (finding that 87.5% of sexual health services were "reactive services, viewing sexual health negatively").

150. Id. "Reactive services contain[] elements of sex-negative ideas, including that sex is dangerous, should be avoided, or assuming sexual deviancy." Carli Friedman & Aleksa L. Owen, Sexual Health in the Community: Services for People With Intellectual and

services "often begins when sexual violence victimization comes to light."[151] This incident-driven response predominates the understanding and acknowledgment of sexuality within disability systems.[152] The study found that states apportioned only $282,492 of HCBS waiver spending to exclusively provide sexual health services.[153] The study projected that this allocation only served 0.04% of people with intellectual and developmental disabilities who received services from the HCBS waiver program.[154]

There is also a reticence among society, agencies that serve people with intellectual and developmental disabilities, and family members to support the sexuality of persons with intellectual and developmental disabilities.[155] Some family members may feel that providing sexuality education to their intellectually or developmentally disabled child will "encourage sexual behavior."[156] Families sometimes restrict or avoid the topic of sexuality out of concern about sexual abuse, pregnancy, and sexually transmitted infections.[157]

These views around sexuality conflict with the documented benefits of providing sexuality education and supports. Studies reflect that access to sexuality supports while living in the community "increased sexual

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Developmental Disabilities, 10 Disability & Health J. 387, 389 (2017). Reactive services engage "exclusively" with "sexually inappropriate behaviors." Id.

151. Nechama F. Sammet Moring, Rebel Girl Rsch. Commc'ns, State of Affairs in Sex Education for People With Intellectual and Developmental Disabilities (IDD) 5 (2019) (unpublished report), https://www.plannedparenthood.org/uploads/filer_public/15/ba/15bab9eb-9a2b-4758-87a3-0b55de8a11f9/pplm_white_paper_state_of_affairs_in_sex_ed_for_people_with_idd.pdf (on file with the *Columbia Law Review*).

152. See, e.g., Lisa Colarossi, Kate L. Collier, Randa Dean, Siana Pérez & Marlene O. Riquelme, Sexual and Reproductive Health Education for Youth With Intellectual Disabilities: A Mixed Methods Study of Professionals' Practices and Needs, 24 Prevention Sci. (Supplemental Issue) S150, S159 (2023) ("[I]ncident-driven conversations about sexuality (particularly issues of sexual boundaries, consent, and sexual harassment) are the norm.").

153. See Friedman, Sexual Health and Parenting Supports, supra note 31, at 268.

154. See id.

155. See, e.g., id. at 270 ("[M]any family members do not discuss sex with their children with [intellectual and developmental disabilities], even as adults, and may even serve as gatekeepers to sexual education, sexuality, and intimate relationships." (citations omitted)).

156. Id.

157. See Rhonda S. Black & Rebecca R. Kammes, Restrictions, Power, Companionship, and Intimacy: A Metasynthesis of People With Intellectual Disability Speaking About Sex and Relationships, 57 Intell. & Developmental Disabilities 212, 213 (2019) ("[R]estrictions and avoidance of the topic of sexuality are often done due to caregiver concern surrounding the high rates of abuse and exploitation this population experiences." (citations omitted)); see also Michel Desjardins, The Sexualized Body of the Child: Parents and the Politics of "Voluntary" Sterilization of People Labeled Intellectually Disabled, *in* Sex and Disability 69, 70–71 (Robert McRuer & Anna Mollow eds., 2012) ("[S]ome . . . parents see their intellectually disabled children as asexual and chaste seraphim, juvenile and lacking in any erotic desire, and unable to face the many dangers of sexuality (such as abuse, prostitution, illness, and unwanted pregnancies).").

knowledge and skills in recognizing abuse, building relationships, maintaining boundaries, and decision-making [which] can help protect against sexual victimization."[158] Sexuality education and supports increase empowerment in making informed choices that protect a person's health and safety.[159] Sexual education also "empowers individuals with [intellectual and developmental disabilities] to enjoy personal sexual fulfillment" and can "promote an individual's self-determination and self-advocacy skills," which "are indicators of overall quality of life."[160]

Despite these positive findings, states are not offering sexuality education as a standard HCBS waiver service, alongside, for example, education, social development, and employment supports.[161] States could provide "[c]omprehensive and culturally competent sex ed" through the HCBS waiver program, which could include training and supports about how to engage in safe sexual practices, develop healthy emotional and intimate relationships, ask for and give consent, and identify and protect oneself from sexual abuse.[162] Sexuality education and programming could further encompass sexual self-awareness, communication and understanding of social cues, bodily autonomy, sexual self-expression, sexual orientation, gender identity, reproduction, and family planning.[163]

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158. See Rosemary B. Hughes, Susan Robinson-Whelen, Rebecca Goe, Michelle Schwartz, Lisa Cesal, Kimberly B. Garner, Katie Arnold, Tina Hunt & Katherine E. McDonald, "I Really Want People to Use Our Work to Be Safe" . . . Using Participatory Research to Develop a Safety Intervention for Adults With Intellectual Disability, 24 J. Intell. Disabilities 309, 310 (2020) (citations omitted).

159. See Nikita Mhatre, Nat'l P'ship for Women & Fams., Access, Autonomy, and Dignity: Comprehensive Sexuality Education for People With Disabilities 6–7 (2021), https://nationalpartnership.org/wp-content/uploads/2023/02/repro-disability-sexed.pdf [https://perma.cc/V7HG-GR7Y] (explaining how sex education can reduce rates of intimate partner violence and sexually transmitted illnesses); E. Dukes & B.E. McGuire, Enhancing Capacity to Make Sexuality-Related Decisions in People With an Intellectual Disability, 53 J. Intell. Disability Rsch. 727, 732 (2009) ("[I]mprovements in knowledge [about sexuality] resulted in improved decision-making ability."); see also Abigail Abrams, How Accessible Sex Ed Helps Young Adults With Developmental Disabilities Form Healthy Relationships, Mother Jones (Nov.–Dec. 2023), https://www.motherjones.com/politics/2023/10/how-accessible-sex-education-helps-young-adults-with-developmental-disabilities-form-healthy-relationships/ [https://perma.cc/NL4V-F3AP] (discussing a sex education curriculum tailored to the needs of those with intellectual and development disabilities); Sammet Moring, supra note 151, at 9–11 (discussing how comprehensive sexuality education influences healthy sexual behaviors).

160. James Sinclair, Deanne Unruh, Lauren Lindstrom & David Scanlon, Barriers to Sexuality for Individuals With Intellectual and Developmental Disabilities: A Literature Review, 50 Educ. & Training Autism & Developmental Disabilities 3, 3, 14 (2015).

161. Friedman, Sexual Health and Parenting Supports, supra note 31, at 259.

162. See Mhatre, supra note 159, at 5, 16 (providing a definition and description of comprehensive sexuality education).

162. Id. at 16–18.

163. See, e.g., Sexuality: Joint Position Statement of AAIDD and the Arc, Am. Ass'n on Intell. & Developmental Disabilities (2013), https://aaidd.org/news-policy/policy/position-statements/sexuality [https://perma.cc/3KLT-GMA8] (stating that people

2. *Fostering a Culture of Desexualization.* — Minimizing the importance of sexuality supports and services paradoxically fosters community-based environments that place intellectually and developmentally disabled people at a greater risk of becoming victims of, or perpetrating, sexual violence. The lack of information on how to engage in healthy sexual behavior is shown to increase the likelihood of sexual violence against people with intellectual and developmental disabilities.[164] Barriers to accessing sexuality education and supports create a greater risk for developing maladaptive sexual behaviors, which may lead to an individual harming others.[165] Further, the lack of recognition of sexuality for intellectually and developmentally disabled people creates barriers to accessing sexual and reproductive healthcare needs, such as Pap smears and cervical cancer screenings, resulting in poorer health outcomes.[166]

As reflected in the law,[167] the actions of group homes,[168] and the response of support staff,[169] the erasure of sexuality as a part of community integration creates a culture in which intellectually and developmentally disabled people are more vulnerable to constraints on their sexual and reproductive agency as a default reaction. *Forziano v. Independent Group Home Living Program, Inc.* illustrates this point.[170] Paul Forziano and Hava

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with intellectual disabilities and developmental disabilities have the right to"[i]ndividualized education and information to encourage informed decision-making, including education about such issues as reproduction, marriage and family life, abstinence, safe sexual practices, sexual orientation, sexual abuse, and sexually transmitted diseases").

164. See Kathryn Pedgrift & Nicole Sparapani, The Development of a Social-Sexuality Education Program for Adults With Neurodevelopmental Disabilities: Starting the Discussion, 40 Sexuality & Disability 503, 504 (2022) ("The literature suggests that people with neurodevelopmental disabilities are more likely to experience sexual assault due, in part, to limited access to effective interventions . . . ."); see also infra sections III.A–.B.

165. See infra section III.B.

166. Julie S. Armin, Heather J. Williamson, Janet Rothers, Michele S. Lee & Julie A. Baldwin, An Adapted Cancer Screening Education Program for Native American Women With Intellectual and Developmental Disabilities and Their Caregivers: Protocol for Feasibility and Acceptability Testing, J. Med. Internet Rsch. Protocols, e37801, Feb. 13, 2023, at 2 ("One reason that individuals with [intellectual and developmental disabilities] do not receive cervical cancer screening may be that they have been perceived as asexual . . . .").

167. See Vaughn v. Ruoff, 253 F.3d 1124, 1129 (8th Cir. 2001) (noting that "involuntary sterilization is not always unconstitutional" and that people with intellectual disabilities "may be subjected to various degrees of government intrusion that would be unjustified if directed at other segments of society").

168. See, e.g., Chin, Group Homes as Sex Police, supra note 50, at 385 (recounting a group home placing indefinite restrictions on its resident's right to engage in sexual activity after she expressed her desire to get married and have children). Group homes are congregate settings where people with disabilities may reside to receive varying levels of daily living supports. See id. at 381 n.3.

169. See, e.g., Gill, supra note 30, at 61 ("[W]hen a person with an intellectual disability becomes pregnant or is diagnosed with a sexually transmitted infection, support staff might try to control the sexual activity of the individual instead of equipping [them] with knowledge that facilitates and informs [their] sexual choices.").

170. No. CV 13-0370, 2014 WL 1277912, at *1 (E.D.N.Y. Mar. 6, 2014), aff'd, 613 F. App'x 15 (2d Cir. 2015).

Samuels, both of whom have an intellectual disability, fell in love and wanted to live together and get married.[171] Paul and Hava lived in separate group homes within the community.[172] They met in a program designed for people with intellectual and developmental disabilities to learn life skills and engage in community-based opportunities that enhanced their personal development.[173]

With the support of their families, Paul and Hava approached their respective group homes (and the state agency that provides supports and services to people with intellectual and developmental disabilities) asking to live together in one of their group homes.[174] The group homes opposed this request, stating that living together in a group home was "'unprecedented,' 'impossible,' and 'fraught with difficulties.'"[175] The representative of the state agency recommended that both Paul and Hava undergo a sexual consent assessment[176] and receive sex education.[177] Neither Paul's nor Hava's group home, however, "included sex education"

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171. Id.

172. Brief for Plaintiffs-Appellants at 3, *Forziano*, 613 F. App'x 15 (No. 14-1147), 2014 WL 4477091.

173. See id. ("Paul and Hava met and became friends through Defendant Maryhaven Center for Hope's . . . Day Habilitation Program in 2004.").

174. *Forziano*, 2014 WL 1277912, at *1.

175. Id. (quoting Amended Complaint ¶¶ 96–97, *Forziano*, 2014 WL 1277912 (No. 13 Civ-0370), 2013 WL 9680392).

176. Id. Assessments to determine whether a person with an intellectual or developmental disability has the capacity to consent to sexual activity "could potentially be utilized by a clinician to determine what gaps in knowledge exist for someone that may inhibit their ability to perform sexual acts safely." Andrea Onstot, Capacity to Consent: Policies and Practices that Limit Sexual Consent for People With Intellectual/Developmental Disabilities, 37 Sexuality & Disability 633, 635 (2019). But "[t]here is no clear definition, criteria, or standard for determining a person's sexual consent capacity." Shaniff Esmail & Brendan Concannon, Approaches to Determine and Manage Sexual Consent Abilities for People With Cognitive Disabilities: Systematic Review, Interactive J. Med. Rsch., Jan.–June 2022, e28137, at 1, 3,. Sexual consent "[c]apacity assessments are sometimes weaponized to restrict persons with intellectual disabilities' right to sexual expression." Matthew S. Smith & Michael Ashley Stein, Legal Capacity and Persons With Disabilities' Struggle to Reclaim Control Over Their Lives, Harv. L. Sch. Petrie-Flom Ctr.: Bill Health (Sept. 29, 2021), https://blog.petrieflom.law.harvard.edu/2021/09/29/legal-capacity-disabilities/ [https://perma.cc/KBQ2-3PSG]. Assessments are also susceptible to "cultural bias of their administrators when they make sexual capacity determinations." Onstot, supra, at 635; see also Roy G. Spece, Jr., John K. Hilton & Jeffrey N. Younggren, (Implicit) Consent to Intimacy, 50 Ind. L. Rev. 907, 910 (2017) ("If incorrectly employed or relied upon as panaceas, . . . [sexual consent assessments] can work against residents' rights and best interests."). This Article does not take a position on the adequacy of, or what criteria should be used, to determine sexual consent capacity. Any assessment of consent capacity should be determined according to an "individualized, fact-specific inquiry based on circumstances of the desired sexuality choice[s] of the individual." See Chin, Group Homes as Sex Police, supra note 50, at 405 (footnote omitted).

177. *Forziano*, 2014 WL 1277912, at *1.

or "relationship counseling" as a "goal, service or treatment" in the supports provided to its residents.[178]

In defending its decision that Paul and Hava could not live together, Hava's group home argued that she had the "mental age" of "a four-year-old girl" and allowing her to engage in sexual conduct would be "permitting abuse."[179] The group home relied on two outdated sexual consent assessments of Hava to assert her sexual consent incapacity: one that was conducted two years prior and another that was completed ten years prior.[180] The couple decided to find an independent agency to perform an updated sexual consent assessment.[181] This assessment determined that Paul and Hava each had the capacity "to give verbal informed sexual consent."[182] The agency that conducted the assessment provided "specialized educational materials" to Paul and Hava as part of the assessment process.[183] Hava's group home, however, rejected the result of her updated independent assessment.[184]

The *Olmstead* integration mandate created opportunities for Paul and Hava to live and thrive in the community with supports. They met in the community and fell in love.[185] But in matters of sexuality, *Olmstead* presents a lost opportunity to support the couple's desire to experience love, intimacy, and marriage in the community. Here, the group homes and state agency had the opportunity to support Paul and Hava by providing

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178. Id. at *2.

179. Oral Argument at 1:02:25, *Forziano*, 613 F. App'x 15 (No. 14-1147) (on file with the *Columbia Law Review*). The term "mental age" is often referred to in court proceedings to evaluate cases of sexual assault and rape when the victim is someone with an intellectual or developmental disability. As expressed by Professor Deborah Denno, "Although courts also typically refer to a victim's 'mental age' when evaluating rape" and cases that involve people with intellectual disabilities, organizations and commentators consider "mental age" to be "a misleading concept, most particularly because it perpetuates beliefs that the mentally retarded are 'forever young' or 'childlike.'" Deborah W. Denno, Sexuality, Rape, and Mental Retardation, 1997 U. Ill. L. Rev. 315, 330–31 (footnotes omitted) (quoting William Fink, Education and Habilitation of the Moderately and Severely Mentally Retarded, *in* Mental Retardation: From Categories to People 260, 262 (Patricia T. Cegelka & Herbert J. Prehm eds., 1982)); see also Gill, supra note 30, at 38 ("Mental age is an ableist notion that can actively discredit individual choice and perpetuate assumptions about incompetence, childhood, and necessity for protection by prioritizing professional medical authority at the expense of individual desire and epistemology."); cf. Jasmine Harris, Sexual Consent and Disability, 93 N.Y.U. L. Rev. 480, 538 (2018) [hereinafter Harris, Sexual Consent and Disability] ("[C]ourts routinely review a mix of evidence of IQ, mental age, and adaptive evidence in evaluating a victim's incapacity to consent.").

180. See *Forziano*, 2014 WL 1277912, at *1 (noting that Paul and Hava expressed an interest to get married in 2010); Brief for Defendants-Appellees at 44, *Forziano*, 613 F. App'x. 15 (No. 14-1147), 2014 WL 7003967 (noting that the group home relied on assessments from 2000 and 2008).

181. *Forziano*, 2014 WL 1277912, at *2.

182. Id (citing Amended Complaint, supra note 174, at ¶ 161).

183. Id.

184. Id. at *3.

185. Id. at *1.

sexuality services to enhance what the group home perceived to be incapacities in Hava's sexual decisionmaking.[186] But they chose not to.[187]

It took three years for Paul and Hava to find a group home that allowed them to live together.[188] The couple were married shortly after moving in together, following "a courtship of seven years and an engagement of two years."[189] Paul and Hava's experience reflects the need to reframe the narrative around sexuality beyond that of vulnerability and victimhood. It also displays the inadequacy of the sexual violence narrative in navigating issues of sexuality and intellectual and developmental disabilities.

3. *Sexuality and Disability Scholarship.* — The development of recent legal scholarship continues to elevate discourse on how to address the sexual and reproductive control of people with disabilities.[190] Disability rights scholar Robyn Powell discusses what she termed "reproductive oppression"—"the myriad ways sexuality and reproduction is weaponized to subjugate people with disabilities."[191] She argues for a renewed "jurisprudential and legislative framework" that centers the tenets of reproductive justice and disability justice to "shift attention away from the courts and onto policymaking, organizing, and the electorate."[192]

Professor Jasmine Harris has challenged legislative and judicial approaches in navigating questions of capacity and consent in sexual assault cases.[193] Professor Harris calls for legislatures and judges to gain a stronger grasp on "the experiences of people with mental disability living in the community," arguing that statutes cannot "capture the way in which people with disabilities encounter and respond to sexual violence."[194] Other scholars have suggested reform efforts to "modern rape law" to

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186. Id. at *2.

187. Id.

188. See id. at *1, *3.

189. Id. at *1 (citing Amended Complaint, supra note 174, at ¶ 2).

190. See, e.g., Emens, supra note 7, at 1381–82 ("Sex and relationship education, institutional and residential rules, and welfare laws should all be structured to anticipate and facilitate opportunities for intimate relationships."); Joseph J. Fischel & Hilary R. O'Connell, Disabling Consent, or Reconstructing Sexual Autonomy, 30 Colum. J. Gender & L. 428, 508, 514, 516, 519 (2015) (suggesting "publicly funded comprehensive sexual education," "publicly funded sexual assistance," facilitated masturbation, and the facilitated purchase of sexual services); Powell, Disability Reproductive Justice, supra note 16, at 1889–98 (proposing, inter alia, "develop[ing] and implement[ing] legal and policy responses that are aimed at disrupting intersecting oppressions," "[c]entering people with disabilities as leaders," protecting autonomy and self-determination, and "ensuring that sexual and reproductive health services and information are accessible").

191. Powell, Disability Reproductive Justice, supra note 16, at 1860.

192. Id. at 1887, 1903.

193. See Harris, Sexual Consent and Disability, supra note 179, at 488 ("This Article examines fifty state statutes plus the District of Columbia and 172 sexual assault and rape decisions . . . related to cognitive disability and capacity to consent to sex.").

194. Id. at 547.

address the failures of the criminal system in prosecuting sexual violence cases against disabled people.[195]

Scholarship has further explored the necessity of facilitated decisionmaking and welfare reform efforts in supporting the sexual autonomy of disabled people.[196] Several scholars have also examined issues of sexuality and disability for residents in congregate settings such as nursing facilities and hospitals, proposing tools and strategies to address the complex questions of capacity and consent with the goal of protecting the disabled individual's sexual and bodily autonomy.[197]

This expansive discourse has yet to deeply explore how laws, policies, and sociocultural norms work collectively to control the sexual and reproductive lives of people with intellectual and developmental disabilities—or how this control effectuates and maintains a status quo of sexual violence against this community. Thinking about the structural causes of the desexualization of disability provides an opportunity to reimagine how to confront sexual violence and its root causes.

II. REFRAMING THE VICTIM–PERPETRATOR BINARY THROUGH THE STRUCTURAL FRAME OF DESEXUALIZING DISABILITY

The nature of individualized sexual violence against people with intellectual and developmental disabilities generally limits deeper inquiry into its causes and consequences. That is, the primary focus of sexual violence is a victim–perpetrator binary.[198] Sexuality is primarily viewed

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195. See, e.g., Fischel & O'Connell, supra note 190, at 431–32 (arguing for statutory reform to "modern rape law" by moving away from the conflation of sexual autonomy with consent to recognize "sexual autonomy as the capability to codetermine sexual relations"); see also Holly Jeanine Boux, "#UsToo": Empowerment and Protectionism in Responses to Sexual Abuse of Women With Intellectual Disabilities, 37 Berkeley J. Gender L. & Just. 131, 162 (2022) (arguing that current legislative proposals for reforming this area of law fail to extend the personal autonomy of women with intellectual disabilities); Denno, supra note 179, at 321 (proposing a "contextual approach to consent that incorporates a range of factors, including modern knowledge about [intellectual disability], individual attributes beyond the labels of intelligence quotient (IQ) and mental age, and, most importantly, the context of the sexual encounter"); Danielle M. Shelton, Accommodating Victims With Mental Disabilities, 127 Dick. L. Rev. 163, 223 (2022) (arguing for legislative reforms that provide "specific accommodations and protections to" people with intellectual disabilities who are survivors of sexual assault to ensure participation in all stages of the criminal process).

196. See supra note 190; cf. Jasmine Harris, Response, The Role of Support in Sexual Decision-Making for People With Intellectual and Developmental Disabilities, 77 Ohio St. L.J. Furthermore 83, 101–04 (2016), http://hdl.handle.net/1811/78681 [https://perma.cc/9EP6-8GAX] [hereinafter Harris, The Role of Support] (questioning the legal implications of applying the legal framework of supported decisionmaking to persons with intellectual and developmental disabilities).

197. See Chin, Group Homes as Sex Police, supra note 50, at 396–97 nn.89–90.

198. See Gill, supra note 30, at 7 ("Advocating for the sexuality of people with intellectual disabilities challenges sexual ableism insomuch as intellectual disability assumes inability to consent because of the manifestation of an intellectual impairment.").

through the lens of protecting the disabled person from sexual violence and administering criminal and civil responses to address the harm. As a result, issues of sexuality are rendered invisible in the lives of people with intellectual and developmental disabilities. There is an erasure of "the embodied knowledge and unique epistemology about life and physical maturity of individuals with intellectual disabilities."[199] This Part discusses the limitations in addressing the sexual violence of people with intellectual and developmental disabilities through a victim–perpetrator binary. It further discusses the necessity to break from this binary to examine more critically the structures that normalize the desexualization of disability.

A. *The Inadequacy of the Victim–Perpetrator Binary View of Sexual Violence*

In confronting issues of sexuality and intellectual and developmental disability "[m]uch of the discourse . . . can be classified as 'crisis responsive' or 'harm reducing.'"[200] The lives of intellectually disabled women, in particular, are "largely constructed around the twin poles of 'regulation of pregnancy/reproduction' and 'protection from sexual abuse and assault.'"[201] In the legal context, "vulnerability as a construct"[202] creates a presumption of sexual incompetency around sexuality and disability. Take the case of Johnny Timpson, a 60-year-old Black man[203] with "severe intellectual disabilities and cerebral palsy" who lives in a group home.[204]

Timpson was discovered in his group home "having oral sex with another male."[205] The group home staff explained that "their actions were very inappropriate and asked them to go to their rooms."[206] In response to this incident, Timpson's family filed a broadly sweeping lawsuit alleging "negligent care and abuse,"[207] including "physical, emotional and sexual

199. Id. at 3.

200. Id. at 7.

201. Id. at 19.

202. Sherene H. Razack, Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms 138 (1998).

203. See Tim Smith, Intellectually Disabled Man Given Sex Education in Group Home Before Having Sex: Lawsuit, Greenville News (Nov. 12, 2018), https://www.greenvilleonline.com/story/news/local/south-carolina/2018/11/12/intellectually-disabled-man-given-sex-ed-before-having-sex-lawsuit/1847718002/ [https://perma.cc/EH78-GVZE].

204. Timpson ex rel. Timpson v. Anderson Cnty. Disabilities & Special Needs Bd., 31 F.4th 238, 245 (4th Cir. 2022).

205. Plaintiffs' Motion & Memorandum in Support of Partial Summary Judgment at 26, Timpson ex rel. Timpson v. McMaster, 437 F. Supp. 3d 469 (D.S.C. 2020) (No. 6:16-cv-1174-DCC), aff'd in part, vacated in part sub nom. *Timpson ex rel. Timpson*, 31 F.4th 238.

206. Brief of Appellant at 13, *Timpson ex rel. Timpson*, 31 F.4th 238 (No. 20-1163), 2021 WL 633290 (quoting Joint Appendix at 1651–52).

207. *Timpson ex rel Timpson*, 437 F. Supp. 3d at 472.

abuse, neglect and financial exploitation."[208] The family asserted that the group home and state agency that provides services to people with intellectual and developmental disabilities "encouraged" this "risky sexual behavior[]"[209] by providing Timpson with "sexual awareness . . . training."[210]

Timpson "received sex education courses from 2010 to 2013"[211] after signing consent forms to participate in these classes.[212] The sexuality education included teaching Timpson to "[a]lways use a latex condom during sex," "[l]imit the number of partners you have," and "recognize the symptoms of [sexually transmitted diseases]."[213] It also included information related to "responsible decisions about sex" and other ways to "build a loving relationship."[214] The family claimed that Timpson "had the mental capacity of a four or five year old child" and that the sexuality education included "concepts a child that age cannot and should not comprehend."[215] In response, the former director of Timpson's group home testified to taking "measures . . . in confronting the dilemma of providing safe sex education while not encouraging sexual activity, and still respecting . . . Johnny Timpson's liberty interests as an adult."[216] Due to the absence of Timpson's perspective, thoughts, and feelings throughout the litigation, it is unclear what he felt or experienced at the group home related to this sexual encounter and what impact sexuality education had on his sexual actions.[217]

The *Timpson* case reflects what is customarily conceived as sexual violence, presenting difficult questions. If examining this case through a victim–perpetrator binary, the inquiry may explore the following: Did

208. Amended Complaint at 3, Timpson ex rel. Timpson v. Haley, 2017 WL 588497 (D.S.C. Feb. 14, 2017) (No. 6:16-cv-01174-DCC), 2016 WL 11658111.

209. Plaintiffs' Motion & Memorandum in Support of Partial Summary Judgment, supra note 205, at 26.

210. Id. at 8 (internal quotation marks omitted) (quoting exh.7).

211. *Timpson ex rel. Timpson*, 31 F.4th at 245.

212. Plaintiffs' Motion & Memorandum in Support of Partial Summary Judgment, supra note 205, at 8.

213. Id. at exh.7.

214. Id.

215. Id. at 25–26.

216. Brief of Appellees at 21, *Timpson ex rel. Timpson*, 31 F.4th 238 (No. 20-1163), 2021 WL 510613.

217. The district court reprimanded Plaintiffs' counsel for its failure to properly present issues specific to Timpson and the level of care, treatment, and services he was receiving at the group home. The court noted, "Federal courts resolve cases and controversies, not crusades. . . . Plaintiffs' counsel in this case have sought to wage a ground war against the South Carolina disability and Medicaid system. In the process of this crusade, Plaintiffs' counsel have neglected to focus on what is important: Johnny Timpson." *Timpson ex rel. Timpson*, 437 F. Supp. 3d at 472. The district court entered directed verdicts on several of Plaintiffs' claims with the jury returning verdicts on the remaining claims. See id. at 478. The Fourth Circuit Court of Appeals sustained the verdicts, vacating only the District Court's dismissal of Plaintiffs' retaliation claim. *Timpson ex rel. Timpson*, 31 F.4th at 251.

Timpson engage knowingly and willingly in sexual conduct? What was the capacity of each person involved to consent?[218] Did the encounter constitute sexual assault? Did sexuality education "encourage" Timpson, as the family posits, or provide the tools for an informed sexual encounter? Is there a perpetrator? Is there a victim? Should someone be held accountable? Is "mental age" something to rely on in determining capacity to consent to sexual activity?[219]

These questions, and many others, are often the starting and stopping place of inquiry for discussions on sexuality and intellectual and developmental disability. Answering these questions may resolve issues around criminal culpability and negligence but does little to interrogate the foundations that support sexual violence. Responses to sexual violence against people with intellectual and developmental disabilities that are crafted through a victim–perpetrator binary lens have little permanent effect on supporting the health and well-being of the disability community most affected by sexual violence. They also fail to examine the root causes of this violence.

In her article, *"#UsToo": Empowerment and Protectionism in Responses to Sexual Abuse of Women With Intellectual Disabilities*, Holly Jeanine Boux critically examined several legislative proposals that focused on sexual assault against women with intellectual disabilities. These proposed reforms followed shortly after the early swell of the #MeToo movement that captured national attention in 2017.[220] The reforms largely focused on addressing sexual violence through "law enforcement and judicial practices."[221] They included increasing training, funding, and other resources for criminal investigations and prosecutions and strengthening care provider abuser registries and mandatory reporter requirements for employees working with people with intellectual disabilities.[222] The reforms, Boux noted, sought to "remedy[] the symptoms, rather than the

218. State criminal laws on determining sexual capacity and consent vary. See, e.g., People v. Cratsley, 653 N.E.2d 1162, 1165 (N.Y. 1995) ("The law does not presume that a person with [an intellectual disability] is unable to consent to sexual intercourse, and proof of incapacity must come from facts other than [intellectual disability] alone." (citation omitted)). A discussion of capacity and consent in matters of sexual conduct, and the criminal legal standards that may apply, is beyond the scope of this Article. For an in-depth discussion on issues of capacity, consent, and people with intellectual and developmental disabilities, see Ann Linder, Stan. Intell. & Developmental Disabilities L. & Pol'y Project, Capacity to Consent to Sexual Activity Among Those With Developmental Disabilities 7–12 (2018), https://law.stanford.edu/wp-content/uploads/2018/11/Ann-Linder-Capacity-to-Consent-to-Sexual-Activity-Among-those-with-Developmental-Disabilities.pdf [https://perma.cc/B7ZP-346N].

219. See supra note 179 (discussing how courts often use the term "mental age" despite critiques that this term reinforces notions of incompetency).

220. Boux, supra note 195, at 141.

221. Id. at 149.

222. Id. at 143–45.

root causes" of sexual violence,[223] with a majority of state statutes further marginalizing intellectually disabled survivors of sexual assault through "infantilizing language [that] entrench[es] disempowering and paternalist norms and practices."[224]

Enhanced surveillance is another measure that states propose to deter or identify perpetrators of sexual violence. During the course of the *Timpson* litigation, the South Carolina state legislature proposed the implementation of surveillance cameras in group homes and the enhancement of a caretaker abuser registry.[225] Twelve states currently allow surveillance monitoring in congregate care settings, including nursing and group homes,[226] which both raises privacy and additional civil rights concerns and conflicts with the goal of protecting the disabled individual's sexual and bodily autonomy.[227] Cultivating efforts to remediate sexual violence

223. Id. at 134.

224. Id. at 133. Boux additionally notes that in thirty-two states, "[T]he same laws that protect children from physical and sexual abuse are used to protect adults with intellectual disabilities." See id. at 146–47 (quoting Joseph Shapiro, The Sexual Assault Epidemic No One Talks About, NPR (Jan. 8, 2018), https://www.npr.org/2018/01/08/570224090/the-sexual-assault-epidemic-no-one-talks-about [https://perma.cc/4A5X-T83H]).

225. Tim Smith, Control of South Carolina Disabilities Agencies Must Change, House Panel Says, Greenville News (Nov. 12, 2018), https://www.greenvilleonline.com/story/news/local/south-carolina/2018/11/12/south-carolina-ddsn-disabilities-agency-should-change-house-panel-says/1752727002/ [https://perma.cc/TU5A-GDAC].

226. See, e.g., 210 Ill. Comp. Stat. Ann. 32/10 (West 2024) ("A resident shall be permitted to conduct authorized electronic monitoring of the resident's room through the use of electronic monitoring devices placed in the room pursuant to this Act."); 12 Mo. Ann. Stat. § 198.612 (2024) ("Residents of long-term care facilities in this state shall have the right to place in the resident's room an authorized electronic monitoring device that is owned and operated by the resident or provided by the resident's guardian or legal representative."); Okla. Stat. tit. 63, § 1-1956 (2024) ("A resident or the representative of a resident may conduct authorized electronic monitoring of the resident's room through the use of authorized electronic monitoring devices placed in the room . . . ."); Wash. Admin. Code §§ 388.97.0380, 388.97.400 (2024) ("For the purposes of consenting to video electronic monitoring without an audio component, the term 'resident' includes the resident's surrogate decision maker."); see also Prianka Nair, Surveilling Disability, Harming Integration, 124 Colum. L. Rev. 197, 231 n.229 (2024); Marisa Saenz, Esther's Law, Allowing Families to Install Cameras in Ohio Nursing Homes, Goes Into Effect Wednesday, WKYC (Mar. 23, 2022), https://www.wkyc.com/article/news/local/ohio/esthers-law-cameras-ohio-nursing-homes-goes-into-effect-wednesday/95-7549798d-a65b-4719-a94e-ffb573b35f7a [https://perma.cc/YD7B-FLM9]; Terry Tang, Arizona Health Facility Rape Spurs Video Surveillance Push, Associated Press (Feb. 8, 2019), https://apnews.com/article/766df61d860e44a39df163799e5daeb6 [https://perma.cc/7YCU-N4B7]; Is It Legal to Install Surveillance Cameras in Nursing Home Rooms?, Miller Kory Rowe LLP (May 16, 2022), https://www.mkrfirm.com/blog/2022/may/is-it-legal-to-install-surveillance-cameras-in-n/ [https://perma.cc/Z2SU-ASH4].

227. Nair, supra note 226, at 202–05 & n.22 (arguing that surveillance systems over people with disabilities could constitute violations of the ADA's antidiscrimination mandate and the integration mandate).

against people with intellectual disabilities primarily through criminal, prosecutorial, and surveillance efforts has largely proven ineffective.[228]

B. *The Social Machinery that Normalizes the Structural Desexualization of Disability*

The central role that the disability systems of guardianship, special education, and the HCBS waiver program play in the lives of people with intellectual and developmental disabilities reflects a type of "social machinery" that engages to normalize the structural desexualization of disability.[229] The structural desexualization of disability framework examines how each system interacts and can work systematically within structures to minimize, discount, or erase the reality that people with intellectual and developmental disabilities have the same desire for intimacy, love, and connection as people without disabilities. In applying the structural desexualization of disability framework, structures are the "social relations and arrangements—economic, political, legal, religious, or cultural—that shape how individuals and groups interact" in society.[230] Structures include "broad-scale cultural and political-economic

228. See, e.g., Elizabeth A. Armstrong, Miriam Gleckman-Krut & Lanora Johnson, Silence, Power, and Inequality: An Intersectional Approach to Sexual Violence, 44 Ann. Rev. Socio. 99, 110–12 (2018) (discussing the "consequences of the criminalization and medicalization of sexual violence"); Denno, supra note 179, at 321; Fischel & O'Connell, supra note 190, at 431–33; Shelton, supra note 195, at 223.

229. Paul Farmer, An Anthropology of Structural Violence, 45 Current Anthropology 305, 307 (2004) [hereinafter Farmer, Structural Violence].

230. Rylko-Bauer & Farmer, supra note 45, at 47. This definition and application of structures draws directly from the concept of structural violence. The foundational ideas of structural violence evolved from liberation theology in Latin America. Lee, Violence, supra note 5, at 125. Norwegian anthropologist Johan Galtung introduced the concept of structural violence to the field of sociology in 1969. See Galtung, Violence, Peace, and Peace Research, supra note 5, at 171. Galtung described structural violence as "violence [that] is built into the structure and shows up as unequal power and consequently as unequal life chances." Id. It is "indirect" compared to "personal" or "direct" violence, which is when an actor or actors commit the harm. Id. at 169. Structural violence is often applied when examining healthcare disparities and the human toll of living in poverty. See, e.g., Akhil Gupta, Red Tape Bureaucracy, Structural Violence, and Poverty in India 35 (2012) (discussing poverty as structural violence and writing that "an essential part of combating acute poverty involves changing the narratives through which structural violence is normalized and hence changing the expectations of what bureaucrats can do and what they can be expected to do").

structures"[231] such as ableism,[232] racism, homophobia, poverty, transphobia, misogyny, slavery, and eugenics.[233]

These structures cause violence and other forms of harm because they are maintained by institutional policies and practices; choices of resource allocation; and legal, historical, sociopolitical, and culturally driven processes and norms. These policies, practices, and norms coalesce to inflict harms as a matter of course by way of society's day-to-day collective actions.[234] Due to the quiet workings of these structures, their harms are less likely to elicit moral outrage or garner strong positions to mitigate the harms.[235] Because these disability systems "operate normatively," the suffering that flows from the structural desexualization of disability is continuous. They occur through the general course of one's life.[236] As a result, the harms are "taken for granted" and "no one is held accountable except, perhaps, the [individuals] themselves."[237] This routinization of the harm that flows from the structural desexualization of disability effectively erases this harm's social, political, and historical origins,[238] which surface when applying the structural desexualization of disability framework.

In the case of Paul and Hava, the decision of Hava's group home, upon reliance of the outdated sexual consent assessments, effectively stripped Hava of her sexual personhood.[239] This action by the group home limited Hava's choices of who she could interact with intimately, where and with whom she could live, and created potential legal uncertainty around whether she could marry. The harms experienced by Hava are structural because the loss of her sexual personhood occurred as a result of the coalescing of structures that limit the sexuality of persons with intellectual and developmental disabilities.[240] These structures include the

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231. Rylko-Bauer & Farmer, supra note 45, at 47.

232. "*Ableism* is oppression faced due to disability/impairment (perceived or lived), which not only signals disability as a form of difference but constructs it as inferior." Liat Ben-Moshe, Decarcerating Disability: Deinstitutionalization and Prison Abolition 16 (2020). For a more expansive definition of ableism, see Working Definition of Ableism: January 2022 Update, Talila A. Lewis Blog, (Jan. 1, 2022), https://www.talilalewis.com/blog/working-definition-of-ableism-january-2022-update [https://perma.cc/MF3B-LANV].

233. Rylko-Bauer & Farmer, supra note 45, at 47.

234. See, e.g., Lee, Violence, supra note 5, at 126; Rylko-Bauer & Farmer, supra note 45, at 47.

235. Cf. Johan Galtung, Twenty-Five Years of Peace Research: Ten Challenges and Some Responses, 22 J. Peace Rsch. 141, 145–46 (1985) (explaining that if structural violence "works quickly it is more likely to be noticed and strong positions for and against will build up so that moral stands emerge").

236. Lee, Violence, supra note 5, at 123.

237. Nancy Scheper-Hughes, Dangerous and Endangered Youth Social Structures and Determinants of Violence, *in* Youth Violence: Scientific Approaches to Prevention 13, 14 (John Devine, James Gilligan, Klaus A. Miczek, Rashid Shaikh & Donald Pfaff eds., 2004).

238. Id.

239. See supra notes 179–180 and accompanying text.

240. See Lee, Violence, supra note 5, at 123 ("The harm is structural because it is a product of institutions and other structures . . . .").

restrictive role of law in matters of sexuality for people with intellectual and developmental disabilities;[241] the inequitable distribution of resources directed at sexuality supports and services by the HCBS waiver program, the institutional policies (whether formal or informal) and practices of the group home in choosing not to provide sexuality supports and services to Hava; and the embedded ableism, bias, and stigma that normalize the restriction of people with intellectual disability and women, in particular, in making sexual and reproductive choices.[242]

Confronting this history's role in creating this "fretwork of entrenched structures" is necessary in any examination of the structural desexualization of disability.[243] The form of harm experienced by Hava is further reinforced by the history of sexual and reproductive control of women with intellectual disabilities. Eugenicists sought to label women with actual or perceived intellectual disability as licentious or perpetual children,[244] requiring protection by the state to control their sexual and reproductive desires. Hava's group home challenged the finding of only her updated sexual consent assessment, even though the assessments determined that both Paul and Hava had the capacity to consent to sexual conduct.[245] This decision by Hava's group home affected Paul by situating him as a potential predator, exposing him to possible criminal penalty, and foreclosing any opportunity for him to engage intimately with Hava. The structural desexualization of disability framework requires exploration of the subjugation, indignity, loss of autonomy, and other forms of direct and indirect harms that people with intellectual and developmental disabilities can experience by interacting with disability systems.

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241. See supra section II.A (discussing the contemporary laws that limit choices around reproduction, parenting, cohabiting, and marriage).

242. See, e.g., Sam R. Bagenstos, Disability and Reproductive Justice, 14 Harv. L. & Pol'y Rev. 273, 284 (2020) ("If medical professionals and prospective parents have an unduly negative understanding of life with a disability, driven by widespread societal stereotypes, then their decisions will be driven by bias unless the state steps in to counteract those stereotypes."); Doron Dorfman, Penalizing Prevention: The Paradoxical Legal Treatment of Preventative Medicine, 109 Cornell L. Rev. 311, 320 (2024) ("[S]tereotypes can have a relationship with reality because they make generic, exaggerated statements about social phenomena.").

243. Farmer, Structural Violence, supra note 229, at 308–09.

244. Trent, supra note 53, at 139, 224.

245. "Sexuality Consent Assessments were conducted of Paul and Hava on June 14, 2012 and June 21, 2012, respectively. Both Paul and Hava were found to be able to give verbal informed sexual consent." Forziano v. Indep. Grp. Home Living Program, No. CV-13-0370, 2014 WL 1277912, at *2 (E.D.N.Y. 2014) (citation omitted). Hava's group home rejected the 2022 sexual consent assessment and instead "rel[ied] on the previous assessments performed in 2000 and 2008." Id. at *2–3.

III. THE SYSTEMS THAT MAINTAIN THE STRUCTURAL DESEXUALIZATION OF DISABILITY

This Part applies the structural desexualization of disability framework to the systems of guardianship, special education, and the HCBS waiver program to illustrate the harms and consequences that flow from desexualization. This analysis considers the structures that influence each of these disability systems to present how they perpetuate and maintain physical, emotional, psychological, and other forms of harm.

A. *The Desexualization of Disability Through Guardianship*

Guardianship creates conditions that allow for the deprivation of sexual agency, bodily autonomy, and reproductive choice. Guardianship laws are regulated by states. According to the most recent available data, between forty-five and fifty-five percent of people with intellectual and developmental disabilities are under guardianship.[246] The guardianship system developed based on notions of parens patriae, or "parent of the country."[247] The government assumes a protectionist role to secure the health and safety of people deemed unable to care for themselves due to diminished mental capacity.[248] Courts may appoint a guardian—most often a family member or a public guardianship provided by the state—for an individual who it determines lacks mental capacity.[249]

The National Council on Disability[250] referred to guardianship as a "kind of civil death" because people subject to guardianship are "no

246. Nat'l Council on Disability, Turning Rights Into Reality: How Guardianship and Alternatives Impact the Autonomy of People With Intellectual and Developmental Disabilities 42 (2019), https://www.govinfo.gov/content/pkg/GOVPUB-Y3_D63_3-PURL-gpo121724/pdf/GOVPUB-Y3_D63_3-PURL-gpo121724.pdf [https://perma.cc/HP64-497R] [hereinafter Nat'l Council on Disability, Turning Rights Into Reality]. This percentage reflects the "overall average [annual] state percentages of people with [intellectual and developmental disabilities]" over the course of a ten-year period. Id. There is limited data to accurately assess the number of people with intellectual and developmental disabilities who are under guardianship, therefore, this percentage is likely not the complete picture. In 2001, in an effort to gather data on the prevalence of guardianship in the United States, Senators Elizabeth Warren and Robert P. Casey Jr. wrote a letter to HHS and the DOJ. The letter requested that the agencies provide guardianship and conservatorship data that it collected and information on how the agencies collected this data. Letter From Sen. Elizabeth Warren and Sen. Robert P. Casey Jr. to Xavier Becerra, Sec'y, HHS, and Merrick Garland, Att'y Gen., DOJ (July 1, 2021), https://www.warren.senate.gov/imo/media/doc/2021.07.01%20Letter%20to%20DOJ%20and%20HHS%20re%20Conservatorship.pdf [https://perma.cc/R4C7-9USW].

247. Leslie Salzman, Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans With Disabilities Act, 81 U. Colo. L. Rev. 157, 164–67 (2010).

248. Id.

249. Id.

250. The National Council on Disability is a federal administrative agency that focuses on policies, programs, practices, and procedures that affect people with disabilities. See

longer permitted to participate in society without mediation through the actions of another if at all."[251] They are stripped of their legal capacity, reverting them to the status of minors under the law.[252] In guardianship proceedings, a court may appoint a third party (guardian) with the legal authority to make decisions such as where the person who is under guardianship may live, whether they can vote, how much control they have over their sexual and reproductive choices, who they can interact with, what intimate and social interactions they may have, and whether the person may marry.[253] As a result of guardianship, people are divested of opportunities to exercise self-determination and agency in choices that most affect their lives.[254] In areas of medical care and treatment, they "may get little information" related to their "condition or treatment options, eventually becoming disregarded as a participant in the decision-making process."[255]

Despite increasing recognition that alternatives to guardianship are necessary to prevent undue restrictions on a disabled person's right to control their own life,[256] guardianship remains central as a disability system that legitimizes third-party control over the sexual and reproductive choices of disabled people. A recent Massachusetts case, *In re Guardianship*

Mission and History, Nat'l Council on Disability, https://www.ncd.gov/about-us/ [https://perma.cc/BK7Y-CPQM] (last visited Sept. 26, 2024).

251. Nat'l Council on Disability, Turning Rights Into Reality, supra note 246, at 24 (internal quotation marks omitted) (quoting Robert D. Dinerstein, Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons With Disabilities: The Difficult Road From Guardianship to Supported Decision-Making, Human Rts. Brief, January 2012, at 8, 8–9).

252. Kristin Booth Glen, Not Just Guardianship: Uncovering the Invisible Taxonomy of Laws, Regulations and Decisions that Limit or Deny the Right of Legal Capacity for Persons With Intellectual and Developmental Disabilities, 13 Alb. Gov't L. Rev. 25, 25–26 (2020).

253. Emily DiMatteo, Vilissa Thompson, Osub Ahmed, Mia Ives-Rublee & Ma'ayan Anafi, Rethinking Guardianship to Protect Disabled People's Reproductive Rights, Ctr. For Am. Progress (Aug. 11, 2022), https://www.americanprogress.org/article/rethinking-guardianship-to-protect-disabled-peoples-reproductive-rights/ (on file with the *Columbia Law Review*).

254. See Salzman, supra note 247, at 159–60; Marie Bergum, It Took Me 12 Years to Get Out of My Conservatorship. Now I'm Finally Free., ACLU (June 26, 2023), https://www.aclu.org/news/disability-rights/it-took-me-12-years-to-get-out-of-my-conservatorship-now-im-finally-free [https://perma.cc/TP9Q-6QS2].

255. Salzman, supra note 248, at 168.

256. See In Your State, Nat'l Res. Ctr. for Supported Decision-Making, https://supporteddecisionmaking.org/in-your-state/ (on file with the *Columbia Law Review*) (last visited July 28, 2024) (listing the current status of supported decisionmaking laws in all states, including thirty-two jurisdictions that have passed supported-decisionmaking laws); see also Emily Largent, Andrew Peterson & Jason Karlawish, Opinion, Britney Spears Didn't Feel Like She Could Live 'a Full Life.' There's Another Way., N.Y. Times (Apr. 3, 2023), https://www.nytimes.com/2023/04/03/opinion/guardianship-britney-spears-decision-making.html (on file with the *Columbia Law Review*) (discussing the nonpartisan support of supported decisionmaking as an alternative to guardianship).

of Moe, provides a good example.[257] There, the Department of Mental Health petitioned the Probate and Family Court to appoint the parents of a thirty-two-year-old woman with a psychiatric disability (identified as "Mary Moe" in court documents) to serve as guardians of their daughter for the purpose of consenting to an abortion.[258]

Mary Moe's parents felt that the termination of their daughter's pregnancy was in her best interest.[259] Moe opposed the abortion for religious reasons.[260] The trial court agreed with Moe's parents and granted them coguardianship.[261] The trial court determined that, to ensure the abortion took place, Moe could be "coaxed, bribed, or even enticed . . . by ruse" into a hospital where she could undergo the procedure.[262] The trial judge, without provocation, also directed the facility performing the abortion to sterilize Moe "to avoid this painful situation from recurring in the future."[263] The presumed vulnerability of intellectually disabled women as "passive[] or helpless"[264] or overly sexual is a purported justification to sterilize and engage in other means of control over the sexual lives of girls and women.[265] This view of sexuality is embedded within the guardianship system, yet sterilization is not a panacea to protect people with intellectual and developmental disabilities from sexual violence.[266]

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257. 960 N.E.2d 350 (Mass. App. Ct. 2012).

258. Id. at 352.

259. Id. at 353.

260. Id.

261. Id.

262. Id. (alteration in original) (internal quotation marks omitted) (quoting the lower court judge).

263. Id. (internal quotation marks omitted) (quoting the lower court judge). The appellate court reversed the order to sterilize Moe and vacated the order that required her to undergo the abortion procedure, reasoning that the court's decision was issued without a hearing and in opposition to Moe's express desire not to have an abortion. Id. at 355. The Court remanded the case for an evidentiary hearing that considered Moe's wishes. Id.

264. Marta Codina, Diego A. Díaz-Faes & Noemi Pereda, Women With Intellectual Disabilities: Unraveling Their Victim–Offender Status, *in* The Emerald International Handbook of Feminist Perspectives on Women's Act of Violence 109, 113 (Stacy Banwell, Lynsey Black, Dawn K. Cecil, Yanyi K. Djamba, Sitawa R. Kimuna, Emma Milne, Lizzie Seal & Eric Y. Tenkorang eds., 2023).

265. Catalina Devandas Aguilar, Special Rapporteur, Promotion and Protection of Human Rights: Human Rights Questions, Including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms, ¶ 30, U.N. Doc. A/72/133 (July 14, 2017), https://www.ohchr.org/en/documents/thematic-reports/a72133-sexual-and-reproductive-health-and-rights-girls-and-young-women [https://perma.cc/J83Q-ZNUU].

266. Id. (discussing how "sterilization neither protects [girls and young women] against sexual violence or abuse nor removes the State's obligation to protect them from such abuse"). This United Nations report emphasizes that "[t]he practices [of sterilization] are often conducted on a purported precautionary basis." Id. Sterilization practices have been justified because of the "vulnerability of girls and young women with disabilities to sexual abuse, and under the fallacy that sterilization would enable girls and young women with

A structural desexualization of disability framework exposes the concerted ways that structures and systems interact to control the sexuality of people under guardianship. Consider the following. Several doctors and practitioners from the Division of Plastic Surgery at Yale University School of Medicine recently published a case report titled, *Prophylactic Desexualizing Mastectomy for an Intellectually Disabled Woman: Protective Measure or Disregard for Autonomy?*[267] In this brief case report, the authors discuss the case of a woman with an intellectual disability who was born with "breast asymmetry."[268] The woman felt "distress and embarrassment" because of this congenital condition.[269] In efforts to minimize these feelings, before going in public, she "would often attempt to symmetrize her breasts with homemade breast inlets."[270] Her mother, who was also her daughter's guardian with the legal authority to make her medical decisions, consulted with a surgeon.[271] The surgeon informed the mother that a procedure to augment her daughter's smaller breast was the most common approach.[272] But her mother opposed the breast augmentation surgery.[273]

According to the authors, the mother "believed that the augmentation of [her daughter's] breasts might result in an increased risk of sexual assault should her daughter ever live in an assisted care setting."[274] Rather than the augmentation surgery, the mother requested that the doctor perform a mastectomy "to reduce [her daughter's] sexuality."[275] The medical complications of the surgery would likely result in a loss of "nipple sensation and the ability to breastfeed."[276] The authors noted that it could be reasonably argued that a mastectomy was necessary to "desexualize" this young woman, citing that "intellectually disabled women are at a 12-fold increased risk for sexual assault."[277]

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disabilities who are 'deemed unfit for parenthood' to improve their quality of life without the 'burden' of a pregnancy." Id.

267. Omar Allam, Emily Gudbranson, Aaron S. Long, Michael Alperovich & Tomer Avraham, Prophylactic Desexualizing Mastectomy for an Intellectually Disabled Woman: Protective Measure or Disregard for Autonomy?, Plastic & Reconstructive Surgery–Glob. Open, e4347, May 23, 2022, at 1.

268. Id. at 1.

269. Id.

270. Id.

271. Id.

272. Id.

273. Id.

274. Id.

275. Id.

276. Id. at 2.

277. Id. The authors concluded that the legal determination (under guardianship) that the young woman lacked capacity did not diminish her autonomy or erase her desires and refused to perform the surgery. They reasoned that conducting a mastectomy for the purposes of desexualization was an unethical form of "soft sterilization." Id.

Through the structural desexualization of disability framework, the mother's decision that a mastectomy was the best course to protect her disabled daughter from sexual abuse could not occur but for the interaction of social and legal structures. First, the mother wanted to protect her daughter from sexual victimization because of the documented evidence that people with intellectual and developmental disabilities are disproportionately affected by sexual violence.[278] Second, the legal system provided the mother with the legal right to make healthcare decisions for her daughter through guardianship, which secured the legal grounds to authorize a surgery.[279] Third, the medical professionals retained the power to reject the surgery but maintained equal power to move forward with this procedure, as other medical professionals have chosen when confronted with similar family requests to desexualize a disabled loved one. Conducting growth-attenuation procedures is but one example.[280]

The court-ordered appointment of a guardian occurs in an instant moment of time. But the guardianship system lawfully permits bodily, sexual, and reproductive control at any time. The exercise of this control throughout the individual's lifetime reflects the structural, slow nature of the harm experienced.[281]

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278. See Sex Abuse Against People With Disabilities Is Widespread—And Hard to Uncover, PBS News Hour (Jan. 17, 2018), https://www.pbs.org/newshour/show/sex-abuse-against-people-with-disabilities-is-widespread-and-hard-to-uncover (on file with the *Columbia Law Review*) ("People with developmental disabilities become victims of sexual assault at a rate seven times higher than those without disabilities . . . .").

279. State guardianship laws contain standards that are intended to guide guardians concerning how medical decisions are made and what court approval is necessary to make medical decisions for the person under guardianship. See Kim Dayton, Standards for Health Care Decision-Making: Legal and Practical Considerations, 2012 Utah L. Rev. 1329, 1329–30 (detailing how most states legally charge guardians with healthcare decisionmaking). Despite statutory guidance, persons under guardianship remain susceptible to a guardian making medical decisions that extend beyond their statutory authority as guardian. See, e.g., In re Guardianship of Kennedy, 845 N.W.2d 707, 713 (Iowa 2014) (determining that a vasectomy did not qualify as a "nonemergency medical procedure" under the state guardianship law and therefore required court approval).

280. Growth attenuation is a controversial medical procedure that resurfaced in 2006 and involves permanent body manipulation that arrests a child's growth with high-dose estrogen therapy. It represents a relatively unregulated form of social control, raising ethical and legal issues concerning the right to the bodily integrity of intellectually and developmentally disabled children. See DEE-P Connections, Growth Attenuation Therapy—Everything You Want and Need to Know, YouTube (May 18, 2022), https://youtu.be/-oiEKt3KPTM (on file with the *Columbia Law Review*). Growth-attenuation procedures include hysterectomies, mastectomies, and other procedures. See Growth Attenuation, Am. Ass'n on Intell. & Developmental Disabilities (June 10, 2020), https://www.aaidd.org/news-policy/policy/position-statements/growth-attenuation [https://perma.cc/W9SG-KAS6].

281. See Spivakovsky & Steele, supra note 16, at 181 ("Th[e] specification of time disperses the perpetration of lawful violence across time and space, enabling it to become a defining condition for those under guardianship . . . .").

B. *The Desexualization of Disability Through Special Education*

In March 2022, a federal court rejected a school district's motion to set aside a $500,000 jury verdict in favor of C.K.M., a high school student with an intellectual disability who was sexually assaulted during her freshman year by another student, David M., who was also in her special education class.[282] Due to his past sexual misconduct, restrictions were placed on David M. for his attendance at his new school: He was not allowed to be left unattended with other students or go to the bathroom alone.[283] According to court documents, the school did not adhere to these restrictions, which resulted in the alleged repeated acts of sexual violence against C.K.M.[284] Arguably, the litigation achieved a level of justice for C.K.M.'s family. Applying the normative victim–perpetrator binary lens to examine the sexual violence in this case, however, stunts a deeper inquiry beyond the narrative of C.K.M. as the victim and David. M. as the perpetrator.

1. *C.K.M.* — After an eleven-day trial, a jury found that the school district violated C.K.M.'s due process and equal protection rights and acted with negligence.[285] The jury determined that the school failed to protect C.K.M from repeated peer sexual harassment which, C.K.M.'s family contended, "culminated" in her being sexually assaulted by this same student, David M.[286] The vice principal's response to the allegations included expelling C.K.M and David M. as an "intervention technique."[287] The school district further argued, with support from expert testimony, that the school's sexual harassment policy did not apply to C.K.M. because "C.K.M. did not object to what was going on"[288] or express that the sexual behavior was "unwanted."[289]

The vice principal explained, "I would not characterize it as sexual harassment. . . . [T]he person has to object to what's going on for it to be harassment. . . . I don't know that [C.K.M.] knew better."[290] The school district's expert witness similarly stated that the sexual harassment policy did not apply to C.K.M. because she "did not object to" the sexual actions

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282. See Berg ex rel. C.K.M. v. Bethel Sch. Dist., No. 3:18-CV-5345-BHS, 2022 WL 796315, at *1, *5–6 (W.D. Wash. Mar. 16, 2022) ("There is substantial evidence adequate to support the jury's conclusion that the District's failure to report David M.'s harassment of C.K.M. was a moving force of her injury.").

283. See L.K.M. v. Bethel Sch. Dist., No. 318-CV-05345-BHS, 2020 WL 7075209, at *2 (W.D. Wash. Dec. 3, 2020).

284. *Berg ex rel. C.K.M.*, 2022 WL 796315, at *4–6.

285. Id. at *1; Jury Verdict Form at 2, *Berg ex rel. C.K.M.*, 2022 WL 796315 (No. 3:18-CV-05345-BHS), 2021 WL 5571110.

286. *L.K.M.*, 2020 WL 7075209, at *3.

287. Id. at *4.

288. Id.

289. Id.

290. Plaintiff C.K.M.'s Trial Brief at 14, Berg ex rel. C.K.M. v. Bethel Sch. Dist., No. 3:18-cv-05345-BHS, 2022 WL 796315 (W.D. Wash. Mar. 16, 2022), 2021 WL 5571007.

toward her.[291] Despite David M.'s documented history of sexually violent behavior, school employees also referred to C.K.M. as being "'too sexual' toward David M."[292] The vice principal similarly expressed that "the physical reality of . . . hormones" was "driving" their behavior.[293]

For C.K.M., the intellectual disability diagnosis imputes a duality around her sexuality that is rooted in history and was used by the school district to defend its inaction in this matter. History has given sustained power to constructs and labels that influence the modern treatment of intellectually disabled girls and women.[294] This school's emphasis of C.K.M. as both "too sexual"[295] and too cognitively disabled to "know better" and object to David M.'s conduct[296] reflects a modern application of eugenics ideologies. Eugenicists viewed "feebleminded" women as "excessively interested in sex"—the unrestrained feebleminded women—who required protection from themselves. [297]

This dual assessment of C.K.M.'s sexuality provided the school district with justification to expel her as a purportedly protective measure to keep her safe from her own sexual wantonness and feeblemindedness, which is a characterization that eugenicists used to control the sexual and reproductive choices of the "manifestly unfit" population.[298] The emphasis by the school district on this constructed view of C.K.M. shifted the attention away from the school district to an individualized focus on C.K.M. as the victim who was also responsible for the harm done to her. It drew attention away from the responsibility of the school district to ensure that its students with intellectual and developmental disabilities were equipped with the knowledge, information, and related services and supports to be safe in an educational setting, which is discussed in more detail below.

2. *David M.* — The structural desexualization of disability affects perpetrators and victims alike. It is a cause and consequence of sexual violence. David M. is a perpetrator of sexual violence.[299] This identification

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291. *L.K.M.*, 2020 WL 7075209, at *4.

292. Id. at *3.

293. Plaintiff C.K.M.'s Trial Brief, supra note 290, at 14. Court documents indicate that, after being transferred from C.K.M.'s school, David M. sexually assaulted a seven-year-old girl and was arrested and jailed. Id. at 16.

294. See Cecilia Benoit, Andrea Mellor & Zahra Premji, Access to Sexual Rights for People Living With Disabilities: Assumptions, Evidence, and Policy Outcomes, 52 Archives Sexual Behav. 3201, 3211 (2023) (observing that society views women living with intellectual disabilities as "sexually vulnerable and unable to be sexually autonomous for fear of exploitation by others").

295. See supra note 292 and accompanying text.

296. See supra note 290 and accompanying text.

297. Cohen, supra note 54, at 6; Trent, supra note 53, at 136.

298. Buck v. Bell, 274 U.S. 200, 207 (1927).

299. The parties do not dispute David M.'s past history of violent sexual conduct against others. See L.K.M. v. Bethel Sch. Dist., No. C18-5345 BHS, 2020 WL 7075209, at *1–2 (W.D.

alone, however, does little to inform efforts to maintain student safety against sexual victimization or to engage with preventive and treatment strategies to avert the development of sexually inappropriate behaviors.

While we do not have much information about David M.'s history, it is this lack of information that requires a closer examination in moving through the structural desexualization of disability framework. The inquiry would, for example, explore how the laws, societal norms, the school district, and the special education system interacted to support David M. as he was developing a sexual identity or when he first began to exhibit sexually inappropriate behaviors. It would further examine how the intersections of race, socioeconomic class, sexuality, gender, past trauma, and other social and environmental factors in David M.'s life affected decisions to provide him, and his family, with early intervention, preventative measures, and other supports. A structural desexualization of disability inquiry does not focus on demonizing the perpetrator for the direct harms caused. Rather, by surfacing the structures that coalesced to cause the harm, it seeks to identify potential strategies for preventing future suffering.

3. *The School District.* — In further applying the structural desexualization of disability framework to C.K.M.'s case, a closer examination is needed as to how the school district and the special education system interact to maintain and perpetuate the sexual victimization of, or the victimizing by, students with intellectual and developmental disabilities. The Individuals with Disabilities Education Act (IDEA) requires that states provide a free and appropriate public education to disabled school-aged children and young adults until the age of twenty-one.[300] According to recent available data, the U.S. special education system serves approximately 6.5 million students between the ages of six and twenty-one.[301] The purpose of the IDEA is to provide

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Wash. Dec. 3, 2020) (listing four undisputed instances of David M.'s prior violent sexual conduct).

300. See Individuals with Disabilities Education Act of 1997, Pub. L. No. 105-17, 111 Stat. 37 (codified as amended at 20 U.S.C. §§ 1400–1482 (2018)).

301. See U.S. Dep't of Educ., 44th Annual Report to Congress on the Implementation of the Individuals With Disabilities Education Act 41 (2022), https://sites.ed.gov/idea/files/44th-arc-for-idea.pdf [https://perma.cc/8QK7-77E3] [hereinafter DOE Report] ("In 2020, a total of 6,464,088 students ages 6 through 21 were served under IDEA . . . in the 49 States for which data were available, the District of Columbia, Bureau of Indian Education schools, Puerto Rico, the four outlying areas, and the three freely associated states."); see also Laura Graham Holmes & Sexual Information and Education Council of the United States (SIECUS): Sex Ed for Social Change, Comprehensive Sex Education for Youth With Disabilities: A Call to Action 9–10 (2021), https://siecus.org/wp-content/uploads/2021/03/SIECUS-2021-Youth-with-Disabilities-CTA-1.pdf [https://perma.cc/U798-UFUM] ("In 2016, over six million youths ages 6–21 were served by the U.S. special education system."). The IDEA identifies "14 disability categories: (1) autism, (2) deaf-blindness, (3) deafness, (4) emotional disturbance, (5) hearing impairment, (6) intellectual disability, (7) multiple disabilities, (8) orthopedic impairment, (9) other health impairment, (10) specific learning disability, (11) speech or

students with special education and related services that are tailored to meet their "unique needs and prepare them for further education, employment, and independent living."[302] These unique needs "include learning differences, social inexperience, and social naiveté that could lead to vulnerability, and warrant education programs" that provide "accurate and accessible information about social-sexual behavioral norms."[303]

The services and supports provided under the IDEA are intended to prepare students for transitioning into adulthood. Yet, studies reflect that school districts are failing to keep disabled students safe from sexual violence. According to a recent study, "Anywhere from 40% to 70% of girls with disabilities will experience sexual abuse before they turn 18, while up to 30% of boys with disabilities are at risk of sexual abuse during the same period."[304] At the same time, as is similarly reflected in studies focused on adults, there are barriers to accessing accurate and accessible sexuality education that leave disabled young people "more vulnerable to sexual victimization . . . and lead[] to difficulty achieving the healthy relationships that many desire."[305]

The lack of a national mandate for comprehensive sexual education leaves it up to states to determine whether to provide sex education, and what type of education to offer. As such, there is a patchwork of curriculums offered with only thirty-eight states and Washington, D.C., mandating that schools teach sex education.[306] The range and comprehensiveness of the sex education offered also varies. For example, thirty-nine states and Washington, D.C., require that information be provided on abstinence, with twenty-nine of these states requiring that abstinence be stressed.[307] Forty percent of states do not require evidence-based sexual education programs.[308] For disabled students, access to

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language impairment, (12) traumatic brain injury, (13) visual impairment, and (14) developmental delay." Kyrie E. Dragoo, Cong. Rsch. Serv., R46566, The Individuals With Disabilities Education Act: A Comparison of State Eligibility Criteria (2020), https://crsreports.congress.gov/product/pdf/R/R46566 [https://perma.cc/DQE7-ZXPB].

302. See 34 C.F.R. § 300.1 (2024).

303. Pedgrift & Sparapani, supra note 164, at 504.

304. Holmes & SIECUS, supra note 301, at 26.

305. Id. at 9.

306. State Laws and Policies: Sex and HIV Education, Guttmacher Inst. (Sept. 1, 2023), https://www.guttmacher.org/state-policy/explore/sex-and-hiv-education [https://perma.cc/S2CF-WNGQ].

307. Id.

308. Holmes & SIECUS, supra note 301, at 17; Dianne Morrison-Beedy & Bernadette Mazurek Melnyk, Making a Case for Integrating Evidence-Based Sexual Risk Reduction and Mental Health Interventions for Adolescent Girls, 40 Issues Mental Health Nursing 932, 932 (2019) (reporting that evidence-based sexual education programs have been "rigorously evaluated" through research, using "strict systematic criteria set by a credible authority" and have been shown, in at least one program evaluation, to have a positive outcome).

comprehensive sexual education is largely inaccessible; only three states explicitly include disabled students within their sex education requirements.[309] There is a lack of information, however, as to what extent sexual education programs that do include disabled students offer comprehensive sexual education that is tailored to the learning needs of students with intellectual and developmental disabilities.[310]

Studies indicate that tailored sex education that "emphasize[s] the importance of communication, boundary-setting, and decision-making skills,"[311] can: provide young people with intellectual and developmental disabilities "with necessary social skills that can prepare them for fulfilling future interactions,"[312] afford "opportunities to experience a sexually satisfying life,"[313] and improve "capacity to make decisions about sex and sexuality."[314] Further, the development of decisionmaking skills through sex education contributes to "greater capacity to protect oneself from harm" and "an ability to be cognizant of the sexual boundaries and expectations that are prevalent within society."[315] Tailored sex education also "contribute[s] to reducing vulnerability" and "inappropriate sexual expression."[316]

In contrast, a lack of access to sexuality services places intellectually and developmentally disabled students "at risk for demonstrating unexpected social-sexual behavior."[317] The behaviors include "public masturbation, touching people's private body parts without permission, and interacting in a sexually inappropriate manner with children."[318] Intellectually and developmentally disabled young people may not

309. Holmes & SIECUS, supra note 301, at 17.

310. See Abrams, supra note 159 (explaining that even in the few states that mandate sexuality education, "there's no requirement that such instruction be accessible to all").

311. Lisa Colarossi, Marlene O. Riquelme, Kate L. Collier, Siana Pérez & Randa Dean, Youth and Parent Perspectives on Sexual Health Education for People With Intellectual Disabilities, 41 Sexuality & Disability 619, 637 (2023); see also Holmes & SIECUS, supra note 301, at 22.

312. Bradley W. McDaniels & Allison R. Fleming, Sexual Health Education: A Missing Piece in Transition Services for Youth With Intellectual and Developmental Disabilities?, 84 J. Rehab. 28, 29 (2018).

313. Id. at 31.

314. Rachelle Hole, Leyton Schnellert & Gloria Cantle, Sex: What Is the Big Deal? Exploring Individuals' With Intellectual Disabilities Experiences With Sex Education, 32 Qualitative Health Rsch. 453, 461 (2022).

315. Anna C. Treacy, Shanon S. Taylor & Tammy V. Abernathy, Sexual Health Education for Individuals With Disabilities: A Call to Action, 13 Am. J. Sexuality Educ. 65, 87 (2018).

316. Amy Swango-Wilson, Caregiver Perceptions and Implications for Sex Education for Individuals With Intellectual and Developmental Disabilities, 26 Sexuality & Disability 167, 168 (2008) (citations omitted).

317. Pedgrift & Sparapani, supra note 164, at 504.

318. Id.

understand their right to bodily autonomy and how to recognize sexual harms.[319]

This inattention to sexuality in special education leaves a gap for young people with intellectual and developmental disabilities who seek access to information and knowledge around healthy intimate relationships, bodily autonomy, issues of sexual and reproductive health, and healthy boundary-setting in relationships.[320] It fuels the suppression of sexual awareness and healthy sexual exploration, increases the possibility of developing improper sexual behavior,[321] and perpetuates increased vulnerability to sexual violence.

An education advocate for students with intellectual and developmental disabilities provided examples of the tangible harms experienced by students with intellectual and developmental disabilities when comprehensive sexuality education is not prioritized as an essential component to securing sexual and reproductive health and safety.[322] She discussed the following:

> Students I work with have been . . . denied basic information about their sexual and reproductive health . . . they've been trafficked [and] . . . catfished; sexually abused; suspended for bungled attempts to engage with crushes; harassed and threatened at school and home by intimate partners . . . and disciplined unknown times for "sexually inappropriate behaviors."[323]

These tangible harms are compounded by the racism, heterosexism, homophobia, and transphobia experienced by LGBTQ+ people of color with disabilities and LGBTQ+ people with disabilities who encompass other marginalized identities. LGBTQ+ people with intellectual disabilities, for example, experience rejection from family and fear that they may lose services such as housing or put "valued relationships with

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319. Holmes & SIECUS, supra note 301, at 26 (mentioning researchers who argue that some young people with disabilities might "not know they have a right to bodily autonomy").

320. Scholars have explored the necessity of sex positive education in developing healthy sexual behaviors in young people. See, e.g., Charisa Smith, #WhoAmI?: Harm and Remedy for Youth of the #MeToo Era, 23 U. Pa. J.L. & Soc. Change 295, 347 (2020) ("Feminist theorists and juvenile law scholars alike assert that the development of sex positivity requires a balance of self-confidence, personal agency, and external boundaries. This healthy sexual personhood also requires increased awareness of the risks of violence, exploitation, boundary-crossing and oppression.").

321. See supra sections III.B–.C (discussing role of sexuality education in minimizing the development of inappropriate sexual behaviors).

322. Katherine (Kate) Hoy, Sex Ed Is Not (Just) About Sex, AHRC N.Y.C. (Feb. 28, 2022), https://www.ahrcnyc.org/news/sex-ed-is-not-just-about-sex/ [https://perma.cc/S6RQ-6KD9].

323. Id.

staff" at risk by expressing their authentic selves or for seeking out support related to questions about their sexuality and gender.[324]

Someone looking to view the *C.K.M.* case through the structural desexualization of disability framework could confront ableist assumptions around issues of gender, race, sex, and intellectual and developmental disability; conduct a deeper inquiry into the different pathways that David M. took—or could have taken if given the opportunity and resources—in navigating his sexuality as it emerged; and examine how comprehensive sexuality education can enhance the safety and healthy sexual behaviors of intellectually and developmentally disabled students. In doing so, the hope is to recenter the analysis and open new avenues for structural change in addressing sexual violence against intellectually and developmentally disabled students.

C. *The Desexualization of Disability Through the HCBS Waiver Program*

Through the HCBS waiver program, as discussed previously, states have extensive deference to determine what community-based supports and services are available to individuals with intellectual and developmental disabilities.[325] States and the agencies that administer the HCBS program drive "the culture, expectations, resources, and available accommodation options" that largely dictate the life choices of disabled people who receive these services.[326] The case of Alex illustrates this point.

Alex[327] is a thirty-two-year-old man who identifies as autistic. He receives community-based services through the HCBS waiver program. Like many people with intellectual and developmental disabilities, he is dependent on this program to finance the community-based supports that he receives.[328] Over the years, Alex expressed his deep desire to have meaningful relationships. He requested, without success, developmentally appropriate sex education and sexuality supports. He acknowledges that

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324. Ginn, supra note 28, at 922 (citing D. Abbott & J. Burns, What's Love Got to Do With It?: Experiences of Lesbian, Gay, and Bisexual People With Intellectual Disabilities in the United Kingdom and Views of the Staff Who Support Them, 4 Sexuality Rsch. & Soc. Pol'y 27 (2007)).

325. See supra section II.C (discussing the HCBS waiver program).

326. Renáta Tichá, K. Charlie Lakin, Sheryl A. Larson, Roger J. Stancliffe, Sarah Taub, Joshua Engler, Julie Bershadsky & Charles Moseley, Correlates of Everyday Choice and Support-Related Choice for 8,892 Randomly Sampled Adults With Intellectual and Developmental Disabilities in 19 States, 50 Intell. & Developmental Disabilities 486, 502 (2012).

327. The facts related to Alex have been modified and the name changed.

328. As of 2017, "over 90 percent of people with" intellectual and developmental disabilities receive HCBS waiver services. Sarah Barth, Sharon Lewis & Taylor Simmons, Medicaid Services for People With Intellectual or Developmental Disabilities—Evolution of Addressing Service Needs and Preferences 7 (2020), https://www.macpac.gov/wp-content/uploads/2021/01/Medicaid-Services-for-People-with-Intellectual-or-Developmental-Disabilities-%E2%80%93-Evolution-of-Addressing-Service-Needs-and-Preferences.pdf [https://perma.cc/Q269-DHRN].

he lacks the functional skills to safely engage in intimate relationships, often struggling to understand and recognize boundaries when interacting with people.

Alex experiences suicidal ideations and engages in self-harm due to feelings of loneliness and isolation. His social worker recommended that he receive sexuality support services that will teach him the steps necessary to engage in healthy relationships, emphasizing that Alex's behavior puts him at a greater risk of self-harm, sexual and financial exploitation, and incarceration. In seeking sexuality supports, Alex expressed the following to his providers:

> I know you don't understand but I need to express my sexual needs and desires. It is a basic human need. Give me the funding for [sexuality supports] . . . . I must be able to express that I am a sexual person and just because I have autism does not make me a non or asexual person like the government would like to believe.[329]

Through a structural desexualization of disability framework, the barriers that Alex faces to accessing sexuality supports through the HCBS waiver program demonstrate the roots of this inaccessibility and the resulting harms that he is experiencing. The lack of access to gaining the skills that allow for learning proper social cues and norms, sexually appropriate behaviors, and proper boundary setting, for example, places Alex at a greater risk of developing inappropriate sexual behaviors.[330] Exercising sexual behavior in nonhealthy ways may lead to harming others and cascade into other forms of violence, as discussed in the case of C.K.M., that have both individual and community impact.

The social worker in Alex's case has already expressed these concerns as it relates to his needs for sexuality supports. Such consequences may include arrest, conviction, and placement on the sex offender registry.[331] Placement may lead to indefinite detention and houselessness.[332] Further, being ill-equipped to navigate one's sexual feelings and behavior may also lead to depression, anxiety, and self-harm, as Alex has already experienced. The emotional and psychological impact of an "inability to

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329. Facts and quote changed to protect client identity.

330. Pedgrift & Sparapani, supra note 164, at 504–05.

331. See, e.g., Brian Kelmar, Kelmar Story, Legal Reform for the Intellectually & Developmentally Disabled (Aug. 6, 2021), https://lridd.org/kelmar-story/ [https://perma.cc/MAK9-MSHD] (discussing a father's experience of his twenty-four-year-old autistic son's involvement in the criminal legal system and placement on the sex offender registry).

332. See Allison Frankel, Pushed Out and Locked In: The Catch-22 for New York's Disabled, Homeless Sex-Offender Registrants, 129 Yale L.J. Forum 279, 282–83, 295, 300 (2019), https://www.yalelawjournal.org/forum/pushed-out-and-locked-in [https://perma.cc/ARX5-M4HB] (discussing the collateral consequences experienced by sex-offender registrants that include exclusion from federally subsidized housing and other residency restrictions, which may "lead to homelessness, unemployment, and isolation").

access meaningful relationships" may leave people "vulnerable to isolation" and "feelings of hopelessness."[333]

As a further consequence of the desexualization of disability through the HCBS waiver program, families, support providers, and others whom persons with intellectual and developmental disabilities engage with for supports are also not equipped with information, awareness, or knowledge on how to navigate issues of sexuality with the disabled population that they serve. The biases that may exist toward sexuality and disability—infantilization, deemed sexually predatory or overly sexual—therefore are not challenged. As such, intellectually and developmentally disabled adults are "held to rigid standards of sexual morality and receive messages from families, professionals, and society that marriage, children, and an active sexual life are forbidden."[334]

Reframing the victim–perpatrator binary to reconceptualize sexuality is a critical next step in addressing sexual violence against people with intellectual and developmental disabilities and the structural harms that lead to this violence. Implementing state interventions, prioritizing cross-movement building, centering the lived experiences of this community in any advocacy and policy efforts, and confronting ableism within society and disability systems on issues of sexuality are the preliminary steps for moving the issue of sexuality rights forward.

IV. THE STATE'S ROLE IN RECONCEPTUALIZING SEXUALITY

The below passage is from a conversation between people with intellectual and developmental disabilities:

> Why do you think people with disabilities need sexuality education?
>
> Roy: So we can learn to have healthy relationships.
>
> Rebecca: So we are able to make informed choices.
>
> Elizabeth: So we can pick the right person.
>
> Adam: For help with the toughest part of the relationship, making it last.
>
> Gabrielle: So we can be safe.
>
> Andrew: Because we all have desires/needs, and that's okay.
>
> Clara: To get the correct information.
>
> Kevin: To get resources/tools to make healthy sexual choices.
>
> Roy: So that people know their rights.
>
> Molly: So people with disabilities don't put themselves in bad situations.

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333. Pedgrift & Sparapani, supra note 164, at 505.

334. Sarah H. Ailey, Beth A. Marks, Cheryl Crisp & Joan Earle Hahn, Promoting Sexuality Across the Life Span for Individuals With Intellectual and Developmental Disabilities, 38 Nursing Clinics N. Am. 229, 233 (2003).

Julie: So we will know how to protect ourselves.[335]

As expressed throughout this Article, states play an outsized role in the lives of people with intellectual and developmental disabilities. This Part proposes strategies to confront the structural desexualization of disability.

A. *Harnessing the Jurisprudential Advances of the* Olmstead *Integration Mandate Under Title II of the ADA to Compel Sexuality Supports and Services*

In the twenty-five years since the Court decided *Olmstead*, litigation, DOJ investigations, and other advocacy efforts have changed the landscape of how people with intellectual and developmental disabilities live and receive services.[336] The central role of states in supporting community integration under Title II of the ADA entails an affirmative duty to administer its programs to avert the unjustified isolation of people with intellectual and developmental disabilities.[337] Courts have interpreted the ADA to have "an expansive reach, touching upon all aspects of an individual's life in which 'isolat[ion] and segregat[ion]' may be experienced."[338]

Further, states "may not, directly or through contractual or other arrangements, utilize criteria or methods of administration . . . [t]hat have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the [state's] program with respect to individuals with disabilities."[339] Despite these mandates, through a lack of HCBS waiver funding allocation, states deprive people with intellectual and developmental disabilities of opportunities to acquire knowledge—

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335. Self-Advocates Speak Up About Sex, Elevatus Training, https://www.elevatustraining.com/selfadvocates/ [https://perma.cc/3LLS-EAWD] (compiled by Karen Topper & Katherine McLaughlin) ("Members of Green Mountain Self-Advocates in Vermont held a discussion group about sexuality . . . . Here are their candid responses to a number of questions about the messages they received about sexuality over the years and why they think sexuality education is important.").

336. See, e.g., Robert D. Dinerstein, The *Olmstead* Imperative: The Right to Live in the Community and Beyond, 4 Inclusion, no. 1, 2016, at 16, 19 (discussing the role and impact of *Olmstead* enforcement on the federal, state, and local level).

337. Courts have not applied Eleventh Amendment immunity to states in *Olmstead* integration claims under Title II of the ADA. See, e.g., Seum v. Osborne, 348 F. Supp. 3d 616, 628 (E.D. Ky. 2018) ("A 'court may enter a prospective suit that costs the state money . . . if the monetary impact is ancillary, i.e., not the primary purpose of the suit.'" (alteration in original) (quoting Boler v. Earley, 865 F.3d 391, 413 (6th Cir. 2017))); Martin v. Taft, 222 F. Supp. 2d 940, 964 (S.D. Ohio 2002) ("[V]irtually any prospective relief against a state will affect the state's budget. For this very reason, courts have held that an ancillary effect of prospective relief on a state's treasury does not violate Eleventh Amendment immunity.").

338. Guggenberger v. Minnesota, 198 F. Supp. 3d 973, 1026–27 (D. Minn. 2016) (alteration in original) (quoting 42 U.S.C. § 12101(a)(2) (2012)); see also Steimel v. Wernert, 823 F.3d 902, 911 (7th Cir. 2016) (holding that the ADA "bars unjustified segregation of persons with disabilities, wherever it takes place").

339. 28 C.F.R. § 35.130(b)(3)(ii) (2024).

and develop and strengthen skills—around issues related to sexuality. Sexual isolation further maintains a culture that makes people with intellectual and developmental disabilities more susceptible to sexual violence.[340] Critically, sexual isolation leads to the desexualization of disability.

In discourse around securing and expanding the rights of targeted populations to exercise control and choices around sexuality, it is important to consider the expansiveness of the tools available in this effort. One such tool is harnessing the jurisprudential advances of the *Olmstead* integration mandate under Title II of the ADA to compel states to allocate adequate resources to provide sexuality supports and services. More intentionality is needed in using the courts as a tool to confront the structural desexualization of disability[341] as states are held accountable—or are sought to be held to account—through creative litigation strategies that push the parameters of *Olmstead*.[342]

In recent decades, advocates have utilized opportunities to expand the reach of *Olmstead* in ways previously unimagined. Since *Olmstead*, courts have interpreted the integration mandate under Title II of the ADA to extend beyond unjustified isolation within the four walls of an institution. The expanded reach of *Olmstead* has resulted in challenges to state agencies' administration of community-based mental health services and housing to formerly incarcerated individuals;[343] state provision of resources to establish supported employment programs, maintain grants, and offer technical assistance to avert people with intellectual and developmental disabilities from working in segregated employment settings;[344] state implementation of mental health services;[345] and states'

340. Chin, Group Homes as Sex Police, supra note 50, at 383.

341. See, e.g., Britney R. Wilson, Making Me Ill: Environmental Racism and Justice as Disability, 170 U. Pa. L. Rev. 1721, 1751 (2022) ("The lack of an intent requirement similar to that in racial discrimination law makes the ADA an attractive alternative for challenging structural harm.").

342. See supra section I.C.

343. M.G. v. N.Y. State Off. of Mental Health, 572 F. Supp. 3d 1, 6 (S.D.N.Y. 2021) (denying a motion to dismiss a claim that the New York State Office of Mental Health and Department of Corrections and Community Supervision placed people at risk of institutionalization and decompensation by failing to provide "community-based mental health housing and supportive services").

344. Fact Sheet on Proposed Agreement Over Oregon Supported Employment, DOJ, https://archive.ada.gov/olmstead/documents/lane_fact_sheet.pdf [https://perma.cc/BK5V-VNXX] (last visited July 28, 2024).

345. McClendon v. City of Albuquerque, No. 95-CV-24, 2016 U.S. Dist. LEXIS 156370, at *70–71 (D.N.M. Nov. 9, 2016) (finding that Defendants "may comply with the ADA by developing community-based programs" for mental healthcare); cf. United States v. Mississippi, 82 F.4th 387, 398 (5th Cir. 2023) ("The possibility that some un-named individual with serious mental illness or *all* such people in Mississippi could be unjustifiably institutionalized in the future does not give rise to a cognizable claim under Title II.").

policies of segregating disabled students in public education.[346] Transformative lawyering requires the kind of imagination that these novel cases harnessed in pushing the boundaries of *Olmstead*.[347]

It is time that sexuality supports and services are included in these efforts. The creativity in advocacy efforts to expand the reach of *Olmstead* has the potential to reach issues of sexuality supports and services. As this author has argued in prior scholarship, "a systematic failure to provide community-based treatment and services around sexuality" results in the unjustified sexual isolation of people with intellectual and developmental disabilities and is a cognizable claim under the *Olmstead* integration mandate as interpreted under Title II of the ADA.[348]

Sexual isolation and segregation manifest through the failure of states to expend resources through the HCBS waiver program for sexuality supports and services, which unjustifiably suppresses the sexual and reproductive lives of people with intellectual and developmental disabilities.[349] In 2014, the Centers for Medicare & Medicaid Services (CMS)[350] issued regulations to specify that community integration for people with disabilities as required under *Olmstead* must "ensure[] an individual's rights of privacy, dignity and respect, and freedom from coercion and restraint" and must "optimize[] but . . . not regiment, individual initiative, autonomy, and independence in making life choices, including but not limited to, daily activities, physical environment, and with whom to interact."[351] This expanded definition of community integration is incompatible with state policies that exclude access to sexuality supports in providing community-based services.

Approaching this issue through a rights-based framework that relies primarily on the civil rights enforcement of the ADA will likely fail.[352] Any

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346. United States v. Georgia, 461 F. Supp. 3d 1315, 1317 (N.D. Ga. 2020); Ga. Advoc. Off. v. Georgia, 447 F. Supp. 3d 1311, 1315 (N.D. Ga. 2020).

347. Amna A. Akbar, Non-Reformist Reforms and Struggles Over Life, Death, and Democracy, 132 Yale L.J. 2497, 2507 (2023) (discussing how legal reforms can be imagined to "rethink the kinds of laws, policies, norms, relationships, and modes of organization that we might build to govern society, and an effort to democratize relations of power: to have fundamentally different people at the helm").

348. Chin, Group Homes as Sex Police, supra note 50, at 382, 420–37.

349. For the application of sexual isolation as an integration-mandate violation against group homes, see id. at 382–84.

350. CMS is the federal administrative agency that approves HCBS state waiver applications. CMS HCBS Instructions, supra note 110, at 6.

351. 42 C.F.R. § 441.301(c)(4)(iii)–(iv) (2024); see also 42 U.S.C. § 12101(b)(3) (2018) ("[T]he Federal Government plays a central role in enforcing the standards established [by the ADA] . . . .").

352. See, e.g., Dean Spade, Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law 43 (rev. ed. 2015) ("Narrowing political resistance strategies to seeking inclusion in anti-discrimination law makes the mistaken assumption that gaining recognition and inclusion in this way will equalize our life chances and allow us to compete in the (assumed fair) system."); Ani B. Satz, Disability, Vulnerability, and the Limits of

state resourcing of sexuality supports and services must further involve a multidisciplinary and community-focused effort that both recognizes and centers the lived experience, knowledge, and expertise of the intellectually and developmentally disabled community.[353] The intersectional nature of sexuality and intellectual and developmental disability implicates areas of disability, race, housing, sexuality, gender, sexual and reproductive health, social welfare, and other intersecting areas.[354] Supporting efforts in cross-movement building that engage justice-based movements is central to any advocacy strategy.

B. *State Resourcing to Center Sexuality in Community Integration*

In calling on states to resource sexuality supports and services for people with intellectual and developmental disabilities, lessons can be learned from the funding-driven, multidisciplinary approach of the Violence Against Women Act (VAWA).[355] VAWA "funded the criminal legal response to gender-based violence"[356] while focusing on carceral interventions to violence.[357] The primary purposes of VAWA are to "prevent violent crime; respond to the needs of crime victims; learn more about crime; and change public attitudes through a collaborative effort by the criminal justice system, social service agencies, research organizations, schools, public health organizations, and private organizations."[358]

Antidiscrimination, 83 Wash. L. Rev. 513, 522 (2008) ("[D]isability law requires a blend of the civil rights and social welfare models . . . .").

353. See, e.g., Chin, Centering Disability Justice, supra note 48, at 688 ("The future of disability rights requires advocacy and discourse that holds racism/ableism and interlocking systems of oppression at its center to better assess who is being left out . . . and what steps future disability rights strategies can take to more intentionally center racism/ableism in its framework." (footnote omitted)); Powell, Disability Reproductive Justice, supra note 16, at 1887 ("[T]o achieve reproductive justice, legal and policy solutions must be aimed at disrupting the intersecting oppressions experienced by multiply-marginalized people with disabilities[,] [and] . . . activists, scholars, legal professionals, and policymakers must actively engage people with disabilities in establishing legal and policy responses.").

354. See, e.g., Lorr, supra note 26, at 1328–29 (arguing that "there is evidence of the cocreation of race and disability and its relationship to family regulation: Black children who are more likely to be given a disability label, and therefore placed in special education, then grow up and are more likely to have their families forcibly separated"); Morgan, supra note 63, at 688 ("[W]hen viewed intersectionally, each case, law, or policy is situated in 'historical contexts and structural conditions within which the identity categories of race and disability intersect.'" (quoting Nirmala Erevelles & Andrea Minear, Unspeakable Offenses: Untangling Race and Disability in Discourses of Intersectionality, 4 J. Literary & Cultural Disability Stud. 127, 131 (2010))).

355. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C.).

356. Leigh Goodmark, Assessing the Impact of the Violence Against Women Act, 5 Ann. Rev. Criminology 115, 116 (2022).

357. Id. at 118 (noting criticism that VAWA "increased criminalization on communities of color").

358. Lisa N. Sacco & Emily J. Hanson, Cong. Rsch. Serv., R45410, The Violence Against Women Act (VAWA): Historical Overview, Funding, and Reauthorization 12 (2019).

In critiquing VAWA, Leigh Goodmark notes that while it "has been credited with higher rates of arrest, prosecution, and conviction; . . . the proliferation of specialized units addressing intimate partner violence; greater collaboration among service providers; and the specialization of bureaucrats focused on gender-based violence," little is documented as to the positive effects on survivors of violence.[359] Goodmark concludes that "a noncarceral VAWA, one that shift[s] funding from the criminal legal system to economic, prevention, and community-based programs, would more effectively meet the needs of people subjected to abuse and address the correlates of violence."[360] To the point of Goodmark and critics of VAWA, any state efforts to ameliorate sexual violence toward people with intellectual and developmental disabilities must move away from the carceral and punitive as primary responses.

1. *Guardianship*. — Judges, guardians, family members, and people subject to guardianship must be educated on the retention of the right of persons under guardianship to make choices around sexuality. Illinois provides an effective roadmap for this process.[361] In Illinois, the statewide Guardianship and Advocacy Commission engaged in a multiyear effort to amend the state statute to require that Illinois provide adults with intellectual and developmental disabilities with the access to developmentally appropriate sexuality education and resources.[362] This effort harnessed support from the disability community, parents of people under guardianship, service provider agencies, advocacy organizations, and politicians.[363] The law creates sex education curricula[364] with train-the-trainer modules[365] and provides access to "sex education, related resources, and treatment planning that supports [their] right to sexual

359. Goodmark, supra note 356, at 121–22.

360. Id. at 116.

361. See 2021 Train the Trainer—What's Right About Sex Education: Transcript for Module 1, Ill. Dep't of Hum. Servs., https://www.dhs.state.il.us/page.aspx?item=136090 [https://perma.cc/JD7V-C94F] [hereinafter 2021 Train the Trainer] (last visited July 28, 2024) (transcribing one of eight modules on Illinois sex education legislation and the sexual rights of people with disabilities).

362. See 405 Ill. Comp. Stat. Ann. 5/4-211 (West 2024) ("A person admitted to a developmental disability facility and receiving habilitation shall have access to sex education, related resources, and treatment planning that supports [their] right to sexual health and healthy sexual practices and to be free from sexual exploitation and abuse.").

363. See 2021 Train the Trainer, supra note 361 (detailing broadly attended "stakeholder meetings" on input for proposed legislation as well as elected officials who sponsored the amendment).

364. See Curriculum Committee Survey, Ill. Dep't of Hum. Servs., https://www.dhs.state.il.us/page.aspx?item=124394 [https://perma.cc/R72N-XKZD?type=image] (last visited July 28, 2024) ("The Curriculum committee identified seven sexuality education curricula designed for educating individuals with intellectual and developmental disabilities." (emphasis omitted)).

365. See, e.g., 2021 Train the Trainer, supra note 361.

health and healthy sexual practices and to be free from sexual exploitation and abuse."[366]

In recent years, states have passed supported-decisionmaking laws to provide a less restrictive alternative to guardianship. Supported decisionmaking is a legal process that allows a disabled person to identify people to support them in making legal and other personal decisions, thereby allowing the disabled person to retain their legal decisionmaking capacity.[367]

Some agencies that provide services to people with intellectual and developmental disabilities are engaging in trainings that focus on sexual self-determination and supported decisionmaking.[368] Still a nascent area of the law, evidence-based trainings and guidance are necessary to ensure that different models of supported-decisionmaking are utilized in ways that do not cause harm or exploitation when navigating issues of sexuality.[369]

2. *Mandating Comprehensive Sexuality Education in the Special Education System.* — State legislations can mandate guidelines for implementing comprehensive sexuality education in students' individualized education plans.[370] As an example, Virginia enacted a law that requires its Department of Education to establish "guidelines for individualized education program (IEP) teams to utilize when developing IEPs for children with disabilities to ensure that IEP teams consider the need for age-appropriate and developmentally appropriate instruction related to

366. 405 Ill. Comp. Stat. Ann. 5/4-211.

367. See In Your State, supra note 256; see also Harris, The Role of Support, supra note 196, at 84–85 ("The addition of [supported decisionmaking] as an alternative means of demonstrating legal capacity expands the possibilities for greater sexual access for people with cognitive disabilities.").

368. See, e.g., Sexual Self-Determination and Supported Decision-Making, The Arc Oregon, https://thearcoregon.org/event/1664-ssdsdm/ [https://perma.cc/Z7HL-94LX] (last visited Aug. 20, 2024); Sexual Self-Determination and Supported Decision-Making, Or. Dep't of Hum. Servs. Off. of Developmental Disabilities, https://center.uoregon.edu/CaseManagement/2023/program/search/detail_session.php?id=13872045# [https://perma.cc/8RQF-6XD4] (last visited Aug. 24, 2024); Among Friends: Sexual Self-Determination and Supported Decisionmaking, Wash. State Dep't of Soc. & Health Servs. Developmental Disabilities Admin., https://www.dshs.wa.gov/sites/default/files/DDA/dda/documents/Among-Friends-Sexual-Self-Determination-Flyer-October-Trainings_1.pdf [https://perma.cc/8RQF-6XD4] (last visited Aug. 20, 2024).

369. See, e.g., Emily DiMatteo, Osub Ahmed, Vilissa Thompson & Mia Ives-Rublee, Reproductive Justice for Disabled Women: Ending Systemic Discrimination, Ctr. for Am. Progress (Apr. 13, 2022), https://www.americanprogress.org/article/reproductive-justice-for-disabled-women-ending-systemic-discrimination/ (on file with the *Columbia Law Review*) [hereinafter DiMatteo et al., Reproductive Justice for Disabled Women] ("[I]t is essential to study different models of supported decision-making to create more guidance around implementation and create evidence-based policies.").

370. See Virginia's Sex Education Snapshot, SIECUS, https://siecus.org/state_profile/virginia-state-profile/ [https://perma.cc/2TMN-B6HU] (detailing the efforts to make comprehensive sex education a legislative mandate in Virginia).

sexual health, self-restraint, self-protection, respect for personal privacy, and personal boundaries of others."[371]

The legislation succeeded in large part due to parent advocacy efforts.[372] In advocating for this legislation, parents of young people with intellectual and developmental disabilities "shared common experiences of their children . . . not receiving more comprehensive instruction on sexual health within their IEP."[373] In addition to guidelines, states can mandate that developmentally appropriate comprehensive sexual education is incorporated into student IEPs based on an individualized assessment of a student's needs.

3. *State Resourcing of Sexuality Services and Supports that Confront Ableism.* — Community-based service-provider agencies that seek to support the sexuality of people with intellectual and developmental disabilities often lack resources and knowledge to navigate these issues.[374] A lack of standardized, fact-based sexuality training for the support staff of community-based provider agencies may result in misinformation and the reinforcement of biases around disability and sexuality.[375] Kate Napolitano, who is a sexuality educator for people with intellectual and developmental disabilities, explained:

> What [state provider agencies can do is] train all their workers so that when someone . . . has a question they can be a little more prepared to respond, or if not give a direct answer, to be able to help direct [a person with an intellectual disability] to where [they] can find an answer.[376]

Napolitano expressed that support staff "feel . . . nervous" and need to feel more informed about navigating issues of sexuality and people with intellectual and developmental disabilities.[377]

Many provider agencies, however, do not have the resources to invest in sexuality supports and services.[378] The failure of states to provide resource-backed mandates that agencies provide sexuality education and

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371. Va. Code § 22.1-217.03 (2024).

372. See Virginia's Sex Education Snapshot, supra note 370 ("The legislation was successfully implemented through the tireless advocacy efforts of a parent led subcommittee of The Arc of Virginia . . . .").

373. Id.

374. See, e.g., Pedgrift & Sparapani, supra note 164, at 504 ("[S]ervice providers report a lack of adequate support to handle serious sexual behavior problems with confidence. A lack of professional expertise and a lack of accessible education programs are severe service gaps for social service providers." (citation omitted)).

375. Id.

376. Interview by Justin Engles with Kate Napolitano, Social Relationships and Sexuality Educator, Wildwood Programs (Sept. 23, 2022) (on file with the *Columbia Law Review*).

377. Id.

378. See supra section I.D.

supports leaves agencies with few options for providing these supports.[379] In response, some agencies engage in creative ways to build coalitions and enhance sexuality education outreach efforts by accessing funding outside the HCBS waiver program.[380]

To centralize the importance of sexuality as an essential aspect of community integration and health, states can implement regular trainings, policies, and education efforts throughout their disability service systems. State resources can build the capacity for community-based service providers and the intellectual and developmentally disabled community that they serve to create policies, programs, and education materials that support sexuality as a necessary strategy to "dismantl[e] ableist assumptions about disability and sexuality."[381] Sexuality training that (i) is informed by the lived experiences and needs of people with intellectual and developmental disabilities and (ii) creates opportunities for this community to act as peer-to-peer sexuality educators must be implemented.[382] Through this effort, states would play a central role in changing the culture of ableism, bias, and ignorance around sexuality and people with intellectual and developmental disabilities to reinforce that sexuality supports are a necessary and essential part of one's life.

CONCLUSION

The structural desexualization of disability is not a general acquiescence by society that results in sexual violence. It is fueled by societal arrangements that are accepted and maintained by society as the

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379. See, e.g., Carli Friedman, Catherine K. Arnold, Aleksa L. Owen & Linda Sandman, "Remember Our Voices Are Our Tools:" Sexual Self-Advocacy as Defined by People With Intellectual and Developmental Disabilities, 32 Sexuality & Disability 515, 528–29 (2014) (observing that "much work remains to enact policies at the community, state, and federal levels to ensure that sexual self-advocacy is practiced"); see also section I.D.

380. See, e.g., Project Sexual Health Innovation Network for Equitable Education, Planned Parenthood Greater N.Y., https://www.plannedparenthood.org/planned-parenthood-greater-new-york/learn/community-programs/project-shine [https://perma.cc/FR44-YHS6] (last visited July 28, 2024) (consisting of a three-year program funded through a grant from HHS to create sexuality education tools and resources for youth ages sixteen to twenty-four with intellectual and developmental disabilities). Project SHINE was led by a community-based consortium in New York State, which included youth with intellectual and developmental disabilities (I/DD), parents, other family caregivers of persons with I/DD, and service providers and educators who serve the I/DD community. See Press Release, Project SHINE Launches to Address Inequities in Sexual Health of Youth With Intellectual and Developmental Disabilities Across New York, Planned Parenthood of Greater N.Y. (Mar. 29, 2021), https://www.plannedparenthood.org/planned-parenthood-greater-new-york/about/news/project-shine-launches-to-address-inequities-in-sexual-health-of-youth-with-intellectual-and-developmental-disabilities-across-new-york [https://perma.cc/SS4B-WAD9].

381. DiMatteo et al., Reproductive Justice for Disabled Women, supra note 369.

382. For an example of people with intellectual and developmental disabilities leading efforts to advance legislative change in access to sexuality education and resources, see id.

normal course through embedded structural systems.[383] Viewing the desexualization of disability through a structural framework serves several goals. It "shifts attention" away from the momentary act of the individualized harm to examine larger questions as to "what puts people *at risk of risks*."[384] It further allows for a reframing of sexuality as a central aspect of community integration and as a sexual and psychosocial health priority.

Such a reframing provides a renewed lens for advocates, policymakers, lawyers, judges, and scholars by expanding the victim–perpetrator binary of sexual violence. This broader understanding seeks to expose how the structural desexualization of disability causes indirect harms that maintain and perpetuate sexual violence. Confronting the structural desexualization of disability is a "collective responsibility"[385] within society. Its exacting and sustaining harms must be examined and challenged in any effort to attenuate sexual violence and to begin viewing sexuality as central to community integration.

383. Lee, Violence, supra note 5, at 124.

384. Rylko-Bauer & Farmer, supra note 45, at 57 (internal quotation marks omitted) (quoting Bruce G. Link & Jo Phelan, Social Conditions as Fundamental Causes of Disease, 35 J. Health & Soc. Behav. (Extra Issue) 80, 80 (1995)).

385. Lee, Violence, supra note 5, at 130.

REASONS FOR INTERPRETATION

*Francisco J. Urbina**

What kinds of reasons should matter in choosing an approach to constitutional or legal interpretation? Scholars offer different types of reasons for their theories of interpretation: conceptual, linguistic, normative, legal, institutional, and reasons based on theories of law. This Article argues that normative reasons, and only normative reasons, can justify interpretive choice. This is the "normative choice thesis." This Article formulates the normative choice thesis and offers a systematic analysis of the different kinds of reasons usually canvassed to defend theories of interpretation, showing why each type of non-normative reason cannot justify interpretive choice. In doing this, this Article also offers an account of interpretive choice and its relation to theories of interpretation. All the ways of determining the meaning of a legal source—and all the actions that could be undertaken instead—are alternatives for interpretive choice, regardless of what counts as "interpretation."

If interpretive choice cannot be grounded in some immutable truth about the idea of interpretation or language, but only on normative reasons, then the proper method of constitutional or statutory interpretation is liable to change with circumstances. This questions some well-established features of our legal culture, such as the common practice of committing to a single method of interpretation ("I'm an originalist," "I'm a living constitutionalist"), the expectation that judges be consistent in their approaches to interpretation, and the assumption that some legal provisions should always be interpreted in the same way.

* Associate Professor of Law, Notre Dame Law School. I am grateful to Stephanie Barclay, Aaron-Andrew Bruhl, Samuel L. Bray, Mariana Canales, Fernando Contreras, Diane Desierto, Johanna Frölich, Sherif Girgis, Andrew Jordan, Tyler Lindley, Stefan McDaniel, Maria Maciá, Paul Miller, Jeff Pojanowski, Clemente Recabarren, Jordan Rudinsky, Angelo Ryu, Michael L. Smith, Lawrence Solum, Cass R. Sunstein, Julian Velasco, Sergio Verdugo, Adrian Vermeule, Bill Watson, Grégoire Webber, and R. George Wright. Teresa Killmond, María Teresa Chadwick, and Braden Lloyd provided excellent research assistance. I am also grateful to the editors of the *Columbia Law Review* for their thorough editorial assistance.

INTRODUCTION

How does one choose a theory of interpretation? People confronted with that choice—from judges to legislators to ordinary citizens—face an embarrassment of riches. There is no shortage of theories of legal interpretation, with their corresponding favored methods for reading statutes or the Constitution: in statutory interpretation, pragmatism, textualism, intentionalism, and purposivism; and in constitutional interpretation, originalism in its many variants, moral readings, common law constitutionalism, and common good constitutionalism, just to name a few.[1]

1. See generally Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution (1997) [hereinafter Dworkin, Freedom's Law] (arguing for a "moral reading" of the Constitution); Richard Ekins, The Nature of Legislative Intent (2012) [hereinafter Ekins, Legislative Intent] (offering a defense of intentionalism based on a theory of legislation); William N. Eskridge, Jr., Dynamic Statutory Interpretation (1994) (defending dynamic statutory interpretation); David A. Strauss, The Living Constitution (2010) (arguing for common law constitutionalism); Adrian Vermeule, Common Good Constitutionalism (2022) (arguing for common good constitutionalism); Conor Casey & Adrian Vermeule, Myths of Common Good Constitutionalism, 45 Harv. J.L. & Pub. Pol'y 103 (2022) (same); Felipe Jiménez, Minimalist Textualism, Seton Hall L. Rev. (forthcoming), https://ssrn.com/abstract=4780572 [https://perma.cc/6NTE-JVSB] [hereinafter Jiménez, Minimalist Textualism] (explaining minimalist textualism); John F. Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1 (2001) (defending textualism); John F. Manning, What Divides Textualists From Purposivists?, 106 Colum. L. Rev. 70 (2006) (analyzing the nuanced differences between modern textualism and purposivism); Walter Benn Michaels, A Defense of Old Originalism, 31 W. New Eng. L. Rev. 21 (2009) (arguing for original intentions originalism); Caleb Nelson, What Is Textualism?, 91 Va. L. Rev. 347 (2005) (discussing differences between textualism and intentionalism); Lawrence B. Solum, The Fixation Thesis: The Role of Historical Fact in Original Meaning, 91 Notre Dame L. Rev. 1 (2015) (arguing for the "fixation thesis," a core aspect of originalism); Lawrence B. Solum, Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate, 113 Nw. U. L. Rev. 1243 (2019) (discussing the difference between originalism and other approaches); Lawrence B. Solum, The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning, 101 B.U. L. Rev. 1953 (2021) (describing original public meaning originalism).

Any person tasked with applying a statute or the Constitution[2] has to settle—with more or less deliberation and awareness—on a way of interpreting it. If one is to apply a statute or the Constitution, one will interpret it, and in interpreting it, one will be, in fact, choosing a method of interpretation.[3] Before choice, though, there should be deliberation: a weighing of reasons for and against one method or another. And before weighing the relevant reasons, one needs to know which reasons should count.

Which reasons should count? Debates on interpretation are marred by a disordered pluralism. Authors offer reasons of different kinds for their preferred methods of interpretation, which this Article classifies as conceptual, linguistic, normative, institutional, legal, and theory reasons.[4] Yet, as Professor Mark Greenberg notes, "arguments for particular theories of legal interpretation are typically offered without any account of why these arguments are the relevant ones."[5]

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2. This Article focuses on statutory and constitutional interpretation because these are the main concerns of scholarship on interpretive choice. See infra Part I. This Article can't address the interpretation of other sources. For an exposition of interpretive alternatives on precedent, see generally Craig Green, Turning the Kaleidoscope: Toward a Theory of Interpreting Precedents, 94 N.C. L. Rev. 379 (2016) (explaining how the different methods of interpreting precedents can lead to different interpretive results). On the interpretation of private instruments, see Kent Greenawalt, Legal Interpretation: Perspectives From Other Disciplines and Private Texts 217–328 (2010) [hereinafter Greenawalt, Legal Interpretation] (discussing the law of agency, will interpretation, the law of contracts, and the doctrine of cy pres).

3. See Cass R. Sunstein, How to Interpret the Constitution 21 (2023) [hereinafter Sunstein, How to Interpret the Constitution] ("[T]o understand what the Constitution means, . . . [w]e also need a theory of constitutional interpretation. This is so whether or not we have such a theory explicitly in mind."). Professor Cass Sunstein speaks of interpretive choice as a choice between "theories." This Article refers to "methods" instead, as that word best conveys a proposal for action: a way in which an agent should act ("interpret") in a specific context. A theory may be purely explanatory and entail no proposal for action or may thematize a single aspect of interpretation, thus failing to specify a full alternative for action. In interpretive choice, theories are not assessed for their own sake but as entailing a proposal for the way someone should interpret a legal norm—that is, as proposing a "method." This is probably what Sunstein has in mind when speaking of "theories," so the difference is only terminological.

4. See infra Part I.

5. Mark Greenberg, Legal Interpretation, Stan. Encyc. Phil. (Edward N. Zalta ed., July 7, 2021), https://plato.stanford.edu/entries/legal-interpretation/ [https://perma.cc/2W2W-R9TV] [hereinafter Greenberg, Legal Interpretation]. For Professor Mark Greenberg, "It is unusual for theorists to explicitly address the question of how to choose between competing theories of interpretation." Id. Greenberg notes that his own works, as well as works by Professors Scott Shapiro and Richard H. Fallon Jr. serve as exceptions. See Scott Shapiro, Legality 1–35, 331–88 (2011) (addressing meta-interpretive debates emphasizing the relevance of a system's economy of trust); Richard H. Fallon, Jr., How to Choose a Constitutional Theory, 87 Calif. L. Rev. 535, 537–39 (1999) [hereinafter Fallon, How to Choose a Constitutional Theory] ("The written Constitution, by itself, cannot determine the correctness of any particular theory of constitutional interpretation.

This Article offers such an account. It undertakes a systematic assessment of the reasons offered for methods of interpretation. The Article claims that normative reasons and only normative reasons can ultimately justify interpretive choice. This is the "normative choice thesis." This means that debates on interpretation should be settled ultimately by reference to things such as which method of interpretation leads to more just outcomes, is most consistent with the rule of law, leads to better consequences, or best satisfies some other value. It also means that reasons referring to, for example, what counts as interpretation, or to the nature

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Selection must reflect a judgment about which theory would yield the best outcomes, as measured against relevant criteria."); Mark Greenberg, Response, What Makes a Method of Interpretation Correct? Legal Standards vs. Fundamental Determinants, 130 Harv. L. Rev. Forum 105, 105–07 (2017), https://harvardlawreview.org/wp-content/uploads/2017/02/vol130_Greenberg.pdf [https://perma.cc/FT54-KRYS] [hereinafter Greenberg, Legal Standards vs. Fundamental Determinants] ("The more general point is that what makes a method of legal interpretation correct is that it accurately identifies the law. Consequently, . . . answers to questions about legal interpretation depend on how the content of the law is determined at a more fundamental level than legal standards."). For other works addressing that question, see generally Joseph Raz, Between Authority and Interpretation: On the Theory of Law and Practical Reason 352–70 (2009) [hereinafter Raz, Authority and Interpretation] (arguing that constitutional interpretation weighs reasons for continuity with reasons for change in the law); Adrian Vermeule, Judging Under Uncertainty: An Institutional Theory of Legal Interpretation 1 (2006) [hereinafter Vermeule, Judging Under Uncertainty] ("[J]udges should (1) follow the clear and specific meaning of legal texts, where those texts have clear and specific meanings; and (2) defer to the interpretations offered by legislatures and agencies, where legal texts lack clear and specific meanings."); Evan D. Bernick, Eliminating Constitutional Law, 67 San Diego L. Rev. 1, 5 (2022) (discussing positivist arguments for originalism); Andrew Coan, The Foundations of Constitutional Theory, 2017 Wis. L. Rev. 833, 835–36 (considering varieties of constitutional interpretation and their foundations); Richard H. Fallon, Jr., The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation, 82 U. Chi. L. Rev. 1235, 1238–39 (2015) [hereinafter Fallon, Meaning of Legal Meaning] (addressing interpretive choice in terms of a choice of legal meaning); Mark Greenberg, Legal Interpretation and Natural Law, 89 Fordham L. Rev. 109, 109–10 (2020) [hereinafter Greenberg, Natural Law] ("Behind the familiar question of what method of interpretation is the right one lies a more fundamental question: what does legal interpretation, by its nature, seek? . . . [R]oughly speaking, legal interpretation seeks the contribution that statutory and constitutional provisions make to the content of the law."); Adrian Vermeule, Interpretive Choice, 75 N.Y.U. L. Rev. 74, 78 (2000) [hereinafter Vermeule, Interpretive Choice] (analyzing how "[v]arious techniques and strategies for reasoning under uncertainty, strategies that are well known in decision theory, political science, philosophy, and rhetoric, can fruitfully be applied to the judicial choice of statutory interpretation doctrine" (footnote omitted)); Greenberg, Legal Interpretation, supra ("But there is a more fundamental question that has to be addressed in order to make progress on the question of which method of legal interpretation is correct."). Sunstein has contributed many writings to this literature. See infra note 93. Other works address this choice in terms of constitutional decisionmaking rather than interpretive choice. See generally Andrew Jordan, Constitutional Anti-Theory, 107 Geo. L.J. 1515, 1517 (2019) [hereinafter Jordan, Constitutional Anti-Theory] ("[C]onstitutional decisionmaking is just a species of practical reasoning."); Richard A. Primus, When Should Original Meanings Matter?, 107 Mich. L. Rev. 165, 167–68 (2008) ("Different methods of decisionmaking have different virtues, and decisionmakers should always ask whether the virtues of a given technique have purchase in the particular case to be decided.").

of interpretation or of law, can neither constrain nor justify interpretive choice. This entails an account of interpretive choice. On this account, interpretive choice is not constrained by what counts as interpretation or by any other non-normative consideration.

The normative choice thesis has practical implications. One of them is that interpretive choice is *contingent*. Interpretive choice should track the balance of normative reasons, which can always change as circumstances change—from case to case, jurisdiction to jurisdiction, institution to institution, area of law to area of law, etc. As a result, it is not reasonable to commit to a single method of interpretation for all situations and institutional roles.[6] Thus, the normative choice thesis supports arguments for a limited, context-dependent, and perhaps sometimes even case-by-case[7] determination of interpretive approach.[8] By the same token, interpretation is *unstable*: Nothing guarantees that a legal provision should always be interpreted in the same way.[9] This challenges some well-established features of our legal and political discourse. It should unsettle the practice of judges, lawyers, and academics of self-identifying according to their views on constitutional or statutory interpretation ("I'm an originalist", "I'm a living constitutionalist").[10] The normative choice thesis vindicates the "faint-hearted,"[11] as well as judicial inconsistency in interpretation[12]—a

6. For views that different circumstances may require different methods of interpretation, see Fallon, Meaning of Legal Meaning, supra note 5, at 1303 (defending "a relatively case-by-case approach to selecting among otherwise legally and linguistically plausible referents for claims of legal meaning"); Jordan, Constitutional Anti-Theory, supra note 5, at 1534–38 (offering a comprehensive account of how constitutional decisionmaking is context-dependent); Primus, supra note 5, at 221 (arguing that "[c]onstitutional decisionmakers should evaluate the propriety of decisionmaking methods with attention to the differences between different kinds of cases, not for the enterprise of constitutional law as a whole"); Bill Watson, What Are We Debating When We Debate Legal Interpretation?, B.U. L. Rev. (forthcoming) (manuscript at 46–47) (on file with the *Columbia Law Review*) (arguing against "monolithic theories that claim to apply across the board" based on the Hartian Positivistic idea that interpretation is "remedial"—it takes place when the law "runs out"). Part III draws on these views to offer a focused engagement with the practice of committing to a method of interpretation in light of the account of interpretive choice defended here and draws some implications to assess the relevance of a method's origins in its justification, in light of debates on originalism. It also articulates the burdens that this entails for arguments for and against methods of interpretation. See infra section III.C.

7. Though not necessarily case by case. See infra section III.C.1.

8. See infra section III.C.

9. See infra section III.D.

10. See infra section III.C.3.

11. The term is taken from Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 864 (1989) [hereinafter Scalia, Originalism: The Lesser Evil] ("I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging.").

12. See infra section III.C.3.

behavior usually criticized.[13] Awareness of the contingency of interpretive choice creates a burden for arguments for methods of interpretation: they must either make explicit the (contingent) circumstances under which the method is expected to apply (which institution, under what circumstances, etc.) or offer an argument for the universal application of the method.[14]

This is an uncompromising view. While rarely the main focus of attention, the idea that normative reasons play a crucial role in justifying methods of interpretation resonates with many theorists.[15] But works on interpretation usually don't explain whether non-normative reasons—which also often feature in arguments for theories of interpretation[16]—play a role in interpretive choice. It's legitimate for writings on interpretation to bracket the question of what reasons ultimately matter for interpretive choice. Addressing this question is the task of a theory of interpretive choice. But the normative choice thesis seems, if anything, more controversial when read in contrast with prominent works on interpretive choice. Some authors flatly deny that there is such a thing as

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13. E.g., Randy E. Barnett, Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism, 75 U. Cin. L. Rev. 7, 13 (2006) [hereinafter Barnett, Critique of "Faint-Hearted" Originalism].

14. See infra section III.C; Conclusion. Contingency and instability aren't the only consequences that this Article explores. See infra Part III.

15. See, e.g., Randy E. Barnett, Getting Normative: The Role of Natural Rights in Constitutional Adjudication, 12 Const. Comment. 93, 112 (1995) (affirming that "[o]ur choice among interpretations as well as interpretive methods is, then, a normative one"); Randy E. Barnett, The Gravitational Force of Originalism, 82 Fordham L. Rev. 411, 417 (2013) (explaining that while "original public meaning is an empirically objective fact, . . . the New Originalism does *also* make a *normative* claim, and it is this: the original meaning of the text provides the law that legal decisionmakers are bound by or *ought* to follow"); Tara Leigh Grove, Foreword: Testing Textualism's "Ordinary Meaning", 90 Geo. Wash. L. Rev. 1053, 1073 (2022) [hereinafter Grove, Testing Textualism] ("[D]ebates over interpretive method . . . depend largely on normative considerations, not an empirical investigation."); Walter Benn Michaels, Using a Firearm, Using a Word: What Interpretation Just Is, 23 J. Contemp. Legal Issues 143, 144, 149 (2021) [hereinafter Michaels, Using a Firearm] (arguing that "intentionalism is just what interpretation is" but also that "questions like whether we should produce and then follow constructs like the original public meaning are entirely normative"); Jeffrey A. Pojanowski & Kevin C. Walsh, Enduring Originalism, 105 Geo. L. J. 97, 98 (2016) [hereinafter Pojanowski & Walsh, Enduring Originalism] (holding that "a positive-law argument for constitutional originalism must also have firm conceptual and normative grounds"). Note that in all the cited texts (but the first), either the role of normative reasons is qualified or the acknowledgment of their role comes accompanied by an assertion suggesting some role for non-normative reasons. This is not to suggest that there is a contradiction in any of these texts, but only that there is a need for clarifying the role of normative and non-normative reasons in interpretive choice, as this Article does.

16. See infra sections I.A–.B, .D–.F; see also Jiménez, Minimalist Textualism, supra note 1, at 55 (arguing that "many textualists" acknowledge that "theories of statutory interpretation . . . need to be defended on normative grounds," but that "non-normative theories of statutory interpretation . . . play an important role").

interpretive choice[17] or that normative reasons play a role in it.[18] And even the groundbreaking theories of Professors Cass Sunstein and Richard Fallon[19]—which make the strongest cases for the role of normative reasons in interpretive choice—allow for some independent role for non-normative reasons, such as those concerning the concept of interpretation and the nature of language.[20] They should make no such concession.[21]

Authors such as Sunstein, Fallon, and Vermeule made crucial contributions in reframing debates on interpretation as concerning not what true interpretation is, but rather a choice: the choice of a method of interpretation by a particular agent (typically a judge) in engaging in a specific task.[22] The normative choice thesis entails an account of this choice—interpretive choice. If only normative reasons justify alternatives for interpretive choice, then interpretive choice can't be constrained by non-normative reasons, including by reasons regarding what counts as interpretation. But the view defended here doesn't entail that theories of interpretation don't matter, or that it's impossible to draw the line between what is and what isn't interpretation. It does entail, though, something about the significance of this line-drawing: It has *none* for the *practical* choices of actual judges, legislators, administrators, or citizens

17. See, e.g., Richard Ekins, Interpretive Choice in Statutory Interpretation, 59 Am. J. Juris. 1, 2 (2014) ("[W]hile there is scope for reasonable statutory interpretation to vary from system to system, the scope of variation is sharply limited.").

18. See Donald Drakeman, Consequentialism and the Limits of Interpretation, 9 Jurisprudence 300 (2017) (criticizing Sunstein's view that interpretation is not settled by the meaning of interpretation); Richard Ekins, Objects of Interpretation, 32 Const. Comment. 1 (2017) [hereinafter Ekins, Objects of Interpretation] (same); see also infra section II.B.1.i.

19. E.g., Sunstein, How to Interpret the Constitution, supra note 3; Fallon, Meaning of Legal Meaning, supra note 5.

20. See infra section II.B.1.

21. Professor Andrew Jordan's important work offers an uncompromisingly normative account of "constitutional decisionmaking" at the level of theory, building on the work of Richard Primus. Jordan, Constitutional Anti-Theory, supra note 5; Primus, supra note 5. It also derives relevant consequences from the normative nature of legal decisionmaking, such as its context-dependency. See supra note 6 and accompanying text; infra note 294 and accompanying text. While drawing from these illuminating works, this Article departs from them in framing the issue as one concerning interpretation rather than (constitutional) "decisionmaking," and thus addresses a range of questions concerning interpretation proper, including the nature of interpretive choice and the role of non-normative reasons for interpretive choice. Section II.D.2 explores these differences.

22. See infra section II.B.1. Professor Adrian Vermeule's early work frames debates on interpretation as a matter of choice, the object of that choice being a different one than that of subsequent literature: strategies for implementing an approach to interpretation rather than the approaches themselves (originalism, textualism, etc.). See infra note 78. This Article focuses on Sunstein and Fallon's work for the reasons explained infra note 92 and accompanying text, and it engages with Vermeule's important work infra sections I.E and II.C.4.

regarding how they engage with the law.[23] The defense of the normative choice thesis explains why this should be so.[24]

It may be useful to offer some working definitions here.[25] "Interpretation" here means the activity of determining the legal content of legal materials (for example, a statute or a constitution).[26] This broad definition is intended to include different theories of interpretation.[27] What matters in practice are the alternatives for choice and action, not how they are categorized. "Methods of interpretation" are precisely such alternatives regarding what agents could do in determining the meaning of legal materials. Methods of interpretation may go beyond what counts as "interpretation" for a given theory, or for any theory for that matter.[28] "Interpretive choice" is a choice of methods of interpretation.

The Article proceeds as follows: Part I surveys the different kinds of reasons that feature in debates about methods of interpretation: conceptual, linguistic, normative, institutional, legal, and theory reasons. It also

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23. See infra section II.C.1.b.

24. See infra sections II.A–.C. At the same time, even for a normative theory of interpretive choice, there are good reasons to frame the inquiry in terms of "interpretation" and "interpretive choice." See infra sections II.D.1–.2.

25. Below they will be justified in greater detail. See infra section II.D.1.

26. Referring to "the" legal content does not rule out the possibility of multiple meanings. See Ryan D. Doerfler, Can a Statute Have More Than One Meaning?, 94 N.Y.U. L. Rev. 213, 228–42 (2019) (defending the possibility of multiple meanings of a single provision). Multiple meanings could also be a function of the contingency and instability of interpretive choice. See infra sections III.C–.D.

27. Other authors use a similarly broad notion. See Greenawalt, Legal Interpretation, supra note 2, at 13 (employing "a broad sense of interpretation that includes all efforts to discern meaning and to determine particular applications that depend on that meaning"); Kent Greenawalt, Constitutional and Statutory Interpretation, *in* Oxford Handbook of Jurisprudence & Philosophy of Law 268, 269 (Jules L. Coleman, Kenneth Einar Himmas & Scott J. Shapiro eds., 2004) (taking an "inclusive approach" to legal interpretation); William Baude & Stephen E. Sachs, The Law of Interpretation, 130 Harv. L. Rev. 1079, 1082 (2017) [hereinafter Baude & Sachs, The Law of Interpretation] ("'[I]nterpretation' determines what a particular instrument 'means' in our legal system."). For other academic or practical purposes, it may be useful to have a narrower concept of interpretation. See, e.g., Timothy Endicott, Legal Interpretation, *in* The Routledge Companion to the Philosophy of Law 109, 109 (Andrei Marmor ed., 2012) [hereinafter Endicott, Legal Interpretation] ("[N]o need for interpretation arises if no question arises as to the meaning of an object."); Watson, supra note 6, at 32–42 (defending a "remedial" account of interpretation); infra section II.D.3 (discussing writings on the interpretation–construction distinction).

28. Then why call them methods of "interpretation"? Because they are all alternatives in the same choice, one which—on account of including as typical and prominent alternatives what are usually understood as forms of interpretation—can be rightly characterized as concerning interpretation. An alternative would be to say that alternatives for interpretive choice include things that are methods of interpretation and things that aren't, and thus use a narrower concept of methods of interpretation. The latter terminology is more cumbersome and, more importantly, it would obscure what this Article aims to underscore: that all these alternatives—whether they count as forms of "interpretation" or not—are alternatives for the same choice, regardless of conceptual line drawing. See infra sections II.D.1–.2.

introduces the distinction between "independent" and "subordinate" reasons. Section II.A introduces the normative choice thesis. The normative choice thesis entails a positive thesis (that normative reasons matter for interpretive choice) and a negative thesis (that non-normative reasons don't matter for interpretive choice). Section II.B then makes the case for the positive thesis.

Authors who defend the role of normative reasons in interpretive choice adopt a "residual" approach: The role of normative reasons is a function of other reasons (e.g., conceptual or linguistic) not fully determining interpretive choice. This Article instead defends another approach: Normative reasons matter to interpretive choice because of the practical nature of interpretive choice. It's not that non-normative reasons don't fully determine interpretive choice—it's that they aren't pertinent to interpretive choice. Section II.C develops this negative thesis through a systematic assessment of the kinds of reasons surveyed in Part I, showing why each kind of non-normative reason can't justify or constrain interpretive choice, and how they could feature in other ways in deliberation on interpretive choice. This justifies the normative choice thesis. The normative choice thesis entails an account of interpretive choice. Section II.D articulates this account and explains how theories of interpretation and interpretive choice interact.

Part III explains the consequences of the normative choice thesis: that normative reasons are sufficient to justify and challenge interpretive choice (III.A), that interpretive choice depends on a variety of normative reasons (III.B), that it is always contingent (III.C), and that interpretation is unstable (III.D).

I. REASONS FOR METHODS OF INTERPRETATION

There are several methods of interpretation on offer.[29] These methods of interpretation are not churned out mindlessly by legal scholars and practitioners. There are arguments for each of them. In reflecting critically on choosing a method, one should assess these arguments.

Before assessing the relative strengths of these arguments, however, one should know if they provide reasons that matter: reasons that actually count in favor of a method of interpretation. What kinds of reasons are appropriate for justifying the choice of a method of interpretation?

There are several candidates. Authors offer different arguments for their preferred methods of interpretation, and these arguments put forward reasons of different kinds.[30] This Article identifies the following

29. See supra note 1.

30. Because arguments offer reasons, this Article works with the more fundamental concept of reasons rather than arguments.

kinds of reasons that feature in debates on interpretation[31]: conceptual, linguistic, normative, legal, institutional, and theory reasons.[32]

An important distinction is whether these reasons are "independent" or "subordinate." Independent reasons count by themselves in deliberation on interpretive choice. For a reason to count "by itself," the reason counts in favor of a given method of interpretation regardless of whether any other reason calls for its consideration. It's important to clarify this because reasons can still feature in deliberation on interpretive choice, even if they do not count "by themselves." This is the case with "subordinate" reasons, which count to the extent that their consideration is called for by reasons of a different kind. For example, assume the following: (i) that linguistic reasons have no independent weight in interpretive choice, (ii) that only conceptual reasons do, and (iii) that the true or best concept of interpretation is one according to which interpretation is defined by conformity with certain rules of language. If this were the case, then linguistic reasons (about the content of those rules, the best way to fulfill them, etc.) would count in favor (or against) a method of interpretation. But they would count only to the extent determined by conceptual reasons. If one realized that the best concept of interpretation is actually one that doesn't refer to facts about language, then linguistic reasons wouldn't count for interpretive choice.

The rest of this Part explains the different kinds of reasons that are discussed with regard to interpretive choice. It does so by giving examples of academic works offering these reasons, both as independent and as subordinate reasons. This will set up the problem that will occupy the rest

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31. If ultimately only normative reasons can justify interpretive choice, why refer to non-normative reasons as "reasons"? Isn't the point that they are not really reasons for interpretive choice? If this were so, it would still be legitimate to refer to them as "reasons," as shorthand for "proposed as, and thought by many to be, reasons." There is nothing odd in this. A bad argument is not really an argument, just as a bad friend is not really a friend, but one can still legitimately call them "argument" and "friend." Furthermore, non-normative reasons can also be reasons, just not normative ones (they can be theoretical reasons); and, in this Article's terminology, they can be subordinate reasons for interpretive choice.

32. The list of reasons is not meant to be exhaustive, but it includes the reasons usually mentioned in scholarly writings and at least covers the reasons identified by authors who have listed reasons for approaches to interpretation. Greenberg refers to the first three reasons mentioned here, and then adds his own, included here as the fifth. See Greenberg, Legal Interpretation, supra note 5, § 5.1 ("Such arguments for particular theories of legal interpretation are typically offered without any account of why these arguments are the relevant ones and often without consideration of other kinds of arguments."). Professor Andrew Coan groups reasons for "approach[es] to constitutional decision-making" into four categories: metaphysical, procedural, substantive, and positivist. See Coan, supra note 5, at 836. Coan's list doesn't include theory reasons, and it doesn't include linguistic reasons as a separate category. There are differences in categorization as well. For example, his metaphysical reasons include conceptual reasons, but also other reasons; his substantive reasons only include normative reasons related to outcomes. See id. at 840–45, 859–63. This Part has greatly benefited from these works.

of the paper: Which of these reasons should count in deliberation on interpretive choice?

A. *Conceptual Reasons*

Conceptual reasons are facts about the concept or idea of interpretation that are taken to count for or against a particular method of interpretation.[33]

At least some of the debate over legal interpretation is articulated in terms of what methods really qualify as "interpretation." Professor Larry Alexander notes that an aspect of the debate between originalists and non-originalists "has to do with what interpreting a text is. Originalists . . . argue that when one is interpreting a text, as opposed to doing other things with it, one is necessarily seeking its author's or authors' intended meaning."[34] For Professor Stephen Sachs, "[M]ost defenses of originalism fall into two camps, which we can call 'normative' and 'conceptual.'"[35] Professor William Baude writes that "current debates [on originalism] are generally either conceptual or normative,"[36] following Professor Mitchell Berman, for whom some arguments for

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33. This is narrower than Greenberg's "conceptual arguments," which "claim that a particular approach to legal interpretation follows from the concept of interpretation, the concept of law, the concept of authority, or some other relevant concept." See Greenberg, Legal Interpretation, supra note 5, § 5.1; supra text accompanying note 31. This Article focuses on the concept of interpretation because these kinds of reasons are distinctive in offering reasons that truly rely on the boundaries of a concept or an idea. Some of Greenberg's "conceptual arguments" are not conceptual reasons in this Article's terminology. For example, reasons based on authority here are normative reasons. On authority, see infra sections III.B.2 and III.C.2.1.

34. Larry Alexander, Telepathic Law, 27 Const. Comment. 139, 139 (2010) [hereinafter Alexander, Telepathic Law]; see also Stanley Fish, Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law, 29 Cardozo L. Rev. 1109, 1122, 1127 (2008) ("An interpreter cannot disregard [the author's] intention and still be said to be interpreting . . . . Interpretation is the act of trying to figure out what the author, not the dictionary, meant by his or her (or their) words."). Though some of this debate may be formulated in conceptual terms, it may ultimately be about linguistic reasons: about the best way to understand communication given certain facts about language and communication. See infra section I.B.

35. Stephen E. Sachs, Originalism as a Theory of Legal Change, 38 Harv. J.L. & Pub. Pol'y 817, 819 (2015) [hereinafter Sachs, Originalism as a Theory of Legal Change].

36. William Baude, Is Originalism Our Law?, 115 Colum. L. Rev. 2349, 2351 (2015) [hereinafter Baude, Is Originalism Our Law?]. It is unclear, though, if all the arguments referred to by Baude and Sachs are conceptual in the sense identified here. Some seem linguistic (see infra section I.B.), such as arguments based on "conceptual truths about the right way to read legal documents . . . . If, for example, written texts always mean whatever their authors intended them to mean . . . ." Sachs, Originalism as a Theory of Legal Change, supra note 35, at 823. That proposition could be defended on conceptual or linguistic grounds. See id. at 828–35. For the argument of this Article, nothing depends on whether these arguments offer linguistic or conceptual reasons.

originalism are about "the nature of interpretation."[37] Professor Ronald Dworkin's proposal of a method of interpretation constituted by the dimensions of "fit" and "justification"—one of the most influential in legal philosophy—relies on his own concept of interpretation.[38]

Beyond explicit assertions, conceptual reasons are a brooding presence in debates on interpretation. Sunstein's influential argument that "there is nothing that interpretation 'just is'"[39] attempts to contain them. For Sunstein, "The idea of interpretation is capacious, and a range of approaches fit within it."[40] Sunstein opposes those[41] who "insist *that the very idea of interpretation* requires judges to adopt their own preferred method of construing the founding document."[42] In other words, his argument challenges those who believe that conceptual reasons fully vindicate their approach to interpretation. This view is not without critics.[43]

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37. Mitchell N. Berman, Originalism Is Bunk, 84 N.Y.U. L. Rev. 1, 37–38 (2009). Other arguments are about "the *nature of constitutional authority*" and about the consequences of originalism. See id. at 38.

38. See Ronald Dworkin, Law's Empire 239 (1986) [hereinafter Dworkin, Law's Empire] ("The judge's decision—his postinterpretive conclusions—must be drawn from an interpretation that both fits and justifies what has gone before, so far as that is possible."). Sunstein attributes to Dworkin the view that his approach to interpretation is vindicated by conceptual reasons: "On the basis of Dworkin's argument, we might be tempted to think (as Dworkin does) that there is one thing that legal interpretation just is: an attempt to ensure both fit and justification." Sunstein, How to Interpret the Constitution, supra note 3, at 83–84.

39. Cass R. Sunstein, There Is Nothing that Interpretation Just Is, 30 Const. Comment. 193, 193 (2015) [hereinafter Sunstein, There Is Nothing that Interpretation Just Is].

40. Sunstein, How to Interpret the Constitution, supra note 3, at 91; see also id. at 68 (arguing that original public meaning originalism "cannot be ruled out of bounds by the very idea of interpretation"); id. at 67 ("If some intelligent originalists call for attention to intentions, and other intelligent originalists call for attention to the public meaning, it would seem unlikely that the abstract idea of interpretation . . . requires one rather than the other."); id. at 84 ("Reasonable people can and do understand interpretation in different ways. Radically different approaches can fairly count as interpretive."); id. at 82 ("Different answers to [what the requirement of 'fit' means] are admissible within the general concept of interpretation.").

41. Sunstein says that "many people believe" that he is wrong in thinking that "there is nothing that interpretation 'just is[]'" and that the view that interpretation corresponds to only one theory "is especially pervasive among originalists, though some version of it can be found among nonoriginalists as well." Sunstein, How to Interpret the Constitution, supra note 3, at 61, 63. Sunstein attributes this view to original intention originalists broadly, and to Professor Walter Benn Michaels, Justice Antonin Scalia, Professors Randy Barnett and Evan Bernick, Professor Lawrence Solum, and Professor Ronald Dworkin. Id. at 27, 62, 67–73, 83–84, 86; see also Donald L. Drakeman, The Hollow Core of Constitutional Theory 19–20, 178–84 (2020) (criticizing Sunstein and claiming that "the concept of 'interpretation' has had fixed boundaries for centuries"); Coan, supra note 5, at 841 ("[A] number of prominent constitutional theorists have argued that only originalism is consistent with the nature of interpretation."). But Sunstein also acknowledges that sophisticated originalists provide normative reasons for their arguments. See Sunstein, How to Interpret the Constitution, supra note 3, at 68 n.8.

42. Sunstein, How to Interpret the Constitution, supra note 3, at 61 (emphasis added).

43. See supra note 18 and accompanying text.

And yet, even Sunstein accepts that the concept of interpretation sets some boundaries to interpretive choice.[44]

B. *Linguistic Reasons*

As Greenberg says, "Typical linguistic arguments defend a particular approach to legal interpretation by appealing to claims about how language or communication works."[45]

Linguistic reasons play an important role in Professors Larry Alexander and Saikrishna Prakash's defense of intentionalist interpretation. In their view, authorial intent is necessary to attribute any meaning to a text,[46] and, indeed, to identify something as a text,[47] as well as to determine what is to be interpreted as a text in a conjunction of symbols.[48] Professor Scott Soames's approach, centered on what a speaker asserts or conveys, similarly appeals to facts about language and communication.[49] For Soames, "[w]hat textualists" and, presumably, all interpreters "should be seeking is fidelity to what the legislature asserts or stipulates, not what the sentences used to do so mean," which includes taking into account

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44. See infra section II.B.1.a.

45. Greenberg, Legal Interpretation, supra note 5, § 5.1.

46. See Larry Alexander & Saikrishna Prakash, "Is that English You're Speaking?" Why Intention Free Interpretation Is an Impossibility, 41 San Diego L. Rev. 967, 975 (2004) ("Our claim is that we must posit the existence of some author if we are to attribute meaning to these statements."); see also the discussion of "'mindless' 'texts.'" Id. at 977 ("Without an author who intends a meaning, such marks are meaningless.").

47. Id. at 969 (positing that "texts can only be identified as texts by reference to authorial intent").

48. Id. at 976 ("[O]ne cannot look at the marks on a page and understand those marks to be a text . . . without assuming that an author made those marks intending to convey a meaning by them."); see also Larry Alexander, Simple-Minded Originalism, *in* The Challenge of Originalism: Theories of Constitutional Interpretation 87, 87–88 (Grant Huscroft & Bradley W. Miller eds., 2011) [hereinafter Alexander, Simple-Minded Originalism]; Alexander, Telepathic Law, supra note 34, at 139–40 ("[O]ne can only successfully interpret a text by determining what code it is, which itself is determined by authorial intent.").

49. For Soames, one should focus on "what a text says, or has been used to say." Scott Soames, Philosophical Essays, Volume 1: Natural Language: What It Means and How We Use It 422 (2009) [hereinafter Soames, Philosophical Essays]. This calls for attending not only to the meaning of words in a text, but also to "other information present in contexts of utterance." Id. "This pragmatic information interacts with the semantic content of the sentence to add content to the discourse," and "pragmatic determinants of this content are not minor add-ons to semantic content." Id. at 404 (emphasis omitted). There is a gap between the meaning of the words in a text and its content or "what is asserted by uttering it." Id. at 410. This is evident in some nonlegal contexts, as when a "doctor examining a gunshot wound says to the patient, 'You aren't going to die,' thereby asserting that the patient isn't going to die yet, or from this, not that death will never come." Id. at 410 (emphasis omitted). The same applies in law. See id. at 412 (referring to Smith v. United States, 508 U.S. 223 (1993), concerning the question whether trading a gun for drugs constitutes "using" it in relation to drug trafficking).

legislative intention.[50] Soames distinguishes his approach from theories that do without legislative intention (like Justice Scalia's[51]), as well as from moral readings[52] (such as Ronald Dworkin's[53]). Soames's arguments rely on the relevance of certain truths about language, which are offered as reasons to interpret in the way that he proposes.[54] Hence, for him, "The first, and most important, step in legal interpretation is not moral, social, or political, but linguistic."[55]

Similarly, Professor Richard Ekins appeals to linguistic reasons in defending his influential theory of intentionalist interpretation.[56] Ekins's arguments are complex and sophisticated, and they allude to reasons of different kinds. Yet linguistic reasons feature prominently in his account. For example, in challenging Sunstein's idea that "there is nothing that interpretation just is,"[57] Ekins argues that interpretation has a well-defined object and point. He writes:

> Language use consists in one person's attempt to convey an intended meaning by uttering some words in some context, which meaning other persons should try to recognize. The

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50. Scott Soames, Toward a Theory of Legal Interpretation, 6 N.Y.U. J.L. & Liberty 231, 239 (2011) [hereinafter Soames, Toward a Theory]; see also id. at 239–59 ("[T]he intentions of lawmakers are directly relevant to the contents of the laws they enact.").

51. See Antonin Scalia, A Matter of Interpretation 16–18 (1997) [hereinafter Scalia, A Matter of Interpretation] ("[I]t is simply incompatible with democratic government . . . to have the meaning of a law determined by what the lawgiver meant, rather than what the lawgiver promulgated."). For Soames's critique of Scalia's position, see Soames, Toward a Theory, supra note 50, at 239–41.

52. See Soames, Philosophical Essays, supra note 49, at 422 ("[A] judge's view of the legitimate social, moral, and political purposes of the law is not the crucial ingredient added by interpretation." (emphasis omitted)).

53. See generally Dworkin, Freedom's Law, supra note 1, at 2 ("[W]hen some novel or controversial constitutional issue arises . . . people who form an opinion must decide how an abstract moral principle is best understood.").

54. See Soames, Philosophical Essays, supra note 49, at 422 ("The first and most important task of interpretation is to discern what a text says, or has been used to say. . . . [S]peakers assert or commit themselves to . . . a function not only of the meanings of their words, but also of other information present in contexts of utterance."). In other works, Soames premises his analysis on a postulated "traditional norm of legal interpretation," the existence of which is a legal matter. See Soames, Toward a Theory, supra note 50, at 236.

55. Soames, Philosophical Essays, supra note 49, at 422. Soames argues that:

> Contemporary philosophy of language and theoretical linguistics distinguish the meaning of a sentence S from its semantic content relative to a context, both of which are distinguished from (the content of) what is said, asserted, or stipulated by an utterance of S. . . . [I]t is the third—asserted or stipulated—content that is required by any defensible form of textualism.

Soames, Toward a Theory, supra note 50, at 236–37 (emphasis omitted).

56. For Greenberg, Ekins's work provides an "example of intentionalism motivated by appeal to a proper understanding of language." Greenberg, Legal Interpretation, supra note 5, at n.22.

57. See Sunstein, There Is Nothing that Interpretation Just Is, supra note 39, at 193. See infra section II.B.1.a.

> speaker's intended meaning is the intelligible object of the hearer's process of inference, such that there is good reason to term these inferences "interpretations" and to withhold the label from other modes of engagement with the speaker's choice of words.[58]

This fact about "language use" is taken to count in favor of intentionalist interpretation.[59]

C. *Normative Reasons*

"A normative reason is a reason (for someone) to act—in T.M. Scanlon's phrase, 'a consideration that counts in favour of' someone's acting in a certain way."[60] Moral and prudential reasons are normative reasons. There are a great variety of normative reasons. Many normative reasons have been given in support of different methods of interpretation. Examples are that the method realizes values "such as democracy, fairness and the rule of law,"[61] (good) social aims of the law,[62] justice,[63] integrity,[64] arrives at (good) consequences,[65] fulfills duties (such as those arising from oaths or promises[66]), or improves institutional legitimacy,[67] among many others. Some are related to outcomes (say, fulfilling rights, achieving good

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58. Ekins, Objects of Interpretation, supra note 18, at 4 (footnote omitted).

59. It is also a reason against other forms of interpretation. See id. at 12 (arguing that Justice Breyer's democracy-protective approach is "problematic" as "it licenses 'interpreters' to invent meanings that cannot be squared with the act of language use in question").

60. Maria Alvarez, Reasons for Action: Justification, Motivation, Explanation, Stan. Encyc. Phil. (Edward N. Zalta ed., Apr. 24, 2016), https://plato.stanford.edu/archives/win2017/entries/reasons-just-vs-expl/ [https://perma.cc/S4CB-2G6A] (quoting T.M. Scanlon, What We Owe to Each Other 17 (1998); T.M. Scanlon, Reasons: A Puzzling Duality, *in* Reason and Value: Themes From the Moral Philosophy of Joseph Raz (R. Jay Walker, Philip Pettit, Samuel Scheffler & Michael Smith eds., 2004)); see also infra section II.B.2.

61. Greenberg, Legal Interpretation, supra note 5, § 5.1.

62. Aharon Barak, Purposive Interpretation in Law 223–24 (2005).

63. See, e.g., Michel Rosenfeld, Just Interpretations: Law Between Ethics and Politics 2 (1998) ("For justice to be achieved and for a legal system to qualify as legitimate requires just interpretations of applicable laws . . . .").

64. See Dworkin, Law's Empire, supra note 38, at 225 ("According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice.").

65. See Sunstein, There Is Nothing that Interpretation Just Is, supra note 39, at 207–09 (focusing on decision costs and error costs); see also infra section III.C.2.c.

66. See Randy E. Barnett & Evan Bernick, The Letter and the Spirit: A Unified Theory of Originalism, 107 Geo. L.J. 1, 6 (2018) (arguing that "the oath imposes a moral and legal duty upon judges to engage in good-faith interpretation and construction"); Richard M. Re, Promising the Constitution, 110 Nw. U. L. Rev. 299, 304 (2016) ("In general, officials have a promissory obligation to adhere to the public meaning of 'the Constitution' that existed at the time they took their oaths.").

67. See, e.g., Tara Leigh Grove, Which Textualism? 134 Harv. L. Rev. 265, 270 (2020) (proposing protecting the legitimacy of the judiciary as a reason for textualism).

consequences, or promoting justice) and others aren't (such as procedural fairness, the rule of law, or democratic legitimacy, among others).[68]

Subsequent sections explore in more detail some normative reasons applicable to interpretive choice in law.[69] For now, it's important to note that normative reasons stand in sharp contrast with the other kinds of reasons mentioned in arguments for methods of interpretation. Unlike non-normative reasons, they are not about what something is—be it a concept, or language and communication, or the nature of law—but about how one should act.

D. *Legal Reasons*

When a legal norm counts in favor of a particular approach to interpretation, it is a legal reason. One can treat legal reasons as a specific kind of reason. This doesn't entail that they are irreducible to some other kind of reason.[70] Because they feature in debates on interpretive choice as a distinctive type of reason, this Article singles them out for separate treatment.

Legal reasons rose to prominence with the "positive turn" in originalism and the works of Stephen Sachs and William Baude.[71] They

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68. See Lawrence B. Solum, Outcome Reasons and Process Reasons in Normative Constitutional Theory, 172 U. Pa. L. Rev. 913, 931 (2024) (explaining the distinction between outcome- and process-related reasons, and the dangers of exclusive focus on outcomes); see also Jeremy Waldron, The Core of the Case Against Judicial Review, 115 Yale L.J. 1346, 1376–95 (2006).

69. See infra Part III.

70. See infra section II.C.3.a.

71. See William Baude & Stephen E. Sachs, Grounding Originalism, 113 Nw. U. L. Rev. 1455, 1457–58 (2019) [hereinafter Baude & Sachs, Grounding Originalism] (presenting the three "core claims" of their approach); see also Baude, Is Originalism Our Law?, supra note 36, at 2351 (introducing positive law as the third way to assess originalism); Baude & Sachs, The Law of Interpretation, supra note 27, at 1096–97 (offering an account of legal interpretive rules); William Baude & Stephen E. Sachs, Originalism and the Law of the Past, 37 Law & Hist. Rev. 809, 809–20 (2019) (explaining the role of history in originalism according to the "positive turn"); Sachs, Originalism as a Theory of Legal Change, supra note 35 (arguing that originalism is primarily a theory of U.S. law and legal change). These works have generated a debate within originalism and beyond. See Charles L. Barzun, The Positive U-Turn, 69 Stan. L. Rev. 1323, 1379 (2017) (arguing that the "positive turn" fails under the main positivist approaches); Greenberg, Legal Standards vs. Fundamental Determinants, supra note 5, at 106 (arguing that "answers to questions about legal interpretation depend on how the content of the law is determined at a more fundamental level than legal standards"); Pojanowski & Walsh, Enduring Originalism, supra note 15, at 99 (offering "positive-law-based arguments for constitutional originalism" but doing so "by confronting, rather than by claiming, legal positivism"). Other works explore what the law of interpretation is or should be. See, e.g., Anthony J. Bellia Jr. & Bradford R. Clark, The Constitutional Law of Interpretation, 98 Notre Dame L. Rev. 519, 521–22 (2022) (arguing that rules governing transfer of sovereign rights are part of the Constitution and govern its interpretation); Richard M. Re, Permissive Interpretation, 171 U. Pa. L. Rev. 1651, 1659 (2023) (proposing permissive interpretation).

observe that "the legal system frequently chooses artificial rules of interpretation, and once chosen they're the law, whether or not they reflect what a given text *really meant*."[72] The resulting positive "law of interpretation," on this view, affects the meaning of legal provisions as much as language.[73] Hence, "[a]rguments about the approaches used in our legal system should be conducted as legal arguments, based on legal materials and not (or not primarily) on pure interpretive theory."[74]

For Baude and Sachs, the law of interpretation espouses originalism.[75] But, as Professor Charles Barzun notes, their main point is methodological: "that we should resolve interpretive debates by reference to what 'our law' is, whether or not they happen to be right that originalism is our law."[76]

E. *Institutional Reasons*

Institutional reasons concern the characteristics, operations, and effects of institutions, such as their capacities, the likely motivations of those who run them, and the effects of their actions.[77] For example, a method of interpretation may require attention to legislative intentions—as manifested in legislative records—from courts that are ill-suited to process that kind of data.[78] This fact is a reason for courts not to adopt

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72. Baude & Sachs, The Law of Interpretation, supra note 27, at 1095. Their argument relies on doctrinal analysis as well as on their own understanding of legal positivism. For critiques of Baude and Sachs's reliance on legal positivism, see Emad Atiq & Jud Matthews, The Uncertain Foundations of Public Law Theory, 31 Cornell J. L. Pub. Pol'y 389, 397–418 (2022); Barzun, supra note 71.

73. See Baude & Sachs, The Law of Interpretation, supra note 27, at 1093 ("If language alone can't finish the job, as we agree it often can't, then something else must. We suggest that this something else is law.")

74. Id. at 1116.

75. Id. at 1135 ("This way of looking at interpretation is particularly compatible with certain forms of originalism."); see also Baude & Sachs, Grounding Originalism, supra note 71, at 1457 ("As it turns out, the particular rules of our legal system happen to endorse a form of originalism."). In their individually authored works, they also adopt the view that U.S. law is originalist. See Baude, Is Originalism Our Law?, supra note 36, at 2352 ("Having framed the question, this Essay argues that a version of originalism is indeed our law."); Sachs, Originalism as a Theory of Legal Change, supra note 35, at 838 ("[O]riginalism is actually our law.").

76. Barzun, supra note 71, at 1327.

77. See Cass R. Sunstein & Adrian Vermeule, Interpretation and Institutions, 101 Mich. L. Rev. 885, 886 (2003) (calling for theories of interpretation to address institutional capacities and dynamic effects); Vermeule, Judging Under Uncertainty, supra note 5, at 68–70 (arguing that conclusions about what judges should do at the operational level require consideration of institutional capacities, motivations, and systemic effects).

78. See Vermeule, Interpretive Choice, supra note 5, at 84 ("[W]ill judges of limited competence do better at identifying legislative intent with legislative history or without it?"); Adrian Vermeule, Legislative History and the Limits of Judicial Competence: The Untold Story of *Holy Trinity Church*, 50 Stan. L Rev. 1833, 1837 (1998) (revisiting the case to note the Court's misreading of the legislative history). Vermeule focuses on the choice of

such a method. In this sense, facts about institutions can be reasons for or against a method of interpretation.

Institutional reasons serve an indispensable mediating role. As Vermeule explains, "It is impossible to move directly from high-level commitments—about democracy, language, or the nature of law—to the operational level of interpretive rules judges use."[79] To move to the "operational level," one needs to take into account what judges (or other interpreters) can do well, given their institutional role and capacities.[80] Institutional reasons are explicitly presented as subordinate reasons, a point this Article will return to below.[81]

F. *Theory Reasons*

Theory reasons are based on a theory of law. They concern general claims about the law and its "nature," claims which are taken to count for or against a method of interpretation. They are not about the specific rules or doctrines that have been adopted in a specific legal system (those are legal reasons).

Greenberg's theory offers a paradigmatic example. Greenberg deserves special attention not only as the author of a sophisticated and important general theory of law but also as one of the few authors who explicitly addresses the question of which reasons are apt to justify a method of interpretation.[82]

For Greenberg, "Behind the familiar question of what method of interpretation is the right one lies a more fundamental question: what does legal interpretation, by its nature, seek?"[83] This is so "because which method is correct depends on what legal interpretation seeks."[84] Greenberg states that "legal interpretation seeks legal provisions'

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doctrines that implement methods of interpretation rather than on the methods themselves. See Vermeule, Interpretive Choice, supra note 5, at 76, 82 (referring to "the selection of one interpretive doctrine, from a group of candidate doctrines, in the service of a goal specified by a higher-level theory of interpretation" and noting that interpretive choice focuses on "low-level questions of doctrine"). There is choice regarding higher-level theories (of the kind Fallon, Sunstein, and others write about) and a choice of lower-level implementing doctrines relative to a higher-level theory. This Article addresses only the former.

79. Vermeule, Judging Under Uncertainty, supra note 5, at 71. The insight applies beyond judges to all interpreters.

80. See id. at 2 ("[I]ntermediate premises about the capacities and interaction of legal institutions are necessary to translate principles into operational conclusions.").

81. See infra section II.C.4.

82. Greenberg, Natural Law, supra note 5, at 109–10.

83. Id.

84. Id. at 126 (emphasis omitted); see also Greenberg, Legal Interpretation, supra note 5, § 5.1 ("To a first approximation, whether a method of legal interpretation is correct depends on whether it reliably yields what legal interpretation seeks.").

contributions to the content of the law."[85] If so, "a method cannot be a good one unless it reliably yields the content of the law."[86] In interpreting a legal provision, "the crucial question is how to figure out the impact of the enactment of a provision on the content of the law."[87] This, Greenberg holds, "is the province of . . . a theory of law."[88]

For Greenberg, a "theory of law" is "an account of how the more basic, determining facts determine the legal facts, i.e., make those facts what they are."[89] The crucial point is that "any kind of argument for a method of interpretation will be apt only to the extent that it bears on how to ascertain what the law is. So, any argument for a method of legal interpretation will have to proceed via claims about how the content of the law is determined"[90]—that is, via the kinds of claims articulated by theories of law. Thus, normative reasons (such as fairness[91]) are relevant only to the extent that they are made relevant by the (best, true) theory of the law. The same could be said of other reasons. On this view, a theory of the law provides the only independently relevant reasons for interpretive choice—other reasons are admissible only as determined by, and thus subordinate to, theory reasons.

II. THE NORMATIVE CHOICE THESIS

Conceptual, linguistic, normative, legal, institutional, and theory reasons—they all feature in arguments for or against methods of interpretation. Are all these reasons pertinent? Should all these kinds of reasons matter for interpretive choice?

No. Only normative reasons ultimately matter. Normative reasons are the only reasons that count by themselves for interpretive choice. Non-normative reasons count only to the extent that they can be connected to normative reasons, as, for example, when they articulate some truth about how to best achieve some goal or fulfill a requirement justified by a normative reason. Ultimately, any argument in favor of a theory of

85. Greenberg, Natural Law, supra note 5, at 127. For Greenberg's reasons for this position, see id. at 127–29. For a different view, see, e.g., Jeffrey A. Pojanowski & Kevin C. Walsh, Recovering Classical Legal Constitutionalism: A Critique of Professor Vermeule's New Theory, 98 Notre Dame L. Rev. 403, 427 (2022) (book review) ("[W]e hold that in the central case the legal interpreter's object qua interpreter is identifying the propositions . . . the lawmaker introduced into the system of law when it exercised its authority.").

86. Greenberg, Legal Interpretation, supra note 5, § 5.1.

87. Greenberg, Natural Law, supra note 5, at 129.

88. Id.

89. Id. Greenberg uses the term "legal facts" to refer to "facts about the content of the law—for example, the fact that, in California, contracts for the sale of land are not valid unless they are in writing." Id.; see also Shapiro, supra note 5, at 25–27 ("[W]henever a law or legal system exists, it does so in virtue of some other facts.").

90. Greenberg, Natural Law, supra note 5, at 130.

91. See id. at 131.

interpretation, and any interpretive choice, must be based on normative reasons. This is the "normative choice thesis."

This Part articulates and defends the "normative choice thesis." It first offers a formulation of the normative choice thesis and the two subtheses that constitute it: the positive thesis and the negative thesis (A). It then proceeds to justify both theses (B–C). In justifying the positive thesis (B), it engages with the seminal works of Sunstein and Fallon—who have done most to elucidate interpretive choice and the importance of normative considerations in it—and suggests an alternative justification for the positive thesis that better illuminates the practical nature of interpretive choice. Then, in its longest section, it justifies the negative thesis dialectically (C), showing that each non-normative reason mentioned in Part I is not an independent reason for interpretive choice (though it may feature in deliberation on interpretive choice as a subordinate reason). Sections A–C articulate and defend the normative choice thesis. Section D draws the implications of the normative choice thesis for a theory of interpretive choice. It does so by addressing three issues: how a theory of interpretive choice relates to a theory of interpretation, why a practical theory of interpretive choice doesn't collapse into a theory of decisionmaking, and how the normative choice thesis bears on the interpretation–construction distinction.

A. *The Normative Choice Thesis*

The normative choice thesis is the following: *Only normative reasons matter independently for interpretive choice.*

The word "matter" is doing a lot of work here. It refers to whether some reason is an independent reason or not. Recall that independent reasons are those that count, by themselves, for interpretive choice—they count in favor of choosing a given method of interpretation regardless of whether any other reason calls for their consideration. The normative choice thesis holds that only normative reasons are independent reasons for interpretive choice.

The normative choice thesis entails a positive thesis and a negative thesis. The positive thesis is the following: *Normative reasons matter independently for interpretive choice.* The negative thesis is the following: *Non-normative reasons do not matter independently for interpretive choice.*

Non-normative reasons do not count by themselves for interpretive choice. They have no independent weight. They will only matter if they are connected to a normative reason, in that, for example, they refer to facts related to the fulfillment of a normative reason in practice.

As seen in Part I, at least some prominent writings on interpretation seem to rely on non-normative reasons as independent reasons for the methods of interpretive choice they defend. Indeed, as shown below, even prominent defenders of the importance of normative reasons seem to grant independent weight to non-normative reasons.

B. *The Positive Thesis*

There are two ways to ground the positive thesis—the thesis that normative reasons matter for interpretive choice. The first is the "residual" approach. This is the approach favored by prominent authors who emphasize the role of normative reasons in interpretive choice. Section II.B.1. explains the residual approach. Section II.B.2. presents an alternative approach, one centered on the nature of interpretive choice. In this approach, normative reasons matter for interpretive choice not because of some limitation of non-normative reasons but because of the practical nature of such choice.

1. *The "Residual" Approach.* — This section discusses the accounts of interpretive choice of Sunstein and Fallon—the authors who have done the most to formulate the role of normative reasons in interpretive choice.[92] Even the theories of Sunstein and Fallon, which explicitly make the case for normative reasons in interpretive choice, grant independent weight to non-normative considerations. This follows from a way of grounding the relevance of normative reasons: the "residual approach." What characterizes the residual approach is that it attempts to carve a space for normative reasons by showing that non-normative reasons can't determine interpretive choice on their own. In this approach, normative reasons matter for interpretive choice because of the limitations of non-normative reasons.

a. *Cass Sunstein's View that "There Is Nothing that Interpretation 'Just Is.'"* — Sunstein's account of interpretive choice is probably the most

92. There are other works that (more or less explicitly and directly) address interpretive choice. See supra note 5. This Article focuses on Fallon's and Sunstein's arguments because they explicitly formulate the problem of justifying a method of interpretation as one concerning a choice between alternatives (unlike, for example, Greenberg, who focuses on arguments for methods of interpretation, and Raz, who is not explicit about interpretive choice; see Raz, Authority and Interpretation, supra note 5; Greenberg, Natural Law, supra note 5, at 124; Greenberg, Legal Interpretation, supra note 5), and because they offer arguments aimed at establishing the role of normative reasons in interpretive choice (which distinguishes these works from, for example, Vermeule's institutional analysis, though this Article addresses Vermeule's work in discussing institutional reasons; see supra section I.E; infra section II.C.4; see also Raz, Authority and Interpretation, supra note 5; Vermeule, Interpretive Choice, supra note 5; Vermeule, Judging Under Uncertainty, supra note 5). Other works discuss normative reasons for interpretive choice in the context of a specific theory of law. See Shapiro, supra note 5, at 331–87; Greenberg, Legal Interpretation, supra note 5, § 3; Greenberg, Natural Law, supra note 5, at 133. This Article engages with Greenberg in discussing theory reasons. See supra section I.F; infra section II.C.5. And yet other theories address interpretive choice in terms of constitutional decisionmaking. See Jordan, Constitutional Anti-Theory, supra note 5, at 1517 (arguing for a positive view of constitutional decisionmaking); Primus, supra note 5, at 167–68 (explaining the competing virtues of different decisionmaking methods); infra section II.D.2 (engaging with this approach).

developed. It has been articulated in several writings over the years.[93] One of its main contributions is presenting the debate over methods of interpretation as one concerning a choice.[94] Sunstein holds that no theory of interpretation "might be 'read off' the Constitution itself, or come from some abstract idea like 'legitimacy' or from the very idea of interpretation."[95] Crucially, he argues that "there is nothing that interpretation 'just is'"—the title of his seminal paper.[96] The idea of interpretation is not boundless, but it's broad enough to include the theories of constitutional interpretation often discussed in the United States. In this sense, no theory of interpretation is "mandatory."[97] If the idea of interpretation does not single out a method (or, in Sunstein's writings, a "theory"[98]) of interpretation, then interpreters need to choose. But how are they to do so?

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93. See Cass R. Sunstein, There Is Nothing that Interpretation Just Is, *in* A Constitution of Many Minds 19, 19–32 (2009) (arguing that the concept of interpretation does not settle interpretive debate, which must be settled on normative grounds); Sunstein, There Is Nothing that Interpretation Just Is, supra note 39 (offering a revised version of the same argument); see also Sunstein, How to Interpret the Constitution, supra note 3 (offering a systematic treatment of the claims advanced in previous works); Cass R. Sunstein, Experiments of Living Constitutionalism, 46 Harv. J.L. & Pub. Pol'y 1177, 1184–85 (2023) (contrasting "Experiments of Living Constitutionalism" with "Common Good Constitutionalism" to suggest criteria for choosing methods of interpretation); Cass R. Sunstein, Formalism in Constitutional Theory, 32 Const. Comment. 27 (2017) (defending his argument from Richard Ekins's objections); Cass R. Sunstein, Originalism, 93 Notre Dame L. Rev. 1671, 1673 (2018) [hereinafter Sunstein, Originalism] (arguing that theories of constitutional interpretation must be considered alongside the risk of judicial fallibility); Cass. R. Sunstein, "Fixed Points" in Constitutional Theory 2 (Harv. Pub. L., Working Paper No. 22-23, 2022), https://papers.ssrn.com/abstract_id=4123343 [https://perma.cc/8FGS-SMDY] (applying the method of reflective equilibrium to interpretive choice); Cass R. Sunstein, How to Choose a Theory of Constitutional Interpretation, Balkinization (Jan. 12, 2023), https://balkin.blogspot.com/2023/01/how-to-choose-theory-of-constitutional.html [https://perma.cc/RY48-556Z] (arguing that one should choose the interpretive theory that would make the constitutional order better rather than worse, applying the method of reflective equilibrium). Though these writings all express a coherent and distinctive view, there are minor differences between them. What follows focuses on Sunstein, How to Interpret the Constitution, supra note 3, as this is the latest and most complete version of Sunstein's position.

94. See Francisco J. Urbina, It Doesn't Matter What "Interpretation" Is, 38 Const. Comment. 335, 336–37 (forthcoming 2024) (book review) (on file with the *Columbia Law Review*) [hereinafter Urbina, It Doesn't Matter What "Interpretation" Is]; see also Vermeule, Interpretive Choice, supra note 5, at 76; supra note 93.

95. Sunstein, How to Interpret the Constitution, supra note 3, at 8–9.

96. Id. at 61; see also Sunstein, There Is Nothing that Interpretation Just Is, supra note 39, at 193 ("The problem with this view is that in the legal context, there is nothing that interpretation 'just is.' Among the reasonable alternatives, no approach to constitutional interpretation is mandatory." (footnote omitted)).

97. Sunstein, How to Interpret the Consitution, supra note 3, at 61. This idea is repeated several times. See, e.g., id. at 64, 65, 73, 127–28. The claim is prominent in earlier work. See Sunstein, There Is Nothing that Interpretation Just Is, supra note 39, at 193–94 ("[W]ithout transgressing the legitimate boundaries of interpretation, judges can show fidelity to texts in a variety of ways.").

98. On the difference between choice of a method or of a theory, see supra note 3.

Sunstein believes that "[j]udges (and others) should choose the theory that would make the American constitutional order better rather than worse."[99] In choosing a method of interpretation, one should search for "a kind of 'reflective equilibrium'"[100]—one in which "judgments, at multiple levels of generality, are brought into alignment with one another."[101]

The approach is decidedly normative: There is a choice to be made between different methods of interpretation, and in justifying a choice there is no alternative but to appeal to normative reasons, particularly to what "would make the American constitutional order better rather than worse."[102] Yet why are normative reasons relevant? For Sunstein, this is because conceptual and other non-normative reasons, while bearing on the choice, do not determine a single interpretive choice. Given that other reasons run out, there is space for normative reasons. For example, Sunstein says that "[t]he idea of interpretation is capacious, and a range of approaches fit within it. Among the reasonable alternatives, any particular approach to the Constitution must be defended on the ground that it makes the relevant constitutional order better rather than worse."[103] On this view, there is something crucial at stake in arguing that the idea of interpretation is broad: If the idea of interpretation were not broad enough to include all theories of interpretation, those theories would not be live alternatives for interpretive choice.[104]

In fact, for Sunstein, while the idea of interpretation doesn't determine interpretive choice, it does impose constraints on it:

> It is true that some imaginable practices cannot count as interpretation at all. The text matters. If judges do not show fidelity to authoritative texts, they cannot claim to be interpreting them. . . . Without transgressing the legitimate boundaries of interpretation, judges can show fidelity to a text in a variety of ways. Within those boundaries, the choice among possible approaches depends on a claim about what makes our constitutional system best.[105]

On this view, the idea of interpretation constrains the set of alternatives for choice: Interpretive choice occurs "[w]ithin those boundaries," namely, the "legitimate boundaries of [the idea of] inter-

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99. Sunstein, How to Interpret the Constitution, supra note 3, at 8.

100. Id. at 10. The notion is drawn from John Rawls. See John Rawls, A Theory of Justice 17–19 (1st ed. 1971); John Rawls, Outline of a Decision Procedure for Ethics, *in* Collected Papers 1, 1–19 (Samuel Freeman ed., 1999). For its use in constitutional debates, see Richard H. Fallon, Jr., Law and Legitimacy in the Supreme Court 142–54 (2018).

101. Sunstein, How to Interpret the Constitution, supra note 3, at 102.

102. Id. at 8.

103. Id. at 91.

104. See supra note 40 and accompanying text.

105. Sunstein, How to Interpret the Constitution, supra note 3, at 62.

pretation."[106] It is *because* the idea of interpretation doesn't "rule out any of the established approaches" that normative reasons are decisive.[107] Sunstein's approach to legal reasons is the same: While the law may bear on interpretive choice, it is not the case that originalism (or any other method of interpretation) is the unique approach sanctioned by law, and thus normative reasons are needed to choose a method of interpretation.[108]

This exemplifies the residual approach to normative reasons. In Sunstein's view, normative reasons are indispensable. But they are indispensable because of the limitations of other reasons. Were originalism the only method consistent with the idea of interpretation, or the law fully committed to originalism, there would be no room for interpretive choice based on which method makes the "constitutional order better rather than worse."[109] It is *because* the idea of interpretation is broader, and the law less committed, that there is room for interpretive choice based on normative reasons. This is why Sunstein takes pains to argue that the concept of interpretation is broad[110] and the law of interpretation is ambivalent.[111] Yet none of this would matter under the rival approach: an approach that grounds the relevance of normative reasons on the practical nature of interpretive choice.

b. *Richard Fallon's Meanings of Meaning*. — Richard Fallon starts from the idea that "meaning is the object, or at least one of the objects, that statutory and constitutional interpretation seek to discover."[112] Yet, Fallon observes, there is "an astonishing diversity of senses of meaning," which, for him, are "potential 'referents' for claims of legal meaning."[113] Fallon suggests the following list:

> [I]n claiming what a statutory or constitutional provision means, judges, lawyers, and scholars often invoke or refer to what I characterize as its literal or semantic meaning, its contextual meaning as framed by the shared presuppositions of speakers

106 Id.

107. Id.; see also Urbina, It Doesn't Matter What "Interpretation" Is, supra note 94, at 344–45 (characterizing Sunstein's view as a "two-step" approach to interpretive choice).

108. See Sunstein, How to Interpret the Constitution, supra note 3, at 77–80; see also Sunstein, Originalism, supra note 93, at 1672–73 ("Within the (broad) constraints of the concept of interpretation, and within the constraints of existing law governing that topic, shouldn't judges do whatever they deem best?" (footnote omitted)).

109. Sunstein, How to Interpret the Constitution, supra note 3, at 8.

110. See supra notes 103–104 and accompanying text.

111. See Sunstein, How to Interpret the Constitution, supra note 3, at 77–80.

112. Fallon, Meaning of Legal Meaning, supra note 5, at 1237.

113. Id. at 1239; see also Baude & Sachs, The Law of Interpretation, supra note 27, at 1089–90 ("As decades of interpretive debates have established, there's more than one plausible way to read a text. To put the standard picture into practice, we have to decide which meaning, produced by which theory of meaning, we ought to pick." (emphasis omitted)).

> and listeners, its real conceptual meaning, its intended meaning, its reasonable meaning, or its previously interpreted meaning.[114]

Given this plurality, "Among the foremost challenges for legal interpretation is to determine which of these possible senses constitutes legal meaning."[115] Theories of legal interpretation often presuppose that the object of interpretation is one of these alternative referents for claims of meaning.[116] And yet there is no linguistic fact that determines which of the referents is the relevant one.[117] "Absent a linguistic fact of the matter, selection among alternative possible legal meanings becomes inevitable."[118] Choice is, then, inevitable.

What are the relevant criteria for making this choice? For Fallon, the "standards for the determination of legal meaning are necessarily internal to legal practice and require interpreters to exercise a form of legally constrained judgment or choice."[119] More precisely, he recalls "three normative criteria" that apply in choosing a prescriptive constitutional theory,[120] suggesting that "similar considerations should come into play in selecting a theory of statutory interpretation."[121] The criteria are: "promoting rule of law values," "facilitating political democracy," and "defining a morally defensible set of individual rights."[122] Fallon admits that these criteria are contestable.[123] What matters for our purposes is not which specific normative criteria are the relevant ones but rather that the relevant criteria are normative.[124]

Fallon's study of the role of "potential 'referents' for claims of legal meaning" (hereinafter, "meaning") offered a new way of understanding interpretive choice by focusing primarily on alternative meanings rather than on alternative methods of interpretation. Choosing a method of interpretation entails determining which meaning is the relevant one. Normative reasons matter in choosing the relevant meaning.

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114. Fallon, Meaning of Legal Meaning, supra note 5, at 1239.

115. Id.

116. Fallon says that "the champions of competing theories—especially textualism and originalism—sometimes appear to assume that there is a linguistic fact of the matter about what statutory and constitutional provisions mean and to argue that their theories reveal that fact." Id. at 1240.

117. See infra note 125 and accompanying text.

118. Fallon, Meaning of Legal Meaning, supra note 5, at 1287.

119. Id. at 1243.

120. Id. at 1300; see also Fallon, How to Choose a Constitutional Theory, supra note 5, at 558–59.

121. Fallon, Meaning of Legal Meaning, supra note 5, at 1300.

122. Id (citing Fallon, How to Choose a Constitutional Theory, supra note 5, at 558–59).

123. Id.

124. A separate question that Fallon raises is whether choice of meaning should be undertaken categorically or on a case-by-case basis. Fallon favors the latter. See id. at 1242–43, 1303–05; see also infra section III.C.

Why? Here the residual approach kicks in, as the answer seems to lie in the limitations of linguistic reasons. While several meanings are linguistically possible, linguistics does not determine a single one. Thus, Fallon explains that

> there frequently is no single, linguistic fact of the matter concerning what statutory or constitutional provisions mean. Rather, there can be a multitude of linguistically pertinent facts, generating different senses of meaning, which in turn support a variety of claims. In cases of conflict or uncertainty, it is sensible enough to talk about what disputed provisions mean. But the question of practical importance is what judges or other officials ought to do or how they ought to resolve hard cases *when no sense of meaning controls as a matter of linguistic necessity*.[125]

On this account, there are two relevant linguistic facts that shape interpretive choice. First, there is a plurality of linguistically possible meanings. Second, none of these meanings is controlling as a matter of linguistic necessity. Hence normative reasons are needed to settle the issue. Linguistic reasons run out.[126] This is the residual approach at work.

2. *The Practical Nature of Interpretive Choice*. — The main reason why normative reasons matter for interpretive choice is not that other reasons run out. Normative reasons matter for interpretive choice because interpretive choice is practical[127] and, as such, is governed by normative reasons.

This presupposes a distinction between the theoretical and the practical. "[T]here is a difference between theoretical reasoning and practical reasoning and a corresponding difference between theoretical reasons and practical reasons."[128] The basic premise of the normative choice thesis is that legal interpretation is the action of someone for a practical purpose, be it deciding a case, declaring what the law is, passing legislation coherent with other norms, or something else. Interpretation is part of this practical enterprise (of deciding a case, declaring the law, passing legislation harmonious with other norms, etc.). In this sense, interpretive choice in law is always situated and practical. It is not a choice in the abstract but rather the choice of someone, in some specific role, and for some practical purpose.

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125. Fallon, Meaning of Legal Meaning, supra note 5, at 1272 (emphasis added); see also id. at 1241 ("As a result, linguistic analysis and the philosophy of language lack the tools to settle controversies in legally disputable cases."); id. at 1273 ("So far I have argued that there are multiple possible senses of meaning and that the linguistic norms bearing on conversational meaning will frequently fail to identify one as uniquely correct without a further judgment of salience or practical appropriateness.").

126. It would seem as if, for Fallon, legal reasons also constrain interpretive choice. See supra note 119 and accompanying text.

127. See Jordan, Constitutional Anti-Theory, supra note 5, at 1550–59 (emphasizing the practical character of "constitutional reasoning"); infra section II.D.2.

128. Gilbert Harman, Practical Aspects of Theoretical Reasoning, *in* The Oxford Handbook of Rationality 45, 46 (Alfred R. Mele & Piers Rawling eds., 2004).

The enterprise, then, falls under the domain of practical reason. Practical reason concerns itself with "the question of what one is to do,"[129] rather than with what to believe or what is the case.[130] The question presupposes that there are alternatives as to what to do (including doing nothing), and thus practical reason includes reasoning as to what one should choose to do.[131] It concerns itself, thus, with reasons for choice and action—practical reasons[132] or (used synonymously here) normative reasons.[133] That an action is good (or bad), virtuous (or vicious), or has good (or bad) consequences, is each a practical reason in favor of (or

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129. R. Jay Wallace & Benjamin Kiesewetter, Practical Reason, Stan. Encyc. Phil. (Edward N. Zalta & Uri Nodelman eds., Oct. 13, 2003), https://plato.stanford.edu/entries/practical-reason/ [https://perma.cc/XY69-AVP2] (last updated July 31, 2024). This is enough of a characterization here. The literature on practical reason is vast and accounts of practical reasoning differ on specific aspects. For example, is the conclusion of practical reasoning properly an action, an intention, or a deontic statement? See Joseph Raz, Introduction, *in* Practical Reasoning 1, 5 (Joseph Raz ed., 1978) [hereinafter Raz, Practical Reasoning] (posing this question and presenting the alternatives). Yet the characterization of practical reason as concerned with deciding what to do seems general enough to capture the core of the idea for different traditions. See, e.g., Onora O'Neill, Kant: Rationality as Practical Reason, *in* The Oxford Handbook of Rationality 93, 94 (Alfred R. Mele & Piers Rawling eds., 2004) (writing in the Kantian tradition that "[a]gents use practical reasoning to shape or guide their future action"); Thomas Osborne, Practical Reasoning, *in* The Oxford Handbook of Aquinas 276, 276 (Brian Davies ed., 2012) (writing in the Aristotelian-Thomistic tradition that "[p]ractical reason is distinct from speculative reason because it is ordered to some work or end"); see also infra note 130.

130. The distinction is a common one. See G.E.M. Anscombe, Intention 60 (2d ed. 1963) ("There is a difference of form between reasoning leading to action and reasoning for the truth of a conclusion."); Gilbert Harman, Practical Reasoning, 29 Rev. Metaphysics 431, 431 (1976) ("Let us distinguish practical reasoning from theoretical reasoning in the traditional way: practical reasoning is concerned with what to intend, whereas theoretical reasoning is concerned with what to believe."). The distinction doesn't entail that there is no relation or similarity between the two. See, e.g., Anscombe, supra, at 60 ("Aristotle however liked to stress the similarity between the kinds of reasoning . . . .").

131. For characterizations of practical reason in terms of choice see, e.g., John Finnis, Foundations of Practical Reason Revisited, 50 Am. J. Juris. 109, 109 (2005) [hereinafter Finnis, Foundations of Practical Reason Revisited] ("Doing law immerses one both in practical reason's activities, thinking about what to choose and do . . . ."); John Finnis, On Reason and Authority in *Law's Empire*, 6 Law & Phil. 357, 358 (1987) (referring to "practical reasoning" as "reasoning towards choice and action").

132. For a characterization of the relation between practical reasons and practical reasoning, see Raz, Practical Reasoning, supra note 129, at 5; see also Finnis, Foundations of Practical Reason Revisited, supra note 131, at 110 (referring to "practical" reasons as "reasons for action").

133. See, e.g., Robert Audi, Reasons for Action, *in* The Routledge Companion to Ethics 275, 277 (John Skorupski ed., 2010) ("In ethical theory, a main focus of analysis is normative reasons for action. These are also called *practical reasons* . . . ."). On some accounts, normative reasons are one kind of "practical reasons." Practical reasons would include both "reasons that explain why someone did something ('motivating reasons'), and the reasons why she should (or should not) have done it ('normative reasons')." David McNaughton & Piers Rawling, Motivating Reasons and Normative Reasons, *in* The Oxford Handbook of Reasons and Normativity 171, 171 (Daniel Star ed., 2018) (footnote omitted). Here, practical reasons refer to normative reasons in this strict sense.

against) that action.[134] If engaging with some legal text is part of the enterprise we are undertaking, and if there are, in fact, several ways we could go about carrying out that enterprise, then we will inevitably face a choice. We need to choose what we will do: how we will engage with that legal text in the context of this particular enterprise. This is interpretive choice.

The point is so simple that it can be easily missed. The rationale for why normative reasons play a role in interpretive choice is not that non-normative reasons leave a gap and can't do all the work alone; rather it's the nature of the enterprise. Normative reasons matter for interpretive choice not because everything else fails, but because interpretive choice is practical.

Does this view contradict theories that hold that the activity of interpretation is not practical?[135] Theories that say, for example, that the point of interpretation is to "seek[] legal provisions' contributions to the content of the law"[136] or determine the linguistic meaning of a text?[137] No. The normative choice thesis is about interpretive choice, not about interpretation.[138] It is agnostic as to what interpretation is and whether it is a practical or theoretical ("empirical") activity.[139] Even if interpretation (on the best theory) were not practical—not about what to do but about what the case is regarding a particular text or fact—interpretive choice always is. The practical nature of the latter doesn't entail the practical nature of the former, and the nonpractical nature of the former wouldn't entail the nonpractical nature of the latter.[140] Interpretive choice concerns the choice of a method of interpretation, but it's not interpretation itself. This makes the relation between a theory of interpretation and a theory of interpretive choice more complex than it would seem.[141]

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134. Debates at the level of moral and political theory on what are truly relevant normative reasons span over millennia and are too vast to mention here. For a survey, see Alan Donagan, The Theory of Morality 75–209 (1977) (considering how views of normative considerations in political and moral philosophy have changed over time).

135. Thank you to Bill Watson for raising this question.

136. Greenberg, Natural Law, supra note 5, at 127.

137. As is often conceived regarding the interpretation–construction distinction. See infra notes 256–259 and accompanying text.

138. See infra section II.D.1.

139. For an example of the contrast between normative and theoretical (or empirical) accounts of interpretation, see Grove, Testing Textualism, supra note 15, at 1073 (contrasting empirical and normative accounts of textualism to determine ordinary meaning).

140. See infra section II.D.3.

141. See infra section II.D.1.

C. *The Negative Thesis*

The conclusion of the previous sections is that normative reasons matter. How about non-normative reasons? They do not count by themselves for interpretive choice. This is the negative thesis.

This section surveys each of the non-normative reasons explained in Part I. For each, it explains why it has no independent weight in deliberation on interpretive choice.

1. *Conceptual Reasons*

a. *Why Conceptual Reasons Don't Matter.* — Imagine that in our society debates on constitutional interpretation are about just three methods of interpretation: methods X, Y, and Z. Each method is supported by one normative reason in the form of a single value realized by each method. Method X realizes the value of substantive justice. Method Y realizes formal values associated with the rule of law, such as legal certainty. Method Z realizes the value of democracy.[142] An influential theory holds that the "true" concept of interpretation only includes X and Y. On this theory, while X and Y are methods of interpretation, Z isn't. Z is only a "so-called" method of interpretation. Does that make any difference for interpretive choice?

No. Conceptual delimitation shouldn't affect choice.[143] This becomes clear if we situate the decision. As mentioned above, these methods of interpretation are not proposed as mere academic exercises but as proposals for choice and action in the practice of law. Assume that a judge, Judge A, has to decide a constitutional case, and thus has to choose whether to adopt X, Y, or Z to interpret the Constitution. If method Z would not fall under the "true" concept of interpretation, would this

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142. Assuming that these are all distinctive values and thus are not conflated in a way that makes them indistinguishable, as they often are. See Isaiah Berlin, Liberty 172 (Henry Hardy ed., 2d ed. 2002) ("Everything is what it is: liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quiet conscience."); John Tasioulas, The Rule of Law, *in* The Cambridge Companion to the Philosophy of Law 117, 117–19 (John Tasioulas ed., 2020) (explaining that a broad definition of "rule of law" ignores the distinct elements that constitute it as well as conflicts between those elements); John Tasioulas, The Inflation of Concepts, Aeon (Jan. 29, 2021), https://aeon.co/essays/conceptual-overreach-threatens-the-quality-of-public-reason [https://perma.cc/U3VC-BUGC] (introducing the notion of "conceptual overreach" and arguing that it leads to obscuring the distinctness of each value and the possibility of conflicts between values).

143. See Kent Greenawalt, Realms of Legal Interpretation: Core Elements and Critical Variations 95 (2018) (claiming that "the central focus should be on the question of what judges *should* do rather than on what arguably counts as the edges of 'legal interpretation'"); see also id. at 2, 3, 80, 83, 85–86, 90 (insisting on this claim); Greenberg, Natural Law, supra note 5, at 130 ("It is beside the point whether interpretation properly so-called must seek to identify the speaker's intentions; if legal interpretation is not a form of interpretation by this criterion—just as starfish are not fish and computer viruses are not viruses—then so be it."); Primus, supra note 5, at 181 ("Assuming that the content of the decisionmaking process is the same no matter what label we put on it, the fact that we say 'interpretation' as opposed to 'shmerpretation' will have no impact on constitutional decisions.").

change the alternatives available to Judge A, or the reasons bearing on Judge A's choice? Surely not. The reason for choosing Z is that it realizes the value of democracy; Z will realize that value whether it is a method of interpretation or only a "so-called" method of interpretation. To the extent that the value of democracy is relevant for interpretive choice, the choice that A faces and the reasons that bear on that choice are the same, regardless of whether Z is a method of interpretation or only a "so-called" method of interpretation. If Judge A's concept of interpretation were more capacious and included Z, the choice and the reasons bearing on that choice would be the same as if it were less capacious and excluded Z. It would be unreasonable for A to restrict deliberation to X and Y only because Z is a "so-called" method of interpretation.

The next two subsections answer two objections to this view. The first is that this view does away with the idea of interpretation. The second is that this view confuses a theory of interpretation with a theory of adjudication.

b. *Doing Away With Interpretation.* — On the normative choice thesis, conceptual reasons do not constrain interpretive choice. It's not only that interpretation isn't one thing (Sunstein's "there is nothing that interpretation 'just is'" argument[144]), but that it simply doesn't matter what interpretation is.

This thesis clashes with two intuitions. The first is that interpretation surely includes some things and not others. Bouncing a ball and the color blue are not interpretation. The second intuition is that this must somehow matter, because we do in fact rely on the idea of interpretation when we deliberate as to what to do. So, for example, you can choose whether to interpret an unjust law, or, instead, simply not apply it or disobey it. Isn't that distinction important?

The first intuition is compatible with the normative choice thesis. The normative choice thesis is not a thesis about the meaning of interpretation. It claims neither that the idea of interpretation is boundless, nor that it is restricted to some methods of interpretation. It can accept that some things fall under the (best) concept of interpretation, and some don't. It simply claims that this categorizing has no significance for interpretive choice.

This brings us to the second intuition. The second intuition does seem opposed to the normative choice thesis. The intuition is that "what interpretation is" does play a role in deliberation on interpretive choice. For a judge, the fact that some course of action is not a form of interpretation should count against it. If in Judge A's choice, alternative X is "interpretation," and alternatives Y and Z are "reading into the law whatever I want," this should be a reason for choosing X. If so, conceptual reasons do play a role in interpretive choice.

144. See supra notes 96–97 and accompanying text.

There is something to this objection, but it ultimately fails. This becomes clear if we ask why the fact that one form of action is "interpretation" and the other "reading into the law whatever I want" makes a difference in deliberation. The reason is that we assume that Judge A has some reason to follow the law in a particular way that is incompatible with "reading into the law whatever I want." That reason can be, for example, the value in respecting the democratic authority of whoever passed that law,[145] or the injustice of submitting a person to the "arbitrary will" of an official,[146] or the wrongness of violating the oath of office.[147] But all these are normative reasons. They are not about any truth about the concept of interpretation, but about values to be realized and fulfilled.[148]

Here, the idea of interpretation seems to be playing some role, but it is not the role of an independent conceptual reason for interpretive choice. The role is parasitic on normative considerations, and it is the following: The concept of "interpretation" is highlighting some features of certain courses of action—features that purely *normative* reasons make relevant to interpretive choice.[149] For example, a concept of "interpretation" centered on authorial intent can guide interpreters toward ways of engaging with a statute that would track the will of the lawmaker and so promote the values associated with democratic authority. Other ways of engaging with that statute—including ones that fall under

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145. See Scalia, A Matter of Interpretation, supra note 51, at 17 (arguing against intentionalism and for textualism on the basis that it is "incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated").

146. See Endicott, Legal Interpretation, supra note 27, at 110 (referring to the "best feature of a concern for the rule of law: the determination not to subject parties and the community to the arbitrary will of an official").

147. See supra note 66 and accompanying text.

148. As suggested in Primus, supra note 5, at 181 ("[W]hy might the meaning of 'interpretation' matter? One possibility is that our constitutional culture's use of that word provides a clue about its underlying values.").

149. Below, this Article refers to this as a "practical" concept of interpretation. See infra section II.D.1. The normative choice thesis, while opposing the idea that conceptual reasons have any independent weight in normative choice, doesn't oppose all uses of the concept of interpretation—neither theoretical nor practical. For example, description of a course of action deemed valuable can play an important role in law in, for instance, coordinating action. See Urbina, It Doesn't Matter What "Interpretation" Is, supra note 94, at 355 (explaining the same). On the role of law in coordinating judicial approaches to, for example, ways of engaging with sources or applying rights, see Francisco J. Urbina, How Legislation Aids Human Rights Adjudication, *in* Legislated Rights: Securing Human Rights Through Legislation 153, 153–56 (Grégoire Webber, Paul Yowell, Richard Ekins, Maris Köpcke, Bradley W. Miller & Francisco J. Urbina eds., 2018) [hereinafter Urbina, Human Rights Adjudication]. On law as coordination, see generally Maris Köpcke, Legal Validity: The Fabric of Justice 69–88 (2019) (explaining how law and legal validity allow for "convergence"); John Finnis, Law as Coordination, *in* Philosophy of Law: Collected Essays Volume IV 66, 66 (2011) (explaining how law achieves coordination).

the description of "reading into the law whatever I want"—might undermine that value and therefore be unappealing.

Thus, that something is or is not a method of "interpretation" may feature in an agent's deliberation about interpretive choice, ostensibly providing reasons for and against a method of interpretation. But this reference to "interpretation" could respond to two different kinds of reasons. First, it could respond to conceptual reasons, if what is doing the work is a concept of interpretation arrived at through speculative or theoretical reasoning concerning what is the nature or idea of interpretation. Second, it could respond to normative reasons, which include singling out normatively significant characteristics of a given course of action in the way explained in the previous paragraph. The second intuition is plausible because it trades on this ambiguity, but it is also this ambiguity that makes it fail as an objection to the normative choice thesis: On one reading, the intuition is mistaken, and on the other, it is consistent with the normative choice thesis.

c. *Confusing a Theory of Interpretation With a Theory of Adjudication.* — Another challenge to the view that conceptual reasons don't have independent weight in interpretive choice draws on a familiar distinction between a theory of interpretation and a theory of adjudication.[150] The challenge would go along the following lines: A theory of interpretation tells us what interpretation is; a theory of adjudication tells us what judges should do in deciding cases.[151] The normative choice thesis confuses the two.[152]

The challenge relies on a distinction between a theory of what is (say, the nature of interpretation, or what interpretation really is) and a theory

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150. Note that the objection is too narrow. The normative choice thesis extends to all interpretive choices in law, not only to judicial ones.

151. A classic statement of this distinction is Gary Lawson's. See, e.g., Gary Lawson, On Reading Recipes . . . and Constitutions, 85 Geo. L.J. 1823, 1823 (1997) ("In large measure, the backwardness of much modern constitutional theory rests on a failure to distinguish theories of interpretation from theories of adjudication." (emphasis omitted)). Different authors seem to express a similar idea through different distinctions. See J. Joel Alicea, Liberalism and Disagreement in American Constitutional Theory, 107 Va. L. Rev. 1711, 1773–74 (2021) ("The most plausible arguments in favor of interpretation-just-is-originalism acknowledge something like this distinction between the linguistically correct interpretation of the text and the application of the text to cases and controversies."). This subsection works with a thin version of the distinction. A thicker version would claim that "interpretation" in the distinction (either in theory or activity) is just some specific form of originalism. But then the distinction wouldn't pose a challenge to anything, because it would be question-begging. See Michael C. Dorf, Recipe for Trouble: Some Thoughts on Meaning, Translation and Normative Theory, 85 Geo. L.J. 1857, 1857 (1997) (arguing that "our failure to distinguish between interpretation and adjudication reflects a fundamental disagreement between Lawson and us mainstream scholars, rather than mere sloppiness on our part").

152. See Ekins, Objects of Interpretation, supra note 18, at 20 (arguing that "Sunstein confuses a theory of adjudication with a theory of constitutional meaning and interpretation").

of what ought to be (what judges should do).[153] The normative choice thesis takes this distinction seriously. If the distinction entails that "what judges should do" doesn't affect the "best" philosophical understanding of the true nature of interpretation, then the latter should also not affect the former. The normative choice thesis is about the former. As explained in the previous subsection, the normative choice thesis does not oppose any conceptual (theoretical) understanding as to what is "interpretation." It only holds that that enterprise has no inherent significance for interpretive choice. This position is, if anything, more consistent with a distinction between a theory of interpretation and a theory of adjudication than any alternative.

Perhaps the challenge is not about distinguishing "theories," but different activities: the *activity* of determining the meaning of the law and the *activity* of determining what to do with the law once its content is determined.[154] Does this distinction pose a challenge to the normative choice thesis? No. The normative choice thesis counsels against a possible mistake that this distinction—or a distorted understanding of it—might invite. The mistake is to isolate an element of the enterprise of legal decisionmaking (namely, interpretive choice) from practical deliberation and subject it to some other consideration (such as a conceptual consideration of what interpretation really is). The mistake is in the inability to see that adjudication entails more than one moment of (practical, normative) choice. Just as there is a choice at the level of "adjudication" regarding what to do with the law (once its content has been determined), there is a choice at the level of "interpretation" regarding how to go about determining the meaning of the law. To put it in the terms of a distinction recently formulated by Sachs: It's not only that there is a choice in how to act *given* the law, but there is also an inescapable choice in how to determine the meaning of law so as to act *according* to law.[155] Both choices are real and practical.[156] Being able to draw a distinction between interpretation and adjudication is no grounds for confining all the practical reasoning to the latter category.

Nothing said here denies that theories of interpretation are legitimate or important, even if they are theoretical rather than practical. The intellectual enterprise ("theory") aimed at understanding things such as

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153. The locus classicus for this distinction is 1 David Hume, A Treatise of Human Nature 302 (David Fate Norton & Mary J. Norton eds., Oxford Uni. Press 2007) (1740); see also G.E. Moore, Principia Ethica 62 (Thomas Baldwin ed., rev. ed. 1993) (1903). For a critical discussion, see Alasdair MacIntyre, After Virtue: A Study in Moral Theory 57–59 (3d ed. 2007).

154. Note also that there may be different activities bearing on the determination of legal content, as in the interpretation–construction distinction. See infra section II.D.3.

155. See Stephen E. Sachs, According to Law, 46 Harv. J.L. & Pub. Pol'y 1271, 1272 (2023) [hereinafter Sachs, According to Law] (distinguishing between "what we ought to do according to a legal system" and "what we ought to do given the existence of that legal system" (emphasis omitted)).

156. See infra sections II.D.1–.2.

the nature of the knowledge derived from interpretation, or the kind of truth at which it aims, or the different activities it may involve,[157] is theoretical—and legitimate and important. Furthermore, the view defended here is compatible with theories holding that some aspect—or all of the *activity* one refers to as "interpretation"—is not practical but theoretical (for example, that "interpretation" is only about determining linguistic meaning.)[158] This Article is agnostic as to the definition of legal interpretation, whether it is a practical or a theoretical intellectual activity, and the proper role of a theory of interpretation. But, as explained below, interpretation—whatever it is—is different from interpretive choice. Interpretive choice is about choosing what one should do, how one should engage with a particular legal text; therefore, it is inescapably practical.[159] A theory of interpretive choice needs to capture this. Theorists who wish to advocate for the adoption of a particular approach to interpretation by practitioners are participating in the practical enterprise of deliberating on how someone should choose.[160]

2. *Linguistic Reasons*

a. *Linguistic Reasons Don't Determine Interpretive Choice.* — Linguistic reasons also don't count by themselves for interpretive choice. Of the different alternative meanings that interpretive choice could pick, there is no linguistically controlling alternative independent of normative reasons. What makes a meaning salient is that it is the most appropriate given the applicable normative reasons.[161]

Consider the following observation from Baude and Sachs:

> [T]he right way to read a text, in a given circumstance, depends on our reasons for reading it in the first place. To use Alexander's example, one spouse following the other's shopping list might care only about author's intent—knowing, say, that "cherries" really means "cherry tomatoes." But an FDA bureaucrat reviewing a nutrition label ("Ingredients: Cherries") would put aside any special knowledge of the author's past intentions, caring only about what the likely future reader would

157. See infra section II.D.3 (on the interpretation–construction distinction).

158. As conceived in the interpretation–construction distinction. See infra section II.D.3.

159. See infra section II.D.1.

160. Though note that, while only normative reasons can justify the advice the theorist is giving to a practitioner, theoretical reasoning may aid in the exposition of these reasons and of the practical reasoning of which they are part. See John Finnis, Reason in Action: Collected Essays 1, 8 (2011) (holding, in the context of explaining the relation between theoretical and practical reasoning, that "practical reason's activities in directing this or any other activity are subjects for reflective scrutiny and philosophical contextualization").

161. This Article draws from Fallon in framing interpretive choice as a choice between possible "meanings." See supra section II.B.1.b (discussing Fallon's view).

> understand. . . . We need to know which aspects of the text *the law* cares about, whether or not they truly qualify as "meaning."[162]

Baude and Sachs focus on the reasons that "the law cares about,"[163] but the insight applies to normative reasons generally.[164] Assume there is a bureaucrat charged with determining whether the ingredients label on a product accurately represents its contents. The bureaucrat has reasons to care about the public's understanding, for reasons related to fulfilling her function ("ensuring that ingredient labels reflect their products' content"), which in turn is justified by further reasons ("this promotes public health"). These are normative reasons. The meaning that matters for this bureaucrat is one that tracks public understanding—not because of some truth about language, but because this is the meaning most supported by normative reasons.

The bureaucrat's interpretive choice seems unproblematic. Baude and Sachs present it as intuitive, and it is. But why? Because there are normative reasons to attend to a meaning that tracks the public's understanding, and there seems to be no normative reason to do otherwise. Note, though, that it is not intuitive that there are no linguistic, conceptual, or theory reasons to do otherwise. If anything, the intuition should be the opposite, given that some of those reasons (say, linguistic reasons) are usually canvassed to defend methods of interpretation that don't track the public's understanding, such as intentionalism.[165] If our intuition is that this is an easy interpretive choice, then that intuition suggests that non-normative reasons do not matter for interpretive choice.

Consider what would happen if there *were* opposing normative considerations. A legislature committed to intentionalism passed a law prescribing that bureaucrats should consider intended meaning exclusively. The label says "ingredients: cherries," but this is a product from Xodonia, where people say "cherry" when they mean "wheat." The law, then, requires the bureaucrat to read "cherry" as meaning "wheat." Here, the bureaucrat would face a dilemma: Either follow the law and deem the label accurate (since the meaning of "wheat" on the label coincides with the actual ingredient in the product, namely, wheat) or reject it, thus better fulfilling other normative considerations (say, protecting celiacs, who may consume the product on the mistaken belief

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162. Baude & Sachs, The Law of Interpretation, supra note 27, at 1090 (footnotes omitted) (citing Larry Alexander, The Objectivity of Morality, Rules, and Law: A Conceptual Map, 65 Ala. L. Rev. 501, 506 (2013)).

163. Id. (emphasis omitted); see also supra section I.D.

164. See Dorf, supra note 151, at 1858 ("Whether we equate meaning with original public meaning, or with speaker's meaning, or with a dynamic conception of meaning, or with something else, depends on why we care about the meaning of whatever it is we are interpreting.")

165. In fact, Alexander's hypothetical of cherry tomatoes is a linguistic argument in defense of intentionalist interpretation. See Larry Alexander, The Objectivity of Morality, Rules, and Law: A Conceptual Map, 65 Ala. L. Rev. 501, 506 (2013).

that it doesn't contain wheat). Note that now the example went from easy to hard. This is because suddenly this is not a conflict of normative against non-normative reasons, but a conflict between different normative reasons: following the law (and whatever values are realized through that)[166] and protecting health. The point here is not that sometimes one may disobey the law.[167] What the hypothetical is meant to illustrate is that normative reasons make a difference to interpretive choice, and non-normative reasons (including linguistic reasons) don't. Only normative reasons can make linguistic facts relevant for interpretive choice.[168]

b. *Linguistic Reasons Don't Constrain Interpretive Choice*. — The point of the example above was to show that linguistic reasons can't make a meaning salient: only normative reasons can. It could be argued that linguistic reasons perform a different role: constraining interpretive

166. On law as a normative reason, see infra section II.C.3.a. On the variable authority of law, see infra section III.C.2.a.

167. For a discussion of civil disobedience, see John Rawls, The Justification of Civil Disobedience, *in* Collected Papers 176, 176 (Samuel Freeman ed., 1999) [hereinafter Rawls, The Justification of Civil Disobedience].

168. Some prominent arguments for intentionalism seem to implicitly acknowledge this. See Alexander, Simple-Minded Originalism, supra note 48, at 87 ("*[G]iven what we accept as legally authoritative*, the proper way to interpret the Constitution . . . is to seek its authors' intended meanings . . . ." (emphasis added)); see also Alexander, Telepathic Law, supra note 34, at 144 ("[Originalism's] position is that whoever has lawmaking authority, it is their intended meaning that governs." (emphasis omitted)). True, Alexander offers several linguistic reasons in defense of intentionalism. See Alexander & Prakash, supra note 46 and accompanying text. But, despite all linguistic reasons in favor of intentionalism, one must accept that there are other possible meanings "besides the intended meaning of its author. There is its meaning in, say, standard English . . . . There is its 'original public meaning.' And so on." Alexander, Simple-Minded Originalism, supra note 48, at 88 (footnote omitted). His reaction to this is that, in adopting any of these other meanings, "[O]ne has not so much departed from the original, authorially intended meaning as merely substituted hypothetical authors for the real ones." Id. That last point presses the question of why privilege "real authors" for "hypothetical ones." The answer is in the normative premise: authority.

This is clearer in Ekins's theory of legislative intention, which ultimately relies on his seminal theory of legislation. See Ekins, Legislative Intent, supra note 1. In his critique of Sunstein, Ekins offers linguistic reasons for intentionalism that seem to ultimately rely on normative reasons such as authority. He says:

> [I]t bears mentioning that the grounding for a theory of interpretation need not be either the nature of interpretation or the consequences of adopting the theory. The grounding might instead be the relationship of authority between lawmaker and subjects, taken together with insight into the nature of language use, which the lawmaker employs to exercise authority.

Ekins, Objects of Interpretation, supra note 18, at 10–11. This presents things in a way consistent with the normative choice thesis: If authority is a relevant normative reason, linguistic reasons matter to the extent that they bear on how to best fulfill that normative reason.

choice.[169] In the previous example, both alternatives (reading "cherries" to mean "cherries" or to mean "wheat") are linguistically possible. Perhaps none determines choice, but choice is about these linguistically available meanings, and so they constrain choice.[170]

Not so. Linguistically available meanings don't constrain interpretive choice. Our bureaucrat is now tasked with applying a statute that allows her to deny entry "only" to "cherries." A shipment with poisoned avocados comes in, and it turns out that because of some public emergency, no other agency or individual is capable of stopping its entry. Once it enters the country, there is no way to stop their distribution and consumption. Our bureaucrat is the last line of defense. Can she stop the entry of the poisoned avocados? There are a range of alternatives. She could: (a) read "cherries" in the statute to mean cherries, and not avocados, and on that reading she doesn't have the power to deny entry to the poisoned avocados. In these circumstances she would face other choices: (a') illegally and overtly (given her determination of the meaning of the law) deny entry to the avocados anyway; or (a'') comply with the law and allow entry to the avocados. But she could also (b) (perhaps implausibly, creatively, flexibly, unfaithfully, etc.) read "cherries" to include "avocados;" or (c) read "only" in the statute as "not only"; and she could also (d) draw from the legal power to deny entry to "cherries" a general principle to deny entry to other fruits.[171]

Some of these alternatives are linguistically plausible readings of the statute, and others aren't ("cherries" are not avocados). But all are alternatives for action: They are practically available to our bureaucrat. Crucially, it's not the case that only (a) (and the subsequent options of (a') and (a'')) are available. The bureaucrat may have strong reasons not to engage in the Humpty Dumptyism of (b) and (c)—what would legal practice become if everyone did! But under some circumstances, that may be the preferable choice. Preserving lives may be an overriding consideration (so, alternative (a)+(a'')) would be out of the picture); overtly challenging the law ((a)+(a')) would lead to judicial review and it would put courts in the position of either sanctioning illegality or endangering the population; drawing a general principle from the statute (alternative (d)) may permanently expand the discretion of the bureaucrat—but our bureaucrat knows that some of her colleagues may use that power arbitrarily. "Misinterpreting" the law (as in (b) and (c)), may be the least bad option—it would allow the bureaucrat to uphold

169. As seen above, Fallon seems to conceive of interpretive choice as constrained in this way. See supra note 125 and accompanying text; see also Dorf, supra note 151, at 1860 ("When our linguistic practices leave an open space, something else must help us decide whether to prefer originalism or some other interpretive methodology to fill it.").

170. Thank you to Lawrence Solum for pointing this out.

171. Alternative (d) would entail the elaboration of doctrine going beyond the legal meaning of the text. That is part of the choice too: to settle for the elaboration of legal meaning of a text or go beyond that and elaborate legal doctrine. See infra note 263.

some sense of legality (avoiding overt disobedience of the law) and restrict whatever legal deficiency is in this alternative to this particular situation (or to a narrow set of circumstances involving avocados), all while still protecting lives.

Now, all this depends on circumstances.[172] The point is not to make a case for the best choice here but rather to illustrate how the alternatives actually and practically available to the bureaucrat go beyond linguistically available meanings.[173]

In fact, meaning can follow normative reasons, just as normative reasons can follow meaning. If no linguistically available meaning is satisfactory, creating a new, normatively appealing meaning is always a possibility and thus an alternative in interpretive choice. Baude and Sachs anticipate this in replying to Fallon:

> If the courts are allowed to produce new meanings for normative reasons by using the traditional rules, then why can't they produce other, normatively better meanings using other, normatively better rules? If the canons are descriptively false as accounts of legislative practice, then the courts' continued use of them seems to license other descriptively false approaches, too—with only normative preferences to guide which falsehoods the courts tell.[174]

Baude and Sachs are right in drawing this implication of Fallon's views, but wrong in seeing in it a deficiency.[175] The invention of a new meaning is not only possible but can be normatively justified.

In fact, at least on some accounts, the history of originalism and textualism seems to be the history of the invention of a new meaning (and a corresponding interpretive method) for normative reasons. The next Part touches on the history of originalism, so let's focus here on textualism.[176] Take Baude's lauded Scalia Lecture.[177] Baude claimed that "textualism has won, and we have Justice Scalia to thank for it."[178] Justice Scalia and others reacted to a status quo characterized by "open and notorious anti-textualist opinions."[179] Baude acknowledged that "it is

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172. See infra section III.C.1.

173. The example also illustrates that there is a choice additional to following or disobeying the law. See supra section II.C.1.c; see also infra section II.D.1–.2.

174. Baude & Sachs, The Law of Interpretation, supra note 27, at 1093.

175. The talk of "falsehoods" here is likely excessive. It depends on how transparent the court (or other interpreters) is regarding what they are doing. But this Article doesn't pursue this argument.

176. See infra section III.C.3.

177. William Baude, The 2023 Scalia Lecture: Beyond Textualism?, 46 Harv. J.L. & Pub. Pol'y 1331 (2023) [hereinafter Baude, Beyond Textualism]. For a longer history of textualism, stressing commonalities between modern and previous versions of textualism, see Tara Leigh Grove, The Misunderstood History of Textualism, 117 Nw. U. L. Rev. 1033, 1137–39 (2023).

178. Baude, Beyond Textualism, supra note 177, at 1332.

179. Id.

possible that to get us to this place, Justice Scalia sometimes made textualist claims that were a *bit* overbroad," such as "[coming] close to insisting that the use of legislative history was completely illegitimate."[180] But there was a point to this exaggeration: "[T]hat overstatement may have been the best way to make the point, practically speaking, in the world Justice Scalia confronted."[181] Baude spoke of the "textualist revolution,"[182] and the term is apt: Revolution entails both a break with the past and success in bringing about a new status quo.[183] The new dominant approach, while "correct and salutary,"[184] entailed some undesirable consequences. Textualism, on Baude's telling, is a strong purge that removes the good with the bad. Its excessive focus on text risks ignoring considerations of unwritten law that were ordinarily taken into account before the advent of textualism—including a law of interpretation and background principles.[185] The "art" of deciding cases "that are not governed by statute . . . has been lost," and, for all its virtues, "[t]extualism has helped it become lost, and we need to help recover it."[186]

The story seems to highlight something artificial about textualism. Its admitted narrowness was meant to respond to perceived deficiencies: a lax approach to legal materials, judicial aggrandizement, etc. To address these problems, people like Justice Scalia put forward—one could say—an idea of legal meaning that was unprecedented in its exclusive focus on textual meaning. Until then, the "meaning" of statutes had never been exclusively that meaning. And yet it was necessary for Justice Scalia and others to put forward such a meaning of statutes, one intentionally stunted, because only then it was possible to correct some vices of legal practice.

Perhaps not everybody will agree with this reconstruction of the story. But it's at least plausible. And if it's plausible, it's possible, which is all that is needed to illustrate how legal meaning (and methods of interpretation) can follow (and not only precede) normative considerations. In the absence of an alternative meaning (and a corresponding interpretive method) in the existing legal practice that could sufficiently limit judicial discretion, those who saw in such discretion a deficiency (a normative judgment) had (normative) reasons to come up with an alternative. Thus, a new and, in some sense, artificial form of meaning can be born to satisfy practical needs.

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180. Id. at 1334 (citing Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring)).

181. Id.

182. Id.

183. See Hanna Arendt, On Revolution 35 (1963) (referring to revolutions as bringing about a "new beginning").

184. Baude, Beyond Textualism, supra note 177, at 1332.

185. Id. at 1336 ("We need to supplement textualism with this unwritten law, law that governs both interpretation and background principles against which interpretation takes place.").

186. Id. at 1344.

3. *Legal Reasons.*

a. *Legal Reasons Are Normative Reasons.* — What kinds of reasons are legal reasons? Greenberg lists them in their own category, separate from conceptual, linguistic, and normative reasons.[187] Professor Michael Ramsey, in a blog post, contrasts legal reasons with normative reasons in referring to Stephen Sachs's work.[188] Ultimately, though, legal reasons are best understood as a type of normative reason.[189] From the point of view

187. See Greenberg, Legal Interpretation, supra note 5, § 5.1. After explaining conceptual, linguistic, and normative reasons, Greenberg adds the following: "Much less common is an argument that a particular method of interpretation is required by substantive legal standards." Id. § 5.1 n.31.

188. See Michael Ramsey, Stephen Sachs: Originalism as a Theory of Legal Change, Originalism Blog (Sept. 23, 2014), https://originalismblog.typepad.com/the-originalism-blog/2014/09/stephen-sachs-originalism-as-a-theory-of-legal-change-michael-ramsey.html [https://perma.cc/PA6K-LSKW] ("It's a very ambitious attempt to justify originalism by reference to legal practices, not (as I'm inclined to do) by reference to normative claims."); see also Sachs, Originalism as a Theory of Legal Change, supra note 35, at 865 ("Our legal practices care about history. Whether a rule has the right historical pedigree does a great deal to show that it's part of our law. Indeed, this is often where originalist arguments derive their rhetorical force.").

189. Three clarifications are in order. First, in a formal sense legal reasons are normative reasons: They generate criteria of correctness, regardless of whether they truly provide reasons for action. See David Enoch, Is General Jurisprudence Interesting?, *in* Dimensions of Normativity: New Essays on Metaethics and Jurisprudence 69 (David Plunkett, Scott J. Shapiro & Kevin Toh eds., 2019) (explaining "formal normativity"); see also Andrew Jordan, The (Ir)relevance of Positivist Arguments for Originalism, 56 Loy. L.A. L. Rev. 937, 952–54 (2023) (applying Enoch's notion of "formal normativity" to legal reasons for interpretation). This is not the sense used here. Here, normative reasons justify action.

Second, if one treats the law as a reason for action because one has reasons to follow the law, then why not treat legal reasons as subordinate reasons? Perhaps one should, and one could do the same with other alleged normative reasons. One treats democracy as a normative reason because democracy promotes some valuable things, such as good government, and one treats good government as a normative reason because it achieves things such as development, security, respect for rights, and so on. One may go all the way down the chain, until one finds something foundational—here it's not relevant what the foundations are. The point is that this chain-like structure is characteristic of practical reasoning. When something is already a link in the chain, it can bring other things into the chain. Because one has reasons not to get ill, one has reasons not to get wet in the rain, and that makes the (otherwise normatively inert) fact that covering keeps people dry a reason for one to cover.

This is why there isn't much at stake here in thinking of the law as a subordinate or independent normative reason. What matters is that the law is (or normally is) part of the chain of practical reasoning. To say that legal reasons are normative reasons simply entails that law is already part of the chain of practical reasoning and, as such, it's capable of bringing other things into the chain as subordinate reasons. To say that legal reasons are subordinate reasons is to be agnostic as to whether law is part of the chain. Talk of "independent" and "subordinate" reasons helps us highlight this in the context of debates on interpretation. The normative choice thesis holds either way, since it is not a thesis about the normativity of law.

This takes us to the third clarification. The claim is not that all law provides reasons for action, but that only law that provides reasons for action can bear on interpretive choice.

of those subject to the law (the internal viewpoint),[190] the law provides reasons for action.[191] The fact that the law commands stopping at a red light is a reason for stopping at red rather than green. There are (normative) reasons for having law.[192] An example is coordination, which is indispensable for the realization of many social goods. Given the important benefits of legal coordination in many areas, one has good reasons to have law that brings about coordination, and, if that law exists, one has good reasons to comply with it[193]—it thus provides reasons for action.[194] These may be strong reasons.[195] But they are defeasible reasons: Sometimes one may have more reasons to disobey the law than to obey it.[196]

Law can and normally does provide reasons for action, though it may not always do so.[197] But law generally does so, in many areas of life, from motorized transportation to contracts to administrative law. There is no reason to think that legal interpretation should be different. As Baude and Sachs say, "The same reasons why we have law in general are reasons to have a law of interpretation in particular."[198]

Ultimately, what matters is whether something normative follows from the law of interpretation.[199] For legal reasons to matter in interpretive

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It's unnecessary to explore further the complex issue of the normativity of law. For a thorough study, see Alma Diamond, Shadows or Forgeries? Explaining Legal Normativity, 37 Can. J.L. & Juris. 47 (2024) (distinguishing between different ways to account for the normativity of law).

190. See H.L.A. Hart, The Concept of Law 89 (3d ed. 2012) (explaining the internal point of view).

191. See Steven J. Burton, Law as Practical Reason, 62 S. Cal. L. Rev. 747, 747 (1989) ("Philosophers of law have treated law as practical reason in this sense intensively since H.L.A. Hart dramatized the importance of the law as a provider of reasons for action . . . .").

192. See, e.g., John Finnis, Natural Law and Natural Rights 3 (2d ed. 2011) [hereinafter Finnis, Natural Law] ("There are human goods that can be secured only through the institutions of human law, and requirements of practical reasonableness that only those institutions can satisfy.").

193. For a discussion on law and coordination, see supra note 149.

194. For a philosophical survey of reasons provided by positive law, see John Finnis, On Hart's Ways: Law as Reason and as Fact, 52 Am. J. Juris. 25, 38–39 (2007).

195. As when a law satisfies the focal sense of law. See Finnis, Natural Law, supra note 192, at 276–81 (explaining the "focal meaning" of law).

196. See, e.g., Rawls, The Justification of Civil Disobedience, supra note 167 (articulating conditions in which civil disobedience is justified).

197. There is a debate regarding whether there is a prima facie obligation to obey the law. See M.B.E. Smith, Is There a Prima Facie Obligation to Obey the Law?, 82 Yale L.J. 950, 950 (1973) (arguing that those subject to a government "have no prima facie obligation to obey all its laws").

198. Baude & Sachs, The Law of Interpretation, supra note 27, at 1097.

199. See Baude, Is Originalism Our Law?, supra note 36, at 2392 ("[O]riginalists and their critics are ultimately arguing about how judges *ought* to decide cases. So the question remains how this descriptive account of our legal practice has normative implications."). Some authors note that in their individually authored works, Baude makes normative claims

choice, they must be understood as normative reasons. Thus understood, a law of interpretation is compatible with the normative choice thesis. The normative choice thesis, though, has nothing to say regarding whether a law of interpretation is possible or desirable, or whether there is a law of interpretation in our legal system, or whether one should follow this particular law. If there is a law of interpretation that one should follow,[200] and if such law of interpretation favors one method of interpretation over others, this will provide a (normative) reason in favor of that method.

The normative choice thesis should be liberating for theorists of the "law of interpretation," who also seem to adopt their own "residual" approach. Baude and Sachs say that "[i]f language alone can't finish the job, as we agree it often can't, then something else must. We suggest that this something else is law."[201] But what if ordinary language *can* finish the job? Surely the law can still prescribe a meaning that departs from ordinary language.

b. *The Normative Choice Thesis Doesn't Oppose a Law of Interpretation.* — The debate over the law of interpretation in interpretive choice is premised on the mistaken belief that legal sanction of a method of interpretation is incompatible with interpretive choice, and with the preeminent role that normative reasons play in it. For Baude and Sachs, their view is an alternative to that of "skeptics"—Sunstein and Fallon—who believe there is no fixed meaning of texts and hence that there is need for normative reasons to determine the appropriate method of interpretation.[202] Sunstein replies that U.S. law doesn't determine a single method of interpretation.[203]

But there is no incompatibility. A law of interpretation operates on two levels concerning interpretive choice. There is the deliberation of the judge, for whom this law provides reasons for a method of interpretive choice. But there is also the deliberation of whoever is putting in place a law of interpretation: Now this person has to choose one from a variety of methods of interpretation. This is an interpretive choice, and thus the

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that Sachs does not. See J. Joel Alicea, Practice-Based Constitutional Theories, 133 Yale L. J. 568, 578 n.62 (2023); Barzun, supra note 71, at 1339 n.96; Bernick, supra note 5, at 5.

200. This does not only depend on whether this particular law actually gives reasons for action and on the relative strengths of those reasons vis-à-vis reasons for not following that law. It may be that the law of interpretation doesn't apply or applies less to some actors than others. For example, not all interpreters are legal officials. The citizenry can, and arguably must, interpret the Constitution in, for example, participating in public debate and voting, but it's not constrained in its interpretive choices by the law—at least not in the same way that legal officials are. And not all legal officials are the same. A superior court may be less bound by some aspects of positive law (say, its own precedents) than lower courts. These distinctions are important for the contingency of interpretive choice. See infra Part III.

201. Baude & Sachs, The Law of Interpretation, supra note 27, at 1093.

202. Id. at 1092–93.

203. See Sunstein, How to Interpret the Constitution, supra note 3, at 76–84; see also id. at 91 ("If the founding document set out the rules for its own interpretation, judges would be bound by those rules . . . . But the Constitution sets out no such rules.").

normative choice thesis applies to it. And so, even if there was a law of interpretation that sanctioned originalism, *that* choice would have to be justified by reference to the relevant normative reasons.

Even if a law of interpretation precluded courts from adopting any method other than originalism, this would not entail that there is no interpretive choice, or that there are no other reasons—beside the law of interpretation—bearing on interpretive choice. It would simply mean that whoever is the lawgiver made an interpretive choice.[204] For that choice, as for every interpretive choice, only normative reasons matter.

4. *Institutional Reasons.* — Institutional reasons mediate between other reasons and a specific choice for a specific institution.[205] This is why they are always subordinate reasons. Institutional reasons presuppose that there is some value or requirement that methods of interpretation should fulfill; in assessing whether such value is best satisfied by one method of interpretation or another, institutional reasons focus deliberation on the institution that is to use that method, its capacities, constitutional role, interaction with other institutions, etc. As Vermeule says, "Institutionalism acknowledges the place of value theories in constructing accounts of interpretation, but insists . . . that such theories are necessarily incomplete without second-best analysis . . . ."[206] This Article returns to the compatibility between the normative choice thesis and institutional analysis below.[207]

5. *Theory Reasons.* — Recall that for Greenberg "any kind of argument for a method of interpretation will be apt only to the extent that it bears on how to ascertain what the law is" and thus needs "to proceed via claims about how the content of the law is determined."[208] For example, "whether fairness is relevant in this way depends on how the content of the law is determined."[209] Theories of law articulate how basic facts determine legal facts,[210] and thus they explain what facts affect the content of the law. In Greenberg's view, whether normative reasons matter would depend on what this Article calls "theory reasons."

For Greenberg, some theories of the law do in fact exclude normative reasons from consideration. Most prominently, for exclusive legal

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204. See infra note 304 and accompanying text.

205. See supra section I.E.

206. Vermeule, Judging Under Uncertainty, supra note 5, at 85; see also id. at 83–84 (criticizing Posner's pragmatism for lacking a value theory). Vermeule also argues that one could "bracket" the question of first-order commitments if the different alternatives converge at the operational level, after taking into account institutional reasons. See id. at 82–83. Here institutional reasons are still subordinated to (and presuppose) whatever are the more fundamental reasons.

207. See infra section III.C.2.b.

208. Greenberg, Natural Law, supra note 5, at 130.

209. Id. at 131.

210. Id. at 129.

positivism[211] "normative arguments have no bearing on whether a theory of interpretation is true,"[212] given that, for this theory, "normative factors can play no role in determining the content of the law at any level."[213]

One problem with this argument is that, as Professor Brian Bix cautions, legal theories do not have such straightforward implications for interpretation, including interpretive choice.[214] There are two different enterprises here, as Professor Evan Bernick explains.[215] One is to provide a general description of law; in doing that, the exclusive legal positivist may conclude that "the existence and content of every law is fully determined by social sources."[216] A different enterprise is that of choosing an approach to interpreting the law, say, as a judge resolving a dispute. A moral agent involved in a practical task is not in the business of providing accurate general descriptions of the law but of choosing and acting in a way consistent with the best reasons available. In this second enterprise, even if one thinks that, say, the law is exclusively determined by social sources, one shouldn't allow this theoretical conviction to restrict one's deliberation to reasons related or expressed in social sources.

This is why it is perfectly possible to hold both the view that law is determined only by social sources *and* the view that in applying the law (whatever that is) we, as moral agents, should be mindful of all relevant moral considerations—including those not captured in social sources. In fact, the leading exclusive legal positivist, Professor Joseph Raz,[217] not only emphasized that no method of interpretation followed from his theory of

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211. See infra note 216.

212. Greenberg, Natural Law, supra note 5, at 133.

213. Id. (emphasis omitted). Similarly, the legal positivism of Hart "does not support an appeal to democratic and other normative arguments in defending theories of legal interpretation." Id. at 133.

214. Bix writes:

> Legal positivism is a theory about the nature of law, by its self-characterization a descriptive or conceptual theory. By its terms, legal positivism does not have consequences for how particular disputes are decided, how texts are interpreted, or how institutions are organized. At most, the theory may have something to say about how certain ways of operating are characterized (is it "law" or is it, for some reason, "not law"?), but not on how they should be evaluated or reformed.

Brian H. Bix, Legal Positivism, *in* The Blackwell Guide to the Philosophy of Law and Legal Theory 29, 31 (Martin P. Golding & William A. Edmundson eds., 2005) (emphasis omitted).

215. See generally Evan D. Bernick, Eliminating Constitutional Law, 67 S.D. L. Rev. 1, 2 (2022) (arguing against giving independent weight to what counts as "law" for a given jurisprudential theory in normative constitutional theories).

216. Joseph Raz, The Authority of Law 46 (1979); see also Joseph Raz, Authority, Law and Morality, 68 The Monist 295 (1985) [hereinafter Raz, Authority, Law and Morality], for a more developed defense of exclusive legal positivism.

217. Greenberg refers to Raz as an exclusive legal positivist in Greenberg, Natural Law, supra note 5, at 130.

legal positivism[218] but also recognized the role of normative reasons in choosing an approach to constitutional interpretation.[219]

Theories of law can't determine interpretive choice. A particular account of how social facts determine legal facts doesn't translate into a view of how a particular agent should choose a method of legal interpretation.

D. *Theories of Interpretation and Theory of Interpretive Choice*

Let's take stock of the argument so far. The normative choice thesis entails two subtheses. The positive thesis is that normative reasons matter for interpretive choice. The reason for this is not that non-normative reasons are incapable of determining interpretive choice but that interpretive choice is practical, and thus the reasons that bear on it are practical. The negative thesis is that only normative reasons matter for interpretive choice. The previous section showed dialectically why none of the non-normative reasons usually mentioned in debates on interpretation bear on interpretive choice.

The normative choice thesis entails an account of interpretive choice and of the theory of interpretive choice. This account is mostly implicit in the previous sections, and so it's worth presenting it explicitly here. The issue is the following: If only normative reasons can justify methods of interpretation, then interpretive choice is neither determined nor constrained by any non-normative consideration. A theory of interpretive choice needs to reflect this. But it also needs to account for the fact that interpretive choice is, in some sense, about interpretation—whatever its precise contours. How does interpretive choice stand to interpretation, and to theories of interpretation, considering that non-normative reasons (including the concept of interpretation) play no practical role in interpretive choice?

This section articulates such an account of interpretive choice. It does so by addressing three questions. First, and most importantly: How does interpretive choice stand to theories (and their concepts) of

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218. See Raz, Authority, Law and Morality, supra note 216, at 317 ("Furthermore, and this is often overlooked, the sources thesis by itself does not dictate any one rule of interpretation. It is compatible with several."). Raz also suggests that the question "which . . . interpretation[] is the right one" depends on the "rules of interpretation," which "var[y] from one legal system to another." Id. at 317–18.

219. Raz, Authority and Interpretation, supra note 5, at 355 (developing "an approach to constitutional interpretation that, for lack of a better word, we may call a moral approach"); id. at 360 ("[C]onstitutional interpretation has to answer to a variety of reasons, some urging fidelity to existing law, others urging its development, change, and adaptation . . . ."); id. at 361 (referring to considerations for conservation and change as "moral considerations" and recalling a central claim in the argument, namely, that "courts are faced with moral issues and should make morally justified decisions").

interpretation?[220] Second: Why frame the issue in terms of interpretive choice and not in terms of (judicial, legal, constitutional) decisionmaking? And third: How does the normative choice thesis relate to the interpretation–construction distinction? All three bear on how interpretive choice relates to the activity, the concept, and the theories of interpretation.

1. *What Is "Interpretive Choice"?* — There is a puzzling feature of the view presented here. While it relies on the notion of "interpretation" ("interpretive choice"), it also somehow dispenses with it. How can this be? Simply put, a choice can be "about interpretation" without being constrained to what counts as interpretation.

To explain this, one must distinguish between two perspectives: that of the theorist and that of the agent.[221] A theory may, based on speculative or practical reasons, come to a concept of interpretation. If the theory is sound, that concept is helpful for describing some aspect of our reality (if the aspiration is theoretical) or distinctive features of an action relevant to determining if that action should be done (if the aspiration is practical). Once the theory arrives at such a concept, there will be things that will fall under the concept of interpretation and things that will not. Now, from the point of view of an agent who must decide how to engage with a legal text, what matters are the alternatives available to that agent and the normative appeal of each alternative. It is immaterial whether some of those alternatives fall under the concept of interpretation of a given theory or not.[222] This is why interpretive choice is broader than interpretation. From the point of view of an agent who subscribes to a theory of interpretation, the decision will always appear as a decision between doing some actions that fully and properly fall under the theory's concept of interpretation (interpreting), or doing some actions that are marginal

220. Thank you to Lawrence Solum and Sherif Girgis for their helpful comments that lead to this section.

221. This doesn't suggest that theory is prior to practice. In a sense, it's the contrary: The object of theory is the activity undertaken in the practice. See John Finnis, Law and What I Truly Should Decide, 48 Am. J. Juris. 107, 114–15 (2003) (discussing these issues). Thank you to Angelo Ryu for pointing this out.

222. See supra section II.C.1. This, or something like this, seems to be Walter Benn Michaels's point in talking about the "irrelevance of the theor[ies] of interpretation" and that "questions like whether we should produce and then follow constructs like the original public meaning are entirely normative," while also defending the view that interpretation is necessarily intentionalist originalist. See Michaels, Using a Firearm, supra note 15, at 144, 145, 148, 149.

instances of the concept,[223] or not interpreting at all.[224] From a practical point of view, those alternatives are on the same level, in the sense that they are all alternatives regarding the same choice.[225]

But one should also bear in mind the practical significance of interpretive choice. From the point of view of the agent, there are often normative reasons to follow the law and thus to determine its meaning according to whatever reasons she has for following the law. An example may clarify. Recall the bureaucrat applying a statute authorizing her to deny entry only to "cherries."[226] The bureaucrat has good reason to act: to let something enter the country or not. There will also be reasons bearing on how to act. These reasons bear not only on the outcome but also on how an agent (a judge, bureaucrat, legislator, etc.) arrives at a decision as to how to act. Here, law enters the picture. In a reasonably just and well-functioning legal system, judges and other officials, as well as private individuals, have reasons to adjudicate and make other decisions by reference to law. There could be, and typically are, reasons for their decisions to be guided in some way or another, to be constrained in some way or another, or even to be fully determined, by law—by an applicable legal source antecedent to the case. Examples of these reasons are commitments to obey the law (having sworn to respect or uphold the law), the rule of law, authority, fairness, democracy, the specific values or goods promoted by the particular legal norm at stake, etc.[227] In the case of the bureaucrat, the same may be true. She will then have reasons to treat the directives contained in the statute regulating her powers as reasons featuring in her own practical reasoning oriented to deciding what to do in a specific situation in which the statute is applicable. But what are the directives contained in the statute? She would need to know this to know if and how they bear on her decision. Because the bureaucrat has good reasons to decide in accordance with the statute, she has good reasons to determine what the directives contained in the statute are.

What has been said of this bureaucrat could be said equally of judges, legislators, other officials, and private parties that have reasons to abide by the law in some way. If they have reasons to follow the law in engaging in

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223. By "marginal instances" this Article means borderline or deficient instantiations of the concept. For example, misinterpretations would fall in this category. See Timothy Endicott, Legal Misinterpretation, 13 Jurisprudence 99, 103–05 (2022) (distinguishing misinterpretation from both interpretation and "judicial abandonment of the law").

224. If the concept of interpretation is practical, then that concept will express some properties of one or more alternatives that are reasons for choosing them. But the fact that those properties are captured by that concept doesn't constrain choice to instances of that concept.

225. Or, put more technically, they are all alternatives in the same choice situation. See Ruth Chang, Comparison and the Justification of Choice, 146 U. Pa. L. Rev. 1569, 1574 (1998) ("[A] choice situation is any actual or possible situation in which an agent must choose only one of a multiple, but finite, number of available alternatives.").

226. See supra section II.C.2.b.

227. See supra section I.C.

some practical activity, then, within their decisionmaking procedure for that activity, there will be normative reasons for that agent to confront a specific choice: how to understand the relevant legal materials (the statute, in the case of the bureaucrat) so as to determine their legal content, or what to do instead. In practice, then, the alternatives for this choice will include everything the agent could do in determining the content of the relevant legal source, or anything she could do instead of that. This was the situation of the bureaucrat in the example above, facing several alternatives ranging from reading the statute as restricting her powers to cherries to interpreting it to include a general principle expanding her discretion. Consider the theorist for a moment. The theorist can offer an account (a theory) of the activity of understanding, say, statutes, so as to determine their content. Such account can be, as said above, theoretical or practical. This is a theory of interpretation. The theory may offer a concept of that activity and recommend a particular way of carrying it about. Returning now to the agent, who may be confronted with different alternatives as to how to determine a statute's content—some of these alternatives will be thematized and recommended by theories of interpretation. In the example of the poisoned avocados,[228] reading "cherries" to mean cherries may be recommended by a textualist theory of interpretation, which may even understand this to be the only thing that qualifies as interpretation (alternative (a)). Other alternatives (reading "cherries" freely, laxly, with little regard for its semantic meaning, to include avocados (alternatives (b) and (c) in the example)) may not qualify as interpretation for that theory, or for any theory. But the bureaucrat will be confronted with those alternatives anyway. All the alternatives available in practice to the agent are on the same level as possible courses of action with regard to this particular choice. *This choice* is the subject of a theory of interpretive choice.

A theory of interpretive choice must be mindful, then, of two things. First, of the great practical significance for law of a specific activity (call it "interpretation"), which, for that reason, deserves to be conceptually demarcated for theoretical focus and also for practical reflection: to communicate and understand its distinctive importance, the way it should operate, etc. Theories of interpretation—among other things—engage in this process of conceptual demarcation, and this is an important task. But where they draw the precise lines is not decisive *for a theory of interpretive choice*. That is because a theory of interpretive choice must be mindful of a second thing: An agent could be faced with many alternatives, only some of which may fall under a given (or even the "best") theory's concept of "interpretation," and yet, from the point of view of the agent, those will be live alternatives for choice and action. Even if the activity conceptualized by theory as "interpretation" is of great practical importance, nothing

228. See section supra II.C.2.b. for both the example and the alternatives.

guarantees that on all the occasions in which one could engage in it, one will actually have most reason to do so.

It is in this sense that "interpretive choice" refers to interpretation: For any theory, interpretive choice will appear as a choice in which at least one of the alternatives supported by sufficiently relevant normative reasons is (on theoretical reflection, may rightly be described as, or appears to many as) to interpret, and thus it will appear as a choice between different ways of interpreting, or between ways of interpreting and something else that is not quite interpreting (interpreting "in a sense," or misinterpreting, or pretending to interpret, etc.) or not interpreting at all. For this reason, from the point of view of theory, it is still a choice that is well characterized in terms of interpretation, even if not all the alternatives are characterized as such by the best (or even any) theory of interpretation.

Here is a more stylized way to put this. A theory T1 elaborates a concept of interpretation. For T1, interpretation is X.[229] On the normative choice thesis, all the following propositions could be true at the same time. First, in circumstances C1 there are most reasons to do X. Second, C1 are the standard circumstances in our society. Third, in circumstances C2, there are most reasons to determine the meaning of the law in a way which is a marginal or borderline instance of X, call it X'. Fourth, in C3 there are most reasons to determine the meaning of the law differently, Y. Fifth, for another theory, T2, interpretation is Y and not X. Sixth, because C2 and C3 are not standard circumstances, T1 is still justified in having a concept of X as "interpretation," and in treating X as the proper, right, main, and perhaps even (with some exaggeration) the only form of "interpretation." Seventh, in circumstances C4 we don't have reasons to determine the meaning of the law at all, but we do have reasons for decisions to have some loose connection with it. Here, Z is the best approach. Eighth, for another theory, T3, interpretation includes X, Y, and Z. Ninth, in circumstances C5 there are no reasons to follow the law whatsoever, and here there are most reasons to do Ω instead of X, Y, Z. Tenth, Ω is not interpretation under any theory.

T1 may be right in treating X as interpretation and not the other alternatives, or treating X as a central instance of interpretation, X' and Y as peripheral ones, Z as interpretation only in appearance, and Ω as not interpretation at all. But it is possible that in circumstances C1–C5, an agent could (in the non-normative sense of "could") do X, X', Y, Z, and Ω, and thus in each of those circumstances the agent has to choose. This choice is not constrained by the terms of T1 and its concept of interpretation (or of any other theory or concept), and thus it is not the case that only X is a live alternative for that agent. It could be that in all

229. "X" is a concept of "interpretation." It may be a theoretical or a practical concept of interpretation, and it may refer to a specific method of interpretation ("intentionalism") or to the activity more broadly.

circumstances, X', Y, Z, and Ω have some normative appeal, and, as stated above, in some circumstances each is the most appealing option and should be chosen. A theory of interpretive choice should be open to the possibility of the practical relevance of interpretation according to T1 and at the same time acknowledge the possibility and appeal of other alternatives. This entails acknowledging that the end result of interpretive choice could be the choice of something that is not interpretation according to the best theory (for T1, all alternatives but X and perhaps X'), or even for any plausible theory (Ω).

A theory of interpretive choice must also be mindful of the fact that, from the point of view of each theory (T1, T2, T3, . . .), the choice appears as one in which the alternatives include ways of "interpreting" (variations of X, for T1; variations of Y, for T2, etc.) and something else (X', Y, Z, and Ω, for T1; X, X', Z, and Ω for T2; etc.). It's reasonable to speak of this choice as "interpretive choice," lest all alternatives be seen as variations of Ω.[230]

Nothing in this denies the importance of theories of interpretation or suggests that they are all equally true. A full theoretical understanding of interpretation and of interpretive choice requires both a theory of interpretive choice and of interpretation. Even for practice, as explained above, a theory of interpretation can be crucial in articulating distinctive features of an activity that is choice-worthy, which in turn can guide and coordinate action as to how exactly to undertake that activity in concrete circumstances. But there is an intellectual division of labor. There is a need for a theory of interpretive choice too. And a theory of interpretive choice doesn't need to be built on a theory of interpretation, or otherwise commit to one, precisely because the choices of agents are not limited to the terms of any theory of interpretation.

With this in mind, we can return to the definitions mentioned in the Introduction:

"Interpretation" here means "legal interpretation," which refers to the activity of determining the legal content of legal materials (for example, a statute or a constitution). This is a broad and noncommittal concept of legal interpretation[231] because for a theory of interpretive

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230. This is one of the deficiencies of dispensing with interpretation and framing the choice in terms of "decisionmaking." See infra section II.D.2.

231. See supra note 27. One of the ways in which this notion of interpretation is vague is that it doesn't specify what "determining" means. "Determining" here is ambiguous. It could mean something like "discovering" or "asserting" (in law, this asserting is often authoritative). See Greenberg, Legal Standards vs. Fundamental Determinants, supra note 5, at 107 ("[T]he term 'legal interpretation' is often used in a way that is ambiguous between ascertaining the meaning of legal texts and using the relevant texts to ascertain what the law is."); Soames, Toward a Theory, supra note 50, at 231 (explaining that interpretation has a constitutive and an epistemic aspect). Both activities are related: What is asserted may, and perhaps should, be what is discovered. But this is neither conceptually nor practically

choice nothing depends on getting the specific contours of "interpretation" right. The definition refers to determining the meaning of legal materials because here it is presupposed that this is a typically important and distinctive activity in law,[232] one that agents often have reasons to engage in (in some way or another), and that it is the object of many theories of interpretation.[233] Different theories will characterize this activity in different ways. There can be theoretical or practical concepts of interpretation, as suggested above. Having a concept of interpretation allows for central and peripheral instances of that which the concept refers to, as well as for pretended or purported instances of it (interpretation "in name only").

This takes us to the idea of "methods of interpretation." Methods of interpretation specify what one could do in determining the meaning of legal materials. Is it to attend to the original public meaning? Is it to engage in an effort to understand a text in a way that makes most moral sense? Is it something else? What is it that one should do when "interpreting"? The specific activities recommended by methods of interpretation may, from the point of view of some theory, appear as central, peripheral, or even false instances of interpretation—or not instances of interpretation at all.[234] This terminology is ecumenical: They are all "methods of interpretation."

"Interpretive choice" is a choice in which the alternatives are "methods of interpretation"—including those that, from the point of view of some theory or even the best theory, are peripheral forms of interpretation or don't qualify as interpretation at all. Interpretive choice legitimately includes (what for some theory is, or is a central case of) "interpretation" and all available alternatives to it. What matters is only their normative appeal—though in a well-functioning legal system, there will be reasons to follow the law, and to do so in a specific way, and thus the fact that a method of interpretation faithfully determines the meaning of the law will often be an important normative reason in favor of it.

2. *Why Not Decisionmaking?* — If the normative choice thesis stresses the practical nature of interpretive choice, why frame the argument in terms of interpretation or interpretive choice rather than, for example, in terms of judicial, legal, or constitutional decisionmaking? Perhaps if we set aside interpretation and replace it with, say, judicial decisionmaking, we would be on safer ground for the defender of normative considerations.

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necessary. Some methods of interpretation may emphasize one rather than the other and relate them in different ways. This Article is interested in both precisely because interpretive choice is, in principle, open regarding what task should be undertaken.

232. See infra section II.D.2.

233. But if wrong, then this analysis is wrong in its expectations of the actual practice and the existing theories of interpretation, but not in defending the practical character of interpretive choice that the normative choice thesis vindicates.

234. See supra note 28.

Why theorize interpretive choice and not focus directly on legal or constitutional decisionmaking?

There are two main reasons for this: one scholarly and one substantive.

The scholarly point is that it's legitimate for theory to address the phenomenon as it appears in practice (in legal decisions and in scholarly and legal debates)—where the question arises as one of interpretation. In this regard, decisionmaking can be a plausible framework for interpretive debates only if a normative account of interpretive choice is plausible. The two intellectual enterprises of exploring legal or constitutional decisionmaking and interpretive choice are important and, on the view defended here, related. But this relation needs to be established, and to establish it is a matter for a theory of interpretive choice.

For example, Professor Richard Primus frames debates on whether originalism should be adopted in terms of "methods of constitutional decisionmaking."[235] His framework "analogizes the choice of methods to a choice among physical tools, each of which has multiple uses but none of which is good for everything."[236] One should match methods to values. "The validity of the methods in the first set as aids to constitutional decisionmaking is a function of their relationship to the values in the second set."[237] Methods, like tools, are appropriate in some contexts and not in others.[238] This is all illuminating and true. But it presupposes that it is legitimate to assess methods of interpretation in terms of a practical choice (as choosing a tool). This presupposition needs to be vindicated, including by assessing alternative grounds for methods of interpretation.[239] This is not a critique of Primus's argument, but rather it highlights the need for a different kind of argument.

The substantive point is that, from a practical perspective, interpretive choice is distinctive. Interpretive choice in law is always part of a practical enterprise, to which it is ordered. It is nested in a larger practical undertaking, and it is ordered to the good of that undertaking, as a part is ordered to the whole. And yet, as mentioned in the previous section, it remains a distinctive part. The normative choice thesis doesn't entail that, from a practical viewpoint, there is nothing distinctive about interpretation, or that one never has most reason to engage in that distinctive practice. Framing the issue in terms of interpretive choice allows us to focus on something distinctive in a decisionmaking processes.

Focusing on decisionmaking may do away with the distinctness of this practice. For example, Professor Andrew Jordan observes that Primus's

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235. Primus, supra note 5, at 168.

236. Id.

237. Id. at 172.

238. See id. at 175–76, 186–221 (explaining the limited use of originalism).

239. As those addressed in section II.C. Primus does address objections related to the nature or concept of interpretation. See Primus, supra note 5, at 180–82.

"toolbox approach" invites dispensing with the question of constitutional content altogether:

> If the driving force for constitutional decisionmaking is certain constitutional values, then it is not clear why we should not just try to vindicate those values directly rather than try to do so in a mediated manner via a constitutional theory or a determinate set of constitutional tools. . . . [W]hy not simply ask what sort of decisions serve those values?[240]

Jordan's insightful critique of Primus's approach presses the question of why frame the decision in terms of "originalism," "textualism," and other such interpretive approaches, and not directly in terms of which courses of action most realize the relevant values. If what matters is decisionmaking, why frame the issue in terms of a choice of methods of interpretation?

The answer lies in the practical reality sketched above. From a practical point of view, it is often the case in legal practice that one has reasons to follow and be guided by the law, and thus to determine the meaning of the law, and therefore to settle on a particular way of doing so from the many available. That settling entails a choice, but it is a choice that is, *for practical reasons*, oriented to methods of determining the meaning of the law. True, theories will dispute what really counts as such. And methods of interpretation are proposals for choice and action, and thus one can legitimately—and illuminatingly—call them "decisionmaking" tools, as Primus does.[241] But if following the law matters, then interpretation matters. Of course, as explained above, there may be different ways of determining legal meaning, and there are things that one could do instead of interpreting, and there are in-between things that are marginal instances or borderline cases of interpretation. All these are alternatives regarding what an agent could do. There is a choice. But the choice is usefully presented as one about interpreting: regarding whether to "interpret" and how. This is useful because it gets at the practical distinctiveness of this particular choice in the general context of legal decisionmaking and at the practical reality that many or at least some prominent alternatives in this choice can be aptly characterized, highlighting its distinctiveness, as "interpretation." The fact that the conceptual boundaries of "interpretation" don't constrain interpretive choice in practice doesn't entail that, for theory, it is not useful to characterize such choice as a choice "about" interpretation.

Now, Jordan's view is precisely that, in constitutional law, one should "reject[] the idea that there is any role for an account of constitutional

240. Jordan, Constitutional Anti-Theory, supra note 5, at 1542–43.

241. Primus, supra note 5, at 176.

content in sound constitutional decisionmaking."[242] He criticizes the "traditional model"—of Primus and others—which entails that "constitutional content grounds, at least partially, the theorists' preferred account of sound constitutional decisionmaking."[243] Constitutional law can play a role in practical deliberation, but as an external factor. For example, "the reason that a lower court should not ignore the Supreme Court decision is not that the Supreme Court creates law . . . . Rather, it is that the Supreme Court creates reasonable expectations and lower courts should not unnecessarily upset those expectations."[244] On this view, there is nothing distinctive about following the law.[245] It presents the law as an external phenomenon that provides reasons for action, in the same way that, say, the acts of a central bank create reasons for that central bank in the future not to upset expectations, and for other agents to adjust their behaviors to its monetary policy. Jordan rejects the view presupposed here, namely that there can be reasons for agents to treat the law not merely as some external fact but rather to allow their practical reason to be guided and constrained by the law's content. Upsetting expectations may be a relevant normative consideration. But so it may be to faithfully *follow* precedent so as to keep the integrity and coherence of a legal norm, or to benefit from the superior epistemic capacities and legitimacy of a higher court, or for other reasons—even if the people have misunderstood the Supreme Court's precedent, and following precedent would actually upset their expectations. This will require determining the meaning of the relevant precedents. There is no reason to exclude the possibility that one may have normative reasons to engage with the law not as a purely external fact to which one needs to adjust but as a proper guide to one's practical deliberations.

It's legitimate for a theory of interpretive choice to presuppose the commonsense view that the content of the law can and often should guide our practical deliberations. But, in any case, there is no reason to deny the importance of legal content. Ultimately, Jordan seems to deny it based on a commitment to an "eliminativist" position[246] of the kind proposed by

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242. Jordan, Constitutional Anti-Theory, supra note 5, at 1517–18. This is part of Jordan's critique of the "traditional model," according to which "constitutional content grounds, at least partially, the theorists' preferred account of sound constitutional decisionmaking." Id.

243. Id. at 1518. The "traditional model" also entails that "a normative justification . . . justifies the theorists' preferred account of constitutional content." Id.; see also id. at 1523–24 (explaining the traditional model).

244. Id. at 1555.

245. Id. at 1554 ("If legal actors should just act on the basis of whatever practical reasons bear on the decision that confronts them, then one might worry that we have lost anything distinctly constitutional, or indeed legal, about constitutional reasoning.").

246. See id. at 1554 n.158 (drawing a parallel between his argument and eliminativist positions in jurisprudence). Thank you to Andrew Jordan for highlighting the importance of this as a point of disagreement, and generally for raising questions addressed in this section.

Professor Scott Hershovitz.[247] On this view, "we could abandon the thought that, in addition to their moral and prudential upshots, legal practices have distinctively legal upshots."[248] Jordan, in turn, argues that "the common assumption of constitutional theorizing is that there is some fact about constitutional content that grounds constitutional normativity—in other words, such content has distinctly constitutional upshots—and that this is an assumption that we ought to reject."[249] Eliminativism is a controversial view in legal philosophy.[250] But, in any case, that there is no distinct legal or constitutional normativity doesn't mean that there can't be good moral and prudential reasons to follow a law—and thus to care about how *its content* determines moral and prudential (if not specifically "legal") reasons that bear on our actions. Eliminativism doesn't rule out this possibility. Hershovitz, for example, seems to explicitly accept it.[251]

In well-functioning legal systems, there are often reasons to follow the law. A theory of interpretive choice presupposes that sometimes agents should do that and engage in interpretation—whatever are the contours of that capacious concept. And, in a sense, the use of the term "interpretive" choice acknowledges that this possibility has a certain pride of place (perhaps as a typically or normally practically appealing possibility). But a theory of interpretive choice must also accept that sometimes agents don't have most reason to engage in interpretation, or that they have reasons to do something that is a marginal instance of "interpretation." All these are live possibilities. Theoretical work needs to illuminate this complexity, rather than do away with it.

3. *Interpretation and Construction.* — Some authors distinguish between "interpretation" and "construction."[252] Not all theorists of

247. Scott Hershovitz, The End of Jurisprudence, 124 Yale L.J. 1160, 1193 (2015) (referring to his view as "a kind of eliminativism").

248. Id. at 1173.

249. Jordan, Constitutional Anti-Theory, supra note 5, at 1554 n.158.

250. See Angelo Ryu, How Reasons Make Law, 44 Oxford J. Legal Stud. 133, 134 nn.2–3 (2024) (distinguishing between types of eliminativism and offering a critique of category eliminativism).

251. Hershovitz, supra note 247, at 1193 n.54 ("Murphy is surely right to think that we need to be able to talk about what the law requires . . . . What I want to eliminate is the idea that there is a distinctively legal domain of normativity . . . that we appeal to when we make claims about what the law requires.").

252. There is a vast literature on the distinction. Some prominent works defending and applying the distinction to discussions on interpretation are Keith E. Whittington, Constitutional Construction: Divided Powers and Constitutional Meaning (1999); Keith E. Whittington, Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review 5–14 (1999) [hereinafter Whittington, Interpretation] ("Drawing a distinction between constitutional interpretation and constitutional construction can ultimately help clarify both the role of judicial review in constitutional government and the specific function of originalism within constitutional theory."); Randy E. Barnett, Interpretation and Construction, 34 Harv J.L. & Pub. Pol'y 65, 65 (2011) [hereinafter Barnett, Interpretation

interpretation adopt this distinction, and some reject it.[253] Yet the interpretation–construction distinction plays an undoubtedly important role in scholarship on legal interpretation. Hence, it is appropriate to inquire how the normative choice thesis relates to this distinction.

The distinction calls attention to a divide between "two different moments or stages that occur when an authoritative legal text (a constitution, statute, regulation, or rule) is applied or explicated."[254] For Professor Lawrence Solum, a leading proponent of the distinction, "interpretation" (in the sense of the distinction)[255] is "the process (or activity) that recognizes or discovers the linguistic meaning or semantic content of the legal text."[256] For this view, "the linguistic meaning of a text is a fact about the world"; it "is determined by a set of facts: these facts include the characteristics of the utterance itself . . . and . . . facts about linguistic practice."[257] Linguistic meaning "cannot be settled by arguments of morality or political theory."[258] Construction, in contrast, is "the process

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and Construction] ("[F]ollowing the lead of political science professor Keith Whittington, legal scholars are increasingly distinguishing between the activities of 'interpretation' and 'construction.' Although the Supreme Court unavoidably engages in both activities, it is useful to keep these categories separate." (footnote omitted)); Lawrence B. Solum, Originalism and Constitutional Construction, 82 Fordham L. Rev. 453, 485 (2013) [hereinafter Solum, Originalism and Constitutional Construction] (arguing that the interpretation–construction distinction is both "real and fundamental").

253. See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation Of Legal Texts 15–18 (2012) (describing the connection between interpretation and statutory construction); John O. McGinnis & Michael B. Rappaport, Originalism and the Good Constitution, 98 Geo. L.J. 1693, 1696 (2010) ("[Original methods originalism] sharply contrasts with the so-called new originalism, which contends that much of the Constitution is so vague and ambiguous that judges must construct a meaning to fill in these gaps."); John O. McGinnis & Michael B. Rappaport, Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction, 103 Nw. U. L. Rev. 751, 752 (2009) ("We find no support for constitutional construction, as opposed to constitutional interpretation, at the time of the Framing."); John O. McGinnis & Michael B. Rappaport, The Power of Interpretation: Minimizing the Construction Zone, 96 Notre Dame L. Rev. 919, 930–31 (2021) ("[C]onstruction as a concept first emerged a half century after the Framing."); Frederick Schauer, Constructing Interpretation, 101 B.U. L. Rev. 103, 109 (2021) ("In other words, interpretation itself is often constructed in just the way that the point of the interpretation-construction distinction is committed to denying.").

254. Lawrence B. Solum, The Interpretation–Construction Distinction, 27 Const. Comment. 95, 95–96 (2010) [hereinafter Solum, Interpretation–Construction Distinction].

255. In what follows, the word "interpretation" is in inverted commas when used in the specific and restricted sense of the interpretation–construction distinction. As authors defending the distinction often remark, nothing depends on the terminology. See id. at 96 ("[T]he terminology (the words 'interpretation' and 'construction' that express the distinction) could vary . . . ."); see also Barnett, Interpretation and Construction, supra note 252, at 65 ("Although I begin by offering definitions of interpretation and construction, the labels are not important.").

256. Solum, Interpretation–Construction Distinction, supra note 254, at 96.

257. Id. at 99.

258. Id. at 99–100; see also Barnett, Interpretation and Construction, supra note 252, at 66 ("It cannot be overstressed that the activity of determining semantic meaning at the time of enactment required by the first proposition is *empirical*, not normative.").

that gives a text legal effect (either [b]y translating the linguistic meaning into legal doctrine or by applying or implementing the text)."[259] This includes the determination of legal content.[260] Construction allows for normative considerations. "[T]heories of construction are ultimately normative theories: because constructions go beyond linguistic meaning, the justification for a construction must include premises that go beyond linguistic facts."[261]

Is the normative choice thesis about "interpretation" or construction? It is about both. The normative choice thesis is about interpretive choice, and interpretive choice is concerned with the determination of legal content.[262] In the interpretation–construction distinction, "interpretation" determines the linguistic content of a provision while construction determines the legal content generated (at least partly) by that linguistic content (construction entails other things as well).[263]

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259. Solum, Interpretation–Construction Distinction, supra note 254, at 96. For other definitions, see Barnett, Interpretation and Construction, supra note 252, at 66 ("*Interpretation* is the activity of identifying the semantic meaning of a particular use of language in context. *Construction* is the activity of applying that meaning to particular factual circumstances."); Richard S. Kay, Construction, Originalist Interpretation and the Complete Constitution, 19 U. Pa. J. Const. L. Online 1, 2 (2017), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1024&context=jcl_online [https://perma.cc/H4GL-9AMJ] (similarly understanding construction in terms of application). Professor Gregory Klass distinguishes between accounts of the distinction in which construction supplements the deficiencies or limitations of "interpretation" and accounts in which construction always accompanies "interpretation." See Gregory Klass, A Short History of the Interpretation–Construction Distinction, Georgetown Law Faculty Publications and Other Works, Working Paper No. 2607, 2024, https://ssrn.com/abstract=4857430 [https://perma.cc/23PV-3H8F] (distinguishing between both views). This Article does not engage with all the accounts of the distinction, and focuses on the latter view (which is also Solum's), which seems to be the strongest and separable from a specific method of interpretation (such as originalism).

260. Lawrence B. Solum, Communicative Content and Legal Content, 89 Notre Dame L. Rev. 479, 483 (2013) (asserting that construction is the "determination of the legal content and legal effect produced by a legal text").

261. Solum, Interpretation–Construction Distinction, supra note 254, at 104; see also Whittington, Interpretation, supra note 252, at 7 ("Constitutional interpretation is essentially legalistic, but constitutional construction is essentially political. Its precondition is that parts of the constitutional text have no discoverable meaning."). But see Randy E. Barnett, Restoring the Lost Constitution 124 (2013) [hereinafter Barnett, Restoring the Lost Constitution] (criticizing Whittington's idea that construction is "political").

262. See supra sections II.D.1–.2 (discussing the distinctiveness of interpretive choice).

263. Construction may also involve other things. For example, the determination of legal content and the elaboration of doctrine are arguably different things (whatever the names given to these activities may be). See Mitchell N. Berman, Constitutional Constructions and Constitutional Decision Rules: Thoughts on the Carving of Implementation Space, 27 Const. Comment. 39, 67 (2010) [hereinafter Berman, Constitutional Constructions] (drawing this distinction). Doctrine may simply state the content of the law, but it often does more, like providing implementing or decision rules for the application of legal content. See Richard H. Fallon, Jr., Implementing the Constitution 38 (2001) (distinguishing between an activity of "identifying constitutional

Determining legal content requires construction, but construction is at least premised on (though not necessarily constrained by) the results of "interpretation." One determines legal meaning . . . of what? Of a legal material such as a statute: not of the way it's formatted or of the font in which it's typed but of its linguistic content as determined by "interpretation." Even when construction transcends the text, or understands it in novel or innovative ways, or attributes to it a legal meaning that is specific to law and far removed from what the words used may convey in ordinary talk, the point of reference (whose legal meaning is determined, and which may be transcended, complemented, overridden, etc.) is the legal material as "interpreted."

In this sense, proposals about how to determine the legal meaning of, say, a statute or a constitution (named here "methods of interpretation") must be about both construction and "interpretation." Methods of interpretation also entail a view as to how to relate interpretation and construction: for example, whether interpretation constrains construction or whether construction can override interpretation.[264] A method of

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norms and specifying their meaning and another of crafting doctrine or developing standards of review"). Similarly, the determination of legal effect is different from the determination of legal content. For example, in many legal systems, when a norm is declared unconstitutional, this entails both a determination of the legal content of that norm (which is thought incompatible with the legal content of the constitution) and the denial of legal effect (precisely because it infringes the constitution). See, e.g., Hans Kelsen, The Nature and Development of Constitutional Adjudication, *in* The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law 29 (Lars Vinx ed., trans., 2015) ("The unconstitutionality of a statute can consist . . . in the fact that the content of the statute contradicts the basic principles or guidelines laid down in the constitution, or that it exceeds the limitations imposed by it."). There is nothing wrong with grouping these different activities (determining legal content, elaborating doctrine, and determining legal effect) under the label "construction," particularly if one wishes to highlight what they all have in common and what sets them apart from "interpretation," namely, that all those activities necessarily involve practical reasoning, whereas "interpretation" is (for proponents of the distinction) purely empirical.

264. For example, for originalism, "interpretation" constrains construction. See, e.g., Solum, Interpretation–Construction Distinction, supra note 254, at 116 (arguing that "[m]ost Originalists also affirm a partial theory of constitutional construction: they claim that the legal content of constitutional doctrine should be constrained by the linguistic content of the text"); see also Barnett, Restoring the Lost Constitution, supra note 261, at 102 ("[A]ny construction must not contradict whatever original meaning has been discerned by interpretation."); Amy Barrett, The Interpretation/Construction Distinction in Constitutional Law: Annual Meeting of the AALS Section on Constitutional Law: Introduction, 27 Const. Comment. 1, 5 (2010) ("[O]riginalists treat a text's fixed semantic meaning as defining the permissible bounds of construction . . . ."). This "relation" can be understood as part of construction, as the reference to Solum above in this footnote illustrates. Here it is treated separately only to highlight it. Nothing of substance depends on this. This relation also concerns the intensity with which each activity is performed. For example, Sachs criticizes "authors" for "choosing not to take the trouble to find out very much about [social sources], resting on claims of ambiguity rather than running the social and political facts to ground." Sachs, According to Law, supra note 155, at 1292–93. But this is not obviously wrong. As Sachs says, whether to run "the social and political facts to [the] ground" is a *choice*, which should be made on normative reasons. Id. at 1293.

interpretation is a "package": It entails a view of construction, of the "interpretation" that is its necessary antecedent, and of the relation between the two.[265]

Interpretive choice is a choice of methods of interpretation. On a first approach, then, the normative choice thesis concerns both "interpretation" and construction in that it is about a choice (interpretive choice) between alternatives (methods of interpretation) regarding "interpretation," construction, and the relation between the two.

It could be thought that this is in tension with a key tenet of the distinction: that only construction calls for normative reasoning whereas "interpretation" is exclusively about facts. Extending the normative choice thesis to "interpretation" would contradict this tenet. But there is no such contradiction. We should distinguish between the criteria for doing "interpretation" or construction and the criteria for *choosing* methods of "interpretation" or construction. The criteria for choosing methods of "interpretation" are not the same as the criteria for "interpreting." There is no contradiction in thinking both that the former are normative criteria while the latter aren't. It may be that a method of "interpretation" X pays no attention to normative considerations: It determines semantic meaning by reference to purely factual considerations as, for example, the meaning of words in a particular community at a particular time. But if there are other ways of doing this, then this will give rise to the question of which method should be used. For example, X could entail attending only to the literal meaning, while Y to that meaning plus communicative context,[266] and Z to authorial intentions. How does one settle this?

One view sees this as a choice. Then this is a practical matter, governed by normative considerations. A second view could hold that

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265. Recall the distinction between theories and methods of interpretation. See supra note 3. A theory of interpretation offers an account of interpretation. It will cover whatever the theorist thinks worth theorizing. It could be about "interpretation," construction, both, or some aspect of these activities. The theory may (or may not) recommend a way to interpret, and this recommendation may be incomplete, referring only to a part of the interpretive process. A "method of interpretation," on the other hand, is an alternative for action on determining the meaning of a legal text. See supra section II.D.1. If this determination requires both the activities of "interpretation" and construction, a method of interpretation must be an alternative for how to undertake both activities. Otherwise it will fail in specifying a course of action for determining legal content—thus failing to be a real alternative. Interpretive choice is not about choosing "theories" but about choosing "methods of interpretation." See supra note 3. This doesn't mean that an interpreter can't consider a theory that only proposes a partial account of "interpretation" and construction. In doing so, they will consider the partial account of the theory as specifying one or more alternatives in interpretive choice and will have to supplement that with some other view (perhaps an unarticulated, intuitive view, not gathered from any theory) of the elements missing in the theory.

266. On the distinction between the two, see, e.g., Lawrence B. Solum, Originalism and Constitutional Construction, supra note 252, at 464–65. Solum adds that it "is possible that [originalists] will disagree about the precise role that contextual enrichment plays." Id. at 466.

adopting a method of "interpretation" should be guided not by practical considerations but by speculative or theoretical ones. It is not about which choice is most appealing but about which form of "interpretation" best conforms to, for example, the truth about language use and communication.

The first view is plausible: If "interpretation" is about linguistic content, and what language communicates could be more than one thing—depending on different ways of understanding our, and ultimately engaging in, communication—choice of a way of "interpreting" is about what practice of communication we think best to engage in. Framed like this, "interpretation" entails a moment of choice. This argument, however, is not pursued here. Instead, two more modest points are offered. First, the interpretation–construction distinction, in itself, doesn't entail favoring the second view over the first.[267] Second, even if the "interpretation" part of a method of interpretation is not justified normatively, ultimately "interpretation" forms part of a method of interpretation—the whole "package" which, as a unit, forms an alternative for interpretive choice and thus for the application of the normative choice thesis.[268]

This Article does not adopt the language of the "interpretation"–construction distinction. But if one adopted the distinction in thinking about the normative choice thesis, then the previous discussion referring to interpretation generally should read to refer to "interpretation" and construction in the way just explained. And, crucially, the same caveat concerning conceptual delimitation applies: In deciding how to determine the content of law, an interpreter may face a range of alternatives, some of which may be central instances of "interpretation" and construction, some marginal, and some not even qualify as instances of such activities at all. As long as these are possible courses of action, they

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267. A view incompatible with the normative choice thesis (because it is incompatible with the existence of interpretive choice) would be one composed of the following ideas: (i) all the determination of legal content is done by "interpretation"; the normative work is done only as a matter of application of legal content when legal content runs out (this could be called "construction"); (ii) the "second view" referred to above (no choice regarding ways of "interpreting"). Something like this is the view that Berman attributes to "most proponents" of the distinction. See Berman, Constitutional Constructions, supra note 263, at 46 ("[M]ost proponents of the interpretation/construction distinction likely mean to advance the compound thesis that interpretation is the search for legal content, that legal content is linguistic content, and that linguistic content is fixed."). Whatever the views of those proponents, (i) and (ii) are distinguishable from the interpretation–construction distinction.

268. On the "second view," one could say that interpretive choice is only about construction, just that any proposal for construction will be premised on some view of "interpretation" to which it will adjust. In substance, this is the same as the "package" formulation when that formulation is taken in conjunction with the second view. Here the "package" formulation is adopted to highlight that construction is necessarily premised on the results of "interpretation," and thus a method of construction necessarily entails some view of "interpretation."

are alternatives in interpretive choice, and the fact that some of the alternatives are noncentral instances of "interpretation" or of construction shouldn't count against them.[269]

III. CONSEQUENCES OF THE NORMATIVE CHOICE THESIS

What difference does the normative choice thesis make? This Part outlines four main consequences: the sufficiency of normative reasons, the diversity of normative reasons, the contingency of interpretive choice, and the instability of interpretation.[270] It singles them out because of their influence on interpretation debates. The second and the third consequences place distinct argumentative burdens on proposals for methods of interpretation. The first removes a possible argumentative burden, and the fourth also serves as a reply to a possible objection.

What follows is not a refutation of any method of interpretation. On occasion, the discussion focuses on some version of intentionalism or originalism, when this helps illustrate some point. Thus, not all the relevant versions of these theories are discussed here—which would be necessary to refute them rather than merely use them to illustrate a point. The following sections don't contain a critique of these theories any more than they contain a critique of other theories of interpretation.

A. *The Sufficiency of Normative Reasons*

On the normative choice thesis, only normative reasons count by themselves for or against choosing a method of interpretation. Hence, only normative reasons are sufficient to justify adopting or abandoning a method of interpretation.

It is important to highlight this to avoid a possible confusion. It could be argued that the normative choice thesis doesn't make any difference to debates on interpretation, since non-normative reasons can feature in deliberation on interpretive choice, just that as "subordinate" rather than as "independent" reasons. Take intentionalism, for example. Authors defending intentionalism often rely on linguistic reasons.[271] In principle, those reasons don't count for interpretive choice, but they do count if they are connected to some normative reason. This is the case with respect to

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269. See supra sections II.C.1. and II.D.1.

270. As indicated below, other authors have drawn similar consequences of normative approaches to interpretation or legal decisionmaking. See infra note 280 (discussing Fallon's, Greenberg's, and Jordan's treatments of the diversity of normative reasons). The most thorough discussion is Jordan, Constitutional Anti-Theory, supra note 5, at 1528–38 (referring to the plurality of constitutional values, the open-ended nature of constitutional values, and the context-variation of the normative relevance of such values as consequences of Jordan's normative approach to constitutional decisionmaking). In what follows, this Article only address the consequences related to the normative choice thesis and focuses on the implications for the view of interpretive choice defended here.

271. See supra section I.B.

some prominent intentionalist arguments, which are premised on normative reasons, such as respect for authority.[272] Assume, for example, that there is a normative reason for intentionalism (respect for authority) and a linguistic reason for it (one best complies with the will of an authority if one attends to its intentions in interpreting the legal provisions it enacts).[273] The linguistic reason matters because it's about how the normative reason is best satisfied. But then, what difference does the normative choice thesis make? In the end, linguistic reasons do count, even if one categorizes them as "subordinate" rather than as "independent" reasons. Does the distinction matter?[274]

Yes. When non-normative reasons feature as subordinate reasons in arguments for methods of interpretation, the force of the whole argument rests on normative reasons. On the normative choice thesis, normative reasons can always provide a sufficient reason to choose or challenge a method of interpretation. To challenge intentionalism, for example, one only needs to point to a normative reason in support of a different method that is stronger than authority (or whatever is the underlying normative value)—regardless of any truth about language.[275] Because authority is not always a conclusive reason for action, it could be overridden by weightier reasons.[276] The same could be said about other reasons for other methods of interpretation.

This finding illuminates the burdens that arguments against a method of interpretation must satisfy. Arguments against adopting a method of interpretation don't need to challenge any subordinate reason for that method of interpretation. Arguments against intentionalism, for example, don't need to show that intentionalists got the nature of language wrong. It suffices to show that the normative reasons that support intentionalism are defeated by those supporting other methods of interpretation.

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272. See supra note 168.

273. This is only a stylized version offered for ease of exposition and is not meant as an accurate description of any particular justification for intentionalism.

274. Note that the normative choice thesis still removes from consideration a number of non-normative reasons: all those not connected to normative reasons. The objection would only apply to non-normative reasons that are "subordinate" reasons for interpretive choice.

275. Though, of course, one may challenge a method by challenging a subordinate non-normative reason. Thus, arguing that facts about language don't support the claim that intentionalism is the best (or only) way to fulfill authority in interpretation is a legitimate way to challenge intentionalism.

276. This is the case even if authority operates as an exclusionary reason, since exclusionary reasons can be defeated by other (second-order) reasons. See Joseph Raz, Practical Reason and Norms 47 (3d ed. 1999) [hereinafter Raz, Practical Reason and Norms] (explaining conflicts between second-order reasons); id. at 62–65 (explaining authority as an exclusionary reason).

B. *The Diversity of Reasons*

1. *Conceptual vs. Normative Determination.* — To explain the diversity of normative reasons, it is helpful to contrast normative reasons with other kinds of reasons.

Take conceptual reasons. Imagine a rival of the normative choice thesis: the conceptual determination thesis. On the conceptual determination thesis, only conceptual reasons matter for adopting a method of interpretation, and the concept of interpretation is sufficiently determined to include only one method of interpretation, method X. On this theory, there isn't really any interpretive "choice": There is only one thing for interpreters to do.[277]

For this thesis, there is only one reason that really matters: the fact that the concept of interpretation only includes X. The situation is the opposite if one adopts the normative choice thesis. Normative reasons are typically many.[278] In this respect, interpretive choice is not different from any practical choice. In choosing a course of action (be it whether to go for a walk or read a book, or whether to begin a career in law or medicine,[279] or something else) an agent is usually confronted with several and diverse considerations that bear on that choice.

2. *Avoiding the Vice of Narrowing Normative Considerations Down.* — If we take the normative choice thesis seriously, then we need to inquire about the relevant normative reasons before choosing a method of interpretation. Normative reasons matter—all the relevant normative reasons. It is a mistake, then, to offer a normative reason as the single normative premise in the justification of an interpretive method without assessing whether there are other reasons that bear on that interpretive choice, including opposing normative reasons. Authors have alerted against this vice.[280] This subsection only adds two things to this literature.

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277. As Coan notes, "metaphysical arguments mask the role of choice in constitutional decision-making and thus the need for moral justification." Coan, supra note 5, at 847. The insight can be extended to all non-normative reasons.

278. This Article presupposes, but can't prove, that there are many relevant normative considerations bearing on interpretive choice. This is intuitive, given the plurality of plausible normative considerations mentioned in debates on interpretation. See supra section I.C. It is also consistent with the literature criticizing theories for focusing on one or a limited set of considerations. See infra note 280. For a discussion of pluralism, see Jordan, Constitutional Anti-Theory, supra note 5, at 1528–30.

279. These examples are discussed in Joseph Raz, The Morality of Freedom 304, 328, 332 (1986).

280. Fallon, for example, criticizes arguments based on the rule of law on the grounds that "this objection . . . ignores other values bearing on the choice of an interpretative theory." Fallon, Meaning of Legal Meaning, supra note 5, at 1304. Greenberg makes a similar point: "The Moral Impact Theory makes clear that it is not enough that some normative factor supports treating provisions as contributing to the law in a particular way; a method of interpretation must be favored by all relevant values on balance." Greenberg, Natural Law, supra note 5, at 139 (emphasis omitted). Jordan argues that the "plurality of

First, non-normative considerations may obscure the normative considerations that ultimately support a method of interpretation. Take intentionalism. Given the sophistication of the linguistic reasons offered by intentionalists, and the prominent role these play in their accounts,[281] it is easy to miss that—at least for some prominent accounts—the whole edifice rests on normative reasons, typically, authority.[282]

Second, the vice of narrowing normative considerations down occurs not only when authors focus on a single value but can also take place when they focus on a broader and more complex criterion. For example, there is no reason to think that all the potentially relevant reasons are captured by Sunstein's criterion of what "would make the American constitutional order better,"[283] unless that term is understood so broadly as to empty it of all content. For example, speaking of the "U.S. constitutional order" suggests that the relevant reasons relate to something systemic ("order").[284] If so, this criterion would leave out of consideration reasons that have no systemic impact, such as those that bear only on a specific case (for example, consequences for the parties).[285] It would also seem to leave out of consideration reasons related to orders different from the "constitutional" order, such as the economic order.[286] Finally, what about the impact of the decision in places beyond the United States, as is the case with judicial decisions concerning foreign policy or military intervention? Of course, these decisions might have some impact on the domestic constitutional order, but that impact is different from—and may not be commensurate with—its impact abroad. A decision that allows a military

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values will present a problem for some constitutional theories that pick a single value, or even a narrowly constrained set of values, to justify the theory." See Jordan, Constitutional Anti-Theory, supra note 5, at 1528.

281. See supra sections I.B. and II.C.2.

282. For an illustration, see supra note 168. There may be other normative reasons at stake. Ekins, for example, refers to "[t]he continuity of law and the importance of self-government over time." See Ekins, Objects of Interpretation, supra note 18, at 22. These can also be normative reasons for a particular method of interpretation. But they will not be the only ones. Id.

283. See Sunstein, How to Interpret the Constitution, supra note 3, at 8.

284. Id.

285. It may seem difficult to think of a Supreme Court decision that does not have a systemic impact, given its precedent-setting powers and influence. The Supreme Court is not the only interpreter, though. And, in any case, the systemic effects of precedents may provide reasons different than (and even opposite to) non-systemic considerations.

286. Of course, often there is a relation. Changes in the constitution affect the economic order. See Torsten Persson & Guido Tabellini, The Economic Effects of Constitutions 7 (2003) (offering a comprehensive study of economic effects of constitutions). And changes in the economic order may have an impact on the constitutional order, as when the executive grows in power to respond to an economic crisis. See Eric A. Posner & Adrian Vermeule, The Executive Unbound: After the Madisonian Republic 208 (2010) (referring to how the "financial crisis of 2008–2009 also revealed the extent of executive power"). But these considerations (economic and constitutional) are distinct: They may be of different magnitudes and support different methods of interpretation.

intervention may have a minor impact on, say, the allocation of war powers domestically (in the U.S. constitutional order) but momentous consequences in the country where the military intervention takes place.

3. *Reasons that Bear on Interpretive Choice vs. Reasons that One Should Consider.* — Some of the appeal of unduly focusing on a subset of the relevant normative considerations may come from an excessive focus on the judicial role. Much legal scholarship adopts the perspective of judges: It addresses how judges should reason and decide cases.[287] This is legitimate, but one should be cautious to extend it too far. Crucially, one shouldn't import the constraints of the judicial office into theoretical thinking.

The reasons that bear on a choice are not necessarily the same as the reasons that a specific person, in discharging a specific role, should weigh in making that choice.[288] Conversely, from the fact that it would be rational for a person to consider a set of reasons, and only such reasons, in making a choice, it doesn't follow that these are the reasons, or all the reasons, that bear on that choice.[289]

The fact that, say, consequences matter for interpretive choice doesn't mean that any judge should assess consequences in choosing a method of interpretation for adjudication. If judges have no way of knowing the possible consequences of their interpretive choices,[290] then

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287. See Frederick Schauer, Unoriginal Textualism, 90 Geo. Wash. L. Rev. 825, 855 (2022) ("Overwhelmingly, the literature on constitutional interpretation takes as its paradigm interpreter a Supreme Court Justice . . . ."); see also Sunstein & Vermeule, supra note 77, at 888 (2003) ("Legal education, and the legal culture more generally, invite interpreters to ask the following role-assuming question: 'If you were the judge, how would you interpret this text?'").

288. This could be for different reasons. For example, it could be because of the difference between the reasons that we have and the reasons that we believe we have. See Derek Parfit, Reasons and Motivation, 71 Procs. Aristotelian Soc'y (Supplementary Volumes) 99, 99 (1997) (explaining the distinction between normative reasons and motivating reasons). It could also be because it is reasonable to adopt (or impose the adoption of) second-order decisions. See Cass R. Sunstein & Edna Ullmann-Margalit, Second-Order Decisions, 110 Ethics 5 (1999) (explaining the nature and role of second-order decisions). There may also be reasons that some person or institution should exclude from consideration, for moral or institutional reasons. See, e.g., A.M. Honore, Legal Reasoning in Rome and Today, 4 Cambrian L. Rev. 58, 64 (1973) (arguing that "the most important feature of Roman and modern legal argumentation" is "the existence of a canon of unacceptable arguments").

289. See Courtney M. Cox, The Uncertain Judge, 90 U. Chi. L. Rev. 739, 741 (2023) (distinguishing between "what the judge ought to do according to a particular . . . theory" and "what the judge ought do given her beliefs about which jurisprudence(s) might be correct and her aim of doing that which she ought (judicially) to do"); Felipe Jiménez, Two Questions for Private Law Theory, 12 Jurisprudence 391, 407–08 (2021) (defending this claim in the context of private law theory).

290. For example, this could be the case if assessing consequences requires understanding empirical evidence. See Paul Yowell, Constitutional Rights and Constitutional Design: Moral and Empirical Reasoning in Judicial Review 56–89 (2018) (arguing that "courts lack institutional capacities to acquire and assess empirical research").

that provides a reason for them not to directly assess the consequences of that choice. But, from this, it doesn't follow that it is indifferent whether their interpretive choice leads to good consequences. If, say, a legislator or superior court was well aware of the consequences of an interpretive choice, and there were no stronger opposing reasons, it would be reasonable for this legislator or superior court to choose for the lower courts the method of interpretation that produces the best consequences if it had the competence and could do so (perhaps through a law of interpretation).[291] Furthermore, if the public is aware of the consequences of an interpretive approach adopted by courts, it would be reasonable for it to criticize that interpretive approach on the grounds of the consequences it produced or failed to produce—even if it was reasonable for judges not to assess the consequences.

The normative choice thesis is about the reasons that bear on interpretive choice. Whether those reasons should be weighed directly by an interpreter, and how, is a different question that cannot be answered without attention to the specific circumstances and the institutional role of each interpreter.[292] Perhaps judges should assess a narrow range of considerations. But one shouldn't go from that view to the view that the reasons bearing on interpretive choice are only those that judges should consider.

4. *Burden of Proof.* — One should pay attention to all the normative reasons bearing on interpretive choice. In this sense, the normative choice thesis entails the following burden for arguments for methods of interpretation: They must show that the normative reasons in favor of a method of interpretation are undefeated by other applicable normative reasons.[293] The normative choice thesis doesn't answer the question of which normative reasons are relevant in a specific interpretive choice and which ones should predominate. It only entails that these are the questions that interpretive choosers must ask.

C. *The Contingency of Interpretive Choice*

Another consequence that follows from the normative choice thesis is the contingency of interpretive choice. Authors who emphasize in some way the normative character of interpretive choice have noticed that this requires that such choice be case by case, context-dependent, limited, or non-monolithic.[294] Contingency doesn't entail that interpretive choice

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291. See supra section I.D.

292. See supra section II.B.2. (interpretive choice is practical and situated); see also supra section I.E; supra section II.C.4; infra section III.C.2.b (discussing institutional considerations).

293. The appropriate burden is for the normative reasons to be "undefeated" because it is possible that interpretive choice be rationally underdetermined.

294. See supra note 6 (referring to the views of Fallon, Jordan, Primus, and Watson on the contingent character of interpretive choice). For a thorough discussion, see Jordan, Constitutional Anti-Theory, supra note 5, at 1534–38.

needs to be undertaken case by case, but rather that it has to be made with an eye to circumstances. It rules out the idea that one chooses methods of interpretation in the abstract once and for all. Because relevant circumstances change, it's unlikely that interpretive choice will be the same for every domain, place, time, institution, etc.

1. *Contingency and Circumstances.* — Recall the hypothetical rival of the normative choice thesis: the conceptual determination thesis. For the conceptual determination thesis, only conceptual reasons matter. Since there is one thing that interpretation just is—only one method that conforms to the idea of interpretation—this is the method that interpreters should adopt. This is method X. Because the reason for adopting X is the concept of interpretation, and the concept of interpretation doesn't change with changes in circumstances or interpreters, then one can confidently assert that interpreters should adopt X, regardless of who interprets and their circumstances.

In contrast, for the normative choice thesis, there is no guarantee of stability. As seen in the previous section, many normative reasons could be relevant. These reasons change according to actors and circumstances.

On the practical view of interpretation defended here, interpretive choice in law is always the choice of some person for some practical purpose, be it to adjudicate a dispute, to pass legislation that is responsive to extant law, to implement and enforce legislation, or to evaluate the work of those interpreting law, among others.[295] Interpretive choice is thus *situated*. There is no interpretive choice in a vacuum—not in law.

The situated nature of interpretive choice means that interpretive choice takes place under specific circumstances. This leads to contingency if (unlike conceptual and other non-normative reasons) normative reasons vary with circumstances. There are good reasons for thinking that this is the case, though proving this is beyond the scope of this Article.[296]

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295. See supra section II.B.2.

296. This is so even for rule-consequentialist theories and for theories that include moral absolutes. Regarding the former, contingency doesn't deny the view that sound practical reasoning about interpretive choice could be oriented to determining what the "rule" whose acceptance will bring about the best consequences in interpretive choice is. If the rule could be different in different circumstances and places, then this is contingent as understood here. If, contrary to the claims this Article advances about contingency, some method of interpretation is universally applicable, its proponents need to argue for its universality. See infra section III.C.4. Regarding moral absolutes (exceptionless moral requirements), if they exist, then there are reasons that are always decisive. If one should never torture, whatever the circumstances, then presumably there is some reason that is always decisive against that action. Do any of such reasons bear on interpretive choice? Unless they bear directly on the interpretive process (which is dubious), moral absolutes would bear on interpretive choice indirectly: Interpretation may lead to an action that one has always-decisive reasons never to undertake (e.g., an interpretation that allows for torture). Interpretive choice would still be contingent, because the always-decisive reason wouldn't bear on all cases or all cases of a certain type, but rather whether it bears or not in a case would be contingent on the specifics of the case. Thank you to R. George Wright and Lawrence Solum for raising this point.

What makes this plausible is that at least the normative reasons usually mentioned in debates on interpretation[297] (a sample of which the next subsection surveys) change with circumstances. Jordan explains this: Both the set of such reasons,[298] and their balance,[299] change with circumstances.[300] Among those circumstances is the function the interpreter is performing (legislating, adjudicating, etc.), institutional setting, jurisdiction, area of law, the group affected by the decision, possible consequences, and many others. It is not only that "[n]o theory makes sense for every imaginable world."[301] In our own world, the relevant circumstances change.

Perhaps part of the appeal of non-normative reasons derives from the aspiration to avoid contingency.[302] But if non-normative reasons don't matter in themselves for interpretive choice, contingency cannot be avoided.

Contingency doesn't mean "case by case." It only means that interpretive choice depends on circumstances. In many circumstances, the reasons that bear on interpretive choice are such that can lead to adopting an interpretive method for a range of circumstances and cases. It could be that circumstances are stable, and thus interpretive choice is stable. Some agents, such as courts, may have reasons (say, the value of legal certainty) to be consistent in their interpretive choices, or to coordinate with other agents in adopting the same interpretive approach.[303] Similarly, the contingency of interpretive choice doesn't entail that interpretive choice needs to be undertaken by each individual agent. There could be reasons (for example, the need for coordination for the sake of legal certainty) for some actor (a constitution-maker, a legislator, a superior court) to choose

297. See supra section I.C.

298. As Jordan explains in the context of constitutional law, "[T]he range of constitutionally relevant values . . . is not a closed set." Jordan, Constitutional Anti-Theory, supra note 5, at 1530.

299. "Balance" (of reasons) here refers simply to the adequate way of relating reasons to one another. This is compatible with, for example, "trumps" or constraints. See Philip Pettit, Rights, Constraints and Trumps, 47 Analysis 8, 11–12 (1987) (explaining the notions of trump and constraint). Some literature on proportionality alludes to a narrower sense of "balancing." See Francisco J. Urbina, A Critique of Proportionality and Balancing 9–10 (2017) (explaining the different senses of balancing).

300. For Jordan, the "fit between the theory and the normative bases or values that justify it," the "relevance of those putative value bases," and the "agent relativity with regard to the reasons a decisionmaker has for making a constitutional decision," all entail that choice is "context dependence." See Jordan, Constitutional Anti-Theory, supra note 5, at 1534.

301. Sunstein, How to Interpret the Constitution, supra note 3, at 159.

302. See Coan, supra note 5, at 845 (arguing that "metaphysical arguments," including conceptual reasons, "hold a powerful appeal" in "a world of uncertainty and ambiguity").

303. On the value of judicial coordination and how law may facilitate it, see Urbina, Human Rights Adjudication, supra note 151, at 165.

an approach to interpretation for a range of situations and actors through a law of interpretation.[304]

Yet even if interpretive choice is in some place (more or less) regular, it is still contingent—it could be otherwise and it could change. The normative choice thesis should lead to an awareness of the ever-present possibility of striking a new balance of reasons and of the need to change methods of interpretation.

2. *Authority, Institutions, and Consequences*. — The possibility that new circumstances will justify a new balance of reasons and a change in method of interpretation is not only theoretical. Normative reasons are often mutable in strength.[305] Some are particularly mutable, as is the case with consequences. This section illustrates this mutability with reference to three examples of reasons that plausibly bear on interpretation: authority, institutional considerations, and consequences.

a. *Authority*. — Authority provides reasons for action—normative reasons. This is because there are reasons for authority. Yet the force of these reasons, and hence of authority as a reason, can vary with circumstances.

For example, if democracy is the reason to respect certain legal authorities,[306] then we should bear in mind that authorities can be more or less democratic. A constitution that is the product of representative lawmaking and is validated by democratic practice is not in the same position as a constitution enacted by a dictator, or an "abusive" constitution,[307] or a constitution that is passed through irregular procedures that exclude the opposition.[308] Similarly, legislation may be fully democratic (for example, the end-result of intense democratic deliberation, participation, and voting) or not democratic at all. Even within the same country, some laws may realize the democratic ideal more and some less, depending on the deliberation and democratic

304. See supra section I.D; see also Jiménez, Minimalist Textualism, supra note 1, at 57 (holding that a lawmaker could settle interpretive choice). In a sense, an authority can settle interpretive choice for those subject to it. In another sense, each actor bound by that authority still needs to choose whether to follow or not the authoritative determination, though authoritative determination may provide strong reasons in favor of an alternative.

305. Though not all. Some may have absolute normative force and thus should always be satisfied. For example, in some theories, absolute rights are taken to provide such reasons. See Finnis, Natural Law, supra note 192, at 223–26; see also supra note 296.

306. See Scalia, supra note 51, at 9–14, 40 (arguing for textualism and originalism based on respect for democracy).

307. See David Landau, Abusive Constitutionalism, 47 U.C. Davis L. Rev. 189, 191 (2013) (discussing how constitutional change can be used to undermine democracy).

308. As in the case of the 2019 constitutional reforms in Benin challenged in XYZ v. Republic of Benin, No. 010/2020, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], (Nov. 27, 2020), https://www.african-court.org/cpmt/storage/app/uploads/public/5fc/7b5/78c/5fc7b578ce85b302168501.pdf [https://perma.cc/LZG9-BKEV].

engagement that went into it.[309] Time may also be a factor, with democratic authority waning over time.[310]

The same can be said of other justifications for authority. Two common ones are coordination and superior knowledge.[311] If the reason for authority is that it secures coordination, then some authorities may be more successful at coordinating than others. If the reason for authority is the epistemic advantages of some authority (an authority knows more than those subject to it), then some authorities have more epistemic capacities than others, and their relative advantage vis-à-vis their subject varies not only with their epistemic capacities, but also with those of their subjects.[312]

The same applies to the authority of law. As Finnis says, "the moral obligation to obey each law is variable in force."[313] One way to think about this is in terms of central and noncentral cases of law. A central case of a law is a just law, enacted by someone with authority to do so, through the proper procedures, and which contributes to the common good.[314] The reasons to comply with a particular law (say, a statute) will change according to whether that law is closer to or farther from the central case. For example, if a reason to comply with the law is that it's just, then, other things being equal, the less just a law is, the less reason there is to comply with it. There may be no reason whatsoever to comply with some laws.[315]

In a well-functioning democracy, one should expect authority to provide relatively stable reasons. But even in a developed democracy, the force of reasons relating to authority, and to the authority of the law, can vary.

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309. Further considerations related to the kind of democratic engagement that is at stake may bear on interpretive choice. For example, the appropriate method for interpreting legislation passed by referenda may not be the same as the one that is appropriate for legislation passed by a representative body. See, e.g., Ethan J. Leib, Interpreting Statutes Passed Through Referendum, 7 Election L.J. 49 (2008) (explaining how interpretive methods may vary when applied to legislation passed through a referendum). This is compatible with the normative choice thesis, because the differences may be normatively relevant. Thank you to Aaron-Andrew Bruhl for raising this point.

310. For such an argument with regard to originalism, see Primus, supra note 5, at 186–211.

311. See Raz, Practical Reason and Norms, supra note 276, at 63 (referring to these "methods of justifying authority" as "two of the most common and important"); see also Larry Alexander & Emily Sherwin, The Rule of Rules: Morality, Rules & the Dilemmas of Law 14 (2001) ("Authoritative settlement solves the problems of coordination, expertise, and efficiency." (emphasis omitted)).

312. As illustrated by the example of the "wise electrician" in Timothy Endicott, The Subsidiarity of Law and the Obligation to Obey, 50 Am. J. Juris. 233, 244–45 (2005).

313. Finnis, Natural Law, supra note 192, at 318 (emphasis omitted).

314. This is a simplified version of Finnis's "focal meaning" of law. See Finnis, Natural Law, supra note 192, at 276–77. The expression "focal" refers to "meanings" and "central" to "instances," but they are used to the same effect by Finnis. See id. at 429–30.

315. See, e.g., Anna Lukina, Making Sense of Evil Law (Univ. Cambridge Faculty of Law, Research Paper No. 14/2022, 2022), http://ssrn.com/id=4180729 [https://perma.cc/344H-CHQD] (arguing that evil law is law, but doesn't create pro tanto moral duties).

b. *Institutional Considerations.* — For the normative choice thesis, interpretive choice is always situated, and thus requires framing questions about interpretive choice as questions regarding the performance of a specific role in a specific context. If the choice of a method of interpretation attempts to effectively realize the relevant normative reasons, one needs to take into account the circumstances that will affect their realization in practice. In this sense, institutional considerations are subordinated to normative reasons: They provide a factual input for deliberation on the realization of normative reasons in concrete circumstances. This entails two things that lead to contingency in interpretive choice.

First, as Jordan explains, there is "[a] kind of agent relativity" to constitutional decisionmaking,[316] and the same can be said of interpretive choice generally. Different actors have different roles, and their roles shape the reasons for which they should act. Respect for the law and the law's integrity presumably weighs more heavily on judicial interpretive choice than on a citizen's interpretive choices. The fact that a superior court chose a particular method of interpretation may be a strong reason for a lower court to choose that same method, but that may not be as strong a reason for interpretive choice in the legislature.[317]

Second, as Vermeule explains, the different institutional capacities and limitations of institutions also affect interpretive choice.[318] Take the judicial role: The way in which the judicial power is actually institutionalized in our society provides a factual context that sound normative reasoning can't ignore. Institutional considerations are an important part of this factual setting. Thus, realizing the value of substantive justice in the concrete case, to take only one specific normative reason, requires special awareness of the expected capacities and motivations of courts. If courts are not particularly good moral reasoners,[319] then this counts against them assessing reasons of justice, and thus against a method of interpretation that requires them to do that. The interpretive method that would rank higher on that value is that which,

316. Jordan, Constitutional Anti-Theory, supra note 5, at 1538.

317. See id. (providing examples of how "reasons for constitutional decisions" change according to the different "social roles that constitutional decisionmakers might occupy").

318. See supra section II.B.2; see also Vermeule, Judging Under Uncertainty, supra note 5, at 86.

319. For an exploration of this claim, see generally Yowell, supra note 290, at 104–15 (arguing that a judge's training focuses on technical legal learning and reasoning, not moral reasoning); Jeremy Waldron, Judges as Moral Reasoners, 7 Int'l J. Const. L. 2, 5 (2009) (arguing that a judge's duty to follow precedent and the implications of a statute prevent him from fully applying moral reasoning).

given the capacities and motivations of courts and judges, is more likely to realize that value to a greater degree than other alternatives.[320]

Now, institutional considerations vary from institution to institution, as different institutions (including courts of different levels[321]) have different capacities, legitimacy, and motivations, and their actions produce different effects.

Ekins rightly notices that, for a view such as Sunstein's, institutional reasons can lead to different interpretive choices, adding that he regards as "very odd to think . . . that sound interpretation varies with the interpreter."[322] From the vantage point of the normative choice thesis, there is nothing odd in this. If interpretive choice depends on institutional considerations, and institutional considerations vary with different institutions (including different kinds of courts within the judiciary), then the interpretive methods that are reasonable for each institution could vary accordingly.[323]

c. *Consequences*. — If there is a type of normative reason that is prone to change, it is consequences. An interpretive choice can have good or bad consequences. The fact that it will produce good consequences is a reason for it, and the fact that it will produce bad consequences is a reason against it.[324] Even in legal adjudication, consequences vary. Consequences may be modest in many cases, and when that is the case, consequences may not matter, or matter little, for interpretive choice.

But consequences change with circumstances. The method of interpretation that usually leads to immaterial or acceptable consequences could, in some specific case, lead to nefarious consequences. Then, consequences will provide reasons for changing the method of interpretation, and depending on the magnitude of the consequences, these reasons may override the reasons supporting the method usually

320. See Vermeule, Judging Under Uncertainty, supra note 5, at 1 ("The question is always 'What decision-procedures should particular institutions, with their particular capacities, use to interpret this text?'").

321. See Aaron-Andrew P. Bruhl, Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court, 97 Cornell L. Rev. 433, 458, 470, 487 (2012) (arguing that different courts may approach interpretation differently, depending on their hierarchy, democratic legitimacy, and institutional capacities).

322. Ekins, Objects of Interpretation, supra note 18, at 15.

323. They could also vary in relation to other factors as well, such as complexity of the issue, pressure of public opinion, capacities of other related institutions to deal with the specific problem at hand, and so on.

324. This does not entail that the normative choice thesis is consequentialist. See John Tasioulas, Punishment and Repentance, 81 Philosophy 279, 279–80 (2006) (warning against assuming that a concern for consequences is necessarily "consequentialist" in criminal punishment).

adopted.[325] Because consequences change, they contribute to the contingency of interpretive choice.

3. *One Shouldn't Commit to a Method of Interpretation.* — The contingent nature of interpretive choice should cast doubt on a remarkable aspect of American legal practice: that jurists self-identify or are identified by others by reference to the method of interpretation they favor. Some judges and scholars are originalists,[326] some are not. At work here is the intuition that the "right" or "best" method of interpretation must be one that applies to every instance of interpretation. An originalist, then, would be committed to the idea that the U.S. Constitution should always be interpreted according to originalist methods. The same would apply to other approaches to interpretation. There are less strict variations of the same idea: a "faint-hearted" originalist would think proper to interpret the Constitution according to originalist methods but allow for some specific exceptions when originalism leads to clearly unacceptable outcomes.[327] Approaches to interpretation are typically defended as the best approach *tout court*, not as the best approach for this type of case, in this type of institution.[328]

The contingent nature of interpretive choice challenges this. There is no reason for jurists to defend one method of interpretation as the unqualified best, just as there is no reason to adopt in practice a method of interpretation for all situations and offices.[329]

Now, just as contingency casts doubt on any unqualified commitment to a method of interpretation, it can also redeem its contingent, perhaps even opportunistic, use.

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325. The claim here is not that judges should always consider consequences in adjudicating. As said above, there may be good institutional reasons for them not to do so. But these reasons also vary with circumstances. Some courts may be better placed than others to assess empirical facts regarding consequences; some courts may hold a special responsibility regarding one type of consequence (e.g., a constitutional court in a transitional period, regarding political consequences that could derail the transition process); and sometimes consequences may be clear and certain, and sometimes not.

326. See, e.g., Sunstein, How to Interpret the Constitution, supra note 3, at 30 ("Justice Clarence Thomas subscribes to [original public meaning originalism], and so does Justice Neil Gorsuch.").

327. See Scalia, Originalism: The Lesser Evil, supra note 11, at 862, 864 ("I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging.").

328. There are exceptions to this. Fallon, for example, argues that interpretive choice should be case by case. See Fallon, Meaning of Legal Meaning, supra note 5, at 1242–43, 1303–05. Professor Philip Bobbitt famously defends a nonexclusive approach to interpretation based on modalities of legal argumentation. See generally Philip Bobbitt, Constitutional Fate: Theory of the Constitution (1982) ("[T]here are five types [of constitutional argument]. As will become clear, these five are really archetypes, since many arguments take on aspects of more than one type.").

329. Though it could happen that, under some circumstances, it is advantageous that some interpreters (say, courts) apply a uniform approach—for example, if reasons of legal certainty became particularly important in a certain period.

For example, contingency explains why interpretation can be a local phenomenon. Take originalism again. If conceptual reasons determined interpretation, defenders of originalism would have to argue that originalism is the only method of interpretation that conforms to the "true" idea of interpretation. But isn't originalism an almost uniquely American phenomenon?[330] If so, then does everyone else in the world get interpretation wrong? If one thinks that methods of interpretation must be vindicated by reference to some truth about the idea of interpretation, or some basic truth about language use, or a theory of law, or any other noncontingent factor, then being a local phenomenon would cast doubt on originalism. Not so on the normative choice thesis. The relevant normative reasons and their balance can shift from place to place. For example, the Framers may command such authority and respect that there are very strong reasons to read the Constitution as they or their generation would have. But these reasons might be absent in places where the constitution has less conspicuous origins.

Similarly, it vindicates the "invention" of a method of interpretation. Sometimes originalism is portrayed critically as a doctrine made up to respond to specific political concerns. This is the version of the story according to which "in its modern form, originalism was born as a political movement, not only as a legal movement; it was a self-conscious response from the right to a set of Supreme Court decisions that pleased the left."[331]

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330. See Jack Balkin, Why Are Americans Originalists?, *in* Law, Society and Community: Socio-Legal Essays in Honour of Roger Cotterrell 309, 309 (Richard Nobles & David Schiff eds., 2016) (defending the claim that "[o]riginalism is mostly unknown outside of the United States"); Jamal Greene, On the Origins of Originalism, 88 Tex. L. Rev. 1, 6 (2009) [hereinafter Greene, Origins of Originalism] ("[A]lthough some version of originalist judicial practice is not peculiar to the United States, the historicist appeals that support American originalism have a potency here that is found in few foreign constitutional courts . . . ."). But see Yvonne Tew, Originalism: A Uniquely American Preoccupation?, 31 Diritto Pubblico Comparato ed Europeo 647, 647–51 (2017) (surveying the use of originalist arguments in India, Malaysia, and Singapore); Ozan O. Varol, The Origins and Limits of Originalism: A Comparative Study, 44 Vand. J. Transnat'l L. 1239, 1252–87 (2011) (analyzing the use of originalism by the Turkish Constitutional Court); Lael K. Weis, What Comparativism Tells Us About Originalism, 11 Int'l J. Const. L. 842, 846–48 (2013) (discussing originalism's foundations in Australia).

331. Sunstein, How to Interpret the Constitution, supra note 3, at 28; see also Sunstein, Originalism, supra note 93, at 1673–74 ("[O]riginalism seemed to be a highly political weapon in a highly political war over the future direction of the Supreme Court. Whether right or wrong, originalism served as a foundation for an objection to the Warren Court and to *Roe v. Wade*."). For accounts of the "making" of originalism, see Jack Goldsmith, The Conservatives and the Court, Liberties J. Culture & Pol., Winter 2021, 126, 129–31; Jamal Greene, Origins of Originalism, supra note 330, at 63–71; Jamal Greene, Selling Originalism, 97 Geo. L.J. 657, 680–81 (2009); Robert Post & Reva Siegel, Originalism as a Political Practice: The Right's Living Constitution, 75 Fordham L. Rev. 545, 547, 554–61 (2006); Keith E. Whittington, Is Originalism Too Conservative?, 34 Harv. J.L. & Pub. Pol'y 29, 29–30 (2011).

Originalists seem to resist this narrative.[332] With good reason. It casts doubt on claims that originalism is grounded on some atemporal and necessary truth about interpretation. But this shouldn't be a cause for concern from the point of view of the normative choice thesis. Because interpretive choice is contingent, it should always respond to circumstances. The fact that originalism was a response to specific needs of legal practice in the '70s and '80s actually counts in favor of originalism, if those needs were real and originalism was indeed an apt means to address them.

Perhaps this is not the defense that originalists want.[333] It can vindicate the adoption of originalism at one moment and justify its abandonment at another. It allows for claims that "originalism has now outlived its utility."[334] If contingency is a necessary feature of interpretive choice, one should always be open to the possibility of changing one's favored method of interpretation.

Finally, contingency vindicates the faint-hearted of this world.[335] Commentators have noticed that judges rarely stick to a single method of interpretation;[336] sometimes judges are criticized for this.[337] But inconsistency is not a vice.[338] There is nothing arbitrary or immoral in adopting different methods of interpretation in different situations. To the contrary, this may be the most reasonable course of action, given that the normative reasons that ground an interpretive choice change with circumstances. On the normative choice thesis, change and adaptation is what we should expect of conscientious judges.

4. *Burden of Proof.* — The contingency of interpretive choice entails a burden for proponents of methods of interpretation: They must either make explicit the circumstances under which their favored method is expected to apply (to which institution, where, for which area of law, for

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332. See Baude, Is Originalism Our Law?, supra note 36, at 2390 ("I know of no originalist who holds this view of the history, and I find it rather dubious myself . . . ." (footnote omitted)).

333. Though, as Sunstein notes, sophisticated defenses of originalism offer normative reasons. See Sunstein, How to Interpret the Constitution, supra note 3, at 61–62.

334. Adrian Vermeule, Beyond Originalism, The Atlantic (Mar. 31, 2020), https://theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037 [https://perma.cc/ X82X-4TNP].

335. See Scalia, Originalism: The Lesser Evil, supra note 11, at 864 ("[I]n a crunch I may prove a faint-hearted originalist.").

336. See, e.g., Stephen I. Vladeck, The Inconsistent Originalism of Judge-Made Remedies Against Federal Officers, 96 Notre Dame L. Rev. 1869, 1872 (2021) ("[E]ven the staunchest originalists aren't originalists about everything.").

337. See Barnett, Critique of "Faint-Hearted" Originalism, supra note 13, at 13 ("Does Justice Scalia's faint-hearted fidelity to the original meaning of the Constitution not represent something of a refutation of originalism itself[?]").

338. Though inconsistency can be accompanied by some vices, such as disingenuousness. See, e.g., Richard H. Fallon, Jr., Selective Originalism and Judicial Role Morality, 102 Tex. L. Rev. 221, 233 (2023) ("If the originalist Justices are prepared to rest their decisions on originalist premises only some of the time, they should acknowledge as much . . . .").

example)[339] or offer an argument for the universal application of the method. Approaches to interpretation should place their limitations front and center by answering the following question: What is the set of circumstances and actors to which the proposal applies?

D. *The Instability of Interpretation*

Contingency in interpretation leads to instability of interpretation. Even when a method of interpretation seems exclusively appropriate for interpreting a given provision, that may change with a change in circumstances. This becomes clear when evaluating a possible objection.

It could be argued that interpretive choice is not always contingent because the appropriate method of interpretation doesn't always depend on normative considerations.[340] Rather, it can have a more fixed source: the formulation of a legal provision in the text. On this reasoning, a very precise text requires a more rigid form of interpretation, while a more open-ended or vague one, a more flexible approach. We can skip the details of what is "precise," "rigid," "flexible," etc. The general proposition is intuitive enough. For example, there seems to be broad agreement that the provision in the Constitution establishing that "neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years"[341] sets a very clear and precise requirement for a person to be eligible for the presidency: to be at least thirty-five years old.[342] This broad agreement suggests that nothing but the most naked

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339. They could do so in a number of ways. One possibility is to explain the conditions under which the method applies. Another is to treat the method as the default in a given area, but subject to defeasibility conditions. See, e.g., Lawrence B. Solum, Originalism and the Unwritten Constitution, 2013 U. Ill. L. Rev. 1935, 1977–78 (referring to defeasibility conditions to originalism in the form of doctrine "inconsistent with communicative content of the constitutional text").

340. Thank you to Michael Smith for raising this objection.

341. U.S. Const. art. II, § 1, cl. 5.

342. Several authors who adopt different approaches to interpretation share this view. Sunstein, for example, mentions it as an example of unproblematic "semantic originalism." "To be president, someone must be at least thirty-five years of age . . . . If the semantic meaning of words shifts over time, it is fair to say that what is binding is the original semantic meaning, not some new semantic meaning. Almost everyone almost always accepts semantic originalism." Sunstein, How to Interpret the Constitution, supra note 3, at 95–96. Moyn concurs: "Some aspects of American election law are perfectly clear—like the rule that prohibits candidates from becoming president before they turn 35 . . . ." Samuel Moyn, Opinion, The Supreme Court Should Overturn the Colorado Ruling Unanimously, N.Y. Times, (Dec. 22, 2023) https://www.nytimes.com/2023/12/22/opinion/trump-colorado-ballot-ban.html (on file with the *Columbia Law Review*). Similarly, Dworkin: "It is as illegitimate to substitute a concrete, detailed provision for the abstract language of the equal protection clause as it would be . . . to treat the clause imposing a minimum age for a President as enacting some general principle of disability for persons under that age." Dworkin, Freedom's Law, supra note 1, at 14. And Barnett: "[S]ome provisions of the Constitution are rule-like enough to be applied directly to most cases without need of

literal meaning is to be read from this provision, and hence nothing but the most austere textualism is pertinent to its interpretation. The intuition, then, is that what determines how to interpret this provision is not normative reasons, but the precision of its formulation.

The intuition is misleading. It's never the case that the formulation of a provision determines interpretive choice. What justifies interpretive choice here is that there are goods of paramount importance served by precision and stability in this domain: avoiding the risk of manipulation that a broader standard would entail, reducing the possibility of discord in elections, etc. Any alternative method of interpretation (living constitutionalism, moral readings, etc.) that could upset that stability and render this provision less determinate would compromise achieving goods of great importance. So, there is an (often intuitive) understanding of relevant normative reasons that are, in our circumstances, decisive.

This becomes transparent if one imagines a scenario in which the text remains constant but normative reasons change. If our intuitions are that interpretive choice could change with a normatively significant change in circumstances, despite the text remaining the same, then we'll have abandoned the intuition that the text's formulation determines interpretive choice.[343]

Here's the scenario: In the year 2100, people live until they are 300 years old. As a result of longevity and the chemicals that allow it, people mature much later than previous generations. At thirty-five, people are still adolescents. They typically haven't finished high-school, or had such experiences as having responsibility over others, working for a substantial time, voting, and participating in civic life. The most famous streamer, a thirty-five-year-old gamer known as "CptA1N," has announced his bid for the presidency. Confusing popularity with competence, he believes he is qualified to be president. Yet, he evidently lacks the maturity to run the country.

If there were a constitutional challenge to his nomination on the grounds that he does not fulfill the requirement set by the provision requiring thirty-five years of age for eligibility to the presidency, how should that provision be interpreted? In those circumstances, it is not obvious that a literalist approach would be justified. It would be more plausible than it is now to read the provision attending to its purpose, for example, as requiring that a person be of "middle-age," or of the maturity that, at the time the Constitution was written, people typically had at thirty-five, or in some other way that would go beyond the semantic meaning of

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intermediate doctrine. The most oft-cited example of this is the provision limiting the presidency to persons who are at least thirty-five years old." Barnett, Restoring the Lost Constitution, supra note 261, at 125.

343. There are other explanations compatible with the one provided here. See, e.g., Ryan D. Doerfler, High-Stakes Interpretation, 116 Mich. L. Rev. 523, 523–28 (2018) (arguing on epistemic grounds that "unambiguous" text can become unclear in virtue of the high-stakes of a case).

the text. Surely in weighing interpretive alternatives, one should consider the great benefits of having a precise rule mentioned above. Perhaps those reasons still outweigh all others, and we should keep our traditional reading. But the point is that an alternative reading (such as one that downplayed the literal meaning in favor of the purpose of the text) would be more plausible than it is now. This change can't be explained by reference to the formulation of the provision, because the provision hasn't changed. Because normative reasons can always change with a change in circumstances, interpretation is never entirely stable.

CONCLUSION

Only normative reasons can justify choosing a method of interpretation. This is the normative choice thesis advanced here. There is no immutable conceptual, linguistic, or theoretical consideration that can ground a method of interpretation. Since the balance of normative reasons changes with circumstances, the interpretation of no provision is fixed forever, and no one should always be an originalist, or a living constitutionalist, or a textualist, or a purposivist.

There is nothing cynical or anarchist in this argument. It's not a plea for disbelief in law or for failing to observe it. True, on the account of interpretive choice proposed here, interpreters confronted with a legal text may be more or less faithful to it in determining its meaning. They may undertake activities that can be plausibly categorized as "interpretation," or do something else. To the extent that these activities are practically available, they are all alternatives for choice. There is no point in hiding this reality. But one would expect that, in a well-functioning legal system, contemplation of all alternatives would make us *more* aware of the importance of fidelity to the law—whatever that entails. It would show, through contrast, the goods and requirements of practical reasoning that only law and its observance can secure.[344] But if, after pondering all the alternatives, we realize that fidelity to the law is unappealing, then our problem would not lie in our theories but in our practice.[345]

If the normative choice thesis were widely accepted, debates on interpretation would look different. They would be less structured around camps (originalists vs. living constitutionalists of different stripes; textualists vs. purposivists; etc.), would be less about grand philosophies, and would not be about an all-or-nothing determination of what is *the* right way of interpreting. Instead, they would be about more tentative,

344. See supra note 192.

345. This can happen for many reasons, of which the most evident is that the content of the law is unjust or otherwise deficient. A less evident reason is that law and legal methods are being used in matters for which they are unsuited. See Judith Shklar, Legalism 2 (1986) (referring to legalism as "one morality among others" and offering a criticism of the legalistic approach to politics).

circumscribed, compromising and, overall, modest proposals for going about determining the meaning of a legal text. In a highly polarized society, where the stakes of legal adjudication are already too high,[346] this should be an appealing prospect.

346. See Jamal Greene, How Rights Went Wrong: Why Our Obsession With Rights Is Tearing America Apart 143–44 (2021) ("Constitutional law has high enough stakes, but our courts keep making them higher.").

NOTES

PROTECTING GOOD-FAITH COOPERATION AND INFORMATION: DEFERRAL OF REMOVAL PROCEEDINGS FOR SYMPATHETIC SNITCHES

*Tanisha Gupta**

The criminal and immigration systems in the United States have increasingly overlapped, adversely affecting noncitizens even distantly involved in criminal activity. Individuals without legal status who have engaged significantly with a criminal organization can cooperate with law enforcement in exchange for formal immigration benefits. There are no formal protections, however, for individuals residing in the country without legal status who have engaged in minor criminal activity—so minor that charges are not brought against them—even when they cooperate with law enforcement to provide information on the larger criminal scheme. This seemingly contravenes the goals of criminal and immigration law by failing to protect vulnerable accomplices who have not been charged with wrongdoing.

This Note proposes shielding such susceptible populations by expanding immigration protections. In the criminal sphere, charged individuals who lack the ability to render the substantial assistance needed for formal cooperation can still be eligible for a "safety valve" if, in good faith, they provide details on the activities that they partook in. Recipients of safety-valve protections receive sentences below the defined statutory minimums for the crimes they have committed. They do not obtain as much of a reduction in sentencing as formal cooperators or informants do but still benefit from engaging honestly with law enforcement. This Note proposes mirroring such a protection—a lesser version of the S visa modeled after the safety valve—into the immigration context.

* J.D. Candidate 2025, Columbia Law School. Thank you to Professor Daniel Richman for his invaluable guidance throughout the Note-writing process. Thank you also to Professor Elora Mukherjee, Professor Anjum Gupta, and Jey Hernandez for their insightful commentary on the piece. This Note is dedicated to Dr. Arti Kapoor Gupta—a staunch advocate, ambitious leader, and extraordinary mother. May her legacy continue to inspire us all.

INTRODUCTION

Envision a thirty-year-old man who works part time for a shipping company and has been residing in the United States without legal status since 2022.[1] Now imagine that his boss, knowing that this noncitizen would not risk the potential immigration ramifications of interacting with law enforcement, involves him in a spinoff of the legitimate shipping business: narcotics transport and trafficking. All he does is unpack and repack these shipments to send to their next destination, but he does so knowingly, and this minor action inculpates him in the trade. The DHS, which has increasingly focused efforts on preventing illicit drug trade,[2] traces a shipment back to him. Brought in for questioning, he immediately shares whatever information he has on his boss's business, but his knowledge is

1. This hypothetical is based on an existing case, though certain facts have been changed to preserve anonymity.

2. For more information on DHS's efforts to target narcotics trade, see Press Release, DHS, DHS Doubles Down CBP Efforts to Continue to Combat Fentanyl and Synthetic Drugs (Oct. 26, 2023), https://www.dhs.gov/news/2023/10/26/dhs-doubles-down-cbp-efforts-continue-combat-fentanyl-and-synthetic-drugs [https://perma.cc/7BM8-MQ5D] (detailing DHS's updated strategy to disrupt the supply chain of drugs from other countries into the United States).

limited. The U.S. Attorney's Office, recognizing his complicated situation and minor involvement in the crime during a criminal proffer, decides not to bring charges.[3] Interaction with federal law enforcement, however, does not end there. Now that DHS has records indicating he is someone who entered the country without legal paperwork, he is at risk of immigration action.

The growing overlap between criminal and immigration law, coined "crimmigration,"[4] has significant effects on noncitizens in the United States. Immigration law has evolved from merely refusing entry to individuals with preexisting criminal histories to increasingly deporting people who have committed crimes or are "deemed likely to commit" certain crimes.[5]

Currently, individuals residing in the country without legal status who have engaged in criminal activity are eligible to receive immigration protections through S nonimmigrant visas if they sign on to work with government agencies as formal cooperators or informants.[6] Those protections will not, however, apply in a situation like the hypothetical above. There is no formal immigration protection available for an individual who played such a minor role in a larger criminal scheme. Even if they fully cooperate in a criminal proffer, a law enforcement agency may not value their aid to the same extent as that of a formal cooperator or

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3. Federal prosecutors have discretion over whether to bring criminal charges against individuals involved in a crime. Factors for declining to prosecute an individual include minor culpability in connection with the offense and personal circumstances that affect the accused. DOJ, Just. Manual § 9-27.230 (2023). In Fiscal Year 2022, U.S. Attorneys' Offices declined to prosecute 24,345 cases presented to them, including 3,197 cases referred by DHS. See DOJ, United States Attorneys' Annual Statistical Report Fiscal Year 2022 61 tbl.15 (2022), https://www.justice.gov/usao/file/1574596/dl?inline [https://perma.cc/8UEQ-2WVT] (listing the number of Customs & Border Protection, ICE, USCIS, Secret Service, and all other DHS cases that the DOJ declined to prosecute in Fiscal Year 2022, adding up to 3,197 cases referred by DHS that the DOJ declined to prosecute). Studies suggest that prosecutorial discretion plays a key role in the future of those involved in crime: Choosing not to prosecute minor players in a criminal activity statistically decreases their likelihood of recidivism and improves their economic outcomes. See, e.g., Michael Mueller-Smith & Kevin T. Schnepel, Diversion in the Criminal Justice System, 88 Rev. Econ. Stud. 883, 885 (2021) (finding that felony diversion, which pauses or terminates a felony case, has resulted in "[t]he probability of any future conviction declin[ing] by approximately 45% and the total number of future convictions fall[ing] by 75%" along with "quarterly employment rates improv[ing] by 49%").

4. The term "crimmigration" was first used by Professor Juliet Stumpf. See Juliet Stumpf, The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power, 56 Am. U. L. Rev. 367, 376 (2006).

5. Id. at 381–84.

6. In fact, the S visa can even be used to provide immigration benefits to foreign nationals living abroad who are extradited to the United States for criminal trial and who enter into cooperation agreements. See Laura A. Gavilán, A Criminal's Path to the American Dream: Extradition as a Drug Enforcement Policy Tool, 28 Geo. Immigr. L.J. 597, 612–13 (2014) (arguing that the extradition of Colombian drug traffickers creates a potential immigration pathway enabling them to seek permanent residency in the United States).

informant. This structure seemingly contravenes the goals of criminal and immigration law by failing to protect vulnerable accomplices who have not been charged with wrongdoing.[7]

Compared to the typical cooperator who "forces the government to 'buy' information that the 'concerned citizen' would have freely given,"[8] noncitizens without legal status may not feel comfortable freely interacting with law enforcement. Their willingness to work openly and truthfully with criminal agencies once discovered thus indicates "a genuine desire to make amends for wrongdoing."[9] This is especially the case for the class of individuals addressed by this Note, who were so minorly involved in criminal activity that charges were not brought against them.

This group falls into a quite unfortunate trap—they were not involved enough in criminal activity to gain formal immigration benefits, yet their contact with criminal authorities is likely the reason they are considered priority status for immigration action. Having become subject to government attention, they face a dire need for immigration protection. Whatever prejudice stems from their interaction with the criminal system should thus be expunged by their cooperation.

This Note proposes shielding such susceptible populations by expanding immigration protections. In the criminal sphere, charged individuals who lack the ability to render the substantial assistance needed for formal cooperation can still be eligible for a "safety valve" if, in good faith, they provide details on the activities that they partook in. Recipients of safety-valve protections receive sentences below the defined statutory minimums for the crimes they have committed. The information they provide need not be unknown to the government nor particularly relevant or useful in future trials of higher-ups.[10] So long as the defendant did not serve as an organizer or leader in the conduct at hand and has provided

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7. See Rachel Frankel, Note, Sharks and Minnows: Using Temporary Alien Deportation Immunity to Catch the Big Fish, 77 Geo. Wash. L. Rev. 431, 436–38 (2009) (highlighting that criminal law seeks a combination of retribution, deterrence, incapacitation, and retribution, while immigration law seeks to enforce immigration priorities to achieve justice). Frankel's innovative argument focuses on legal permanent residents who have officially been charged with crimes and now seek cooperation status—a very different subset of the population than that discussed in this Note because of both the immigration status of the noncitizen and their level of criminal involvement. Despite these differences, the general goals of law hold true in both situations. See also 18 U.S.C. § 3553(a)(2) (2018) (listing out the factors to consider upon imposing a criminal sentence).

8. Daniel C. Richman, Cooperating Clients, 56 Ohio St. L.J. 69, 83 (1995).

9. See Michael A. Simons, Retribution for Rats: Cooperation, Punishment, and Atonement, 56 Vand. L. Rev. 1, 4 (2003) ("[F]or some cooperators, cooperation can be a vehicle through which the defendant experiences atonement. . . . [T]here is an occasional defendant for whom the decision to cooperate is motivated by a genuine desire to make amends for wrongdoing.").

10. See 18 U.S.C. § 3553(f)(5) ("[T]he fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.").

all the information that they have related to said conduct, they may qualify for safety-valve provisions.[11] Recipients do not obtain as much of a reduction in sentencing as cooperators or informants do, but they still benefit from engaging honestly with law enforcement.[12] This Note proposes mirroring such a protection—a lesser version of the S visa modeled after the safety valve—in the immigration context.

The Note proceeds in three Parts. Part I details existing avenues for working with the government to gain nonimmigrant status, which provides temporary legal residence in the United States.[13] Some of these opportunities have the potential to lead to permanent residency while others do not, depending on the level of assistance an individual provides to government officials. It then lays out current guidelines and immigration priorities for DHS officials. This Part explains why none of the existing immigration protections adequately cover the group addressed in this Note.

Part II focuses on individuals overlooked by the existing system. It highlights the high bar to serving as a cooperator or informant and the many critiques of these roles. As an alternative, this Part explores the requirements and benefits of the criminal safety valve and good-faith cooperation. It then elucidates why the S visa, as it is currently set up, cannot be expanded to include individuals who meet the truthful information-sharing requirements of the criminal safety valve and good-faith cooperation.

Finally, Part III proposes a feasible protection for such individuals based on existing movements in immigration law. Specifically, it advocates for broadened protections coupled with a deferred removal program that does not waive the right to judicial resort. While deferred removal is not

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11. Id. § 3553(f)(4)–(5). Other requirements of the safety valve include that:

> (1) the defendant does not have—
>
> (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
>
> (B) a prior 3-point offense, as determined under the sentencing guidelines; and
>
> (C) a prior 2-point violent offense, as determined under the sentencing guidelines;
>
> (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
>
> (3) the offense did not result in death or serious bodily injury to any person . . . .

Id. § 3553(f)(1)–(3).

12. Id. § 3553(f).

13. For a full list of available nonimmigrant statuses, see Nonimmigrant Classes of Admission, Off. of Homeland Sec. Stat., DHS, https://www.dhs.gov/ohss/topics/immigration/nonimmigrants/classes-of-admission [https://perma.cc/3QKW-Z2L5] (last visited Aug. 1, 2024).

the ideal proposal to support migrants, this Part clarifies why such a program is the most feasible option in the current immigration climate. It then highlights systematic issues to address for effective implementation of the proposal.

I. LAW ENFORCEMENT IMMIGRATION PROTECTIONS

Existing immigration protections can be broadly classified as either formal or informal. Formal protections include visas and deferred-action programs that noncitizens apply for to remain in the United States. Informal protections rely on the prosecutorial discretion of immigration agents and attorneys in choosing whether to bring charges against a noncitizen. This Part addresses each of these protections in turn, explicating why they fail to adequately protect the group of people addressed in this Note.

A. *Formal Procedures—Nonimmigrant Avenues*

A number of formal immigration protections exist specifically for individuals who have worked with government agencies in the investigation or prosecution of criminal activity. These protections are divided into two categories. Law enforcement visas provide individuals with temporary nonimmigrant status and employment authorization, which can eventually lead to permanent residency through a green card. Deferrals of removal proceedings provide individuals with temporary nonimmigrant status for however long a law enforcement agency's request remains operational.

1. *Law Enforcement Visas.* — The S, T, and U visas jointly form the subset of visas known as "law enforcement visas." These nonimmigrant visas provide temporary protections to individuals who have worked or have the potential to work with government agencies on criminal investigations and charges. The U visa grants victims of substantial crimes nonimmigrant status and employment authorization for four years in exchange for providing "specific, credible, and reliable information about the qualifying crime" they endured.[14] The T visa analogously grants victims of severe forms of trafficking nonimmigrant status and employment authorization for four years in exchange for cooperation with any "reasonable requests for assistance."[15] The S visa, in comparison, focuses on individuals involved in crime rather than victims of crime. It provides individuals with nonimmigrant status and employment authorization for three years in exchange for "critical reliable information" regarding a

14. DHS, U Visa Law Enforcement Resource Guide, at iii (2022), https://www.uscis.gov/sites/default/files/document/guides/U_Visa_Law_Enforcement_Resource_Guide.pdf [https://perma.cc/H8NG-SBXM].

15. DHS, T Visa Law Enforcement Resource Guide, at iii (2022), https://www.uscis.gov/sites/default/files/document/guides/T-Visa-Law-Enforcement-Resource-Guide.pdf [https://perma.cc/TQS4-USZ2].

criminal or terrorist organization or enterprise.[16] It can eventually lead to a green card, allowing individuals to obtain permanent legal residence in the country once the three-year visa has expired.[17]

The S visa, also known as the "snitch visa," was first established after the 1993 World Trade Center bombings and was made permanent after the attacks of September 11, 2001.[18] As established in the Violent Crime Control and Law Enforcement Act of 1994, the visa is divided into two subcategories.[19] The S-5 visa pertains to individuals "whose presence . . . is essential to the success of an authorized criminal investigation or . . . prosecution" due to the information they provide about a criminal organization.[20] The S-6 visa removes the "essential" standard and instead provides protections to individuals with information on a terrorist organization who "will be or ha[ve] been placed in danger as a result of providing such information."[21]

Though the statutory language of the S visa does not explicitly state that recipients must be formal cooperators or informants working with a government agency, this requirement is implicit.[22] First, the

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16. 8 U.S.C. § 1101(a)(15)(S) (2018).

17. See Green Card for an Informant (S Nonimmigrant), USCIS, https://www.uscis.gov/green-card/green-card-eligibility/green-card-for-an-informant-s-nonimmigrant [https://perma.cc/V94P-AFFJ] (last updated Dec. 14, 2017). Note that if an individual applies for a green card and is denied, they no longer receive S-visa protections after three years and are therefore removable from the country. U.S. Dep't of State, Foreign Aff. Manual, 9 FAM 402.6-4(H)(a) (Sept. 23, 2024), https://fam.state.gov/fam/09FAM/09FAM040206.html [https://perma.cc/J5F5-9DXD].

18. See Carrie Johnson, 'Snitch' Visa: Tool to Get Terrorism Suspects Talking, NPR (July 16, 2010), https://www.npr.org/2010/07/16/128543298/snitch-visa-tool-to-get-terrorism-suspects-talking [https://perma.cc/GCV4-VA6M].

19. Violent Crime Control and Law Enforcement Act Title XIII § 130003, Pub. L. No. 103-322, 108 Stat. 1796, 2024 (codified at 8 U.S.C. 1101(a)(15)).

20. 8 U.S.C. § 1101(a)(15)(S)(i). Specifically, an S-5 recipient is someone who the Attorney General determines:

> (I) is in possession of critical reliable information concerning a criminal organization or enterprise;
>
> (II) is willing to supply or has supplied such information to Federal or State law enforcement authorities or a Federal or State court; and
>
> (III) whose presence in the United States the Attorney General determines is essential to the success of an authorized criminal investigation or the successful prosecution of an individual involved in the criminal organization or enterprise . . . .

Id.

21. 8 U.S.C. § 1101(a)(15)(S)(ii). An S-6 recipient must meet the same (I) and (II) requirements listed above for the S-5 recipient, focusing on information about a "terrorist organization, enterprise, or operation." Id.

22. The DOJ Criminal Resource Manual, for example, has continuously referred to the S visa as applying to witnesses and informants, stating that the visa "is particularly useful for witnesses or informants who would otherwise be in danger in their home countries. It is also a substantial benefit for many other witnesses and informants who might not otherwise

aforementioned language of "critical reliable information" to be supplied to agencies or courts suggests that recipients must be substantially involved in the activity. An S-visa recipient must also report quarterly to their sponsoring law enforcement agency,[23] indicating that the recipient must have enough information to justify a formal ongoing relationship with the agency. Unlike the T and U visas, which are self-petitioned, the S visa requires a petitioning agency to apply on behalf of the individual.[24] This further signifies that the individual and agency must have a preexisting formal relationship. Finally, the limited supply of S visas suggests it is likely that only migrants with strong ties to agencies will become visa recipients. By law, only two hundred S-5 visas and fifty S-6 visas can be granted per year, and leftover visas cannot carry over into future years.[25]

Because the S visa only applies to cooperators and informants, individuals like the one at the start of the Note cannot qualify for visa protections. Out of recognition that individuals may work with government agencies without reaching the standards of the various prosecutorial visas, deferral protections have emerged in recent years.

2. *Deferral of Proceedings.* — Agency deferrals of proceeding requests are more formalized versions of individual noncitizens' prosecutorial discretion requests.[26] They consist of both general requests that apply to any type of case, and specific requests for labor and civil rights violations. None of these existing protections effectively covers the subset of individuals this Note focuses on.

Law enforcement agencies have the broad ability to request deferred action and stay of removal for individual noncitizens who are witnesses, victims, or defendants in a criminal trial.[27] To facilitate this process, the law enforcement agency must not only compose a written request but also

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be able legally to enter or remain in the United States." DOJ Archives, Criminal Resource Manual § 1862 (2011).

23. 8 U.S.C. § 1184(k)(3)(A).

24. See DOJ Archives, supra note 22, § 1863 ("To apply for S visa classification on behalf of an eligible alien, a sponsoring law enforcement agency must complete a Form I-854 and a worksheet prepared by the Office of Enforcement Operations (OEO), together with the supporting documents specified in those forms."). Petitioning agencies broadly include federal, state, or law enforcement authorities that investigate or prosecute criminal or terrorist organizations. Id.

25. 8 U.S.C. § 1184(k)(1). In comparison, the T visa is capped at twenty times as many, and the U visa is capped at forty times as many, the number of total S-visa recipients. Id. § 1184(o)(2), (p)(2).

26. Individual prosecutorial discretion requests can follow any variety of formats depending on the individual field office's preferences. Doyle Memorandum: Frequently Asked Questions and Additional Instructions, ICE, https://www.ice.gov/about-ice/opla/prosecutorial-discretion [https://perma.cc/7AE2-THRC] [hereinafter ICE, Doyle FAQ] (last visited Aug. 1, 2024). For more on immigration prosecutorial discretion, see section I.B.

27. See ICE, Protecting the Homeland: Tool Kit for Prosecutors 4–8 (2011), https://www.ice.gov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutors.pdf [https://perma.cc/87J8-4XFU].

conduct a risk and threat assessment of the noncitizen.[28] This compilation is then sent to either the local ICE Enforcement and Removal Operations (ERO) Field Office Director (FOD) or the Homeland Security Investigation's (HSI) Special Agent in Charge (SAC).[29] Along with an explanation of why they are seeking deferred action, the law enforcement official must also include the noncitizen's personally identifying information.[30] If the noncitizen is in ICE custody, officials must prove they are able to bring the individual fully into their agency's custody and monitor the individual for the duration of the deferred action.[31]

This traditional deferral program does not adequately protect the group at hand for two reasons. First, the individuals this Note addresses are not involved at trial in any of the protected capacities. Given they have limited information on ongoing criminal activity, they would not serve as strong witnesses, and thus the prosecution would likely not call them to trial. They also do not qualify as victims of crime because they participated in the criminal conduct.[32] They clearly are not defendants, as they have not been charged with any wrongdoing. Thus, law enforcement agencies would not have grounds to submit a deferred-action request. Second, as laid out above, the traditional deferred-action program contains significant procedural requirements. Given an agency's minimal prior interaction with and limited future use of the noncitizen, it likely does not want to undergo the burden of conducting a risk analysis and monitoring the individual for the duration of deferred action. The negative impacts of the procedural requirements are indicated both by available data suggesting a continual decline in the use of traditional deferred-action protections[33] and by the recent development of streamlined deferred-action requests.[34]

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28. Id. at 5.

29. Id.

30. Id.

31. Id. at 6.

32. Note that, though the criminal activity stemmed from interactions in the workplace, economic coercion alone would not qualify defendants as victims under current U.S. standards. See 18 U.S.C. § 3771(e)(2)(A) (2018) ("The term 'crime victim' means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia.").

33. The lack of transparency surrounding deferred-action requests granted by ICE and USCIS makes it difficult to determine how successful law enforcement agency requests are. Shoba Sivaprasad Wadhia, Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law, 10 U.N.H. L. Rev. 1, 34–44 (2010) [hereinafter Wadhia, Sharing Secrets]. Data collected from ICE between 2003 to 2010 indicates that the number of total deferrals granted (including but not limited to those made by law enforcement agencies) have almost consistently declined yearly: The number of reported requests granted in 2003 (117) was ten times the number granted in 2010 (16). Id. at 36.

34. See infra notes 35–42 and accompanying text. Although exact numbers are not available to compare how often this traditional deferred-action program is used compared to the new streamlined program, the existence of a new program alone suggests that the original procedure has areas to be improved.

A new labor and civil rights program has streamlined DHS's typical requests for deferred-action discretion by allowing noncitizens to self-petition for protections and establishing a central intake point for all requests.[35] Individuals who specifically provide information about labor and civil rights violations may request deferred action of removal proceedings in exchange for assisting agency officials.[36] Rather than spearheading the entire process, labor agencies must simply write a supporting letter addressing specific criteria for the request.[37]

The new deferred-removal program lasts for two years at a time, though individuals can submit new requests upon expiration so long as the basis for the law enforcement agency's deferral request remains.[38] Unlike nonimmigrant visa holders, deferred-action recipients cannot apply for green cards.[39] Recipients of deferred action can, however, apply for and obtain employment authorization.[40]

This program seemingly lowers the level of involvement noncitizens need to have at trial to gain deferred-action protections. Individuals who have incurred serious enough labor or civil rights violations to serve as witnesses or victims at trial would qualify for U or T visas, which provide much greater protections than deferred action.[41] Those who apply for the deferral program, therefore, have likely undergone lesser violations or served as eyewitnesses rather than suffered as victims of crime.

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35. See Press Release, DHS, DHS Announces Process Enhancements for Supporting Labor Enforcement (Jan. 13, 2023), https://www.dhs.gov/news/2023/01/13/dhs-announces-process-enhancements-supporting-labor-enforcement-investigations [https://perma.cc/Y8JJ-3SJR] (last updated Jan. 18, 2024) [hereinafter DHS, Process Enhancements].

36. Relevant agency officials "include, but are not limited to, the DHS Office of Inspector General, Office for Civil Rights and Civil Liberties, Department of Justice (DOJ) Civil Rights Division Immigrant and Employee Rights Section, Department of Labor, National Labor Relations Board, Equal Employment Opportunity Commission, ERO, Homeland Security Investigations, and any relevant state counterparts." Memorandum from Kerry E. Doyle, Principal Legal Advisor, ICE on Guidance to OPLA Att'ys Regarding the Enf't of Civ. Immigr. L. and the Exercise of Prosecutorial Discretion to All OPLA Att'ys 5 & n.12 (Apr. 3, 2022), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf [https://perma.cc/8RMV-YTDB] [hereinafter Doyle Memorandum].

37. See DHS, Process Enhancements, supra note 35; see also DHS, Requests for Deferred Action for Workers in Support of Labor Agency Investigations, https://www.dhs.gov/sites/default/files/2024-01/24_0117_sec_deferred-action-infographic_english.pdf [https://perma.cc/2ERT-WFF6].

38. DHS, DHS Support of the Enforcement of Labor and Employment Laws, https://www.dhs.gov/enforcement-labor-and-employment-laws [https://perma.cc/YUK6-3SPH] (last updated July 23, 2024) [hereinafter DHS, Enforcement of Laws].

39. See id. ("[D]eferred action does not confer lawful status or excuse any past or future periods of unlawful presence . . . ."). Note that this means deferred-action recipients cannot directly petition for permanent residence in the country as part of the deferred-action program.

40. Id.

41. Id.

Immigration officials recognize that immigration status often gets exploited in labor and employment contexts and thus seek to protect all noncitizens who report such misbehavior, even if those who report are not directly affected.[42] The key problem is that the program only applies to victims and eyewitnesses of labor and civil rights violations. It would not protect the group addressed by this Note—those who were knowingly involved in criminal activity.

B. *Informal Procedures—Immigration Prosecutorial Discretion*

Given the stringent requirements of formal immigration protections, migrants who receive benefits often do so in large part based on immigration officers' prosecutorial discretion. Prosecutorial discretion is defined as "the longstanding authority of an agency charged with enforcing the law to decide where to focus its resources and whether or how to enforce the law against an individual."[43] The use of prosecutorial discretion for determining nonpriority status in immigration cases first became widespread in 1975.[44] For a myriad of financial, humanitarian, and political reasons, immigration officials have since focused their efforts on target issues rather than equally penalizing all immigration transgressions.[45]

The concept of prosecutorial discretion is most commonly associated with criminal law.[46] While the exercise of discretion in the immigration field resembles much of the practice in the criminal field, key differences embolden immigration officials more than criminal officials.[47]

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42. See Memorandum from Alejandro N. Mayorkas, Sec'y, DHS on Guidance for the Enf't of Civ. Immigr. L. & the Exercise of Prosecutorial Discretion to Tae D. Johnson, Acting Dir., ICE 5 (Sept. 30, 2021), https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf [https://perma.cc/5GEG-BSM8] [hereinafter Mayorkas Memorandum] ("It is an unfortunate reality that unscrupulous employers exploit their employees' immigration status and vulnerability to removal by, for example, suppressing wages, maintaining unsafe working conditions, and quashing workplace rights and activities. Similarly, unscrupulous landlords exploit their tenants' immigration status and vulnerability . . . .").

43. ICE, Doyle FAQ, supra note 26.

44. Shoba Sivaprasad Wadhia, The Role of Prosecutorial Discretion in Immigration Law, 9 Conn. Pub. Int. L.J. 243, 246 (2010) [hereinafter Wadhia, Prosecutorial Discretion].

45. See id. at 244–45 ("The theory behind prosecutorial discretion is seemingly simple and two-fold. The first theory is monetary. . . . The second theory is humanitarian."); see also Nicole Hallett, Rethinking Prosecutorial Discretion in Immigration Enforcement, 42 Cardozo L. Rev. 1765, 1767 (2021) ("[T]he congressional impasse on immigration has emboldened successive administrations to stretch executive power to its limits in attempts to accomplish what Congress either cannot or will not. The result is an immigration policy that swings violently depending on the administration in office.").

46. For a basic understanding of criminal prosecutorial discretion, see supra note 3.

47. Similarities include the financial and humanitarian motives underlying prosecutorial discretion and the need for discretion due to overinclusive lists of activities that constitute infractions. Earlier immigration-discretion guidelines also relied on criminal guidelines to determine policies, thereby resulting in similar outlooks on prosecutorial

Immigration officials have both the power to arrest and the power to bring charges against migrants, going beyond criminal prosecutors' sole discretion over charges.[48] Although criminal prosecutors do work closely with law enforcement agents who conduct arrests, their powers are still distinct, which provides greater checks on the criminal system than the immigration system. The standard for proving an immigration violation is also far lower than that for a criminal violation, so immigration officials have fewer institutional incentives against charging individuals.[49] Finally, because migrants are not guaranteed a right to counsel in immigration court, immigration officials hold even greater power in the adjudication process than criminal prosecutors do.[50] Recognizing immigration officials' vast authority, guidelines on immigration-enforcement priorities push for consistent discretion in immigration cases. This section first outlines prosecutorial-discretion guidelines under the current administration and then evaluates prosecutorial discretion in practice.

1. *The Mayorkas and Doyle Memoranda.* — Memoranda published at the start of each administration establish guidelines for immigration agencies' enforcement of civil immigration law. On September 30, 2021, Secretary of Homeland Security Alejandro N. Mayorkas released a final memorandum to the Acting Director of ICE on the use of prosecutorial discretion.[51] Based on Supreme Court precedent emphasizing the exercise of immigration-enforcement discretion[52] and on the belief that "[j]ustice and our country's well-being require [discretion],"[53] Secretary Mayorkas underscored the importance of rewarding noncitizens' contributions to society. Specifically, the Mayorkas Memorandum guides immigration officials to use their discretion to focus efforts on noncitizens who are (1) a threat to national security, (2) a threat to public safety, or (3) a threat to border security.[54] The memo also highlights aggravating and mitigating factors for determining who constitutes a "threat to public safety."[55]

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discretion. For more on this, see Wadhia, Prosecutorial Discretion, supra note 44, at 268–72 (applying criminal prosecutorial discretion to the immigration context due to certain similarities in the two fields).

48. Id. at 274.

49. Id. at 277–78.

50. Id. at 277; see also Doyle Memorandum, supra note 36, at 8–9 ("Fundamentally, OPLA attorneys play a significant and important role as officers of the court and DHS representatives . . . . OPLA attorneys should be particularly mindful of their role and the important impact that their representation of DHS can have in cases involving pro se respondents.").

51. Mayorkas Memorandum, supra note 42.

52. Arizona v. United States, 567 U.S. 387, 396 (2012) ("A principal feature of the removal system is the broad discretion exercised by immigration officials.").

53. Mayorkas Memorandum, supra note 42, at 2.

54. Id. at 3–4. Note that any noncitizen who is caught while attempting to enter unlawfully or who has entered unlawfully after November 1, 2020, meets "threat to border security" criterion. Id.

55. Id.

To further elucidate these priorities, Kerry E. Doyle, the Principal Legal Advisor at ICE, distributed her own memorandum among Office of the Principle Legal Advisor (OPLA) attorneys in April 2022.[56] OPLA is comprised of more than 1,300 attorneys who represent DHS in immigration removal proceedings and provide legal advice and other services to ICE offices.[57] The Doyle Memorandum elaborates on Secretary Mayorkas's three categories to maintain consistency among OPLA attorneys and inform their work before immigration courts, specifically the Executive Office for Immigration Review (EOIR).[58]

The Mayorkas Memorandum, and by extension the Doyle Memorandum, have faced significant challenges in court. From March through June 2022, a nationwide injunction limited DHS's discretion to release individuals in mandatory detention and to grant discretionary stays of removal when disallowed by statute.[59] While this first case was being argued in the Sixth Circuit, a separate suit vacated the entirety of the Mayorkas Memorandum on the grounds that it was arbitrary, contrary to law, and violative of procedures mandated by the Administrative Procedure Act.[60] The Mayorkas and Doyle Memoranda were thereby invalidated in June 2022.[61] The Supreme Court finally reinstated the Mayorkas and Doyle Memoranda one year later.[62] The guidelines laid out in the Memoranda have thus been the guiding principles for immigration officials since June 2023.

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56. Doyle Memorandum, supra note 36.

57. Office of the Principal Legal Advisor, ICE, https://www.ice.gov/about-ice/opla [https://perma.cc/LRC3-JJSQ] [hereinafter ICE, OPLA] (last visited July 31, 2024).

58. Doyle Memorandum, supra note 36, at 3. The EOIR adjudicates all immigration removal decisions in the United States. Executive Office for Immigration Review, Organization, Mission and Functions Manual, DOJ, https://www.justice.gov/doj/organization-mission-and-functions-manual-executive-office-immigration-review [https://perma.cc/WWG7-5HTX] (last visited July 31, 2024) [hereinafter DOJ, EOIR Manual].

59. In March 2022, the states of Arizona, Montana, and Ohio won a suit in the Southern District of Ohio for a preliminary injunction barring use of specific aspects of the Mayorkas Memorandum. Arizona v. Biden, 593 F. Supp. 3d 676, 736 (S.D. Ohio 2022). Four months later, the Sixth Circuit overturned this injunction. Arizona v. Biden, 40 F.4th 375, 380 (6th Cir. 2022).

60. Texas v. United States, 606 F. Supp. 3d 437, 450 (S.D. Tex. 2022).

61. Texas v. United States, 40 F.4th 205, 213 (5th Cir. 2022).

62. United States v. Texas, 143 S. Ct. 1964, 1976 (2023). The Supreme Court held that Texas and Louisiana lacked Article III standing to challenge the guidelines because lack of prosecution does not result in a legally and judicially cognizable harm. Id. This case was clearly controversial, as many states filed amicus briefs in favor of Texas and Louisiana. See Brief of the States of Arizona, Alabama, Arkansas, Georgia, Indiana, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Utah, West Virginia, and Wyoming as Amici Curiae in Support of Respondents at 4, *Texas*, 143 S. Ct. 1964 (No. 22A17), 2022 WL 16708872; Brief of State of Florida as Amicus Curiae in Support of Respondents at 3, *Texas*, 143 S. Ct. 1964 (No. 22-58), 2022 WL 16239734.

Undocumented migrants like the individual discussed at the start of this Note are likely deemed enforcement priorities under current memo guidelines. The Mayorkas Memorandum deems individuals who entered the country unlawfully after November 1, 2020, to constitute "threat[s] to border security" under the third enforcement priority.[63] This would encompass a significant number of people currently living in the United States who, for no reason besides their timing of entry, are deemed removal interests. Other individuals who knowingly engaged "in the smuggling of noncitizens" or immigration benefit fraud may also fall under this category, even if they were not criminally charged with such offenses.[64] Individuals may also be subject to enforcement as "threat[s] to public safety" per the second enforcement priority.[65] The Doyle Memorandum clarifies that "an individual's convictions or prosecutions are not the only indicators of whether or not an individual poses a current threat to public safety."[66] This not only means that individuals with convictions do not necessarily pose a threat to public safety but also that individuals without convictions may still be deemed to pose such a threat.[67] Based on a plain reading of the Doyle Memorandum, the fact that the government learned of an undocumented migrant's presence due to their interaction with the criminal justice system may be enough for an OPLA attorney to determine that the migrant is an enforcement priority.[68] The distinction between a witness and an involved individual is crucial here—though a witness would likely not be deemed a "threat" to public safety, an individual even minorly involved in a crime could be.[69]

Although mitigating factors may point toward protecting migrants who provide truthful information to the government, current guidelines on this issue are unclear. The Doyle Memorandum lays out mitigating circumstances that could weigh in favor of nonprosecution, including "status as a cooperating witness or confidential informant."[70] Here, the individual's official status appears to be key—someone who does not qualify to serve as a cooperator or informant likely would not qualify for

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63. See Mayorkas Memorandum, supra note 42, at 4.

64. Doyle Memorandum, supra note 36, at 6. For example, a noncitizen who has willfully misrepresented a material fact to a U.S. official in hopes of gaining a "benefit under U.S. immigration laws"—even without intent to deceive—is deemed inadmissible under immigration law even without a criminal case. Overview of Fraud and Willful Misrepresentation, USCIS, https://www.uscis.gov/policy-manual/volume-8-part-j-chapter-2 [https://perma.cc/RB34-XGV5] (last visited Aug. 1, 2024).

65. Mayorkas Memorandum, supra note 42, at 3.

66. See Doyle Memorandum, supra note 36, at 4.

67. Id.

68. See id. ("[A] removable noncitizen may play a role in the criminal activities of a violent organization but may not yet have been arrested or prosecuted . . . . Such individual may be deemed a significant threat, nonetheless.").

69. See id. at 5 (explaining that cooperating as a witness is a mitigating factor in determining whether one poses a threat to public safety).

70. Id.

such discretionary protections.[71] The Memorandum mentions that "other assistance sought from the noncitizen by, or provided by the noncitizen to, federal, state, local or tribal law enforcement" could mitigate against enforcement but does not clarify how this factor is applied in practice.[72] Individuals who speak to police officers or prosecutors but are not charged with offenses typically do not receive documentation of such dialogue, such that there is no easy method to substantiate a claim of assistance. Even if an individual tracks down the specific government officials that they spoke to and those officials vouch that the migrant truthfully assisted in a police interrogation or attorney proffer,[73] there is no established baseline for what constitutes "other assistance" provided to receive immigration protections. These systematic hurdles likely affect most individuals in situations analogous to the hypothetical at the start of the Note. The nature of immigration prosecutorial discretion suggests that some individuals who truthfully provide information to the government will be protected under this vague provision while others will not. Such outcomes will not only be based on the specific facts of individuals' cases but will also likely depend on which OPLA attorney happens to be assigned to their case.[74]

2. *Prosecutorial Discretion in Practice.* — OPLA attorneys have the power to exercise discretion by not filing a Notice to Appear (NTA), dismissing or terminating proceedings, or administratively closing a case.[75] Because discretion decisions are made on a case-by-case basis, it is difficult to predict how any individual case will turn out. Since the first official discretion guidelines were released, immigration agencies have made clear that "[g]eneral guidance . . . cannot provide a 'bright line' test that may easily be applied to determine the 'right' answer in every case" because "minds reasonably can differ."[76] Although such flexibility is meant

71. Notably, the Doyle Memorandum does not clarify how formally one's "status" needs to be documented. There may be police offices without formal registries of official informants. Cooperation agreements almost always have formal proof. See Graham Hughes, Agreements for Cooperation in Criminal Cases, 45 Vand. L. Rev. 1, 4–7 (1992) (emphasizing the formality of cooperation agreements, which could include making formal grants in public proceedings).

72. Doyle Memorandum, supra note 36, at 5. The Memorandum specifically highlights assistance to labor and civil rights enforcement agencies, creating further ambiguities about how the guidelines would be applied to people working with other law enforcement agencies. Id. The Memorandum also looks to "readily available, persuasive evidence of mitigating factors" to "clearly overcome" someone's priority determination, which likely requires greater evidence than provided at this stage. Id. at 7; see also infra note 73 and accompanying text.

73. This is not an easy feat—officers and prosecutors do not benefit from helping minor players who have already provided all the information they have. Criminal law enforcement's willingness to corroborate these past encounters thus cannot be assumed.

74. For more on factors leading to varying case outcomes, see infra section I.B.2.

75. Doyle Memorandum, supra note 36, at 10.

76. Memorandum from Doris Meissner, Comm'r, Immigr. & Naturalization Serv. on Exercising Prosecutorial Discretion to INS Reg'l Dirs., Dist. Dirs., Chief Patrol Agents, and

to help migrants, it may actually result in arbitrariness and lack of consistency, which harms individual relief-seekers.[77]

The crux of the issue stems from the fact that once an agency reaches a priority decision, few if any opportunities exist to overturn such discretion. OPLA attorneys are instructed to defer to any priority decisions made by ICE, USCIS, and U.S. Customs and Border Protection (CBP) after the institution of the Mayorkas Memorandum.[78] These three agencies work jointly to enforce U.S. immigration law: ICE enforces detention and removal operations, USCIS evaluates immigration and naturalization benefits, and CBP administers law at and between ports of entry into the country.[79] Their agents' decisions to bring charges thus cannot be easily altered. If an OPLA attorney made the initial discretionary decision, they have greater flexibility in changing priority or nonpriority status, though this still requires the field location's Chief Counsel's approval.[80] Outside of this process, cases can only be changed if individual migrants themselves submit affirmative requests for prosecutorial discretion with the agency.[81] All other cases deemed to be enforcement priorities cannot benefit from subsequent prosecutorial discretion by OPLA attorneys; attorneys are expected to abide by priority decisions and to litigate such cases to completion.[82]

Furthermore, the use of discretion has varied significantly based on the location of a given ICE office.[83] Thus, without OPLA attorneys or judges retaining the ability to overturn agency decisions, the removal

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Reg'l & Dist. Couns. 8 (Nov. 17, 2000), https://www.aila.org/aila-files/AD41F82E-81E2-4AFE-92FA-827D2927EF69/00112702.pdf [https://perma.cc/46RL-SYCV].

77. See Maria A. Fufidio, Note, "You May Say I'm a Dreamer, but I'm Not the Only One": Categorical Prosecutorial Discretion and Its Consequences for US Immigration Law, 36 Fordham Int'l L.J. 976, 1015–16 (2013) ("This may result in arbitrary decision-making made at the individual level, and a lack of consistency across similar cases.").

78. Doyle Memorandum, supra note 36, at 7.

79. Immigration Enforcement Actions Annual Flow Report, DHS, https://www.dhs.gov/ohss/topics/immigration/enforcement-AFR#:~:text=CBP%20enforces%20immigration%20laws%20at,for%20immigration%20and%20naturalization%20benefits [https://perma.cc/E4PZ-US2B] (last visited Aug. 1, 2024).

80. Doyle Memorandum, supra note 36, at 8. OPLA has twenty-five field locations in the country, each of which is headed by a Chief Counsel, whose role includes guiding DHS lawyers in EOIR immigration courts. See ICE, OPLA, supra note 57.

81. Doyle Memorandum, supra note 36, at 8, 10. For the official guidance given to individuals seeking prosecutorial discretion, see ICE, Doyle FAQ, supra note 26. Even though this guidance exists, information about such requests may not be widely known in migrant communities. This issue is likely further exacerbated by the lack of appointed counsel in immigration matters. See infra section III.B.1 for more on this issue.

82. Doyle Memorandum, supra note 36, at 10.

83. See Madison Burga & Angelina Lerma, The Use of Prosecutorial Discretion in the Immigration Context After the 2013 ICE Directive: Families Are Still Being Torn Apart, 42 W. St. L. Rev. 25, 33 (2014) ("[T]he use of prosecutorial discretion has varied from state to state, ranging from approximately three percent of cases in Las Vegas, San Antonio, and New York to twenty-four percent in Los Angeles and thirty-one percent in Tucson, Arizona." (footnote omitted)).

process remains a haphazard geographical lottery. This is exacerbated by the fact that deeming a case as nonpriority simply delays an outcome, rather than officially closing the case.[84] Without a clearer definition of "other assistance" or the ability to authenticate that such assistance has occurred, prosecutorial discretion will likely continue to uphold a state of uncertainty regarding one's immigration status in the country. As such, the existence of prosecutorial discretion alone does little to alleviate immigration repercussions for noncitizens who have engaged in minor criminal behavior.

II. MISSING PROTECTIONS

This Note seeks to provide benefits to individuals who remain unprotected under the current system by applying the idea of the safety valve and good-faith cooperation from the criminal context into the immigration context. This Part first highlights the high bar to serving as a cooperator or informant and explores the criminal safety valve and good-faith cooperation as an alternative. It then delves into why limitations of the S visa suggest that working within the existing framework to broaden visa protections will not sufficiently safeguard the population at hand.

A. *The Unaccounted-For Group*

To understand the predicament facing unprotected individuals, this section delves into the criminal law parallels to the immigration protections in Part I. It first explores the roles of cooperators and informants and the many critiques of their functions. It then explores the criminal safety valve and good-faith cooperation as an alternative means of protection.

1. *High Bar to Becoming Government Cooperators and Agency Informants.* — Government cooperators and agency informants form the backbone of the criminal legal system. Confidential informants provide intelligence and operational assistance to officers and agents conducting ongoing criminal investigations.[85] Defendant cooperators assist criminal attorneys in the investigation and prosecution of other individuals through both information-sharing and witness testimony.[86]

Nevertheless, the government holds inordinate power in these relationships.[87] Section 5K1.1 of the United States Sentencing

84. Doyle Memorandum, supra note 36, at 10.

85. Though some informants work for money, the relevant group to this Note works in exchange for leniency on criminal charges.

86. DOJ, Just. Manual § 9-27.410 (2023); DOJ, Just. Manual § 9-27.420 (2018).

87. See Ian Weinstein, Regulating the Market for Snitches, 47 Buff. L. Rev. 563, 577 (1999) ("[T]he government is the sole gatekeeper for cooperation departures."); Shana Knizhnik, Note, Failed Snitches and Sentencing Stitches: Substantial Assistance and the Cooperator's Dilemma, 90 N.Y.U. L. Rev. 1722, 1724 (2015) ("Prosecutors essentially have unilateral bargaining power to obtain any and all inculpatory information possessed by a

Commission's Guidelines allows sentences to be reduced below the conduct's guidelines when individuals provide "substantial assistance in the investigation or prosecution of another person."[88] Because § 5K1.1 parameters do not clarify what constitutes "substantial assistance" and sentencing benefits are provided only "[u]pon motion of the government," agencies have nearly full authority in the cooperator determination.[89] Thus, each agency sets its own expectations for its cooperators or informants,[90] and even within agencies, there may be inconsistencies in how the "substantial" requirement is evaluated.[91] Despite these individual differences, agencies uniformly uphold a high bar for reaching the "substantial" standard.[92] Prosecutors from varying districts indicate that insufficient and unhelpful information constitute some of the most frequent reasons that individuals do not receive cooperation agreements.[93] In comparison, a defendant being "too culpable relative to others" in criminal activity rarely serves as a barrier to cooperation agreements.[94] This means that individuals marginally involved in a larger organized crime or conspiracy likely do not have enough novel insight to be considered "substantial" assisters.[95]

The high bar to receiving cooperator and informant benefits has resulted in significant critiques of the process. Out of a desire to gain maximum leniency, cooperators may purposefully spin court testimony in favor of the government.[96] In a similar vein, informants may persuade

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defendant—regardless of whether providing that information will actually result in a lesser sentence.").

88. U.S. Sent'g Guidelines Manual § 5K1.1 (U.S. Sent'g Comm'n 2023).

89. Id.

90. Prosecutors typically make the final call on what constitutes "substantial assistance" but are often heavily influenced by agency expectations in doing so. For example, the type of information considered "substantial" enough to gain informant status for the FBI may be different than for DHS. See generally Shari A. Brandt, Margaret W. Meyers & Jamie A. Schafer, United States: Avoiding Common Pitfalls When Cooperating with Government Investigations, Ams. Investigations Rev., Oct. 2020, at 125 (outlining the guidelines various agencies have espoused for defendants to receive cooperation benefits).

91. See Knizhnik, supra note 87, at 1732 ("There is no definition of 'substantial assistance' to guide prosecutors in their decisionmaking and, indeed, individual United States Attorneys' offices vary widely with respect to 5K1.1 motions.").

92. Brandt et al., supra note 90, at 135.

93. Jessica A. Roth, Anna D. Vaynman & Steven D. Penrod, Why Criminal Defendants Cooperate: The Defense Attorney's Perspective, 117 Nw. U. L. Rev. 1351, 1392 tbl.5 (2023).

94. Id.

95. Knizhnik, supra note 87, at 1726.

96. Daniel C. Richman, Informants & Cooperators, *in* Bridging the Gap: A Report on Scholarship and Criminal Justice Reform 279, 287 (Erik Luna ed., 2017) [hereinafter Richman, Informants & Cooperators] ("[C]ooperators seeking to gain maximal leniency via the prosecutor's recommendation will shade their testimony to favor the government, at the expense of the defendant.").

others to commit crimes.[97] There are particular concerns that individuals will use the government power backing them to target and implicate criminal rivals.[98] Even if such perverse incentives do not influence an individual cooperator or informant, the threat that such incentives exist results in social instability.[99] Cooperators and informants are thus vulnerable to both physical and psychological retaliation due to the way their actions are perceived in the broader community.[100]

These prevailing problems are particularly accentuated in the immigration context. Susceptible populations, such as individuals facing deportation, often feel pressured into cooperator and informant work because of the unique challenges they face.[101] These informants have less bargaining power and face potentially more serious consequences for failing to meet agency demands, thereby increasing their incentives to fabricate information and incriminate innocent individuals.[102] This has been a problem particularly in the S-6 terrorism context, in which the FBI has reportedly persuaded individuals with no prior experience to serve as informants in exchange for immigration protections.[103] These relationships have damaged the sentiment of community safety, reduced

97. See Lesley Stahl, Confidential Informants, CBS News (Dec. 6, 2015), https://www.cbsnews.com/news/confidential-informants-60-minutes-lesley-stahl/ [https://perma.cc/GN33-RGYY].

98. Alexandra Natapoff, Snitching: The Institutional and Communal Consequences, 73 U. Cin. L. Rev. 645, 674 (2004); Richman, Informants & Cooperators, supra note 96, at 284.

99. Alexandra Natapoff, Snitching: Criminal Informants and the Erosion of American Justice 137–38 (2d ed. 2022).

100. Id. at 189.

101. See id. ("Vulnerable informants . . . are more subject to coercion, less likely to be able to make good decisions on their own behalf, and as a result more likely to enter into bad deals or get hurt as a result of their cooperation.").

102. Emily Stabile, Comment, Recruiting Terrorism Informants: The Problems With Immigration and the S-6 Visa, 102 Calif. L. Rev. 235, 246 (2014).

103. See, e.g., Wadie E. Said, The Terrorist Informant, 85 Wash. L. Rev. 687, 710 (2010) ("In cases where the individuals refuse the FBI's invitation [to become informants], the agency increases the pressure by seeking to deport them, in the hopes that the threat of being forcibly removed from the United States will cause them to change their minds."); Diala Shamas, A Nation of Informants: Reining in Post-9/11 Coercion of Intelligence Informants, 83 Brook. L. Rev. 1175, 1191 (2018) ("[A]n FBI training presentation obtained by civil liberties groups 'on recruiting informants in the Muslim community suggest[ed that] agents exploit "immigration vulnerabilities" because Muslims in the United States are "an immigrant community."' Another presentation urged agents to leverage the 'immigration relief dangle.'" (alteration in original) (footnote omitted) (first quoting ACLU, Unleashed and Unaccountable 40 (2013); then quoting Cora Currier, Revealed: The FBI's Secret Methods for Recruiting Informants at the Border, The Intercept (Oct. 5, 2016), https://theintercept.com/2016/10/05/fbi-secret-methods-for-recruiting-informants-at-the-border/ (on file with the *Columbia Law Review*))).

the prevalence of cooperative intelligence information, and even led to the entrapment of innocent individuals.[104]

In response to the high bar for attaining cooperator or informant status and the societal challenges outlined above, there has been an increasing push toward other forms of protection from criminal prosecution.

2. *Other Forms of Protection: Criminal Safety Valve and Good-Faith Cooperation.* — A large class of individuals who are willing to cooperate with the government fail to gain cooperation status due to their lack of information about ongoing criminal activity.[105] This may occur for a range of reasons: the individual was not involved enough to learn details about other illicit activity,[106] a similarly situated individual already signed on to cooperate and provided the same information,[107] law enforcement agents learned the same information through their own investigations,[108] or a higher-up member of the group signed on with even more information than this individual can provide.[109] Even when official cooperator or informant benefits are not available, other forms of protection exist for individuals who work truthfully with law enforcement. These include the safety-valve protection for certain crimes with statutory mandatory minimums and downward variance in sentencing for all crimes without mandatory minimums.

Congress passed the first safety-valve provision in 1994[110] in response to the influx of incarceration for low-level drug crime and the difficulty in achieving cooperator benefits.[111] The safety valve provides defendants

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104. See Said, supra note 103, at 715–33 (analyzing high-profile terrorism cases post-9/11 that have relied on informant testimony to evaluate their entrapment claims and concluding that these cases all had valid entrapment defenses, even though the court did not rule in favor of any of them); Stabile, supra note 102, at 246–58 (laying out how use of immigrant informants chills free speech, encourages religious and ethnic profiling, damages cooperative intelligence efforts, and leads to entrapment).

105. See supra note 93 and accompanying text.

106. See Knizhnik, supra note 87, at 1726 ("[D]efendants peripherally involved in such conspiracies are not likely to hold the sort of novel evidence that could be considered 'substantial.'").

107. See id. at 1725 ("[T]he additional information necessary to receive a substantial assistance motion must be inculpatory as to crimes for which the government does not yet have sufficient evidence.").

108. See id. (asserting the government will only sign on cooperators for information it does not already have proof of).

109. See Weinstein, supra note 87, at 611–14 ("[H]igher level defendants will be better able to trade upon their supposedly more valuable information to receive lower sentences through cooperation than their less culpable, but less well informed underlings.").

110. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001, 108 Stat. 1796, 1985–86 (codified at 18 U.S.C. § 3553(f) (2018)).

111. See Philip Oliss, Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines, 63 U. Cin. L. Rev. 1851, 1886–88 (1995) (arguing that the safety valve is a "congressional acknowledgement of the failings of mandatory minimum sentencing and an attempt to prevent future inequitable consequences").

convicted of certain nonviolent drug crimes with the ability to receive sentences below the defined statutory minimums.[112] Specifically, if the defendant has limited criminal history, was not a leader in the offense, did not use violence or credible threats of violence, and did not possess a firearm or other dangerous weapon in connection to the offense, then as long as the crime did not result in death or serious bodily injury to any person, the defendant may benefit from the safety valve.[113] To do so, the defendant must "truthfully provide[] to the Government all information and evidence the defendant has."[114] So long as this truthfulness requirement is met, even if the defendant provides "no relevant or useful other information" and "the Government is already aware of the information," the government can still recommend to the judge that the defendant receive safety-valve protections.[115]

Similar benefits exist for individuals charged with crimes that do not have statutory mandatory minimums. As held in *United States v. Booker*, judges are not required to impose a sentence within the range set by the Sentencing Guidelines but rather can consider other factors and establish a reasonable sentence below the range.[116] Judges can thus take into account readiness to cooperate and truthful but irrelevant information when determining a sentence.[117] This discretion applies to any crime without a mandatory minimum, thereby having a far greater impact than the safety valve's limited applicability in the drug context.

The criminal safety valve and advisory sentencing guidelines under *Booker* address one of the biggest inconsistencies of cooperation. Cooperators and informants typically retain substantial knowledge about ongoing criminal activity, which is why the government signs them on in the first place.[118] Providing sentencing benefits to these individuals without providing similar benefits to individuals less involved in criminal conduct seemingly contravenes the objective of fairness in criminal law.[119] In

112. 18 U.S.C. § 3553(f).

113. Id. § 3553(f)(1)–(4).

114. Id. § 3553(f)(5).

115. Id.; see also id. § 3553(e) (requiring government motion for safety valve to take effect).

116. 543 U.S. 220, 264–65, 267–68 (2005).

117. See id. (noting that judges should be afforded flexibility to "individualize sentences where necessary").

118. Richman, Informants & Cooperators, supra note 96, at 282.

119. This is often referred to as the "cooperation paradox," which suggests that higher-level members of criminal activity often have more substantive information to share than less culpable codefendants, so they are the ones benefitting from cooperation deals. Weinstein, supra note 87, at 611–14. Data suggest that this is not necessarily the case, as lower-level participants in crime may have better insight on daily conduct than higher-ups. Id. Even if it does not apply in all contexts, the paradox likely does apply to some cases, as some individuals are so minimally involved that they do not have enough substantive information to share to get cooperator or informant benefits. For more on the cooperation paradox and its critiques, see id.

response, the safety valve and *Booker* provisions provide a route for less-involved members to engage in their own sharing of information and seek their own reductions in sentencing.

There have been increasing movements to expand the protections under the criminal safety valve to mirror the broad range of *Booker*. Most recently, the First Step Act (FSA) of 2018 broadened the offense categories and prior criminal history for eligible defendants.[120] Despite these changes, the FSA still narrowly limits eligibility for the safety valve to nonviolent drug offenses.[121] This leaves a wide range of low-level participants in nondrug offenses without a statutory route for leniency. In response to this continual problem, advocates have pushed for expanding the truthfulness benefit of the safety valve to other types of crime on the grounds of "good-faith cooperation."[122] Under this proposal, minor players would receive benefits for voluntarily and truthfully providing information to government officials, even if such information would not reach the current standard of cooperator or informant intelligence.[123] Additional proposals push for judges to consider good-faith assistance without a government motion to do so, whether that be by the judge's own volition or through the defendant's motion for consideration.[124] Such a system would recognize the contributions that good-faith cooperators and informants have made and proportionately reward them for truthfully working with the government. This would transform the current binary benefits program of the safety valve into a holistic, sliding-scale benefits program of good-faith cooperation and information. It would also likely diminish reliance on fabricated evidence by reducing the need to achieve cooperator or informant status and enabling the government to fact-check between defendants. Viewed together, these suggestions demonstrate a strong desire to provide protections for individuals who cannot reach the official status of cooperator or informant.

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120. First Step Act of 2018, Pub. L. No. 115-391 § 402, 132 Stat. 5194, 5221 (codified at 18 U.S.C. § 3553(f)). For a discussion of the political history of federal drug crime sentence changes leading up to the First Step Act of 2018, see generally Jesselyn McCurdy, The First Step Act Is Actually the "Next Step" After Fifteen Years of Successful Reforms to the Federal Criminal Justice System, 41 Cardozo L. Rev. 189 (2019).

121. First Step Act, § 402.

122. See I. India Geronimo, Comment, "Reasonably Predictable": The Reluctance to Embrace Judicial Discretion for Substantial Assistance Departures, 33 Fordham Urb. L.J. 1321, 1339–42 (2006); Knizhnik, supra note 87, at 1754–57.

123. See Geronimo, supra note 122, at 1339–42 ("Judges should . . . reduc[e] the sentences of offenders who provide a good faith effort to cooperate, where reasonableness so requires."); Knizhnik, supra note 87, at 1754–57 ("Just as Congress placed discretion in the hands of judges to determine defendants' qualification for the safety valve departure, the discretion to evaluate evidence regarding a defendant's attempted good faith cooperation also should be in judges' hands." (footnote omitted)).

124. See Geronimo, supra note 122, at 1342 (advocating for granting judges the power to consider good faith on their own); Knizhnik, supra note 87, at 1755–57 (advocating for granting defendants the ability to file a good-faith motion in front of a judge, who may be more sympathetic to lack of knowledge than a prosecutor would be).

B. *Reforming the S Visa Is Not Enough*

Despite multiple levels of cooperator protections in the criminal system, the immigration system has taken a narrower approach. The S visa only applies to formal government cooperators and agency informants; it does not safeguard recipients of safety valve or post-*Booker* downward variance protections who have exercised good-faith cooperation.[125] It thus definitely does not protect uncharged good-faith cooperators like the person at the start of this Note. While one proposal might be to broaden the S visa to cover these other forms of cooperation, this will likely fail. The S visa has faced significant criticism for its failure to adequately protect formal cooperators and informants. In light of these shortcomings, it appears highly infeasible to expand the S visa to cover good-faith cooperators and informants who have not attained official status.

Use of the S visa has continuously declined since its peak in 2001.[126] A study of foreign citizens admitted through the S-visa program from its inception in 1995 until 2018 indicates that the S visa has never been used to its full capacity of 250 visas in a year, and the S-5 visa has only once been used at more than half capacity.[127] A DOJ audit report of the S-visa program finds "diminished perceptions of the program's ability to achieve its intent."[128] Due to significant backlog and processing time, law enforcement agencies often determine it is not worth the effort to pursue visa protections, especially given such protections are not legally promised to cooperators in the first place.[129] Because of these barriers, no S-5 or S-6 visas have been issued since Fiscal Year 2013.[130]

The largest hurdle facing individuals appears to be convincing an agency to sponsor them. The problem is twofold. First, the visa application process requires the sponsoring government official to work through multiple layers of bureaucracy. Once a Form 1-854 application is prepared

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125. See supra notes 22–25 and accompanying text.

126. Brad Gershel, Nat'l Ass' of Crim. Def. Laws., Shining a Light on the "S" Visa: A Long History of Unfulfilled Promises and Bureaucratic Red Tape 23 chart 1 (2021), https://www.nacdl.org/getattachment/91baa4d2-05d0-42b3-833c-d466a544ca93/shining-a-light-on-the-s-visa-a-long-history-of-unfulfilled-promises-and-bureaucratic-red-tape.pdf [https://perma.cc/GXN5-V4RJ].

127. Id. at 20–21 & tbl.1.

128. Off. Inspector Gen., DOJ, Audit of the Department of Justice's Use of Immigration Sponsorship Programs 5 (2019), https://www.oversight.gov/sites/default/files/oig-reports/a1932.pdf [https://perma.cc/T527-QBQG].

129. See Gershel, Nat'l Ass'n of Crim. Def. Laws., supra note 126, at 21 ("[T]he potential benefits LEAs stand to gain from making use of the visa's availability are outweighed by the lengthy process involved, especially if an LEA is free to circumvent the process or break its promises without recourse.").

130. For yearly reports on the issuance of visas, see U.S. Dep't of State, Nonimmigrant Visa Statistics, Travel.State.Gov, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html [https://perma.cc/2AZT-D44A] (last visited Aug. 1, 2024).

and certified by the law enforcement agency's highest-ranking official, it is then sent to the Assistant Attorney General of the Criminal Division. At that point the Office of Enforcement Operations (OEO) balances the value of an individual's cooperation against the factors favoring their ineligibility.[131] If the Assistant Attorney General concurs with the OEO's conclusion to move the application forward, it is next sent to DHS. It is there that the ICE Homeland Security Investigations (ICE-HSI) directorate conducts its own evaluation.[132] The application is then sent to DHS's Executive Associate Director, who finally submits the application to USCIS for a final decision.[133] Because an application can be rejected at any point during this process, sponsoring agencies are likely wary to take on any applications that do not meet the highest of standards. Published data indicate that approximately eighty-six percent of submitted S-visa applications have been approved, but the bar to applying is rigid; S-visa recipients on average provide information for the conviction of 211 defendants in the fiscal year their visa is issued.[134] This suggests that recipients are typically involved in large-scale, multi-level criminal organizations.

The second, related issue is a lack of government incentives to follow through with S-visa applications. Law enforcement agencies face no consequences by reneging on discussions to apply for S visas because they cannot legally promise or provide immigration protections in the first place.[135] Government agencies have reportedly used the S visa to compel noncitizens to work for them, only to renege on their end of the deal and not apply for protections when the time comes.[136] While scholars have

131. Gershel, Nat'l Ass'n Crim. Def. Laws., supra note 126, at 12–14.

132. Id.

133. Id.

134. Id. at 26 & tbl.4.

135. 28 C.F.R. § 0.197 (2024); see also Prerna Lal, Reforming a Visa to Snitch: The Case for Self-Petitioning, 3 Accord Legal J. for Pracs. 63, 66 (2014).

136. Although exact statistics on how often the government promises to apply for S visas and fails to follow through with this promise are unavailable, prominent news coverage seems to suggest the issue is not minute. See Lal, supra note 135, at 66–70 (providing a laundry list of case studies demonstrating how the government has failed to follow through on promises to provide S visa protections); see also Andrew Becker, Retired Drug Informant Says He Was Burned, NPR (Feb. 13, 2010), https://www.npr.org/2010/02/13/122357350/retired-drug-informant-says-he-was-burned [https://perma.cc/BXT8-8WAL] ("They cited bureaucratic bungling, mistreatment and broken promises of being shielded from deportation in exchange for their cooperation in dangerous investigations. The informants have been willing to put their lives on the line, but now they face the prospect of harm in their native countries if they're sent back."); Helen O'Neill, Immigrants for Feds Face Deportation, NBC News (Feb. 13, 2010), https://www.nbcnews.com/id/wbna35383376 (on file with the *Columbia Law Review*) ("[T]he deal was straightforward: In exchange for working as informants, ICE would help the Mayas get coveted S visas, which, in rare instances, are awarded to immigrants who help law enforcement. . . . [F]or reasons they do not understand, ICE agents abruptly turned against them—and they now face imminent deportation."); Maria Sacchetti, ICE Says They Arrested a Human-Rights Violator. Retired Federal Agents Call Him a Hero., Wash. Post

suggested reforming the visa program to allow informants and cooperators to self-petition for the S visa, such a change is likely not feasible without an overhaul of the multi-step bureaucratic process currently in place.[137] Even if this adjustment were to take place, it is difficult to imagine how the existing system would be expanded to such an extent as to cover all official cooperators and informants, let alone include good-faith cooperators and informants.

The stark precedent that has been set over the past thirty years for the level of criminal involvement requisite for S-visa eligibility suggests that a new approach is needed to protect individuals with all levels of involvement in crime. This Note seeks to fill some of the gap by proposing a novel solution for individuals with low-level involvement in crime.

III. EXPANDING PROTECTIONS

While the S visa may not feasibly expand enough to protect good-faith cooperators and informants, the new deferred-action program provides a compelling framework to adopt. Just as the labor and civil rights deferral program serves as a lesser version of the U and T visas, it would be practicable to establish a deferred-action program for good-faith cooperators and informants as a lesser version of the S visa.

The protections afforded by the deferred-action program in the immigration system mirror those provided by the criminal safety valve in the criminal system. Just as the safety valve and *Booker* analysis proportionately reward individuals for their attempted cooperation through criminal benefits, the deferred-action program proposed by this Note proportionately rewards individuals for their good-faith cooperation through immigration benefits. The subset of the population covered by this Note likely would not have been given priority status for immigration action had they not encountered criminal authorities. Their perception in the criminal context is thus inextricably linked with their outcome in the immigration context. They do not need criminal benefits, as they have not been charged with any wrongdoing in the first place. Their good-faith cooperation thus limits response in the immigration context just as attempted cooperation encourages leniency in the criminal context.

To establish a well-rounded program for good-faith cooperators and informants, this Part lays out a three-part proposal. It then highlights

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(May 31, 2017), https://www.washingtonpost.com/local/ice-says-they-arrested-a-human-rights-violator-retired-federal-agents-call-him-a-hero/2017/05/31/29a3fad0-382d-11e7-b4ee-434b6d506b37_story.html (on file with the *Columbia Law Review*) ("[H]e is a confidential FBI informant who risked his own safety to save American lives and should have received a Green Card. Instead, he faces deportation to a country where his history of spying for the United States could get him killed.").

137. See Lal, supra note 135, at 72 (advocating for the ability to self-petition but recognizing that this would require a simplification of the current S-visa process to only involve the law enforcement agency with whom cooperation took place, the Attorney General's office, and USCIS).

underlying structural issues that must be addressed and offers feasible solutions for effective implementation of such a program.

A. *The Three-Part Solution*

To best protect good-faith cooperators and informants, this Note proposes that: (1) the Mayorkas and Doyle Memoranda should broaden protections to explicitly include serving as a good-faith cooperator or informant as a mitigating factor; (2) DHS should establish a streamlined, self-petitioned, deferred-removal program with clear guidelines for letters written by agencies; and (3) such a program should not prohibit applicants from presenting their case before an immigration judge as a last resort.

1. *Broaden Protections Under the Prosecutorial Discretion Memos.* — The most immediate method of providing protections to individuals would be through guidance to immigration officials and attorneys under the Mayorkas and Doyle Memoranda. The Mayorkas Memorandum lists a handful of mitigating factors and clarifies why the exercise of certain legal rights, including in the labor and civil rights contexts, deserves unique protections through immigration discretion.[138] An updated memo could add a provision for good-faith cooperation and information to the mitigating factors, emphasizing why individuals are so minimally involved in criminal schemes that they have not faced criminal charges deserve protection through immigration discretion.[139] The Doyle Memorandum lists assistance to labor and civil rights agencies as part of "other assistance" through which individuals without official informant or cooperator status can gain protection.[140] A subsequent memorandum could simply include good-faith cooperation and information provision in this list of "other assistance."[141]

Enshrining this protection in the prosecutorial discretion memos is crucial because it is the only avenue in the three-step solution through which noncitizens can receive the protection without advocating for it themselves. One of the key issues in the immigration sphere is that immigrants facing removal proceedings are not guaranteed the right to an attorney, as deportation is considered a civil rather than criminal penalty.[142] This puts indigent migrants who cannot afford counsel in an

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138. See Mayorkas Memorandum, supra note 42, at 3–5.

139. Along with a broader description emphasizing the importance of good-faith cooperation later on in the memo, this protection could be solidified by adding a new bullet point to the list of potential mitigating factors that states, "status as a good-faith cooperator or informant in criminal legal proceedings."

140. Doyle Memorandum, supra note 36, at 5.

141. Hypothetical language that amends existing memo language could state "or other assistance sought from the noncitizen by, or provided by the noncitizen to, federal, state, local or tribal law enforcement, including labor and civil law enforcement agencies, and good-faith cooperation and information provided to criminal law enforcement agencies."

142. See Am. Immigr. Council, Two Systems of Justice: How the Immigration System Falls Short of American Ideals of Justice 10 (2013),

incredibly tough position. Immigrants who have lawyers are "much more likely to prevail in their removal case than those who [do] not," such that not having guaranteed access to counsel "may have the most profound impact on immigrants' ability to receive a fair hearing."[143] This same rationale likely applies to official nonimmigrant programs as well: Individuals with access to attorneys are likely better able to reap the benefits of such programs, due to both attorneys' abilities to craft strong applications and migrants' potential lack of knowledge about these opportunities. It is therefore valuable to have immigration officials themselves weigh good-faith cooperation when conducting a discretionary analysis to determine whether to bring a case in the first place. Noncitizens may not even realize that their good-faith cooperation or information qualifies them for immigration protections yet may receive such protections through the work of diligent immigration agents and OPLA attorneys.

Relying on prosecutorial discretion alone, however, results in many of the same qualms expressed earlier.[144] Both the Mayorkas and Doyle Memoranda make clear that the protections listed "[are] not intended to, [do] not, and may not be relied upon to create or confer any right or benefit . . . enforceable at law or equity by any individual or other party, including in removal proceedings."[145] Individual agents have the right to weigh aggravating and mitigating factors as they deem best, and the decisions they reach cannot be easily overturned.[146] To best protect noncitizens, therefore, changes in informal prosecutorial discretion should be accompanied by formal program changes as well.

2. *Establish an Official Deferral Program.* — A deferred-action program would benefit noncitizens by providing a formal procedure to affirmatively request temporary residence in the country. Good-faith cooperators and informants would be considered lawfully present in the United States while their deferred-action protection exists.[147] They would also be eligible to apply for employment authorization under this program.[148] This program

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https://www.americanimmigrationcouncil.org/sites/default/files/research/aic_twosystemsofjustice.pdf [https://perma.cc/JPX7-R2S4] ("Of all the differences between criminal and removal proceedings, the lack of appointed counsel may have the most profound impact on immigrants' ability to receive a fair hearing.").

143. Id. See also Doyle Memorandum, supra note 36, at 9 ("OPLA attorneys should be particularly mindful of their role and the important impact that their representation of DHS can have in cases involving pro se respondents.").

144. See supra section I.B.2.

145. Doyle Memorandum, supra note 36, at 17; see also Mayorkas Memorandum, supra note 42, at 7 ("This guidance is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at laws by any party in any administrative, civil, or criminal matter.").

146. See supra notes 78–82 and accompanying text.

147. Deferred-action protections typically last for two years. DHS, Enforcement of Laws, supra note 38.

148. Id.

would empower noncitizens to get involved in the community and push back against injustice by "righting this power imbalance between" legal and illegal immigration status-holders.[149] It would provide a layer of protection to noncitizens seeking to escape coercion into criminal activity by safeguarding reports of such behavior. It would also widen opportunities to avoid such interactions in the first place by providing employment authorization to leave the informal economy and join the formal economy.[150]

The self-petitioned, streamlined aspects of the deferral program overcome key issues with the S visa. As discussed previously, government agencies are wary to submit applications unless practically certain that individuals will receive protections, in large part because of the time and effort it takes on the agency's end to engage in this process.[151] The deferral program overcomes this issue by only requiring the agency to write one letter in support of the applicant.[152] After that, the burden is on the applicant—who presumably has much greater willingness to engage in bureaucratic hurdles, given the personal nature of the application—to compile information and submit the request. This process simultaneously ensures that law enforcement agencies have authority over the sensitive information provided in the application[153] while reducing the burden on these agencies to follow through with said applications. The streamlined deferral process also removes much of the administrative backlog

149. See Meredith Cabell, Lynn Damiano Pearson & Jessie Hahn, Nat'l Immigr. L. Ctr., Building Worker Power Through Deferred Action 2, 6 (2024), https://www.nilc.org/wp-content/uploads/2024/01/NILC_WorkersRightsReport-1.12.2024_-1.pdf [https://perma.cc/S4DD-9HVZ] ("The guidance, issued by the Department of Homeland Security (DHS), empowers immigrant workers to file complaints with labor agencies, participate in labor investigations, and to build power together with U.S.-born workers—without the fear of potential deportation hanging over their heads.").

150. See, e.g., Zenen Jaimes Pérez, Ctr. for Am. Progress, How DACA Has Improved the Lives of Undocumented Young People 3 (2014), https://www.americanprogress.org/wp-content/uploads/sites/2/2014/11/BenefitsOfDACABrief2.pdf [https://perma.cc/U5K5-SGG7] ("[Deferred Action for Childhood Arrivals] has opened new doors for undocumented youth, leading to a stronger economy for everyone. . . . [I]t means being able to exit the informal economy and move on to better-paying jobs.").

151. See supra notes 131–134 and accompanying text.

152. See supra notes 27–31 and accompanying text.

153. Law enforcement agencies must provide all exculpatory and impeachment evidence to defendants in a criminal trial. See, e.g., Giglio v. United States, 405 U.S. 150, 154 (1972); Brady v. Maryland, 373 U.S. 83, 87 (1963); see also DOJ, Just. Manual § 9-5.001(B) (2020) ("Government disclosure of material exculpatory and impeachment evidence is part of the constitutional guarantee to a fair trial."). Enforcement officials and criminal prosecutors may therefore want to closely monitor the language used in immigration petitions to ensure that the language describing a good-faith cooperator's aid matches the charges brought against the defendant to avoid a *Brady* violation. By having law enforcement agencies write letters of support, the potential for *Brady* violations likely decreases.

associated with the S visa, making the process smoother for both the immigration agency and the applicant.

Although individuals would likely prefer a longer-term visa over temporary deferred action, a deferral program seems most feasible in the current immigration climate. Despite academic proposals for labor-specific visas,[154] both congressional[155] and advocacy group[156] proposals have understood existing limitations and pushed for deferred action in the labor and civil rights context as a minimum protection. Most notably, deferred-action protections remain in the executive's discretion.[157] Thus, they do not have to overcome the political turbulence of visa protections, which must be passed by the legislature.[158] The existing labor and civil rights deferral program reflects many of the requests outlined by the above-mentioned groups, providing a substantive guide for a good-faith criminal cooperator and informant deferral program. This proposed self-petitioned deferral program would provide noncitizens with one central intake point to submit requests for deferred action. The same documentation requisite for the existing deferral program could be applied here as well, with a letter or statement of interest from a criminal

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154. See, e.g., Farhang Heydari, Note, Making Strange Bedfellows: Enlisting the Cooperation of Undocumented Employees in the Enforcement of Employer Sanctions, 110 Colum. L. Rev. 1526, 1564 (2010) ("The most surgical alteration—leaving intact existing visas—would be the creation of a new visa category. While legislation would likely be contentious and difficult to ratify, targeted legislative reform designed to give law enforcement an additional tool in its arsenal has distinct advantages.").

155. See, e.g., Letter from Pramila Jayapal, Jerrold Nadler, Zoe Lofgren, Veronica Escobar, and Raúl Grijalva, Members of Cong., to Hon. Alejandro Mayorkas, Sec'y, DHS 1 (Sept. 29, 2022), https://jayapal.house.gov/wp-content/uploads/2022/09/Letter_to_DHS_Relief_for_Immigrant_Workers_09_29_2022.pdf [https://perma.cc/MB9D-NFEA] ("To be effective, this process should include, at a minimum, the following components: Consistent processing by United States Citizenship and Immigration Services (USCIS), where immigrants in civil rights or labor disputes can affirmatively request parole and deferred action (where eligible) . . . .").

156. See, e.g., Letter from African Cmtys. Together et al. to Hon. Alejandro Mayorkas, Sec'y, DHS 1 (Nov. 17, 2022), https://www.nilc.org/wp-content/uploads/2022/11/DHS-Sign-On-Letter-Regarding-Prosecutorial-Discretion-Labor-Disputes-Nov-2022.pdf [https://perma.cc/MJ4H-9FYD] ("We . . . urge DHS to immediately release written guidance that clarifies the process by which undocumented workers, guestworkers, and others with precarious immigration status who are victims or witnesses of labor exploitation may seek prosecutorial discretion.").

157. See Am. Immigr. Council, Deferred Action for Childhood Arrivals (DACA): An Overview 1 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/deferred_action_for_childhood_arrivals_daca_an_overview_0.pdf [https://perma.cc//F9SH-TUGM] (clarifying that the deferred-action program is an "exercise of prosecutorial discretion" that is "[u]nlike federal legislation").

158. Visa protections must pass the legislature and be preserved in the U.S. code. See U.S. Dep't of State, U.S. Visa Law & Policy, Travel.State.Gov, https://travel.state.gov/content/travel/en/legal/visa-law0.html [https://perma.cc/MCY5-9VUW] (last visited Aug. 22, 2024) (explaining that laws enacted by Congress govern visas and travel into the United States).

agency addressed to DHS supporting the request.[159] The same guidelines for agency letters that exist in the labor context could be applied to the criminal context.[160]

Law enforcement agencies would likely be willing to work with migrants to fulfill deferral requests because the implementation of such a deferral program also benefits the government. The practice "of offering discretionary protection on a case-by-case basis to victims who lack employment authorization directly increases the ability of [relevant] agencies to more fully investigate" violations under their purview.[161] Law enforcement agencies heavily rely on inside information to ascertain what criminal activity has taken place and thus need mechanisms to incentivize attempts to cooperate. The impact of this improved investigation ability will likely extend beyond the narrow group addressed in this Note. By protecting good-faith cooperators, government lawyers can improve their general reputation in migrant communities, thereby increasing the likelihood that other individuals with information on criminal activity speak up. This may also improve relations with defense attorneys, as the government demonstrates its commitment to protecting vulnerable cooperators and informants.

In addition, this policy may improve federal and local relations, particularly with localities that have adopted sanctuary city programs.[162] Approximately 200 cities, counties, and states have adopted such

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159. In the labor context, requisite documentation in addition to the letter of support includes a written request signed by the noncitizen stating the basis for the deferred-action request, evidence to establish that the individual falls within the scope of the agency's investigation, and evidence of any additional factors that support use of discretion. DHS, Enforcement of Laws, supra note 38. Noncitizens are responsible for providing identifying documentation such as proof of their identity and nationality, evidence relating to their immigration history or status, and Form G-325A biographic information for deferred action. Id. Individuals seeking employment authorization must also fill out the Form I-765 application for employment authorization and Form I-765WS worksheet. Id.

160. Specifically, the statement of interest should address the nature of the agency's investigation and need for DHS support, the agency's enforcement interests that provide the basis for the request, the individuals with information who would be helpful with the investigation, and a point of contact in the agency who can respond to follow-up questions from DHS. See id.

161. Id.

162. Many cities have designated themselves as "sanctuary cities" and chosen not to cooperate with federal immigration agencies. Despite arguments that sanctuary cities will suffer economically as a result, studies suggest that public safety and economic outcomes are better in these cities. See, e.g., Tom K. Wong, Ctr. for Am. Progress & Nat'l Immigr. L. Ctr., The Effects of Sanctuary Policies on Crime and the Economy 1–3 (2017), https://www.nilc.org/wp-content/uploads/2017/02/Effects-Sanctuary-Policies-Crime-and-Economy-2017-01-26.pdf [https://perma.cc/2H8E-SDVZ] (finding that sanctuary cities have, on average, higher median household income, less poverty, less reliance on public assistance, higher labor force participation, higher employment-to-population ratios, and lower unemployment).

programs,[163] and many others have informally limited cooperation with immigration authorities without going so far as to become formal sanctuary cities.[164] By proving to state and local governments that federal authorities are willing to protect migrants against negative immigration action, the federal criminal and immigration systems may advance their relationships. Of course, the proposed program would only protect a specific subgroup of the migrant population, so its impact will be limited; still, all parties involved will hopefully embrace a step in the right direction.

3. *Allow for Judicial Resort.* — Finally, this proposal ensures access to immigration court to try one's case as a last resort. If an OPLA attorney has decided not to exercise prosecutorial discretion and has rejected a deferred-action application, the case comes to the EOIR and an immigration judge makes the final removal determination.[165] Immigration judges have discretion to terminate proceedings if they find a noncitizen not removable at the time of the hearing.[166] Termination does not provide the noncitizen with official immigration status, and a new case can be brought against them at any time,[167] but it still provides a period of relief somewhat analogous to deferred action.

Individuals who apply for the S visa must waive their right to contest removal should they be deemed ineligible for the visa unless they meet specific grounds for withholding of removal.[168] This means that applicants often cannot advocate their case in front of an immigration judge. This rule is broadly related to the prevalence of immigration waivers in criminal plea agreements, which bind people against contesting deportation

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163. Is New York Rethinking Its Sanctuary-City Status?, The Economist (Mar. 7, 2024), https://www.economist.com/united-states/2024/03/07/is-new-york-rethinking-its-sanctuary-city-status (on file with the *Columbia Law Review*).

164. See, e.g., Alejandra Lopez, Sanctuary Communities: A New Approach to Comprehensive Migratory Policy, Routed: Migration & (Im)mobility Mag. (May 26, 2024), https://www.routedmagazine.com/post/sanctuary-communities-a-new-approach-to-comprehensive-migratory-policy (on file with the *Columbia Law Review*) ("Sanctuary Communities serve as bridges between informal practices and formal policies, offering insight into the relationship between formal and informal governance. They provide a much more thorough understanding about host communities that receive migrants, [and] the policies and practices that have been adopted to integrate migrants . . . .").

165. See DOJ, EOIR Manual, supra note 58.

166. DOJ, Executive Office for Immigration Review: An Agency Guide 5 (2017), https://www.justice.gov/eoir/page/file/eoir_an_agency_guide/ [https://perma.cc/MS93-W4ZS].

167. Id.

168. 8 U.S.C. § 1184(k)(3) (2018). Withholding of removal is only provided by an immigration judge when a noncitizen proves they will more likely than not be subject to persecution (specifically based on race, religion, nationality, membership in a particular social group, or political opinion) or torture in their home country if forced to return there. 8 C.F.R. § 208.16 (2024).

proceedings.[169] It is important that the official deferred-action program does not adopt a similar rule superseding the migrant's right to fight a removal decision in immigration court as a last resort. The changes proposed in this Note are thus twofold. First, the deferral program should not include any provision denying access to immigration courts as a condition to applying for protections.[170] Second, the deferral program should ensure that good-faith cooperators and informants are not coerced into signing an immigration defense waiver in exchange for an agency's letter of support. Individuals would likely have a compelling reason not to sign such a waiver if they understood the ramifications.[171] Signatories frequently do not grasp the full weight of the defense waivers they are presented with, such that enforcement of these waivers violates legal ethics and public policy goals.[172] Furthermore, criminal agencies likely would not have a credible reason to mandate such waivers to be signed by individuals who have not even been charged with criminal conduct. Thus, access to immigration court should be protected.

Notably, noncitizens cannot rely on the existence of the deferral program or the exact text of the prosecutorial discretion memorandum to argue on their behalf in immigration court.[173] They also cannot use the existence of these programs to bring cases in federal district court.[174] Thus,

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169. Prosecutors have frequently used immigration defense waivers in federal plea agreements in recent years. See Donna Lee Elm, Susan R. Klein & Elissa C. Steglich, Immigration Defense Waivers in Federal Criminal Plea Agreements, 69 Mercer L. Rev. 839, 842 (2018) (highlighting the prevalence of "coercive aspect[s] of plea bargains," including "waivers of most of the defendant's substantive and procedural rights"). Districts set their own requirements, including mandating those who sign on to plea deals to agree to removal, admit they are removable, agree to reinstatement of previous removal orders, guarantee to not contest previous removal orders, waive particular rights in immigration proceedings, abandon existing immigration litigation, and even abandon persecution and torture-based protections in immigration hearings. Id. at 845–48.

170. The existing labor and civil rights deferral program does not appear to have this condition, so explicitly ensuring this right should not be particularly controversial.

171. This is not always the case, as waivers of civil claims sometimes provide coveted criminal immunity to defendants who themselves waive certain constitutional rights by taking plea agreements rather than going to trial. See Town of Newton v. Rumery, 480 U.S. 386, 393–97 (1987) ("In many cases a defendant's choice to enter into a release-dismissal agreement will reflect a highly rational judgment that the certain benefits of escaping criminal prosecution exceed the speculative benefits of prevailing in a civil action."). The *Rumery* majority analysis would likely not apply here, however, because the noncitizen has not been charged with a crime and is therefore not acquiring "immunity from criminal prosecution in consideration of abandoning a civil suit that he may well have lost." Id. at 394.

172. See Elm et al., supra note 169, at 871–85 (pushing back against immigration waivers because public education on the waivers is limited, public interest against the waivers is significant, and criminal defense attorneys and judges are not informed enough on the topic to ethically advise noncitizens).

173. See supra note 145 and accompanying text.

174. See supra note 145 and accompanying text; see also 8 U.S.C. § 1252(g) (2018) (providing that, with minor exceptions, "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney

the fact that an individual served as a good-faith cooperator or informant does not guarantee protection or a finding of "not removable as charged." This can, however, be one of several factors that the judge considers in concluding whether a migrant is removable.[175] The noncitizen seeking protection from removal must prove in their Motion to Terminate Removal Proceedings why good-faith cooperation or information deserves favorable discretion.[176] A judge could reach an outcome in favor of the applicant even if immigration attorneys felt otherwise in their discretionary evaluation.[177]

B. *Ensuring Effective Implementation*

The three-part proposal laid out in this Note covers the key avenues through which uncharged noncitizen good-faith cooperators and informants can be recompensed in the immigration sphere for their aid in the criminal sphere. The effective implementation of this proposal requires additional steps to address lasting structural issues in the crimmigration domain. Though this Note suggests some feasible solutions, these problems will likely never be fully resolved, and they ought to be monitored accordingly.

1. *Information Dissemination.* — The most critical barrier to the effective implementation of the proposal is poorly disseminated information about immigration benefits in the criminal sphere. The issue is twofold. First, individuals not charged with a crime may never access an attorney and may not have the requisite background to push for protections themselves. Second, even if individuals gain access to criminal defense attorneys, the attorneys may not know enough about the immigration protections to advise their clients.

General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter"); Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 485 (1999) (holding that judicial review outside of immigration court is limited such that "'no deferred action' decisions and similar discretionary determinations . . . will not be made the bases for separate rounds of judicial intervention"). But see Shoba Sivaprasad Wadhia, The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions, 16 Harv. Latino L. Rev. 39, 77 (2013) ("[N]oncitizens possibly do have a procedural right to challenge a prosecutorial discretion decision by the agency under the [Administrative Procedures Act] because there exists 'more than enough law' against which a judge can determine whether a decision was rationally made."). This argument does not appear to be adopted widely enough to be deemed an established method of judicial protections at the time of Note-writing.

175. Judges can evaluate any information a noncitizen provides to argue they merit a favorable exercise of discretion, so long as the information abides by the applicable submission requirements. See 8 U.S.C. § 1229a(c)(4)(B) (establishing that the immigration judge "shall weigh the credible testimony" submitted by migrants in favor of relief from immigration action "along with other evidence of record").

176. See id. § 1229a(c)(4)(A)–(B) (stating that noncitizens bear the burden to submit documentation in favor of removal relief and to prove their credibility in court).

177. See id. § 1229a(c)(1)(A) ("The determination of the immigration judge shall be based only on the evidence produced at the hearing.").

Individuals charged in a criminal prosecution have the right to assistance of defense counsel free of charge.[178] They also maintain this right to counsel while held in police custody.[179] The right does not exist, however, during police interrogation or questioning that takes place when an individual is not in custody.[180] Noncitizen good-faith cooperators and informants, who engage with officers or agents to share information about a larger criminality but are not officially arrested or prosecuted, likely never enter custody and may therefore never interact with a criminal defense attorney. Attorneys are crucial driving forces behind the provision of protections: While pro se defendants[181] receive certain protections in criminal trials,[182] the same is not true for unrepresented individuals interacting informally with government officials. The average noncitizen likely does not have detailed knowledge of the immigration protections they can receive, and good-faith informants presumably do not have time before their unplanned interaction with the government to learn relevant information. They therefore may not be aware of what information to obtain from the criminal agents they speak to. Because there is no requirement placed on government agents to inform noncitizens of these benefits,[183] defense attorneys likely play a crucial role in advocating for and obtaining deferral protections.

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178. Gideon v. Wainwright, 372 U.S. 335, 342 (1963).

179. See Miranda v. Arizona, 384 U.S. 436, 492 (1966) (speaking of the "right to consult with an attorney and to have one present during the interrogation" for an individual who was arrested and taken into custody).

180. Id. at 444; see also Thompson v. Keohane, 516 U.S. 99, 112 (1995) (establishing that the custody determination is based on "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave" (footnote omitted)); Berkemer v. McCarty, 468 U.S. 420, 442 (1984) ("[R]espondent was not taken into custody for the purposes of *Miranda* until Williams arrested him.").

181. Pro se defendants are individuals charged with crime who choose to forego attorney representation. This decision is likely due to dissatisfaction with the quality of the representation and concern about whether their best interests will truly be represented. See Erica J. Hashimoto, Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant, 85 N.C. L. Rev. 423, 460–76 (2007). Some defendants feel strongly against having any lawyer represent them out of general apprehension about the field, whereas others make the decision based on the specific lawyer they have been assigned. Id. Although these rationales for declining attorney representation may be valid, they cannot be presumptively applied to new defendants, who should be given a chance to decide for themselves whether they want legal advice.

182. See Sharon Finegan, Pro Se Criminal Trials and the Merging of Inquisitorial and Adversarial Systems of Justice, 58 Cath. U. L. Rev. 445, 472–85 (2009) (arguing that judges play a key role in advising pro se defendants on both procedural rules and substantive issues of the case, straying from the "detached overseer of the adversarial system" to become a "proactive participant" helping the defendant navigate the process).

183. Criminal defense attorneys have the responsibility to advise noncitizens of the potential immigration ramifications to their criminal plea deals. Padilla v. Kentucky, 559 U.S. 356, 374 (2010). The Supreme Court has not explicitly extended the same burden to government attorneys. Therefore, although the DOJ Office of Immigration Litigation has advocated that "prosecutors . . . have a basic understanding of the immigration

Even when criminal defense attorneys are present, however, they may not have adequate information on the immigration deferral program to appropriately guide noncitizens. Criminal and immigration law are treated as distinct fields despite the growing overlap between the two, such that it is often difficult for criminal defense attorneys to remain up to date on changes to the immigration side.[184] Although it is "quintessentially the duty of counsel to provide her client with available advice about an issue like deportation," it is also true that "[i]mmigration law can be complex," and there may be "numerous situations in which the deportation consequences of a particular plea are unclear or uncertain."[185] This is especially the case for good-faith cooperation, as individuals are not charged with an offense and therefore do not receive the typical deals that defense attorneys handle. Defense attorneys likely have no obligation in this situation.[186] The concern here is not that a particular agreement will lead to deportation but rather that negotiation could protect *against* deportation. The immigration consequences are thus beneficial rather than adverse, and only exist because the individual never faced criminal charges. Without easy access to updates in the immigration sphere or a legal requirement to exert time and effort finding these updates, defense attorneys may overlook good-faith cooperator and informant protections. Therefore, even if a good-faith cooperator is given the opportunity to speak to counsel, it is unclear how beneficial the attorney will be.

This problem is best addressed by widespread publicization of the good-faith cooperation and information protections.[187] This can be done at multiple levels to simultaneously target defense attorney circles and migrant communities. An ideal long-term solution would target even deeper issues at play by protecting greater access to counsel and broadening the range of crimmigration information that a defense attorney must legally advise on. Such proposals, however, take far more time to implement and may not be as palatable in the current judicial

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consequences that flow from a[] [noncitizen]'s guilty plea," it has clarified that the responsibility lies on "defense attorneys to advise aliens of the potential risks of immigration consequences." Off. of Immigr. Litig., DOJ, Immigration Consequences of Criminal Convictions: *Padilla v. Kentucky*, at i–ii (2010), https://www.justice.gov/sites/default/files/civil/legacy/2011/05/03/REVISED%20Padilla%20v.%20Kentucky%20Reference%20Guide_11-8-10.pdf [https://perma.cc/8RZR-SVQT].

184. Stumpf, supra note 4, at 376.

185. *Padilla*, 559 U.S. at 369, 371.

186. *Padilla* holds that "[w]hen the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." Id. at 369.

187. In addition to publicizing the new benefits, it would be impactful if DHS publicized the facts of individual cases that receive deferred action. This would likely help noncitizens and their attorneys evaluate the likelihood of their own chance to receive such protections. A more transparent process would also improve efficiency, accuracy, and consistency in deferral cases. See Wadhia, Sharing Secrets, supra note 33, at 64–65.

climate.[188] Effective information dissemination should therefore be the first priority.

2. *Letters of Recommendation.* — Another lasting issue hampering successful implementation of the proposal concerns agency abuse of protections. As discussed previously, government agencies have reportedly dangled the promise of applying for the S visa to compel noncitizens to cooperate, only to fail to actually complete the application once the cooperation has taken place.[189] Without speaking directly to agency officials who have withheld S-visa applications, it is unclear how much their decision is swayed by the workload of applying for an S visa[190] more than by a general lack of care for migrants and willingness to abuse immigration benefits to accomplish agency goals. Regarding the former, the deferral program imposes far less work on agencies. Rather than putting together all the paperwork and tracking a complicated web of visa proceedings for years, the agency must only once write a letter of recommendation and leave the rest of the hassle to individual applicants. This mitigates at least some factors pushing agencies against applying for deferral proceedings. The latter reasons, however, may still pose a threat.

The most effective solution to this problem would likely be to legally require agencies to write letters of recommendation for good-faith cooperators and informants within a specific time frame from when they provided aid. This would ensure that all individuals who meet the requirements of a good-faith cooperator or informant can have their case evaluated by the immigration system. The set time frame also provides noncitizens with an opportunity to meet with an attorney or research themselves how their good-faith aid impacts immigration and return to request a letter thereafter. This proposal simultaneously protects law enforcement officials from unreasonable duties. Criminal investigators already have a slew of paperwork to complete on the job;[191] the addition

188. There have been pushes to reform the immigration system to provide guaranteed access to counsel for years. See, e.g., Michael Kagan, Toward Universal Deportation Defense: An Optimistic View, 2018 Wis. L. Rev. 305, 316 (highlighting considerable "obstacles to universal deportation defense" but still advocating that such a change can and should be implemented). Noncitizens are "ten-and-a-half times more likely to successfully avoid deportation if they had counsel representing them." Ingrid Eagly, Second Chances in Criminal and Immigration Law, 98 Ind. L.J. 977, 994 (2023). But as seen in other fields like housing, right to counsel is not easily implemented from a municipal to a national scale. See Ericka Petersen, Building a House for Gideon: The Right to Counsel in Evictions, 16 Stan. J. C.R. & C.L. 63, 91–97 (2020) (outlining the growth of the right to counsel in eviction proceedings in large cities but noting that it has not yet been adopted at a national scale).

189. See supra note 136 and accompanying text.

190. Along with expending the time and effort required to apply for an S visa, some offices protest that they do not have the resources required to quarterly monitor recipients who do eventually receive an S visa. See, e.g., Becker, supra note 136 ("Mark Bartlett, the first assistant U.S. attorney for Western Washington, said his office isn't equipped to monitor Gamboa or any confidential informants who have an S visa, as required.").

191. For example, FBI agents must complete a daily report on Form FD-28, log information gathered in an interview that could eventually be used for testimony on Form

of one more piece of paperwork, used in limited circumstances when noncitizens meet the requirements of good-faith cooperators or informants, will thus likely not impose an undue burden.[192] Limits on the duration of the requirement further protect agents by ensuring that there is a limit to being bound to noncitizens' requests.

Although the implementation of a formal letter of recommendation requirement would be ideal, the three-part proposal also establishes buffer protections to accommodate the status quo lack of requirement. Neither prosecutorial discretion nor judicial review explicitly requires letters from agencies to prove noncitizens' good-faith cooperation and information.[193] Individuals therefore have alternate routes to seek immigration protection should agency officials refuse to write letters of support. Though such letters would clearly bolster cases for prosecutorial discretion and judicial review, noncitizens' own testimony about the aid they provided may be enough to grasp immigration benefits from a benevolent judge.

CONCLUSION

Individuals without legal status who try to cooperate but lack enough information for the government to sign on face a unique challenge in the oft-grim crimmigration system. Though not necessarily more "deserving" of protections than other migrants—such as those never arrested on criminal matters to begin with—they arguably have a greater need for swift immigration protection. Having been forced to encounter government officials, the individuals addressed in this Note have a strong appeal for personal assistance.

While deferred-action protections could theoretically expand beyond the class of this Note to include good-faith cooperators charged with criminal activity, the implications of such an enlargement are outside the scope of this piece. Noncitizen good-faith cooperators and informants who

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FD-302, and register interactions with "assets" like informants on Form FD-209. Government Attic, Forms Used by the Federal Bureau of Investigation (FBI) 2003-2004, at 11–14 (2022), https://www.governmentattic.org/44docs/FBIforms_2003-4.pdf [https://perma.cc/QY8N-8RXQ].

192. Compare this burden to other proposals that have suggested allowing criminal agencies themselves to provide immigration benefits so that criminal agents and noncitizens need not worry about navigating the immigration sphere separately. See Frankel, supra note 7, at 449–50 ("Congress should override, or DHS should repeal, § 0.197 of Title 28 of the CFR. Section 0.197 prevents prosecutors from entering binding cooperation agreements that promise nondeportation without the written authorization of the DHS Under Secretary." (footnote omitted)). The creation of a new power would likely add significant work to federal law enforcement agencies' plates. It also might not resolve the issue at hand, as there would still be ample opportunity for agency abuse. Noncitizens questioned without an attorney present may not understand what language is legally binding and what is not, such that they may be coerced into good-faith cooperation only to not receive benefits after-the-fact because the language did not legally constitute a promise.

193. See supra sections III.A.1 and III.A.3 for the specific language used and requirements set.

are so minorly involved in criminal activity that they do not face charges play a unique role in the criminal system. Their limited involvement in criminal activity, lack of formal charges brought against them, and willingness to work openly with criminal agencies once discovered provide particularly compelling reasons for protections in the immigration system.

The benefits of such a proposal go beyond the impact that they have on individual noncitizens. Just as deferred-action protections have emboldened migrant workers to speak out against abusive employment practices in the labor and employment field,[194] the current proposal seeks to encourage migrants to feel comfortable reporting attempts to coerce them into criminal activity. This improves both migrant and overall community safety, such that even conservative law enforcement agents and judges will likely find compelling reasons to help noncitizens.

As informal and formal mechanisms for protecting noncitizens evolve, it is important to remember those who are too often written off as "threats" to public safety or border security. By broadening prosecutorial discretion protections, establishing an official deferred removal program, and allowing for judicial resort, this Note seeks to recognize and restrain the particularly difficult situation that noncitizens without legal status face in this country.

194. See DHS, Process Enhancements, supra note 35 (explaining that deferred-action protections facilitate the reporting of unlawful working conditions); see also Stephen Lee, Workplace Enforcement Workarounds, 21 Wm. & Mary Bill Rts. J. 549, 552 (2012) ("[T]he Executive's increased reliance on local law enforcement to identify 'criminal aliens' undermines competing commitments in the realm of workplace enforcement, which sets out to identify and punish 'exploitative employers.'"); Heydari, supra note 154, at 1572–73 ("[O]ur marginalization of undocumented communities 'makes it difficult for people here illegally to report crimes—driving a wedge between communities and law enforcement, making our streets more dangerous and the jobs of our police officers more difficult.'" (quoting Barack Obama, President, U.S., Remarks by the President on Comprehensive Immigration Reform (July 1, 2010), https://obamawhitehouse.archives.gov/realitycheck/the-press-office/remarks-president-comprehensive-immigration-reform [https://perma.cc/FW3S-FRAX])).

A PATH TO CLIMATE ASYLUM UNDER U.S. LAW

*By Natalie Smith**

Clarifying the extent to which existing legal regimes afford protection to climate migrants must be part of an effective and coordinated response to climate change. This Note argues that climate refugees, a group which it narrowly defines as those who meet the requirements of the 1951 Refugee Convention because they have experienced climate change–induced harm amounting to persecution, should qualify for asylum under U.S. immigration law. To establish an initial asylum claim, climate refugees must demonstrate persecution on account of one of the Refugee Convention's five protected grounds. Either membership in a particular social group or nationality could be an appropriate basis. In the context of climate change, the accumulation of slow- and rapid-onset harm inflicted by high-emitting actors in the Global North, against which climate refugees' governments are unable or unwilling to protect them, should constitute persecution. Actual or constructive knowledge of the relationship between high-emitting activities, climate change, and damage to climate-vulnerable populations should establish a nexus between persecution and the protected ground. Successfully meeting these criteria establishes a well-founded fear of future persecution, which the U.S. government may rebut. To overcome such a refutation, climate refugees should argue for humanitarian asylum based on their fear of experiencing "other serious harm" if repatriated, which provides an opportunity to introduce the full range of evidence of climate change–related harm. While most climate migrants will not meet the criteria for climate asylum, those who qualify should benefit from this established form of protection.

* J.D. Candidate 2025, Columbia Law School. Thanks to Professor Camille Pannu for her support and to the staff of the *Columbia Law Review* for their diligent editorial work.

INTRODUCTION

The immense scale of predicted climate migration demands an effective and coordinated international response.[1] One component of this effort must be clarifying the application of existing international legal regimes to this novel context—perhaps most saliently, the extent to which

1. See Juergen Voegele, Foreword to Viviane Clement, Kanta Kumari Rigaud, Alex de Sherbinin, Bryan Jones, Susana Adamo, Jacob Schewe, Nian Sadiq & Elham Shabahat, World Bank, Groundswell Part 2: Acting on Internal Climate Migration, at xvii (2021), http://hdl.handle.net/10986/36248 (on file with the *Columbia Law Review*) (predicting that climate change will internally displace 143 million people in sub-Saharan Africa, South Asia, and Latin America alone by 2050); UN, The Sustainable Development Goals Report 2020, at 37 (2020), https://unstats.un.org/sdgs/report/2020/The-Sustainable-Development-Goals-Report-2020.pdf [https://perma.cc/H33L-DPDM] (claiming that, if water stress remains "unmitigated," water scarcity could displace 700 million people by 2030); Paula Beltran & Metodij Hadzi-Vaskov, How Climate Shocks Are Linked to Cross-Border Migration in Latin America and the Caribbean, IMF (Dec. 8, 2023), https://www.imf.org/en/News/Articles/2023/12/08/cf-how-climate-shocks-are-linked-to-cross-border-migration-in-latin-america-and-the-caribbean [https://perma.cc/YN76-8R7U] (demonstrating that acute climate change events have an appreciable impact on migration from Latin American countries); Cesia Chavarría, Alejandro Cartagena, Alberto Cabezas & Pablo Escribano, In Central America, Disasters and Climate Change Are Defining Migration Trends, Int'l Org. Migration, https://environmentalmigration.iom.int/blogs/central-america-disasters-and-climate-change-are-defining-migration-trends [https://perma.cc/B4MN-39L4] (last visited Aug. 5, 2024) (discussing increased migration from Central to North America due to climate change–induced natural disasters).

the protections of international refugee law can encompass climate migrants.[2]

As for any other category of displacement, the standard governing refugee status in the context of climate migration emerges from the 1951 Convention Relating to the Status of Refugees ("Refugee Convention") and its 1967 Protocol.[3] The Refugee Convention defines a refugee as an individual who has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion," is outside their country of origin, and, due to such fear, is "unwilling to avail [them]self of [its] protection."[4] To be legally considered refugees and eligible for asylum, climate migrants thus face three central challenges: they must have (1) experienced harm amounting to persecution (2) on account of (3) one of these five protected grounds.[5] Though persecution has no precise definition in this context, "a threat to life or freedom" based on one of the protected grounds "is always persecution."[6] The second requirement, termed the "nexus," demands that such persecution be inflicted because of one of the protected characteristics.[7]

There is widespread recognition that some climate migrants will meet the Refugee Convention's standard but little agreement as to the precise

2. See Jane McAdam, Climate Change, Forced Migration, and International Law 39–51 (2012) [hereinafter McAdam, Climate Change] (discussing the application of existing international legal regimes to climate migrant protection).

3. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention]; see also Protocol Relating to the Status of Refugees, Dec. 16, 1966, 606 U.N.T.S. 267 [hereinafter Refugee Protocol]. The Refugee Convention originally applied only to events that occurred before January 1, 1951, and allowed each signatory to decide whether it had an obligation to refugees from outside of Europe. See Refugee Convention, supra, art. 1, ¶ B.1(1), 189 U.N.T.S. at 154. The Protocol removed these temporal and geographic restrictions, recognizing "that new refugee situations have arisen since the convention was adopted" and "it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention." See Refugee Protocol, supra, at 268.

4. Refugee Convention, supra note 3, art. 1, ¶ A(2), 189 U.N.T.S. at 152.

5. See id. (establishing these three elements of the "refugee" definition under international law).

6. UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, ¶ 51, HCR/1P/4/ENG./REV.4 (2019) [hereinafter UNHCR Handbook]; see also Matter of Laipenieks, 18 I. & N. Dec. 433, 457 (B.I.A. 1983) (adopting identical language). As a crime against humanity under international criminal law, persecution is more precisely defined as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity." Rome Statute of the International Criminal Court art. 7, ¶ 2(g), July 17, 1998, 2187 U.N.T.S. 90, 94.

7. See UNHCR Handbook, supra note 6, ¶¶ 66–67 (examining the requirement that persecution be experienced on account of one of the protected grounds).

context it governs.[8] Some types of climate change–related[9] asylum claims correspond more naturally to conventional understandings of the protection that the Refugee Convention offers. For instance, President Joe Biden's Administration has recognized that a government's discriminatory withholding of climate change relief from particular groups might amount to persecution.[10] Similarly, the U.N. High Commissioner for Refugees (UNHCR) accepts that the Refugee Convention extends to situations in which climate change increases the risk of persecution or violence.[11] For example, refugees who fled from northern Cameroon to neighboring Chad in 2021 after conflict erupted due to climate change–induced water scarcity would fall within the ambit of the Refugee Convention.[12] However, these limited categories exclude what might be termed "climate asylum": qualification for asylum on the basis that climate change–based harm, for which a set of international high-emitting actors are responsible, amounts to persecution, against which climate migrants' own governments are unable or unwilling to protect them.

In the absence of an international agreement reconciling climate migration and refugee status, examining domestic legislation

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8. See infra section I.B.

9. This Note adopts the following definition for climate change: "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods." UN Framework Convention on Climate Change, art. 1, ¶ 2, May 9, 1992, 1771 U.N.T.S. 107, 168.

10. See The White House, Report on the Impact of Climate Change on Migration 17 (2021), https://www.whitehouse.gov/wp-content/uploads/2021/10/Report-on-the-Impact-of-Climate-Change-on-Migration.pdf [https://perma.cc/6UQ7-UVVT] [hereinafter Climate Migration Report] ("For example, if a government withholds or denies relief from the impacts of climate change to specific individuals who share a protected characteristic in a manner and to a degree amounting to persecution, such individuals may be eligible for refugee status."); see also Christel Cournil, The Inadequacy of International Refugee Law in Response to Environmental Migration, *in* Research Handbook on Climate Change, Migration and the Law 85, 102 (Benoît Mayer & François Crépeau eds., 2017) ("[A]nother example could include governments that persecute through the denial of assistance to specific groups of people affected by an environmental disaster.").

11. See Kristy Siegfried, Climate Change and Displacement: The Myths and the Facts, UNHCR U.K. (Nov. 15, 2023), https://www.unhcr.org/uk/news/stories/climate-change-and-displacement-myths-and-facts [https://perma.cc/UZ6C-RLTF] (recognizing that the Refugee Convention may afford protection when "an individual's risk of facing persecution or violence is increased by climate change").

12. Id. In this region, temperatures increased 1.5 times more quickly than the global average, impacting an estimated 80% of farmland. The surface area of Lake Chad, the body of water supporting the region, decreased by up to 95% over the past sixty years due to rain scarcity. The violent conflict between pastoralists and a group of fishermen and farmers displaced eleven thousand people to Chad between August and September 2021. To support their livelihoods, the latter resorted to trapping rainwater in trenches, in which the pastoralists' cattle were frequently trapped. Aristophane Ngargoune, Climate Change Fuels Clashes in Cameroon that Force Thousands to Flee, UNHCR (Sept. 9, 2021), https://www.unhcr.org/news/stories/climate-change-fuels-clashes-cameroon-force-thousands-flee [https://perma.cc/XE7X-SJMD].

implementing the Refugee Convention better facilitates actual consideration of the potential success of a climate asylum claim. In the United States, the Immigration and Nationality Act (INA) incorporates and expands upon the language of the Refugee Convention.[13] As amended by the Refugee Act of 1980, it establishes a burden-shifting framework for an asylum claim, introducing additional elements: (1) the applicant must establish past persecution, which creates a presumption of a well-founded fear of future persecution; (2) the government may rebut this presumption by proving either that country conditions have changed or that the applicant could reasonably relocate within their country of origin; and (3) the applicant, by prevailing on a claim of humanitarian asylum, may overcome the rebuttal.[14] Prior scholarship has explored strategies for establishing past persecution under the INA but has largely neglected to evaluate this framework as a whole.[15] In particular, it has failed to consider the role of humanitarian asylum, the discretionary grant of protected status in the absence of a future fear of persecution, in combating challenges raised by the U.S. government.[16]

Considering this burden-shifting framework collectively, this Note argues that U.S. asylum law is capable of providing—and, applied justly

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13. The INA distinguishes between asylum and refugee status, awarding the former to applicants within the territorial United States and the latter to those abroad. See 8 U.S.C. § 1101(a)(42) (2018) (defining "refugee"); id. § 1158 (establishing provisions for asylum); see also id. § 1157 (articulating criteria for admitting refugees).

14. See Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.) (amending the INA to bring the United States into compliance with the Refugee Convention and its Protocol). Federal appellate courts have characterized this as a burden-shifting framework. See, e.g., Mejia-Lopez v. Barr, 944 F.3d 764, 768–69 (8th Cir. 2019) (explaining that establishing past persecution as part of an asylum claim provides a "rebuttable presumption of a well-founded fear of [future] persecution"). But it may, in practice, function more as a balancing test for cases in which the government alleges reasonable internal relocation and the applicant seeks humanitarian asylum based on "other serious harm." See infra section III.B.1.

15. For scholars that have examined only the initial asylum claim, see, e.g., Jessica B. Cooper, Environmental Refugees: Meeting the Requirements of the Refugee Definition, 6 N.Y.U. Env't L.J. 480, 486–87 (1998) (arguing that "environmental refugees" meet the criteria of the Refugee Convention based on "government-induced environmental degradation"); Shea Flanagan, "Give Me Your Tired, Your Poor, Your Huddled Masses": The Case to Reform U.S. Asylum Law to Protect Climate Change Refugees, 13 DePaul J. for Soc. Just. 1, 22–32 (2019) (proposing either the addition of a sixth "environmental" protected ground or recognition on the basis of a particular social group); Barbara McIsaac, Domestic Evolution: Amending the United States Refugee Definition of the INA to Include Environmentally Displaced Refugees, 9 U. Mia. Race & Soc. Just. L. Rev. 45, 69–72 (2019) (recommending an amendment to the INA to encompass environmental refugees); see also Julia Toscano, Climate Change Displacement and Forced Migration: An International Crisis, 6 Ariz. J. Env't L. & Pol'y 457, 476–78 (2015) (rejecting the possibility that the Refugee Convention might afford protection to environmentally displaced people and recommending the development of a new international agreement).

16. See infra section III.B (exploring potential government rebuttals, such as the argument that an applicant's own government has taken substantial steps to mitigate and adapt to the impacts of climate change).

toward humanitarian ends, must provide—protection for climate refugees. It first introduces international discourse surrounding climate asylum and its relationship to the United States' burgeoning response to climate migration. It then examines the initial and humanitarian asylum claims in turn, countering potential rebuttals and outlining a successful claim.

I. ASYLUM IN THE CONTEXT OF CLIMATE MIGRATION

To frame the protection the INA might afford to climate refugees, this Part explores the current discourse surrounding climate asylum. It first briefly acknowledges disputes of terminology and explains this Note's use of the terms "climate asylum" and "climate refugee." Turning to broad challenges in applying refugee law in the context of climate change, it then examines growing international recognition of climate change as a basis for asylum claims. Finally, it discusses the United States' response to climate migration and argues that climate asylum must be an integral component of maximizing the protections afforded to migrants by existing U.S. immigration law.

A. *A Brief Note on Terminology*

This Note consciously employs the terms "climate asylum" and "climate refugee," the latter of which has been the subject of contentious discourse. Both the UNHCR and the International Organization on Migration (IOM) have explicitly disavowed the term "climate refugee," objecting to its broad use in popular media and advocacy to describe all "those uprooted because of disasters, climate change and environmental degradation," many of whom could not qualify for protection under the Refugee Convention.[17] They emphasize that the use of "refugee" is inapposite because most climate migrants experience internal rather than international displacement.[18] Consequently, the Refugee Convention, which establishes physical presence "outside the country of [an individual's] nationality" as a criterion for asylum, would be inapplicable.[19]

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17. Environmental Migration, IOM Env't Migration Portal, https://environmentalmigration.iom.int/environmental-migration [https://perma.cc/55YW-SP62] [hereinafter IOM Environmental Migration] (last visited Aug. 2, 2024) (observing that "people moving for environmental reasons, do not fall squarely within any one particular category provided by the existing international legal framework" and consequently rejecting the universal application of any one legal framework); see also Siegfried, supra note 11 (describing the UNHCR's rejection of synonymy between climate displacement and protection under the Refugee Convention).

18. See Climate Change Displacement, UNHCR, https://www.unhcr.org/what-we-do/build-better-futures/environment-disasters-and-climate-change/climate-change-and-displacement [https://perma.cc/96AQ-3ANR] (last visited Aug. 2, 2024); IOM Environmental Migration, supra note 17.

19. Refugee Convention, supra note 3, art. 1, ¶ A(2), 189 U.N.T.S. at 152. See generally UN Off. for the Coordination of Humanitarian Affs., Guiding Principles on Internal

As a "more accurate" alternative, the UNHCR has adopted the phrase "persons displaced in the context of disasters and climate change."[20]

Though recognizing the significance of the term "climate refugee" in broader discourse is valuable, this Note does not directly engage with that dispute. Instead, it restricts the term "climate refugee" to its narrowest legal sense, describing only those who meet the criteria for asylum under the Refugee Convention because they have experienced climate change–induced harm amounting to persecution on account of a protected ground. This term was chosen for parity with the phrase "climate asylum," which, perhaps because its legal character is more clearly understood, has not engendered the same confusion. When it refers more broadly to "climate migration," this Note adopts the definition proposed by the IOM, which encompasses both internal and international displacement based on either acute or progressive harm.[21]

In utilizing "climate refugees," then, this Note makes no claim of equivalency with the broader concept of "climate migrants." Only for the former does it assert a claim to protection under the Refugee Convention.

B. *Growing Recognition of Climate Asylum*

This section discusses the increasing demand for an effective response to climate migration, subsequently exploring whether an international trend recognizing the Refugee Convention as the appropriate basis for affording legal protection to climate migrants has emerged.

1. *Reconciling Asylum and Climate Change–Induced Displacement.* — While there have been calls for expansion of the Refugee Convention and Protocol,[22] the prevailing consensus among both scholars and

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Displacement (2001), https://www.unhcr.org/media/guiding-principles-internal-displacment [https://perma.cc/63X9-5TVH] (providing international standards for internal displacement).

20. Climate Change and Disaster Displacement, UNHCR Ir., https://www.unhcr.org/ie/what-we-do/how-we-work/environment-disasters-and-climate-change/climate-change-and-disaster [https://perma.cc/2VFQ-298H] (last visited Aug. 21, 2024); see also UNHCR, Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters 2 (2020), https://www.refworld.org/policy/legalguidance/unhcr/2020/en/123356 (on file with the *Columbia Law Review*) [hereinafter UNHCR, Legal Considerations] (discussing the applicability of existing international instruments to climate migration without reference to "climate refugees," instead employing variants of the alternative referenced in the text).

21. The IOM defines climate migration as the movement of "a person or groups of persons who, predominantly for reasons of sudden or progressive change in the environment due to climate change, are obliged to leave their habitual place of residence, or choose to do so, either temporarily or permanently, within a State or across an international border." IOM, Glossary on Migration 31 (Alice Sironi, Céline Bauloz & Milen Emmanuel eds., 2019), https://environmentalmigration.iom.int/sites/g/files/tmzbdl1411/files/iml_34_glossary.pdf [https://perma.cc/H4JM-9XYG].

22. See, e.g., Tyler Bergeron, No Refuge for 'Climate Refugees' in International Law, Environmental, Natural Resources, & Energy Law, Lewis & Clark L. Sch.: Env't, Nat. Res. & Energy L. Blog (Jan. 20, 2023), https://www.lclark.edu/live/blogs/200-no-refuge-for-

international actors is that any attempt to modify these instruments to accommodate climate migrants will weaken its robust protection for those who qualify as refugees.[23] Nonetheless, there is also broad recognition that a narrow subset of migrants displaced by climate change will qualify for protection under the Refugee Convention.[24]

The complex and often progressive nature of harm caused by climate change, however, makes it difficult to clearly determine who falls within the Convention's scope—particularly with respect to the nature of the required persecution.[25] To be effectively applied to the context of climate asylum, persecution must be reframed as the product of a complex network of sociopolitical, economic, and environmental factors.[26] Although climate change may, in limited contexts, be the sole underlying cause of displacement, it is more likely to interplay with resource scarcity

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climate-refugees-in-international [https://perma.cc/8X8D-FDXE] (arguing for the development of a novel climate refugee treaty on the basis that international law currently affords no protection to those displaced by climate change); Christiano d'Orsi, Environmental Disasters and Climate Change Force People to Cross Borders, but They're Not Recognized as Refugees—They Should Be, The Conversation (Sept. 26, 2023), https://theconversation.com/environmental-disasters-and-climate-change-force-people-to-cross-borders-but-theyre-not-recognised-as-refugees-they-should-be-212979 [https://perma.cc/HA3V-2F8V] (proposing that "international laws and conventions be amended to explicitly include people forced by weather shocks to move across borders"); Morgiane Noel, Here's How International Law Can Protect People Fleeing Environmental Disaster, World Econ. F. (Mar. 16, 2023), https://www.weforum.org/agenda/2023/03/as-people-flee-environmental-disasters-how-can-international-law-help-them/ (on file with the *Columbia Law Review*) (arguing that the "the scope of the [R]efugee [C]onvention . . . must be widened" to encompass climate migrants).

23. For scholars, see, e.g., McAdam, Climate Change, supra note 2, at 39; Elizabeth Keyes, Environmental Refugees? Rethinking What's in a Name, 44 N.C. J. Int'l L. 461, 478–79 (2019); Sanjula Weerasinghe, In Harm's Way: International Protection in the Context of Nexus Dynamics Between Conflict or Violence and Disaster or Climate Change 11 (UNHCR Div. of Int'l Prot., Legal and Protection Policy Research Series No. 39, 2018), https://www.unhcr.org/5c1ba88d4.pdf (on file with the *Columbia Law Review*). For international actors, see, e.g., Claudia Savage, UN Chief Warns Refugee Rights Would 'Go Backwards' Amid Populist Rhetoric, The Independent (Oct. 4, 2023), https://www.independent.co.uk/news/uk/belfast-suella-braverman-lake-chad-washington-dc-icc-b2423906.html [https://perma.cc/4SFZ-48G3]; see also infra section I.B.2 (summarizing the positions of relevant international actors).

24. See supra notes 8–12 and accompanying text.

25. For a more detailed discussion of how persecution might be defined in a domestic legal system to accommodate climate refugees, see infra section II.B.

26. See Matthew Scott, Finding Agency in Adversity: Applying the Refugee Convention in the Context of Disasters and Climate Change, 35 Refugee Surv. Q. 26, 56 (2016) (recognizing that refugee status determination in the context of climate change "builds on an understanding of disasters as being deeply social phenomena that have a differential impact on individuals and groups"); cf. Roxana A. Mastor, Michael H. Dworkin, Mackenzie L. Landa & Emily Duff, Energy Justice and Climate-Refugees, 41 Energy L.J. 337, 339 (2020) (finding a persecution-based framework for protection to be insufficient but nonetheless recognizing that "[t]he reality is that the reasons people flee their houses and countries go beyond fear of prosecution [sic]—they include major disasters, imminent impacts of climate change, wars and conflicts brought on by resource scarcity").

and conflict.[27] For instance, flooding due to increased rainfall in Nigeria and the shrinking of Lake Chad in Northern Cameroon have both led to conflict between farmers and herdsmen over usable land, the latter producing refugees to Chad.[28] Both examples of environmental degradation are attributable to the impacts of climate change on the Lake Chad Basin.[29]

Thus, climate change may serve as a "threat multiplier" that "exacerbat[es] resource scarcity and existing vulnerabilities," particularly in states without sufficient resources to respond effectively to its impacts.[30] Alarmingly, fifteen of the twenty-five most climate-vulnerable countries are also fragile and conflict-affected states.[31] Communities vulnerable to climate change–based harm are thus also likely to experience other significant human rights abuses, including severe food and water scarcity

27. See Mastor et al., supra note 26, at 344 (discussing the indirect ways in which climate change can drive displacement); see also Michael T. Klare, Climate Change, Water Scarcity, and the Potential for Interstate Conflict in South Asia, 13 J. Strategic Sec. 109, 119 (2020) (discussing water scarcity due to climate change as a precipitator of interstate as well as intrastate conflict and a national security risk); Jane McAdam, Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement, 114 Am. J. Int'l L. 708, 712 (2020) [hereinafter McAdam, Protecting People Displaced] ("[T]he drivers of displacement are typically multi-causal, which means that disasters, conflict, and persecution are often intertwined." (citing Weerasinghe, supra note 23, at 10)); Kerstin Unfried, Krisztina Kis-Katos & Tilman Poser, Water Scarcity and Social Conflict, J. Env't Econ. & Mgmt., Feb. 2022, no. 102633, at 1, 15 (conducting an empirical analysis of water scarcity in Africa and Latin America to conclude that climate change–induced water scarcity significantly increases the likelihood of local conflict); Paola Vesco, Shouro Dasgupta, Enrica De Cian & Carlo Carraro, Natural Resources and Conflict: A Meta-Analysis of the Empirical Literature, Ecological Econ., Mar. 2020, no. 106633, at 1, 12 (concluding through a literature review that climate change, by increasing scarcity of vital resources, promotes conflict).

28. See Abugu Nkechinyere Anthonia, Yero Ahmed Bello, Odele Muyiwa Oliatan & Irene Amahagbor Macaulay, Reviewing the Links Between Climate Change and Resource Conflict, 27 Glob. J. Pure & Applied Sci. 243, 245 (2021) (examining the role of climate change in provoking resource conflict in Nigeria); Amali Tower, Shrinking Options: Climate Change, Displacement and Security in the Lake Chad Basin, *in* Loss and Damage Case Studies From the Frontline: A Resource to Support Practice and Policy 24, 24–30 (Ritu Bharadwaj & Clare Shakya, Int'l Inst. for Env't & Damage eds., 2021), https://www.iied.org/sites/default/files/pdfs/2021-10/20551iied.pdf [https://perma.cc/8ULS-ZW8E] (discussing both case studies).

29. Tower, supra note 28, at 24–30.

30. Toscano, supra note 15, at 463; see also Hadil Al-Mowafak, Yemen Pol'y Ctr., Rising Temperatures, Falling Resources: Climate Change Impacts on Yemen's Agrarian and Coastal Communities 3 (2023), https://ceobs.org/wp-content/uploads/2023/10/Rising_Temperatures_Falling_Resources_Bosch_Eng.pdf [https://perma.cc/3FQG-VN8T] (discussing climate change as a threat multiplier in the Yemeni context).

31. Fragility, Conflict & Violence, World Bank Grp., https://www.worldbank.org/en/topic/fragilityconflictviolence/overview [https://perma.cc/FK3J-PA55] (last updated May 24, 2024) (defining climate-vulnerable countries according to the Notre Dame Global Adaptation Initiative index).

and increased rates of both acute and chronic health problems, which implicate the rights to life and to health.[32]

Climate migration also challenges the fundamental assumption that repatriation is possible, a concept integral to "conventional" asylum adjudications.[33] Such cases generally evaluate whether an applicant could reasonably be expected to return to their country of origin.[34] If climate change has rendered an individual's home state uninhabitable, repatriation is no longer a recourse.[35] In cases of severe environmental degradation falling short of actual uninhabitability, repatriation could violate states' *non-refoulement* responsibility with respect to, at minimum, the right to life.[36] This critical difference from traditional political asylum acts as a practical incentive to adjudicate climate asylum cases and establish additional safeguards for those who fail to meet the Refugee Convention's standards.[37]

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32. Scott, supra note 26, at 27, 56 (relating climate vulnerability to increased rates of human rights abuses and further recognizing the "deeply social nature of disasters, within which existing patterns of discrimination and marginalisation are exacerbated"). For further discussion, see infra sections II.B.1 and III.A.2, which explore severe human rights violations as a basis for persecution and humanitarian asylum, respectively.

33. See UN Hum. Rts. Comm., Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2728/2016, ¶ 9.11, UN Doc. CCPR/C/127/D/2728/2016 (Sept. 23, 2020) [hereinafter *Teitiota* Opinion] (finding that climate change may trigger states' non-refoulement obligations and noting that, in countries at risk of becoming fully submerged, "the conditions of life . . . may become incompatible with the right to life with dignity before the risk is realized").

34. See generally Am. Immigr. Council & Nat'l Immigrant Just. Ctr., The Difference Between Asylum and Withholding of Removal (2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_difference_between_asylum_and_withholding_of_removal.pdf [https://perma.cc/NC7H-AJNB] (describing asylum and withholding of removal as forms of protection against repatriation). Withholding of removal is a lesser form of protection awarded to applicants ineligible for asylum but who possess a "reasonable fear" of experiencing persecution if returned. Id. at 1–2.

35. Mastor et al., supra note 26, at 344–45.

36. See *Teitiota* Opinion, supra note 33, ¶ 9.3 (establishing a "real risk of irreparable harm" standard for non-refoulement with respect to human rights violations in the context of environmental degradation); see also McAdam, Protecting People Displaced, supra note 27, at 712–19 (noting that human rights law provides greater scope for protection than refugee law with respect to non-refoulement); Shaindl Keshen & Steven Lazickas, Non-Refoulement: A Human Rights Perspective on Environmental Migration From Small Island Developing States, J. Int'l Affs., Spring/Summer 2022, at 21, 23–27, 30 (examining the positive obligation imposed by the *Teitiota* opinion with respect to non-refoulement for environmental migrants). Note, however, that the United States has not recognized a non-refoulement obligation under the International Covenant on Civil and Political Rights. See infra note 52 and accompanying text.

37. See Benoit Mayer, The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework, 22 Colo. J. Int'l Env't L. & Pol'y 357, 381 (2011) (arguing that the similar human rights violations experienced by climate and political refugees give climate refugees a moral entitlement to the same right to non-refoulement). Subsidiary protection, a lesser form of protection than refugee status, has begun to serve as one such avenue. See Monika Mayrhofer & Margit Ammer, Climate Mobility to Europe: The Case of Disaster Displacement in Austrian Asylum Procedures,

2. *Evolving Bases for Climate Refugee Protection Under International Law.* — These considerations demonstrate that application of the Refugee Convention to the context of climate asylum must confront a set of novel challenges. Nonetheless, recent years have brought international recognition that climate refugees may fall within the ambit of an unaltered Refugee Convention. The Human Rights Committee's 2020 *Teitiota* opinion, which reviewed the case of a man from Kiribati who claimed his life would be jeopardized if he was forced to return, most fully considered this issue.[38] Its review focused on human rights violations under the International Covenant on Civil and Political Rights (ICCPR).[39] Because Mr. Ioane Teitiota had initially sought and been denied asylum in New Zealand, however, the Committee also commented upon Teitiota's claim that, if returned to Kiribati, he faced an imminent risk of arbitrary deprivation of life due to climate change–induced sea level rise.[40] It concluded that the ICCPR requires State parties to "allow all asylum seekers claiming a real risk of a violation of their right to life in the State of origin access to refugee or other individualized or group status determination procedures that could offer them protection against *refoulement*."[41]

Moreover, in reviewing for "arbitrariness, error[,] or injustice" committed by the New Zealand courts, the Committee observed that both the immigration tribunal and the Supreme Court had "allowed for the possibility that the effects of climate change or other natural disasters could provide a basis for protection."[42] In conjunction, these remarks suggest that parties to the ICCPR have an obligation to consider climate change–induced harm as part of the asylum adjudication process. Ostensibly on this basis, the Office of the High Commissioner for Human Rights (OHCHR) welcomed the ruling as a step toward future successful climate asylum claims.[43]

Frontiers in Climate, Dec. 8, 2022, at 1, 11–17 (examining recent trend in Austrian courts to extend subsidiary protection in cases of natural disasters when asylum claims are brought).

38. See *Teitiota* Opinion, supra note 33.

39. See id. ¶¶ 8.1–9.10; see also International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S 172 [hereinafter ICCPR].

40. See *Teitiota* Opinion, supra note 33, ¶¶ 8.4–9.14.

41. See id. ¶ 9.3 (citing UN Hum. Rts. Comm., General Comment No. 36 on Article 6 of the Covenant on the Right to Life, ¶ 31, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019)). Note how the Human Rights Committee's reasoning integrates refugee and human rights law by predicating refugee non-refoulement on the risk of violating the right to life. For further discussion of the interplay between international refugee and human rights law, see Valéria Horváth, The Right to Seek Asylum of 'Climate Refugees', 9 Acta Humana 119, 124–26 (2021).

42. See *Teitiota* Opinion, supra note 33, ¶ 9.6.

43. Press Release, OHCHR, Historic UN Human Rights Case Opens Door to Climate Change Asylum Claims (Jan. 21, 2020), https://www.ohchr.org/en/press-releases/2020/01/historic-un-human-rights-case-opens-door-climate-change-asylum-claims [https://perma.cc/PH2S-E3J2] (referencing Committee expert Yuval Shany's statement

In sharp contrast to the exclusion of climate asylum from recent international instruments on refugee protection,[44] the U.N. Special Rapporteur tasked with examining the impact of climate change on human rights released an April 2023 report suggesting that the Refugee Convention should be the basis for addressing climate migration.[45] He urged the creation of an optional Protocol to the Refugee Convention "to address displacement and legal protection for people all over the world affected by the climate crisis."[46] The Convention would be a "logical" framework, he asserted, because it would "come[] close to affording the type of protections that are needed" and would effectively normalize existing informal UNHCR policies.[47] His selection of the Refugee Convention as a basis for protection, as opposed to the ICCPR, in which the Human Rights Committee's *Teitiota* opinion rooted its consideration of non-refoulement, centralizes a refugee rights framework as a basis for addressing the crisis posed by climate migration.[48]

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that "this ruling sets forth new standards that could facilitate the success of future climate change-related asylum claims").

44. The New York Declaration for Refugees and Migrants (a 2016 UN General Assembly Resolution committing to the development of the instrument that would become the Global Compact on Refugees) made no specific commitment to refugees with respect to climate change, only to migrants more broadly. G.A. Res. 71/1, ¶ 50 (Sep. 19, 2016). The Global Compact on Refugees more directly dismissed the idea of climate refugees, observing that "climate, environmental degradation and natural disasters" are "not in themselves causes of refugee movements" but merely "increasingly interact with the[ir] drivers." See UN, Global Compact on Refugees ¶ 8 (2018), https://www.unhcr.org/sites/default/files/legacy-pdf/5c658aed4.pdf (on file with the *Columbia Law Review*). Its outright rejection of climate change as a basis for refugee status conflicts with the Human Rights Committee's recognition of climate harm as a factor in asylum evaluations, as well as the UNHCR's caution against taking a "narrow view . . . of the effects of climate change and disasters." Compare id., with *Teitiota* Opinion, supra note 33, ¶ 9.6, and UNHCR, Legal Considerations, supra note 20, ¶ 5.

45. See Ian Fry, Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, Providing Legal Options to Protect the Human Rights of Persons Displaced Across International Borders Due to Climate Change, A/HRC/53/34 (Apr. 18, 2023) [hereinafter Climate Rapporteur Report].

46. Press Release, OHCHR, UN Expert Calls for Full Legal Protection for People Displaced by Climate Change (June 27, 2023), https://www.ohchr.org/en/press-releases/2023/06/un-expert-calls-full-legal-protection-people-displaced-climate-change (on file with the *Columbia Law Review*).

47. Climate Rapporteur Report, supra note 45, ¶¶ 68, 71(a). Within the body of the report, the Special Rapporteur identified language from regional instruments that might accommodate climate refugees, including the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa ("events seriously disturbing public order") and the Cartagena Declaration on Refugees ("generalized violence, foreign aggression, internal conflicts, massive violations of human rights 'or other circumstances that have seriously disturbed the public order'"). See id. ¶¶ 33, 48 (quoting Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena Declaration on Refugees, art. III, ¶ 3, Nov. 22, 1984).

48. Compare Climate Rapporteur Report, supra note 45, ¶¶ 64–68 (discussing a protocol under the Refugee Convention as the most appropriate solution), with *Teitiota*

The Special Rapporteur's proposal accords with the position that has since been advanced by UN Assistant Secretary General Gillian Triggs.[49] Asserting that amending the Refugee Convention would risk undermining the protection it affords, she stated that there was a "good case to be made" for creating an optional protocol or a new treaty on climate refugees.[50] While it is too soon to conclude that "a new era in refugee protection" has dawned, such comments suggest an institutional shift within the UN to root legal protections for climate migration in refugee law.[51]

3. *U.S. Asylum Law and Climate Migration.* — Because the United States has rejected the Human Rights Committee's determination that the ICCPR imposes a non-refoulement obligation,[52] arguments for human rights–based protection of climate refugees emerging from the Committee's *Teitiota* opinion are unpersuasive in the domestic context. The United States does, however, recognize a non-refoulement responsibility under the Refugee Convention.[53] This disparity magnifies the importance of recognizing protection for climate refugees to the greatest extent possible under the INA.

The United States' official response to climate migration is still in its nascency. The first explicit executive action to deal with climate migration was Executive Order 14,013 (Order), signed by President Biden in February 2021, which ordered various executive actors to prepare a report examining "climate change and its impact on migration, including forced migration, internal displacement, and planned relocation."[54] While the Order broadly urges the utilization of "all available authorities for humanitarian protection,"[55] its emphasis on the United States Refugee Assistance Program (USRAP)[56] suggests that the Biden Administration

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Opinion, supra note 33, ¶ 9.11 (focusing non-refoulement with respect to human rights violations).

49. Savage, supra note 23.

50. Id (internal quotation marks omitted) (quoting Assistant Secretary General Gillian Triggs).

51. See Ryan Plano, UNHCR Official: "Good Case to Be Made" for Climate Refugees Protocol, Climate Refugees (Nov. 2, 2023), https://www.climate-refugees.org/spotlight/2023/11/2/unhcr-climate-refugees [https://perma.cc/XG2S-UTRG] (expressing hope that Triggs' comments are indicative of a "new era in refugee protection").

52. Climate Migration Report, supra note 10, at 19.

53. Id.

54. Exec. Order No. 14,013, 86 Fed. Reg. 8839, 8844 (Feb. 4, 2021) [hereinafter Executive Order on Climate Migration].

55. Id. at 8839.

56. See id. (explaining that the U.S. government demonstrates the "core values of our Nation" through its administration of USRAP, listing several robust proposals for bolstering the reach of the humanitarian program). Under the INA, USRAP is a referral system that facilitates resettlement in the United States for vulnerable migrants who meet the refugee definition. For a more detailed description and current processing priorities, see The United States Refugee Admissions Program (USRAP) Consultation and Worldwide Processing Priorities, USCIS, https://www.uscis.gov/humanitarian/refugees-and-

envisioned refugee resettlement as the most useful tool for responding to climate migration.[57] The greater weight afforded to USRAP is also consistent with the administration's increasing reliance on refugee resettlement to respond to irregular migration.[58]

The Report on the Impact of Climate Migration (Report) released in response to the executive order, however, emphasized USRAP's limitations in this context.[59] In particular, it observes that USRAP is heavily dependent on the UNHCR, which "does not explicitly incorporate climate considerations into referral criteria."[60] Emphasizing that USRAP applicants must still meet the criteria for refugee status, it notes with concern the absence of "well-established alternative pathways to complement refugee resettlement" affording permanent protection to "individuals facing serious threats to their life because of climate change"[61] and rejects mechanisms for temporary resettlement as insufficient.[62] Development of a private sponsorship program for refugees, another directive of the Order, is ongoing and will expand USRAP's capacity, but it alone will not adequately address these limitations.[63] Consequently, in addition to developing a novel and more comprehensive legal framework for all climate migrants, the Biden Administration stresses the importance of "strengthen[ing] the application of existing protection frameworks" and "adjust[ing] U.S. protection mechanisms to better accommodate people fleeing the impacts of climate change."[64]

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asylum/usrap [https://perma.cc/VZ2B-HAFC] (last visited Aug. 2, 2024). From the perspective of efficiency, one benefit of USRAP is that it permits the designation of groups of "special humanitarian concern to the United States" as eligible to apply for refugee status, though individual review to determine refugee status is nonetheless required. See id.

57. For instance, in establishing "the policy of [President Biden's] administration," the Order declared that "USRAP and other humanitarian programs shall be administered in a manner that furthers our values as a Nation and is consistent with our domestic law, international obligations, and the humanitarian purposes expressed by the Congress in enacting the Refugee Act of 1980." See Executive Order on Climate Migration, supra note 54, at 8839.

58. For example, in July 2023, the Biden Administration reached an agreement with Mexico to "accept refugee resettlement referrals from qualified individuals from Cuba, Haiti, Nicaragua, and Venezuela who are already in Mexico." Press Release, Statement From National Security Advisor Jake Sullivan on Legal Pathways Initiative With Mexico, White House (July 28, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/28/statement-from-national-security-advisor-jake-sullivan-on-legal-pathways-initiative-with-mexico/ [https://perma.cc/BG2Z-KZ64]. This represented a significant evolution in U.S. immigration policy.

59. See Climate Migration Report, supra note 10, at 21.

60. See id.

61. See id.

62. See id. (rejecting parole awarded on a case-by-case basis as a temporary measure "not designed to be a long-term solution").

63. See 30-Day Notice of Proposed Information Collection: Welcome Corps Application, 88 Fed. Reg. 66547, 66547 (Sept. 27, 2023).

64. Climate Migration Report, supra note 10, at 6.

Though neither the Report nor the initial Order specifically discusses the use of asylum law to fulfill this mandate, the Report examines how refugee status might do so.[65] Because the INA utilizes the Refugee Convention's standard for both asylum and refugee status, recommendations for the application of one in the context of climate migration are also relevant to the other.[66] The Report calls for the United States to "maximize [the] application, as appropriate," of "existing legal instruments" to those climate migrants eligible for protection.[67] With respect to the Refugee Convention, it recognizes that "people fleeing in the context of the adverse effects of climate change and disasters may, in limited instances, have valid claims for refugee status."[68] For instance, government refusal of "relief from the impacts of climate change to specific individuals who share a protected characteristic" may constitute persecution depending on manner and degree.[69] Similarly, climate change may influence the reasonableness of internal relocation, a consideration relevant to asylum adjudication under the INA.[70]

While the Report provides only broad guidance for evaluating claims for asylum or refugee status in the context of climate change–induced harm, its clear conclusion, consistent with the purpose of the original Order, is that existing legal frameworks must be maximized to achieve humanitarian ends.[71] The Biden Administration's ongoing commitment to acting on the recommendations of the Report further supports the proposition that asylum law ought to be interpreted in the light most favorable to climate refugees.[72]

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65. See id. at 17.

66. See supra note 13 (discussing definitions for asylum and refugee status under the INA).

67. See Climate Migration Report, supra note 10, at 17, 19 ("This new legal pathway should be additive to and in no way infringe upon or detract from existing protection pathways to the United States, including asylum and refugee resettlement.").

68. Id. at 17.

69. Id.; see also infra section II.B (discussing cases in which persecution might occur based on unequal government allocation of resources for climate change adaptation or mitigation).

70. Climate Migration Report, supra note 10, at 17; see also infra section III.B.1 (examining internal relocation in the context of climate change).

71. Climate Migration Report, supra note 10, at 17 ("The use of existing legal instruments to protect individuals displaced across borders by the impacts of climate change is limited in scope, and the United States should endeavor to maximize their application, as appropriate, to such individuals.").

72. In addition to the private sponsorship program it is developing, see 30-Day Notice of Proposed Information Collection, supra note 63, the State Department has adopted a new approach to addressing climate change–induced displacement based on the findings of the Report. "Protection" is one of its four principal objectives, requiring the United States to "[s]trengthen and expand protection of refugees, conflict victims, internally displaced persons (IDPs), stateless persons, and migrants in situations of vulnerability affected by climate change." Press Release, U.S. Dep't of State, The Department of State's Bureau of Population, Refugees and Migration Announces New Approach to Address the Impacts of

To that end, this Note rests not on a broad argument for the United States' responsibility to climate migrants as a class but rather on a narrower claim: that if American asylum law is to be justly applied, climate refugees already fall within its ambit of protection. Undoubtedly, the persuasive weight of this assertion depends on a compelling demonstration that some subset of climate migrants meets the criteria of the Refugee Convention as enshrined in American law and can therefore legally be considered "climate refugees." It is to this subject that the discussion now turns.

II. ESTABLISHING AN INITIAL CLIMATE ASYLUM CLAIM

Though prior scholarship has explored both how a particular social group for climate refugees might be characterized and how environmental or climate-based harm might amount to persecution, it has neglected to consider the full range of practical legal challenges facing a climate asylum claim.[73] This Part outlines a preliminary climate asylum claim under the INA, analyzing its most challenging elements: the protected ground, persecution, and their nexus.[74] Part III subsequently applies humanitarian asylum to the climate refugee context and evaluates potential rebuttals of the presumption of a future fear of persecution. As noted earlier, this proposed framework for climate asylum focuses specifically on cases in which the impacts of climate change themselves amount to persecution, against which the government of an applicant's country of origin is unable or unwilling to afford protection.[75]

A. *Protected Grounds*

One foundational challenge for a climate asylum claim is demonstrating that climate refugees fall within any of the five protected

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Climate Change on Migration and Displacement (June 21, 2023), https://www.state.gov/the-department-of-states-bureau-of-population-refugees-and-migration-announces-new-approach-to-address-the-impacts-of-climate-change-on-migration-and-displacement/ [https://perma.cc/ZFR6-DCSU]. Moreover, in July 2023, USCIS amended its training for asylum and refugee officers to include information on the intersection between climate change and asylum/refugee status; those materials are not publicly available at the time of publication. See Fact Sheet: Marking the Two-Year Anniversary of the Report on the Impact of Climate Change on Migration, White House (Dec. 1, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/12/01/fact-sheet-marking-the-two-year-anniversary-of-the-report-on-the-impact-of-climate-change-on-migration/ [https://perma.cc/J2KY-3YY3].

73. See examples of such scholarship summarized supra note 15.

74. See 8 C.F.R. § 208.13(b)(1) (2024) (defining elements of an asylum claim); see also supra text accompanying notes 5–7.

75. As discussed in section I.B.1, supra, climate change may exacerbate existing socioeconomic and cultural inequities, which may in turn give rise to more traditional asylum claims based on other protected grounds, such as race or political opinion. Because, however, such cases do not directly depend either on climate change–induced harm amounting to persecution or on discriminatory government responses to climate change, they do not fall within the scope of climate asylum as defined by this Note.

grounds.[76] This section argues that one of two bases may be appropriate depending on the extent to which climate change–based harm threatens climate refugees' country of origin: (1) membership in a particular social group in which a subgroup experiences the alleged harm and (2) nationality in cases of broader threat to a state's population. While a number of scholars have recognized the possibility of membership in a particular social group,[77] the nationality basis remains comparatively unexplored.

1. *Membership in a Particular Social Group.* — Although membership in a particular social group has not yet successfully afforded protection to climate refugees, wholesale dismissal as a basis for climate asylum is premature.[78] A particular social group comprising climate refugees is definable without jeopardizing other components of an asylum claim, such as the nexus requirement.

a. *Doctrinal Framework.* — The Board of Immigration Appeals (BIA) has recognized that the flexibility of the particular social group protected ground permits it to serve as a "catch-all" for applicants with legitimate claims who could not qualify on one of the other bases.[79] In *Matter of Acosta*, the BIA originally required membership in a particular social group to be based, like the other four grounds, on a "common, immutable characteristic."[80] That trait could either be innate (something which members of the group could not change, such as race, nationality, or some forms of past experience) or fundamental (something that members should not be required to change, such as the state of being uncircumcised in the context of female genital mutilation).[81] Generally, the BIA has

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76. The INA, like the Refugee Convention, affords protection to those who can demonstrate persecution on the basis of race, religion, nationality, membership in a particular social group, or political opinion. See 8 C.F.R. § 208.13(b)(1).

77. For examples of scholars who have examined membership in a particular social group for climate refugees, see, e.g., Flanagan, supra note 15, at 26 (suggesting that the definition of "particular social group" in U.S. asylum law should be amended to encompass climate change refugees); Amra Ismail, A Penchant for Protection: Climate Change Refugees Under the 1951 Refugee Convention, 28 Sri Lanka J. Int'l L. 63, 83 (2020) (arguing that climate refugees constitute a particular social group based on their collective attempt to exercise the right to a healthy environment).

78. See Natasha Spreadborough, Oceans Apart: A New Proposal for Climate-Driven Refugees, 30 Mich. St. Int'l L. Rev. 531, 533 (2022) (asserting that the particular social group basis is a "near-impossible" requirement for climate refugees); see also Toscano, supra note 15, at 477–78 (observing that courts have thus far failed to afford protection to those "searching for better living conditions or those forced to flee as a result of a natural disaster" even if their country of origin could not ameliorate the harm).

79. See Matter of Kasinga, 21 I. & N. Dec. 357, 375 (B.I.A. 1996).

80. 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

81. Id. at 233–34; see also Nat'l Immigr. Just. Ctr., Particular Social Group Practice Advisory: Applying for Asylum Based on Membership in a Particular Social Group 2 (2021), https://immigrantjustice.org/for-attorneys/legal-resources/file/practice-advisory-applying-asylum-based-membership-particular (on file with the *Columbia Law Review*) (discussing what may constitute a "common, immutable characteristic"); USCIS, RAIO

rejected voluntary association, cohesiveness, or homogeneity requirements with respect to membership in a particular social group.[82]

In a series of cases in 2014, the BIA further narrowed eligibility for asylum on this basis by introducing two additional requirements: particularity and social distinction.[83] For a group to be "defined with particularity," it must be "discrete and have definable boundaries" that "provide a clear benchmark for determining who falls within the group."[84] "Social distinction" entails not "literal or 'ocular' visibility" but rather that an applicant's society of origin be able to perceive the group.[85] This requires a fact-intensive, country- and case-specific analysis.[86]

Notably, this standard means that a particular social group must be perceived as "distinct" not by its persecutors but by its members' society of origin, even though the association linking members of a persecuted group may exist only in their persecutor's mind.[87] The social distinction criterion receives legitimate criticism on this basis.[88] However, this definition proves useful in the climate asylum context because it means that a cognizable particular social group may be recognized even when, as here, persecutor and persecuted never directly interact.

Proposed particular social group formulations must also avoid circularity; that is, they cannot be defined solely by the shared harm that their members experience.[89] This means that neither the social distinction nor the particularity criterion can be satisfied by identifying a group that has endured a specific or particularly acute form of harm. Climate asylum, then, demands a unifying characteristic independent from the experience of climate change–based injury.

The increased stringency of the BIA's three-part particular social group test has generated substantial domestic and international

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Directorate—Officer Training: RAIO Combined Training Program: Nexus—Particular Social Group 12 (2021), https://www.uscis.gov/sites/default/files/document/foia/Nexus_-_Particular_Social_Group_PSG_LP_RAIO.pdf [https://perma.cc/38PW-A2KP] [hereinafter USCIS, Particular Social Group] (same).

82. Matter of C-A-, 23 I. & N. Dec. 951, 956–57 (B.I.A. 2006).

83. See, e.g., Matter of M-E-V-G-, 26 I. & N. Dec. 227, 232 (B.I.A. 2014) (clarifying the particularity and social distinction requirements); Matter of W-G-R-, 26 I. & N. Dec. 208, 210 (B.I.A. 2014) (same).

84. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 237–39 (citing Matter of A-M-E & J-G-U-, 24 I. & N. Dec. 69, 76 (B.I.A. 2007)).

85. *Matter of W-G-R-*, 26 I. & N. Dec. at 208.

86. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 242; see also Pirir-Boc v. Holder, 750 F.3d 1077, 1084 (9th Cir. 2014) (recognizing that the social distinction criterion requires an "evidence-based" and "society-specific" inquiry).

87. Nat'l Immigr. Just. Ctr., supra note 81, at 7.

88. Id. at 7 n.4 (critiquing this position on grounds of unreasonableness and observing that this position conflicts with federal appellate precedent).

89. USCIS, Particular Social Group, supra note 81, at 19 (warning that particular social groups cannot be solely or primarily defined by the harm experienced by their members, though it may be a contributing factor).

criticism.[90] Even federal appellate courts have not applied it uniformly. Although most courts of appeals have historically afforded *Chevron* deference to the BIA's framework, the U.S. Court of Appeals for the Seventh Circuit continues to apply only the *Matter of Acosta* immutability test and to cite to its own precedent.[91] It has never engaged directly with the question of deference to the BIA's particularity and social distinction requirements, though it noted that an applicant's "arguments that the Board's interpretation [of the particular social group test] is unreasonable have some force."[92] A particular social group claim advanced in the Seventh Circuit would thus depend only on immutability, avoiding the difficulty of formulating a particularly defined and socially distinct group on a basis other than shared harm. It remains to be seen whether, in the wake of the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, other federal appellate courts will continue to utilize the BIA's more exacting standard.[93]

b. *Application to Climate Asylum.* — Avoiding circularity is particularly difficult in the context of climate migration because the most natural formulation of a common characteristic centers around harm.[94] Particular social groups commonly proposed in scholarship often unconsciously fall into this trap, adopting a formulation analogous to "individuals impacted by environmental degradation."[95] But such a group, defined solely by the

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90. Immigrant rights advocates criticized the BIA's failure to publish a case recognizing a particular social group for six years after it introduced the tripartite test. Nat'l Immigr. Just. Ctr., supra note 81, at 6–7. The UNHCR, which approved the *Matter of Acosta* immutability standard, has repeatedly condemned the BIA's heightened standards as being inconsistent with the purpose of the Refugee Convention and the UNHCR's guidance. See, e.g., Brief of the United Nations High Comm'r for Refugees as Amicus Curiae in Support of the Petitioner at 3, Valdiviezo-Galdamez v. Holder, 663 F.3d 582 (3d Cir. 2011) (No. 08-4564), 2009 WL 8754827; see also Grace Carney, Note, Re-Defining Particular Social Group in the United States: Looking to International Guidance in the Wake of the *Matter of A-B-* Vacatur, 45 Fordham Int'l L.J. 575, 592, 601 (2022) (contrasting U.S. standards with UNHCR-endorsed standards over time).

91. Carney, supra note 90, at 590; see also Flanagan, supra note 15, at 28.

92. W.G.A. v. Sessions, 900 F.3d 957, 964 n.4 (7th Cir. 2018).

93. See 144 S. Ct. 2244, 2273 (2024) (overruling Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), holding that courts need not defer to an agency's interpretation of an ambiguous statutory provision).

94. Keyes, supra note 23, at 473 (observing that groups impacted by climate change may form "a strong social identity" around that shared experience, but that "a group defined by that affinity is defined by the very harm the group fears").

95. See, e.g., Cooper, supra note 15, at 522 (proposing "persons who lack the political power to protect their own environment"); Flanagan, supra note 15, at 29–30 (suggesting "citizens of [a given country] who lack the political power to protect their environment from climate change–related disaster" or "people who believe that no population should have to bear the consequences of climate change and be denied the human right to a safe living environment" (alteration in original) (internal quotation marks omitted) (quoting Cece v. Holder, 733 F.3d 662, 670 (7th Cir. 2013))); Toscano, supra note 15, at 477 (advancing "a group of people who have a common fear of being displaced by the effects of climate change").

alleged harm, would not survive judicial scrutiny.[96] Even human rights–oriented proposals, such as a particular social group based on a "common attempt made by its members to exercise the right to a healthy environment," might not survive review on this basis.[97] The nexus requirement, demanding a causal link between the protected ground and the harm suffered, also limits the range of legally practicable particular social groups.[98]

In response to these challenges, the most promising formulation involves a group with a shared heritage that justifies their connection to a climate-vulnerable place of residence.[99] Indigenous groups are perhaps the most salient example. Such communities frequently share language, culture, heritage, and location of residence, which may be a "legally protected land or historically occupied area," factors which support the classification of indigenous identity as an immutable characteristic.[100] Moreover, the governments of their countries of origin have often already recognized them as specific subpopulations, assisting with the particularity and social distinction arguments.[101] Particular social groups based on this model would satisfy the BIA's framework without referencing harm, thus avoiding circularity of definition.

Another set of formulations could be based on climate-vulnerable occupations. For instance, climate change–induced shrinking of Lake Chad has imperiled the livelihoods of farmers, fishermen, and pastoralists in northern Cameroon.[102] While occupation is not an innate characteristic, it is arguably a fundamental one.[103] Because climate-vulnerable occupations such as farming or herding are land-dependent, they may also coincide with property ownership, which both federal appellate courts and the BIA have recognized as a basis for membership in a particular social group.[104] Groups based on climate-vulnerable

96. See supra note 89 and accompanying text.

97. See Ismail, supra note 77, at 83 (proposing the formulation in question).

98. See infra section II.C.

99. See, e.g., Christopher M. Kozoll, Note, Poisoning the Well: Persecution, the Environment, and Refugee Status, 15 Colo. J. Int'l Env't. L. & Pol'y 271, 290 (2004) ("[T]he best chance of making a successful argument for asylum in the case of environmental refugees will lie with a claimant whose cultural ties place them in a close relationship to the environment, and preferably to a particular area.").

100. Joseph Cauich-Tamay, Indigenous Groups Who Have Been Environmentally Displaced Should Be Considered Environmental Asylees Under a Particular Social Group, 24 Rutgers Race & L. Rev. 257, 279 (2023).

101. Id.

102. Tower, supra note 28, at 24–30.

103. Contrast this case study with Matter of Acosta, 19 I. & N. Dec. 211, 234 (B.I.A. 1985) (finding that taxi drivers threatened by guerillas did not constitute a particular social group because they could avoid harm by switching occupations). Yet climate change–based harm is more pervasive and cannot necessarily be avoided by abandoning one's profession.

104. See, e.g., N.L.A. v. Holder, 744 F.3d 425, 439 (7th Cir. 2014) ("[T]here can be no rational reason for the Board to reject . . . 'land owners' when the Board in *Acosta* specifically

occupations are also likely to satisfy particularity and social distinction requirements, as they comprise discrete social subgroups.

These nonexhaustive examples illustrate the considerations underlying the formation of a particular social group for climate refugees.

2. *Nationality*. — Compared to membership in a particular social group, nationality is a matter of straightforward definition, including, but not limited to, citizenship and ethnicity.[105] Where climate change–based harm is widespread, basing a climate asylum claim in nationality rather than membership in a particular social group avoids the challenges posed by the social distinction and particularity requirements. Even under the *Matter of Acosta* immutability standard alone, nationality is a more appropriate basis, as the most obvious "common, immutable characteristic" shared by members of a particular social group would be nationality itself.

A climate asylum case predicated upon nationality would be, admittedly, an atypical formulation of such a claim. Generally, nationality claims involve a particular ethnic, linguistic, or cultural group experiencing persecution within a heterogenous society.[106] In contrast, a climate asylum claim would argue that individuals of a particular citizenship or ethnicity have experienced *externally* inflicted harm on the basis of that nationality. Consistent with a literal reading of both the Refugee Convention and the INA, this reframing repurposes the nationality basis to respond to a novel context of a set of international perpetrators.[107]

Small island nations threatened with vanishing or inhabitability provide the clearest example of this application. Within these states, climate change has already threatened housing, infrastructure, health, food and water security, economic stability, and culture.[108] As global

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used land owning as an example of a social group and this Circuit has [recognized that] . . . educated land owning cattle farmers targeted by the FARC qualifies as a social group."); *Matter of Acosta*, 19 I. & N. Dec. at 233 ("The shared characteristic might be . . . a shared past experience such as former military leadership or land ownership.").

105. See Shoafera v. Immigr. & Naturalization Serv., 228 F.3d 1070, 1074 n.2 (9th Cir. 2000) (recognizing that race and nationality claims may overlap, including with the use of "ethnicity"); UNHCR Handbook, supra note 6, ¶ 74 (observing that nationality also encompasses "membership of an ethnic or linguistic group").

106. For an overview of typical nationality claims, see USCIS, RAIO Directorate—Officer Training: RAIO Combined Training Program: Nexus and the Protected Grounds 26—27 (2023), https://www.uscis.gov/sites/default/files/document/lesson-plans/Nexus_minus_PSG_RAIO_Lesson_Plan.pdf [https://perma.cc/RZ67-GNNF] [hereinafter USCIS, Nexus].

107. See Refugee Convention, supra note 3, art. 1, ¶ A(2), 189 U.N.T.S. at 152 (recognizing only "nationality" as a basis for refugee status without further elaboration); 8 U.S.C. § 1158 (2018) (same).

108. Michelle Mycoo et al., 2022: Small Islands, *in* Climate Change 2022: Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change 2043, 2045 (Hans-Otto Pörtner

temperatures continue to rise, island access to fresh water will decrease dangerously, exacerbated by flooding from ocean waves and typhoons.[109] Moreover, coral bleaching, caused by ocean acidification, will undermine traditional practices related to both culture and livelihood.[110] Environmental degradation demonstrably increases climate vulnerability and will threaten the habitability of small island nations, even at current global temperature levels.[111]

Such evidence demonstrates that climate change broadly threatens the populations of small island states based on their nationality. In such circumstances, nationality will likely form a more effective basis for a climate asylum claim than membership in a particular social group, as it avoids the definitional limitations of the latter formulation.[112] Yet a nationality-based claim poses a greater strategic risk than an argument grounded in membership in a particular social group. A simpler standard to satisfy, it is also more vulnerable to total foreclosure by an unfavorable ruling—a practical consideration with which any climate asylum claim must contend.

B. *Persecution*

This section explores the nature of persecutory acts and actors in the context of climate change. It demonstrates that the most effective characterization of persecution is as an aggregate of substantial sudden- and slow-onset nonphysical harms inflicted by a set of international high-emitting actors, against whom the governments of climate refugees' countries of origin are unwilling or unable to protect them.

1. *Nature of Persecution.* — In light of the nuanced manner in which climate change may cause harm, demonstrating injury amounting to persecution requires collective consideration of sudden- and slow-onset climate events.[113] Doing otherwise would fail to adequately recognize the full scale and complexity of the harm that climate refugees experience.[114]

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et al. eds., 2022), https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_Chapter15.pdf [https://perma.cc/JQN6-D7C8].

109. Id. at 2045–46.

110. Id. at 2046.

111. Id.

112. See supra notes 90–92 and accompanying text.

113. See McAdam, Protecting People Displaced, supra note 27, at 711 (recognizing that climate refugees may be forced to migrate by either sudden- or slow-onset climate events, or by a combination of the two); see also Scott, supra note 26, at 52–53 (arguing that "[g]iven the complexity of each disaster situation, conventional distinctions between sudden onset and slower onset disasters should be avoided" and focus instead placed "on the current circumstances and foreseeable developments, albeit placed in historical and social context").

114. Challenges in defining the nature of the persecutory actor are discussed in section II.B.2 infra. But see Scott, supra note 26, at 32 (arguing that recognizing the role of human agency in natural disasters—"existing patterns of discrimination and marginalisation

Because the BIA considers whether harm in the aggregate amounts to persecution, such an approach is viable in immigration courts.[115]

The standard paradigm for persecution, the knowing imposition of harm on an identified victim, applies poorly to the context of climate change–induced harm.[116] Instead, persecution is better based on nonphysical categorical harms identified in BIA precedent, including economic harm, mental harm, and the deprivation of fundamental human rights.

In *Matter of T-Z-*, the BIA defined nonphysical harm amounting to persecution as the "deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life."[117] A climate asylum claim is unlikely to be able to overcome the intent requirement implicit in "deliberate imposition"; even if high-emitting actors know they are contributing to climate change, it is another matter altogether to successfully demonstrate that they, as a group, meant to inflict "severe economic disadvantage" on a specific population.[118] However, the latter "deprivation" basis is more favorable. The presence of "the" before "deprivation" indicates that "deliberate" does not modify "deprivation of . . . essentials of life." The absence of such a qualifier suggests that "deprivation of . . . essentials of life" could be a collateral consequence of the persecutor's actions—as, for instance, when

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generating unsafe conditions where individuals are exposed and vulnerable to natural hazard events"—is integral to the applicability of international refugee law).

115. See, e.g., Matter of T-Z-, 24 I. & N. Dec. 163, 174–75 (B.I.A. 2007) (citing Li v. U.S. Att'y Gen., 400 F.3d 157, 169 (3d Cir. 2005)) (finding that economic harms in the aggregate could rise to the level of persecution); Matter of O-Z- & I-Z-, 22 I. & N. Dec. 23, 26 (B.I.A. 1998) (holding that repeated instances of discrimination and harassment amounted to persecution).

116. Cournil, supra note 10, at 95–96 (observing that the Refugee Convention and Protocol apply to instances of individualized rather than generalized violence (e.g., persecution but not general civil unrest) and that establishing the relevant "personal" threat compelling migration in cases of environmental degradation is challenging).

117. *Matter of T-Z-*, 24 I. & N. Dec. at 171 (alteration in original) (citing H.R. Rep. No. 95-1452, at 5 (1978), as reprinted in 1978 U.S.C.C.A.N. 4700, 4704). Enumerated factors related to economic harm include the applicant's and their household's earnings, the applicant's net worth, other employment available to the applicant, loss of housing, loss of health benefits, loss of school tuition and educational opportunities, loss of food rations, confiscation of property, including household furniture and appliances, and any other relevant factor. Id. at 173–75; see also USCIS Refugee, Asylum & Int'l Operations Directorate (RAIO), Definition of Persecution and Eligibility Based on Past Persecution 21–22 (2015), https://www.uscis.gov/sites/default/files/document/foia/Persecution_LP_RAIO.pdf [https://perma.cc/9D3U-7BMV] [hereinafter USCIS, Persecution] (discussing economic harm as a form of persecution).

118. The use of "imposition" also suggests that "severe economic disadvantage" is inflicted by an entity with significant power over the persecuted individuals, consistent with the BIA's focus on government-imposed persecution in *Matter of T-Z-*. See 24 I. & N. Dec. at 173–75. The argument that high-emitting actors, whether other countries or private corporations, have the authority to "impos[e]" harm on climate refugees is at best tenuous.

a state's industrial sector produces substantial emissions in pursuit of economic success.[119]

Although the impacts of climate change can cause loss of "essentials of life" in a broad range of ways, both BIA and federal appellate precedent emphasize the role of state action in creating such deprivation.[120] For economic harm due to climate change to be sufficient, deprivation of fundamental necessities by a non-state actor must also constitute persecution. As section II.B.2 discusses, a demonstration that the state was unwilling or unable to prevent persecutory acts can provide the necessary government nexus.[121]

Though focusing on economic harm, *Matter of T-Z-* stands for the broader proposition that "forms of nonphysical harm . . . may amount to persecution."[122] Psychological harm, including past trauma, and mental harm, including forcibly witnessing the suffering of others, are other forms of nonphysical harm that federal appellate courts have explicitly recognized.[123] The well-demonstrated relationship between climate change and increased incidence of mental health problems suggests that

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119. See Kozoll, supra note 99, at 297 (considering the possible rebuttal that "the project inflicting the environmental harm on the group was intended to benefit the group through economic development, jobs, or by forcing the group into the mainstream culture").

120. See, e.g., *Matter of T-Z-*, 24 I. & N. Dec. at 170–71 (framing economic deprivation as occurring through governmental measures); see also, e.g., Wu v. U.S. Att'y Gen., 745 F.3d 1140, 1157 (11th Cir. 2014) (concerning administration of fines as economic harm); Vincent v. Holder, 632 F.3d 351, 355 (6th Cir. 2011) (involving government forces burning an applicant's home); Zhang v. Gonzales, 495 F.3d 773, 777–78 (7th Cir. 2007) (rejecting an economic harm claim when an applicant did not experience continuing harm from his government and when the harm was remediable); Li v. U.S. Att'y Gen., 400 F.3d 157, 166–69 (3d Cir. 2005) (likewise characterizing administration of fines as economic harm). The UNHCR's guidance seems to adopt a similar perspective. See UNHCR Handbook, supra note 6, ¶ 63 (recognizing grounds for refugee status when "economic measures destroy the economic existence of a particular section of the population," illustrating the importance of persecutory intent).

121. For an extension of this argument analogizing economic to environmental harm, see Kozoll, supra note 99, at 298–306 (asserting environmental and economic harm are analogous; further examining a constellation of environmental harms, including river pollution, landscape destruction, ruin of arable land, air pollution from mining, and impacts of these on health, culture, and community life, and concluding that they more than amount to persecution).

122. *Matter of T-Z-*, 24 I. & N. Dec. at 171.

123. See, e.g., Ouk v. Gonzales, 464 F.3d 108, 111 (1st Cir. 2006) (recognizing that "a finding of past persecution might rest on a showing of psychological harm" (internal quotation marks omitted) (quoting Makhoul v. Ashcroft, 387 F.3d 75, 80 (1st Cir. 2004)); Mashiri v. Ashcroft, 383 F.3d 1112, 1120 (9th Cir. 2004) (similarly finding that "emotional or psychological" harm may constitute persecution); see also USCIS, Persecution, supra note 117, at 24 (recognizing psychological harm as a type of nonphysical harm that could amount to persecution). But see Niang v. Gonzales, 492 F.3d 505, 512 (4th Cir. 2007) (finding that "psychological harm, without any accompanying physical harm, does not constitute 'persecution[]'" with respect to withholding of removal).

this may be an apt basis for a persecution claim.[124] The Intergovernmental Panel on Climate Change (IPCC) has found that discrete climate events, such as storms, floods, heatwaves, wildfires, and droughts, have "significant negative consequences" for mental health across national contexts, increasing rates of PTSD, anxiety, and depression.[125] Furthermore, there is an "observable association" between increased heat and severe mental health problems, including suicide, psychiatric hospital admissions, anxiety, depression, and acute stress.[126] Adverse mental health outcomes are also secondary consequences of climate change's impacts on economic, social, food, and healthcare systems.[127] For instance, current or future threats to livelihood correlate to increased rates of suicide, suicidal ideation, and substance abuse, while malnutrition and food insecurity also jeopardize mental health.[128] Consequently, refugees whose experience with climate change–based environmental harm caused severe

124. See Carlos Corvalan, Brandon Gray, Elena Villalobos, Aderita Sena, Fahmy Hanna & Diarmid Campbell-Lendrum, WHO, Mental Health and Climate Change: Policy Brief 4 (2022), https://www.who.int/publications/i/item/9789240045125 [https://perma.cc/7DRJ-Z4EB] (demonstrating the deleterious impacts of climate change on environmental, social, and economic determinants of mental health and calling for measures to address climate change to protect mental health); see also Guéladio Cissé et al., Health, Wellbeing and the Changing Structure of Communities, *in* Intergovernmental Panel on Climate Change, Climate Change 2022: Impacts, Adaptation and Vulnerability 1041, 1076–78 (Hans-Otto Pörtner et al. eds., 2022), https://www.ipcc.ch/report/ar6/wg2/ [https://perma.cc/L9ZK-4ZAK] (discussing observable increases in mental health risks in conjunction with discrete and persistent climate change effects); Molly Monsour, Emily Clarke-Rubright, Wil Lieberman-Cribbin, Christopher Timmins, Emanuela Taioli, Rebecca M. Schwartz, Samantha S. Corley, Anna M. Laucis & Rajendra A. Morey, The Impact of Climate Change on the Prevalence of Mental Illness Symptoms, 300 J. Affective Disorders 430, 436 (2022) (finding that climate change–induced sea level rise and tropical cyclone exposure in coastal Florida increased the risk of PTSD, anxiety, and depression). Despite this well-established relationship, states' responses to climate change have rarely included mental health support. See WHO, 2021 WHO Health and Climate Change Global Survey Report 60–61 (2021), https://www.who.int/publications/i/item/9789240038509 [https://perma.cc/GV75-ZWS6] [hereinafter WHO 2021 Survey] (finding that, of the ninety-five countries surveyed, only eight had developed a "climate-informed health early warning system" for issues related to mental and psychosocial health). Of the small island nations surveyed, only the Marshall Islands and Palau met this criterion. Id.

125. See Cissé et al., supra note 124, at 1076–78 (emphasizing that youth are particularly vulnerable and identifying risks associated with displacement, migration, and concern about climate change, among other factors discussed in the text infra).

126. Id. at 1076.

127. Id.; Hans Pörtner et al., Technical Summary, *in* Climate Change 2022: Mitigation of Climate Change 37, 63 (Hans Pörtner et al. eds., 2022), https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_TechnicalSummary.pdf [https://perma.cc/3EG2-VK4W] ("Mental health impacts are expected to arise from exposure to extreme weather events, displacement, migration, famine, malnutrition, degradation or destruction of health and social care systems, climate-related economic and social losses and anxiety and distress associated with worry about climate change . . . .").

128. Cissé et al., supra note 124, at 1078 (identifying farmers as particularly vulnerable and observing that mental health impacts from childhood malnutrition persist into adulthood).

psychological or emotional distress might allege that their experience amounts to persecution on this basis.

The deprivation of fundamental human rights recognized by customary international law may also rise to the level of persecution.[129] USCIS, in its training manual for asylum and refugee officers, provides the greatest context for what rights might qualify, listing arbitrary deprivation of life, legal personhood, and freedom of conscience as examples.[130] Climate refugees would need to successfully demonstrate rights directly threatened by climate change, such as life and an adequate standard of living,[131] are equally fundamental under customary international law in order to prevail on this basis.[132] Members of indigenous communities might also allege that climate change, by depriving them of their traditional land and livelihoods, has violated their right to self-determination, recognized in Article 1 of the ICCPR.[133]

Because the range of rights recognized in customary international law depends on state practice, this basis for asserting persecution has the potential to become more favorable to climate refugees over time. For instance, no consensus has emerged as to whether the right to a healthy

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129. USCIS, Persecution, supra note 117, at 17.

130. See id. (noting that the "[d]eprivation of these rights may also constitute persecution").

131. See OHCHR, Understanding Human Rights and Climate Change: Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change 13–18 (2021), https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/COP21.pdf [https://perma.cc/WDM4-HHQ9] [hereinafter OHCHR Submission] (identifying these two rights as among those most threatened by climate change).

132. The United States' conventional rejection of economic, social, and cultural rights or those that impose positive obligations on states poses a challenge for such arguments. Compare William A. Schabas, The Customary International Law of Human Rights 303–12 (2021) (recognizing a universal right to an adequate standard of living as a matter of customary international law), with UN Hum. Rts. Council, Rep. of the Working Group on the Universal Periodic Review, U.S. Am., Addendum: Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State Under Review, ¶ 12, UN Doc. A/HRC/30/12/Add.1 (Sept. 14, 2015) (rejecting the UN General Assembly resolution recognizing a right to safe and clean drinking water and sanitation as legally binding).

133. See Catalina Devandas Aguilar, John H. Knox, Philip Alston, Léo Heller & Virginia Dandan, OHCHR, The Effects of Climate Change on the Full Enjoyment of Human Rights 15–16, 20 (Apr. 30, 2015), https://unfccc.int/files/science/workstreams/the_2013-2015_review/application/pdf/cvf_submission_annex_1_humanrights.pdf (on file with the *Columbia Law Review*) (recognizing that deprivation of territory or loss of livelihood due to climate change implicates indigenous peoples' right to self-determination); see also ICCPR, supra note 39, art. 1, 999 U.N.T.S. at 173 (enshrining the right to self-determination). The right is also recognized in Art. 1 of the International Covenant on Economic, Social, and Cultural Rights, which the United States has not signed. International Covenant on Economic, Social, and Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 4, 5. For further discussion of environmental harm to indigenous communities amounting to persecution, see generally Kozoll, supra note 99 (arguing that harm to the natural resources of indigenous groups amounts to "environmental persecution").

environment has fully entered into customary international law.[134] Nonetheless, the United States' vote to recognize this right in July 2022, part of its overwhelming adoption by the UN General Assembly, affirms its salience.[135] As international practice related to state obligation to ensure the right to a healthy environment evolves, the case for asserting that its violation amounts to persecution may strengthen.

2. *Persecutory Actor.* — In the context of climate asylum, the persecutory actor is best defined as the set of state actors and non-governmental actors, such as the industrial sectors of high-emitting countries and private corporations, whose emissions have substantially contributed to climate change.[136] Because these persecutors are external actors, a climate asylum claim must demonstrate that an applicant's government was unable or unwilling to control them.[137] Government complicity, or even involvement with this third party, is not a requirement.[138]

Demonstrating that the government is unable or unwilling to control the persecutors requires analysis of the extent to which the government could impose "controls and restraints" on the entities inflicting harm, the applicant's attempts to avail itself of the government's protection, and the

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134. See Schabas, supra note 132, at 335 (concluding, based on review of regional instruments and state practice that "[t]here is compelling evidence for a human right to a safe, clean, healthy, and sustainable environment under customary international law."). But see Edward Heartney, Couns. for Econ. & Soc. Affs., Explanation of Position on the Right to a Clean, Healthy, and Sustainable Environment Resolution, U.S. Mission to UN (July 28, 2022), https://usun.usmission.gov/explanation-of-position-on-the-right-to-a-clean-healthy-and-sustainable-environment-resolution/ (on file with the *Columbia Law Review*) (explicitly rejecting that the American decision to sign the UN General Assembly resolution recognizing a right to a healthy environment makes the right a norm of customary international law).

135. See Jacob Katz Cogan, The United States Recognizes the Human Right to a Clean, Healthy, and Sustainable Environment, *in* Contemporary Practice of the United States Relating to International Law, 117 Am. J. Int'l L. 128, 129 (Jacob Katz Cogan ed., 2023) ("Not only was the U.S. vote in the General Assembly a reversal of its consistent stance against the right to a healthy environment, it was also a striking exception to the long-standing resistance of the United States to the recognition of 'new' human rights.").

136. For quantification of global greenhouse gas emissions by state, see Historical GHG Emissions, ClimateWatch, https://www.climatewatchdata.org/ghg-emissions?end_year=2020&start_year=1990 (on file with the *Columbia Law Review*) (observing 60% of total emissions come from only ten countries).

137. Federal appellate courts have widely accepted the unwilling or unable standard for third-party actors. See, e.g., Nabulwala v. Gonzales, 481 F.3d 1115, 1118 (8th Cir. 2007) (recognizing that harm "inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control" may constitute persecution (alteration in original) (internal quotation marks omitted) (quoting Suprun v. Gonzales, 442 F.3d 1078, 1080 (8th Cir. 2006))); Faruk v. Ashcroft, 378 F.3d 940, 944 (9th Cir. 2004) (affirming that "private individuals that the government is unable or unwilling to control can persecute someone" (internal quotation marks omitted) (quoting Singh v. Immgr. & Naturalization Serv., 134 F.3d 962, 967 n. 9 (9th Cir. 1998))).

138. USCIS, Persecution, supra note 117, at 28.

government's response.[139] Evidence of whether climate refugees' governments have attempted to mitigate the impacts of climate change will thus be instrumental to determining whether they are "unwilling" to address climate change–based persecution.[140] It is difficult to argue, however, that failure to address climate change due to lack of resources equates to "unwillingness"; it would be better to characterize such governments as "unable" to effectively respond.[141]

Federal appellate courts have found that the state's inability to prevent persecutory acts would satisfy the government nexus requirement.[142] Their precedent requires "more than just a difficulty controlling private behavior"; the government must have "at least demonstrated a complete helplessness to protect the victims."[143] It is true that climate-vulnerable countries cannot regulate emissions from other states or independently address mounting climate change, so that their governments, despite good-faith effort on their part to do so, remain unable to fully stop the persecutory acts. Nonetheless, some governments, such as those of vanishing island nations, have taken steps to mitigate climate degradation, adapt to climate change, and advocate for international efforts to resolve the crisis.[144] In such cases, climate refugees must demonstrate that, in their individual circumstances, their

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139. Id. at 28–29.

140. The BIA notes that "government authorities' timely response to a respondent reporting harm may be indicative of their ability or willingness to protect the respondent from harm." See Matter of C-G-T, 28 I. & N. Dec. 740, 743 (B.I.A. 2023).

141. See Flanagan, supra note 15, at 17 ("Thus, under current asylum law, it is a stretch to argue that the fact a government cannot afford to fulfill adaptation responsibilities constitutes an unwillingness to protect climate change refugees."); see also Khan v. Holder, 727 F.3d 1, 7 (1st Cir. 2013) ("[W]here a government is 'making every effort to combat' violence by private actors, and its 'inability to stop the problem' is not distinguishable 'from any other government's struggles,' the private violence has no government nexus and does not constitute persecution." (quoting Burbiene v. Holder, 568 F.3d 251, 255–56 (1st Cir. 2009))).

142. See Charles Shane Ellison & Anjum Gupta, Unwilling or Unable? The Failure to Conform the Nonstate Actor Standard in Asylum Claims to the Refugee Act, 52 Colum. Hum. Rts. L. Rev. 441, 470–90 (2021) (conducting a comprehensive review of federal appellate engagement with the "unwilling or unable" standard and concluding it had been universally adopted).

143. Gutierrez-Vidal v. Holder, 709 F.3d 728, 732 (8th Cir. 2013) (internal quotation marks omitted) (quoting Salman v. Holder, 687 F.3d 991, 995 (8th Cir. 2012)).

144. See, e.g., Ministry of Climate Change & Adaptation, Gov't of Vanuatu, Vanuatu Climate Change & Disaster Risk Reduction Policy 2022–2030, at 8 (2d ed. 2022), https://www.nab.vu/sites/default/files/documents/National%20CCDRR%20Policy%202022-2030.pdf [https://perma.cc/G9AA-PFFL] (providing Vanuatu's climate mitigation strategy); UN General Assembly Seeks World Court Ruling on Climate Change, Hum. Rts. Watch (Mar. 29, 2023), https://www.hrw.org/news/2023/03/29/un-general-assembly-seeks-world-court-ruling-climate-change [https://perma.cc/TP43-6UFK] (discussing Vanuatu's push for an I.C.J. advisory opinion on climate change).

government "demonstrated a complete helplessness" to redress the harm they suffered.[145]

C. *Nexus*

The nexus—the causal link between the protected ground and the climate change–based harm suffered—requires creative application of existing asylum law related to persecutory intent.[146] Constructive knowledge of the impact of greenhouse gas emissions and resulting climate change, even in the absence of malicious intent, should satisfy the nexus requirement.

Recognition of persecution does not require subjective punitive or malignant intent on the persecutor's part.[147] The U.S. Court of Appeals for the 9th Circuit has suggested that "even actions engaged in for the nominal good of the individual affected may be deemed persecution if they in fact inflict harm on the claimant."[148] Moreover, USCIS indicates that the nexus may be established when the persecutor believes they have the right to harm the persecuted because of their membership in a group.[149] In the climate asylum context, high-emitting actors may believe that they have the right to take actions driving climate change even if they cause harm to specific groups, or even that they are economically benefitting the persecuted through their actions.[150]

Under the BIA's mixed-motives doctrine, the protected characteristic must be "one central reason" for the alleged persecution.[151] Requiring it to be a "reason" rather than a "motive" imposes a causal rather than an intentional relationship. Nonetheless, this is a demanding standard, which

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145. USCIS, Persecution, supra note 117, at 31 (internal quotation marks omitted) (quoting *Gutierrez-Vidal*, 709 F.3d at 732–33).

146. See Flanagan, supra note 15, at 18–19 (characterizing this as the greatest challenge of a climate asylum claim).

147. Matter of Kasinga, 21 I. & N. Dec. 357, 365 (B.I.A. 1996). But see Carey DeGenaro, Comment, Looking Inward: Domestic Policy for Climate Change Refugees in the United States and Beyond, 86 U. Colo. L. Rev. 991, 1014 (2015) (denying the existence of a persecutory actor in climate degradation and thus concluding that no nexus exists).

148. Kozoll, supra note 99, at 295 (commenting on Pitcherskaia v. Immigr. & Naturalization Serv., 118 F.3d 641, 646 (9th Cir. 1997), which observed that "[n]either the Supreme Court nor this court has construed the Act as imposing a requirement that the [noncitizen] prove that [their] persecutor was motivated by a desire to punish or inflict harm").

149. See USCIS, Nexus, supra note 106, at 26–27 ("The important inquiry is whether the persecutor is motivated to harm the applicant on account of his or her . . . protected characteristics . . . . ").

150. See Kozoll, supra note 99, at 295 (emphasizing that a persecutory actor may rely on economic benefit to excuse environmental harm).

151. See Matter of J-B-N- & S-M-, 24 I. & N. Dec. 208, 212 (B.I.A. 2007). The B.I.A. also recognized that the reason could not be "incidental, tangential, superficial, or subordinate to another reason for harm." Id. at 214.

a presumption of the actual or constructive knowledge of high-emitting actors helps to satisfy.

Given the wide availability of evidence for emissions causing climate change, high-emitting actors should be presumed to have at least constructive, if not actual, knowledge of the geographically disparate impacts of their emissions.[152] With respect to both nationality and particular social group formulations with a geographic tie, such as indigenous heritage, physical location is the primary reason why climate refugees experience the harm that prompts their relocation.[153] A similar argument applies to climate refugees who experienced severe deprivation of the essentials of life because climate change decimated natural resources upon which their livelihoods depend.[154] Presuming persecutors' constructive knowledge of the existence of and harm experienced by climate–vulnerable populations links the protected ground as a central reason for climate refugees' *experience* of climate change–based harm to the *infliction* of that harm. Such an argument is consistent with the BIA's holding that applicants need not demonstrate the exact motivation of their persecution, the standard being only a "well-founded fear" that persecution arises from the protected ground.[155]

Given this nexus between the protected grounds discussed above and climate change–based harm amounting to persecution, climate refugees can assert an initial asylum claim based on their experience of climate degradation.

III. CLAIMING HUMANITARIAN ASYLUM

Climate refugees could receive asylum based only on establishing past persecution. If the U.S. government is able to rebut the presumption of future persecution on either of the bases discussed infra in section III.B, however, relief will depend on the grant of humanitarian asylum. This Part argues that climate refugees justly qualify for humanitarian asylum based

152. See Kate McKenzie, Due Diligence – The Lay of the Land from an Ocean-Climate Perspective, 17 Carbon & Climate L. Rev. 35, 50–52 (2023) (arguing that the international law governing oceans requires constructive as well as actual knowledge for states' due diligence obligations). But see Cournil, supra note 10, at 103 (arguing that mere fact of human contributions to global warming does not satisfy the intent requirement).

153. See Carly Marcs, Spoiling Movi's River: Towards Recognition of Persecutory Environmental Harm Within the Meaning of the Refugee Convention, 24 Am. U. Int'l L. Rev. 31, 62–64 (2008) (illustrating how indigenous heritage might link an applicant to land and thus to climate change–based harm).

154. See supra note 12 and accompanying text (discussing such an example in Cameroon).

155. Matter of S-P-, 21 I. & N. Dec. 486, 489–90 (B.I.A 1996).

on recognition that "other serious harm" will befall them if returned to their countries of origin.[156]

A. *Humanitarian Asylum in the Climate Change Context*

Humanitarian asylum differs from other forms of relief provided in response to natural disasters or other humanitarian crises, such as temporary protected status (TPS) or humanitarian parole.[157] While the latter are mechanisms for authorized entry into the United States in response to urgent humanitarian situations, they are temporary measures independent from the more substantial requirements of and protections afforded by the Refugee Convention.[158]

In contrast, humanitarian asylum still requires demonstration of past persecution but permits other factors to substitute for a well-founded fear of future persecution, including demonstrated risk of suffering severe harm upon return, even if it does not amount to persecution.[159] In particular, the "other serious harm" basis for humanitarian asylum permits the adjudicator to evaluate the full range of reasons why the applicant may have fled and the harms they fear upon return.[160] Critically, this provides an opportunity for climate refugees to fully present evidence of the harm they have experienced or would be likely to suffer as a result of climate change, even if it is independent from persecution.[161]

1. *Introduction to Humanitarian Asylum.* — Awarded only "in certain rare cases,"[162] humanitarian asylum may be granted discretionarily if an applicant has established past persecution[163] but failed to demonstrate a

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156. See 8 C.F.R. § 208.13(b)(1)(iii)(B) (2024) (establishing the criteria for humanitarian asylum). 8 C.F.R. § 208 has been duplicated at 8 C.F.R. § 1208; reviewing courts may cite to either provision.

157. Temporary protected status provides temporary but extendable work and residence permission for migrants unable to return to their home countries due to humanitarian crises. For further definition and discussion, see generally Diana Roy & Claire Klobucista, What Is Temporary Protected Status?, Council on Foreign Rels., https://www.cfr.org/backgrounder/what-temporary-protected-status [https://perma.cc/495X-529Q] (last updated Sept. 21, 2023). Humanitarian parole is generally related to urgent individual humanitarian situations, such as medical crises, and provides temporary entry to the United States without a visa. See Explainer: Humanitarian Parole, Nat'l Immigr. F. (Mar. 24, 2022), https://immigrationforum.org/article/explainer-humanitarian-parole/ [https://perma.cc/Y2NL-LYVJ] (explaining the context for and process of humanitarian parole).

158. See Explainer: Humanitarian Parole, supra note 157 (describing these two forms of temporary status).

159. See 8 C.F.R. § 208.13(b)(1)(iii) (establishing the criteria for humanitarian asylum).

160. See infra section III.A.2.

161. See infra section III.A.2.

162. Mirzoyan v. Gonzales, 457 F.3d 217, 220 (2d Cir. 2006).

163. While this is the general consensus, the Second Circuit has recently indicated that humanitarian asylum could afford protection in the absence of past persecution. See M.M.M. v. Barr, 831 F. App'x 544, 548 (2d Cir. 2020) (holding that "[b]ecause M.M.M. did

well-founded fear of future persecution.[164] The INA provides two possible grounds for humanitarian asylum:

> (A) The applicant has demonstrated *compelling reasons* for being unwilling or unable to return to the country arising out of the severity of the past persecution; or
>
> (B) The applicant has established that there is a reasonable possibility that [they] may suffer *other serious harm* upon removal to that country.[165]

Federal appellate courts have not interpreted the humanitarian asylum provision to be a form of relief independent from asylum; rather, an applicant who asserts past persecution and provides evidence of one of these two statutory bases for humanitarian asylum will preserve the latter claim, even without separately raising it before the immigration judge.[166]

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not establish past persecution on account of a protected ground, she had to demonstrate" one of the two statutory bases for humanitarian asylum). This, however, directly contradicts the BIA's interpretation of the statute, as well as the interpretations of other circuits, and is seemingly inconsistent with statutory structure. See Matter of L-S-, 25 I. & N. Dec. 705, 710 (B.I.A. 2012) ("We emphasize that every asylum applicant who arrives at this stage of the analysis has demonstrated past persecution and thus has proven he or she is a 'refugee.'"); see also Ayala v. Holder, 683 F.3d 15, 18 (1st Cir. 2012) (stating that past persecution is required for humanitarian asylum, as 8 C.F.R. § 208.13(b)(1)(iii)(B) applies only to "an applicant described in [8 C.F.R. § 208.13(b)(1)(i)]," which discusses an individual "found to be a refugee on the basis of past persecution" (internal quotation marks omitted) (quoting 8 C.F.R. § 208.13(b)(1))); Kholyavskiy v. Mukasey, 540 F.3d 555, 577 (7th Cir. 2008) (finding that an applicant must have established past persecution to seek humanitarian asylum). For a more recent and forceful formulation of this position, see Goncalves de Oliveira v. U.S. Att'y Gen., No. 22-2743, 2023 WL 4542004, at *2 (3d Cir. July 14, 2023) ("By requesting asylum for 'other serious harm,' without first establishing past persecution, [the applicant] is attempting to take an unauthorized shortcut. We only consider whether a[] [noncitizen] has a well-founded fear of persecution based on 'other serious harm' if [they] ha[ve] already established past persecution.").

164. 8 C.F.R. § 208.13(b)(1)(iii); see also *Matter of L-S-*, 25 I. & N. Dec. at 713 (recognizing that the burden is on the applicant to demonstrate "why asylum should be granted on this basis in the exercise of discretion"). The BIA's denial of humanitarian asylum is "conclusive unless manifestly contrary to the law and an abuse of discretion." 8 U.S.C. § 1252(b)(4)(D).

165. 8 C.F.R. § 208.13(b)(1)(iii) (emphasis added).

166. See, e.g., B.L.L. v. U.S. Att'y Gen., No. 22-2039, 2023 WL 2423482, at *3 (3d Cir. Mar. 9, 2023) ("We . . . conclude that a noncitizen does not waive a request for humanitarian asylum where [their] asylum application asserts past persecution and provides facts showing compelling reasons for [their] being unable or unwilling to return to that country or that [they] would face other serious harm if removed."); Juan Antonio v. Barr, 959 F.3d 778, 798 (6th Cir. 2020) (finding that humanitarian asylum is preserved even if it is not explicitly requested before the Immigration Judge because it is "one avenue to achieve asylum under the broader statutory scheme, rather than a distinct form of relief"); Martínez-Pérez v. Sessions, 897 F.3d 33, 42 (1st Cir. 2018) (rejecting the argument that humanitarian asylum is waived if not explicitly raised before the Immigration Judge); cf. Mbonga v. Garland, 18 F.4th 889, 898 (6th Cir. 2021) (denying humanitarian asylum not because the issue was first argued at the appellate level but rather because the applicant neither raised the issue in his opening brief nor provided arguments supporting its grant on either statutory basis).

Of the two possible bases for humanitarian asylum, only the "other serious harm" provision merits further examination. The well-developed jurisprudence surrounding the "compelling reasons" basis almost certainly forecloses it as a possible avenue to relief for climate refugees. The language originated as a regulatory amendment designed to ensure that humanitarian asylum was awarded "*only* where there are compelling reasons related to the severity of the past persecution, providing relief to those who have suffered worst."[167] Most relevantly, its language intentionally foreclosed the possibility that humanitarian asylum might be granted on the basis of "general humanitarian factors, unrelated to the [past persecution], such as age, health, or family ties."[168] Yet such experiences, including severe human rights violations not directly related to past persecution, are common drivers of climate migration.[169]

Subsequent interpretation has not deviated from this original intent. Humanitarian asylum based on "compelling reasons" requires multiple experiences of extremely severe violence, rather than the pattern of ongoing human rights abuses—perhaps interspersed with discrete climate change–based events—that characterizes the experience of many climate refugees.[170] The BIA considers the "degree of harm suffered by the applicant" and the "length of time over which the harm was inflicted."[171] Appellate courts have further characterized the "compelling reasons" standard as requiring "extraordinary suffering"[172] and "reserved for 'atrocious forms of persecution.'"[173] The paradigmatic example of a group

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167. See Sheriff v. U.S. Att'y Gen., 587 F.3d 584, 595 (3d Cir. 2009) (examining the Supplementary Information provided in the proposed rule introducing this language); see also New Rules Regarding Procedures for Asylum and Withholding of Removal, 63 Fed. Reg. 31,945, 31,947 (proposed June 11, 1998) (to be codified at 8 C.F.R. § 208) [hereinafter New Asylum Rules] (introducing the amendment in question).

168. *Sheriff*, 587 F.3d at 594–95 (alteration in original) (internal quotation marks omitted) (quoting New Asylum Rules, supra note 167, at 31,947).

169. See supra notes 25–32 and accompanying text; see also Ayesha Tandon, In-Depth Q&A: How Does Climate Change Drive Human Migration?, Carbon Br. (Apr. 10, 2024), https://interactive.carbonbrief.org/climate-migration/ [https://perma.cc/XV7B-RD85] ("Climate change can interact with other factors, such as conflict, economic opportunity and politics, to drive migration.").

170. See Scott, supra note 26, at 53–56 (discussing the complex interplay of acute and ongoing climate events that climate refugees are likely to experience).

171. Matter of N-M-A-, 22 I. & N. Dec. 312, 326 (B.I.A. 1998). The BIA also considers the "evidence of severe psychological trauma stemming from the harm." Id. For another standard widely used in appellate jurisprudence, see Jalloh v. Gonzales, 498 F.3d 148, 151–52 (2d Cir. 2007) (per curiam) (requiring a demonstration of "severe harm" and "long-lasting physical or mental effects of . . . persecution").

172. Zarouite v. Gonzales, 424 F.3d 60, 64 (1st Cir. 2005) (citing Tokarska v. Immigr. & Naturalization Serv., 978 F.2d 1, 1–2 (1st Cir. 1992) (per curiam)).

173. Kone v. Holder, 596 F.3d 141, 152 (2d Cir. 2010) (quoting Matter of Chen, 20 I. & N. Dec. 16, 19 (B.I.A. 1989)); see also Precetaj v. Holder, 649 F.3d 72, 77 (1st Cir. 2011) ("[S]o much abuse has been directed against the victim that the suffering is projected into the future and that a return of the applicant to the place where the harm was inflicted would magnify the prior suffering."); Kazlauskas v. Immigr. & Naturalization Serv., 46 F.3d 902,

that meets this threshold is survivors of genocide.[174] While this extraordinary level of harm need not be considered the threshold for qualification, "there can be no dispute that severe *means* severe."[175] Even repeated or extended experiences of substantial violence may not qualify.[176]

Because climate refugees experience complex forms of harm less clearly attributable to individual perpetrators, including human rights violations resulting from exacerbation of preexisting inequities,[177] they are unlikely to be able to persuasively argue that they have experienced such "atrocious" or "extraordinary" persecution that they have "compelling reasons" to fear return. Indeed, because persecution must adopt an unusual characterization in a climate asylum claim,[178] reliance on persecution should be minimized when possible—here, in favor of an argument predicated upon "other serious harm."

2. *"Other Serious Harm".* — Because the "other serious harm" ground permits consideration of the full range of harms for which climate refugees might be at risk upon return—not merely those related to persecution—it better provides an avenue for relief. A "forward-looking" inquiry, it focuses on "current conditions and the potential for new physical or psychological harm that the applicant might suffer."[179] The BIA has recognized that the standard for qualifying for humanitarian asylum

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906 (9th Cir. 1995) (holding that asylum was warranted only if the applicant or their family had suffered "atrocious forms of persecution" (quoting Acewicz v. Immigr. & Naturalization Serv., 984 F.2d 1056, 1062 (9th Cir. 1993))); *Tokarska*, 978 F.2d at 2 (holding that an applicant must demonstrate "past persecution so severe that repatriation would be inhumane" (internal quotation marks omitted) (quoting Baka v. Immigr. & Naturalization Serv., 963 F.2d 1376, 1379 (10th Cir. 1992))).

174. See Bucur v. Immigr. & Naturalization Serv., 109 F.3d 399, 405 (7th Cir. 1997) (declaring that humanitarian asylum on the basis of severe persecution was "designed for the case of the German Jews, the victims of the Chinese 'Cultural Revolution,' survivors of the Cambodian genocide, and a few other such extreme cases" (citation omitted) (quoting *Matter of Chen*, 20 I. & N. Dec. at 18–19)).

175. Sheriff v. U.S. Att'y Gen., 587 F.3d 584, 594 (3d Cir. 2009).

176. See Hoxhallari v. Gonzales, 468 F.3d 179, 182, 184 (2d Cir. 2006) (finding that the harm suffered by an applicant did not rise to the necessary level when he was beaten and harassed six times for his political affiliation); Gonahasa v. Immigr. & Naturalization Serv., 181 F.3d 538, 540, 544 (4th Cir. 1999) (rejecting the applicant's claim when he was detained by government police for two weeks, beaten, and cut with bayonets). But see Lopez-Galarza v. Immigr. & Naturalization Serv., 99 F.3d 954, 961–63 (9th Cir. 1996) (remanding for consideration of humanitarian asylum when the applicant, after being imprisoned for her political beliefs, was raped by government officials).

177. See UNHCR, Legal Considerations, supra note 20, at 6–7 (focusing on climate change as exacerbating preexisting socioeconomic inequalities); see also Mastor et al., supra note 26, at 344 ("It can . . . be difficult to pinpoint the direct cause for a refugee-triggering event because of the multi-causal factors that create a situation in which people are forced to leave their home countries.").

178. See supra section II.B.1 (characterizing aggregated nonphysical harm as persecution).

179. Matter of L-S-, 25 I. & N. Dec. 705, 714 (B.I.A. 2012).

based on "other serious harm" (a "reasonable possibility") is lower than that for "compelling reasons."[180] Thus, cases not rising to the level of "compelling reasons" to fear severe future persecution may nonetheless meet the "other serious harm" threshold. The "compelling reasons" ground need not be adjudicated first, however; either basis for relief can be asserted, and the second ought to be considered if relief is denied under the first.[181]

The DOJ introduced "other serious harm" as a basis for humanitarian asylum to broaden paths to the discretionary grant.[182] It recognized that the current law failed to afford protection to applicants who, though they could demonstrate past persecution, feared "future harm that is not related to a protected ground."[183] While "other serious harm" must "be so serious that it equals the severity of persecution," it need not be related to past harm or inflicted based on one of the five protected Refugee Convention grounds.[184] This distinction is critical to the success of a climate asylum claim because it permits consideration of a much broader range of harms in the country of origin, many of which would otherwise have been excluded from the process of establishing a well-founded fear of persecution.[185]

To this end, the BIA has established that the adjudicator must "be cognizant of conditions in the applicant's country of return" and "pay particular attention to major problems that large segments of the population face or conditions that might not significantly harm others but that could severely affect the applicant."[186] A nonexhaustive list of such conditions includes "those involving civil strife, extreme economic deprivation beyond economic disadvantage, or situations where the claimant could experience severe mental or emotional harm or physical

180. Id. Indeed, cases not rising to the level of the latter have been remanded for consideration under the "other serious harm" prong. See, e.g., Hanna v. Keisler, 506 F.3d 933, 939 (9th Cir. 2007) (rejecting applicant's "compelling reasons" claim but remanding to the BIA for consideration of humanitarian asylum based on "other serious harm," when the applicant seemed to have a "reasonable possibility" of suffering harm based on his Christian faith if returned to Iraq).

181. See *Matter of L-S-*, 25 I. & N. Dec. at 713 n.8 ("Asylum applicants who suffered past persecution should be able to state whether they are pursuing humanitarian asylum under either or both provisions. However, if relief is denied on one basis, the other should also be considered."); see also Bardewa v. Barr, 763 F. App'x 47, 48 (2d Cir. 2019) (finding the BIA abused its discretion where it rejected applicant's humanitarian asylum claims solely on the "compelling reasons" prong without considering the possibility of "other serious harm"); Zongxun Jiang v. Holder, 487 F. App'x 655, 657 (2d Cir. 2012) (same).

182. New Asylum Rules, supra note 167, at 31,947.

183. Id.

184. *Matter of L-S-*, 25 I. & N. Dec. at 714 (emphasizing that no nexus with a Refugee Convention ground is required).

185. See, e.g., Mastor et al., supra note 26, at 339 (identifying "major disasters, imminent impacts of climate change, wars and conflicts brought on by resource scarcity" as harms unrelated to persecution).

186. See *Matter of L-S-*, 25 I. & N. Dec. at 714.

injury."[187] However, "[m]ere economic disadvantage or the inability to practice one's chosen profession" would not rise to this threshold.[188]

Immigrant rights advocates have already suggested that climate change should be considered in determining "other serious harm."[189] The strong relationship between the factors weighed in the "other serious harm" calculus and the types of harm produced by climate change provides robust support for this assertion. For instance, serious and widespread human rights abuses, including violations of the rights to food, water, health, and life, are common consequences of climate degradation and of a comparable scale to the enumerated bases.[190] In addition to being forms of "other serious harm" in their own right, these may result in the severe mental, emotional, or physical injury referenced by the statute.[191]

Climate change may also cause "extreme economic deprivation" by disrupting agriculture and producing natural disasters that destroy regional infrastructure, among other effects.[192] For example, in Yemen's Hajar District, extreme and inconsistent weather events and patterns due to climate change have devastated the agricultural industry.[193] Consequent widespread loss of livelihood has led to estimated rates of food insecurity

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187. Id.

188. Asylum Procedures, 65 Fed. Reg. 76,121, 76,127 (Dec. 6, 2000) (codified at 8 C.F.R. pt. 208).

189. See Camila Bustos, John Willshire Carrera, Deborah Anker, Thomas Becker & Jeffrey S. Chase, Harvard Immigr. & Refugee Clinical Program, HLS Immigr. Project, Univ. Network for Hum. Rts., Yale Immigr. Just. Project & Yale Env't L. Ass'n, Shelter From the Storm: Policy Options to Address Climate Induced Migration From the Northern Triangle 34 (Apr. 2021), https://static1.squarespace.com/static/5b3538249d5abb21360e858f/t/6092e7854c5e4362887c0197/1620240265281/Shelter_Final_5May21.pdf [https://perma.cc/ZMZ7-GWFR] ("Climate change factors should be considered as part of the 'other serious harm' determination, which requires no nexus to a Convention ground, but relates to 'the potential for new physical and psychological harm' to the applicant." (quoting *Matter of L-S-*, 25 I. & N. Dec. at 714)).

190. See OHCHR Submission, supra note 131, at 2–20 (finding that such human rights violations "will disproportionately affect individuals, groups and peoples in vulnerable situations including, women, children, older persons, indigenous peoples, minorities, migrants, rural workers, persons with disabilities and the poor"); see also supra notes 129–135 and accompanying text (discussing fundamental human rights abuses resulting from climate change in the context of establishing persecution).

191. See supra notes 122–128 and accompanying text (demonstrating the established relationship between climate change and increased mental and physical health problems).

192. Asylum Procedures, 65 Fed. Reg. at 76,127; see also Intergovernmental Panel on Climate Change, Climate Change 2023: Synthesis Report 98–100 (The Core Writing Team, Hoesung Lee & José Romero eds., 2023), https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_FullVolume.pdf [https://perma.cc/X8X7-MV58] [hereinafter IPCC Report] (discussing a range of climate change effects, including droughts, natural disasters, and rain variability, that impact climate-vulnerable occupations).

193. Yemen Pol'y Ctr., Rising Temperatures, Falling Resources: Climate Change Impacts on Yemen's Agrarian and Coastal Communities 10 (2023), https://ceobs.org/wp-content/uploads/2023/10/Rising_Temperatures_Falling_Resources_Bosch_Eng.pdf [https://perma.cc/9YJF-7FZE] (discussing the Hajar region, which is heavily dependent upon agricultural production).

as high as eighty percent.[194] Similarly, climate change–induced variability in Lake Chad's water levels has decimated the livelihoods of Cameroonian farmers and fishermen.[195] Such examples are more severe than "[m]ere economic disadvantage," imperiling basic human needs, and arguably meet the statutory threshold.[196]

As a threat multiplier, climate change often precipitates "civil strife."[197] In Cameroon, for instance, violent conflict between pastoralists and a group of farmers and fishermen arose from the latter's attempts to adapt to the changing climate.[198] Separately, reports from displaced Cameroonians suggest that instability due to climate vulnerability was one factor in Boko Haram establishing its base in the region, thus contributing to instability and violence.[199] As climate change continues to intensify, its influence as a factor underlying conflict will increase.[200]

Though the impacts of climate change will often amount to "other serious harm," relevant evidence should be framed in the manner most favorable to the applicant. That is, while climate change may be responsible in full or in part for "extreme economic deprivation," mental or physical injury, civil unrest, or situations posing similar risks to fundamental human rights, climate change need not be framed as the unifying basis for "other serious harm." Instead, evidence should encompass all relevant harm climate refugees might experience in their country of origin's unique context if returned.

3. *Federal Appellate Precedent.* — Though relevant precedent delineating "other serious harm" is limited, several federal appellate courts have recognized combinations of factors that might rise to the requisite level of seriousness. The preeminent example is the U.S. Court of Appeals for the Seventh Circuit's opinion in *Kholyavskiy v. Mukasey*,

194. Id. at 11 (explaining that interviewees generally estimated that Hajar District has a poverty rate of 60–80 percent).

195. See supra note 12 and accompanying text (discussing this case study in greater detail).

196. See Matter of L-S-, 25 I. & N. Dec. 705, 714 (B.I.A. 2012) (noting that "[m]ere economic disadvantage" cannot constitute "other serious harm").

197. Id. (discussing "civil strife" in relationship to "other serious harm"); Mastor et al., supra note 26, at 344 (discussing the role of climate change as a threat multiplier).

198. Siegfried, supra note 11 (explaining that "in northern Cameroon in 2021, hundreds of people were killed and tens of thousands fled to neighbouring Chad following violence between herders and fishermen that was sparked by dwindling water resources linked to climate change").

199. See Tower, supra note 28, at 27 (reflecting extremely low development indicators, "fishermen and subsistence farmers have often felt marginalised by their governments," causing "underdevelopment . . . exacerbated by the impacts of climate change," upon which Boko Haram capitalized to establish itself in the region).

200. See IPCC Report, supra note 192, at 72 ("With every increment of warming, climate change impacts and risks will become increasingly complex and more difficult to manage. . . . [M]ultiple climatic and non-climatic risk drivers such as biodiversity loss or violent conflict will interact, resulting in compounding overall risk and risks cascading across sectors and regions.").

which considered "other serious harm" in the context of mental illness.[201] It noted that the applicant would, if returned, lose access to the "only medications that effectively have controlled the symptoms of his mental illness[,] . . . be incapable of functioning on his own," and likely be unable to obtain basic necessities such as housing and healthcare.[202] "Debilitation and homelessness," it concluded, appeared to be examples of serious harm.[203] The U.S. Court of Appeals for the Third Circuit has, in several instances, commented upon the *Kholyavskiy* ruling, similarly recognizing that lack of access to critical medical care might amount to "other serious harm"[204] and positing that, based on the Seventh Circuit's reasoning, the threat of murder should rise to the necessary level.[205]

If returned to their country of origin, climate refugees may face threats of equal severity and comparable scope. They would likewise risk "debilitation" on account of deprivation of fundamental necessities, including, in some cases, adequate food and water.[206] Based on *Kholyavskiy*, applicants who can demonstrate critical deficiencies in physical and mental healthcare in their countries of origin should assert these as bases for serious harm if returned.[207] Though the BIA has not yet commented on the extent of deprivation of fundamental necessities necessary to meet the "other serious harm" threshold, such arguments are consistent with federal appellate application of the statute.[208]

4. *Justifying Climate Change as a Basis for Humanitarian Asylum.* — Perhaps the greatest challenge with respect to humanitarian asylum is to argue why, when it has been denied to victims of torture, it should be extended in the context of climate asylum.[209] The gradual accrual of harm unattributable to an individual perpetrator, inflicted across a period of years, is more difficult to conceptualize than isolated instances of extreme

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201. See 540 F.3d 555, 577 (7th Cir. 2008) (remanding to the BIA to evaluate the applicant's humanitarian asylum claim based on its recognition of possible bases for "other serious harm").

202. See id.

203. Id.

204. Pllumi v. U.S. Att'y Gen., 642 F.3d 155, 162–63 (3d Cir. 2011).

205. Sheriff v. U.S. Att'y Gen., 587 F.3d 584, 596 (3d Cir. 2009).

206. See, e.g., IPCC Report, supra note 192, at 98–100 ("Continued sea level rise and increased frequency and magnitude of extreme sea level events encroaching on coastal human settlements and damaging coastal infrastructure (high confidence), . . . expanding land salinization (very high confidence), with cascading to risks to livelihoods, health, well-being, cultural values, food and water security (high confidence)." (emphasis omitted)).

207. For a survey of countries' efforts to address the physical and mental health impacts of climate change, see WHO 2021 Survey, supra note 124, at 60–61.

208. See *Pllumi*, 642 F.3d at 162–63 (positing that lack of necessary medical care could constitute "other serious harm"); *Sheriff*, 587 F.3d at 596 (suggesting that the threat of murder might meet the statutory level); *Kholyavskiy*, 540 F.3d at 577 (recognizing "debilitation" due to inability to access medication and "homelessness" as forms of "other serious harm").

209. See supra note 176 for examples of denial of humanitarian asylum to victims of torture.

physical or mental anguish.[210] Humanitarian asylum, however, does not depend solely on the intensity of individual experiences of harm. Instead, especially with respect to the "other serious harm" determination, it is concerned with the overall severity of harm over time.[211] As the "other serious harm" factors illustrate, condemnation to the ongoing deprivation of fundamental rights and necessities demands a more substantial form of protection than acute experiences of harm without guarantee of repetition.[212] Because of the comprehensive threat that climate change–induced harm poses, particularly to vulnerable groups in impacted countries, it provides a strong basis for asserting a claim to humanitarian asylum.[213]

B. *Statutory Challenges: Evaluating the Strengths of Potential Government Rebuttals*

As noted above, the INA establishes two grounds for governmental rebuttal of the presumption of a well-founded fear of future persecution: changed country circumstances and reasonable internal relocation.[214] With respect to the former, the government may argue that there has been "a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality."[215] The latter inquiry considers whether future persecution could be avoided by relocating to another region of the country of origin in which the "circumstances . . . are substantially better" than those underlying the applicant's original claim.[216] However, "substantially better" circumstances alone are insufficient; it must be "reasonable under all the circumstances" to expect the applicant to do so.[217] This section first

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210. See supra notes 25–31 and accompanying text (discussing challenges in viewing harm attributable to climate change in the asylum context).

211. See 8 C.F.R. § 208.13(b)(1)(iii) (2024) (establishing that to meet the "other serious harm" threshold, an asylum applicant need only show a "reasonable probability" of harm upon removal); see also Matter of L-S-, 25 I. & N. Dec. 705, 714 (B.I.A. 2012) (describing the same standard as a "forward-looking" inquiry that considers conditions, especially widespread problems, in the country of return).

212. Compare the denial of humanitarian asylum under the "compelling reasons prong" for repeated instances of torture, supra note 176, with the "other serious harm" factors, see *Matter of L-S-*, 25 I. & N. Dec. at 714.

213. See IPCC Report, supra note 192, at 51 ("Across sectors and regions, the most vulnerable people and systems have been disproportionately affected by the impacts of climate change (high confidence)." (emphasis omitted)).

214. 8 C.F.R. § 208.13(b)(1)(i).

215. Id. § 208.13(b)(1)(i)(A).

216. Matter of M-Z-M-R-, 26 I. & N. Dec. 28, 33 (B.I.A. 2012); see also 8 C.F.R. § 208.13(b)(1)(i)(B) (providing grounds for discretionary denial of asylum if the applicant "could avoid future persecution by relocating to another part of [their] country of nationality . . . and under all the circumstances, it would be reasonable to expect the applicant to do so").

217. *Matter of M-Z-M-R-*, 26 I. & N. Dec. at 36 (requiring the Immigration Judge to "balance the factors identified at 8 C.F.R. § 1208.13(b)(3) in light of the applicable burden

examines the close relationship between humanitarian asylum predicated upon "other serious harm" and the reasonableness of internal relocation. It then discusses what changes in an applicant's country of origin might be sufficient to undermine their claim to fear future persecution.

1. *Reasonable Internal Relocation.* — The three phases of an asylum adjudication are often characterized by courts as a burden-shifting framework.[218] But in cases involving both humanitarian asylum on the basis of "other serious harm" and the reasonableness of internal relocation, as is likely to occur in climate asylum cases, this categorization proves inapposite. In determining whether internal relocation would be reasonable, the BIA requires consideration of, among other factors, "whether the applicant would face *other serious harm* in the place of suggested relocation."[219] According to its defining regulation, the term "other serious harm" has the same meaning in the context of humanitarian asylum and as a factor for determining the reasonableness of internal relocation.[220] Consequently, these two components of the asylum adjudication should not be considered independent evaluations.

In contrast to thinking of a climate asylum claim under a simple burden-shifting framework, it would be better to characterize the "other serious harm" element as a shared consideration. That is, a demonstration that "other serious harm" would befall an applicant upon return to their country of origin more broadly, as opposed to the specific location they fled, ought to foreclose the reasonableness of internal relocation, even if a "substantially better" area of the country can be identified.[221] Consequently, in asserting "other serious harm," climate refugees should demonstrate country-wide harms when possible and emphasize clear barriers to internal relocation.

2. *Changed Country Conditions.* — The most appropriate parallels between existing precedent and the context of climate asylum are those cases in which the government has reduced a third-party's ability to inflict

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of proof to determine whether it would be reasonable under all the circumstances to expect the" applicant to relocate).

218. See supra note 14 and accompanying text (establishing the burden-shifting framework).

219. *Matter of M-Z-M-R-*, 26 I. & N. Dec. at 34 (emphasis added) (quoting 8 C.F.R. § 1208.13(b)(3) (2012)) (requiring adjudicators to additionally consider factors including but not limited to "any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties" (quoting 8 C.F.R. § 1208.13(b)(3))). The BIA further notes that these factors "are not necessarily determinative of whether it would be reasonable for the applicant to relocate." Id. at 35 (quoting 8 C.F.R. § 208.13(b)(3)).

220. New Asylum Rules, supra note 167, at 31,947 ("We intend that this 'other serious harm' standard for determining when internal relocation is not reasonable refers to the same type of 'other serious harm' that may warrant a humanitarian grant of asylum to an applicant who shows past persecution but who has no well-founded fear of future persecution.").

221. See id.

persecution upon the applicant.[222] While climate refugees' governments will be unable to exert control over other actors driving climate change, they may be able to adapt or mitigate its effects sufficiently to improve living conditions for their residents.[223] Whether an evaluation of changed country conditions rebuts the presumption of fear of future persecution may largely depend upon their government's success in addressing climate change.[224] Even if country conditions improve slightly, as in the case of island nations attempting to mitigate the impacts of climate change,[225] it will be difficult to demonstrate that circumstances changed to "such an extent" that the applicant's fear of persecution is no longer well-founded.[226] But if the government of the applicant's country of origin successfully ameliorated the major harms suffered by the applicant,[227] the burden would likely shift to the applicant to establish a claim to humanitarian asylum.

CONCLUSION

Applied expansively, in recognition of the humanitarian aims of the Refugee Convention and the Refugee Act, American asylum law provides grounds for asserting a climate asylum claim. Under circumstances of severe harm caused by climate change, climate refugees might successfully allege past persecution and, as necessary, a substantial risk of suffering "other serious harm" if returned to their countries of origin. A claim based on either membership in a particular social group or nationality could provide the requisite nexus to climate change–based persecution to satisfy the requirements of U.S. asylum law.

Nonetheless, a more expansive particular social group standard would significantly simplify climate asylum claims. As discussed in section III.B, the BIA's three-part test for evaluating membership in a particular social group, in addition to receiving sharp criticism from the UNHCR and immigrant rights advocates, has not been universally adopted by appellate courts. In 2021, President Biden requested executive action to provide clarity.[228] Subsequently, DHS and the DOJ have issued a Notice of

222. See, e.g., Matter of A-E-M-, 21 I. & N. Dec. 1157, 1160 (B.I.A. 1998) (finding that the Peruvian government's ability to limit persecution inflicted by the Shining Path undermined the presumption of the applicant's fear of future persecution).

223. See *Teitiota* Opinion, supra note 33, ¶ 9.12–.13 (discussing measures taken by Kiribati to mitigate the impacts of climate change).

224. See id.

225. See supra note 144 (discussing Vanuatu's efforts to mitigate and adapt to climate change).

226. *Matter of A-E-M-*, 21 I.& N. Dec. at 1172.

227. In its *Teitiota* opinion, the Human Rights Committee based its determination that the applicant's rights had not been violated in the mitigation efforts taken by his government. *Teitiota* Opinion, supra note 33, ¶ 9.12–.13.

228. See Exec. Order No. 14,010, 86 Fed. Reg. 8267, 8271 (Feb. 2, 2021) (requesting redefinition of the term "particular social group").

Proposed Rulemaking to amend the definition of "membership in a particular social group," as well as to redefine other terms relevant to a claim on this basis, including "the requirements for failure of State protection, and determinations about whether persecution is on account of a protected ground."[229]

In clarifying the definition of these terms, the U.S. government ought to intentionally accommodate climate refugees. At minimum, returning to the *Matter of Acosta* standard would bring the United States back into compliance with the international norms enshrined in the Refugee Convention.[230] A sole requirement of immutability would simplify the establishment of a particular social group, permitting the focus of climate asylum cases to shift from establishing a protected ground to the characterization of persecution, a line of legal reasoning more consistent with the New Zealand Supreme Court's and the Human Rights Committee's decisions in *Teitiota*.[231] Explicit recognition that harm due to climate change may be an example of persecution based on failure of state protection, as well as that such harm can satisfy the nexus requirement, would substantially strengthen the argument for awarding climate asylum.

At present, the Seventh Circuit appears to be the most favorable federal appellate forum for a climate asylum case.[232] It alone relies upon the favorable *Matter of Acosta* standard for membership in a particular social group,[233] and its opinion in *Kholyavskiy* acknowledges that severe violations of economic and social rights upon return to one's country of origin can constitute "other serious harm."[234] No other federal appellate court's precedent provides so expansive a basis for either the initial asylum claim or an argument for humanitarian asylum.

Yet even under the more demanding standards of other fora, American asylum law as it stands can, if maximized to humanitarian ends, afford protection to climate refugees. Even as the majority of forced migrants cannot qualify for political asylum, regardless of the severity of

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229. Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions (Fall 2022), 88 Fed. Reg. 10,966, 11,054 (Feb. 22, 2023).

230. See Flanagan, supra note 15, at 31–32 (arguing that the Seventh Circuit's jurisprudence should be adopted by the other circuits).

231. See *Teitiota* Opinion, supra note 33, ¶¶ 9.6, 9.11 (referencing Teitiota v. Chief Exec of the Ministry of Bus., Innovation & Empl. [2015] NZSC 107 at [13] (N.Z.)) (identifying the risk of refoulement and noting that the New Zealand Supreme Court recognized "the possibility that the effects of climate change or other natural disasters could provide a basis for protection" and identifying the risk of refoulement).

232. As discussed supra note 93 and accompanying text, the extent to which the Supreme Court's recent decision in *Loper Bright* might alter this landscape is not yet clear.

233. See, e.g., W.G.A. v. Sessions, 900 F.3d 957, 964 & n.4 (7th Cir. 2018) (affirming the *Matter of Acosta* immutability test and noting that it has "sometimes strongly" "disapproved" of the B.I.A.'s additional particularity and social distinction requirements).

234. See Kholyavskiy v. Mukasey, 540 F.3d 555, 577 (7th Cir. 2008) ("Debilitation and homelessness both would appear to constitute serious harms for purposes of 8 C.F.R. § 1208.13(b)(iii)(B).").

harm they have experienced, climate asylum will not be a suitable basis for protection for many climate migrants—even truer for a broader class of victims of environmental harm whose experiences are not clearly attributable to climate change. This broader challenge requires novel protection through legislative and executive action.[235] Nonetheless, because severe impacts of climate change may amount to the level of persecution requisite for an asylum claim, those who qualify should be able to avail themselves of the protections and privileges of this established framework.

235. See supra section I.C (discussing the need for more extensive immigration reform in the context of the United States' climate migration response plan).

ESSAY

THE RIDDLE OF RACE-BASED REDISTRICTING

*Travis Crum**

The Supreme Court has adopted divergent interpretations of the Equal Protection Clause as applied to race and redistricting. Vote dilution doctrine requires mapmakers to consider race to ensure that racial minorities are not packed or cracked. Congress, moreover, has embraced vote dilution doctrine in Section 2 of the Voting Rights Act. By contrast, racial gerrymandering doctrine triggers strict scrutiny if mapmakers subordinate traditional redistricting principles to race, thereby threatening Section 2's constitutionality.

To resolve this doctrinal riddle, this Essay examines whether, as originally understood, the Fourteenth or Fifteenth Amendment governed the use of race during redistricting. The Equal Protection Clause did not apply to political rights. Indeed, the Fifteenth Amendment enfranchised Black men nationwide. The Reconstruction Framers debated whether the Fifteenth Amendment also protected the right to hold office, but they barely discussed redistricting.

This Essay then turns to postratification evidence. The Enforcement Acts did not regulate the use of race during redistricting. During the 1870 and 1880 redistricting cycles, Republican Southern states empowered Black voters whereas Democratic Southern states packed and cracked them.

This Essay argues that, from an originalist perspective, the competing doctrines of vote dilution and racial gerrymandering are improperly grounded in the Equal Protection Clause. This Essay further claims that, under the Fifteenth Amendment, there is some historical evidence in favor of vote dilution doctrine but virtually no historical support for racial gerrymandering doctrine. The upshot is that Section 2 is valid legislation under Congress's Fifteenth Amendment enforcement authority to protect the rights to vote and hold office.

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INTRODUCTION

In drawing redistricting plans, mapmakers are confronted with a Goldilocks problem when considering race. Mapmakers cannot consider race too much or too little. They must get it *just* right.

On the one hand, mapmakers must consider race to ensure that minorities' right to vote is not diluted by packing or cracking them into districts.[1] This doctrine—known as racial vote dilution—was first articulated as an equal protection violation by the Supreme Court in its 1973 decision in *White v. Regester*[2] and subsequently endorsed and expanded by Congress in the 1982 amendments to Section 2 of the Voting Rights Act (VRA).[3] Most importantly, Congress adopted a discriminatory results standard for Section 2, which mandates the creation of majority-minority districts under certain circumstances.[4]

On the other hand, mapmakers cannot rely too heavily on race. In its 1993 decision in *Shaw v. Reno*, the Court recognized an "analytically distinct" cause of action for racial gerrymandering under the Equal Protection Clause.[5] Under *Shaw*, "if racial considerations predominated over [traditional redistricting principles], the design of the district must

1. See, e.g., Johnson v. De Grandy, 512 U.S. 997, 1007 (1994) ("[M]anipulation of district lines can dilute the voting strength of . . . minority group[s] . . . , whether by fragmenting the[m] . . . among several districts where a bloc-voting majority can routinely outvote them, or by packing them into one or a small number of districts to minimize their influence in the districts next door." (citing Voinovich v. Quilter, 507 U.S. 146, 153–54 (1993))).

2. 412 U.S. 755, 765–69 (1973).

3. See Chisom v. Roemer, 501 U.S. 380, 393–96 (1991) (discussing the Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 52 U.S.C. § 10301 (2018))). To avoid confusion, this Essay refers to statutory provisions by Arabic numerals and to constitutional provisions by spelling them out. For example, this Essay refers to Section 2 of the VRA and Section Two of the Fifteenth Amendment.

4. See Bartlett v. Strickland, 556 U.S. 1, 10–13 (2009) (plurality opinion) (commenting that Section 2 may require the creation of majority-minority districts when a "minority group composes a numerical, working majority of the voting-age population" and there is racial bloc voting).

5. 509 U.S. 630, 652 (1993).

withstand strict scrutiny."[6] By subjecting districts to the strong medicine of strict scrutiny, *Shaw* limits the use of race in the redistricting process.

Thus, "a legislature attempting to produce a lawful districting plan is vulnerable to 'competing hazards of liability'" because the Equal Protection Clause simultaneously "restricts consideration of race and . . . demands consideration of race."[7] These two doctrines—racial vote dilution and racial gerrymandering—reflect conflicting interpretations of the Equal Protection Clause. Racial vote dilution doctrine harks back to an age when the Court was more comfortable with race-conscious decisionmaking, whereas *Shaw* embodies the current Court's colorblind interpretation of the Constitution. For decades, these doctrines have lived in an uneasy détente, and the Court has expressly declined to answer whether compliance with Section 2 is a compelling governmental interest.[8]

The Fifteenth Amendment is curiously missing from the Court's decisions recognizing vote dilution and racial gerrymandering claims.[9] The Court has repeatedly refused to answer whether the Fifteenth Amendment prohibits vote dilution.[10] Meanwhile, the *Shaw* Court briefly referenced the Fifteenth Amendment in a rhetorical flourish,[11] but it ultimately grounded the racial gerrymandering claim in the Equal Protection Clause.[12] This doctrinal ambiguity is counterintuitive given that the Fifteenth Amendment—not the Equal Protection Clause—was responsible for enfranchising Black men nationwide in 1870.[13] Put

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6. Cooper v. Harris, 137 S. Ct. 1455, 1464 (2017).

7. Abbott v. Perez, 138 S. Ct. 2305, 2315 (2018) (quoting Bush v. Vera, 517 U.S. 952, 977 (1996) (plurality opinion)).

8. See id. ("[W]e have assumed that compliance with the VRA may justify the consideration of race in a way that would not otherwise be allowed. In technical terms, we have assumed that complying with the VRA is a compelling state interest . . . .").

9. Cf. Eric Foner, The Second Founding: How the Civil War and Reconstruction Remade the Constitution 170 (2019) [hereinafter Foner, Second Founding] (observing that "the Fifteenth [Amendment] plays only a minor role in modern constitutional law").

10. The Court has reaffirmed this point even after a plurality concluded that the Fifteenth Amendment does not encompass vote dilution claims. See Voinovich v. Quilter, 507 U.S. 146, 159 (1993) ("This Court has not decided whether the Fifteenth Amendment applies to vote-dilution claims . . . ."); City of Mobile v. Bolden, 446 U.S. 55, 65 (1980) (plurality opinion) (concluding that the Fifteenth Amendment "prohibits only purposefully discriminatry denial or abridgment by government of the freedom to vote"), superseded by statute, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131, 134 (codified as amended at 52 U.S.C. § 10301 (2018)).

11. See Shaw v. Reno, 509 U.S. 630, 657 (1993) ("Racial gerrymandering . . . threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.").

12. See id. at 642 (concluding that "appellants have stated a claim upon which relief can be granted under the Equal Protection Clause").

13. See Travis Crum, The Unabridged Fifteenth Amendment, 133 Yale L.J. 1039, 1055–56 (2024) [hereinafter Crum, Unabridged Fifteenth Amendment].

differently, the Fifteenth Amendment is the Constitution's original prohibition of racial discrimination in voting.

In two recent cases from the 2020 redistricting cycle, the Court grappled with the riddle of race-based redistricting. In its 2023 decision in *Allen v. Milligan*,[14] the Court confronted the tension between Section 2, *Shaw*, and the Reconstruction Amendments. In *Milligan*, civil rights groups brought a Section 2 challenge against Alabama's congressional redistricting plan, which had only one majority-Black district out of seven districts even though Alabama's population is twenty-seven percent Black.[15] In defending its redistricting plan, Alabama marshaled several arguments based on *Shaw*, seeking to minimize the use of race in the redistricting process and raising constitutional avoidance concerns about Section 2's application to single-member redistricting plans.[16]

In a shocking decision siding with the plaintiffs, the Court rebuffed "Alabama's attempt to remake . . . § 2 jurisprudence anew"[17] and "reject[ed] Alabama's argument that § 2 as applied to redistricting is unconstitutional under the Fifteenth Amendment."[18] The Court's characterization of Section 2 as Fifteenth Amendment enforcement legislation is particularly intriguing because the underlying doctrinal basis for vote dilution doctrine remains the Equal Protection Clause. On this point, the *Milligan* Court's reasoning contains an unexplained assumption. The Court skipped over whether the Fifteenth Amendment applies to redistricting, jumping instead to the question of whether Congress could enact a discriminatory results standard under its Fifteenth Amendment enforcement authority. *Milligan* nevertheless demonstrates the potential in viewing the Fifteenth Amendment as an independent constitutional provision—one that can justify more aggressive congressional action to protect the right to vote free of racial discrimination.[19]

But Section 2 is not out of the woods yet. In *Milligan*, Justice Clarence Thomas, joined by Justices Neil Gorsuch and Amy Coney Barrett, reiterated his long-standing belief that the VRA is unconstitutional as applied to vote dilution claims.[20] Even though Justice Brett Kavanaugh

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14. 143 S. Ct. 1487 (2023). In the interest of full disclosure, I filed an amicus brief in support of the plaintiffs in this case at the Supreme Court. See Brief for Professor Travis Crum as Amicus Curiae Supporting Respondents, *Milligan*, 143 S. Ct. 1487 (Nos. 21-1086 & 21-1087), 2022 WL 2873374.

15. See *Milligan*, 143 S. Ct. at 1502, 1553.

16. See Brief for Appellants at 31, 76, *Milligan*, 143 S. Ct. 1487 (Nos. 21-1086 & 21-1087), 2022 WL 1276146.

17. *Milligan*, 143 S. Ct. at 1506.

18. Id. at 1516.

19. See infra sections I.C, IV.B.1.

20. See *Milligan*, 143 S. Ct. at 1538–39 (Thomas, J., dissenting). Justice Samuel Alito did not join this portion of Thomas's dissent. In his own dissenting opinion, Alito focused on why the plaintiffs failed to satisfy the first *Gingles* prong. See id. at 1548–49 (Alito, J.,

sided with the plaintiffs, he declined to join a key part of Chief Justice John Roberts's opinion concerning the relationship between *Shaw*'s racial predominance standard and Section 2, thereby reducing it to a mere plurality.[21] And in a concurring opinion, Kavanaugh signaled his openness to an argument raised in Thomas's dissent: that Section 2 is invalid on the grounds that Congress's authority to require "race-based redistricting cannot extend indefinitely into the future."[22] The Court recently invoked a temporal argument to invalidate race-based affirmative action in college admissions programs,[23] foreshadowing that a similar claim could be used in a future *Shaw* case.[24] Predictably, states are already raising this temporal argument in the lower courts.[25] Thus, *Shaw* remains a looming threat to Section 2's constitutionality.

In 2024, the Court decided *Alexander v. South Carolina Conference of the NAACP*,[26] a *Shaw* claim brought by civil rights groups against a majority-white district. In an opinion by Justice Samuel Alito, the Court accepted South Carolina's "party not race" defense,[27] effectively greenlighting a strategy for mapmakers to raise partisan gerrymandering as a defense to *Shaw* claims.[28] Thomas's concurrence, however, makes *Alexander* far more remarkable. Despite being one of *Shaw*'s most vocal supporters for decades, Thomas renounced *Shaw*, declaring that racial gerrymandering claims were nonjusticiable political questions.[29] Intriguingly, one of

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dissenting); see also Thornburg v. Gingles, 478 U.S. 30, 50 (1986); infra section I.A.2 (explaining the *Gingles* factors).

21. See *Milligan*, 143 S. Ct. at 1510–11 (plurality opinion) (discussing the relationship between racial predominance and Section 2).

22. Id. at 1519 (Kavanaugh, J., concurring); see also id. (declining to reach this "temporal argument" because Alabama did not raise it); id. at 1543–44 (Thomas, J., dissenting) (criticizing Section 2 for lacking a termination date).

23. See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2172 (2023) (citing Grutter v. Bollinger, 539 U.S. 306, 343 (2003)) (invoking *Grutter*'s twenty-five-year time limit as grounds for invalidating Harvard's and UNC's affirmative action programs); id. at 2222–23 (Kavanaugh, J., concurring) (arguing that affirmative action programs must have an end point).

24. Indeed, this temporal argument is a close cousin of the *Shelby County* Court's criticism that the VRA's coverage formula was based on outdated information. See Shelby County v. Holder, 570 U.S. 529, 556 (2013) ("There is no valid reason to insulate the coverage formula from review merely because it was previously enacted 40 years ago. If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula."); Allison Orr Larsen, Do Laws Have a Constitutional Shelf Life?, 94 Tex. L. Rev. 59, 109–13 (2015) (critiquing *Shelby County*'s stale facts argument).

25. See Alpha Phi Alpha Fraternity, Inc. v. Raffensperger, No. 1:21-CV-5337-SCJ, 2023 WL 5674599, at *20 (N.D. Ga. July 17, 2023) (rejecting Georgia's temporal argument about Section 2's constitutionality).

26. 144 S. Ct. 1221 (2024).

27. See id. at 1240.

28. See id. at 1270 (Kagan, J., dissenting) ("The suspicion, and indeed derision, of suits brought to stop racial gerrymanders are self-evident; the intent to insulate States from those suits no less so.").

29. See id. at 1253 (Thomas, J., concurring in part).

Thomas's analytical moves was to reject the Equal Protection Clause's application to race and redistricting.[30] Thomas did not attempt to reconcile his new position with the VRA's constitutionality,[31] but this Essay shares his impulse to return to first principles.[32] Put simply, the Court's leading originalist is no longer willing to defend *Shaw*.

Given originalism's ascendancy on the Court,[33] this Essay investigates the original understanding of the role of race in the redistricting process. Here, the obvious touchstones are the Fourteenth and Fifteenth Amendments. After all, the Fourteenth Amendment is the contemporary jurisprudential font for voting rights. And the Fifteenth Amendment's guarantee that "[t]he right of citizens . . . to vote shall not be denied *or abridged* . . . on account of race"[34] clearly bans racially discriminatory voting qualifications but also suggests a broader application.

This Essay advances a multipronged argument concerning vote dilution, racial gerrymandering, and Section 2's constitutionality. At the outset, neither vote dilution nor racial gerrymandering claims are properly grounded in the original understanding of the Equal Protection Clause. Section One of the Fourteenth Amendment was understood to exclude political rights.[35] Section Two was a targeted provision that was intended to punish Southern states in the House and the Electoral College if they failed to enfranchise Black men.[36] Indeed, the Reconstruction Framers' decision to adopt the Fifteenth Amendment—instead of enfranchising Black men nationwide via statute—liquidated any

30. See id. at 1260–61 (arguing that the Equal Protection Clause's text and the existence of the Fifteenth Amendment make the Equal Protection Clause "an unlikely source for claims about political districting").

31. See id. at 1252 ("This case is unique because it presents solely constitutional questions. The plaintiffs do not rely on the [VRA] for any of their claims. Nor do the South Carolina officials invoke the [VRA] as part of their defense.").

32. *Alexander* was decided after this Essay had been accepted for publication and had been workshopped four times. However, this Essay had not yet been posted on a publicly available site, like SSRN.

33. See Adam Liptak, Justice Jackson Joins the Supreme Court, and the Debate Over Originalism, N.Y. Times (Oct. 10, 2022), https://www.nytimes.com/2022/10/10/us/politics/jackson-alito-kagan-supreme-court-originalism.html (on file with the *Columbia Law Review*) (noting that Justices Elena Kagan and Ketanji Brown Jackson endorsed originalism during their confirmation hearings).

To be clear, this Essay recognizes that no Justice follows a consistently originalist methodology and that the very definition of originalism is hotly contested. See infra section II.A. Moreover, originalist arguments are oftentimes selectively, strategically, or even cynically deployed. See, e.g., Jack M. Balkin, Memory and Authority: The Uses of History in Constitutional Interpretation 70–73 (2024) (arguing that lawyers and judges are "cafeteria originalists" who pick and choose among originalist arguments). This Essay nevertheless takes originalist arguments seriously on their own terms, rather than critique the project itself.

34. U.S. Const. amend. XV, § 1 (emphasis added).

35. See infra section II.C.

36. See infra section II.C.

uncertainty surrounding the Fourteenth Amendment's application to voting rights.[37] Thus, from an originalist perspective, the Court has committed a grave category error: grounding two constitutional claims in the wrong amendment. This misstep is particularly damning for *Shaw*'s originalist defenders, as it suggests that racial gerrymandering claims are based on normative preferences for colorblindness rather than a faithful interpretation of the Equal Protection Clause.

Turning to the Fifteenth Amendment, the subject of redistricting did not feature prominently in its drafting or ratification. Instead, the Reconstruction Framers debated two key questions. First, whether to forbid additional voting qualifications, such as those based on property or education.[38] Second, whether the right to hold office should be explicitly protected and, once it was deleted from the text, whether it was nevertheless implicitly covered.[39] This history suggests that the Reconstruction Framers did not *intend* to regulate redistricting, but that does not fully answer the original public meaning of the Fifteenth Amendment's text.

In answering that question, this Essay looks at postratification practice as evidence of original understanding.[40] This Essay recounts how Congress declined to regulate race-based redistricting in the Reconstruction era Enforcement Acts and failed to enforce Section Two of the Fourteenth Amendment's apportionment penalty.[41] It also discusses how Congress imposed a one-person, one-vote standard for the 1870 redistricting cycle.[42] It then excavates congressional redistricting plans from Reconstruction and Redemption to determine how race was used by mapmakers.[43] These

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37. See Travis Crum, The Superfluous Fifteenth Amendment?, 114 Nw. U. L. Rev. 1549, 1617–22 (2020) [hereinafter Crum, Superfluous Fifteenth Amendment] ("Congress opted against the statutory option because neither the original Constitution nor the recently ratified Fourteenth Amendment provided sufficient authority. . . . The Fifteenth Amendment was thus a significant expansion of congressional authority to regulate voting rights in the states." (emphasis omitted)); infra section II.D.1.

38. See infra section II.D.3.

39. See infra sections II.D.2–.4.

40. See infra section III.A (discussing the relevance of postratification evidence).

41. See infra sections III.B.1–.2.

42. See infra section III.B.3.

43. For the underlying data, this Essay relies on Stanley B. Parsons, William W. Beach & Michael J. Dubin, United States Congressional Districts and Data, 1843–1883 (1986) [hereinafter Parsons et al., 1843–1883], and Stanley B. Parsons, Michael J. Dubin & Karen Toombs Parsons, United States Congressional Districts, 1883–1913 (1990) [hereinafter Parsons et al., 1883–1913]. Although the data are largely derived from these books, I uncovered a systematic error in the 1870-era redistricting tables that downplayed the percentage of Black inhabitants in each district. For Southern states, the 1870 Census contained two tables delineating the number of Black inhabitants across several decades. One was labeled "free colored" while the other was labeled "slave." After emancipation, the "slave" table zeroes out in 1870. See Francis A. Walker, A Compendium of the Ninth Census (June 1, 1870): Compiled Pursuant to a Concurrent Resolution of Congress, and Under the Direction of the Secretary of the Interior 14–16 (1872) [hereinafter 1870 Census]. It

practices are particularly probative of original understanding because the 1870 redistricting cycle was the first one conducted after the ratification of the Reconstruction Amendments and the widespread enfranchisement of Black men. At the time, voting was intensely racially polarized in the Southern states: Black voters overwhelmingly backed Republicans while white voters mostly supported Democrats.[44] Indeed, this political alignment was openly discussed and motivated the Reconstruction Framers—who were all Republicans—to pass the Fifteenth Amendment.[45] Mapmakers, therefore, could rely on race as a proxy for partisanship when drawing districts.[46] Unsurprisingly, both Republican and Democratic state legislatures did so.[47]

In light of this evidence, there is little historical support for *Shaw*'s racial gerrymandering cause of action under the Fifteenth Amendment. Even assuming the Fifteenth Amendment applies to redistricting, the Reconstruction Framers were comfortable with race-conscious decisionmaking, as evidenced by their frequent references to racial bloc voting. Moreover, there is postratification evidence that Republican legislatures in the South took race into account when drawing congressional districts.[48]

By contrast, Democrats packed and cracked Black voters when they seized power at the end of Reconstruction, thus providing a historical antecedent to contemporary vote dilution. On this point, the historical record on whether these actions were viewed as constitutional violations lacks clarity, as vote dilution was just one of many tools—including discriminatory voting qualifications and outright violence—employed by racist Southerners to neutralize the political power of Black men and effectively nullify the Fifteenth Amendment.[49]

Finally, given potential disagreement over the original understanding of the Fourteenth and Fifteenth Amendments' application to race-based redistricting, Section 2 of the VRA is best defended as an exercise of Congress's *Fifteenth* Amendment enforcement authority to remedy racial

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appears that Parsons, Beach, and Dubin continued using the "slave" table rather than the accurate "free colored" table for some counties. Compare id. at 25 (showing that Etowah County, Alabama, had 1,708 Black inhabitants in 1870), with Parsons et al., 1843–1883, supra, at 146 (showing Etowah County, Alabama, as having a total population of 10,109 inhabitants and 0.0% for the Black percentage of the population). This Essay corrects that error using census data and notes when doing so by citing to the 1870 Census.

44. See infra section II.B.

45. See infra section II.D.

46. See J. Morgan Kousser, Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction 29 (1999) ("Since voting was well known at the time to be extremely racially polarized—a conclusion borne out by extensive statistical analyses—a partisan gerrymander amounted to a racial gerrymander." (citation omitted)).

47. See infra section III.C.

48. See infra section III.C.

49. See infra section IV.B; see also Foner, Second Founding, supra note 9, at 144 (discussing the role of violence in the overthrow of Reconstruction).

discrimination in voting and protect the effective right of racial minorities to hold office.[50] Viewing Section 2 as Fifteenth Amendment enforcement legislation—as the Court did in *Milligan*—is critical because Congress has more leeway to pass enforcement legislation under that Amendment than the Fourteenth. Conversely, with little historical support for *Shaw*, the primary threat to Section 2's constitutionality evaporates.

In addition, under the Elections Clause, Congress has near plenary authority to regulate federal elections, which would include the power to set requirements for congressional redistricting.[51] Absent any race-based, external restraint from the Reconstruction Amendments, Congress would be free to impose Section 2 on the states for purposes of congressional redistricting.[52]

In articulating these claims, this Essay makes several contributions. The literature on the Fourteenth Amendment could fill a small library. The Fifteenth Amendment, however, has been largely ignored by legal scholars.[53] This Essay is the first to examine the Fifteenth Amendment's

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50. See infra Part IV.

51. See U.S. Const. art. I, § 4 ("Congress may at any time by Law make or alter [federal election] Regulations . . . .").

52. Under the Elections Clause, Congress can preempt state laws that regulate federal elections. See id. ("The Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . ."); Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 13–15 (2013) (holding that there is no presumption against preemption under the Elections Clause).

53. Indeed, legal scholarship that primarily focuses on the Fifteenth Amendment's adoption can be summarized in a long footnote. See Earl M. Maltz, Civil Rights, the Constitution, and Congress, 1863–1869, at 142–56 (1990) [hereinafter Maltz, Civil Rights] (claiming that the Fifteenth Amendment prohibits only facially discriminatory laws); 2 The Reconstruction Amendments: The Essential Documents 435–597 (Kurt T. Lash ed., 2021) [hereinafter The Essential Documents] (compiling primary sources); Vikram David Amar & Alan Brownstein, The Hybrid Nature of Political Rights, 50 Stan. L. Rev. 915, 928–56 (1998) (arguing that the Reconstruction Framers had a race-conscious approach to adopting the Fifteenth Amendment); Vikram David Amar, Jury Service as Political Participation Akin to Voting, 80 Cornell L. Rev. 203, 222–41 (1995) [hereinafter Amar, Jury Service] (discussing the Fifteenth Amendment's drafting and its relevance to the right to serve on a jury); Alfred Avins, Literacy Tests and the Fifteenth Amendment: The Original Understanding, 12 S. Tex. L.J. 24, 64–66 (1970) (arguing that Congress could not ban literacy tests under its Fifteenth Amendment enforcement authority); Alfred Avins, The Right to Hold Public Office and the Fourteenth and Fifteenth Amendments: The Original Understanding, 15 U. Kan. L. Rev. 287, 304 (1967) (arguing that the Fifteenth Amendment does not protect the right to hold office); Henry L. Chambers, Jr., Colorblindness, Race Neutrality, and Voting Rights, 51 Emory L.J. 1397, 1425 (2002) ("[T]he Fifteenth Amendment should not be viewed as merely adding the right to vote to the list of other rights to be protected under the Constitution and . . . the Fourteenth Amendment."); Gabriel J. Chin, Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?, 92 Geo. L.J. 259, 263–64 (2004) (arguing that the Fifteenth Amendment effectively repealed Section Two of the Fourteenth Amendment); Travis Crum, The Lawfulness of the Fifteenth Amendment, 97 Notre Dame L. Rev. 1543, 1573–91 (2022) [hereinafter Crum, Lawfulness of the

application to redistricting through an originalist lens. My past work that canvassed the Fifteenth Amendment's adoption explicitly declined to resolve open doctrinal questions such as the Fifteenth Amendment's application to redistricting.[54] This Essay answers that question and is the first piece in a trilogy that examines the Fifteenth Amendment's application to redistricting, private action, and facially neutral voting qualifications. In a similar vein, this Essay is the first to thoroughly analyze the originalist underpinnings of both vote dilution and racial gerrymandering doctrine.[55] And although other scholars—particularly historians—have looked to redistricting during Reconstruction and Redemption to demonstrate how Jim Crow was established,[56] this Essay is

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Fifteenth Amendment] (discussing the irregularities in the Fifteenth Amendment's adoption); Travis Crum, Reconstructing Racially Polarized Voting, 70 Duke L.J. 261, 314–20 (2020) [hereinafter Crum, Racially Polarized Voting] (criticizing the Court's treatment of racially polarized voting as inconsistent with the Fifteenth Amendment's historical context); Crum, Superfluous Fifteenth Amendment, supra note 37, at 1602–17 (discussing the Fortieth Congress's decision to pass a constitutional amendment rather than a nationwide suffrage statute); Crum, Unabridged Fifteenth Amendment, supra note 13, at 1050 (arguing that the Fifteenth Amendment bans the use of racial proxies and protects the right to hold office); David P. Currie, The Reconstruction Congress, 75 U. Chi. L. Rev. 383, 452–56 (2008) (summarizing the history of the Fifteenth Amendment's adoption); Earl Maltz, The Coming of the Fifteenth Amendment: The Republican Party and the Right to Vote in the Early Reconstruction Era, 82 La. L. Rev. 395, 418–43 (2022) [hereinafter Maltz, Coming of the Fifteenth] (surveying the congressional debate over the Fifteenth Amendment); Richard M. Re & Christopher M. Re, Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments, 121 Yale L.J. 1584, 1630–41 (2012) (discussing the Fifteenth Amendment's adoption and felon disenfranchisement laws).

54. See Crum, Unabridged Fifteenth Amendment, supra note 13, at 1123.

55. Two other papers have made similar—but more limited—claims. First, Vikram Amar and Alan Brownstein questioned *Shaw*'s doctrinal underpinnings on Fifteenth Amendment grounds. See Amar & Brownstein, supra note 53, at 919 (describing the contradiction between the reasons for the Fifteenth Amendment and the reasoning in *Shaw*). But their article gave "only brief consideration" to vote dilution doctrine over the course of two pages. Id. at 976–77. Second, in a prior article, I critiqued the Court's treatment of racial bloc voting as a constitutional taboo. See Crum, Racially Polarized Voting, supra note 53, at 310–11. That article gestured toward a holistic reassessment of voting rights jurisprudence based on the Fifteenth Amendment, but it "d[id] not purport to exhaustively address whether the Fifteenth Amendment prohibits vote dilution." Id. at 326.

56. See, e.g., Joseph H. Cartwright, The Triumph of Jim Crow: Tennessee Race Relations in the 1880s, at 223 (1976) (discussing vote dilution of Tennessee congressional districts); Eric Foner, Reconstruction: America's Unfinished Revolution: 1863–1877, at 590 (1988) [hereinafter Foner, Reconstruction] (discussing the packing of Mississippi's Black voters in a "'shoestring' Congressional district running the length of the Mississippi River"); Kousser, supra note 46, at 26–31 (discussing vote dilution in congressional districts in Mississippi, North Carolina, and South Carolina); Howard N. Rabinowitz, Race Relations in the Urban South, 1865–1890, at 270 (1978) ("Gerrymandering in its various forms was the most effective tactic used by sympathetic legislatures both to redeem the cities and to keep them in the hands of white Democrats."); Lawrence D. Rice, The Negro in Texas, 1874–1900, at 25 (1971) (discussing vote dilution in Texas's judicial districts); Sarah Woolfolk Wiggins, The Scalawag in Alabama Politics, 1865–1881, at 104 (1977) [hereinafter Wiggins,

the first to use those redistricting plans to shine light on the original understanding of the Fourteenth and Fifteenth Amendments. Finally, this Essay makes a novel argument that Section 2 can be reconceptualized as protecting the right of minority *politicians* to hold office, as opposed to focusing on the right of minority *voters* to elect their candidates of choice.

The Essay proceeds as follows. Part I canvasses the Court's doctrine on vote dilution and racial gerrymandering, highlighting the tension in how the Court has interpreted the Equal Protection Clause while ignoring the Fifteenth Amendment. Part II examines the original understanding of the Fourteenth and Fifteenth Amendments as applied to voting rights and redistricting. Part III excavates postratification evidence of how Congress and states approached the use of race in redistricting during Reconstruction and Redemption. Part IV reconciles vote dilution and racial gerrymandering doctrine with the original understanding of the Fourteenth and Fifteenth Amendments. Part IV concludes by arguing that Section 2 can be defended as an exercise of Congress's Fifteenth Amendment enforcement authority.

I. THE LAW OF RACE AND REDISTRICTING

Under the Fourteenth Amendment's Equal Protection Clause, mapmakers must consider race, just not too much. The Court's decision in *Regester* and Congress's 1982 amendments to Section 2 protect racial minorities from having their votes diluted. By contrast, *Shaw* restricts the use of race in redistricting. Meanwhile, the Fifteenth Amendment is absent from the doctrine. And therein lies the rub: The underlying cause of this doctrinal tension is that the Court has applied Fourteenth Amendment principles to what should be considered Fifteenth Amendment cases. The Court's recent decision in *Milligan* alleviates—but does not eliminate—this tension. And Thomas's *Alexander* concurrence calls for a wholesale reimagining of the doctrine based on originalist principles. This Part traces the development of the doctrine of race and redistricting from *Regester* to *Shaw* to the erasure of the Fifteenth Amendment to today's uneasy détente.

A. *Racial Vote Dilution*

Under current doctrine, the Equal Protection Clause and Section 2 of the VRA prohibit racial vote dilution. To understand vote dilution, it is helpful to first discuss a predicate condition: racially polarized voting. Also referred to as racial bloc voting, racially polarized voting occurs when racial minorities are "politically cohesive" and the "majority votes

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Alabama Politics] (discussing the Democratic gerrymander of Alabama's congressional districts); see also Carol M. Swain, Black Faces, Black Interests: The Representation of African Americans in Congress 20–29 (1993) (surveying the election of Black politicians to Congress during Reconstruction).

sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."[57] There is no magic ratio for legally cognizable racial bloc voting, which "var[ies] according to a variety of factual circumstances."[58] Unfortunately, "racially polarized voting [is] not ancient history"[59] and remains a persistent feature of American politics.

When voting is racially polarized, "racial minorities are at risk of being systematically outvoted and having their interests underrepresented" because mapmakers can exploit racial differences to draw districts that entrench the dominant party in power.[60] For instance, mapmakers can pack or crack minority voters—that is, voters can be overconcentrated within a district or they can be spread out into multiple districts.[61] Alternatively, at-large and multi-member districts can submerge minority voters "in a larger white voting population," thereby diluting their votes.[62] Furthermore, certain "structural rules within an electoral jurisdiction . . . may enhance the winner-take-all aspects of at-large elections," such as numbered posts and anti-single-shot provisions.[63]

1. *Racial Vote Dilution Under the Constitution.* — Following the VRA's enactment, newly enfranchised Black voters in the South had to contend with these dilutive tactics, sparking a new wave of lawsuits.[64] In its 1973 decision in *White v. Regester*,[65] the Court held that racial vote dilution violates the Equal Protection Clause when "the political processes leading to nomination and election [a]re not equally open to participation by the group in question—that its members ha[ve] less opportunity . . . to participate in the political processes and to elect legislators of their

57. Thornburg v. Gingles, 478 U.S. 30, 51 (1986).

58. Id. at 58 ("Consequently, there is no simple doctrinal test for the existence of legally significant racial bloc voting."); see also Christopher S. Elmendorf, Kevin M. Quinn & Marisa A. Abrajano, Racially Polarized Voting, 83 U. Chi. L. Rev. 587, 625–26 (2016) ("[T]here are no established quantitative cutoffs to distinguish polarized from nonpolarized communities . . . .").

59. Bartlett v. Strickland, 556 U.S. 1, 25 (2009) (plurality opinion).

60. Shelby County v. Holder, 570 U.S. 529, 578 (2013) (Ginsburg, J., dissenting).

61. See, e.g., Johnson v. De Grandy, 512 U.S. 997, 1007 (1994) ("[M]anipulation of district lines can dilute the voting strength of politically cohesive minority group members, whether by fragmenting . . . or by packing them . . . to minimize their influence in the districts next door." (citing Voinovich v. Quilter, 507 U.S. 146, 153–54))).

62. Growe v. Emison, 507 U.S. 25, 40 (1993).

63. Pamela S. Karlan, The Rights to Vote: Some Pessimism About Formalism, 71 Tex. L. Rev. 1705, 1714 (1993) [hereinafter Karlan, Pessimism About Formalism].

64. See Lani Guinier, The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success, 89 Mich. L. Rev. 1077, 1093–94 (1991) ("[T]he focus shifted to second generation, indirect structural barriers such as at large, vote-diluting elections. . . . Thus, second generation voting rights litigation focused on 'qualitative vote dilution.'").

65. 412 U.S. 755 (1973).

choice."[66] Adopting a "totality of the circumstances"[67] approach, the Court looked to several factors, including the number of minorities elected to office, the jurisdiction's history of racial discrimination in voting, racial inequities in socioeconomic indicators, racial campaign tactics, legislators' responsiveness to the minority community's interests, and racially polarized voting.[68] In establishing racial vote dilution as a claim under the Equal Protection Clause, the *Regester* Court made clear that racial minorities do *not* have a right to proportional representation.[69]

In the 1980 case of *City of Mobile v. Bolden*,[70] the Court entertained both constitutional and statutory vote dilution claims. A plurality interpreted Section 2 of the VRA to be limited to vote denial claims, thereby excluding vote dilution claims.[71] On the constitutional front, the *Bolden* plurality concluded that discriminatory intent was a necessary element of a vote dilution claim under the Fourteenth Amendment.[72] And in *Rogers v. Lodge*,[73] a majority of the Court made the *Bolden* plurality's equal protection conclusion a holding.[74] This development mirrored the Court's shift to requiring a showing of discriminatory intent to invalidate facially neutral laws.[75]

2. *Racial Vote Dilution Under Section 2.* — The *Bolden* Court's decision sparked immediate controversy.[76] Coincidentally, Congress had to reauthorize the temporary provisions of the VRA in 1982.[77] Congress,

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66. Id. at 766 (citing Whitcomb v. Chavis, 403 U.S. 124, 149–150 (1971)); see also *Whitcomb*, 403 U.S. at 141–44 (leaving open the possibility of racial vote dilution claims); James U. Blacksher & Larry T. Menefee, From *Reynolds v. Sims* to *City of Mobile v. Bolden*: Have the White Suburbs Commandeered the Fifteenth Amendment?, 34 Hastings L.J. 1, 22 (1982) (noting *Regester*'s unprecedented holding).

67. *Regester*, 412 U.S. at 769.

68. See id. at 766–79.

69. See id. at 765–66 ("To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential.").

70. 446 U.S. 55 (1980), superseded by statute, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131, 134 (codified as amended at 52 U.S.C. § 10301 (2018)).

71. See id. at 60–61 (plurality opinion).

72. See id. at 66–67.

73. 458 U.S. 613 (1982).

74. See id. at 617; see also infra section I.C (discussing how *Bolden* and *Rogers* also had implications for the Fifteenth Amendment).

75. See *Bolden*, 446 U.S. at 66; see also Samuel Issacharoff, Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence, 90 Mich. L. Rev. 1833, 1845 (1992) (commenting that "[t]he Court [has] recast voting rights claims in the mold of *Washington v. Davis*" (citing 426 U.S. 229 (1976))).

76. See Allen v. Milligan, 143 S. Ct. 1487, 1499 (2023) (describing the media and civil rights community's immediate backlash to and criticism of *Bolden*).

77. See, e.g., Samuel Issacharoff, Pamela S. Karlan, Richard H. Pildes, Nathaniel Persily & Franita Tolson, The Law of Democracy: Legal Structure of the Political Process 524–30 (6th ed. 2022) (canvassing Section 2's legislative history).

therefore, seized on the opportunity to significantly revise Section 2 in two ways. First, Congress authorized vote dilution claims.[78] Second, Congress permitted a finding of liability based on discriminatory results.[79] In so doing, Congress expressly incorporated *Regester*'s "totality of [the] circumstances" standard and opportunity-to-elect language into Section 2's text.[80] Congress also adopted language disavowing a right to proportional representation.[81] And an influential committee report listed the so-called Senate Factors, which were "gleaned from the constitutional vote dilution jurisprudence of the 1970s" and would inform the totality of the circumstances analysis.[82] Congress relied on its Reconstruction Amendment enforcement authority in embracing a discriminatory results standard.[83]

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78. See Chisom v. Roemer, 501 U.S. 380, 394–95 (1991) (discussing the Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131, 134 (codified as amended at 52 U.S.C. § 10301 (2018))).

79. See id. at 396. In recent years, controversy has arisen over whether Congress's adoption of a discriminatory results standard may have *excluded* Section 2 claims based on discriminatory intent. See League of Women Voters of Fla., Inc. v. Fla. Sec'y of State, 66 F.4th 905, 943 (11th Cir. 2023) (holding that "a finding of discriminatory impact is necessary to establish a violation of section 2 of the Voting Rights Act"); Amandeep S. Grewal, Discriminatory Intent Claims Under Section 2 of the Voting Rights Act, 2 Fordham L. Voting Rts. & Democracy F. 1, 4 (2023) (arguing that Section 2 lacks an intent test and advocating that Congress fix that oversight).

80. 52 U.S.C. § 10301(b); see also *Milligan*, 143 S. Ct. at 1500–01 (describing *Regester*'s role in Section 2's amendment).

81. 52 U.S.C. § 10301(b) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." (emphasis omitted)); see also *Milligan*, 143 S. Ct. at 1500 (discussing this so-called "Dole compromise").

82. Elmendorf et al., supra note 58, at 597 (citing S. Rep. No. 97-417, at 28–29 (1982) (listing Senate Factors)).

83. See Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 727–28 (2003) ("Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.").

On this point, it may be important to differentiate between the Fourteenth and Fifteenth Amendments, especially as this Essay investigates whether either Amendment was originally understood to apply to redistricting. The *Rogers* Court made clear that discriminatory intent is a necessary element of a vote dilution claim grounded in the Equal Protection Clause. See Rogers v. Lodge, 458 U.S. 613, 617 (1982) ("[A] showing of discriminatory intent has long been required in *all* types of equal protection cases charging racial discrimination." (citing Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976); Wright v. Rockefeller, 376 U.S. 52 (1964))). But a majority of the Court has never held that the Fifteenth Amendment requires a showing of discriminatory intent. See *Milligan*, 143 S. Ct. at 1516 ("But we held over 40 years ago 'that, even if § 1 of the [Fifteenth] Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2 [of the Fifteenth Amendment] outlaw voting practices that are discriminatory in effect.'" (alterations in original) (quoting City of Rome v. United States, 446 U.S. 156, 173 (1980))); Crum, Racially Polarized Voting, supra note 53, at 295 (distinguishing between Congress's Fourteenth and Fifteenth Amendment enforcement authority as to Section 2); Christopher S. Elmendorf, Making Sense of Section 2: Of Biased

The Court first addressed the revised Section 2 in its landmark decision in *Thornburg v. Gingles*.[84] There, the Court established three "necessary preconditions" that plaintiffs must satisfy to bring a racial vote dilution claim under Section 2.[85] First, the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district."[86] Second, the minority group must be "politically cohesive."[87] And finally, majority bloc voting must "usually . . . defeat the minority's preferred candidate."[88] Thus, the *Gingles* factors require plaintiffs to establish residential segregation and racially polarized voting.[89] As the *Gingles* Court put it: "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[90] Although *Gingles* concerned multi-member districts, the Court would soon extend its preconditions to single-member redistricting plans.[91]

To be clear, the *Gingles* factors are necessary conditions for a vote dilution claim under Section 2, but they are not sufficient.[92] Once the *Gingles* factors are satisfied, courts turn to a totality of the circumstances inquiry, which draws on *Regester*'s factors.[93] At this stage of the inquiry, the Court has looked to the Senate Factors, which include, among others, whether the number of majority-minority districts is "*roughly* proportional to the minority voters' respective shares in the voting-age population."[94] This rough proportionality inquiry is in some tension with *Regester*'s rejection of proportional representation and with Section 2's textual disavowal of such a right.[95] The Court has reconciled this tension on the

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Votes, Unconstitutional Elections, and Common Law Statutes, 160 U. Pa. L. Rev. 377, 401 n.117 (2012) ("Section 2 may need the Fourteenth Amendment as its anchor insofar as it reaches injuries beyond simple vote denial, as it remains disputed whether the Fifteenth Amendment goes any further."); infra section I.C.

84. 478 U.S. 30, 34 (1986).

85. Id. at 50.

86. Id.

87. Id. at 51.

88. Id.

89. See, e.g., Nicholas O. Stephanopoulos, Race, Place, and Power, 68 Stan. L. Rev. 1323, 1327 (2016) (explaining "the two key determinants of minority representation under the Court's approach" are "racial segregation and racial polarization in voting").

90. *Gingles*, 478 U.S. at 47.

91. See Growe v. Emison, 507 U.S. 25, 40–41 (1993).

92. The Court has adopted a different approach for vote denial claims brought under Section 2. See Brnovich v. DNC, 141 S. Ct. 2321, 2338–40 (2021).

93. See, e.g., Johnson v. De Grandy, 512 U.S. 997, 1011–12 (1994).

94. Id. at 1000 (emphasis added).

95. See 52 U.S.C. § 10301(b) (2018) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."); White v. Regester, 412 U.S. 755, 765–66 (1973) ("To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential.").

grounds that Section 2 "speaks to the success of minority candidates[] as distinct from the political or electoral power of minority voters."[96]

As the *Milligan* Court recently explained: Because "[f]orcing proportional representation is unlawful and inconsistent with this Court's approach to implementing § 2,"[97] there are only three states and one state, respectively, in which Black- and Hispanic-preferred candidates win congressional seats proportionate to their share of the population.[98] According to the Court, "[t]he numbers bear the point out" because, as residential segregation decreases, it becomes more difficult to satisfy the compactness requirement.[99] In fact, "[s]ince 2010, plaintiffs nationwide have apparently succeeded in fewer than ten § 2 suits."[100]

To sum up, the constitutional and statutory standards differ. The constitutional standard requires a showing of discriminatory intent—a notoriously hard standard for plaintiffs to satisfy.[101] Indeed, the Court has not found a constitutional vote dilution violation since 1982, and it has never done so in a case involving a single-member redistricting plan.[102] By contrast, Section 2 may be satisfied with a showing of discriminatory results and, as interpreted by the Court, employs the *Gingles* preconditions.[103] And today, Section 2 is the primary vehicle for enforcing voting rights.[104]

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96. *De Grandy*, 512 U.S. at 1014 n.11.

97. Allen v. Milligan, 143 S. Ct. 1487, 1509 (2023).

98. See id.

99. See id.

100. Id. (citing Brief of Amici Curiae Professors Jowei Chen, Christopher S. Elmendorf et al. in Support of Appellees/Respondents at 7, *Milligan*, 143 S. Ct. 1487 (Nos. 21-1086 & 21-1087), 2022 WL 2873376).

101. See, e.g., Pamela S. Karlan, Two Section Twos and Two Section Fives: Voting Rights and Remedies After *Flores*, 39 Wm. & Mary L. Rev. 725, 735–36 (1998) ("Given the minuscule size of the voting rights bar, requiring plaintiffs to prove intentional discrimination in cases involving complex election practices with lengthy and distant pedigrees would quite plausibly leave literally thousands of unconstitutional systems in place.").

102. Travis Crum, Deregulated Redistricting, 107 Cornell L. Rev. 359, 439 n.539 (2022) [hereinafter Crum, Deregulated Redistricting]; see also Bartlett v. Strickland, 556 U.S. 1, 20 (2009) (plurality opinion) (clarifying that its conclusion as to the first *Gingles* prong "does not apply to cases in which there is intentional discrimination against a racial minority"); League of United Latin Am. Citizens v. Perry (*LULAC*), 548 U.S. 399, 440 (2006) (remarking that Texas's mid-decade congressional redistricting plan "bears the mark of intentional discrimination that could give rise to an equal protection violation").

103. See 52 U.S.C. § 10301(b) (2018); supra notes 84–89 and accompanying text.

104. See Nathaniel Persily, The Promise and Pitfalls of the New Voting Rights Act, 117 Yale L.J. 174, 201–02 (2007) (noting the shift away from constitutional claims); see also Christopher S. Elmendorf & Douglas M. Spencer, Administering Section 2 of the Voting Rights Act After *Shelby County*, 115 Colum. L. Rev. 2143, 2152 (2015) (arguing that Section 2 is a "[w]eak [s]ubstitute" for the preclearance regime).

Although discriminatory results claims are far more prevalent, plaintiffs have started alleging discriminatory intent to attempt to "bail-in" jurisdictions back into the preclearance regime after *Shelby County*. See Crum, Deregulated Redistricting, supra note 102, at 390–93 (cataloging this development); Travis Crum, Note, The Voting Rights Act's Secret Weapon:

The upshot is that vote dilution doctrine requires mapmakers to take race into account during the redistricting process to avoid liability.[105]

B. *Racial Gerrymandering*

In reaction to aggressive interpretations of the VRA adopted by the DOJ, the Rehnquist Court developed *Shaw*'s racial gerrymandering claim, which allowed white plaintiffs to successfully challenge majority-minority districts. *Shaw* was initially viewed as a threat to the VRA. But in the 2010s, civil rights groups flipped the doctrine on its head and successfully used it to challenge packed majority-Black districts. Then, just this year, Thomas—the Court's most prominent originalist—rejected *Shaw* and concluded that racial gerrymandering claims are nonjusticiable political questions.

1. Shaw*'s First Wave*. — From the VRA's passage in 1965 through the Supreme Court's 2013 decision in *Shelby County v. Holder*, several Southern states were so-called "'covered' jurisdictions" subject to Section 5 of the VRA.[106] Because of their history of racial discrimination, covered jurisdictions had to preclear voting changes with the DOJ or a three-judge district court.[107] In the 1990 redistricting cycle, President George H.W. Bush's DOJ adopted a novel "[B]lack-maximization" interpretation of Section 5 that required covered jurisdictions to create the maximum possible number of majority-minority districts.[108] In response, the Democratic-controlled North Carolina General Assembly drew bizarrely shaped majority-Black districts to obtain preclearance.[109]

In *Shaw v. Reno*,[110] a group of white plaintiffs brought an equal protection challenge against North Carolina's congressional redistricting plan.[111] In agreeing that the plaintiffs had stated a claim, the Court recognized a new "analytically distinct"[112] racial gerrymandering cause of action under the Equal Protection Clause.[113] In contrast to vote dilution

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Pocket Trigger Litigation and Dynamic Preclearance, 119 Yale L.J. 1992, 2019–21 (2010) (arguing that bail-in suits could help respond to a decision invalidating the VRA's coverage formula even in the absence of congressional action).

105. Although outside this Essay's scope, there is ongoing controversy over whether Section 2 has an implied cause of action for private litigants. See Brnovich v. DNC, 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., concurring) (flagging the question); Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204, 1206–07 (8th Cir. 2023) (holding that it does not); Robinson v. Ardoin, 86 F.4th 574, 588 (5th Cir. 2023) (holding that it does).

106. 570 U.S. 529, 537 (2013).

107. See id. at 537–40.

108. See Miller v. Johnson, 515 U.S. 900, 921 (1995).

109. See Richard L. Hasen, Racial Gerrymandering's Questionable Revival, 67 Ala. L. Rev. 365, 369 (2015) [hereinafter Hasen, Racial Gerrymandering].

110. 509 U.S. 630 (1993).

111. See id. at 636–38.

112. Id. at 652.

113. See id. at 642.

doctrine, *Shaw*'s "racial gerrymandering claim does not ask for a fair share of political power and influence . . . [but] asks instead for the elimination of a racial classification."[114]

According to the *Shaw* Court, "The Equal Protection Clause['s] . . . central purpose is to prevent the States from purposefully discriminating between individuals on the basis of race"[115] and therefore prohibits a "reapportionment plan [that] rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification."[116] Alluding to the geopolitics of the 1990s, the Court claimed that race-based redistricting "bears an uncomfortable resemblance to political apartheid"[117] and "balkanize[s] us into competing racial factions."[118] Race-based redistricting, the Court elaborated, "threatens to carry us further from the goal of a political system in which race no longer matters."[119]

Initially, the *Shaw* Court focused on the "bizarre" and "highly irregular" shape of the challenged majority-minority district.[120] But in *Miller v. Johnson*,[121] the Court abandoned an aesthetics-based standard and adopted the "predominant factor" test.[122] Although a district's shape is still relevant evidence,[123] *Shaw* plaintiffs must "prove that the [mapmaker] subordinated traditional race-neutral redistricting principles, including but not limited to compactness, contiguity, and respect for political subdivisions[,] . . . to racial considerations."[124] For example, if a mapmaker moved a substantial number of voters into and out of a district in contradiction of traditional redistricting principles to achieve a racial target, then the racial predominance standard would be satisfied.[125] Critically, a mapmaker's "aware[ness] of racial demographics" is insufficient; race must "predominate[] in the redistricting process."[126] This distinction between awareness and motive opens the door to mapmakers arguing that,

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114. Rucho v. Common Cause, 139 S. Ct. 2484, 2502 (2019).

115. *Shaw*, 509 U.S. at 642 (citing Washington v. Davis, 426 U.S. 229, 239 (1976)).

116. Id. at 652.

117. Id. at 647.

118. Id. at 657.

119. Id.

120. Id. at 646.

121. 515 U.S. 900 (1995).

122. Id. at 916; see also Bethune-Hill v. Va. State Bd. of Elections (*Bethune-Hill I*), 137 S. Ct. 788, 798 (2017) (acknowledging this doctrinal shift); Heather K. Gerken, Understanding the Right to an Undiluted Vote, 114 Harv. L. Rev. 1663, 1692–93 (2001) [hereinafter Gerken, Undiluted Vote] (arguing that only Justice Sandra Day O'Connor appeared to endorse *Shaw*'s "expressive harm" theory).

123. See *Miller*, 515 U.S. at 916–17.

124. Id. at 916.

125. See Cooper v. Harris, 137 S. Ct. 1455, 1468–70 (2017); Ala. Legis. Black Caucus v. Alabama, 575 U.S. 254, 273–74 (2015).

126. *Miller*, 515 U.S. at 916 (citing Shaw v. Reno, 509 U.S. 630, 646 (1993)).

in jurisdictions with racial bloc voting, they were motivated by partisanship—not race—in moving voters between districts.[127]

"[I]f racial considerations predominated over [traditional redistricting principles], the design of the district must withstand strict scrutiny" and the mapmaker must "prove that its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end."[128] For decades, the Court has refused to answer whether compliance with the VRA is a compelling governmental interest; instead, the Court has merely "assumed that one compelling interest is complying with operative provisions of the [VRA]."[129] On the narrow tailoring prong, mapmakers must have "'a strong basis' in evidence for concluding that the [VRA] required its action."[130] Put differently, a mapmaker needed "'good reasons' to think it would transgress the [VRA] if it did *not* draw race-based district lines."[131]

The *Shaw* Court's hostility to the VRA reflects a colorblind approach to the Constitution.[132] Moreover, *Shaw*-esque arguments started creeping into the conservative Justices' interpretation of the VRA.[133] Unsurprisingly, for its first two decades, *Shaw* was criticized by liberal Justices and legal scholars for its doctrinal incoherence and for threatening the VRA's constitutionality.[134]

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127. See *Cooper*, 137 S. Ct. at 1473 (rejecting an argument that a district was packed "with Democrats, not African-Americans"); Easley v. Cromartie, 532 U.S. 234, 253 (2001) (accepting party—not race—as a defense); 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, 1838–39 (2018) (discussing the difficulty in disentangling race and party).

128. *Cooper*, 137 S. Ct. at 1464 (citing Bethune-Hill v. Va. State Bd. Of Elections (*Bethune-Hill I*), 137 S. Ct. 788, 800 (2017)).

129. Id.; see also *Bethune-Hill I*, 137 S. Ct. at 801 (assuming compliance with Section 5, when it was operative, was a compelling interest); Shaw v. Hunt (*Shaw II*), 517 U.S. 899, 915 (1996) (assuming compliance with Section 2 is a compelling governmental interest).

130. *Cooper*, 137 S. Ct. at 1464 (quoting Ala. Legis. Black Caucus v. Alabama, 575 U.S. 254, 278 (2015)).

131. Id. (quoting *Ala. Legis. Black Caucus*, 575 U.S. at 278).

132. See, e.g., Bush v. Vera, 517 U.S. 952, 1071–72 (1996) (Souter, J., dissenting) (critiquing *Shaw*'s colorblind rationale); Dale E. Ho, Something Old, Something New, or Something Really Old? Second Generation Racial Gerrymandering Litigation as Intentional Racial Discrimination Cases, 59 Wm. & Mary L. Rev. 1887, 1891 (2018) ("[T]he first-generation racial gerrymandering cases treated the mere consideration of race as a constitutional evil in itself.").

133. See, e.g., Holder v. Hall, 512 U.S. 874, 892 (1994) (Thomas, J., concurring in the judgment) ("[W]e have devised a remedial mechanism that encourages federal courts to segregate voters into racially designated districts to ensure minority electoral success. In doing so, we have collaborated in what may aptly be termed the racial 'balkaniz[ation]' of the Nation." (second alteration in original) (quoting Shaw v. Reno, 509 U.S. 630, 658 (1993))).

134. See *Shaw*, 509 U.S. at 680–82 (Souter, J., dissenting) (explaining how considering race in redistricting is different from relying on race in other contexts); Amar & Brownstein, supra note 53, at 919 (explaining that the Framers of the Reconstruction Amendments

2. Shaw*'s Second Wave*. — But things changed in 2015 when the Court heard *Alabama Legislative Black Caucus v. Alabama*,[135] the first case in which Black plaintiffs brought a *Shaw* claim.[136] During the 2010 redistricting process, the Republican-controlled Alabama state legislature asserted that, to obtain preclearance under Section 5, "it was required to maintain roughly the same black population percentage in existing majority-minority districts."[137] This interpretation—along with a tightening of the equi-population requirement—led to Alabama "deliberately cho[osing] additional black voters to move into underpopulated majority-minority districts."[138] The Supreme Court concluded that the three-judge district court had applied the wrong standard for determining predominance and strongly criticized "Alabama's mechanical interpretation of § 5."[139]

Curiously, the Court's 5-4 decision did not reflect the old *Shaw* lineup.[140] The Court's majority opinion was written by Justice Stephen Breyer, who was joined by the other three liberal Justices and Justice Anthony Kennedy.[141] So not only were Black plaintiffs now bringing *Shaw* claims,[142] but the liberal Justices were also embracing *Shaw*. By contrast, the Court's conservatives were now skeptical of *Shaw* claims.[143] Meanwhile, Kennedy was consistent in his openness to *Shaw* claims.[144]

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intended for race to be considered in implementing political rights); Gerken, Undiluted Vote, supra note 122, at 1742–43 ("[I]f we are going to recognize an aggregate harm like dilution, we must take into account its group-like qualities. If the Court refuses to do so, it is not only § 2 that will fall. Many claims, particularly civil rights claims, will be in constitutional jeopardy."); Pamela S. Karlan, All Over the Map: The Supreme Court's Voting Rights Trilogy, 1993 Sup. Ct. Rev. 245, 287 (detailing how *Shaw* limits governmental authority to enforce the VRA). But see 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, 509–10 (1993) (engaging with *Shaw*'s theory of expressive harm on its own terms).

135. 575 U.S. 254.

136. See Hasen, Racial Gerrymandering, supra note 109, at 365–66 (explaining how racial gerrymandering claims were used by white plaintiffs to dismantle majority-Black districts in the 1990s before being embraced by Black plaintiffs to challenge racially discriminatory redistricting schemes in the 2010s).

137. *Ala. Legis. Black Caucus*, 575 U.S. at 259–60.

138. Id. at 265.

139. See id. at 277.

140. See Hasen, Racial Gerrymandering, supra note 109, at 366 ("There was great irony in the use of the racial gerrymandering cause of action by minority voters who had rejected it in the 1990s, in its acceptance by liberal justices, and in the defense of race-based redistricting by Alabama Republicans and some conservative Supreme Court justices.").

141. *Ala. Legis. Black Caucus*, 575 U.S. at 257.

142. Id. at 258.

143. See id. at 294 (Thomas, J., dissenting) ("These consolidated cases are yet another installment in the 'disastrous misadventure' of this Court's voting rights jurisprudence." (quoting Holder v. Hall, 512 U.S. 874, 893 (1994) (Thomas, J., concurring in the judgment))).

144. See id. at 257; see also Miller v. Johnson, 515 U.S. 900, 903 (1995) (a first wave *Shaw* case authored by Kennedy).

After *Alabama Legislative Black Caucus*, a new wave of *Shaw* cases—which were brought by Black plaintiffs and backed by the Democratic Party—reached the Court in the late 2010s.[145] These cases were filed against other Southern states that had adopted interpretations of Sections 2 and 5 that packed Black voters.[146] Indeed, civil rights plaintiffs have had almost equal success in bringing *Shaw* claims as Section 2 claims in the past ten years or so, such that these second-wave *Shaw* claims have become a substitute for Section 2 claims.[147]

3. Shaw*'s Third Wave*. — During the 2020 redistricting cycle, *Shaw* claims remained part of the redistricting landscape. Once again, white plaintiffs brought traditional *Shaw* claims,[148] while civil rights groups filed more second wave cases.[149] Of relevance here, a third variant of *Shaw* emerged and one of *Shaw*'s most steadfast defenders—Thomas—renounced the doctrine.

Shaw's third wave began in South Carolina. For most of the 2010 cycle, South Carolina's Congressional District 1 was reliably Republican.[150] But

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145. See, e.g., Va. House of Delegates v. Bethune-Hill (*Bethune-Hill II*), 139 S. Ct. 1945, 1950 (2019) (dismissing appeal because a single house of the state legislature lacked standing to appeal); Cooper v. Harris, 137 S. Ct. 1455, 1481–82 (2017) (invalidating two North Carolina congressional districts); Bethune-Hill v. Va. State Bd. of Elections (*Bethune-Hill I*), 137 S. Ct. 788, 802 (2017) (upholding one state legislative district against a *Shaw* challenge but remanding for the district court to apply strict scrutiny as to several others); Wittman v. Personhuballah, 578 U.S. 539, 541 (2016) (dismissing appeal for lack of standing).

146. See Justin Levitt, Quick and Dirty: The New Misreading of the Voting Rights Act, 43 Fla. St. U. L. Rev. 573, 591 (2016) ("These jurisdictions deliberately sought to maintain supermajority quotas of minority voting-age or citizen voting-age population ostensibly to avoid retrogression, or to peg districts at a 50% minority-voter threshold ostensibly to satisfy section 2 . . . .").

147. As of October 2024, civil rights plaintiffs had prevailed in ten *Shaw* cases since *Alabama Legislative Black Caucus*, a comparable number to successful Section 2 lawsuits cited in *Milligan*. See North Carolina v. Covington, 138 S. Ct. 2548, 2553–55 (2018); Abbott v. Perez, 138 S. Ct. 2305, 2330 (2018); *Cooper*, 137 S. Ct. at 1481–82; Navajo Nation v. San Juan County, 929 F.3d 1270, 1293 (10th Cir. 2019); Finn v. Cobb Cnty. Bd. of Elec. & Reg., 1:22-CV-02300-ELR, 2023 WL 9184893, at *9 (N.D. Ga. Dec. 14, 2023); Jacksonville Branch of the NAACP v. City of Jacksonville, No. 22-cv-493-MMH-LLL, 2023 WL 4277423, at *1–2 (M.D. Fla. May 30, 2023); Grace, Inc. v. City of Miami, 674 F. Supp. 3d 1141, 1151, 1165 (S.D. Fla. 2023); Bethune-Hill v. Va. State Bd. of Elections, 326 F. Supp. 3d 128, 181 (E.D. Va. 2018); Ala. Legis. Black Caucus v. Alabama, 231 F. Supp. 3d 1026, 1348–49 (M.D. Ala. 2017); Page v. Va. State Bd. of Elections, No. 3:13cv678, 2015 WL 3604029, at *19 (E.D. Va. June 5, 2015); see also Allen v. Milligan, 143 S. Ct. 1487, 1509–10 (2023) ("Since 2010, plaintiffs nationwide have apparently succeeded in fewer than ten § 2 suits." (citing Brief of Amici Curiae Professors Jowei Chen et al. in Support of Appellees/Respondents, supra note 100, at 7)).

148. See, e.g., Callais v. Landry, No. 3:24-CV-00122 DCJ-CES-RRS, 2024 WL 1903930, at *6, *14 (W.D. La. Apr. 30, 2024) (detailing challenge brought by "non-Black voters" to congressional redistricting plan).

149. See, e.g., *Jacksonville*, 2023 WL 4277423, at *1–2 (approving a settlement agreement regarding the City of Jacksonville's electoral map).

150. See Alexander v. S.C. State Conf. of the NAACP, 144 S. Ct. 1221, 1236–37 (2024).

in the 2018 midterms, a Democrat prevailed, only to be narrowly defeated in 2020.[151] In 2021, the Republican-controlled South Carolina state legislature redrew the district, uniting two counties while dividing the city of Charleston.[152] The NAACP sued, claiming that District 1 was a racial gerrymander because South Carolina had employed a racial target—namely, a Black voting age population of seventeen percent.[153] In response, South Carolina argued that it had engaged in partisan—rather than racial—gerrymandering to make District 1 a safe Republican seat.[154]

In *Alexander v. South Carolina State Conference of the NAACP*, the Supreme Court heard its first *Shaw* challenge to a majority-white district. Thus, *Alexander* differed from both prior *Shaw* waves in that the challenged district was *not* majority-minority. In a 6-3 decision along ideological lines, the Court sided with South Carolina's partisan gerrymandering argument.[155] Although Alito's majority opinion seemed to disregard the deference due to a three-judge district court's factual findings,[156] the Court's "party-not-race" rationale was a frequent escape hatch in other *Shaw* cases, and one that commentators expected would become more common in a post-*Rucho* world.[157] Indeed, the *Alexander* Court's hostility to *Shaw* claims brought by civil rights groups—combined with a revived Section 2 after *Milligan*—may presage a shift back to Section 2 cases.[158]

The far more surprising development was Thomas's concurrence. Despite being one of *Shaw*'s most vocal supporters for decades, Thomas declared racial gerrymandering claims to be nonjusticiable political questions.[159] In other words, Thomas concluded that *Shaw* claims lack a

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151. See id.

152. See id. at 1236–38.

153. See id. at 1238.

154. See id. at 1240.

155. See id. at 1233.

156. See id. at 1275–76 (Kagan, J., dissenting) ("Normal clear-error review would lead to a different outcome. . . . That [factual] finding was reasonable, and deserves to be affirmed.").

157. See Crum, Deregulated Redistricting, supra note 102, at 427–28 ("If the Court wishes to further extricate itself, the clearest escape route is to follow the path set by *Easley* and take a broad view of what counts as partisan discrimination as opposed to racial discrimination."); Pamela S. Karlan, Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket, 82 B.U. L. Rev. 667, 687–88 (2002) (describing how *Shaw*'s first wave ended with a party-not-race "exit strategy").

158. The *Alexander* plaintiffs also brought an intentional vote dilution claim, and the three-judge district court sided with the plaintiffs on that claim as well based on "the 'same findings of fact and reasoning' that guided its racial-gerrymandering analysis." *Alexander*, 144 S. Ct. at 1251 (citing S.C. State Conf. of the NAACP v. Alexander, 649 F. Supp. 3d 117, 198 (D.S.C. 2023)). The Supreme Court remanded this claim based on its findings of clear error. See id. Moreover, the Supreme Court—correctly—determined that the district court "did not take into account the differences between vote-dilution and racial-gerrymandering claims." Id. at 1252.

159. Id. at 1253 (Thomas, J., concurring in part) ("[T]he Court has no power to decide these types of claims. . . . There are no judicially manageable standards for resolving claims

judicially manageable standard and that redistricting is committed to the political branches.

On the manageability prong, Thomas analogized to the Court's recent decision in *Rucho v. Common Cause*,[160] holding that partisan gerrymandering claims were nonjusticiable.[161] More fundamentally, Thomas's *Alexander* concurrence transplanted his skepticism of vote dilution doctrine—epitomized in his famous *Holder v. Hall* concurrence[162]—to racial gerrymandering: the absence of a neutral benchmark,[163] the entanglement of the Court in the political thicket,[164] and frustration with strategic lawyering.[165] Indeed, in proclaiming his new belief that racial gerrymandering claims were nonjusticiable, Thomas reiterated his "long maintained" belief that "vote dilution claims are also 'not readily subjected to any judicially manageable standard.'"[166]

Turning to whether redistricting is committed to a coordinate branch, Thomas emphasized that the Elections Clause gives Congress a "clear mandate . . . to supervise the States' districting efforts."[167] Thomas further claimed that federal courts lack the equitable authority to remedy racial gerrymanders by imposing new maps.[168]

Implicitly responding to originalist critiques of his jurisprudence, Thomas also argued that neither the Fourteenth nor the Fifteenth Amendments provide a constitutional basis for racial gerrymandering or vote dilution claims. Thomas started with the Equal Protection Clause—the Court's hook for both claims. Thomas claimed that the Equal Protection Clause "has no obvious bearing on districting" because it "'focus[es] on protection' . . . from violence" rather than "discriminatory

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about districting, and, regardless, the Constitution commits those issues exclusively to the political branches.").

160. 139 S. Ct. 2484, 2499–500 (2019).

161. See *Alexander*, 144 S. Ct. at 1253–54 (Thomas, J., concurring in part) (discussing *Rucho*).

162. 512 U.S. 874, 891 (1994) (Thomas, J., concurring in the judgment); see also Issacharoff et al., supra note 77, at 583 (referring to this concurrence as "the most sustained judicial critique of the enterprise of adjudicating vote dilution claims").

163. See *Alexander*, 144 S. Ct. at 1254 (Thomas, J., concurring in part) ("Determining how a legislature would have drawn district lines in a vacuum is a fool's errand.").

164. See id. at 1255 ("[T]hat analysis ensnarls courts in a political thicket.").

165. See id. at 1256 ("[T]he dissent's defense of the expert reports includes an exercise in armchair cartography.").

166. Id. at 1256–57 (quoting *Holder*, 512 U.S. at 901–02 (Thomas, J., concurring in the judgment)). Here, it is worth flagging that *Holder* involved a statutory vote dilution claim under Section 2. See *Holder*, 512 U.S. at 891. Thus, *Alexander* is an expansion of Thomas's previously expressed view about vote dilution to the constitutional realm.

167. *Alexander*, 144 S. Ct. at 1260 (Thomas, J., concurring in part). Because *Alexander* involved a congressional redistricting plan, the Elections Clause was implicated. But in a case involving state or local redistricting, the Elections Clause would be inapplicable. Presumably, Thomas would rely on the lack of judicially manageable standards in these cases.

168. See id. at 1264–66. This Article III question is outside the scope of this Essay.

legislative classifications."[169] Regarding the Fourteenth Amendment's structure, Thomas pointed out that Section Two "deals directly with [voting] rights" and an "express provision of a nonjudicial remedy for voting-rights violations in § 2 counsels against reading § 1 to allow judicial remedies implicitly in those same voting-rights disputes."[170] In addition, Thomas commented that "[r]eading the Equal Protection Clause to support claims for racial gerrymandering or vote dilution also makes the existence of the Fifteenth Amendment unexplainable."[171]

As for the Fifteenth Amendment itself, Thomas acknowledged that it "is the primary constitutional protection for the voting rights of racial minorities[,]" but it nevertheless cannot "justify racial gerrymandering or vote dilution claims in its own right."[172] That is because, in Thomas's view, "the Fifteenth Amendment 'address[es] only matters relating to access to the ballot.'"[173]

In sum, Thomas's concurrence in *Alexander* is extraordinary in several respects. First, the Court's leading originalist has rejected the Equal Protection Clause as the constitutional hook for voting rights decisions. Although Thomas hinted at this approach in a one-person, one-vote case from a few years ago,[174] his *Alexander* concurrence was unexpected.

Second, Thomas has repudiated *Shaw*'s racial gerrymandering claim and therefore decades of his votes in those cases. To be crystal clear, everyone—Justices included—is allowed to change their mind, and Thomas has shown an unusual willingness to be persuaded by originalist scholarship in other cases.[175] But it is difficult to overstate how crucial Thomas's prior views on the colorblind Constitution have been to voting rights.

Third, moving forward, Thomas's view that racial gerrymandering claims are nonjusticiable political questions has the potential to make strange bedfellows. In first wave *Shaw* cases, Thomas will vote to dismiss,

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169. Id. at 1260 (internal quotation marks omitted) (quoting United States v. Vaello Madero, 142 S. Ct. 1539, 1551 n.4 (2022) (Thomas, J., concurring)); see also id. at 1261 (arguing that Section One does not apply to voting rights because Section Two of that Amendment "deals directly with those rights").

170. Id. at 1261.

171. Id.

172. Id.

173. Id. (alteration in original) (quoting Holder v. Hall, 512 U.S. 874, 930 (1994) (Thomas, J., concurring in the judgment)). Thomas distinguished the Court's decision in *Gomillion* as a vote denial case rather than one "about the way minority voters were distributed between two districts." Id.; see also infra notes 182–188 (discussing Gomillion v. Lightfoot, 364 U.S. 339 (1960)).

174. See Evenwel v. Abbott, 578 U.S. 54, 87–88 (2016) (Thomas, J., concurring in the judgment).

175. See, e.g., Gamble v. United States, 139 S. Ct. 1960, 1980 (2019) (Thomas, J., concurring) ("I agree that the historical record does not bear out my initial skepticism of the dual-sovereignty doctrine.").

meaning that there is one less vote to invalidate the VRA in that case and aligning him with the liberal Justices.

Fourth and finally, Thomas's *Alexander* concurrence raises new questions. Most importantly, it is unclear how Thomas's position might change in a case brought under Section 2 of the VRA. Put differently, Thomas did not dwell on Congress's Reconstruction Amendment enforcement authority, and his ode to congressional authority under the Elections Clause would open the door to substantial deference to Congress's judgment as to congressional redistricting. These points are explored more below.[176]

* * *

Although *Shaw* has been embraced by civil rights groups and has been repudiated by Thomas, the doctrine continues to pose a threat to the VRA's constitutionality. After all, *Shaw* still mandates strict scrutiny when race predominates over traditional redistricting principles.[177] The *Milligan* dissents further demonstrate that *Shaw* continues to shape how some Justices interpret Section 2.[178]

As now-Judge Dale Ho observed when he was a voting rights lawyer: It could be "counterproductive for civil rights advocates to embrace colorblindness as a constitutional principle, which has been deployed to undermine race-conscious civil rights remedies in a range of areas."[179] *Shaw*'s racial gerrymandering claim "lies about like a loaded weapon ready for the hand" of a plaintiff willing to revive its original, 1990s vintage.[180]

C. *The Missing Fifteenth Amendment*

As the foregoing demonstrates, the Court has articulated two competing doctrines based on the Equal Protection Clause for regulating the use of race in the redistricting process. Intriguingly, the Fifteenth

176. See infra Part IV.

177. In *Bethune-Hill I*, the Court upheld a district against a *Shaw* challenge and avoided answering the compelling-interest prong of strict scrutiny because that issue had not been raised by the plaintiffs. See Bethune-Hill v. Va. State Bd. of Elections (*Bethune-Hill I*), 137 S. Ct. 788, 800 (2017); see also id. at 804 (Thomas, J., concurring in the judgment in part and dissenting in part) ("This Court has never, before today, assumed a compelling state interest while *upholding* a state redistricting plan." (emphasis added)). If plaintiffs were to request this in the future and the Court were to agree, then *Shaw* is less of a threat in that particular case. But not all *Shaw* plaintiffs are friends of the VRA, and the Court has become more conservative since *Bethune-Hill I* was decided in 2017.

178. See Allen v. Milligan, 143 S. Ct. 1487, 1524 (2023) (Thomas, J., dissenting); id. at 1549–51 (Alito, J., dissenting).

179. Ho, supra note 132, at 1901.

180. Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting), overruled by Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

Amendment is missing from the Court's current approach to race and redistricting.[181]

In searching for the missing Fifteenth Amendment, the obvious starting point is the Court's 1960 decision in *Gomillion v. Lightfoot*.[182] In that case, the State of Alabama notoriously redefined the City of Tuskegee's boundaries from a square to a "strangely irregular twenty-eight-sided figure," which had the "inevitable effect of . . . remov[ing] from the city all save four or five of its 400 Negro voters while not removing a single white voter."[183] The Court characterized Alabama's action as "segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their preexisting municipal vote."[184] On these facts, the Court held that the plaintiffs had stated a claim that the law violated the Fifteenth Amendment.[185]

Gomillion establishes that the Fifteenth Amendment extends beyond voting qualifications.[186] But to be clear, *Gomillion*'s fact pattern—namely, a state changing an *entire* municipality's boundaries—does not invoke today's archetypal vote dilution scenario, in which a redistricting plan packs or cracks minority voters. That distinction would come to matter for some Justices.[187] Moreover, Justice Charles Whittaker's short, solo concurrence—which argued that the Equal Protection Clause was the proper basis for the Court's decision—would eventually play an outsized role in how *Gomillion* would be viewed.[188]

Over the next few decades, the Fifteenth Amendment disappeared from the Court's jurisprudence on race and redistricting. In *Wright v. Rockefeller*, the Court heard a Fourteenth and Fifteenth Amendment challenge to New York's congressional redistricting plan, which allegedly packed Black and Puerto Rican voters into one congressional district.[189] The Court did not reach the constitutional question because it affirmed the district court's factual finding that the plaintiffs had "failed to prove that the New York Legislature was either motivated by racial considerations or in fact drew the districts on racial lines."[190]

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181. For a discussion of how the Equal Protection Clause eclipsed the Fifteenth Amendment, see Crum, Superfluous Fifteenth Amendment, supra note 37, at 1557–64.

182. 364 U.S. 339 (1960).

183. Id. at 341.

184. Id.

185. See id. at 340, 347–48; see also id. at 346 ("When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment.").

186. See id. at 346.

187. See infra note 219.

188. See *Gomillion*, 364 U.S. at 349 (Whittaker, J., concurring) (arguing that Alabama's actions constituted "unlawful segregation of races of citizens").

189. 376 U.S. 52, 54–55 (1964).

190. Id. at 56.

Next, and as explained above,[191] the Court recognized vote dilution claims under the Equal Protection Clause in *White v. Regester*.[192] The Fifteenth Amendment was not even mentioned in *Regester*.[193] The *Regester* Court's decision marked the start of the Court's shift to the Equal Protection Clause in race and redistricting cases.

Then, in *United Jewish Organizations of Williamsburgh, Inc. v. Carey* (*UJO*), New York created several majority-Black legislative districts to comply with Section 5 of the VRA.[194] A group of Hasidic Jewish voters sued under the Fourteenth and Fifteenth Amendments, alleging unlawful cracking of their community. Interestingly, the plaintiffs' Fifteenth Amendment argument could be viewed as a hybrid vote dilution and racial gerrymandering claim: The plaintiffs "alleged that they were assigned to electoral districts solely on the basis of race, and that this racial assignment diluted their voting power in violation of the Fifteenth Amendment."[195]

In a deeply fractured opinion, a shifting plurality of the Court rejected the plaintiffs' claims.[196] As relevant here,[197] the plurality—consisting of Justices Byron White, John Paul Stevens, William Brennan, and Harry Blackmun—rejected the plaintiffs' claims that "the use of racial criteria in districting and apportionment is never permissible" and that "the use of a 'racial quota' in redistricting is never acceptable."[198] In reaching that conclusion, the plurality stated that "neither the Fourteenth nor the Fifteenth Amendment mandates any per se rule against using racial factors in districting"[199] and that "a reapportionment cannot violate the Fourteenth or Fifteenth Amendment merely because a State uses specific numerical quotas in establishing a certain number of black majority districts."[200] On this point, the plurality relied heavily on Section 5's constitutionality.[201] The plurality further concluded that New York's redistricting was permissible to comply with Section 5.[202] Finally, a *different* plurality—consisting of White, Stevens, and Justice William Rehnquist—determined that, even setting the VRA aside, New York's redistricting plan did not violate the Fourteenth or Fifteenth Amendments. Relying on *Gomillion* and *Regester*, the plurality stated that there "was no fencing out

191. See supra section I.A.

192. 412 U.S. 755 (1973).

193. Id.

194. 430 U.S. 144, 150–51 (1977).

195. Id. at 153.

196. Id. at 146 (plurality opinion).

197. The bulk of the plurality's reasoning concerned compliance with Section 5's retrogression principle. See id. at 155–62.

198. Id. at 156.

199. Id. at 161.

200. Id. at 162.

201. See id. at 161 (explaining that plaintiffs' argument would render Section 5 unconstitutional).

202. See id. at 164–65.

the white population from participation in the political processes of the county, and the plan did not minimize or unfairly cancel out white voting strength."[203] *UJO*'s splintered reasoning revealed a Court struggling with how to reconcile race and redistricting as well as how to handle a case brought by white voters.[204]

The Fifteenth Amendment's applicability to vote dilution claims was squarely raised in *City of Mobile v. Bolden*.[205] Recall that the *Bolden* plurality concluded that there was an intent element in vote dilution claims under the Fourteenth Amendment and that Section 2 was limited to vote denial cases.[206] On the latter point, the plurality reasoned that the Fifteenth Amendment and the original version of Section 2 were coextensive.[207] The *Bolden* plurality, therefore, determined that the Fifteenth Amendment merely covers vote denial claims—whether citizens can "register and vote without hindrance" regardless of race.[208] The *Bolden* plurality further decided that the Fifteenth Amendment "prohibits only purposeful[] discriminat[ion]."[209] Although the Court transformed *Bolden*'s plurality opinion on the *Fourteenth* Amendment into a holding in *Rogers v. Lodge*,[210] the Court "express[ed] no view on the application of the Fifteenth Amendment [in] th[at] case."[211]

Since *Bolden* and the 1982 amendments to Section 2, constitutional vote dilution claims have taken a back seat to statutory ones.[212] Because discriminatory result claims are easier to win under Section 2, the Court has not had to decide whether the Fifteenth Amendment encompasses vote dilution claims. Indeed, the Court has repeatedly stated that this question remains open.[213]

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203. Id. at 165 (citing White v. Regester, 412 U.S. 755, 765–67 (1973); Gomillion v. Lightfoot, 364 U.S. 339 (1960)).

204. Curiously, White's plurality opinion lumps Hasidic Jewish voters together with the larger white community, even though those voters "might themselves be thought of as a discrete and insular minority." Issacharoff et al., supra note 77, at 522.

205. 446 U.S. 55 (1980), superseded by statute, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131, 134 (codified as amended at 52 U.S.C. § 10301 (2018)).

206. See supra section I.A.

207. See *Bolden*, 446 U.S. at 60 (plurality opinion) ("[I]t is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment . . . .").

208. Id. at 65 (internal quotation marks omitted).

209. Id.

210. 458 U.S. 613, 617 (1982).

211. Id. at 619 n.6.

212. See supra note 104 and accompanying text.

213. See Reno v. Bossier Par. Sch. Bd., 528 U.S. 320, 334 n.3 (2000) ("[W]e have never held that vote dilution violates the Fifteenth Amendment."); id. at 360 n.11 (Souter, J., concurring in part and dissenting in part) ("We have suggested, but have never explicitly decided, that the Fifteenth Amendment applies to dilution claims."); Voinovich v. Quilter, 507 U.S. 146, 159 (1993) ("This Court has not decided whether the Fifteenth Amendment applies to vote-dilution claims; in fact, we never have held any legislative apportionment inconsistent with the Fifteenth Amendment. Nonetheless, we need not decide the precise

Turning to the *Shaw* line of cases, the Court grounded the racial gerrymandering cause of action squarely in the Equal Protection Clause.[214] To be sure, the *Shaw* Court referenced the Fifteenth Amendment in rhetorical fashion.[215] But crucially, the *Shaw* Court reframed *Gomillion* as a Fourteenth Amendment case, highlighting "the correctness of Justice Whittaker's [concurrence]."[216] The Court also distinguished its prior decisions in *Wright* and *UJO*.[217] Once *Miller* established the predominance standard, the Fifteenth Amendment largely disappeared from the *Shaw* line of cases.[218]

To sum up, a majority of the Court has failed to clarify the Fifteenth Amendment's application to redistricting since its decision in *Gomillion*. Tellingly, the Justices have repeatedly disputed whether *Gomillion* provides support for vote dilution doctrine versus racial gerrymandering claims—or whether it is best classified as a Fourteenth Amendment case.[219] Indeed,

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scope of the Fifteenth Amendment's prohibition in this case." (citation omitted)); see also Beer v. United States, 425 U.S. 130, 142 n.14 (1976) ("There is no decision in this Court holding a legislative apportionment or reapportionment violative of the Fifteenth Amendment. The case closest to so holding is *Gomillion v. Lightfoot*, in which the Court found that allegations of racially motivated gerrymandering of a municipality's political boundaries stated a [Fifteenth Amendment] claim . . . ." (citations omitted)).

The Court's recent cases on the Fifteenth Amendment's substantive scope have implicated vote denial claims. See Brnovich v. DNC, 141 S. Ct. 2321, 2348–50 (2021) (holding that Arizona's ballot-collection law was not enacted with discriminatory purpose); Rice v. Cayetano, 528 U.S. 495, 523–24 (2000) (striking down law that disenfranchised citizens who were of non-Hawaiian descent).

214. Shaw v. Reno, 509 U.S. 630, 642 (1993) (concluding that "appellants have stated a claim upon which relief can be granted under the Equal Protection Clause").

215. See id. at 657 ("Racial gerrymandering . . . threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.").

216. Id. at 645.

217. See id. at 645–46 (emphasizing *Wright*'s affirmance on factual grounds); id. at 651–52 (downplaying *UJO* as a fractured decision that did not preclude a racial gerrymandering claim).

218. To be clear, the Court has referenced the Fifteenth Amendment in *Shaw* cases in relation to Congress's authority to pass the VRA. See Miller v. Johnson, 515 U.S. 900, 926–27 (1995); see also Bush v. Vera, 517 U.S. 952, 991 (1996) (O'Connor, J., concurring). The *Miller* Court also referenced the Fifteenth Amendment in a large block quote from *Shaw* about the desirability of a post-racial future. See *Miller*, 515 U.S. at 912 (quoting *Shaw*, 509 U.S. at 657); supra note 215 (quoting the relevant *Shaw* language). But after *Shaw*, the Court has not mentioned the Fifteenth Amendment as a potential *source* of the racial gerrymandering cause of action.

219. See Reno v. Bossier Par. Sch. Bd., 528 U.S. 320, 334–35 & n.3 (2000) (arguing that *Gomillion* "had nothing to do with racial vote dilution, a concept that does not appear in our voting-rights opinions until nine years later"); id. at 360 n.11 (Souter, J., concurring in part and dissenting in part) ("Changing political boundaries to affect minority voting power would be called dilution today. *Gomillion* shows that the physical image evoked by the term 'dilution' does not encompass all the ways in which participation in the political process can be made unequal."); *Shaw*, 509 U.S. at 645 (viewing *Gomillion* as a Fourteenth Amendment case and as support for *Shaw*'s bizarreness inquiry); id. at 668–69 (White, J., dissenting) (arguing that *Gomillion* "cannot stand for the proposition that the intentional creation of

Gomillion has long stood as a *Rashomon* for the Court, with different Justices interpreting its holding to support their own conclusions about the Fifteenth Amendment's scope.[220]

D. *Doctrinal Tension*

The Court's vote dilution and racial gerrymandering doctrines have long been on a collision course. Typically, this tension is characterized as between the VRA and the Equal Protection Clause.[221] That is because Section 2's discriminatory results standard sweeps more broadly than *Regester*'s discriminatory intent requirement, thereby demanding greater consideration of race and teeing up more potential *Shaw* claims.

There are two ways to conceptualize this problem. First, there is the tension within Equal Protection doctrine between *Regester* and *Shaw*. Second, and contingent on the answer to the prior question, there is the issue of whether Section 2 is permissible enforcement legislation under the Reconstruction Amendments. This section unpacks each of these issues. It concludes by arguing that the Court's recent decision in *Allen v. Milligan* does not fully resolve them.

First, and most obviously, the Court has interpreted the Equal Protection Clause in diametrically opposite ways. To briefly recap, *Regester* demands that mapmakers consider race to ensure that racial minorities have an equal opportunity "to participate in the political processes and to elect legislators of their choice."[222] In encouraging race-conscious decisionmaking, *Regester* is a relic from a bygone era of constitutional law. But *Regester*'s doctrine has not been internally reworked or overturned in our new colorblind age.

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majority-minority districts, without more, gives rise to an equal protection challenge"); City of Mobile v. Bolden, 446 U.S. 55, 86 (1980) (Stevens, J., concurring in the judgment) (viewing *Gomillion* as a Fourteenth Amendment case), superseded by statute, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131, 134 (codified as amended at 52 U.S.C. § 10301 (2018)); South Carolina v. Katzenbach, 383 U.S. 301, 311 (1966) ("Racial gerrymandering was forbidden by *Gomillion v. Lightfoot*.").

220. The *Rashomon* effect is named for a famous 1950 Japanese movie in which four eyewitnesses recount a crime in mutually exclusive ways and "is used to describe those occasions when a single event is perceived in contradictory, although perhaps equally plausible, ways." Derek A. Webb, The *Somerset* Effect: Parsing Lord Mansfield's Words on Slavery in Nineteenth Century America, 32 Law & Hist. Rev. 455, 455 (2014); cf. Heather K. Gerken, *Rashomon* and the Roberts Court, 68 Ohio St. L.J. 1213, 1214 (2007) ("The authors' interpretations of *LULAC* are so different that at times one wonders whether they were reading the same opinion. This *Rashomon* effect is, again, just what one would expect from a Court in an inchoate state.").

221. See, e.g., Abbott v. Perez, 138 S. Ct. 2305, 2315 (2018) ("Since the Equal Protection Clause restricts consideration of race and the VRA demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to 'competing hazards of liability.'" (quoting Bush v. Vera, 517 U.S. 952, 977 (1996) (plurality opinion))).

222. White v. Regester, 412 U.S. 755, 766 (1973) (citing Whitcomb v. Chavis, 403 U.S. 124, 149–50 (1971)).

Instead, the Court adopted *Shaw*'s racial gerrymandering doctrine to push back on race-based redistricting. The *Shaw* Court's assertions that race-based redistricting entrenches racial differences is a familiar theme in colorblind jurisprudence.[223] *Shaw* is the colorblind Constitution applied to redistricting.

Second, once the VRA enters the equation, the question becomes one of congressional authority. Congress has power under the Fourteenth and Fifteenth Amendments to pass "appropriate" enforcement legislation.[224] As the Court has explained, "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct."[225] As unpacked below,[226] the scope of Congress's power may very well depend on whether it is exercising its Fourteenth or Fifteenth Amendment enforcement authority.

After the *Milligan* Court's surprising decision, many scholars—understandably—celebrated that Section 2 remained on the books.[227] To be sure, Section 2 is on the firmest constitutional ground since *Shaw* was decided. Thomas's *Alexander* concurrence also takes one vote off the table to invalidate Section 2 when its constitutionality is challenged in a *Shaw* case. But one should also be realistic about *Milligan*'s limits and how a future majority could approach the question differently.

Recall that the Court rebuffed "Alabama's attempt to remake . . . § 2 jurisprudence anew"[228] and "reject[ed] Alabama's argument that § 2 as applied to redistricting is unconstitutional under the *Fifteenth* Amendment."[229] A few obvious points before concluding with the unacknowledged gap in the Court's reasoning.

First, at least based on Thomas's *Milligan* dissent, there are three votes to invalidate Section 2 as applied to vote dilution claims.[230] Curiously, Alito did not join this portion of Thomas's dissent. But, as noted, Kavanaugh's

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223. See, e.g., Johnson v. California, 543 U.S. 499, 507 (2005) ("[B]y insisting that inmates be housed only with other inmates of the same race, it is possible that prison officials will breed further hostility among prisoners and reinforce racial and ethnic divisions.").

224. U.S. Const. amend. XIV, § 5; id. amend. XV, § 2.

225. Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 727–28 (2003).

226. See infra Part IV.

227. These reactions ranged from victory lap to cautious optimism. See Nicholas Stephanopoulos, Early Thoughts on *Milligan*, Election L. Blog (June 8, 2023), https://electionlawblog.org/?p=136712 (on file with the *Columbia Law Review*) ("Finally, and maybe most importantly, *Milligan* resolved the question of Section 2's constitutionality."); Franita Tolson, A Few Preliminary Thoughts on *Allen v. Milligan*, Election L. Blog (June 8, 2023), https://electionlawblog.org/?p=136693 (on file with the *Columbia Law Review*) ("Does that mean that Section 2 is constitutional and won't go the way of preclearance? Maybe not, but I think Section 2 is okay for now.").

228. Allen v. Milligan, 143 S. Ct. 1487, 1506 (2023).

229. Id. at 1516 (emphasis added).

230. As discussed previously, Thomas's *Alexander* concurrence somewhat problematizes this count. See supra section I.B.3.

concurrence suggested that he might agree with Thomas's claim that "race-based redistricting cannot extend indefinitely into the future."[231]

Second, Kavanaugh did not join a portion of Roberts's opinion, downgrading it to a plurality for that section. That section grappled with how *Shaw*'s predominance standard interacts with Section 2. The plurality declared that "[w]hen it comes to considering race in the context of districting, we have made clear that there is a difference 'between being aware of racial considerations and being motivated by them.' The former is permissible; the latter is usually not."[232] Kavanaugh's reluctance to join the plurality's reconciliation of *Shaw* and *Gingles* is worrisome for the VRA's future constitutionality.

Third, the Court's decision could be read as an ode to statutory stare decisis,[233] a point that Kavanaugh emphasized in his concurrence.[234] Although Alabama advocated an aggressive rewriting of the *Gingles* factors and invoked constitutional avoidance concerns to limit Section 2's application to single-member redistricting plans, Alabama did *not* argue that *Gingles* should be overturned, only cabined. Moreover, the case's procedural posture—on appeal of a preliminary injunction—meant that the question was whether the plaintiffs were likely to succeed based on existing precedent.

Finally, the Court's reasoning on enforcement authority overlooked the question of whether the Fifteenth Amendment applies to redistricting. Here, it is worth quoting the Court's reasoning in full:

> We also reject Alabama's argument *that § 2 [of the VRA] as applied to redistricting is unconstitutional under the Fifteenth Amendment.* According to Alabama, that Amendment permits Congress to legislate against only purposeful discrimination by States. But we held over 40 years ago "that, *even if § 1 of the [Fifteenth] Amendment prohibits only purposeful discrimination*, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2 [of the Fifteenth Amendment] outlaw voting practices that are discriminatory in effect." The VRA's "ban on electoral changes that are discriminatory in effect," we emphasized, "is an appropriate method of promoting the purposes of the Fifteenth Amendment." As *City of Rome* recognized, we had reached the

231. *Milligan*, 143 S. Ct. at 1519 (Kavanaugh, J., concurring); id. at 1541 (Thomas, J., dissenting) (criticizing Section 2 for lacking a termination date).

232. Id. at 1510 (plurality opinion) (citations omitted) (quoting Miller v. Johnson, 515 U.S. 900, 916 (1995)).

233. See id. at 1515 (majority opinion) ("Congress is undoubtedly aware of our construing § 2 to apply to districting challenges. It can change that if it likes. But until and unless it does, statutory *stare decisis* counsels our staying the course.").

234. See id. at 1517–19 (Kavanaugh, J., concurring in part). To be sure, the Court can still overrule statutory precedents. See, e.g., Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (overruling Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).

> very same conclusion in *South Carolina v. Katzenbach*, a decision issued right after the VRA was first enacted.[235]

The *Milligan* Court viewed the *sole* question as whether Congress may enact a discriminatory results standard pursuant to its Fifteenth Amendment enforcement authority. Relying on key precedents that had upheld prior versions of the VRA under a rationality standard—namely, *South Carolina v. Katzenbach*[236] and *City of Rome v. United States*[237]—the Court held that Congress may do so. The Court went even further in concluding that Congress may "authorize race-based redistricting as a remedy for § 2 violations."[238]

But the *Milligan* Court skipped over—indeed, failed to even flag—that it remains an open question whether the Fifteenth Amendment applies to redistricting. Tellingly, the *Milligan* Court recognized that *City of Rome* worked around the *Bolden* plurality's conclusion that the Fifteenth Amendment applies only to intentional discrimination.[239] Nonetheless, the *Milligan* Court conflated Section 2's discriminatory results standard with its application to vote dilution claims.

In some ways, the *Milligan* Court's analysis highlights just how much deference is given to Congress under *Katzenbach*'s rationality standard. Indeed, the Court cited *only* decisions applying *Katzenbach*'s rationality standard.[240] By contrast, Thomas's dissent relies on a mishmash of *Katzenbach*'s rationality standard, *City of Boerne v. Flores*'s congruence and proportionality test, and *Shelby County*'s equal sovereignty principle.[241] Thus, the relevant standard of review could ultimately determine the VRA's constitutionality. But the Court's analytical conflation merely highlights that Section One of the Fifteenth Amendment is underdeveloped in the Court's redistricting doctrine.

To his credit, Thomas's *Alexander* concurrence seeks to resolve this tension by returning to first principles.[242] But, as noted, Thomas's

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235. *Milligan*, 143 S. Ct. at 1516 (majority opinion) (second and third alterations in original) (emphasis added) (first quoting City of Rome v. United States, 446 U.S. 156, 173, 177 (1980), then citing South Carolina v. Katzenbach, 383 U.S. 301, 308–09 (1966)).

236. 383 U.S. at 327, 337.

237. 446 U.S. at 182.

238. *Milligan*, 143 S. Ct. at 1516.

239. See id. ("But we held over 40 years ago 'that, even if § 1 of the [Fifteenth] Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not . . . outlaw voting practices that are discriminatory in effect.'" (first alteration in original) (quoting *City of Rome*, 446 U.S. at 173)).

240. Id. at 1516–17.

241. Id. at 1539–46 (Thomas, J., dissenting) (arguing that the amended Section 2 lacks a nexus between "districting-related commands" and "any likely constitutional wrongs," is "not congruent and proportional," and is at odds "with the letter and spirit of the constitution" (internal quotation marks omitted)).

242. See Alexander v. S.C. State Conf. of the NAACP, 144 S. Ct. 1221, 1252 (2024) (Thomas, J., concurring in part) ("This case is unique because it presents solely

Alexander concurrence only answers the substantive scope question. His newfound view that racial gerrymandering and vote dilution claims are nonjusticiable political questions does not fully answer whether Congress can exercise its powers under the Elections Clause or Section Two of the Fifteenth Amendment to pass the VRA.[243]

By answering whether the Fifteenth Amendment applies to redistricting, this Essay seeks to answer the assumption underlying the *Milligan* Court's decision. It is to this question that this Essay now turns.

II. REDISTRICTING AND THE RECONSTRUCTION AMENDMENTS

Prior to the Reconstruction Amendments, the Constitution apportioned seats in the House of Representatives and the Electoral College according to the Three-Fifths Clause.[244] But the Constitution was silent as to redistricting within states. Indeed, state legislatures were given initial authority to set the time, place, and manner of congressional elections. Congress, however, could preempt that authority.

This Part investigates whether the Fourteenth and Fifteenth Amendments changed that Founding-era arrangement. This Part begins with a quick synopsis of originalist theory. It then discusses the constitutional politics of Reconstruction, emphasizing the role of racial bloc voting in the Republican Party's plans for transforming the South. It canvasses the Fourteenth Amendment's drafting and ratification. It concludes with a deep dive on the Fifteenth Amendment's adoption.

A. *Understanding Originalism*

There is a vast literature on originalism as a theory and methodology. By originalism, this Essay means a theory that views the original understanding of a constitutional provision as a fixed and binding authority for future generations.[245] This Essay acknowledges that originalist claims are not only contestable but also selectively marshaled by judges and lawyers.[246] This Essay, however, seeks to engage with originalism on its own terms, rather than critique it. In any event, even if one is not an

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constitutional questions. . . . There can be no more propitious occasion to consider the constitutional underpinnings of our voting-rights jurisprudence.").

243. See id. (explaining that neither the plaintiffs nor South Carolina relied on the VRA for their claims or defenses); infra section IV.B.1 (defending Section 2's constitutionality).

244. U.S. Const. art. I, § 2, abrogated by U.S. Const. amend. XIV, § 2.

245. See Lawrence B. Solum, Originalism and Constitutional Construction, 82 Fordham L. Rev. 453, 459–62 (2013) [hereinafter Solum, Originalism and Constitutional Construction] (discussing the fixation and constraint theses); see also infra Part III (discussing how postratification practice and liquidation factor into this analysis). For an argument that originalism "imperils democratic structures, practices, and norms that are essential to modern democratic self-government," see Joshua S. Sellers, Election Law, Originalism, and Democratic Self-Government, 76 Fla. L. Rev. (forthcoming 2024) (manuscript at 1) (on file with the *Columbia Law Review*).

246. See supra note 33 (discussing cafeteria originalists).

originalist, history plays an important role in constitutional interpretation.[247]

Today, "[o]riginalist theory has . . . largely coalesced around original public meaning as the proper object of interpretive inquiry."[248] In ascertaining original public meaning, originalists seek "the public meaning of the constitutional text at the time each provision was framed and ratified."[249] But there are other variants of originalism. When originalism was first developed as a theory in the 1970s and 1980s, the original intent of the Framers and ratifiers was the touchstone for divining the Constitution's meaning.[250] Although original intent has lost its talismanic quality, "intentionalism has never entirely disappeared."[251] In a related vein, original expected application looks to "how people living at the time the text was adopted would have expected it would be applied using language in its ordinary sense (along with any legal terms of art)."[252] Another variant is original-methods originalism, which interprets the Constitution "using the conventional legal interpretive rules that would have been deemed applicable to a document of its type at the time it was enacted."[253] Finally, another school of thought is "inclusive originalism," which posits that "the original meaning of the Constitution is the ultimate criterion for constitutional law" and that "judges can look to precedent, policy, or practice, but only to the extent that the original meaning incorporates or permits them."[254]

Most originalists believe in the distinction between interpretation and construction.[255] As Professor Lawrence Solum has explained, "interpretation recognizes or discovers the linguistic meaning of an authoritative legal text," whereas "construction gives legal effect to the semantic content

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247. See, e.g., Philip Bobbitt, Constitutional Fate: Theory of the Constitution 7 (1982) (listing history as one of the modalities of constitutional interpretation).

248. Keith E. Whittington, Originalism: A Critical Introduction, 82 Fordham L. Rev. 375, 380 (2013).

249. Lawrence B. Solum, Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate, 113 Nw. U. L. Rev. 1243, 1251 (2019) [hereinafter Solum, Great Debate].

250. See Thomas B. Colby & Peter J. Smith, Living Originalism, 59 Duke L.J. 239, 247–49 (2009).

251. Solum, Great Debate, supra note 249, at 1251.

252. Jack M. Balkin, Living Originalism 7 (2011) [hereinafter Balkin, Living Originalism].

253. John O. McGinnis & Michael B. Rappaport, Unifying Original Intent and Original Public Meaning, 113 Nw. U. L. Rev. 1371, 1373 (2019).

254. William Baude, Is Originalism Our Law?, 115 Colum. L. Rev. 2349, 2355 (2015) (emphasis omitted).

255. Cf. John O. McGinnis & Michael B. Rappaport, The Power of Interpretation: Minimizing the Construction Zone, 96 Notre Dame L. Rev. 919, 921 (2021) (arguing that "the construction zone is a small one" if one "consider[s] the legal character of the Constitution").

of a legal text."[256] Stated simply, the so-called construction zone is where one resolves ambiguous language or historical indeterminacy.[257] Inside the construction zone, arguments based on the modalities of constitutional interpretation—that is, text, history, structure, doctrine, prudence, and ethos—can help formulate the legal rule.[258] Furthermore, when the meaning of the Reconstruction Amendments is unclear, Congress has a special role to play in passing enforcement legislation.[259]

This Essay is agnostic as to which of these various theories represents the true essence of originalism. For the purposes of this Essay, the phrase "original understanding" serves as an umbrella term that captures these competing schools of originalist theory. As such, this Essay strives to ascertain the original understanding of the Fourteenth and Fifteenth Amendments as applied to race-based redistricting. And when that original understanding is indeterminate or debatable, this Essay utilizes the modalities of constitutional interpretation to craft the governing legal principle and ultimately turns to Congress's judgment in passing Section 2 of the VRA as enforcement legislation pursuant to the Fourteenth and Fifteenth Amendments.

B. *Contextualizing Reconstruction*

Pivoting to Reconstruction, a few points are worth emphasizing so that a modern reader can better understand that era's constitutional politics. First, the Reconstruction Framers believed in a hierarchy of rights that "plays no part in current interpretations of the Fourteenth

256. Lawrence B. Solum, The Interpretation-Construction Distinction, 27 Const. Comment. 95, 100, 103 (2010).

257. See Michael W. McConnell, Time, Institutions, and Interpretation, 95 B.U. L. Rev. 1745, 1761 (2015) ("When history runs out, we have to use other methods of interpretation."); Solum, Originalism and Constitutional Construction, supra note 245, at 469 ("Construction becomes the focus of explicit attention when the meaning of the constitutional text is unclear, or the implications of that meaning are contested . . . [such as when faced with] irreducible ambiguity, vagueness, gaps, and contradictions."); see also Stephen E. Sachs, Originalism: Standard and Procedure, 135 Harv. L. Rev. 777, 816 (2022) ("What does give rise to debate is whether construction has a role to play in cases of uncertainty.").

258. See Bobbitt, supra note 247, at 93–94 (listing the modalities); Stephen M. Griffin, Pluralism in Constitutional Interpretation, 72 Tex. L. Rev. 1753, 1768 (1994) ("The pluralism that characterizes the Supreme Court's jurisprudence has deep roots in the nature of American constitutionalism . . . ."); see also Solum, Originalism and Constitutional Construction, supra note 245, at 482 (making a similar point but arguing that text, history, and structure are best viewed as influencing interpretation).

259. See Jack M. Balkin, The Reconstruction Power, 85 N.Y.U. L. Rev. 1801, 1809 (2010) [hereinafter Balkin, Reconstruction Power] ("[T]he enumerated powers of the Reconstruction Amendments allowed Congress to establish national standards to protect basic rights and liberties."); infra section IV.B.1 (arguing that Congress can pass rational enforcement legislation pursuant to its Fifteenth Amendment enforcement authority).

Amendment."[260] Relying on concepts developed during the antebellum period, "the drafters of the Reconstruction Amendments viewed political rights as qualitatively different from civil rights . . . ."[261]

Civil rights included the right to own property, to contract, to sue and be sued, and to equal treatment in civil and criminal matters.[262] Civil rights were inherent in citizenship.[263] By contrast, political rights were characterized as "more like privileges, reserved for a subset of people charged with making decisions for the whole community."[264] Thus, white women could exercise civil rights but not political rights.[265]

Instead of the modern phrase "voting rights," the Reconstruction era term "political rights" was frequently employed to capture a bundle of rights: the right to vote, to hold office, and to sit on juries.[266] As unpacked more below, the Reconstruction Framers debated whether the right to vote subsumed the right to hold office.[267]

To be sure, there were differences of opinion among the Reconstruction Framers, and the Republican Party's center of gravity shifted considerably over time. At the dawn of Reconstruction, some Radicals supported the political rights of Black men, but moderate Republicans did not.[268] For instance, President Abraham Lincoln, a moderate Republican, announced his support for limited Black male suffrage in his final speech before his assassination.[269] Moderate

260. Michael W. McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947, 1025 (1995) [hereinafter McConnell, Desegregation]. This Essay does not delve into the robust scholarly debate over the distinction between civil and social rights. See id. at 1018–21 (grounding this distinction in the debate over Reconstruction-era antimiscegenation laws); see also Pamela Brandwein, Rethinking the Judicial Settlement of Reconstruction 70–86 (2011) (tracing the antebellum distinction between civil and political rights to the addition of social rights during Reconstruction); Maltz, Civil Rights, supra note 53, at 71–72 (noting that the civil–social rights divide persisted in debates over outlawing racial discrimination in places of public accommodation in the Civil Rights Act of 1964).

261. Amar & Brownstein, supra note 53, at 929; see also Foner, Reconstruction, supra note 56, at 230–31 (unpacking these distinctions and their intellectual history).

262. See Civil Rights Act of 1866, Pub. L. 39-31, § 1, 14 Stat. 27, 27 (codified at 42 U.S.C. §§ 1981-1982 (2018)) (defining civil rights to be enjoyed by all "citizens" regardless of race).

263. See Akhil Reed Amar, America's Constitution: A Biography 382 (2005) [hereinafter Amar, America's Constitution] (discussing the relationship between citizenship and civil rights during Reconstruction).

264. Kate Masur, Until Justice Be Done: America's First Civil Rights Movement, From the Revolution to Reconstruction 19 (2021).

265. See, e.g., Balkin, Living Originalism, supra note 252, at 223–24 (explaining that, although the Framers of the Fourteenth Amendment considered women "civil equals," they did not mandate women's enfranchisement).

266. See Amar, Jury Service, supra note 53, at 234–35.

267. See infra section II.D.4.

268. See Harold M. Hyman & William M. Wiecek, Equal Justice Under Law: Constitutional Development, 1835–1875, at 394 (1982) (observing that "in the 1860s only 'radicals' merged civil and political rights").

269. See Foner, Reconstruction, supra note 56, at 74 (noting that Lincoln supported the right to vote for Black men who were "very intelligent" or had served as soldiers).

Republican opposition to Black male suffrage explains why it was excluded from Section One of the Fourteenth Amendment and why the Fifteenth Amendment was a necessary addition to the Constitution.[270]

Second, notwithstanding Article V's high hurdle for ratification, the Reconstruction Amendments were hardly bipartisan measures. In fact, the Reconstruction Amendments were the Republican Party's de facto platform and vehemently opposed by the Democrats.[271] The Republican Party had won the Civil War and many of its leaders had been long active in abolitionist circles. Meanwhile, the Democratic Party was openly racist and sought to stymie Reconstruction.

Third, and relatedly, voting was racially polarized across the South, a fact that was well known because "[v]oting was public until 1888 when the States began to adopt the Australian secret ballot."[272] This political reality was openly acknowledged by the Reconstruction Framers. Indeed, it was marshaled as a key reason for enfranchising Black men nationwide and passing the Fifteenth Amendment.[273]

Black Southerners associated the Democratic Party with the Confederacy and the Republican Party with emancipation and the expansion of their civil and political rights.[274] In the 1867–1868 constitutional convention elections mandated by the First Reconstruction Act, Black men accounted for between 66% and 97% of votes in favor.[275] Indeed, in four Southern states, no Black man cast a ballot against the constitutional conventions.[276] Furthermore, as the Southern states began to reenter the Union, Black men's votes became even more important for Republican political success. In the 1868 election, Black men were decisive in President Ulysses S. Grant winning the popular vote and helped him win every readmitted Southern state except Georgia and Louisiana, where Klan-related violence suppressed the Black vote.[277]

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270. See infra section II.C.

271. See, e.g., Akhil Reed Amar, America's Unwritten Constitution: The Precedents and Principles We Live By 400 (2012) (observing that "all three Reconstruction Amendments were intensely partisan measures"); Crum, Unabridged Fifteenth Amendment, supra note 13, at 1107 ("[N]o Democrat in the Senate voted for [the Fifteenth Amendment], and only three in the House did. Conversely, 38 out of 54 Republicans voted for it in the Senate, and 140 out of 169 did so in the House.").

272. Doe v. Reed, 561 U.S. 186, 224 (2010) (Scalia, J., concurring in the judgment).

273. See Crum, Racially Polarized Voting, supra note 53, at 300 ("[T]he Reconstruction Framers turned to Black suffrage, predicting that Black voters would support the Republican Party and that empowering these voters would help transform the South.")

274. Conversely, Republicans viewed Black voters as loyal to the Union. See Mark A. Graber, Punish Treason, Reward Loyalty: The Forgotten Goals of Constitutional Reform After the Civil War 123 (2023) ("Much Republican rhetoric justified granting persons of color rights because they were loyal.").

275. Crum, Racially Polarized Voting, supra note 53, at 303.

276. Id.

277. See Ron Chernow, Grant 623 (2017).

By contrast, white Southerners tended to oppose Reconstruction and voted for Democrats. In the constitutional convention elections, white men's support ranged from 8.5% to 33.6% across different states.[278] Turning to partisan elections, "[i]n no Southern state did Republicans attract a majority of the white vote."[279] But to be clear, white men were less politically cohesive than Black men. That is because there were pockets of white Unionism in the South, mostly in more mountainous regions away from the plantation belts.[280] White Northerners who moved to the South—the original carpetbaggers—also backed Republicans.[281]

Finally, and in contrast to today's racial demographics, Black people were not necessarily racial *minorities* across the South. Due to slavery's labor-intensive nature, Black people were heavily concentrated in the Southern states: "Three Southern States—Louisiana, Mississippi, and South Carolina—were majority Black. In addition, Black people were above 45 percent of the population in Alabama, Florida, and Georgia, and around 40 percent in North Carolina and Virginia. Black people were about a quarter of the population in Arkansas and Texas."[282] Furthermore, due to their high registration rates and the disenfranchisement of ex-Confederates, Black men were "effective voting majorities in five Southern States—Alabama, Florida, Louisiana, Mississippi, and South Carolina."[283]

Given this level of racial polarization, the incentives for Southern states to employ race in the redistricting process were clear. Republican mapmakers would seek to create majority-Black districts that could elect Republican candidates to Congress, which was far easier then than it is today given contemporary demographics. Meanwhile, Democratic mapmakers would seek to pack or crack Black voters. That is, Democrats could overconcentrate Black voters in a supermajority-Black district, thereby bleaching the neighboring districts and enabling them to elect more Democrats. Alternatively, Democrats could spread out Black voters across multiple districts, denying them the ability to elect even a token representative.[284]

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278. Hanes Walton, Jr., Sherman C. Puckett & Donald R. Deskins, Jr., The African American Electorate: A Statistical History 240 tbl.13.4 (2012).

279. Foner, Reconstruction, supra note 56, at 297. Indeed, one could view the racial polarization in the Reconstructed South as a precursor to today's politics. Cf. Joshua S. Sellers, Election Law and White Identity Politics, 87 Fordham L. Rev. 1515, 1524–29 (2019) (discussing Nixon's Southern Strategy).

280. See Foner, Reconstruction, supra note 56, at 300 ("The most extensive concentration of white Republicans . . . lay in the upcountry bastions of wartime Unionism.").

281. See id. at 294–95 (discussing the southward migration of carpetbaggers and noting that the majority of those who served in Congress from the South were veterans of the Union army).

282. Crum, Racially Polarized Voting, supra note 53, at 302.

283. Id. at 302–03.

284. See supra section I.A (explaining redistricting strategies).

C. *The Fourteenth Amendment*

The Fourteenth Amendment was originally understood to permit the disenfranchisement of Black men. Given that this is the scholarly consensus,[285] this section briefly summarizes the historical record. This section discusses the constitutional politics surrounding the Fourteenth Amendment's adoption and the original understanding of that Amendment as applied to voting rights.

In the aftermath of the Civil War and emancipation, the Southern states sought to reestablish slavery in all but name only. To accomplish this goal, the Southern states passed strict anti-vagrancy and labor laws, known as the Black Codes.[286] Meanwhile, many Southern states sent unabashed rebels to Congress.[287]

Recognizing that immediate reconciliation would transform Appomattox into a Pyrrhic victory, the Thirty-Ninth Congress refused to seat Southern representatives and senators.[288] Seeking to eradicate the Black Codes, the Thirty-Ninth Congress passed the Civil Rights Act of 1866 over President Andrew Johnson's veto.[289] Accurately named, the Civil Rights Act protected a panoply of civil rights, but it did not extend political

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285. See, e.g., Amar, America's Constitution, supra note 263, at 392–93 ("Moderate Republicans feared they could not sell the equal-suffrage idea in the North, where white bigotry remained a stubborn fact of life."); Laura F. Edwards, A Legal History of the Civil War and Reconstruction: A Nation of Rights 108 (2015) (noting that the Fourteenth Amendment did not require the extension of political rights, like enfranchisement, to Black men); Foner, Second Founding, supra note 9, at 83 (explaining that "Section 2 [of the Fourteenth Amendment] did not enfranchise black men").

Some scholars have argued that Section One was capacious enough to *eventually* be read to encompass the right to vote. See Randy E. Barnett & Evan D. Bernick, The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit 367–68 (2021) (arguing that, in light of the other voting rights amendments, the Privileges or Immunities Clause should be read to protect a fundamental right to vote); William W. Van Alstyne, The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress, 1965 Sup. Ct. Rev. 33, 72–73 (claiming that "the open-ended phrases of § 1" left open the opportunity for future use of the Fourteenth Amendment to invalidate laws restricting Black suffrage). Moreover, Professor Franita Tolson has argued that Sections Two and Five of the Fourteenth Amendment should be read in tandem and as evidence of "the Reconstruction Congress's attempt to constitutionalize a mechanism that would allow Congress to all but legislate universal suffrage." Franita Tolson, What Is Abridgment?: A Critique of Two Section Twos, 67 Ala. L. Rev. 433, 458 (2015) [hereinafter Tolson, Abridgment]. But even these scholars do not claim that the Equal Protection Clause was originally understood to mandate the enfranchisement of Black men on its own force.

286. See Crum, Lawfulness of the Fifteenth Amendment, supra note 53, at 1555 ("Recognizing that the Union's victory on the battlefield was at risk, the Thirty-Ninth Congress excluded the South.").

287. See Foner, Reconstruction, supra note 56, at 196 (noting that Georgia appointed former Confederate Vice President Alexander Hamilton Stephens to the U.S. Senate).

288. See Crum, Lawfulness of the Fifteenth Amendment, supra note 53, at 1555.

289. See Foner, Reconstruction, supra note 56 at 250–51 (remarking that the Civil Rights Act of 1866 was "the first time in American history, [that] Congress enacted a major piece of legislation over a President's veto").

rights to Black men. Congress invoked its Thirteenth Amendment enforcement authority to pass the Civil Rights Act, but some moderate Republicans—most prominently, Representative John Bingham (R-OH)—questioned the Act's constitutionality.[290]

Those constitutional doubts helped prompt Congress to pass the Fourteenth Amendment. Section One was widely understood to constitutionalize the Civil Rights Act. Accordingly, it did not spark much controversy. Furthermore, Section One was drafted to avoid enfranchising Black men. A clause-by-clause analysis reveals why.

Section One's first sentence—the Citizenship Clause—established birthright citizenship and overturned *Dred Scott v. Sandford*'s holding that Black people could not be United States citizens.[291] But citizenship did not confer suffrage. Next, the Privileges or Immunities Clause borrowed from Article IV's protections for out-of-state citizens. The right to vote was not considered a privilege or immunity of citizenship. After all, Missouri did not have to grant the right to vote to a visiting Marylander.[292] Finally, the Due Process and Equal Protection Clauses reflect the distinction between civil and political rights. In contradistinction to the Privileges or Immunities Clause, these clauses apply to "person[s]," not just citizens.[293] Thus, if the Equal Protection Clause were to have been originally understood to protect the right to vote, then it would have mandated the enfranchisement of not only Black men but also women and noncitizens.[294]

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290. See Gerard N. Magliocca, American Founding Son: John Bingham and the Invention of the Fourteenth Amendment 120 (2013) ("Bingham's broader argument was that, while he agreed with the goals of the Civil Rights Act, he did not agree that Congress had the power to regulate the states in this way without a constitutional amendment.").

291. U.S. Const. amend. XIV, § 1; see also Dred Scott v. Sandford, 60 U.S. 393, 427 (1857) (enslaved party).

292. To be sure, this interpretation was contested at the time, and women's suffrage activists petitioned Congress and took a case all the way to the Supreme Court. But these efforts failed. See Minor v. Happersett, 88 U.S. 162, 178 (1875) (holding that women were not enfranchised by the Privileges or Immunities Clause); U.S. House, Judiciary Committee, Woodhull Report (1871), reprinted in The Essential Documents, supra note 53, at 609–20 (rejecting petition that argued women were enfranchised by the Privileges or Immunities Clause).

293. U.S. Const. amend. XIV, § 1.

294. In recent years, originalist scholars have examined the original understanding of the Equal Protection Clause, emphasizing that it requires equal treatment under existing laws. This Essay does not take sides in that debate, but it notes that even these theories do not dispute that voting rights were not covered by the Equal Protection Clause as originally understood. See Ilan Wurman, The Second Founding: An Introduction to the Fourteenth Amendment 139 (2020) (arguing that the Equal Protection Clause "does not establish any rights" and does not apply to political rights); Christopher R. Green, The Original Sense of the (Equal) Protection Clause: Pre-Enactment History, 19 Geo. Mason U. C.R. L.J. 1, 44 (2008) (arguing that the Equal Protection Clause's "text expresses an entitlement to the equal fulfillment of the government's remedial and enforcement functions, not a generic right against improper legislative classifications").

While the Fourteenth Amendment was being drafted in Congress, many Republicans insisted that its language ensure that Black men were *not* enfranchised. And during the ratification debate, many Radicals lamented that the Fourteenth Amendment would not extend the ballot to Black men. Indeed, Frederick Douglass "refused to support the Fourteenth Amendment precisely because of its failure to secure political rights for blacks."[295] These contemporary statements buttress the clause-by-clause analysis of Section One's original meaning.

Although relatively obscure to modern readers, Section Two of the Fourteenth Amendment was "far more polarizing and consumed far more political attention."[296] From the Founding through Reconstruction, the Three-Fifths Clause applied to the apportionment process and counted enslaved Black people as three-fifths of a person. One consequence of the Thirteenth Amendment was the effective nullification of the Three-Fifths Clause, which would have had the perverse result of *increasing* the South's share of seats in the House and, concomitantly, the Electoral College after the 1870 Census while Black men remained disenfranchised. Section Two, therefore, provided for a reduction in House seats—and Electoral College votes—if a State "denied" or "in any way abridged" the "right to vote" of its adult "male citizens."[297] As Professor Xi Wang has explained, Section Two "protected the North against an increase in Southern white political power and punished the South for withholding suffrage from Blacks but allowed Northern states to do so with impunity, since their black population was too small to make a difference in representation."[298] During the drafting and ratification debate, Section Two was viewed as a penalty for disenfranchisement rather than a mandate for nationwide male suffrage.[299] From a structural perspective, Section Two's distinct treatment of the right to vote reinforces the claim that Section One's focus is civil rights.[300]

Critically for this Essay's focus, Section Two's linkage of the words "denied" or "abridge" to the phrase "right to vote" was novel and would provide the model for the Fifteenth Amendment.[301] Unfortunately, the

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295. The Essential Documents, supra note 53, at 435.

296. McDonald v. City of Chicago, 561 U.S. 742, 841 (2010) (Thomas, J., concurring in part and concurring in the judgment).

297. U.S. Const. amend. XIV, § 2.

298. Xi Wang, Black Suffrage and the Redefinition of American Freedom, 1860–1870, 17 Cardozo L. Rev. 2153, 2194–95 (1996).

299. See Bruce Ackerman, We the People: Transformations 107 (1998) (noting that this missing mandate for nationwide male suffrage came instead through the Fifteenth Amendment).

300. See Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 217–18 (1998) (commenting that the "overall architecture of the Fourteenth Amendment . . . [has] civil rights at the core of section 1 and political rights featured separately in section 2").

301. See Crum, Unabridged Fifteenth Amendment, supra note 13, at 1071–72 (explaining that Reconstruction era state constitutions did not use the phrase "denied or abridged" in connection with the right to vote); Franita Tolson, The Constitutional

Reconstruction Framers never "specifically discussed" the rationale for selecting the words "denied" or "abridged" in Section Two.[302] Nevertheless, scholars have identified Reconstruction era statutes or hypotheticals that the "deny" or "abridge" language might have addressed: laws that imposed different voting qualifications based on race, such as a property qualification that required Black voters to own more land than white voters.[303] Moreover, Professor Franita Tolson, whose work has focused on Section Two, has argued that "[a]bridgment does not mean purpose."[304] Tolson has further emphasized that Section Two's apportionment penalty is not tied to racial discrimination; rather, it applied to any denial or abridgment of the right to vote.[305] Section Two's connection of a "deni[al] . . . or . . . abridge[ment]" of the "right to vote" and a reduction in House seats indicates that the Reconstruction Framers recognized that political rights were exercised collectively.[306] Put differently, a restriction of a group's participation in the political process should result in an aggregate punishment.

D. *The Fifteenth Amendment*

In stark contrast to the voluminous literature on the Fourteenth Amendment, the Fifteenth Amendment is a scholarly afterthought. The Fifteenth Amendment is truly the forgotten Reconstruction Amendment.[307]

Structure of Voting Rights Enforcement, 89 Wash. L. Rev. 379, 414 (2014) [hereinafter Tolson, Structure] (noting the "textual and historical link" between the Apportionment Clause and the Fifteenth Amendment).

302. Van Alstyne, supra note 285, at 81.

303. See id. (arguing that abridgment would have prohibited States from implementing a property qualification and then banning Black people from owning property); see also Kousser, supra note 46, at 17 (arguing that the Reconstruction Framers likely had in mind New York's "widely known" law that imposed racially discriminatory residency, property, and taxpaying requirements); Michael T. Morley, Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment, 2015 U. Chi. Legal F. 279, 310 (arguing that "the term 'abridge' . . . referred to the imposition of qualifications to vote for blacks, such as property or intelligence requirements, that did not also apply to white people").

304. Tolson, Abridgment, supra note 285, at 438.

305. See id.

306. See Crum, Racially Polarized Voting, supra note 53, at 325 (alterations in original) (internal quotation marks omitted) (quoting U.S. Const. amend. XIV, § 2) (expanding on this argument).

307. Compared to law professors, see supra note 53, historians have more thoroughly analyzed the Fifteenth Amendment. Their inquiries, however, have focused on motivations and causation rather than the Fifteenth Amendment's original understanding or modern doctrinal significance. See, e.g., Michael Les Benedict, A Compromise of Principle: Congressional Republicans and Reconstruction, 1863–1869, at 335–36 (1974) (arguing that "the chaos of the third session of the Fortieth Congress . . . portended the rupture of the party and the collapse of Republican Reconstruction policy"); Gregory P. Downs, After Appomattox: Military Occupation and the Ends of War 218 (2015) (arguing that "[r]atifying the Fifteenth Amendment depended upon the war powers"); Foner, Second Founding,

This section starts by explaining why and how the Fifteenth Amendment was added to the Constitution. Black men remained disenfranchised even after the Fourteenth Amendment's ratification, and Congress rejected Radical Republicans' attempts to pass a nationwide Black male suffrage statute. Next, this section provides an overview of the passing references to redistricting and apportionment during the Fifteenth Amendment's drafting and ratification. This section then pivots to the two main issues that confronted the Reconstruction Framers. First, what groups should be enfranchised? In other words, what characteristics should be the subject of an antidiscrimination provision? Second, should the right to hold office be explicitly protected and, if not, was it encompassed within the right to vote?

1. *The Path to the Fifteenth Amendment.* — While the states debated the Fourteenth Amendment, the lame-duck Thirty-Ninth Congress exercised its authority over areas of federal control to enfranchise Black men. Congress first enfranchised Black men in the District of Columbia and the federal territories.[308] Far more significantly, Congress next passed the First Reconstruction Act, which enfranchised Black men in ten of the eleven Southern states.[309] The First Reconstruction Act enfranchised approximately eighty percent of Black men in the country.[310] And because of the elections held under the First Reconstruction Act, the political fact of racial bloc voting became clear.[311]

Even after the Fourteenth Amendment was ratified in July 1868,[312] states continued to bar Black men from the polls. In the 1868 election,

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supra note 9, at 115 (observing that the "[r]atification of the Fifteenth Amendment marked the completion of the second founding"); William Gillette, The Right to Vote: Politics and the Passage of the Fifteenth Amendment 77 (2d ed. 1969) (arguing that the Fifteenth Amendment's primary purpose was to enfranchise Black men in the North); John Mabry Mathews, Legislative and Judicial History of the Fifteenth Amendment 21 (1909) (arguing that the "controlling motive" behind the Fifteenth Amendment was "supplying a new basis for the continuance of congressional control over the suffrage conditions of the Southern States"); Xi Wang, The Trial of Democracy: Black Suffrage and Northern Republicans, 1860–1910, at 39–48 (1997) (discussing the Fifteenth Amendment's passage as part of a larger project focused on enforcement legislation); LaWanda Cox & John H. Cox, Negro Suffrage and Republican Politics: The Problem of Motivation in Reconstruction Historiography, *in* Reconstruction: An Anthology of Revisionist Writings 156, 156 (Kenneth M. Stampp & Leon F. Litwack eds., 1969) (emphasizing the Radicals' ideological motivations).

308. See Act of Jan. 8, 1867, ch. 6, § 1, 14 Stat. 375, 375 (regulating the elective franchise in the District of Columbia); Act of Jan. 25, 1867, ch. 15, 14 Stat. 379, 379–80 (regulating the elective franchise in the territories of the United States).

309. See First Reconstruction Act, ch. 153, § 5, 14 Stat. 428, 428–29 (1867). Tennessee was excluded from the First Reconstruction Act's strictures because it voluntarily ratified the Fourteenth Amendment. See Crum, Superfluous Fifteenth Amendment, supra note 37, at 1595. Tennessee also voluntarily enfranchised Black men. Id.

310. Richard M. Valelly, The Two Reconstructions: The Struggle for Black Enfranchisement 24 (2004).

311. See supra notes 274–281.

312. See 15 Stat. 708 (1868).

voters in Iowa and Minnesota backed referenda enfranchising Black men, while Missouri voters rejected a similar referendum.[313] When the lame-duck Fortieth Congress convened in January 1869, the nation was bitterly divided. Black men could vote in seventeen states plus the soon-to-be readmitted Mississippi, Texas, and Virginia.[314] By contrast, Black men were disenfranchised in seventeen states.[315] If today's doctrine matched the original understanding of the Equal Protection Clause, Black men would have been enfranchised nationwide in 1868, two years prior to the Fifteenth Amendment's ratification.

At the start of the congressional debate on the Fifteenth Amendment, Representative George Boutwell (R-MA), a prominent Radical Republican, advocated passing *both* a federal statute and a constitutional amendment enfranchising Black men nationwide.[316] For authority, Boutwell cited the Elections Clause, the Guarantee Clause, the Fourteenth Amendment, and Congress's enforcement authority under the Fourteenth Amendment.[317] Tellingly, Boutwell relied on the Fourteenth Amendment's Privileges or Immunities Clause and the Apportionment Clause—not the Equal Protection Clause.[318]

Revealing his strategy, Boutwell claimed that the statute would immediately enfranchise Black men, who would then help get the Fifteenth Amendment ratified by three-fourths of the states. Boutwell's bill was opposed by moderate Republicans, who argued that Congress lacked constitutional authority to impose voting qualifications via statute.[319] The moderates prevailed, and Boutwell shelved the statute in favor of a constitutional amendment.[320]

This discussion was the first significant postratification debate about the Fourteenth Amendment's scope. Congress's failure to pass a nationwide Black suffrage statute reinforces that Section One of the Fourteenth Amendment, as originally understood, excluded political rights. Indeed, this debate helped liquidate that question.[321]

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313. See Gillette, supra note 307, at 26. In addition, Michigan voters rejected a new state constitution that would have enfranchised Black men. See id.

314. Crum, Unabridged Fifteenth Amendment, supra note 13, at 1065–66.

315. Id. In this count, New York is classified as a state with racially discriminatory laws because it imposed racially discriminatory property, tax, and residency requirements on Black men. See id. at 1063 n.125.

316. See Crum, Superfluous Fifteenth Amendment, supra note 37, at 1605.

317. See id. at 1606–08.

318. Id.

319. Id. at 1613.

320. See id. at 1604–14 (recounting the introduction and debate of Boutwell's Bill). A similar—but shorter—debate occurred in the Senate, well after the House had moved down the path of a constitutional amendment. See id. at 1614–16 ("Sumner's statute was short-lived. It was indefinitely postponed on January 15, 1869—a few days before Boutwell's bill met the same fate.").

321. See id. at 1617–22; see also infra section III.A (elaborating on liquidation).

2. *The Omission of Redistricting*. — Lawmakers barely addressed the question of redistricting during the Fifteenth Amendment's drafting and ratification.[322] One reference concerned a debate over whether Congress should submit the Fifteenth Amendment to state legislatures or to state conventions, an option afforded Congress under Article V.[323] As part of that debate, Senator James Dixon (R-CT) criticized the rotten boroughs that pervaded his home state.[324] According to Dixon, that malapportionment "work[ed] a grievance" and "sometimes sen[t] a Senator to this body who misrepresent[ed] the people of the State."[325]

Another reference was made in the debate over whether Congress had constitutional authority to enfranchise Black men nationwide via an ordinary statute.[326] As one of his many fonts of constitutional authority, Boutwell argued that the Elections Clause permitted Congress to regulate the "manner" of federal elections, which he construed to encompass voting qualifications.[327] In response, Representative Albert Burr (D-IL) argued that the word "manner" did not go to voting qualifications. Relying on Justice Joseph Story's Commentaries, Burr stated that "manner" meant "manner of electing," of which there was a "great diversity" of approaches by the States.[328] Those manners of electing included "the districts within which elections [were] held, the proportion of votes required by various States to elect, and the two ways of casting those votes by the elector."[329] As an example, Burr explained that, following the 1860 Census, Congress

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322. There are only a handful of clear references to redistricting or apportionment in the entire congressional debate over the Fifteenth Amendment. See infra notes 323–335. None of these references went to the Fifteenth Amendment's substantive scope.

323. See U.S. Const. art. V.

324. See Cong. Globe, 40th Cong., 3d Sess. 543 (1869) (statement of Sen. Dixon (R-CT)) ("In . . . Connecticut, our unfortunate, I may say rotten-borough system of representation, gives the city of New Haven, with fifty thousand inhabitants and nearly ten thousand voters, the same representation in the Legislature which the smallest town in the State has with only one hundred and fifty voters.").

325. Id. A former Republican, Senator Dixon backed the Democrats in the 1868 election, which the Democrats lost in Connecticut. Arguably, this defeat was attributable to the rotten-borough system, hence Dixon's animosity toward it. See id. at 905 (statement of Sen. Vickers (D-MD)) ("If I mistake not, that Senator lost his election in consequence of that system.").

326. See supra note 320.

327. See Cong. Globe, 40th Cong., 3d Sess. 556 (statement of Rep. Boutwell (R-MA)) (arguing that the Elections Clause includes "everything relating to an election, from the qualifications of the elector to the deposit of his ballot in the box").

328. Id. at 698 (statement of Rep. Burr (D-IL)) (internal quotation marks omitted) (quoting 2 Joseph Story, Commentaries on the Constitution of the United States § 824, at 290–91 (Boston, Hillard, Gray & Co. 1833)).

329. Id.

permitted Illinois to elect its new representative in an at-large district rather than redraw its congressional map.[330]

In a related vein, Burr responded to Boutwell's argument that Section Two empowered Congress to enfranchise Black men nationwide via statute.[331] On this point, Burr explained that Section Two imposed a penalty that linked enfranchisement and apportionment: "[I]f you see fit by State law to disfranchise one half of your inhabitants, we, by virtue of the power to apportion Representatives, will decrease your representation to one half of the present number."[332] Representative James Beck (D-KY) advocated a similar interpretation of Section Two.[333]

A final discussion of apportionment concerned an attempt by Senator Charles Buckalew (D-PA) to pass Electoral College reform alongside the Fifteenth Amendment. Buckalew's proposal provided that presidential electors be chosen by popular vote and that Congress could dictate how electors were apportioned within States—that is, Congress could require that states appoint electors via today's common winner-take-all approach or Maine's and Nebraska's modified system.[334] After Buckalew's proposal passed the Senate attached to the Fifteenth Amendment, Bingham briefly summarized this approach in the House. Bingham emphasized that Buckalew's approach did not reapportion electors between states.[335]

The question of redistricting was similarly muted during the ratification battle. The closest analogue is that Section Two's penalty was discussed as a reason for border states to ratify the Fifteenth Amendment, lest those states lose seats in Congress.[336] But that argument merely predicts how

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330. See id. ("Congress, adopting or rather not disturbing the thirteen districts created by State act, provided by joint resolution for the election of the fourteenth member by vote of the whole State [of Illinois].").

331. Id. at 559 (statement of Rep. Boutwell (R-MA)) ("If gentlemen will consider these two sections . . . they will see how . . . wholly unsupported is the doctrine that there is in this second section any concession to a State to abridge or deny to a citizen the right to vote."); Crum, Superfluous Fifteenth Amendment, supra note 37, at 1608–09 (elaborating on Boutwell's argument).

332. Cong. Globe, 40th Cong., 3d Sess. 699 (statement of Rep. Burr (D-IL)).

333. See id. at 692 (statement of Rep. Beck (D-KY)) ("If the first section secured the right to vote at all, the second was the most absurd and abortive effort to secure that right to the parties entitled to it that can well be conceived.").

334. See id. at 668 (statement of Sen. Buckalew (D-PA)) ("[E]lectors of President and Vice President shall be chosen by the people of the several States instead of being chosen as the Legislatures of the States may direct."); id. at 1041–42 (describing the passage of Buckalew's proposal as attached to the Fifteenth Amendment); Crum, Unabridged Fifteenth Amendment, supra note 13, at 1096–99 (summarizing Buckalew's proposal and its path through Congress); see also Chiafalo v. Washington, 140 S. Ct. 2316, 2321 & n.1 (2020) (discussing both the winner-take-all approach as well as Maine's and Nebraska's systems).

335. See Cong. Globe, 40th Cong., 3d Sess. 1224 (1869) (statement of Rep. Bingham (R-OH)).

336. See Crum, Unabridged Fifteenth Amendment, supra note 13, at 1109.

Section Two would have worked in a world in which states with sizable Black populations barred them entirely from the ballot.

Thus, the Reconstruction Framers did not focus on the question of redistricting when drafting and ratifying the Fifteenth Amendment. In originalist parlance,[337] this silence indicates that the Reconstruction Framers and ratifiers did not intend for the Fifteenth Amendment to apply to the redistricting process nor did they expect the Fifteenth Amendment to implicate the use of race in the redistricting process. But as unpacked below, the original public understanding of the Fifteenth Amendment's text suggests that it could apply to redistricting.

3. *Voting Qualifications.* — The bulk of the debate over the Fifteenth Amendment's language concerned which groups should be enfranchised. The Reconstruction Framers were united in their belief that Black men should be enfranchised nationwide. The original drafts of the Fifteenth Amendment proposed by Boutwell and Senator William Stewart (R-NV) were narrow antidiscrimination provisions that accomplished that goal by prohibiting discrimination on account of race, color, or previous condition of servitude.[338] And with some changes—most notably, the deletion of the Senate version's explicit protection for the right to hold office[339]—that language became the Fifteenth Amendment.

Some Republicans wanted to go further. Most prominently, several Radical Republicans sought to add characteristics to the Fifteenth Amendment's antidiscrimination list. The first version passed by the Senate would have protected against discrimination on account of "race, color, nativity, property, education, or religious creed."[340] Toward the end of the debate, the House passed a similarly broad version that barred discrimination on the basis of "race, color, nativity, property, creed, or previous condition of servitude."[341] These versions would have prohibited, for example, literacy tests or property qualifications.

As this debate has been thoroughly canvassed elsewhere,[342] this Essay will not belabor the point here. For present purposes, it suffices to say that the Reconstruction Framers' debate over who could cast a ballot sheds little light on questions of redistricting.

4. *Officeholding Requirements.* — The other major issue debated by the Reconstruction Framers was whether the right to hold office should be

337. See supra section II.A.

338. Cong. Globe, 40th Cong., 3d Sess. 286 (reading the joint resolution as "[t]he right of any citizen of the United States to vote shall not be denied or abridged by the United States or any State by reason of the race, color, or previous condition of slavery"); id. at 379 (reading the joint resolution as "[t]he right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States, or any State, on account of race, color, or previous condition of servitude").

339. See infra section II.D.4.

340. Cong. Globe, 40th Cong., 3d Sess. 1035.

341. Id. at 1428.

342. See Crum, Unabridged Fifteenth Amendment, supra note 13, at 1080–107.

explicitly protected by the Amendment and, once it was not, whether it was nevertheless implicitly covered.

The officeholding question sparked intense controversy because of contemporary events in Georgia. Recall that Congress enfranchised Black men in Georgia as part of the First Reconstruction Act of 1867.[343] Then, in July 1868, Georgia was readmitted to the Union following its ratification of the Fourteenth Amendment.[344] But in September 1868, "a coalition of white Republicans and Democrats voted to expel newly elected black officials from the [Georgia] House and Senate."[345] Adding insult to injury, the expelled Black state legislators were replaced by the white candidates they had defeated at the polls.[346] Concerns were also raised about whether several Georgia state legislators were disqualified by Section Three of the Fourteenth Amendment, which barred ex-Confederates from holding office.[347] In response to these developments, the lame-duck Fortieth Congress—that is, the same Congress that passed the Fifteenth Amendment—refused to seat Georgia's U.S. Senator and one of its seven representatives.[348]

Although the Georgia controversy thrust the right to hold office into the spotlight, Georgia was hardly alone in barring Black men from holding office.[349] Ten other states had racially discriminatory officeholding requirements for their state legislatures.[350] Eight states barred Black men from office by bootstrapping their officeholding requirements to their voting qualifications.[351] Missouri's officeholding requirement expressly discriminated on account of race. Iowa limited the right to hold office to

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343. See First Reconstruction Act, ch. 153, § 5, 14 Stat. 428, 429 (1867).

344. See Act of June 25, 1868, ch. 70, 15 Stat. 73, 73 (admitting Alabama, Florida, Georgia, Louisiana, North Carolina, and South Carolina to representation in Congress).

345. The Essential Documents, supra note 53, at 544–45.

346. See Cong. Globe, 41st Cong., 2d Sess. 176 (1870) (statement of Sen. Edmunds (R-VT)).

347. See Cong. Globe, 40th Cong., 3d Sess. 5 (1869) (statement of Sen. Thayer (R-NE)).

348. See Crum, Lawfulness of the Fifteenth Amendment, supra note 53, at 1580–82.

349. The Georgia Supreme Court ultimately ruled that the state constitution only required state legislators to be citizens. See White v. Clements, 39 Ga. 232, 266–68 (1869); see also Ga. Const. art. III, §§ 2–3 (1868) (requiring that state senators and representatives "be citizens of the United States"). Nonetheless, the Georgia officeholding controversy sparked a long conflict with Congress, culminating in Congress kicking Georgia out of the Union, placing it under military rule, and forcing it to ratify the Fifteenth Amendment as a fundamental condition of its second readmission to the Union. See Crum, Lawfulness of the Fifteenth Amendment, supra note 53, at 1580–89.

In February 1870, Democrats attempted to block the first Black U.S. Senator, Hiram Revels, on the grounds that he had not been a citizen for the requisite number of years. See Richard A. Primus, The Riddle of Hiram Revels, 119 Harv. L. Rev. 1681, 1682 (2006).

350. See Crum, Unabridged Fifteenth Amendment, supra note 13, at 1069–70 & map 2 (compiling these states' histories regarding racial discrimination in voting and officeholding); see also id. at 1146–50 (listing state constitutional provisions).

351. Crum, Unabridged Fifteenth Amendment, supra note 13, at 1069.

white male electors, even though the state had enfranchised Black men in an 1868 referendum.[352] Counterintuitively, Black men could technically hold office in eight states where they were barred from voting; the reason is that those states had decoupled their voting qualifications from their officeholding requirements, and the latter permitted any citizen or inhabitant to hold office.[353]

Given this background, the officeholding question was hotly contested during the drafting and ratification debate. At the outset, the original Senate version explicitly protected the "right to hold office" while the original House version failed to expressly do so.[354] That distinction, however, was not harped on until later in the drafting debate.

In the first round of the congressional debate, the House first passed a narrow antidiscrimination provision that lacked explicit officeholding language[355] while the Senate passed a broad antidiscrimination provision that included such language.[356] On February 15, the House held an abbreviated debate over the Senate's version and decisively rejected it.[357] By this point, neither the House nor the Senate had extensively discussed the officeholding question.

On February 17, the Senate convened to debate the House's actions,[358] and the officeholding debate ensued in earnest given the House's failure to expressly protect that right. Some Radicals pointed to the ongoing Georgia controversy as a harbinger of what was to come if the right to hold office was not explicitly protected.[359] These Radicals, therefore, advocated a clear statement rule in the Amendment's text that the right to hold office was protected.[360] By contrast, other Republicans argued that the right to vote implicitly encompassed the right to hold

352. Id.

353. Id.

354. See id. at 1084–85.

355. See id. at 1083, 1087–90.

356. See id. at 1103, 1090–91.

357. See id. at 1097, 1099–100.

358. See id. at 1100.

359. See Cong. Globe, 40th Cong., 3d Sess. 1296 (1869) (statement of Sen. Wilson (R-MA)) ("There is a controversy in Georgia about it, and why has that controversy arisen? Because it is not expressed in their constitution; it was left to be inferred . . . ."); id. at 1298 (statement of Sen. Sumner (R-MA)) (commenting that the House's version risked condoning Georgia's actions).

360. See id. at 1296 (statement of Sen. Wilson (R-MA)) ("[S]uppose we submit this imperfect proposition which says to seven hundred and fifty thousand colored men in this country, 'You shall have the right to vote, but you shall not have the right to sit upon a jury or the right to hold office' . . . ."); id. at 1298 (statement of Sen. Edmunds (R-VT)) (interpreting the House's version to mean that "while you give every citizen of a State a right to vote[,] you leave it to the majority of that State to determine whether he shall have any right to be voted for"); id. at 1300 (statement of Sen. Edmunds (R-VT)) (arguing that the House's version would create a "white aristocracy"); id. at 1301 (statement of Sen. Welch (R-FL)) ("By implication it deprives him of the right to hold office . . . .").

office, either as a theoretical matter or a practical one.[361] And some Republicans adopted a pragmatic approach: The Senate should accept the House's narrow version given the limited time remaining in the lame-duck session and the difficult ratification battle ahead.[362] The Senate failed to pass the House's version by a two-thirds majority, partly because several Radicals refused to support an amendment that lacked express protection for the right to hold office.[363] The Senate then passed a narrow anti-discrimination version that explicitly protected the right to hold office.[364]

At this juncture, the main substantive point of disagreement between the two chambers was the officeholding question.[365] On February 20, the House met to debate the Senate's version, and Boutwell—as floor manager—suggested that the discussion focus on the officeholding question.[366] As such, Representative John Logan (R-IL) moved to delete the officeholding protections from the Senate's version.

In support of his position, Logan echoed arguments first heard in the Senate. Logan claimed that "when we give [Black men] the right to vote they will take care of the right to hold office."[367] In other words, Logan thought that, as a practical matter, Black men would elect other Black men to office. Representative Benjamin Butler (R-MA) made the theoretical corollary to Logan's point in stating that "the right *to elect* to office carries with it the inalienable and indissoluble and indefeasible right *to be elected* to office."[368]

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361. See id. at 1296 (statement of Sen. Ferry (R-CT)) (disagreeing with Wilson's view and stating that "it says no such thing"); id. at 1300 (statement of Sen. Frelinghuysen (R-NJ)) ("I will only say that if you give seven hundred and fifty thousand men the right to the ballot they will look out for their own rights as to office."); id. at 1302 (statement of Sen. Howard (R-MI)) ("There is no danger that in the densely populated regions of the South, where the black population is so numerous, they will be deprived of the right of holding office though they may be voters.").

362. See id. at 1299 (statement of Sen. Stewart (R-NV)) ("You can carry the question of suffrage easier [in the states], and then after that you can carry the question of holding office easier than you can carry both together."); id. (statement of Sen. Sawyer (R-SC)) (saying that "[i]f the country is not ready for that proposition [i.e., officeholding] now, then let us wait"); id. at 1300 (statement of Sen. Frelinghuysen (R-NJ)) ("If we adopt that [i.e., the House's version], [then] we have a constitutional amendment.").

363. Id. at 1300 (failing by a vote of 31-27); see also id. at 1307 (statement of Sen. Wilson (R-MA)) ("I voted, therefore, against the House amendment . . . that did not secure to colored citizens the right to hold office . . . .").

364. See id. at 1318.

365. See Crum, Unabridged Fifteenth Amendment, supra note 13, at 1103.

366. See Cong. Globe, 40th Cong., 3d Sess. 1425–26 (statement of Rep. Boutwell (R-MA)).

367. Id. at 1426 (statement of Rep. Logan (R-IL)). Logan also pointed out that the federal constitution referred to "persons" as having the right to hold office, except for the natural-born citizen requirement to be President or Vice President. Id.

368. Id. (statement of Rep. Butler (R-MA)) (emphasis added).

Before Logan's motion could be voted on, Bingham hijacked the debate.[369] Bingham proposed additional protections against discrimination on the basis of nativity, property, and creed.[370] As relevant here, Bingham's draft deleted the words "the United States" from the Senate's version. According to Bingham, the inclusion of *both* "the United States" and a right to hold office "seems to intimate . . . that the Constitution . . . discrim-inated among natural-born citizens as to their eligibility to the office of President."[371]

Notwithstanding Bingham's interjection, Logan's motion to delete the officeholding language was voted on first, and it failed by a 70-95-57 margin.[372] Bingham then moved to substitute his version, which passed by a 92-70-60 vote.[373] Bingham's victory was attributable to several Radical Republicans switching their votes as well as bad-faith support from nineteen Democrats who thought the broader version would fail in the states.[374] Bingham's version then passed by the requisite two-thirds threshold with a 140-37-46 margin.[375]

Then, on February 23, both chambers requested a conference committee.[376] Two days later, on February 25, the conference committee released its proposed amendment: a narrow antidiscrimination provision that lacked explicit protections for the right to hold office.[377] The committee, however, was not unanimous; Senator George Edmunds (R-VT) refused to support the final version.[378] As House Rules prohibited debate on the conference committee's report,[379] the House moved quickly to pass the final version by a 144-44-35 vote.[380]

On February 26, the Senate convened to discuss the conference committee's report.[381] Senator Edmunds explained that he dissented from the conference committee's report because it unduly narrowed the Amendment's scope and deleted the officeholding protection.[382] Of particular importance here, Edmunds raised the specter that "the example of Georgia will be imitated in all the other States."[383] Edmunds

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369. See id. (statement of Rep. Bingham (R-OH)).

370. See id.

371. Id. at 1427.

372. Id. at 1428.

373. Id.

374. See Gillette, supra note 307, at 68–69 n.92 (compiling switched votes); Maltz, Coming of the Fifteenth, supra note 53, at 441 (discussing Democratic support).

375. Cong. Globe, 40th Cong., 3d Sess. 1428.

376. See id. at 1470 (House); id. at 1481 (Senate).

377. See id. at 1563.

378. See id.

379. See Gillette, supra note 307, at 73 (explaining House Rules).

380. Cong. Globe, 40th Cong., 3d Sess. 1563.

381. See id. at 1623.

382. See id. at 1625–26 (statement of Sen. Edmunds (R-VT)).

383. Id. at 1626.

further criticized the final version for "containing *half* of an inseparable, indivisible, and united truth" and "giving to the people the mere husk and shell of the feast of political equality."[384] Edmunds's remarks rehashed the prior debate over whether the term "right to vote" encompassed the right to hold office, either as a theoretical matter or a practical one.[385] Notwithstanding many Radical Senators' disappointment with the final language, the Senate passed the Fifteenth Amendment by a vote of 39-13-14.[386]

Even after the Fifteenth Amendment was sent to the states for ratification, the officeholding question was not fully resolved. Indeed, the commentary was scattershot and not necessarily related to whether the speaker supported or opposed ratification. The Virginia Republican Party's 1869 platform supported the Fifteenth Amendment's ratification so that states could not "deny to him who has the right to vote the twin privilege, the right to be voted for."[387] In arguing for ratification, one San Francisco newspaper noted that "[t]he right of any State to say who shall not be eligible to office is left just as it was before. Some will voluntarily establish an impartial rule in this matter, and others will long refuse to admit any to the privilege but white men."[388] By contrast, the California Democratic Party's 1869 platform invoked the prospect of Black and Chinese officeholding to oppose ratification.[389] In short, the officeholding question produced strange bedfellows and, even after explicit protections were removed, was not easily answered.

III. REDISTRICTING DURING RECONSTRUCTION AND REDEMPTION

Postratification evidence is often employed to elucidate the original understanding of a constitutional provision.[390] This Part begins with an

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384. Id. (emphasis added).

385. See id. at 1627 (statement of Sen. Wilson (R-MA)) ("Do not tell me, sir, that the right to vote carries with it the right to hold office. It does no such thing. . . . I believe, however, that if the black men have the right to vote they and their friends in the struggle of the future will achieve the rest."); see also id. at 1625 (statement of Sen. Howard (R-MI)) ("[A] person possessing the right of voting at the polls is inevitably in the end invested with the right to hold office . . . ."); id. at 1629 (statement of Sen. Stewart (R-NV)) ("If they can retain the ballot in Georgia they will force the power that exists there to give them the right to hold office."); William M. Stewart, Reminiscences of Senator William M. Stewart of Nevada 236 (George Rothwell Brown ed. 1908) ("I was willing to strike out [the words 'to hold office'] because I thought the right to vote carried with it the right to hold office. . . . Mr. Conkling agreed with me, making the majority of the committee . . . .").

386. See Cong. Globe, 40th Cong., 3d Sess. 1641.

387. Edward McPherson, The Political History of the United States of America During the Period of Reconstruction 485 (3d ed. 1871).

388. Ratifying the Amendment, Daily Evening Bull., Mar. 4, 1869, at 2, reprinted in The Essential Documents, supra note 53, at 548.

389. McPherson, supra note 387, at 479.

390. My past work that canvassed the Fifteenth Amendment's adoption gestured toward postratification practice but explicitly left that historical evidence for future work

overview of how postratification practice is incorporated in many originalist theories and as part of the historical modality of constitutional interpretation. It then pivots to the Enforcement Acts passed by Congress under its Fourteenth and Fifteenth Amendment enforcement authority. In so doing, it highlights areas in which Congress did—and did not—act vis-à-vis redistricting during Reconstruction.

On the redistricting front, this Essay limits its focus to the Southern states for several reasons. First, given the legacy of slavery, the Southern states had far greater Black populations—both in absolute numbers and as a percentage of the total population—than Northern states. For instance, Black men were effective political majorities in five Southern states—and near majorities in several others.[391] By contrast, the Northern states had relatively small Black populations, sometimes numbering less than 1,000 people.[392] Given this demographic reality, the creation of majority-minority congressional districts was only possible in the Southern states and border states. Second, the Reconstructed Southern states were often controlled by Republicans who could be expected to draw maps that favored their party by empowering Black voters. And, as those Reconstruction era governments were overthrown, it was in these states that one could expect to find new maps drawn by Democrats that would dilute the power of Black voters. Finally, as this Essay is a first cut at looking at redistricting plans during Reconstruction and Redemption, future work will examine plans enacted elsewhere in the United States and at the state and local level in the South.

A. *The Relevance of Postratification Practice*

In recent years, the Supreme Court and legal scholars have increasingly turned to postratification practices as evidence of original understanding.[393] These theories have been embraced by originalists, and like originalist theory more broadly,[394] this subfield of postratification

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that examined specific doctrinal questions. See Crum, Unabridged Fifteenth Amendment, supra note 13, at 1123.

391. See Crum, Racially Polarized Voting, supra note 53, at 302–03.

392. In Minnesota, for example, there were 759 Black people out of 446,056 people. See 1870 Census, supra note 43, at 20.

393. See, e.g., Moore v. Harper, 143 S. Ct. 2065, 2086–87 (2023) ("We have long looked to 'settled and established practice' to interpret the Constitution." (quoting The Pocket Veto Case, 279 U.S. 655, 689 (1929))); Chiafalo v. Washington, 140 S. Ct. 2316, 2326–28 (2020) (looking at two centuries of practice in holding that states could sanction faithless electors); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 565 U.S. 171, 184–85 (2012) (looking to events in the early 1800s in interpreting the Religion Clauses); McDonald v. City of Chicago, 561 U.S. 742, 769 (2010) (noting that "nine more States adopted state constitutional provisions protecting an individual right to keep and bear arms between 1789 and 1820"); McConnell, Desegregation, supra note 260, at 953–55 (looking to the Civil Rights Act of 1875 to argue that the original understanding of the Fourteenth Amendment prohibited segregated schools).

394. See supra section II.A.

practice has many flavors. As Barrett recently remarked, "Scholars have proposed competing and potentially conflicting frameworks for [postratification] analysis, including liquidation, tradition, and precedent."[395]

For instance, the concept of liquidation posits that postratification practice can "settle constitutional disputes."[396] According to James Madison, "All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."[397] Stated simply, the ratifying generation can clarify ambiguous provisions when they are put into actual practice.

Other postratification evidence theories abound. In the separation of powers context, the Court has frequently looked to so-called historical gloss—namely, that "systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution . . . may be treated as a gloss on 'executive Power.'"[398] In construing the Second Amendment, the Court has adopted an "analogical reasoning"[399] approach that looks to "this Nation's historical tradition of firearm regulation."[400] And in some recent election law cases that implicate structural provisions of the Constitution, the Court has relied on history and tradition to guide its inquiry.[401] Moreover, nested within these various postratification approaches are a series of "unsettled questions" such as "[h]ow long after ratification may subsequent practice illuminate original public meaning" and whether "practice [can] settle the meaning of individual rights as well as structural provisions."[402]

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395. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2162–63 (2022) (Barrett, J., concurring).

396. William Baude, Constitutional Liquidation, 71 Stan. L. Rev. 1, 4 (2019) [hereinafter Baude, Liquidation].

397. The Federalist No. 37, at 236 (James Madison) (Jacob E. Cooke ed., 1961); see also Baude, Liquidation, supra note 396, at 10 (elaborating on Madison's liquidation theory as applied to the First National Bank).

398. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring); see also Nat'l Lab. Rels. Bd. v. Noel Canning, 573 U.S. 513, 525 (2014) ("[T]his Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era."); Curtis A. Bradley & Trevor W. Morrison, Historical Gloss and the Separation of Powers, 126 Harv. L. Rev. 411, 416 (2012) (canvassing the "role of historical practice in the separation of powers context").

399. *Bruen*, 142 S. Ct. at 2132.

400. Id. at 2126; see also United States v. Rahimi, 144 S. Ct. 1889, 1903 (2024) (relaxing *Bruen*'s historical analogue requirement.).

401. See Moore v. Harper, 143 S. Ct. 2065, 2086–87 (2023); Chiafalo v. Washington, 140 S. Ct. 2316, 2326–28 (2020).

402. *Bruen*, 142 S. Ct. at 2163 (Barrett, J., concurring); see also Baude, Liquidation, supra note 396, at 49–66 (asking a series of similar questions).

One throughline of these postratification theories is that they apply most forcefully when the original understanding is ambiguous. Indeed, the Court has admonished that "'post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text.'"[403] But given that constitutional text is often vague and that the historical record is frequently indeterminate, postratification practice has a big role to play in constitutional interpretation. And for nonoriginalist readers, this historical evidence is important on its own merit.[404]

This Essay ends its inquiry with the 1880 redistricting cycle. As one moves farther away from the relevant ratification period, the weight accorded to historical evidence decreases.[405] That is because the relevant actors are no longer in charge. This concern is particularly apt when discussing the Reconstruction Amendments, which were adopted by the Republican Party and vehemently opposed by Democrats. As Reconstruction waned, Democrats seized power across the South and implemented a panoply of policies to disempower Black voters. This creates a rich historical record of actions that skirted or crossed the constitutional line.[406] Redemption thus raises the difficult question of how to factor in the bad-faith interpretation of the Reconstruction Amendments by state actors.[407] Furthermore, Southern states adopted new constitutions in the 1890s and early 1900s that were unabashedly written to advance white supremacy and disenfranchise Black voters on a massive scale,[408] thereby creating a useful cut-off date.

B. *Postratification Congressional Practice*

After the ratification of the Fourteenth and Fifteenth Amendments, Congress passed four enforcement acts. None addressed race and redistricting. This section addresses the Enforcement Acts before discussing Congress's failure to enforce Section Two of the Fourteenth

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403. *Bruen*, 142 S. Ct. at 2137 (majority opinion) (quoting Heller v. District of Columbia, 670 F.3d 1244, 1274 n.6 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)).

404. By contrast, for originalists who have concluded that the original understanding of the Fourteenth and Fifteenth Amendments as to race-based redistricting is unambiguous, then Part III carries little, if any, weight.

405. See, e.g., Aziz Z. Huq, The Function of Article V, 162 U. Pa. L. Rev. 1165, 1233 (2014) (claiming that "historical practice ought to matter if it emerged in the first few decades of constitutional history, but perhaps less so otherwise").

406. See infra section III.C.

407. The broader normative question of Redemption's interpretive impact on liquidation theory generally and the Reconstruction Amendments specifically will be addressed in future work. See Travis Crum, Liquidating Reconstruction (Oct. 6, 2024) (unpublished manuscript) (on file with author); cf. Michael W. McConnell, The Forgotten Constitutional Moment, 11 Const. Comment. 115, 115–16 (1994) [hereinafter McConnell, Forgotten] (critiquing Ackerman's constitutional moment theory by applying it to Jim Crow).

408. See Tolson, Abridgment, supra note 285, at 468–73 (detailing this history).

Amendment. It concludes with Congress's enactment of a one-person, one-vote standard under its Elections Clause authority.

1. *The Enforcement Acts.* — The Enforcement Act of 1870 was passed shortly after the Fifteenth Amendment's ratification.[409] In that statute, Congress reiterated that "all citizens . . . shall be entitled and allowed to vote at all . . . elections [by the people], without distinction of race, color, or previous condition of servitude."[410] To accomplish that goal, Congress banned racial discrimination by election officials, targeted private violence that interfered with elections, barred fraudulent election practices, and conferred jurisdiction on federal courts to hear these cases.[411]

Next, Congress passed the Enforcement Act of 1871,[412] which modified and strengthened the 1870 Act. Specifically, Congress provided for greater federal supervision of elections and mandated that "all votes for representatives in Congress shall hereafter be by written or printed ballot."[413] That same year, Congress also enacted the Ku Klux Klan (KKK) Act,[414] which, as its name suggests, was designed to clamp down on Klan-related violence in the Southern states. The KKK Act specifically targeted violence aimed at interfering with elections.[415]

Finally, near the end of Reconstruction, Congress passed the Civil Rights Act of 1875, which prohibited racial discrimination in public accommodations.[416] Unlike its predecessors, the 1875 Act did not regulate elections.[417] The 1875 Act, however, prohibited racial discrimination in juror qualifications.[418] Because the right to be a juror was often described as a political right, this provision could be viewed as enforcing the Fifteenth Amendment.[419]

There is substantial scholarship on these enforcement provisions. For the sake of brevity, this Essay will not even attempt to summarize this literature here. For present purposes, the key takeaway is that none of

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409. See Enforcement Act of 1870, ch. 114, 16 Stat. 140 (passed May 31, 1870); Cong. Globe, 41st Cong., 2d Sess. 2289–90 (1870) (proclaiming the Fifteenth Amendment's ratification on March 30, 1870).

410. Enforcement Act of 1870 § 1, 16 Stat. at 140.

411. See id. §§ 2–8; see also Xi Wang, The Making of Federal Enforcement Laws, 1870–1872, 70 Chi.-Kent L. Rev. 1013, 1021–34 (1995) (summarizing the 1870 Act's legislative history and provisions).

412. Enforcement Act of 1871, ch. 99, 16 Stat. 433.

413. Id. § 19; 16 Stat. at 440.

414. Ku Klux Klan Act, ch. 22, 17 Stat. 13 (1871).

415. Id. § 2; 17 Stat. at 13; see also Richard Primus & Cameron O. Kistler, The Support-or-Advocacy Clauses, 89 Fordham L. Rev. 145, 146 (2020) (arguing that Section 1985(3) can be used by plaintiffs to help safeguard elections).

416. Civil Rights Act of 1875, ch. 114, 18 Stat. 335.

417. See Enforcement Act of 1870, ch. 114, § 1, 16 Stat. 140; see also Enforcement Act of 1871 § 2, 16 Stat. at 433.

418. Civil Rights Act of 1875 § 4, 18 Stat. at 335–36.

419. See Amar, Jury Service, supra note 53, at 238–39.

these Acts purported to regulate the use of race in the redistricting process.

2. *Congress's Failure to Enforce the Apportionment Clause.* — It is also important to note what Congress did *not* enforce during Reconstruction: Section Two of the Fourteenth Amendment's apportionment penalty. Indeed, Section Two has never been enforced.[420] The reasons for Congress's failure to enforce Section Two during Reconstruction and Redemption were myriad.

As an initial matter, Section Two's intended targets were the Southern states. When Congress drafted Section Two in 1866, the Southern states disenfranchised Black men. But in 1867, Congress enfranchised Black men in ten of the eleven Southern states via the First Reconstruction Act.[421] By the time the 1870 apportionment occurred, Black men had been enfranchised nationwide by the Fifteenth Amendment.[422] Section Two, therefore, had far less work to do than initially intended by the early 1870s.[423]

In a related vein, Section Two proved to be unworkable following the Fifteenth Amendment's passage. In conducting the 1870 Census, the Interior Department attempted to capture practices that denied or abridged the right to vote, such as property qualifications and literacy tests.[424] Indeed, Arkansas and Rhode Island would each have lost one representative if Section Two had been enforced based on the Interior Department's study.[425] Congress nevertheless declined to pull the proverbial trigger because "the numbers of disenfranchised voters in each state according to the Census report, which was of dubious validity anyway, were too small to warrant stripping any states of representation."[426] Congress faced similar problems when it considered enforcing Section Two in 1901 while Jim Crow was being firmly established.[427] Put simply, the twin problems of political will and workability have plagued Section Two since its inception.

3. *The Emergence of One-Person, One-Vote.* — In contrast to Congress's failure to exercise its Reconstruction Amendment enforcement authority to regulate redistricting, the Reconstruction Congress invoked its

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420. See, e.g., Gerard N. Magliocca, Our Unconstitutional Reapportionment Process, 86 Geo. Wash. L. Rev. 774, 783 (2018).

421. First Reconstruction Act, ch. 152, 18 Stat. 428 (1867).

422. See supra sections II.C–.D.

423. See Morley, supra note 303, at 326 (noting that the Reconstruction Framers recognized this point during the 1870 Census).

424. See id. at 326–27.

425. See id. at 327.

426. Id. (citing George David Zuckerman, A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment, 30 Fordham L. Rev. 93, 113–14 (1961)).

427. See Tolson, Abridgment, supra note 285, at 474–77 (highlighting how Southern representatives opposed to enforcing Section Two argued it was "a relic of the Reconstruction era and too impractical to actually implement").

Elections Clause authority to impose novel requirements for congressional districts.[428] Most importantly, in 1872, Congress took the unprecedented step of requiring congressional districts to "contain[] as nearly as practicable an equal number of inhabitants."[429] In plain English, Congress adopted a one-person, one-vote requirement.

Despite this new requirement's potential import, scholars have been flummoxed that its origins are mysterious and that it proved relatively uncontroversial.[430] Indeed, the relevant discussion in the Congressional Globe spans less than a page.[431] The motion was submitted by Representative James H. Platt Jr. (R-VA), who argued that, under current law, "There is nothing to prevent a State, if it chooses to do so, from making half a State one congressional district and dividing the rest of the State among the other members."[432] Representative Ulysses Mercur (R-PA) concurred with Platt's motion.[433] The sole dissenting voice came from a fellow Republican, Representative William Stoughton (R-MI). Invoking his home state of Michigan, Stoughton argued that a one-person, one-vote rule would be unfair to fast-growing states, who should be trusted to take predicted population growth into account when drawing lines.[434] The House then voted on the measure, which passed *without* even a roll call vote.[435]

This Essay floats a potential explanation for Representative Platt's proposal. At the time, Platt's state of Virginia had eight seats in the House. Half of those districts were majority-Black, and they elected three Republicans to the Forty-Second Congress. The remaining five districts—

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428. See U.S. Const. art. I, § 4 ("The Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . .").

429. Act of Feb. 2, 1872, ch. 11, § 2, 17 Stat. 28; see also Pamela S. Karlan, Reapportionment, Nonapportionment, and Recovering Some Lost History of One Person, One Vote, 59 Wm. & Mary L. Rev. 1921, 1932 (2018) [hereinafter Karlan, Reapportionment] (noting the provision's novelty). Congress omitted the equi-population requirement in the 1929 Apportionment Act, and the Court ultimately held that Congress had impliedly repealed it. See Wood v. Broom, 287 U.S. 1, 6–7 (1932).

430. See Peter H. Argersinger, Representation and Inequality in Late Nineteenth-Century America: The Politics of Apportionment 14 (2012) ("This stipulation, although adopted by an overwhelmingly Republican Congress, provoked no discussion or dissension in either Congress or the press . . . ."); Karlan, Reapportionment, supra note 429, at 1933 n.65 ("I have been unable to find any discussion in the scholarly literature as to why this provision was added.").

431. See Cong. Globe, 42nd Cong., 2d Sess. 141 (1871).

432. Id. (statement of Rep. Platt (R-VA)).

433. See id. (statement of Rep. Mercur (R-PA)) ("I believe that is just, and I hope it will be adopted.").

434. See id. (statement of Rep. Stoughton (R-MI)) ("Take my own State of Michigan, for instance: in the southern part of the State the increase of population during the last decade has been comparatively small, while in some of the northern counties . . . the increase of population has been very rapid.").

435. Id.

including one majority-Black district—were represented by Democrats. The ideal district population would have been 151,416. Intriguingly, the two most overpopulated districts—District 1 (167,948 persons) and District 4 (161,545 persons)—were majority-Black. Meanwhile, the least populated district—District 8 (139,146 persons)—was the whitest district, with a population that was only 15.3% Black.[436] Given this political and demographic reality, Platt might have been concerned that Democratic-controlled Southern states could systematically overpopulate majority-Black districts while under-populating majority-white districts.[437]

To be sure, the 1872 Act was not a silver bullet. Perhaps because it lacked an enforcement mechanism,[438] the 1872 Act's statutory equi-population requirement was far looser than today's constitutional one-person, one-vote rule.[439] In the 1870s, the average population deviation for congressional districts was approximately seven percent.[440] By contrast, in 1983, the Court invalidated a congressional redistricting plan for having a population deviation of 0.6984%, or 3,724 people away from an ideal of 526,059.[441] Thus, there was considerable play in the joints in complying with the 1872 Act's requirements, a fact that would enable states to avoid redistricting under certain circumstances.[442]

C. *Reconstructing Redistricting*

This section turns to how states conducted congressional redistricting during Reconstruction and Redemption. It begins by outlining the ground rules for redistricting and emphasizing differences between today's norms and those of the late 1800s. Next, it provides a short primer on political developments between the Fifteenth Amendment's ratification in 1870 and the establishment of Jim Crow. Although the political winds shifted, voting remained racially polarized throughout the South. It then examines redistricting plans enacted by three Southern states: Alabama, Mississippi, and South Carolina. The latter two were redistricted by Republicans early

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436. See Parsons et al., 1843–1883, supra note 43, at 142–43 (providing demographic data); see also Kenneth C. Martis, The Historical Atlas of Political Parties in the United States Congress, 1789–1989, at 124–25 (1989) [hereinafter Martis, Political Parties] (providing partisanship data).

437. Mapmakers have exploited permissive one-person, one-vote rules for partisan gain. See, e.g., Cox v. Larios, 542 U.S. 947, 947–48 (2004) (Stevens, J., concurring) (explaining that mapmakers had systematically underpopulated Republican-leaning districts).

438. See Karlan, Reapportionment, supra note 429, at 1933.

439. See Reynolds v. Sims, 377 U.S. 533, 583 (1964) (one-person, one-vote rule for state legislative districts); Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964) (one-person, one-vote rule for congressional districts).

440. See Erik J. Engstrom, Partisan Gerrymandering and the Construction of American Democracy 154 (2013).

441. See Karcher v. Daggett, 462 U.S. 725, 727–28 (1983).

442. See infra notes 448–454.

on during Reconstruction, and all three were gerrymandered once Democrats seized power.

1. *Contextualizing Redistricting*. — Before delving into the role of race-based redistricting during Reconstruction and Redemption, this Essay addresses a few preliminary matters about how the redistricting process operated in the late 1800s.

Starting with how redistricting worked, state legislatures drew congressional districts during Reconstruction and Redemption.[443] The first independent redistricting commissions for congressional districts were a century away.[444] Accordingly, politicians were in the driver's seat and could gerrymander to keep themselves and their party in power.

When politicians are involved in the redistricting process, it is quite common for mapmakers to use the last redistricting plan as a starting point.[445] Known as core retention, this practice makes sense: "[O]fficeholders typically prefer to keep their districts intact as a way to maximize the advantages of incumbency."[446] Of course, when states gain or lose seats in the House of Representatives after the decennial census, this practice becomes more difficult, as the old map's lines cannot simply be redrawn at the margins.[447]

This assumes, however, that the redistricting process actually occurred. That was not always the case in the late 1800s. To understand why, some context helps. Congress first mandated single-member districts in 1842.[448] That requirement lapsed for the 1850 cycle, but it was reimposed in the 1860 cycle.[449] Following the 1870 cycle, Congress maintained that requirement and further stipulated that, if a state *gained* congressional seats and failed to redistrict, any additional districts

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443. See U.S. Const. art. I, § 4 ("The Times, Places and Manner of holding Elections for . . . Representatives[] shall be prescribed in each State by the Legislature thereof . . . .").

444. See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 793 (2015) (affirming the constitutionality of independent redistricting commissions against an Elections Clause challenge). In 1972, Montana became the first state to adopt an independent commission for congressional districts. See Nathaniel Persily, Samuel Byker, William Evans & Alon Sachar, When Is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative, 77 Ohio St. L.J. 689, 711 (2016).

445. See Robert Yablon, Gerrylaundering, 97 N.Y.U. L. Rev. 985, 1006–10 (2022) (providing examples from the 2010 and 2020 redistricting cycles).

446. Id. at 1005.

447. See id. at 1006 (explaining that "when a state has gained or lost congressional seats, more adjustments are necessary, but substantial core retention often remains possible"); see also Peter Skerry, Counting on the Census?: Race, Group Identity, and the Evasion of Politics 137 (2000) (observing that redistricting battles are often sparked when states gain or lose seats in Congress).

448. See Rucho v. Common Cause, 139 S. Ct. 2484, 2495 (2019) (discussing the Apportionment Act of 1842, ch. 47, 5 Stat. 491 (codified as amended at 2 U.S.C § 2c (2018))).

449. See Justin Levitt & Michael P. McDonald, Taking the "Re" out of Redistricting: State Constitutional Provisions on Redistricting Timing, 95 Geo. L.J. 1247, 1251 n.18 (2007).

defaulted to at-large seats.[450] Alabama, for example, had two at-large congressional districts between 1873 and 1877.[451] This 1870 rule change invited strategic refusals to redistrict because the political party in power might prefer its chances in an at-large election,[452] and unlike under the prior rule, states were not at risk of losing the extra seat(s) if they failed to redistrict.[453] As Professor Michael Kang has explained, "[S]tates whose representation in the U.S. House had not changed following each decennial census had little incentive or need to change district[] lines unless the majority party in the state legislature saw political advantage in doing so."[454]

The norms around redistricting were also different. Unlike today's serpentine districts, "congressional districts in the 1800s typically were composed of whole towns and counties and rarely crossed their boundaries."[455] In addition, while mid-decade redistricting is rare today,[456] the practice was common during the late nineteenth century. In fact, "Between 1862 and 1896, there was *only one* election year in which at least one state *did not* redraw its congressional districts."[457]

As the foregoing suggests, the nature of congressional reapportionment and the redistricting process creates some difficulties for an apples-to-apples comparison across time. As an initial matter, the number of congressional districts apportioned to each state changed over time. Southern states, therefore, lost and gained congressional seats during Reconstruction and Redemption. That is because (1) population changes affected the apportionment of seats; (2) the nullification of the Three-Fifths Clause boosted the South's apportioned seats, and that impact was felt unevenly across the Southern states;[458] and (3) Congress expanded the size of the House of Representatives.[459] In addition, many

450. See Engstrom, supra note 440, at 64.

451. See Parsons et al., 1843–1883, supra note 43, at 146–47.

452. See Engstrom, supra note 440, at 72–74.

453. See id. at 64 ("Congress attached a provision to the Apportionment Act allowing gaining states to keep their old plan intact and elect any new seats in a statewide, at-large election until a new redistricting plan could be passed.").

454. Michael S. Kang, Hyperpartisan Gerrymandering, 61 B.C. L. Rev. 1379, 1391 (2020).

455. Nicholas O. Stephanopoulos, Redistricting and the Territorial Community, 160 U. Pa. L. Rev. 1379, 1407 (2012).

456. See Levitt & McDonald, supra note 449, at 1248 (noting a handful of mid-decade redistrictings in the 2000s); see also League of United Latin Am. Citizens v. Perry (*LULAC*), 548 U.S. 399, 418–19 (2006) (opinion of Kennedy, J.) ("The text and structure of the Constitution and our case law indicate there is nothing inherently suspect about a legislature's decision to replace mid-decade a court-ordered plan with one of its own.").

457. Engstrom, supra note 440, at 61–62 (emphasis added).

458. See supra section II.C.

459. For a helpful graphical depiction of this trend, see Ed. Bd., Opinion, America Needs a Bigger House, N.Y. Times, https://www.nytimes.com/interactive/2018/11/09/opinion/expanded-house-representatives-size.html (on file with the *Columbia Law Review*) (last updated Nov. 15, 2018).

Southern states used at-large districts for parts of this period.[460] This Essay's goal is to ascertain the original understanding of the Fourteenth and Fifteenth Amendments based on postratification evidence; this Essay is not a quantitative analysis of these districts.[461]

One must also be attuned to the racial demographics of the era. Recall that Black people accounted for a far greater share of the South's population and were majorities in some states.[462] Whereas a majority-Black district is a majority-minority district *today*, that was not necessarily true during Reconstruction. Given this demographic reality, majority-Black districts in the South were far more likely to occur during Reconstruction. Finally, this Essay focuses on only three Southern states: Alabama, Mississippi, and South Carolina. These states had large Black populations, multiple congressional districts, and several rounds of redistricting during the 1860s through 1880s.[463]

2. *Shifting Politics*. — Voting was racially polarized in the South before the Fifteenth Amendment's ratification. Black voters overwhelmingly supported the Republican Party whereas a clear majority of white voters backed the Democratic Party. That fact remained true throughout Reconstruction.[464] As such, mapmakers could rely on race-based census data to draw lines that treated Republican voters and Black people interchangeably. Assuming fair elections, a majority-Black district was highly likely to elect Republicans to Congress. As Professor J. Morgan Kousser has explained, "Since voting was well known at the time to be extremely racially polarized . . . a partisan gerrymander amounted to a racial gerrymander."[465]

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460. See infra section III.C.3–.5 (discussing at-large congressional districts in Alabama and South Carolina).

461. A common Redeemers' strategy was to break up counties or redraw their boundaries. See Michael Greenberger, Redrawing the South: County Border Manipulation and the Process of Redemption 10–12 (2022), https://drive.google.com/file/d/1BHvykFcO_znQFIvlnaLsTpkxDrQRxag0/view [https://perma.cc/XWQ2-CRES] (unpublished manuscript) ("[T]he manipulation of county borders allowed local and state-level political actors to protect or harm the electoral security of local officeholders and pursue state-level political goals."). This fact makes it difficult to recreate old congressional districts using today's county lines. For Mississippi and South Carolina, this Essay has strived to recreate these maps below, but the precise boundaries should be taken with a grain of salt given the redrawing of county lines.

462. See Crum, Racially Polarized Voting, supra note 53, at 302 (noting that the populations of Louisiana, Mississippi, and South Carolina were majority Black; in Alabama, Florida, and Georgia, it was above forty-five percent Black; and in North Carolina and Virginia, it was around forty percent Black); see also supra notes 282–283.

463. A future book project will fully canvas—without the restriction of law review essays' word limits—congressional redistricting in the Southern states during this period.

464. See Foner, Reconstruction, supra note 56, at 508 (noting that Black voters continued to view the Republican party "as the only institution capable of securing the South's 'new order of freedom and civilization'"); see also Walton, supra note 278, at 257–77 (providing detailed statistics).

465. Kousser, supra note 46, at 29.

Yet the political grounds shifted considerably after the Fifteenth Amendment's ratification in 1870.[466] The Republican Party fractured "into Liberal and Radical branches. The Liberals supported reconciliation [with white Southerners], while the Radicals continued to press for complete equality."[467] Perhaps most surprising to modern readers accustomed to a two-party duopoly, the Liberal Republicans joined forces with the Democratic Party in backing Horace Greeley in the 1872 presidential race.[468] Greeley ultimately lost the race to President Grant in what was "the most peaceful election of the entire Reconstruction period."[469]

Following the Panic of 1873, Democrats took control of the House in the 1874 midterm elections "[i]n the greatest reversal of partisan alignments in the entire nineteenth century[.] [Democrats] erased the massive Congressional majority Republicans had enjoyed since the South's secession, transforming the party's 110-vote margin in the House into a Democratic majority of sixty seats."[470] As Professor Erik Engstrom has demonstrated, "gerrymandering strategies [in the North and the South] in the early 1870s helped bring Democrats to national power for the first time since the Civil War."[471] Shortly thereafter, the bitterly contested 1876 election between Republican Rutherford B. Hayes and Democrat Samuel Tilden culminated in the Compromise of 1877, under which Hayes became president and withdrew federal troops from the South.[472]

The conventional wisdom surrounding the Compromise of 1877 can be misleading. Democrats had seized control of several Southern states prior to the 1876 election.[473] Meanwhile, Black men continued to vote and hold office throughout the South until the 1890s, albeit at far lower rates

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466. See Michael Benedict, supra note 307, at 335–36 (arguing that the lame-duck Fortieth Congress foreshadowed the "rupture of the party and the collapse of Republican Reconstruction policy").

467. Alexander Tsesis, We Shall Overcome: A History of Civil Rights and the Law 106 (2008).

468. See Foner, Reconstruction, supra note 56, at 501–05 ("Greeley's nomination, declared Democratic National Chairman August Belmont, was 'one of those stupendous mistakes which it is difficult even to comprehend.' But . . . the party had no alternative if it hoped to defeat Grant.").

469. Id. at 508. To be clear, there was still election-related violence, particularly in Georgia. See id.

470. Id. at 523.

471. Engstrom, supra note 440, at 11.

472. See Foner, Second Founding, supra note 9, at 126 (noting how the "bargain of 1877" resolved the disputed election of 1876, awarded Hayes the presidency, and acknowledged Democratic control of all the southern states); see also Edward B. Foley, Ballot Battles: The History of Disputed Elections in the United States 117–49 (2016) (performing a deep dive on the 1876 election).

473. See infra sections III.C.3–.5.

than at the height of Reconstruction.[474] Jim Crow was not established overnight, and redistricting played a part in its creation.

3. *Alabama.* — After the Civil War, Alabama had six congressional districts.[475] Because Alabama had lost a seat during the 1860 reapportionment, the state legislature had to draw a new plan.[476] Initially, that task fell to the provisional state legislature elected under the 1865 Constitution by an all-white male electorate.[477] Alabama drew a map that cracked the Black Belt into four districts and produced two majority-Black districts. Based on the 1860 Census, Alabama's population was 45.4% Black—all of whom were disenfranchised.[478]

Alabama's representatives for the Thirty-Ninth Congress were never seated, as Congress declined to readmit the South.[479] The Thirty-Ninth Congress subsequently passed the First Reconstruction Act of 1867, which voided Alabama's provisional government, enfranchised Black men, and ordered a new constitutional convention.[480] Surprisingly, the constitutional convention maintained the congressional map adopted by the provisional government.[481]

When Alabama was readmitted to the Union in 1868,[482] newly enfranchised Black men helped Republicans win the governor's mansion and take control over the state legislature by a crushing majority.[483] But under the terms of the 1868 Constitution, the state legislature could not redistrict until after the 1870 Census.[484]

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474. See Foner, Second Founding, supra note 9, at 126 ("Yet the full imposition of the new system of white supremacy known as Jim Crow did not take place until the 1890s."); Kousser, supra note 46, at 19 fig.1.1 (showing Southern Black legislators from 1868–1900).

475. Parsons et al., 1843–1883, supra note 43, at 93.

476. See id. at 44 (showing Alabama's seven congressional districts during the 1850 reapportionment).

477. See Wiggins, Alabama Politics, supra note 56, at 12–13 (noting that on August 31, 1865, Governor Lewis Parsons called for an election of delegates to a constitutional convention, which then decided reapportionment of the legislature); see also Ala. Const. of 1865, art. VIII, § 1 (allowing only white males to vote).

478. 1870 Census, supra note 43, at 8, 12 (showing for the 1860 Census a Black population of 437,770 and a total population of 964,201). Once again, past is prologue: Alabama cracked the Black Belt in the 2020 redistricting cycle. See Allen v. Milligan, 143 S. Ct. 1487, 1504–05 (2023) (noting that the state's map split the Black Belt).

479. See John Harrison, The Lawfulness of the Reconstruction Amendments, 68 U. Chi. L. Rev. 375, 397–99 (2001).

480. See First Reconstruction Act, ch. 153, § 5, 14 Stat. 428, 429 (1867).

481. See Ala. Const. of 1868 art. VIII, § 6 ("Until a new apportionment of representatives to the Congress of the United States shall have been made, the Congressional Districts shall remain as stated in the Revised Code of Alabama . . . .").

482. See Act of June 25, 1868, ch. 70, 15 Stat. 73.

483. See Wiggins, Alabama Politics, supra note 56, at 38–39 (1977) (noting that Republicans had a 97-3 majority in the state house and a 32-1 majority in the state senate).

484. See Ala. Const. of 1868 art. VIII, § 1 (mandating that no redistricting could occur before the taking of a new census).

The 1870 election produced a divided government. Democrats won the gubernatorial race and state house. The state senate remained in Republican control because senators served four-year terms and were not up for reelection until 1872.[485]

Following the 1870 Census, Alabama was entitled to eight congressional districts. The divided state legislature failed to redraw the maps,[486] despite the Alabama Constitution's requirement that it do so.[487] The result was that the 1872 congressional elections were conducted using the six districts drawn by the provisional government and two at-large districts.[488] Following the 1872 congressional elections, Alabama's delegation to the Forty-Third Congress included two Democrats, one Liberal Republican, and five Republicans, two of whom were elected from the at-large seats.[489]

Meanwhile, in the 1872 state elections, Republicans bounced back. Republicans won the governor's race by a 53-47 margin.[490] The situation was trickier in the state legislature given that some election results were contested. After two competing state legislatures convened and in response to pressure from the Grant administration, Republicans ultimately took back the state house with a two-seat majority.[491] The evenly divided state senate fell back into Democratic control "after the death of a Republican senator in 1873."[492]

Given the closely divided political environment, the state legislature failed to redistrict once again.[493] Thus, the 1874 congressional elections were held using the same map with two at-large districts. This time, Republicans won only two seats while Democrats took six seats, including the two at-large districts.[494] The two Republicans were elected from

485. See Wiggins, Alabama Politics, supra note 56, at 66–67; see also Sarah Woolfolk Wiggins, Alabama's Reconstruction after 150 Years, *in* The Yellowhammer War: The Civil War and Reconstruction in Alabama 177, 184 (Kenneth W. Noe ed., 2013) [hereinafter Wiggins, Yellowhammer] (attributing Democratic gains to the re-enfranchisement of former rebels).

486. See Parsons et al., 1843–1883, supra note 43, at 146–47.

487. See Ala. Const. of 1868 art. VIII, § 6 ("[A]fter each new apportionment, the General Assembly shall divide the State into as many districts as it is allowed representatives in Congress, making such Congressional Districts as nearly equal in the number of inhabitants as may be.").

488. See Parsons et al., 1843–1883, supra note 43, at 146–47; supra notes 450–454 and accompanying text (discussing at-large seats during Reconstruction).

489. See Martis, Political Parties, supra note 436, at 126–27; see also Wiggins, Alabama Politics, supra note 56, at 83 (explaining that the Liberal Republican won because two Black Republican candidates ran in the same district and split the vote).

490. See Wiggins, Alabama Politics, supra note 56, at 83.

491. See id. at 83–85.

492. Id. at 85.

493. See Parsons et al., 1843–1883, supra note 43, at 146–47.

494. See Martis, Political Parties, supra note 436, at 128–29.

Districts 1 and 4, both majority-Black and on the western end of the Black Belt.[495]

The 1874 elections also witnessed the Democrats seize unified control at the state level in a landslide election. As Alabama historian Sarah Woolfolk Wiggins has observed, "Race was *the* issue of the 1874 campaign and provoked the largest voter turnout in Alabama during Reconstruction."[496] Violence, intimidation, election fraud, and the defection of white Unionist voters helped bring the Democrats to power.[497]

In February 1875, the Democratic state legislature redrew Alabama's congressional map. Unsurprisingly, Democrats packed and cracked the Black Belt. Specifically, "the Democratic legislature gerrymandered five of the most populous counties into the fourth district . . . . The other black counties of central Alabama were distributed into districts where white voters outnumbered blacks."[498]

A visual and tabular display may prove helpful.[499] Map 1 displays Alabama's 1868–1877 congressional redistricting plan drawn by the provisional government and maintained by the 1867 constitutional convention. There were two at-large districts between 1873 and 1877 due to the state legislature's failure to redistrict.

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495. See id. (partisan data); Parsons et al., 1843–1883, supra note 43, at 146–47 (congressional district data).

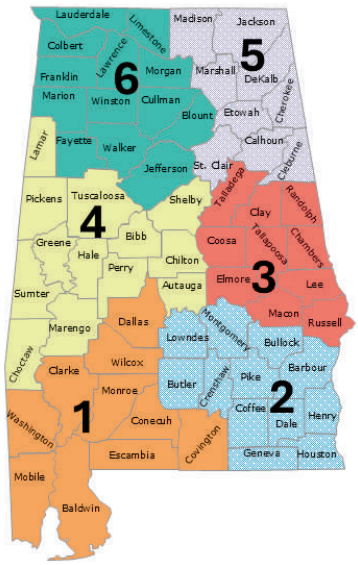
496. Wiggins, Alabama Politics, supra note 56, at 97.

497. See id. at 97–98.

498. Id. at 104; see also Foner, Reconstruction, supra note 56, at 590 ("Alabama parceled out portions of its black belt into six separate districts to dilute the black vote."); Wiggins, Yellowhammer, supra note 485, at 185 (noting that the state legislature also redrew legislative districts and increased bond requirements for holding office).

499. See 1870 Census, supra note 43, at 11–12 (providing state-level figures and accurate data for Black population in certain counties); see also Parsons et al., 1843–1883, supra note 43, at 93–94, 146–49 (providing district lines and demographic data); supra note 43 (explaining data correction).

MAP 1. ALABAMA CONGRESSIONAL DISTRICTS: 1868–1877



Map 2 displays Alabama's 1877–1883 congressional redistricting plan drawn by Democratic redeemers.

MAP 2: ALABAMA CONGRESSIONAL DISTRICTS: 1877–1883

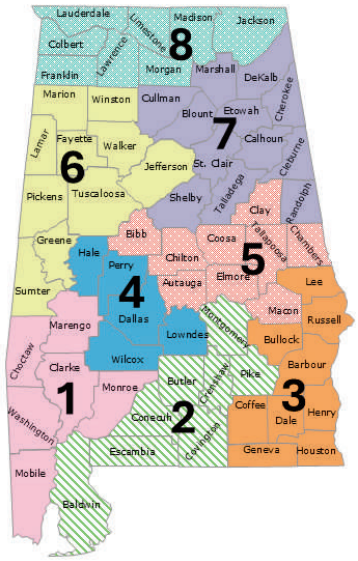


Table 1 displays the relevant demographic criteria.[500]

TABLE 1

	1873–1877 Population	1873–1877 Percent Black	1877–1883 Population	1877–1883 Percent Black
District 1	175,669	57.5	120,927	53.7
District 2	201,412	53.2	111,751	48.1
District 3	161,690	51.2	131,815	62.9
District 4	212,263	60.7	141,568	77.1
District 5	120,272	25.2	107,326	37.2
District 6	125,678	25.9	125,410	45.5
District 7	At-large (996,992)	At-large (47.7)	121,828	22.0
District 8	At-large (996,992)	At-large (47.7)	130,173	36.1

These maps and figures reveal a few things. First, even compared to the provisional government's plan, the Democratic gerrymander *further* fractured Alabama's Black Belt, which runs through the central part of the state. Of course, Democrats were aided by having two extra districts to draw, but the cracking of the Black Belt was not inevitable. Second, the Democratic gerrymander contained three majority-Black districts which is not surprising in a state in which nearly half the population was Black. However, District 4 heavily packed Black voters, both as a percentage of the population (77.1%) and based on one-person, one-vote principles. With 141,568 people, District 4 had nearly 10,000 *more* people than the second most-populous district. Indeed, District 4 showcases how malapportionment can reinforce race-based redistricting.[501]

The effect of the Democrats' 1875 redistricting was dramatic and predictable. Democrats won every congressional district in the 1876 election.[502] Democrats took seven of eight seats in the 1878 election, losing

500. Parsons et al., 1843–1883, supra note 43, at 146–49; 1870 Census, supra note 43, at 8, 12.

501. See supra notes 430–437 and accompanying text (discussing Representative Platt's potential motive in advocating a one-person, one-vote standard).

502. See Martis, Political Parties, supra note 436, at 130–31.

only District 8 in North Alabama to a politician from the Greenback Party.[503] And in the 1880 election, the last of the redistricting cycle, Democrats ultimately prevailed in seven of eight seats, with Republicans managing to capture the heavily packed District 4.[504] During the 1880 redistricting cycle, the Democratic state legislature made minor adjustments to the congressional map.[505] By that point, Democratic control was secure in Alabama.

4. *Mississippi*. — Mississippi's congressional redistricting during Reconstruction and Redemption may be the most infamous example of vote dilution from the period. And because both Republicans and Democrats conducted redistricting during Reconstruction, Mississippi is a prime candidate for understanding how both political parties treated race during the redistricting process.

Following the Civil War, Mississippi had five congressional districts, the same number that it had after the 1850 apportionment.[506] Given that it had the same number of districts, neither the provisional government nor the Reconstruction government redrew the lines for the 1860 redistricting cycle.[507] Mississippi, moreover, was readmitted to the Union relatively late in Reconstruction, meaning that its representatives and senators were seated in 1870.[508] Map 3 displays Mississippi's 1860s redistricting plan, a holdover from antebellum years.[509]

503. See id. at 132–33.

504. District 5's election results were contested, but the seat was eventually awarded to a Democrat. See id. at 134–35.

505. Compare Parsons et al., 1843–1883, supra note 43, at 148–49, with Parsons et al., 1883–1913, supra note 43, at 3–4 (showing minor changes).

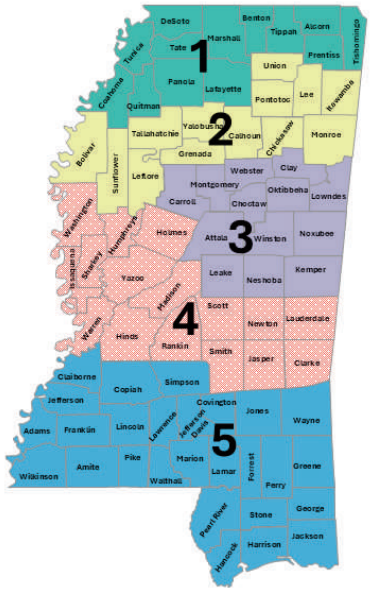
506. See Parsons et al., 1843–1883, supra note 43, at 69 (1850 apportionment); id. at 121 (1860 apportionment).

507. See Kenneth C. Martis, The Historical Atlas of United States Congressional Districts, 1789–1983, at 242 (1982) [hereinafter Martis, Congressional]. The Parsons book shows Pontotoc and Lee Counties moving from District 1 to District 2 during this time. See supra note 506. Parsons's inclusion of Pontotoc County in District 1 in the 1850 cycle is an error, and it appears to stem from Pontotoc being subdivided into Pontotoc and Lee Counties in the 1860s. See 1866 Miss. Laws 29, 34 (keeping the new Lee County in District 2); Martis, Congressional, supra note 507, at 242 (showing the movement of Pontotoc County from District 1 to District 2); see also supra note 461 (discussing county splits).

508. See Act of Jan. 18, 1869, ch. 19, 16 Stat. 67 (admitting Mississippi to representation in Congress).

509. See Parsons et al., 1843–1883, supra note 43, at 121.

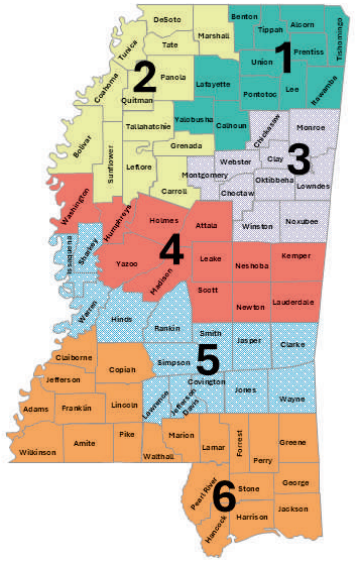
MAP 3. MISSISSIPPI CONGRESSIONAL DISTRICTS: 1870–1873



After the 1870 apportionment, Mississippi was entitled to six representatives. The Republican-controlled state legislature redrew the congressional districts, which largely ran in an east–west direction and divided the Mississippi Delta into four districts.[510] This resulted in five majority-Black districts, ranging from 56.4% to 60.6% Black.[511] Here, it is important to keep in mind that Mississippi was 53.7% Black at the time.[512] In the 1872 elections, Republicans won all five majority-Black districts, losing only the majority-white district to a Democrat.[513] Map 4 displays the Republicans' post-1870 redistricting map.[514]

510. See Kousser, supra note 46, at 30 fig.1.3.
511. See Parsons et al., 1843–1883, supra note 43, at 184–85.
512. See 1870 Census, supra note 43, at 20.
513. See Martis, Political Parties, supra note 436, at 126–27.
514. See Parsons et al., 1843–1883, supra note 43, at 184–85.

MAP 4. MISSISSIPPI CONGRESSIONAL DISTRICTS: 1873–1877



The 1874 congressional elections, however, were a Democratic landslide across the country.[515] In Mississippi, Democrats won four seats, an "Independent Republican" was elected to another, and Republicans held on to one seat.[516] The consequences would be felt immediately, as "[w]hite Mississippians . . . interpreted the 1874 elections as a national repudiation of Reconstruction."[517]

The 1875 state elections were plagued by rampant violence.[518] Aided by even greater cohesion among white voters and depressed Black turnout, Democrats retook Mississippi's state government.[519] Shortly thereafter, Democrats redrew the congressional map.

As Professor Eric Foner has observed, "Mississippi Redeemers concentrated the bulk of the black population in a 'shoestring' Congressional district running the length of the Mississippi River . . . ."[520] Under the Democrats' plan, District 6—the proverbial shoestring—was 77.5% Black. Meanwhile, three other districts were barely over the 50% threshold, and

515. See Foner, Reconstruction, supra note 56, at 523.

516. See Martis, Political Parties, supra note 436, at 128–29.

517. Foner, Reconstruction, supra note 56, at 559.

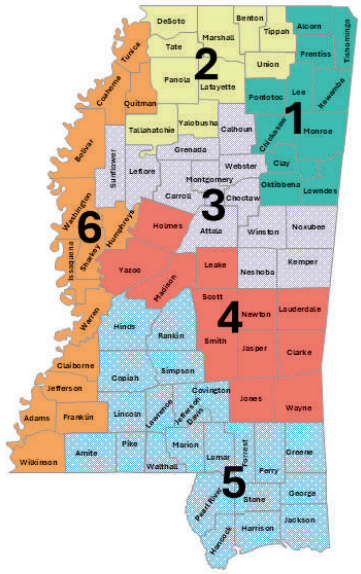
518. See id.

519. See id. at 561–62.

520. Id. at 590. Foner further claims that this left the "five other[] [congressional districts] with white majorities." Id. But as Table 2 reveals, three of the five other districts had bare Black majorities. See infra Table 2.

one was just below. Finally, District 1 was the whitest district with only a 40.1% Black population. Counterintuitively, District 1 was *overpopulated* compared to the other districts, with over 30,000 more people than the next most populous district.[521] The new map helped Democrats sweep the congressional delegation in the 1876 and 1878 elections.[522] In the 1880 election, the Democrats prevailed in five of six seats, with John Lynch, a Black Republican, winning District 6.[523] Map 5 displays the Democrats' 1875 redistricting plan.[524]

MAP 5. MISSISSIPPI CONGRESSIONAL DISTRICTS: 1877–1883



Following the 1880 Census, Mississippi was awarded a seventh congressional district.[525] Once again, Democrats redrew the map and packed Black voters into a Mississippi Delta district. Indeed, District 3 was 80.4% Black.[526] The nearby District 7 was 64.5% Black.[527] Four other districts were just over the 50% threshold, and one district was just below it.[528] Representative Lynch was technically kept in District 6, but the bulk

521. See infra Table 2.

522. See Martis, Political Parties, supra note 436, at 130–33.

523. See id. at 134–35 (providing partisan data); Swain, supra note 56, at 22 tbl.2.2 (identifying Lynch's race).

524. See Parsons et al., 1843–1883, supra note 43, at 186–87.

525. See Parsons et al., 1883–1913, supra note 43, at 68–70.

526. Kousser, supra note 46, at 30 fig.1.3.

527. Id.

528. Id.

of his voters were reallocated to Districts 3 and 7.[529] Map 6 displays the post-1880 redistricting plan.[530]

MAP 6. MISSISSIPPI CONGRESSIONAL DISTRICTS: 1883–1893

Combined with other disenfranchising tactics, the 1880 plan helped maintain Democratic supremacy in Mississippi. Representative Lynch was defeated in his reelection campaign, and Democrats lost only two races the entire decade.[531] In 1890, Mississippi became the first Southern state to rewrite its Reconstruction era constitution and thereby inaugurate a new period of Jim Crow.[532]

529. See id. at 29 (explaining that "Democrats retied the shoestring" and targeted Lynch for defeat); see also Michael S. Kang, The Bright Side of Partisan Gerrymandering, 14 Cornell J.L. & Pub. Pol'y 443, 450 n.35 (2005) (referring to this tactic as "kidnapping" a candidate during redistricting).

530. See Parsons et al., 1883–1913, supra note 43, at 68–70.

531. See Kousser, supra note 46, at 29 (discussing Lynch); Martis, Political Parties, supra note 436, at 136–45 (providing election data).

532. See Tolson, Abridgment, supra note 285, at 468.

Finally, Table 2 displays the relevant demographic figures for these four redistricting plans.[533]

TABLE 2

	1870–1873 Population	1870–1873 Percent Black	1873–1877 Population	1873–1877 Percent Black	1877–1883 Population	1877–1883 Percent Black	1883–1893 Population	1883–1893 Percent Black
District 1	139,749	47.9	136,353	26.1	174,002	40.1	139,112	49.2
District 2	127,367	49.0	148,910	60.6	129,470	52.5	168,844	53.7
District 3	148,355	52.9	134,800	59.4	127,537	48.6	129,910	80.4
District 4	213,255	63.3	147,173	57.1	129,336	52.0	195,735	53.8
District 5	162,579	58.2	127,346	56.4	133,413	52.0	192,642	51.6
District 6	N/A	N/A	142,928	57.3	143,782	77.5	125,860	52.6
District 7	N/A	N/A	N/A	N/A	N/A	N/A	179,494	64.5

5. *South Carolina*. — In the 1860 apportionment, South Carolina lost two congressional seats, going from six to four districts.[534] The state's 1868 constitutional convention—which was controlled by Republicans—adopted a new congressional redistricting plan.[535] This plan created three majority-Black districts, with the fourth district being 46.7% Black. Republicans swept the congressional delegation for the remainder of the decade.[536]

533. See Parsons et al., 1843–1883, supra note 43, at 121, 185–87; Parsons et al., 1883–1913, supra note 43, at 68–70; 1870 Census, supra note 43, at 62–65.

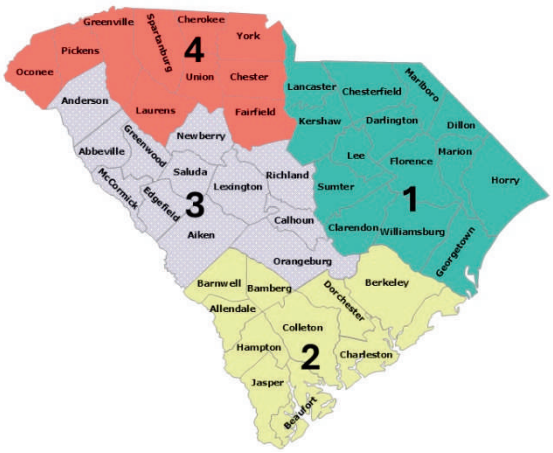
534. See Parsons et al., 1843–1883, supra note 43, at 84 (1850 apportionment); id. at 136 (1860 apportionment).

535. See S.C. Const. of 1868, An Ordinance to Divide the State Into Four Congressional Districts 41–42 ("[T]he State of South Carolina shall be . . . divided into four Congressional Districts . . . until the next apportionment be made by the Congress of the United States . . . .").

536. See Martis, Political Parties, supra note 436, at 120–25 (showing South Carolina's representatives in the Forty-First Congress were all Republican).

Following the 1870 Census, South Carolina was awarded a fifth congressional district.[537] But South Carolina failed to redistrict before the 1872 election, and the fifth representative ran in an at-large seat.[538] Once again, Republicans won all the congressional races.[539] Map 7 depicts the redistricting plan in place from South Carolina's readmission to the Union through the 1872 election.[540]

MAP 7. SOUTH CAROLINA CONGRESSIONAL DISTRICTS: 1868–1875



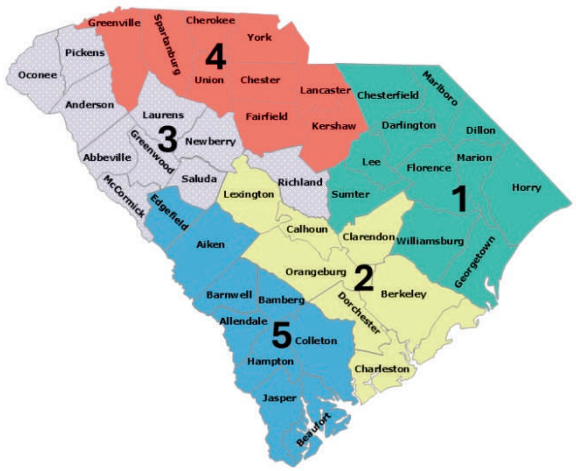
Prior to the 1874 election, Republicans redrew the congressional map. This time, *every* congressional district was majority-Black.[541] But given that South Carolina was 58.9% Black at the time, these were not majority-*minority* districts.[542] Notwithstanding the Democrats' wave election in 1874,[543] Republicans managed to win the entirety of South Carolina's congressional delegation.[544]

But in 1876, Republicans' hold on South Carolina began to slip. Democrats captured two congressional seats, which were barely majority-

537. See Parsons et al., 1843–1883, supra note 43, at 213.
538. See id.
539. See Martis, Political Parties, supra note 436, at 126–27.
540. See Parsons et al., 1843–1883, supra note 43, at 136, 212.
541. See id. at 213.
542. See 1870 Census, supra note 43, at 20.
543. See Foner, Reconstruction, supra note 56, at 523.
544. See Martis, Political Parties, supra note 436, at 128–29.

Black and were overpopulated.[545] Democrats also retook the state government in 1877 as Union troops left the South.[546] Then, in 1878, Democrats captured every congressional district.[547] But unlike in Alabama and Mississippi, Democrats did not redraw South Carolina's congressional districts until after the next apportionment. Map 8 displays the Republicans' plan from the 1874 through 1880 elections.[548]

MAP 8. SOUTH CAROLINA CONGRESSIONAL DISTRICTS: 1875–1883



After the 1880 Census, South Carolina gained two congressional districts.[549] Democrats redrew the map and created the infamous "boa constrictor," District 7, which pitted two incumbent Republicans against each other.[550] District 7 was also 81.7% Black. As shown below, the map broke apart several counties and split the city of Charleston. Indeed, the map was only contiguous because of Charleston Harbor; it was not contiguous by land. From the Library of Congress's archives, Map 9 displays the boa-constrictor map that Democrats drew for the 1880 redistricting cycle.[551]

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545. See id. at 130–31 (providing partisan data); see also Kousser, supra note 46, at 27–29 (noting overpopulation).

546. See McConnell, Forgotten, supra note 407, at 129 ("In April [1877], federal troops were removed from active intervention in the governments of Louisiana and South Carolina. The last Reconstruction governments collapsed.").

547. See Martis, Political Parties, supra note 436, at 132–33 (partisan data).

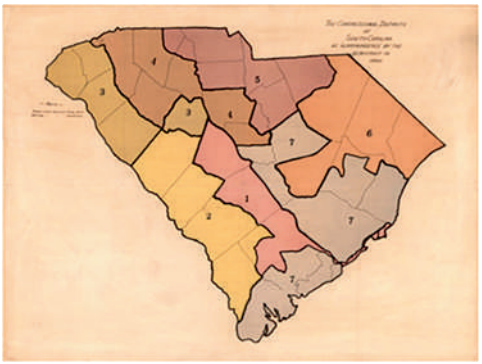
548. See Parsons et al., 1843–1883, supra note 43, at 213.

549. See Parsons et al., 1883–1913, supra note 43, at 138, 143.

550. See Kousser, supra note 46, at 27.

551. Given the sheer number of county splits—including of counties that no longer exist—this Essay does not use today's software to recreate this map. Instead, this Essay uses an 1880s era map in the public domain available through the Library of Congress. See The

MAP 9. SOUTH CAROLINA CONGRESSIONAL DISTRICTS: 1883–1893



Finally, Table 3 provides the relevant demographic data for South Carolina's congressional redistricting plans. Here, it is important to emphasize that the population figures and percentages for the post-1880 map are rough estimates because of the number of county splits.[552]

TABLE 3

	1868–1873 Population	1868–1873 Percent Black	1873–1875 Population	1873–1875 Percent Black	1875–1883 Population	1875–1883 Percent Black	1883–1893 Population	1883–1893 Percent Black
District 1	172,412	59.9	176,217	60.6	138,392	59.6	192,796	69.9
District 2	182,812	68.4	184,356	69.6	132,754	64.5	136,748	63.0
District 3	174,806	58.3	194,342	59.0	142,319	51.6	131,569	52.3
District 4	173,678	46.7	173,614	46.1	154,114	51.1	167,230	56.0
District 5	N/A	N/A	At-large (705,606)	At-large (58.9)	137,979	67.5	121,308	57.1
District 6	N/A	N/A	N/A	N/A	N/A	N/A	129,242	56.6
District 7	N/A	N/A	N/A	N/A	N/A	N/A	128,073	81.7

Congressional Districts of South Carolina as "Gerrymandered" by the Democracy in 1882, Libr. of Cong., https://www.loc.gov/item/2015588077/ [https://perma.cc/3S64-YC9E] (last visited Oct. 13, 2024).

552. See Parsons et al., 1843–1883, supra note 43, at 136, 212–13; Parsons et al., 1883–1913, supra note 43, at 138–43; 1870 Census, supra note 43, at 88–89. Given the bizarre shape of District 1, it is difficult to provide an accurate percentage of the Black population. But the City of Charleston, which contained the bulk of the district's population, was 69.9% Black. Parsons et al, 1883–1913, supra note 43, at 138. Moreover, the districts with split counties likely have higher populations than noted, as the underlying source does not fully allocate those counties. See id. at 138–43.

IV. RESOLVING THE RIDDLE OF RACE-BASED REDISTRICTING

When the Court's doctrine points in divergent directions, it can be helpful to return to first principles. This Part brings together the various threads outlined above to ascertain the original understanding of race-based redistricting under the Fourteenth and Fifteenth Amendments.

This Part begins by laying out the doctrinal options: whether *Regester* or *Shaw* are correctly decided and what that means for the VRA's constitutionality. This Part then argues that, as originally understood, the Equal Protection Clause did not regulate the use of race in the redistricting process. This Part further argues that the Fifteenth Amendment's original understanding does not support *Shaw*'s racial gerrymandering cause of action but does provide limited support for *Regester*'s vote dilution claim. This Part concludes by examining what this means for Section 2 and defending that statute's constitutionality.

A. *Menu of Options*

This brings us to whether *Regester* or *Shaw* comports with the original understanding of the Fourteenth or Fifteenth Amendments. And, depending on the answer to that question, what does that mean for the constitutionality of Section 2 of the VRA? This section sketches out potential answers to these questions.

The first option is that both *Shaw* and *Regester* are correct. In other words, the status quo reflects the original understanding of the Reconstruction Amendments. If that is true, then the *Milligan* Court's attempt to reconcile these doctrines is likely accurate as well.

The second option is that *Regester* is correct and *Shaw* is wrong. The Reconstruction Amendments protect against the dilution—that is, the abridgment—of racial minorities' right to vote. The Reconstruction Amendments also permit race-conscious decisionmaking during redistricting. If *Shaw*'s colorblind vision were rejected, Section 2 would be on firm constitutional ground.

The third option is that *Shaw* is correct and *Regester* is wrong. The Court's current colorblind intuitions, under this framework, reflect the original understanding of the Reconstruction Amendments. And if there is no constitutional grounding for vote dilution claims in *Regester*, then Section 2 is probably unconstitutional, as it would likely not qualify as a compelling governmental interest.

The final option is that neither *Regester* nor *Shaw* are correctly decided as a matter of original understanding. This would mean that neither the Fourteenth nor the Fifteenth Amendment applied to redistricting.

If that's the case, then there are no federal constitutional limits on using race during the redistricting process. There is no Goldilocks problem. As far as the Reconstruction Amendments are concerned, states could

engage in egregious racial gerrymanders, purposefully maximize the number of majority-minority districts, aim for proportional representation, or dilute racial minorities' political power. Thomas's *Alexander* concurrence comes close to this position. But rather than say that a plaintiff cannot state a claim under the Fourteenth or Fifteenth Amendment for racial gerrymandering or vote dilution, Thomas concluded that the issue is a nonjusticiable question.[553]

Of course, whether the Fourteenth or Fifteenth Amendment regulates race-based redistricting does not fully answer whether Section 2 is a permissible exercise of Congress's Reconstruction Amendment enforcement authority. The relevant standard of review would matter greatly in how deferential the Court would be to Congress's interpretations of the Fourteenth and Fifteenth Amendments. Setting aside the Reconstruction Amendments, Congress could regulate federal elections pursuant to its Elections Clause authority, under which it has near plenary power.[554] Absent any race-based, external restraint from the Reconstruction Amendments, Congress would be free to impose Section 2 on the states for purposes of congressional redistricting.[555]

One final point: In the past decade, several states have passed state voting rights acts (SVRAs) that go beyond the federal VRA's protections.[556] If there were no Fourteenth or Fifteenth Amendment restraints on race-

553. See Alexander v. S.C. State Conf. of the NAACP, 144 S. Ct. 1221, 1253 (2024) (Thomas, J., concurring in part) (explaining that a racial gerrymandering claim is a nonjusticiable political question).

554. See supra note 52.

555. One wrinkle here is that the *Shelby County* Court invalidated the VRA's coverage formula even though it applied to voting changes pertaining to both state and federal elections. The Court did so notwithstanding an argument raised in an amicus brief filed by voting rights scholars arguing that the Elections Clause authorized the preclearance regime and coverage formula as applied to federal elections. See Brief of Gabriel Chin, Atiba Ellis et al. as Amici Curiae in Support of Respondents at 4–8, Shelby County v. Holder, 570 U.S. 529 (2013) (No. 12-96), 2013 WL 417743 ("The Elections Clause provides distinct, clear authority for Congress to enact Section 5's pre-clearance procedures for state laws concerning federal elections." (citation omitted)). Intriguingly, the Court did not comment on this argument. See Franita Tolson, The Spectrum of Congressional Authority Over Elections, 99 B.U. L. Rev. 317, 338 (2019) ("[T]he Court . . . disregarded amicus briefs filed in the case that offered a full range of constitutional alternatives that could have saved the VRA."). To the extent that the equal sovereignty principle is a freestanding federalism doctrine—rather than a specific limit on Congress's Reconstruction Amendment enforcement authority—it would function as an external restraint on Congress's Elections Clause authority. This framing explains why the Court would ignore the Elections Clause in *Shelby County*. See Crum, Deregulated Redistricting, supra note 102, at 410–12; Crum, Superfluous Fifteenth Amendment, supra note 37, at 1575–78.

556. See Crum, Deregulated Redistricting, supra note 102, at 420–21 (discussing the constitutionality of SVRAs); Ruth M. Greenwood & Nicholas O. Stephanopoulos, Voting Rights Federalism, 73 Emory L.J. 299, 301 (2023) (cataloguing SVRAs that have been enacted and proposed); see also Pico Neighborhood Ass'n v. City of Santa Monica, 534 P.3d 54, 59–60 (Cal. 2023) (holding that plaintiffs need not satisfy *Gingles* prong one under the California Voting Rights Act).

based redistricting, these SVRAs would likely be constitutional. Under this approach, there would be a two-tiered system for regulating redistricting for state and congressional elections.

B. *The Original Understanding of Race-Based Redistricting*

Given originalism's sway at the Supreme Court, constitutional law is undergoing seismic change based on the original understanding of a constitutional provision. Ascertaining the original understanding of race-based redistricting under the Fourteenth and Fifteenth Amendments matters not only for the underlying legitimacy of *Regester* and *Shaw* but also the constitutionality of Section 2 of the VRA. This section begins with a quick refutation of the Equal Protection Clause's application to voting rights before performing a deeper dive on the original understanding of the Fifteenth Amendment.

The scholarly consensus is that Section One of the Fourteenth Amendment was originally understood to exclude political rights.[557] Moreover, to the extent that any provision of Section One would have been viewed as protecting voting rights, it would have been the Privileges or Immunities Clause, not the Equal Protection Clause.[558] Section Two reinforces this point, as it was viewed as a targeted provision that punished Southern states in the House and the Electoral College if they failed to enfranchise Black men.[559] To the extent that there is any doubt, the Fortieth Congress's decision to pass the Fifteenth Amendment—rather than a nationwide Black male suffrage statute—liquidated the question. From an originalist perspective, the Equal Protection Clause is the wrong constitutional hook for *Regester* and *Shaw*. Indeed, Thomas has belatedly come around to this position.[560]

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557. See supra note 285.

558. Indeed, even those Radicals who claimed that the Fourteenth Amendment mandated enfranchisement looked to the Privileges or Immunities Clause. For instance, women's suffrage advocates based their claims on the Privileges or Immunities Clause. See supra note 292 (discussing the Woodhull Report and Minor v. Happersett, 88 U.S. 163, 178 (1875)). And recall that Representative Boutwell based his suffrage statute on the Privileges or Immunities Clause too. See supra note 320.

559. See supra notes 296–300.

560. See Alexander v. S.C. State Conf. of the NAACP, 144 S. Ct. 1221, 1261 (2024) (Thomas, J., concurring in part) (acknowledging that the Equal Protection Clause was originally understood to exclude voting rights); see also Evenwel v. Abbott, 578 U.S. 54, 76 (2016) (Thomas, J., concurring in the judgment) ("The Constitution does not prescribe any one basis for apportionment within States. It instead leaves States significant leeway in apportioning their own districts to equalize total population, to equalize eligible voters, or to promote any other principle consistent with a republican form of government.").

When the Warren Court interpreted the Equal Protection Clause to apply to malapportionment claims and non-race-based voting qualifications, Justice John Marshall Harlan II dissented on the grounds that the Equal Protection Clause, as originally understood, did not implicate the right to vote or redistricting. See, e.g., Oregon v. Mitchell, 400 U.S. 112, 166 (1970) (Harlan, J., concurring in part and dissenting in part) ("The 40th

Turning to the Fifteenth Amendment, the question becomes whether *Regester* or *Shaw* can be replanted in more fertile soil.[561] A striking feature of the ratification debate over the Fifteenth Amendment is the absence of evidence about redistricting. The Reconstruction Framers were aware of how redistricting could be abused, as their discussions about rotten boroughs reveal.[562] Moreover, after the Fifteenth Amendment's ratification, Congress failed to target race-based redistricting practices in any of the Enforcement Acts or to invoke Section Two's apportionment penalty, even though it established a one-person, one-vote requirement under its Elections Clause authority.[563] To be sure, one should not assume that the Reconstruction Congress "maximally exercised [its] power to regulate," as this risks "adopting a 'use it or lose it' view of legislative authority."[564] Nevertheless, this dearth of discussion and actions suggests that the Reconstruction Framers did not intend for the Fifteenth Amendment to apply to redistricting.

But as today's originalists frequently opine, intent is no longer the touchstone—it is the text's original public meaning.[565] On this front, the original public meaning of the Fifteenth Amendment suggests that it could apply to redistricting. Here, there are two potential textual hooks.

First, the Fifteenth Amendment prohibits the "deni[al] or abridg[ment]" of the right to vote.[566] The disjunctive phrasing implies that the text goes beyond the outright disenfranchisement of voters. As noted, the Reconstruction Framers failed to specify what, exactly, they meant by

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Congress, not content with enfranchisement in the South, proposed the Fifteenth Amendment to extend the suffrage to northern Negroes. This fact alone is evidence that they did not understand the Fourteenth Amendment to have accomplished such a result." (citation omitted)); Carrington v. Rash, 380 U.S. 89, 97 (1965) (Harlan, J., dissenting) ("[A]ll the history of the Fourteenth Amendment . . . plainly show[s] that the Equal Protection Clause was not intended to touch state electoral matters."); Reynolds v. Sims, 377 U.S. 533, 595 (1964) (Harlan, J., dissenting) ("The history of the adoption of the Fourteenth Amendment provides conclusive evidence that neither those who proposed nor those who ratified the Amendment believed that the Equal Protection Clause limited the power of the States to apportion their legislatures as they saw fit.").

561. It is not uncommon for the Court—or individual Justices—to advocate transplanting a doctrine from one constitutional provision to another. See Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1153 (2023) (surveying alternative sources of the Dormant Commerce Clause); McDonald v. City of Chicago, 561 U.S. 742, 806 (2010) (Thomas, J., concurring in part and concurring in the judgment) (arguing that the incorporation of the Bill of Rights should proceed via the Privileges or Immunities Clause rather than through the Due Process Clause); Saenz v. Roe, 526 U.S. 489, 499–504 (1999) (regrounding the right to travel in the Privileges or Immunities Clause rather than the Equal Protection Clause).

562. See supra section II.D.2.

563. See supra section III.B.

564. United States v. Rahimi, 144 S. Ct. 1889, 1925 (2024) (Barrett, J., concurring).

565. See Solum, Great Debate, supra note 249, at 1251 (explaining that "the dominant form of originalism since the mid-1980s" has been "to recover the public meaning . . . at the time each provision was framed and ratified"); supra section II.A.

566. U.S. Const. amend. XV, § 1.

this turn of phrase. A common example of an abridgment of the right to vote might be a law, like New York's, that imposed differential qualifications on Black and white voters.[567] And as Justice Thurgood Marshall emphasized in his *Bolden* dissent, "[b]y providing that the right to vote cannot be discriminatorily 'denied *or* abridged,'" the Fifteenth Amendment "assuredly strikes down the diminution as well as the outright denial of the exercise of the franchise."[568]

Second, the term "right . . . to vote"[569] is not self-defining. It was viewed by many Reconstruction Framers as protecting the right to hold office. Indeed, some drafts of the Fifteenth Amendment—including one that passed the Senate by a two-thirds majority—used the phrase "elective franchise" in contradistinction to the "right to hold office."[570] In a similar vein, Congress's use of a fundamental condition on Nebraska's admission to the Union referred to the "elective franchise" rather than the "right to vote."[571] Turning to the states, the term "right to vote" appeared in only three state constitutions of that era, all from New England.[572] Thus, the relevant legal universe of statutes and constitutions lacked a clear meaning of "right to vote" and employed more specific language to refer to the casting of a ballot.

To be sure, multiple drafts of the Fifteenth Amendment used both the "right to vote" *and* "right to hold office" phrases. Some Radicals vehemently opposed the deletion of the phrase "right to hold office" by the conference committee.[573] But what is crucial is that the Reconstruction Congress and the ratifying generation continued to debate whether the right to hold office was implicitly protected by the "right to vote."[574] Those who advanced an "implicitly protected" argument differed on whether it was a theoretical truism or a political reality. But it remained a contested point during Reconstruction, and one that a modern Congress could weigh in on in Section 2 of the VRA.

Assuming, then, that the Fifteenth Amendment applies beyond discriminatory voting qualifications, how does it regulate the use of race during redistricting?

Let's start with *Shaw*. Here, the touchstones are historical context and postratification practice. *Shaw*'s colorblind instincts are missing from the

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567. See supra notes 303–315 and accompanying text.

568. City of Mobile v. Bolden, 446 U.S. 55, 126 (1980) (Marshall, J., dissenting) (quoting U.S. Const. amend. XV, § 1), superseded by statute, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131, 134 (codified as amended at 52 U.S.C. § 10301 (2018)).

569. U.S. Const. amend. XV, § 1.

570. Cong. Globe, 40th Cong., 3d Sess. 1059 (1869); see also Crum, Unabridged Fifteenth Amendment, supra note 13, at 1151–61 (compiling drafts).

571. Act of Feb. 9, 1867, ch. 36, § 3, 14 Stat. 391, 392 (admitting Nebraska as a state).

572. Crum, Unabridged Fifteenth Amendment, supra note 13, at 1071.

573. See supra section II.D.4.

574. See id.

debate over the Fifteenth Amendment. In advocating nationwide Black male suffrage, the Reconstruction Framers openly acknowledged that Black men overwhelmingly supported the Republican Party, that voting was racially polarized in the South, and that the ballot was the best means for Black men to protect their own interests.[575] Turning to Reconstruction era redistricting plans, Republican-controlled state legislatures were cognizant of race when drawing redistricting plans, seeking to create effective Black majorities in a highly polarized political environment.[576] As Professors Vikram Amar and Alan Brownstein once observed, "One cannot invalidate government race consciousness in the political rights realm on grounds that it reflects unconstitutional assumptions without dealing with the fact that the very constitutional provisions establishing political rights for minorities *were premised on those same assumptions*."[577] Put simply, *Shaw*'s colorblind intuitions—which were developed under the Equal Protection Clause—do not fare well under the Fifteenth Amendment.

As for *Regester*, there is some textual and historical evidence that vote dilution could violate the Fifteenth Amendment, but, admittedly, this is not an open-and-shut case. On the textual front, the terms "abridge" and "dilute" are close cousins.[578] During Reconstruction, dictionaries defined "abridge" as "[t]o contract," "to diminish," or "[t]o deprive of."[579] Today, the word "abridge" similarly means "to reduce in scope" or to "diminish."[580] And during Reconstruction, "dilute" was defined as "[t]o diminish," "to reduce," "to attenuate," and "to weaken."[581] Today, "dilute" likewise means "attenuate," "to diminish the strength, flavor, or brilliance of (something) by or as if by admixture" or "to decrease the per share value of (common stock) by increasing the total number of shares" or to

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575. See supra section II.B.

576. See Kousser, supra note 46, at 27 (discussing race-conscious redistricting by South Carolina Republicans); supra sections III.C.4–.5 (discussing Republican-led redistricting in Mississippi and South Carolina).

577. Amar & Brownstein, supra note 53, at 919 (emphasis added).

578. In defining these terms, this Essay ignores options that clearly apply to books. Although the Supreme Court frequently relies on dictionaries to establish the original understanding of a word, even these sources have their limitations. See Lawrence B. Solum, Originalist Methodology, 84 U. Chi. L. Rev. 269, 279 (2017) ("Dictionaries report usage, and these reports can be accurate or inaccurate. . . . When a word or phrase is used in its conventional sense, the relevant patterns of usage are those of the linguistic community to which the author belongs at the time the text is written.").

579. Abridge, Johnson's English Dictionary (J.R. Worcester, ed., Philadelphia, JAS B. Smith & Co. 1859); see also Abridge, William G. Webster & William A. Wheeler, A Dictionary of the English Language (New York & Chicago, Ivison, Blakeman, Taylor & Co. 1878) ("To deprive; to cut off."); Abridge, Joseph E. Worcester, A Dictionary of the English Language (Boston, Swan, Brewer & Tileston 1860) ("To curtail; to reduce; to contract; to diminish.").

580. Abridge, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/abridge [https://perma.cc/S4VV-FCTP] (last visited Aug. 4, 2024).

581. Dilute, Noah Webster, American Dictionary of the English Language (1880).

"weak[en]."[582] Thus, the concepts of abridgment and dilution both touch on situations in which a right is not outright denied but is curtailed or diminished in some fashion.

Moreover, Section Two of the Fourteenth Amendment's "textual and historical link" to the Fifteenth Amendment cannot be ignored.[583] Section Two also uses a variant of "denied" or "abridged."[584] Section Two imposes an *apportionment* penalty for violating its strictures, suggesting that the Reconstruction Framers associated what might be called a participatory vision of the right to cast a ballot with the aggregation of those preferences in a legislature.[585] Put differently, "abridgment" as it is used in connection to voting rights ties the casting of a ballot with representation—and thus power—in a legislature.

Finally, the postratification redistricting by Democratic state legislatures were classic examples of vote dilution.[586] On the one hand, one could argue that these actions reveal that the Fifteenth Amendment permitted vote dilution. But liquidation as a concept is problematized by the Democratic Party's "unremitting and ingenious defiance of the Constitution."[587] Put differently, the bad-faith, racist, and antidemocratic interpretation of constitutional provisions by Democratic Redeemers should not be accorded the same interpretive weight as Republicans' actions during that period.[588]

To sum up, the originalist account of race and redistricting requires a rethinking of the Court's doctrine if one stays true to original understanding. Grounding *Shaw* and *Regester* in the Fourteenth Amendment's Equal Protection Clause is deeply ahistorical and egregiously wrong. As for the Fifteenth Amendment, the historical context and postratification evidence suggest that *Shaw* finds no home in a more race-conscious Fifteenth Amendment. By contrast, there are textual and historical reasons to believe that vote dilution is prohibited by the Fifteenth Amendment. To the extent there is any remaining uncertainty about that point, Congress can clarify it via enforcement legislation. Tellingly, Congress has never embraced *Shaw*, whereas it endorsed vote dilution claims when it amended Section 2 in 1982. And it is to Section 2's constitutionality that this Essay finally turns.

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582. Dilute, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/dilute [https://perma.cc/BFG8-3KJP] (last visited Aug. 4, 2024).

583. Tolson, Structure, supra note 301, at 414.

584. Compare U.S. Const. amend. XIV, § 2 (imposing apportionment penalty if "the right to vote" is "denied . . . or in any way abridged"), with id. amend. XV, § 1 (protecting the "right . . . to vote" from being "denied or abridged . . . on account of race, color, or previous condition of servitude").

585. See Crum, Racially Polarized Voting, supra note 53, at 325–26 (describing the apportionment penalty).

586. See supra sections III.C.3–.5.

587. South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966).

588. See supra note 407 and accompanying text.

C. *The Constitutionality of Section 2*

With the original understanding of race-based redistricting illuminated, this Essay concludes by turning to Section 2. At the outset, it is worth emphasizing two points. First, the answer to Section 2's constitutionality hinges on (1) whether and how the Reconstruction Amendments regulate race-based redistricting and (2) the governing standard for Congress's Reconstruction Amendment enforcement authority. The prior section sought to answer the first question. This section begins with an overview of *Katzenbach*, *Boerne*, and *Shelby County*. It ends by defending Section 2's constitutionality.

1. *Congress's Fifteenth Amendment Enforcement Authority.* — Congress has authority under the Fourteenth and Fifteenth Amendments to pass "appropriate" enforcement legislation.[589] During Reconstruction, the term "appropriate" was understood to embody the deferential approach to congressional authority articulated in *McCulloch v. Maryland*.[590] Nearly a century after the Fifteenth Amendment was ratified, Congress passed the VRA.[591] In upholding Section 5's preclearance provision, the Court concluded that Congress's use of the term "appropriate" in Section Two of the Fifteenth Amendment was a clear endorsement of *McCulloch*'s broad conception of congressional authority.[592] Under the *Katzenbach* standard, "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."[593]

In *City of Boerne v. Flores*, the Court established a new standard for adjudicating Congress's *Fourteenth* Amendment enforcement authority,[594] one that is widely viewed as contrary to the original understanding.[595] Under *Boerne*'s three-pronged congruence and proportionality test, the

589. U.S. Const. amend. XIV, § 5; id. amend. XV, § 2.

590. 17 U.S. (4 Wheat.) 316 (1819); see also Katzenbach v. Morgan, 384 U.S. 641, 650 (1966) ("By including § 5 the draftsmen sought to grant to Congress . . . the same broad powers expressed in the Necessary and Proper Clause." (citing U.S. Const. art I, § 8, cl. 18)); Michael W. McConnell, Institutions and Interpretation: A Critique of *City of Boerne v. Flores*, 111 Harv. L. Rev. 153, 188 (1997) [hereinafter McConnell, Institutions and Interpretation] (observing that the term "appropriate" "has its origins in the latitudinarian construction of congressional power in *McCulloch*").

591. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

592. *Katzenbach*, 383 U.S. at 325–26.

593. Id. at 324.

594. 521 U.S. 507, 520 (1997).

595. See, e.g., Tennessee v. Lane, 541 U.S. 509, 556–58 (2004) (Scalia, J., dissenting) (renouncing *Boerne*); Balkin, Reconstruction Power, supra note 259, at 1815 ("Nothing in the text of the Fourteenth Amendment justifies the *Boerne* standard . . . ."); Crum, Superfluous Fifteenth Amendment, supra note 37, at 1625 (arguing that the Framers of the Fifteenth Amendment viewed *McCulloch* as the governing standard); McConnell, Institutions and Interpretation, supra note 590, at 194 ("The historical record shows that the framers of the [Fourteenth] Amendment expected Congress, not the Court, to be the primary agent of its enforcement, and that Congress would not necessarily consider itself bound by Court precedents in executing that function.").

Court begins by "identify[ing] with some precision the scope of the constitutional right at issue."[596] The Court then "examine[s] whether Congress identified a history and pattern of unconstitutional [conduct] by the States."[597] The Court concludes by determining whether there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[598] Since *Boerne*, the Court has continued applying the congruence and proportionality test.[599] With one exception,[600] all of these cases implicated Congress's power to abrogate state sovereign immunity. None involved race, racial discrimination in voting, or the Fifteenth Amendment.

In the two challenges to the 2006 reauthorization of the VRA—*Shelby County v. Holder*[601] and *Northwest Austin Municipal Utility District Number One v. Holder*[602]—the parties disputed whether *Katzenbach* or *Boerne* supplied the proper standard of review. In striking down the VRA's coverage formula, the *Shelby County* Court looked to two "basic principles" from *Northwest Austin* for guidance.[603] The first principle was *Northwest Austin*'s statement that the VRA's "current burdens . . . must be justified by current needs."[604] The second principle was *Northwest Austin*'s conclusion "that 'a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets.'"[605] In a key passage, the Court melded these two principles into one standard: "Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis

596. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001).

597. Id. at 368.

598. *Boerne*, 521 U.S. at 520.

599. See Allen v. Cooper, 140 S. Ct. 994, 1004–05 (2020) (Copyright Remedy Clarification Act of 1990); Coleman v. Ct. of Appeals of Md., 566 U.S. 30, 43–44 (2012) (plurality opinion) (FMLA's self-care provision); *Lane*, 541 U.S. at 533–34 (Title II of the ADA's application to state courts); Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 733–35 (2003) (FMLA's family-care provision); *Garrett*, 531 U.S. at 374 (2001) (Title I of the ADA); United States v. Morrison, 529 U.S. 598, 627 (2000) (VAWA's civil-remedies provision); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (ADEA); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 647 (1999) (Patent and Plant Variety Protection Act).

600. See *Morrison*, 529 U.S. at 627 (invalidating VAWA's civil remedies provision). In *Trump v. Anderson*, the Court opined that any congressional legislation that would disqualify federal officeholders under Section Three of the Fourteenth Amendment would be adjudicated under *Boerne*'s congruence and proportionality test. 144 S. Ct. 662, 670 (2024) (per curiam). The Court, however, did not determine the constitutionality of any such legislation, as the case involved Colorado's attempt to keep former President Trump off the ballot. See id. at 671 (explaining that "responsibility for enforcing Section 3 against federal officeholders and candidates rests with Congress and not the States").

601. 570 U.S. 529 (2013).

602. 557 U.S. 193 (2009).

603. *Shelby County*, 570 U.S. at 542.

604. Id. (internal quotation marks omitted) (quoting *Northwest Austin*, 557 U.S. at 203).

605. Id. (quoting *Northwest Austin*, 557 U.S. at 203).

that makes sense in light of current conditions."[606] Thus, the Court determined that the current-conditions requirement is contingent on disparate treatment of the states.[607]

The Court's opinion in *Shelby County* does not even cite *Boerne*—not for the standard of review, not for its application, and not for its praise of previous versions of the coverage formula.[608] Nor does it cite to any of the *Boerne* line of cases. The words "congruent" and "proportional" do not appear either. Thus, on its face, *Shelby County* does not hold that *Boerne* applies to the Fifteenth Amendment.

To be sure, the *Shelby County* Court stated in a footnote that "[b]oth the Fourteenth and Fifteenth Amendments were at issue in *Northwest Austin*" and that decision "guides our review under both Amendments in this case."[609] This language, however, does not mandate that *Boerne* applies to the Fifteenth Amendment. In *Northwest Austin*, the Court concluded that it "need not resolve" the dispute over the proper standard of review given that the VRA's "preclearance requirements and its coverage formula raise serious constitutional questions under either test."[610]

Rather than being a restriction on Congress's Reconstruction Amendment enforcement authority, *Shelby County*'s equal sovereignty principle—that states retain equal political sovereignty under the Constitution and that Congress must justify differentiating between them—is best conceptualized as a freestanding federalism norm.[611] Indeed, the Court focused on the coverage formula's differentiation between the states, that is, the issue "in th[e] case."[612] If the equal sovereignty principle reflected a structural protection, then it would apply to statutes enacted under "both Amendments,"[613] just as it would apply to statutes enacted under any other constitutional provision, such as the Commerce Clause.

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606. Id. at 553.

607. See id. at 550 ("The provisions of § 5 apply only to those jurisdictions singled out by § 4. We now consider whether that coverage formula is constitutional in light of current conditions.").

608. See id. at 534–57.

609. Id. at 542 n.1.

610. *Northwest Austin*, 557 U.S. at 204.

611. See Thomas B. Colby, In Defense of the Equal Sovereignty Principle, 65 Duke L.J. 1087, 1132–33 (2016); Crum, Deregulated Redistricting, supra note 102, at 410–12; Leah M. Litman, Inventing Equal Sovereignty, 114 Mich. L. Rev. 1207, 1259 (2016); see also John F. Manning, Federalism and the Generality Problem in Constitutional Interpretation, 122 Harv. L. Rev. 2003, 2005 (2009) (defining "freestanding federalism" as a structural argument that does not purport "to [be] ground[ed] . . . in any particular provision of the constitutional text"); Franita Tolson, Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act, 65 Vand. L. Rev. 1195, 1258–59 (2012) (making a similar claim about *Northwest Austin*).

612. *Shelby County*, 570 U.S. at 542 n.1.

613. Id.

The *Milligan* Court's analysis confirms that Congress's Fifteenth Amendment enforcement authority remains governed by *Katzenbach*'s rationality standard.[614] On the enforcement authority question, the *Milligan* Court cited only *Katzenbach* cases.[615] The *Milligan* Court also declined to cite *Shelby County* or any of the *Boerne* line of cases. By contrast, Thomas's dissent treated *Katzenbach*'s rationality standard, *Boerne*'s congruence and proportionality test, and *Shelby County*'s equal sovereignty principle as a constitutional mishmash.[616] The upshot is that the Court continues to rely on *Katzenbach*'s deferential standard, which makes defending Section 2's constitutionality far easier.

2. Defending Section 2. — Here, this Essay's focus is defending Section 2's application to vote dilution claims, rather than its discriminatory results standard. Recall that the Milligan Court skipped over the former question.[617]

Section 2 is usually defended as a rational means of protecting the right to vote.[618] As this argument is familiar, this Essay does not spend too much time on it. The right to vote is more than an atomized right to participate. To be effective, voters need to build coalitions and have their votes aggregated. Dilution can take many forms, from ballot box stuffing, to redrawing municipal boundaries as in *Gomillion*,[619] to the packing or cracking of voters in a redistricting plan. Congress need only make the rational choice that vote dilution is a "denial" or "abridgment" of the "right to vote." Moreover, if the Constitution *itself* prohibits vote dilution, then Section 2 is on firm constitutional footing. All that would need to be justified is the discriminatory results standard.

Moving beyond this familiar claim, this Essay makes a novel contribution: Section 2 can also be defended as a rational means of protecting the right to hold office. Elsewhere, I have argued that the Fifteenth Amendment protects a right to hold office.[620] Even if that right is not unambiguously protected by the Fifteenth Amendment, Congress can exercise its enforcement authority to clarify any ambiguity.

Critically for present purposes, the Court and Congress have conceptualized vote dilution doctrine as implicating the right to hold

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614. Moreover, the Fifteenth Amendment is a narrower provision than Section One of the Fourteenth Amendment, meaning that the *Boerne* Court's concerns about handing Congress too much power are reduced in this arena. See Crum, Deregulated Redistricting, supra note 102, at 410–12, 435–36; Crum, Superfluous Fifteenth Amendment, supra note 37, at 1567–78, 1625–26.

615. Allen v. Milligan, 143 S. Ct. 1487, 1516 (2023).

616. Id. at 1539–45 (Thomas, J., dissenting).

617. See supra section I.D. Given *Milligan*'s clear holding, Section 2's discriminatory results standard is valid Fifteenth Amendment enforcement legislation.

618. See, e.g., Gerken, Undiluted Vote, supra note 122, at 1681; Karlan, Pessimism About Formalism, supra note 63, at 1714.

619. See supra notes 182–183 and accompanying text.

620. See Crum, Unabridged Fifteenth Amendment, supra note 13, at 1138–42.

office. At the outset, the Court's decision in *Regester* looked to the number of minority officeholders and the candidate slating process as evidence of vote dilution.[621] To reiterate, this is not a right to proportional representation, but it is evidence that "the political process leading to nomination and election were not equally open to participation" and that racial minorities "had less opportunity . . . to participate in the political processes and to elect legislators of their choice."[622] In 1982, Congress adopted *Regester*'s framework in Section 2's text, and the influential Senate Report endorsed its references to the number of minority officeholders and discriminatory slating processes.[623] Thus, the vote dilution inquiry is inextricably intertwined with the right to hold office.

Furthermore, when Congress reauthorized the VRA's coverage formula and preclearance mechanism, it compiled evidence of minority officeholding as evidence of racial discrimination and political progress. And the Court took the evidence seriously—until *Shelby County*, that is.

In *City of Rome v. United States*,[624] the Court upheld the 1975 reauthorization of the VRA.[625] In so doing, the Court canvassed the evidence that Congress had compiled: "[T]hough the number of Negro elected officials had increased since 1965, most held only relatively minor positions, none held statewide office, and their number in the state legislatures fell far short of being representative of the number of Negroes residing in the covered jurisdictions."[626] This evidence of "undeniable" "minority political progress" was both "modest and spotty."[627] The Court credited this evidence while endorsing Congress's concern that new "measures may be resorted to which would *dilute* increasing minority voting strength."[628]

Fast forward to the 2006 reauthorization when Congress once again compiled this evidence. The *Shelby County* Court emphasized that "there ha[d] been 'significant increases in the number of African-Americans serving in elected offices'" and that there had been "approximately a 1,000 percent increase since 1965 in the number of African-American elected officials in the six States originally covered by the [VRA]."[629] The Court

621. See White v. Regester, 412 U.S. 755, 766 (1973) ("[S]ince Reconstruction days, there have been only two Negroes in the Dallas County delegation to the Texas House of Representatives and that these two were the only two Negroes ever slated by the Dallas Committee for Responsible Government . . . .").

622. Id. at 766 (citing Whitcomb v. Chavis, 403 U.S. 124, 149–50 (1971)).

623. See S. Rep. No. 97-417, at 28–29 (1982).

624. 446 U.S. 156 (1980).

625. See id. at 180–82.

626. Id. at 180–81.

627. Id. at 181 (internal quotation marks omitted) (quoting H.R. Rep. No. 94–196, at 7 (1975)).

628. Id. (emphasis added) (internal quotation marks omitted) (quoting H.R. Rep. No. 94–196, at 10).

629. Shelby County v. Holder, 570 U.S. 529, 547 (2013).

also noted that "[c]overed jurisdictions ha[d] *far more* black officeholders as a proportion of the black population than d[id] uncovered ones."[630] The *Shelby County* Court focused on this progress in finding that the coverage formula and its burdens were irrational—but it still found the officeholding data probative of the VRA's constitutionality.

As a product of compromise, Section 2 requires consideration of race in the redistricting process, but it does not go so far as to require proportional representation. After all, its text explicitly disavows such a right. Nevertheless, Congress recognized that majority-minority districts are far more likely to elect minority officeholders than majority-white districts. Thus, by protecting against vote dilution, Section 2 helps safeguard an effective right to hold office. And because Congress is tasked with enforcing the Fifteenth Amendment, the Court should defer to Congress's reasoned judgment.

* * *

This Essay has strived to (1) ascertain the original public understanding of race and redistricting under the Fourteenth and Fifteenth Amendments and (2) given that original understanding, defend the constitutionality of Section 2 of the VRA's application to vote dilution. In so doing, this Essay has predominately worked within an originalist framework. Of course, there are competing frameworks for interpreting the Constitution—and those methods may yield different answers.

Furthermore, this Essay has not attempted to reconcile original understanding with principles of stare decisis. There is a vast scholarly literature on this question,[631] and the Court has taken inconsistent approaches to overturning precedent in recent years.[632] Nevertheless, it should be apparent that neither *Shaw* nor *Regester*—as they were written and decided under the Equal Protection Clause—are defensible on

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630. Id. at 541–42 (first alteration in original) (internal quotation marks omitted) (quoting Shelby County v. Holder, 679 F.3d 848, 892 (D.C. Cir. 2012)).

631. For a sampling of the literature, see Amy Coney Barrett, Originalism and Stare Decisis, 92 Notre Dame L. Rev. 1921, 1922 (2017) (examining Justice Antonin Scalia's understanding of stare decisis and originalism); William Baude, Precedent and Discretion, 2019 Sup. Ct. Rev. 313, 313–14 (analyzing Thomas's and Alito's approach to precedent); John O. McGinnis & Michael Rappaport, An Originalist Approach to Prospective Overruling, 99 Notre Dame L. Rev. 425, 430 (2023) (arguing for an "originalist approach" to prospective overruling that "returns to the original meaning" of the Constitution); Nina Varsava, Precedent, Reliance, and *Dobbs*, 136 Harv. L. Rev. 1845, 1849–56 (2023) (exploring the importance of reliance interests underlying stare decisis).

632. See, e.g., Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (overruling Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)); Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 143 S. Ct. 2141, 2172–73 (2023) (invalidating race-based affirmative action in college admissions but declining to explicitly overrule Grutter v. Bollinger, 539 U.S. 306 (2003)); Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (stating that Korematsu v. United States, 323 U.S. 214 (1944), had been overruled by the "court of history").

originalist grounds. In particular, *Shaw* has the hallmarks of a precedent that should be overturned: It is egregiously wrong, it lacks textual and historical support, it is in considerable tension with prior constitutional and statutory precedent (*Regester* and *Gingles*), it cuts against Congress's interpretation of the Fifteenth Amendment as embodied in Section 2 of the VRA, it diverges from the usual intent requirement under the Equal Protection Clause, and its distinction between race and politics is unworkable. In an ideal world, *Shaw* would be overturned.

As for *Regester*, this Essay has argued that vote dilution doctrine can be transplanted from the Equal Protection Clause to the Fifteenth Amendment and stay true to originalist principles. But the Court need not—and should not—address that antecedent question. The reason is straightforward and consistent with originalism: Congress has endorsed *Regester* in Section 2 of the VRA, and under *Katzenbach*'s rationality standard, the Court must simply decide whether that is a reasonable construction of the Fifteenth Amendment.

CONCLUSION

The Court's competing doctrines on race and redistricting have come into conflict because they are based in the Equal Protection Clause. By regrounding voting rights in the Fifteenth Amendment, it becomes clear that *Shaw*'s racial gerrymandering claim rests on constitutional quicksand. Meanwhile, there is considerable ambiguity over how to treat vote dilution under the Fifteenth Amendment. Given the dearth of evidence about how the Reconstruction generation thought about race and redistricting, this Essay's claims are premised on original public meaning rather than original intent or expected application. After considering the original understanding of race-based redistricting and Congress's broad enforcement authority under the Fifteenth Amendment, there are no "competing hazards of liability."[633] Rather, Section 2 strikes the appropriate balance and provides the governing framework.

633. Abbott v. Perez, 138 S. Ct. 2305, 2315 (2018) (internal quotation marks omitted) (quoting Bush v. Vera, 517 U.S. 952, 977 (1996) (plurality opinion)).

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