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BRANDING IDENTITY

KATE SABLOSKY ELENGOLD[†]

ABSTRACT

The Civil Rights Act of 1964 protects against discrimination on the basis of race, color, religion, sex, or national origin—the so-called "protected classes." To make out a successful civil rights claim under the current legal structure, a plaintiff must first identify the protected class under which her claim arises (i.e., race or religion). She must then identify a subclass of that protected class (i.e., African American race or Christian religion) and assert that, due to her membership in or relationship to that subclass, she was treated differently in violation of the law. This Article explores the disconnect between self-identity and perceived identity in the context of assigning membership in protected classes and subclasses. Specifically, it analyzes the tension inherent in the protected class deemed "color."

By tracing the relevant legislative history of the Civil Rights Act of 1964 and the jurisprudence that has developed in the wake of its passage, this Article provides critical historical context for how identity has been assigned in civil rights jurisprudence. It finds that the institutional actors—the legislature and the courts—abdicated their responsibility to define the color protected class, differentiate color from race, and give clarity to the relevant subclasses of a color discrimination claim. Recognizing that gap, parties to civil rights actions have stepped into the void. Most recently, parties have begun inserting the concept of "people of color," a term adopted by a modern progressive social movement to build solidarity and power among non-White minorities, into civil rights challenges. Such a shift in the language of civil rights law brings to the forefront the tension between a plaintiff's self-identification and the plaintiff's perceived identity that forms the basis of the defendant's discriminatory action.

This Article warns against adapting the people of color concept for civil rights litigation. It argues that the category people of color, un-

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doubtedly important to developing cultural and political capacity and power, should not be inserted into civil rights litigation. Because of the history of conflating the terms color and "colored," joined with the difficulty in disentangling color from race, the existing legal structure for establishing civil rights claims leaves little room for reimagining identity. Inserting the people of color construct into civil rights challenges will undercut the potential of the law to provide broad protection against discrimination and runs counter to the goal of achieving racial equality.

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> It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels his twoness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.

—W.E.B. Du Bois[1]

INTRODUCTION

On December 17, 2009, Judge Mary S. Scriven, federal district court judge in the United States District Court for the Middle District of

1. W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 8 (1903).

Florida, looked down from the bench and asked counsel for the United States of America, "Am I black?"[2] Counsel responded, "To my naked eye, you are, Your Honor."[3] Judge Scriven's question at the pretrial conference in *United States v. Fountain View Apartments*,[4] a civil rights case involving allegations of race or color and familial status discrimination under the Fair Housing Act,[5] illuminates the complicated nature of racial classification in law. The government's motion to exclude testimony of Hispanic renters where the complaint alleged discrimination based on race ("African-American") and color ("black") prompted the court's inquiry.[6] Defense counsel asserted that defendants should be permitted to introduce testimony from Hispanic tenants because the complaint alleged housing discrimination on the basis of "race or color." Defense counsel posited, "Everything we have researched indicates that the word color encompasses peoples of color today."[7] In other words, she read the assertion of color discrimination under the statute as an assertion of discrimination against people of color, a term commonly associated with non-White racial minorities in modern American society.[8] Defense counsel continued, "It's a crucial point in this case, because the complaint alleges race or color, and it's very important. We have a large population of colored persons historically at Fountain View Apartments. It's a big issue for us."[9] It was clear from context that defense counsel was arguing that,

2. Transcript of Pretrial Hearing at 46, United States v. Fountain View Apartments, Inc. (*Fountain View*), No. 6:08-cv-00891 (M.D. Fla. Dec. 17, 2014), ECF No. 115.

3. *Id.*

4. From February 2008 to June 2014, I was a trial attorney at the United States Department of Justice, Civil Rights Division, and acted as lead counsel for the United States in *United States v. Fountain View Apartments*. *United States v. Fountain View Apartments* was originally filed in the Middle District of Florida on June 4, 2008. Complaint and Demand for Jury Trial at 1, *Fountain View*, No. 6:08-cv-00891 (M.D. Fla. June 4, 2008). The First Amended Complaint was filed on August 11, 2009. First Amended Complaint and Demand for Jury Trial at 1, *Fountain View*, No. 6:08-cv-00891 (M.D. Fla. Aug. 11, 2009), ECF No. 87.

5. *Fountain View*, No. 6:08-cv-00891, 2009 WL 1905046, at *1 (M.D. Fla. July 1, 2009); *see also* Fair Housing Act, 42 U.S.C. § 3601–3631 (2012).

6. *See* First Amended Complaint, *supra* note 4, para. 26 ("From at least 2000 through the present, Defendant James Stevens has been subjecting actual and prospective tenants at Fountain View Apartments to discrimination on the basis of race or color. Such conduct has included, but is not limited to: a. Directing Fountain View employees to tell black or African-American prospective tenants that there are no available apartments, regardless of availability; b. Refusing to negotiate with black or African-American prospective tenants for rental; c. Misrepresenting the availability of units to black or African-American potential tenants; d. Threatening to evict one or more tenants who were known or believed to have black or African-American friends and associates; e. Making statements with respect to the rental of apartments at Fountain View Apartments indicating a preference, a limitation, or discrimination based on race or color; and f. Failing to offer black or African-American persons the same terms, conditions or privileges regularly offered to white persons.").

7. Transcript of Pretrial Hearing, *supra* note 2, at 45.

8. *See* Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 962–63 (1995) (noting that the number of groups and subgroups included in the people of color construct has grown over time to include an increasing percentage of non-Blacks); *see also* Paulette M. Caldwell, *The Content of Our Characterizations*, 5 MICH. J. RACE & L. 53, 55 n.9 (1999) ("The term 'people of color' often refers not only to the possibility of progressive coalition among subordinated racial groups but also to the changing demographics of the population of the United States.").

9. Transcript of Pretrial Hearing, *supra* note 2, at 46.

if the United States alleged color discrimination, then defendants could introduce evidence that they rented to some individuals considered people of color to rebut the allegation that they refused to rent to other individuals also considered people of color.[10]

In civil rights litigation, where discrimination prohibition is based on identified protected classes—race, color, religion, sex, or national origin[11]—the plaintiff identifies the protected class under which her claim arises. In order to prevail, the plaintiff must show that she was treated differently because of her membership in a subclass of that protected class.[12] Defense counsel's assertions and Judge Scriven's response in *Fountain View Apartments* raise critical questions for civil rights advocates: As the demographics of the country become more diverse, can the subcategories that form the basis of a discrimination claim be reimagined? Who gets to set the boundaries of those subcategories? And who determines whether the plaintiff falls within or outside of those boundaries?[13] Focusing specifically on the protected class identified as color, and by tracing the actors who have influenced its definition and the boundaries of its subclasses, this Article investigates those questions.[14] It concludes that the category people of color, widely used in society and political advocacy, should not be defined as a subclass of color within the structure of the civil rights laws. Doing so runs the risk of swallowing the protections of the color class entirely. Even if the category survives, the substantive and evidentiary challenges raised by the insertion of the people of color construct will restrict development of

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10. *See id.* at 43 ("I believe there is some question, even as to the claim, Your Honor. The complaint reads in terms of discrimination in terms of color or race which, in our mind, includes Hispanic population. Fountain View has traditionally had a significant Spanish population. For whatever reason, they have not had as many African-Americans there.").

11. The Civil Rights Act of 1964 prohibits discrimination in certain public and private spheres on the basis of race, color, religion, sex, or national origin. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964). The Fair Housing Act prohibits discrimination on the basis of those protected classes, along with familial status and disability. Fair Housing Act §§ 804–05, 42 U.S.C. §§ 3604–05 (2012).

12. For example, an African American alleging a violation of Title VII of the Civil Rights Act of 1964 may allege that she was the victim of discrimination because she is African American, a particular bounded subclass of race. *See* 42 U.S.C. §§ 2000e-1 to -3. She alleges that she was treated differently because of her membership in the subclass (African American), not the protected class (race). Similarly, a woman alleging illegal sex discrimination in violation of the Fair Housing Act may allege that she faced discrimination because she is female, a particular bounded subclass of sex. *See* 42 U.S.C. §§ 3604–06.

13. There is another critical question related to this analysis—what happens when subclasses are not or cannot be bounded? In other words, what happens to civil rights legal protections when the assumptions about boundaries between subclasses cannot be logically maintained? Can the current civil rights statutory structure survive? Will it have any meaningful impact on addressing entrenched discrimination and bias? With the exception of a brief analysis of certain courts' discomfort with color discrimination as an unbounded concept, see *infra* Section II.B, this Article does not reach those important questions. For analysis of the broader critique and defense of the rights-based civil rights model see sources cited *infra* note 15.

14. The analysis in this Article primarily focuses on the period of time from the debates preceding the Civil Rights Act of 1964 to the present. It also focuses exclusively on the American experience with particular legislation and the interplay with racial labeling and categorization.

color jurisprudence, which is a critical step to realizing the full potential of the current civil rights statutes. This will undercut the potential of the law to provide broad protection against discrimination and runs counter to the goal of achieving racial equality.[15]

The legislature, courts, lawyers, plaintiffs, and defendants are all actors who have a role in asserting and defining protected classes, and the subcategories within those protected classes, that may form the basis of a discrimination claim. Part I of this Article tracks the legislative history of the Civil Rights Act of 1964 and the categories discussed and assigned therein. It highlights the tension between the language of racial classification (i.e., colored) employed at the time of the debates and the undefined protected class identified as color in the statute itself. It establishes that Congress refused to define the boundaries of the color protected class or explicitly identify a distinction between colored and color. Part II reasons that the legislature's inaction is a primary barrier to the courts' ability and willingness to (1) recognize colorism (discrimination on the basis of skin color),[16] (2) define the color protected class, and (3) accept or assign plaintiff's membership in certain subcategories of that protected class.

Part III begins with a discussion of racial labeling over time, with a particular emphasis on the changing labels of Blacks in America. It introduces the difference between external categorization and self-definition, specifically looking at the recent trend of self-categorization as multi-racial, multi-ethnic, and multi-cultural, and the catchall term "person (or people) of color." Part III argues that, in the absence of definition from the legislature and the courts, other actors, including broader cultural forces, will attempt to define color and its boundaries in civil

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15. There is much debate about the utility of the civil rights model as a force of social change and racial equality. *See, e.g.*, Caldwell, *supra* note 8, at 95–96 (arguing that the civil rights model is based on the experience of Whites, not Blacks, resulting in a structure that ignores the unique needs of a subordinated group such as social and economic justice and instead focuses on isolated legal rights); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1363–64 (1984) (offering a four-tier critique on rights-based theory, which includes the ultimate argument that discourse about rights impedes progressive advances). *But see* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1356–58 (1988) (recognizing both the transformative power of anti-discrimination law and the dangers of the rights-based approach in legitimizing a structure that has traditionally subordinated Blacks); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 402–05 (1987) (challenging Critical Legal Studies scholarship in so much as it wholesale rejects rights-based theory, particularly as the critique is applied "to the black struggle for civil rights" (footnote omitted)). I find myself and this Article situated in the latter camp, recognizing both the limits of and the continued need for aggressive enforcement of the current anti-discrimination rights-based laws.

16. I borrow the definition of "colorism" from Trina Jones's adaptation of Alice Walker's definition as "the prejudicial treatment of individuals falling within the same racial group on the basis of skin color in the context of antidiscrimination law." Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1489 (2000) (quoting ALICE WALKER, *If the Present Looks Like the Past, What Does the Future Look Like?*, *in* IN SEARCH OF OUR MOTHERS' GARDENS 290, 290–91 (1983) ("Colorism—in my definition, prejudicial or preferential treatment of same-race people based solely on their color . . . . [I]mpedes us.")).

rights claims. It also recognizes the powerful impact of self-identification and agency in detailing one's narrative in the legal arena. Part III concludes by detailing the current trend of pleading discrimination or differential treatment in civil rights challenges where the complaint invokes the people of color classification. Finally, Part IV concludes the analysis by identifying the potential drawbacks of introducing the terms person of color and people of color into civil rights challenges. Ultimately, this Article argues that, despite the importance of agency in legal storytelling, the risk of importing the people of color concept into civil rights challenges outweighs the benefits.

Racial labels, whether externally defined or self-defined, have profound meaning to those labeling and being labeled.[17] While carrying great meaning, however, labels are mutable and take on different significance depending on time, place, and speaker. Today, the people of color movement may operate to symbolize solidarity and build political and cultural coalitions among historically disenfranchised groups.[18] Within the context of the current civil rights legal structure, however, application of the people of color construction will have the opposite effect. Insertion of the concept into civil rights jurisprudence may actually retract rights and inhibit movement toward racial equality.

I. "COLORED" VERSUS "COLOR" – CIVIL RIGHTS ACT OF 1964

This part provides an in-depth look at the legislative history of the Civil Rights Act of 1964, paying particular attention to the labels of racial categorization used therein and comparing those labels with the protections afforded to individuals based on color. Review of the legislative history provides three related insights. First, as seen in the debates preceding the Act's passage, the majority White legislature regularly invoked the term colored as a racial label affixed to African Americans,[19]

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17. *See infra* Section III.B.

18. While use of the term people of color is regularly employed to foster coalition building among non-Whites in an effort to advance the interests of historically disenfranchised groups, its use in myriad circumstances also risks essentializing an enormously varied group of individuals and subgroups. *See* Caldwell, *supra* note 8, at 55 (citing Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1997)) (recognizing that use of the term "people of color" risks "conceal[ing] overlapping and conflicting theoretical and practical issues"); *see also* discussion *infra* Section III.A.

19. It does not escape my attention that use of the term "African American" is a label itself, in its usage and in its construction (without a hyphen, in this case). *Cf.* Lorraine Bannai & Anne Enquist, *(Un)examined Assumptions and (Un)intended Messages: Teaching Students to Recognize Bias in Legal Analysis and Language*, 27 SEATTLE U. L. REV. 1, 14 n.49 (2003) (noting the recent trend toward omitting the hyphen for terms that combine races or nationalities); Grant H. Morris, *The Greatest Legal Movie of All Time: Proclaiming the Real Winner*, 47 SAN DIEGO L. REV. 533, 543 n.25 (2010) (explicitly choosing not to hyphenate African American because it may suggest that certain Americans are not as worthy as other Americans). The problem of choosing and constructing labels is replicated in this Article many times, with several different labels. For example, I struggled with whether to capitalize "Black" and "White." I decided to capitalize both terms, unless they appeared in a quotation. *Cf.* Wendy Brown-Scott, *Race Consciousness in Higher Education: Does "Sound Educational Policy" Support the Continued Existence of Historically Black Colleges?*,

the group identified by the lawmakers as the primary beneficiary of the legislation.[20] Second, at the time of passage of the Civil Rights Act of 1964, the legislators appeared generally to be operating with a foundational understanding that race is primarily defined as a binary distinction between Black and White. Therefore, even as some grappled with the possibility that race and color were different and that color did not mean colored, a kind of gravitational pull to remain in the binary structure persisted.[21] Finally, the legislators explicitly refused to define the color protected class in the statute.[22] That refusal has had a lasting impact on the analysis of civil rights protections today. It stands as an indicator that racial labels affixed externally define the protections of the Act and also leaves the courts with little authority to, or guidance on which to, define protections beyond traditional racial boundaries.

A. "Colored" in 1960s America

The legislative history of the Civil Rights Act of 1964 establishes, without doubt, that the lawmakers who drafted, amended, and argued about the landmark statute primarily used the terms "colored" and "Negro," often interchangeably, to describe Black citizens, the group regularly identified by legislators as the primary beneficiary of the legislation.[23] The repeated use of the term colored as a racial label sets the stage for Congress's refusal to define the color protected class, its boundaries, and the boundaries of the subcategories under which a color discrimination claim could arise. It also gives historical context for the current confusion in the courts about the relationship between color and race in civil rights litigation.

As early as 1962, Senator Kenneth Keating of New York, an advocate of a federal law banning literacy tests in voting, evidenced the acceptance and institutional use of colored as synonymous with Negro. Senator Keating quoted the Department of Justice's assessment of the Fifteenth Amendment on the Senate floor: "[I]t forbids 'onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race,' and it vitiates measures which have the 'inevitable

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43 EMORY L.J. 1, 4 n.4 (1994) (noting her choice to capitalize "Black" even though certain reference guides advise the use of the lowercase because of her assessment of the "need for self-empowerment and self-definition"); Crenshaw, *supra* note 15, at 1332 n.2 ("When using 'Black,' I shall use an upper-case 'B' to reflect my view that Blacks, like *A*sians, *L*atinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun."); Maritza I. Reyes, *Constitutionalizing Immigration Law: The Vital Role of Judicial Discretion in the Removal of Lawful Permanent Residents*, 84 TEMP. L. REV. 637, 672 n.268 (2012) ("White and Black are capitalized in this Article in the same way as Latino and African American.").

20. *See, e.g.*, 110 CONG. REC. 6527–34 (1964) (Senator Humphrey's explanation of the "affirmative case" for the civil rights legislation); *id.* at 6071–79 (Senator Long's explanation of his opposition to the civil rights legislation).

21. *See* discussion *infra* Section I.B.

22. *See* discussion *infra* Section I.C.

23. *See, e.g.*, 110 CONG. REC. 6527–33 (1964).

effect' of disenfranchising Negroes."[24] Keating and the Department's use of the terms "the colored race" and "Negroes" shows institutional acceptance that the terms could be used synonymously to identify a particular racial group in America. Georgia Senator Herman Talmadge, an opponent of the same legislation, discussed voter registration statistics from Georgia in the same way. He noted:

> [A]ll of the 15 Georgia counties in which Negro registration amounts to 25 percent or more of the total number of voters are small rural counties. In one of them—the coastal county of Liberty—the Journal's tabulation showed 14 more colored persons registered than white. . . . And of the six Georgia counties in which no Negroes are registered, four of them in north Georgia, where few, if any, colored people reside.[25]

Opponents of the civil rights bill regularly used the terms Negroes and colored to describe the same population. For example, in complaining about the request for a trade school for Blacks, Senator Russell Long of Louisiana noted, "The community did not have such a school for whites, but they asked to have one for Negroes, because the colored citizens did not have adequate facilities available to them."[26] And in one of the most loathsome exchanges in the legislative history, Senator Long and Senator Strom Thurmond of South Carolina affixed colored and Negro labels to the same population of people:

> Mr. LONG of Louisiana. Would it not be fair to ask what kind of fix the colored folks would be in if they had not been brought to this country, but had been allowed to roam the jungles, with tigers chasing them, or being subjected to the other elements they would have to contend with, compared with the fine conditions they enjoy in America?
>
> Mr. THURMOND. Of course, the Negroes are much better off as a result of their coming to this country.[27]

Senators Long and Thurmond, employing colored and Negro in the most pejorative way, frame the civil rights legislation as inextricably linked with slavery. It is yet another demonstration that the term colored cannot be separated from the country's history of racial oppression of Blacks. And, therefore, it becomes more difficult to separate color discrimination from race discrimination. America's history of racial hierarchy, which has been woven into the fabric of our language over time, creates significant complexity when trying to separate color discrimination from race discrimination.

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24. 108 CONG. REC. 7797 (1962) (quoting Department of Justice brief).
25. *Id.* at 7217.
26. 110 CONG. REC. 7605 (1964).
27. *Id.* at 7903.

As seen in the Keating quote, it was not just civil rights opponents who conflated the terms colored and Negro in the debates leading up to the passage of the Civil Rights Act of 1964. Senator Dodd, Democrat from Connecticut, for example, complained of segregation and exclusion in the craftsman economy.[28] He noted that "although there exist two Negro locals for cement mixers and bricklayers, most colored persons are employed only as unskilled laborers."[29] And in support of Title VI of the legislation, Senator John Pastore of Rhode Island noted that two hospitals in North Carolina denied medical care "to those whose skin was colored."[30] He went on to note that "[t]he Federal funds that helped to build these hospitals were raised, of course, by taxation—taxes paid by both white and Negro citizens. But the Negro in need of care could not get it at these hospitals simply because he was a Negro."[31]

The pervasive use of the term colored to describe Blacks in the civil rights debates and the similarity of the term colored to one of the identified protected classes—color—is of particular import because it both exacerbated the association between color and race and quelled any movement to articulate legitimate differences between the two constructs. It ultimately operated to limit the emerging definition of the color protection. The legislators' foundational approach to race as a binary distinction between White and Black offers a primary reason why.

B. White Versus Black – A Binary Assessment of Race

The debates preceding the passage of the Civil Rights Act of 1964 establish that the legislators' primary approach to race was one of a singular distinction—White or Black. The binary approach to race is important in this analysis because it sets the stage for Congress's failure to define the color protected class or explicitly distinguish it from race. That the color protection was so close to the term for Blacks—colored—further reinforced the singular division between Black and White, which became basic to the understanding of both the race and color categories in the legislation.

Certain opponents of the proposed legislation argued that the civil rights law would increase the distinction and difference between the two races—Black and White. In arguing that the legislation was unnecessary, South Carolina Senator Olin Johnston discussed proposed changes to voting laws: "Many States have a provision written into the qualifications for voters that if persons have been tried and convicted of certain crimes, they cannot vote. . . . That applies to white or colored citizens. There is no distinction between the two races in that respect."[32] Senator

28. 109 CONG. REC. 4155 (1963).
29. *Id.*
30. 110 CONG. REC. 7054.
31. *Id.*
32. 109 CONG. REC. 5101 (1963).

Russell Long of Louisiana used similar language in protesting legal integration measures by reasoning that forced integration would further increase tension between the two races. He questioned, "Do Senators realize how much legislation on this subject is already in our lawbooks? . . . More of it—especially the kind of it which was rammed through the House and which is now before us—will only drive the white and the colored races further apart . . . ."[33]

Many supporters of the legislation shared the binary assessment of race in America. In affirming his support for Title VI of the legislation, Senator Philip Hart, Michigan Democrat, identified the legislation as one equalizing treatment of two races:

> I share . . . the hope and belief that in the weeks immediately ahead the kind of record that is being made here today will enable us to consider the facts intelligently and respond to the several recommendations made in the President's civil rights message, particularly that section which aims at the use of funds for programs that are worthwhile. In my judgment, such programs will not be killed. Rather, the purpose is to have applicable in the administration of such programs rules which are consistent with the kind of nation we preach to the rest of the world that we are, a Nation that treats all its people with equal hand and equal justice, and does not have one window marked "white" and another window marked "colored," in order that taxpayers, white and colored alike, may participate in Federal programs.[34]

Proponents and opponents of the legislation did *contemplate* beneficiaries of the legislation outside of the traditional Black/White binary. Senator Hubert Humphrey, Minnesota Democrat, specifically identified the fact that the legislators' first instinct was to restrain their analysis to traditional Black/White racial boundaries.[35] In trying to push against that impulse, he noted, "[C]itizens of America—not colored citizens—and, by the way, let us stop talking about colored citizens, and let us talk about citizens, because there are all shades of color."[36] Although less explicitly, in opposing the bill just before its passage, Senator Russell Long of Louisiana also gave a nod to the possibility that color might encompass an identity beyond Black and White.[37] In asserting that "tipping" is a natural by-product of integration, he noted,

> [W]hen our liberal friends went about integrating the school system in Washington, they found that where 1 percent of the schoolchildren in a school were colored, no one tended to move out of the area, except perhaps one or two families. When the percentage reached 8 or 10 percent, the whites started moving out. By the time it reached 20

33. 109 CONG. REC. 5881 (1963).
34. *Id.* at 12,102.
35. 110 CONG. REC. 7799.
36. *Id.*
37. *See id.* at 7563.

> percent, the whites were moving out even faster. Then when it reached about 70 or 80 percent, the great liberal integrationists moved out themselves. So eventually no one was left except one or two white children in an entire school. In an instance like that if one were to study the situation, he would probably find that some of those might have been Puerto Ricans, or might have come from areas where there is somewhat of a shade between the white and the colored races.[38]

Even Senator Strom Thurmond, in opposing the legislation by touting his version of racial progress, gave lip service to the concept that color may be broader than colored. He noted:

> I want to see the people of this country—white or Negro, or of any other color—have every advantage and every opportunity and all the rights to do well and make progress. I think we should be proud of what we have accomplished in the United States, and we should broadcast these facts to the world.[39]

It is hard to ignore, however, the power of the foundational approach, the instinct that race is essentially defined as White versus Black, a singular and clear differentiation between two specific groups. In summing up his remarks in favor of the bill, Senator Warren Magnuson, Democrat from Washington, demonstrated that the legislation, at its core, was designed to equalize treatment of Blacks and Whites.[40] So, even when he explicitly invoked differential treatment on the basis of the color of one's skin, his starting point was a binary Black/White racial assessment:

> Our assumption is that this is a nation of equals—yet this assumption falls to the ground as soon as discrimination to the Negro is taken into account.
>
> . . .
>
> The hard fact is that the American system of equality has, up to now, left out men and women whose skins were of another color.
>
> . . .

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38. *Id.*

39. *Id.* at 5802. Senator Thurmond's comment raises two related issues that should be kept in mind when assessing the usefulness of the language used by the lawmakers opposed to the civil rights legislation. First, each speaker presumably had an agenda and it is difficult, if not impossible, to separate the language used in a statement from the underlying agenda. That is not to say, however, that the language used isn't relevant to the inquiries this Article explores. Rather, as courts struggled to understand congressional intent, it is important to recognize how the lawmakers' agendas influenced the outcome. *See infra* Section IV.A. Second, Senator Thurmond's statement articulates that White may be deemed a subclass of color. The implications of that understanding and its effect on emerging color discrimination claims are discussed later in this Article. *Infra* Section IV.A.

40. *See* 110 CONG. REC. 7412.

> The Federal judiciary has been forthright in upholding the proposition that race has no place in American life or law—that, in the lapidary phrase of the elder Justice Harlan, the American Constitution is colorblind.[41]

Congress's binary Black/White assessment of race sets the stage for the collapse of the color protection into race. It evidences a lack of vision on the part of the legislation's designers to imagine that there could be subcategories within the protected class that would deviate from traditional racial assessment. More specifically, it fails to imagine a scenario other than a Black complainant seeking recourse from a White defendant. When we place the language of the Civil Rights Act and its legislative history in the historical context of segregation and Jim Crow, it is understandable that legislators viewed the debate as a largely binary Black/White debate. A significant effect of that viewpoint, however, is Congress's resulting lack of urgency or foresight to define critical terms in the statute.

C. "Color" is Undefined in the Statute

Throughout the debates on the Civil Rights Act of 1964, Congress expressly and repeatedly refused to define certain critical words, including color. The legislative history shows that the choice to omit definitions was deliberate. Based on the data and reasoning set forth above, one may hypothesize that is because those same lawmakers did not or could not articulate the relationship between colored and color or race and color.

Opponents of the civil rights legislation specifically challenged the meaning of the term color during the many debates on the legislation. Senator John Little McClellan, Arkansas Democrat, and Texas Republican Senator John Tower discussed the lack of a definition for the term color:

> Mr. McCLELLAN. What is "color" as defined by the bill?
>
> Mr. TOWER. I am not sure I understand what is it.
>
> Mr. McCLELLAN. The bill does not define it, does it?
>
> Mr. TOWER. It is not defined. The term is ambiguous.[42]

Senators McClellan and Tower purposefully draw attention to the bill's failure to define color in an effort to discredit the constitutionality and efficacy of the proposed legislation.[43] The legislators continue:

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41. *Id.*
42. *Id.* at 7772.
43. *See id.*

> Mr. McCLELLAN. Suppose that one of the six people to whom I referred should be one-tenth Negro. Under the statute would he be considered colored, or would he be considered more white than black, so that color would not enter into the question of his possible employment or rejection?
>
> Mr. TOWER. That is a very interesting question. If he had a multinational background, and there were some sort of obligation imposed by the commission on the employer, to hire, say, a certain percentage of people with one particular ethnic background, and another percentage of people with another ethnic background, the question would be difficult enough for anybody to resolve, but it would be left to the arbitrary will and discretion of the commission.[44]

The second part of the colloquy establishes that, although there was no explicit definition of color, Senators McClellan and Tower assumed that color was rooted in the term colored as they defined it synonymously with Black. And as the conversation continued, it became clear that the confusion was not limited to the relationship between color and colored, but that the confusion extended to other critical terms in the statute, such as race and national origin:

> Mr. McCLELLAN. The pending bill does not undertake to define what is color and what is not color; does it?
>
> Mr. TOWER. No; and we get into a real problem when we go into questions of color, religion, sex, or national origin. There can be all sorts of discussions along those lines.[45]

The colloquy between Senators McClellan and Tower is interesting because it not only explicitly challenges the bill's failure to define the term color but also demonstrates the legislators' failure to disentangle racial labels (i.e., colored) from protected classes (i.e., color) and protected classes from one another (i.e., color as compared to race).

In debate the next day, Senator McClellan further demonstrated his inability to identify any meaningful differences between the terms color, colored, and Negro, even as he protested the bill's failure to define the term color:

> The bill does not define what color is. What is color?
>
> . . .
>
> . . . The bill defines nothing. It leaves the situation in a hodgepodge.
>
> What is a Negro?

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44. *Id.*
45. *Id.*

> If he is 55 percent white and 45 percent Negro, what is he, then, white or Negro, under this bill?
>
> The bill contains no definition.[46]

Proponents of the legislation never answered the call to define color.[47] Representatives Abernethy and Celler did, however, engage in a conversation acknowledging that certain intraracial discrimination could trigger protection under the color prong of related civil rights legislation:

> Mr. ABERNETHY. I will ask another question. If it should be illegal—and I understand it would be under this bill—for an employer not to hire a person on the ground of race—that is, color—would it be illegal not to hire because of the shade of color, that is because the skin of the applicant is too dark?
>
> Mr. CELLER. I suppose shade of color would be color. The whole embraces all its parts.
>
> . . . .
>
> Mr. ABERNETHY. . . . Would the FEPC have authority to correct an employment discrimination among our Negro citizens in the District of Columbia, where light-skinned Negroes refuse to hire Negroes of dark skin?
>
> Mr. CELLER. . . . I may say if there is any discrimination against the Negro regardless of his shade or gradation of pigmentation of his skin in employment, that discrimination would be a violation of this act.[48]

Like the exchange between Senators McClellan and Tower above, the conversation between Representatives Abernethy and Celler shows that, even in the most expansive reading of color, the confusion between racial labels and protected categories persisted. The conversation highlights the difficulty legislators had both separating color from colored (or

46. *Id.* at 7875.

47. Congressman Dowdy of Texas offered several amendments to Title VII in February of 1964. One such amendment added certain definitions to the bill, including to "define 'race' to include the Caucasian race, and [ ] define 'color' to include white, and [ ] define 'religion' to include the word 'Protestants' and the phrase 'national origin' to include people born in the United States of America." *Id.* at 2725. He explained:

> From the discussions we have had on the floor here there seems to be some doubt that these things were covered. This last amendment would at least make the bill applicable to everybody. And if there is any protection in the bill for anybody, it would give everybody the same equal protection under the law, if there is any protection in the bill.

Id. at 2725–26. Although Representative Celler previously acknowledged that the bill banned discrimination against White people, the amendment was rejected. *Id.* at 2552, 2727.

48. *See* 110 CONG REC. 2553–54 (discussing the Fair Employment Practices Act for the District of Columbia).

Negro) and distinguishing discrimination on the basis of race from discrimination on the basis of color.[49]

Senator Gale McGee, Wyoming Democrat, a proponent of the civil rights legislation, recognized the importance of words and definitions but remained steadfast against pressure to include definitions for all such terms. He explained:

> It is always a fascinating exercise to discuss what words mean. The meaning of words changes in each generation, in the course of time. . . . So long as we are dealing with human language, we shall have a disagreement about the meaning of words. . . .
>
> I submit that so long as there are as many individuals interested in the specific semantics of the language as there are, we can never reach an absolute definition.
>
> So, the choice is, Shall we do nothing, or shall we go too slowly and make certain that we do not make a mistake? Or shall we take a kind of step forward, with the kind of chance it represents, in order to produce timely action in the measure or tempo of our times?
>
> . . .
>
> A part of the colloquy on the floor of the Senate will make clear the general order of intent of Congress that will not be ignored downtown, even though we understand from time to time that there are, sometimes, misreadings of what a man meant when he said a certain thing.
>
> But again, we must take chances. Therefore, I would hesitate to see us worry so much about the meanings of words and the absolute interpretations of where we go from here. I think it is important that we lay down some broad, general guidelines to move us another step toward the achievement of what we all agree is our dream of human rights.[50]

Senator McGee's observations may represent the ultimate reasoning behind the decision to exclude definitions of color and related terms. He

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49. Other proponents of civil rights legislation showed similar confusion. During the course of the debates for the Fair Employment Practices Act for the District of Columbia, Senator Thomas Dodd, Democrat from Connecticut, assumed that color discrimination is a problem of the "Negro population," noting,

> I have been told that there are thousands of young people in this city who are no longer in school, but who cannot obtain employment largely because of their color. And I have been told time and again that the inability to obtain work is one of the main causes of delinquency and crime among young members of the Negro population of this city.

109 CONG. REC. 4154 (1963). And in discussing whether to bar literacy tests in elections, Senator Jacob Javits, liberal Republican from New York, similarly commented, "certain States have deprived thousands of Negroes of the right to vote on the ground of color, in violation of the 15th amendment." 108 CONG. REC. 7913 (1962).

50. 110 CONG. REC. 7794.

acknowledges that language is inherently ambiguous. Senator McGee, however, assumes that the broad guidelines laid out in the legislation will suffice to impart its meaning to future interpreters and adjudicators,[51] which has not proven accurate.[52] Senator McGee's sentiments are troubling in another way. The changing nature of words and labels may be "fascinating" in an academic sense, but the legislation was designed to provide specific legal protection to groups that had been historically disenfranchised and particularly vulnerable to bias and discrimination. As will be seen in the next part, the failure to define the categories of people who were afforded protection under the Act has had lasting consequences in the development of the jurisprudence. Failure on the part of the legislature to define color, to separate it from race and distinguish it from colored, left a vacuum that courts have been reluctant to fill. That vacancy has thus limited the protections embedded in the Act from being fully realized.

II. "COLORISM" IN THE COURTS

Congress failed to define color discrimination in the Civil Rights Act of 1964 and related statutes. The second most obvious actor to provide elucidation on the meaning of the statutory language, the judiciary, has offered minimal guidance and essentially no clarification.[53]

The courts' approach to allegations of color discrimination is unsurprising for three primary reasons. First, when viewing language and racial categorization in the historical context of the Civil Rights Act of 1964, Congress offered little guidance to uniformly or consistently define color and color discrimination or apply legal tests for ferreting out such discrimination. Further, courts seemingly are similarly influenced by the impulse to view race as a Black/White binary. Without guidance from

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51. He fails to see, however, that words contain both semantic and pragmatic meanings. Muneer Ahmad explains that the former is "the 'fixed context-free meaning' of words" and the latter is "the meaning that words assume in a particular context, as understood between particular individuals." Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999, 1032 (2007) (quoting GUY COOK, DISCOURSE 29 (1989)). When it comes to defining the meaning of the term color as a protected class in civil rights legislation, both the semantic and pragmatic meanings of the word, as set forth in the legislative history, are elusive.

52. *See infra* Part II.

53. A basic tenet of statutory construction is that "courts should endeavor to give meaning to every word which Congress used and therefore should avoid an interpretation which renders an element of the language superfluous." Rosenberg v. XM Ventures, 274 F.3d 137, 141 (3d Cir. 2001) (citing United States v. Alaska, 521 U.S. 1 (1997); United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc., 517 U.S. 544, 550 (1996); First Bank Nat'l Ass'n v. FDIC, 79 F.3d 362, 367 (3d Cir. 1996)). So that is the first principle: every word should be given meaning. But what happens when the words used in statutes are undefined or ill-defined? At that point, courts, commentators, and advocates look to the legislative history to give meaning to the words of a statute. *See, e.g.*, Liparota v. United States, 471 U.S. 419, 422–26 (1985) (assessing the plain language of the statute and then assessing congressional intent). And that is the second principle: legislators' discourse provides elucidation for statutory language. In the context of defining the meaning and boundaries of color discrimination and its related subcategories in civil rights legislation, those principles have been essentially unrealized.

the legislature, and starting from a narrow understanding of racial categorization, courts have made incongruous and sometimes baffling decisions with respect to defining and delineating color discrimination claims. Second, courts are uncomfortable categorizing and labeling people based on skin color, which runs along a spectrum and cannot be easily categorized,[54] an issue that will be more fully addressed later in this part. Third, the majority of litigants who plead color discrimination plead it as part and parcel of a race discrimination claim. It is unsurprising that courts fail to separate claims based on two protected classes—race and color—when litigants themselves generally conflate the concepts. Although overlapping issues that inform each other, this part addresses each in turn.

A. Barriers to Moving "Color" Beyond "Colored"

Courts, like the legislators who drafted the Civil Rights Act of 1964, have been stymied by a binary understanding of race. That binary assessment has influenced the judiciary's willingness to grapple with differentiating color discrimination from race discrimination, determining how to assess color discrimination claims, and deciding who is responsible for drawing the relevant boundaries.[55] Because the civil rights laws rose from the vestiges of slavery and Jim Crow, it is challenging even now to move beyond that binary analysis.

When a court begins its analysis of race and color discrimination with an impulse to consider race and racial categorization under a Black/White binary analysis, it is difficult to see color discrimination separate and apart from race discrimination.[56] Through a Black/White

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54. There is certainly a strong argument, however, that race is no more easily categorized than color. In the simplest analysis, there is almost no such thing as a pure race. Perhaps more complicated, but no less true, understanding that the concept of race is a social construct, it is difficult to suggest that race can be definitively ascribed or adopted. *See, e.g.*, Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CALIF. L. REV. 1231, 1283–85 (1994) ("The administration of our extensive corpus of anti-discrimination law and preferential policy requires that we make 'hard' variables of the very 'soft' concepts of race and ethnicity.").

55. Trina Jones identifies a bias in American civil rights jurisprudence "towards thinking of discrimination in Black and White and cross-racial (as opposed to intra-racial) terms." Trina Jones, *Intra-Group Preferencing: Proving Skin Color and Identity Performance Discrimination*, 34 N.Y.U. REV. L. & SOC. CHANGE 657, 677 (2010). Jones has also challenged courts and scholars to separate color discrimination from race discrimination. Jones, *supra* note 16, at 1532–34. While Jones acknowledges that race and color are overlapping phenomena, and that both concepts are social constructions, she makes a concrete distinction between race discrimination and color discrimination. She explains her views on the overlap in the concepts: "Skin color is one device for assigning people to a racial category. Race is the social meaning attributed to that category. It is a set of beliefs or assumptions about individuals falling within a particular racial group." *Id.* at 1497. Jones goes on to distinguish colorism from racism: "With colorism, skin color does not serve as an indicator of race. Rather, it is the social meaning afforded skin color itself that results in differential treatment." *Id.*

56. That color discrimination is separate and distinct from race discrimination, however, is not a conclusion accepted universally. Angela Harris argues that "race and color are not two different [concepts]." Angela P. Harris, Essay, *From Color Line to Color Chart?: Racism and Colorism in the New Century*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 52, 61 (2008). Drawing on what she has defined as the "performativity school" of critical race theory, Harris identifies color as a trigger for

lens, it is also difficult to envision the circumstances under which a member of one racial category may discriminate on the basis of color—not race—against a member of a different racial category. It is unsurprising, therefore, that courts have primarily given credence to color discrimination claims when they are pleaded in circumstances of intragroup discrimination—discrimination against one who is a member of the perpetrator's same racial group.

In *Walker v. Secretary of the Treasury, IRS*,[57] for example, the plaintiff alleged color discrimination under Title VII, specifically arguing that her supervisor, a dark-skinned Black woman, was prejudiced against light-skinned Blacks, a class into which plaintiff fell.[58] In *Walker*, the court rejected defendant's suggestion that the terms race and color in Title VII are synonymous, pointing to "case law [that] repeatedly and distinctly refer to race and color."[59] The court then drew the obvious conclusion:

> This court is left with no choice but to conclude, when Congress and the Supreme Court refer to race and color in the same phrase, that "race" is to mean "race", [sic] and "color" is to mean "color". [sic] To hold otherwise would mean that Congress and the Supreme Court have either mistakenly or purposefully overlooked an obvious redundancy.[60]

The *Walker* court also explicitly recognized the physiognomic differences between members of the same race, specifically Blacks:

> It would take an ethnocentric and naive world view to suggest that we can divide caucasians into many sub-groups but some how [sic] all blacks are part of the same sub-group. There are sharp and distinctive contrasts amongst native black African peoples (sub-Saharan) both in color and in physical characteristics.[61]

Similarly, in *Jones v. Jefferson Parish*,[62] the court declined to dismiss the plaintiff's color discrimination claims under Title VII, noting that "[l]ight-skinned blacks sometimes discriminate against dark-skinned

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racial discrimination. *Id.* at 61–62. She ultimately argues that "[t]he shift from categorical racism to colorism, if that is what the United States is currently experiencing, signals a more complex racial environment, but not a necessarily less racist one." *Id.* at 62. Taunya Lovell Banks similarly identifies color discrimination as a form of race-based discrimination, which she labels "[r]ace-related discrimination." Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1743 (2000) [hereinafter Banks, *Colorism*]; Taunya Lovell Banks, *Multilayered Racism: Courts' Continued Resistance to Colorism Claims*, *in* SHADES OF DIFFERENCE: WHY SKIN COLOR MATTERS 213, 216 (Evelyn Nakano Glenn ed., 2009) [hereinafter Banks, *Multilayered*].

57. 713 F. Supp. 403 (N.D. Ga. 1989).
58. *Id.* at 404.
59. *Id.* at 406.
60. *Id.*; *see also* Barrella v. Village of Freeport, 43 F. Supp. 3d 136, 179 (E.D.N.Y. 2014).
61. *Walker*, 713 F. Supp. at 407–08.
62. No. 12-2191, 2013 WL 871539 (E.D. La. Mar. 8, 2013).

blacks, and vice versa, and either form of discrimination is literally color discrimination."[63]

Similarly, the most likely place to find a color discrimination complaint addressed by courts arises in cases involving a plaintiff of Puerto Rican descent.[64] In 1980, for example, the court in *Felix v. Marquez*[65] denied the defendant employer's motion for summary judgment, recognizing that color discrimination was a legitimate claim under Title VII.[66] The court noted, "Color may be a rare claim, because color is usually mixed with or subordinated to claims of race discrimination, but considering the mixture of races and ancestral national origins in Puerto Rico, color may be the most practical claim to present."[67]

The district court in *Rodriguez v. Gattuso*,[68] a case arising under the Fair Housing Act, echoed *Felix*.[69] After a bench trial, the court found that the defendant landlords had been willing to rent an apartment to a light-skinned Latina woman until they saw her dark-skinned Latino husband. The court discussed color discrimination specifically:

> Most often "race" and "color" discrimination are viewed as synonymous, just as the term "white citizens" is most often contrasted with "black citizens"—a racial distinction. But the very inclusion of "color" as a separate term in addition to "race" in Section 3604(b) implies strongly that someone who is of the same race ("race" as used in the

63. *Id.* at *5–7 (quoting Williams v. Wendler, 530 F.3d 584, 587 (7th Cir. 2008)); *see also* Nettle v. Cent. Okla. Am. Indian Health Council, Inc., 334 F. App'x 914, 926 (10th Cir. 2009); Rodriguez v. Gattuso, 795 F. Supp. 860, 865 (N.D. Ill. 1992); Rougeau v. La. Dep't of Soc. Servs., No. 3:04-cv-00432-JJB-DLD, 2008 WL 818961, at *8 (M.D. La. Mar. 25, 2008).

64. Banks, *Multilayered*, *supra* note 56, at 217–18.

65. No. 78-2314, 1980 WL 242 (D.D.C. Sept. 11, 1980).

66. *Id.* at *1.

67. *Id.*; *see also* Falero Santiago v. Stryker Corp., 10 F. Supp. 2d 93, 96 (D.P.R. 1998). In *Falero Santiago*, the plaintiff filed a Title VII action against his former employer for discrimination on the basis of national origin and color. *Id.* at 94. Pursuant to the *McDonnell Douglas* burden-shifting analysis, the defendant argued that the plaintiff failed to meet the "replaced" prong of the prima facie case because his duties were reassigned to another Puerto Rican. *Id.* at 96. The court pointed to the color discrimination claim, noting that "[t]he fact that Cabrera's skin is of a different color places him outside Falero's protected class, and is enough to satisfy the fourth element of plaintiff's prima facie case." *Id.* Citing to the Supreme Court's reasoning in *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987), the *Falero Santiago* court noted that plaintiff's case raised "allegations of intertwined national origin and color discrimination under Title VII, and given that Title VII explicitly affords protection against *both* national origin *and* color discrimination, the same reasoning [as the Court used in *Shaare Tefila*] would apply here." *Falero Santiago*, 10 F. Supp. 2d at 97. Although the court found that the plaintiff was ultimately unable to establish that the defendant's proffered reason for his dismissal was pretextual, *Falero Santiago* stands as one of the few cases that recognize both that color discrimination is actionable as an individual claim under Title VII and also that a color discrimination claim can stand alongside, without being subordinated to, a claim of discrimination based on another protected class (national origin). *See id.* at 98–99. The same analysis could easily be applied to "double discrimination" based both on race and color. The key issue to acknowledge is that color is not subordinated to race or national origin, but that a victim of discrimination on the basis of race and color faced adverse employment (or housing) actions both because of his color and because of his race. That is a distinctly different analysis from one in which courts treat race and color claims as one and the same.

68. 795 F. Supp. 860 (N.D. Ill. 1992).

69. *Id.* at 865.

ethnic sense, not the broader sense announced in *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 609-13 (1987) as the 19th century understanding of the term) but who is treated differently because of his dark skin has been discriminated against because of his *color*—something expressly forbidden by Section 3604(b).[70]

Because of the impulse to think about race as a Black/White binary, the *Rodriguez* analysis has not translated to a broader array of color discrimination cases. In fact, in light of the current jurisprudence, there is a danger that recognition of color discrimination claims will adhere only to claims of intraracial discrimination or other circumstances in which traditional racial boundaries do not appear to apply.[71] In *Rougeau v. Louisiana Department of Social Services*,[72] for example, the plaintiff, a female of biracial heritage, alleged discrimination and retaliation on the bases of race, color, and gender.[73] While the court specifically recognized that "[t]here is no doubt that plaintiff, who is of bi-racial decent [sic], is a member of a protected class," the court did not specify under which protected class it was analyzing Rougeau's claims.[74] The majority of the opinion discusses "racially charged" questioning, "racial harassment," and "racial discrimination," suggesting that the court viewed Rougeau's color claim as subsumed in her race claim.[75] The court only separated out the color claim in one specific instance. When discussing Rougeau's disparate treatment allegations, the court discussed allegations against three of the plaintiff's supervisors, two Caucasian and one African American.[76] The court assessed the former two under a race discrimination claim and noted, with respect to the African American supervisor, that "the likely basis for plaintiff's discrimination claim against Ms. Booker is not racial discrimination, but rather color discrimination, which is recognized, albeit rarely, under Title VII."[77]

The *Rougeau* court's approach may be a symptom of its urge to view racial categories narrowly drawn as White versus Black. Without a

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70. *Id.* (parallel citations omitted).

71. That is not to say that intraracial discrimination cases are easy to win. Trina Jones identifies the challenges of proving intragroup discrimination, in part because the claims "do not fit the usual analytical framework for discrimination cases." Jones, *supra* note 55, at 680. She defines types of intragroup discrimination claims, identifying particular barriers to those claims and articulating practical tactics plaintiffs can take to succeed in such claims. *Id.* at 677–80. Jones identifies specific challenges for plaintiffs alleging intraracial, intragroup discrimination, which she defines as vertical intragroup discrimination. *Id.* at 681–88. *Rougeau v. Louisiana Department of Social Services*, is an example of intraracial, intragroup discrimination—a Black supervisor discriminating against a lighter-skinned Black employee. Rougeau v. La. Dep't of Soc. Servs., No. 3:04-cv-00432-JJB-DLD, 2008 WL 818961, at *8 (M.D. La. Mar. 25, 2008). Jones argues that skepticism, indifference, and acceptance of such actions create barriers to successful vertical intragroup discrimination claims. Jones, *supra* note 55, at 687–88.

72. No. 3:04-cv-00432-JJB-DLD, 2008 WL 818961 (M.D. La. Mar. 25, 2008).

73. *See id.* at *1–2.

74. *Id.* at *6.

75. *Id.* at *6–8.

76. *See id.* at *7–8.

77. *Id.* at *8.

broader understanding of racial categories and racial identity, however, intraracial discrimination is difficult to assess under a traditional race discrimination analysis. Therefore, courts turn to the undefined, ambiguous concept of color discrimination to explain intraracial discrimination. The statute, however, does not delineate race discrimination and color discrimination in those narrow terms. The protection against race discrimination exists regardless of the perpetrator of the discrimination.[78] And the same is true of the protected class identified as color.

B. Color on a Spectrum

Courts and commentators have identified several impediments to successful claims involving color discrimination.[79] Perhaps the barriers are a symptom of the legislators' and courts' unwillingness to define and bound the protections against color discrimination, and perhaps they are the cause of that unwillingness. Whatever the reason, a major hurdle is a reluctance to label groups based on skin color, seemingly because skin color runs along a spectrum and cannot easily be categorized. Although all of the challenges and possible solutions to litigating a successful color discrimination case are beyond the scope of this Article, the discomfort with labeling and categorizing groups based on skin color is central to this Article's assessment of how color is defined, the subcategories that arise within the protected class, and who gets to define those categories.

The court in *Sere v. Board of Trustees of the University of Illinois*[80] explicitly identified the discomfort with categorizing individuals based on skin color. In dismissing plaintiff's intraracial discrimination claim under Section 1981, the court stated that it "refuse[d] to create a cause of action that would place it in the unsavory business of measuring skin color and determining whether the skin pigmentation of the parties is sufficiently different to form the basis of a lawsuit."[81] Although *Al-Khazraji v. Saint Francis College*[82] overruled *Sere*'s reasoning with respect to intraracial discrimination,[83] it did nothing to change the underlying sentiment with respect to the difficulties in measuring skin color.

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78. The *Rougeau* analysis also poses a problem in that it assumes that intragroup race discrimination may not be actionable. *See id.*

79. The problems of how to successfully litigate a color discrimination claim are beyond the scope of this Article. For a discussion about specific challenges litigants might face and practical advice for attorneys representing plaintiffs in intragroup discrimination cases, see Jones, *supra* note 55, at 662–63. For a discussion of the tests that might be employed in a color discrimination case and a proposed "race-plus" solution for color discrimination claims, see Enrique Schaerer, *Intragroup Discrimination in the Workplace: The Case for "Race Plus,"* 45 HARV. C.R.-C.L. L. REV. 57, 77–91 (2010).

80. 628 F. Supp. 1543 (N.D. Ill. 1986), *abrogation recognized by* Jordan v. Whelan Sec. of Ill., Inc., 30 F. Supp. 3d 746 (2014).

81. *Id.* at 1546.

82. 784 F.2d 505 (3rd Cir. 1986).

83. *Id.* at 517.

In fact, the court in *Moore v. Dolgencorp, Inc.*,[84] identified a similar discomfort. In *Moore*, a discrimination action arising under Title VII, the plaintiff, a dark-skinned African American woman, complained of race discrimination when she was replaced as a manager of a retail store by a biracial man.[85] The court, in assessing her race discrimination claim under the *McDonnell Douglas* framework, found that the plaintiff failed to establish the fourth prong of the analysis because the defendant replaced her with an individual who was a member of the same protected class (African American).[86] The plaintiff in *Moore* argued that her replacement was not a member of the same protected class because he was a "mixed race" male. She submitted affidavits in support of her claim, averring that she is "an African-American woman" whose "skin color is dark, even within the range of other African-Americans, and especially compared to persons of non-African-American heritage, including persons of mixed race."[87] She further averred that she had seen the "mixed race individual who replaced [her]" and "[w]ithout question, his skin color is significantly lighter than [plaintiff's]."[88] The court in *Moore* refused to permit the plaintiff to convert her claims into color discrimination or sex discrimination claims and viewed the quoted averments as "a back-door attempt to amend the complaint to add claims of sex and color discrimination."[89] The court ultimately concluded,

> To recognize a legal hierarchy within the protected class of race based upon differences in the hues of skin color would create or deny legal remedies based upon sub-categories of this class that Congress has not chosen to recognize. It could also open the door to nearly insurmountable issues of proof in court regarding the actual racial heritage of a plaintiff and/or a person replacing a plaintiff, not to mention difficulties for everyone in the daily application of the Civil Rights Act.[90]

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84. No. 1:05-cv-107, 2006 WL 2701058 (W.D. Mich. Sept. 19, 2006).

85. *Id.* at *2.

86. *Id.* at *4. Under the test established in *McDonnell Douglas*, a plaintiff establishes his prima facie Title VII case by showing "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Courts have found that the final prong may be satisfied by a showing that plaintiff "was replaced by a person not within the protected class." Falero Santiago v. Stryker Corp., 10 F. Supp. 2d 93, 95 (D.P.R. 1998) (citing Mulero-Rodriguez v. Ponte, Inc., 98 F.3d 670, 673 (1st Cir. 1996)). Once the plaintiff establishes her prima facie case, the burden shifts to the defendant to establish that there was a valid and non-discriminatory reason for the adverse employment action. *McDonnell Douglas Corp.*, 411 U.S. at 802. If the defendant is successful, the burden shifts yet again back to the plaintiff to show that the stated reason is "mere pretext" for discrimination. *Id.* at 798.

87. *Moore*, 2006 WL 2701058, at *4.

88. *Id.* at *2.

89. *Id.* at *3.

90. *Id.* at *4; *cf.* Franceschi v. Hyatt Corp., 782 F. Supp. 712, 723–24 (D.P.R. 1992) (acknowledging the difficulty of "distinguishing among a myriad of color shades, physiognomic and

The sentiments expressed in *Sere* and *Moore* may also have been at the heart of the Northern District of Illinois court's decision in *Oranika v. City of Chicago*.[91] In *Oranika*, the court noted that the plaintiff's allegation of national origin discrimination on the basis of being Nigerian was reasonably related to a claim of race discrimination and color discrimination because "nothing in the Complaint suggests that the people of Nigeria are not of meaningfully uniform color and race."[92] In fact, the court went on to note that "this at least may be a case where national origin, race, and color are all effectively the same thing."[93] Taunya Lovell Banks raises the question as to whether that same analysis would have been applied if the plaintiff was from a majority White country. Citing to a string of Title VII case law to illustrate courts' extreme reluctance to acknowledge color discrimination claims when the plaintiff is Black, she argues, "The colorism cases demonstrate the extent to which courts recognize, explicitly or implicitly, the fluidity of race when determining who is white and who is nonwhite, but not black."[94] The courts' reluctance to differentiate on the basis of color, especially within the Black race, circles back around to the central theme of this Article: Who sets the boundaries of the protected classes and the distinctions and differences that define the boundaries of their subcategories?

C. *Conflating Race and Color Discrimination Claims*

To date, the majority of courts treat allegations of color discrimination as synonymous with allegations of race discrimination. For example, in affirming the district court's grant of summary judgment to defendants, the Third Circuit in *Hartman v. Greenwich Walk Homeowners' Ass'n*[95] acknowledged that the plaintiff alleged discrimination on the basis of race or color. The court failed, however, to specifically address the two protected classes as separate claims of discrimination.[96] Courts around the country have proceeded in a similar manner, subsuming color discrimination into more widely pleaded claims such as race discrimination and national origin discrimination.[97] "The result, [as noted by at least

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cultural characteristics" and dealing with that discomfort by finding that *Saint Francis*, for purposes of Section 1981, "recogni[zed] that physiognomic characteristics are no longer considered the indispensable magic recipient for a cause of action under the statute"); Walker v. Sec'y of Treasury, IRS, 713 F. Supp. 403, 408 (N.D. Ga. 1989) (acknowledging explicitly the difficulty of categorizing individuals based on skin pigmentation, but ultimately concluding that the color discrimination claim should be put to the jury).

91. No. 1:04-cv-08113, 2005 WL 2663562 (N.D. Ill. Oct. 17, 2005).

92. *Id.* at *4.

93. *Id.* at *4 n.3.

94. Banks, *Colorism*, *supra* note 56, at 1738; *see also* Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1163 (1997).

95. 71 F. App'x 135 (3rd Cir. 2003).

96. *Id.* at 136.

97. *See, e.g.*, Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 579–81 (1st Cir. 1999), *abrogated by* Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003); Porter v. Ill. Dep't of Children &

one commentator,] is that 'color' is read out of the statute."[98] It is tempting to blame that on the systemic issues identified above. It is also, without doubt, a response to the allegations set forth in the complaints and the resulting causes of action.[99]

It is not unusual to find civil rights complaints that plead "race or color discrimination" as a single claim of discrimination.[100] The complaint (and amended complaint) in *Fountain View Apartments* did just that. With the exception of those paragraphs alleging discrimination on the basis of familial status, in each and every paragraph alleging discrimination, the complaint alleged discrimination "on the basis of race or color."[101] The complaint in *Sturm v. Davyln Investments, Inc.*[102] provides yet another example. In *Sturm*, the complaint alleges violations of the Fair Housing Act[103] and other state and federal civil rights statutes.[104] In addition to asserting discrimination on the basis of disability, the *Sturm* complaint alleges race or color discrimination as a single cause of action.[105] The complaint specifically alleges: "Defendants . . . have engaged in discrimination and retaliation against Plaintiffs because of Plaintiffs' disability or on account of Plaintiffs' race and color (Black/African Americans) . . . ."[106] Like the complaint in *Fountain View Apartments*, the *Sturm* complaint separates the allegations of "race and color" discrimination from the allegations of discrimination on the basis of another protected class (in *Sturm*, disability).[107] In other words, the complaints in

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Family Servs., No. 98-1152, 1998 WL 847099, at *1–4 (7th Cir. Nov. 23, 1998); Love v. United Air lines, Inc., No. 98-C-6100, 1999 U.S. Dist. LEXIS 4069, at *7–8 (N.D. Ill. Mar. 25, 1999).

98. Schaerer, *supra* note 79, at 81.

99. *See, e.g.*, Barrella v. Vill. of Freeport, 43 F. Supp. 3d 136, 144 (E.D.N.Y. 2014) (noting the plaintiff's allegations related to "race/color" and "race and/or color" and recognizing that both parties and courts regularly conflate the concepts of race discrimination and color discrimination (quoting Complaint at paras. 90–95, *Barrella*, 43 F. Supp. 3d 136 (E.D.N.Y. 2014))).

100. *See, e.g.*, Jones, *supra* note 16, at 1533 n. 195, 1537–38 & nn.210–13; Trina Jones, *The Case for Legal Recognition of Colorism Claims*, *in* SHADES OF DIFFERENCE: WHY SKIN COLOR MATTERS, *supra* note 56, at 223, 229–32.

101. Complaint and Demand for Jury Trial, *supra* note 4, at 5–6.

102. No. 2:12-CV-07305, 2013 WL 8604662 (C.D. Cal. Sept. 30, 2013).

103. Although the Fair Housing Act was passed in 1968, four years after the Civil Rights Act of 1964, the Fair Housing Act (or Title VIII) has generally been considered an extension of Title VII in that Title VII's jurisprudence and legislative history are generally considered to inform the meaning and import of Title VIII. *See* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934 (2d Cir. 1988), *aff'd in part sub nom.* Town of Huntington v. Huntington Branch, NAACP, 488 U.S. 15 (1988); Smith v. Town of Clarkton, 682 F.2d 1055, 1065 (4th Cir. 1982); Comment, *Applying the* Title VII *Prima Facie Case to* Title VIII *Litigation*, 11 HARV. C.R.-C.L. L. REV. 128, 158–60 (1976). Like the Civil Rights Act of 1964, one will find no definition of "color" or "race" in the Fair Housing Act. *See* Fair Housing Act § 802, 42 U.S.C. § 3602 (2012).

104. Complaint for Damages as a Result of Discriminatory Housing Practices Directed at Plaintiffs in Violation of Federal and State Fair Housing Laws at paras. 50–57, *Sturm*, No. CV 12-07305 (C.D. Cal. Aug. 24, 2012).

105. *Id.* at paras. 50–57.

106. *Id.* at para. 13.

107. *See id.* at para. 14 (asserting that the defendants discriminated in the terms, conditions, or privileges of rental of a dwelling "based on race and color, and disability" and that the defendants "evict[ed] tenants and those associated with the tenants because of the tenants' disability, or race and color").

Fountain View Apartments and *Sturm* exemplify the common practice of alleging "race or color discrimination" using a structure and citing factual allegations that fail to distinguish or give independent meaning to the color discrimination claim.[108]

Litigants have pleaded race or color discrimination as a single cause of action even in cases where the evidence is solely differential treatment based on a Black/White binary, such as where match-pair testing of African Americans and Whites provides the basis for the allegations of discrimination.[109] Litigants have even pleaded "race or color discrimination" when relying on census statistics and Home Mortgage Disclosure Act (HMDA) data, where there is no possibility of differentiating individuals of varying skin color within a category of race or national origin, as evidence of discrimination.[110] Such an approach only serves to reinforce the courts' dual inclinations to view race and racial categories as a Black/White binary and to conflate race and color protections under the civil rights statutes.

When one looks at the complicated legislative history set forth in Part I of this Article, the tension between the language used in the statute ("race, color, . . . or national origin") and the words used to ascribe meaning to the statutory language is stark. The tension between color and colored, which has played out as a convergence of the color and race constructs, is a legacy of the debates preceding the Civil Rights Act of 1964. Courts have been disinclined to fill in definition to the color protection or more clearly differentiate it from the race protection. So it is left to another actor—plaintiff, defendant, attorney or other—to fill in the

108. That the strategy of pleading "race or color discrimination" has been widely used is unsurprising. At first glance, employing such a strategy provides litigants the most flexibility. Flexibility in pleading has always been important in discrimination cases, especially where the defendant's suspected internal considerations or biases may form the basis of plaintiff's intentional discrimination claim. In other words, because a plaintiff does not know conclusively if her skin color or her race was the basis for unfair treatment, it is safest for her to plead "race or color discrimination" to cover her bases. And since courts generally treat the terms the same, there has been little risk to the particular client in maintaining the most flexibility possible. The broader risk, as set forth herein, is the persistent conflation of the race and color protected classes and the resulting limited jurisprudence on color discrimination that constrains civil rights protections to traditional notions of race discrimination.

109. *See, e.g.*, Complaint at paras. 19–21, 53, Fair Hous. Justice Ctr., Inc. v. Revlyn Apartments, LLC, No. CV12-1336 (E.D.N.Y. Mar. 19, 2012) (alleging "discrimination . . . because of race or color" as evidenced through allegations of differential treatment of African Americans and Whites at the subject property). The most common kind of match-pair testing generally involves a series of "secret shopper" testers who pose as prospective tenants and gather evidence about differential treatment of prospective tenants that may be attributed to the tester's membership in a particular subclass of a protected class.

110. *See, e.g.*, Complaint and Demand for Jury Trial at paras. 46, 51–53, 61, 200, Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, No. 1:08-cv-02584-NLH-JS (D.N.J. May 27, 2008) (citing to 2000 Census statistics regarding the percentage of Whites, African Americans, and Hispanics from county and block levels in Mount Holly Gardens to support allegations of "race, color and national origin" discrimination); Complaint at paras. 125–26, 303, Smith v. Bernard Mortgage Corp., No. 1:10-cv-05440 (N.D. Ill. Aug. 27, 2010) (citing to HMDA data, among other sources, to allege individual and class violations of the Equal Credit Opportunity Act for discrimination on the bases of race, color, and sex).

gap left by the legislature and the courts. In the absence of pressure from one of those actors, the jurisprudence on color discrimination will languish and will fail to develop to more effectively combat discrimination in our nation.

III. DEFINING AND DELINEATING "PEOPLE OF COLOR"

In the absence of movement from the legislature or courts to define color discrimination, distinguish it from race discrimination, or identify the bounds of its subcategories, advocates and litigators have stepped in to fill the breach. One significant move is the recent trend to import the people of color construct into civil rights suits.[111] In the last decade, there has been a surge of civil rights complaints that explicitly reference people of color. The final section of this part looks at that trend. Before getting there, however, this part sets the stage by tracing the past and current use of racial labels used for the Black community. It also addresses the recent adoption of the term people of color to include Blacks and other non-White minorities. By analyzing the different racial labels applied to the same community, this part establishes two important and related themes. First, that labels are mutable and the meaning ascribed to them is variable based on time, place, and speaker. Second, that labels are meaningful to those being labeled and those doing the labeling. Both because of, and in spite of, those related themes, litigants must carefully consider how they identify and label their identity for the specific purpose of making out a legal claim under the current anti-discrimination statutes.

A. A Brief History of "People of Color"

Although the term "people of color" is used regularly in social and cultural discourse today, it is not a new term of identification. In *The Color of Words: An Encyclopaedic Dictionary of Ethnic Bias in the United States*, cultural anthropologist Philip Herbst begins his definition of "people of color, People of Color" with an explicit acknowledgement that the terms have been "long in English usage for any nonwhite category."[112]

In fact, a search of early statutory language confirms Herbst's assessment and reveals that the term was originally employed as a divisive and exclusionary device for oppression of those deemed to be "of color."

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111. This analysis is particularly concerned with the dangers inherent in defining people of color as a bounded subclass of color. For the reasons set forth in Section II.C, *supra*, however, discrimination allegations on behalf of or involving people of color are not always explicitly limited to claims of color discrimination. Rather, the claims arise under anti-discrimination statutes alleging color discrimination, race discrimination or "race and/or color discrimination." *See infra* Section III.C.

112. PHILIP H. HERBST, THE COLOR OF WORDS: AN ENCYCLOPAEDIC DICTIONARY OF ETHNIC BIAS IN THE UNITED STATES 178 (1997). Herbst seeks to provide an "extensive reference collection devoted solely to the diverse and often disputed lexicon of American ethnic life and identity." *Id.* at ix.

For example, in 1803, Congress enacted a federal statute titled "An Act to Prevent the Importation of Certain Persons into Certain States, Where, by the Laws Thereof, Their Admission is Prohibited"[113]:

> [N]o master or captain of any ship or vessel, or any other person, shall import or bring, or cause to be imported or brought, any negro, mulatto, or other person of colour, not being a native, a citizen, or registered seaman of the United States, or seamen natives of countries beyond the Cape of Good Hope, into any port or place of the United States, which port or place shall be situated in any state which by law has prohibited or shall prohibit the admission or importation of such negro, mulatto, or other person of colour . . . .[114]

An 1830 Report of the Proceedings of the Pennsylvania Colonization Society notes "[o]f all the descriptions of our population, and of either portion of the African race, the free people of color are, by far, as a class, the most corrupt, depraved and abandoned."[115] The Pennsylvania Colonization Society, an auxiliary of the American Colonization Society, aimed to "transport to the Western shores of Africa, from the United States, all such free persons of color as choose voluntarily to go."[116] In 1839, the District of Columbia Circuit Court upheld "'[a]n act concerning free negroes, mulattoes, and slaves,' passed on [May 31], 1827," which prohibited any "free black or mulatto person" from freely moving through Washington after 10:00 pm, excepting any "person of color passing peaceably through the streets to or from a meeting-house or place of worship; [or] any person of color sent on an errand by the owner or employer of such person."[117] And, in 1927, a Georgia anti-miscegenation statute punished "[a]ny charge or intimation against a white female of having sexual intercourse with a person of color"[118] Another Georgia statute provided definition: "All negroes, mulattoes, and their descendants, having any ascertainable trace of . . . either Negro or African, West Indian, or Asiatic Indian blood in his or her veins, shall be known in this State as persons of color."[119]

It is telling that in *Dred Scott v. Sandford*,[120] as support for its finding that the Black plaintiff held no rights or privileges afforded by the United States Constitution, the Supreme Court identified a series of local

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113. AN ACT TO PREVENT THE IMPORTATION OF CERTAIN PERSONS INTO CERTAIN STATES, WHERE, BY THE LAWS THEREOF, THEIR ADMISSION IS PROHIBITED (Feb. 28, 1803), http://avalon.law.yale.edu/19th_century/sl003.asp (last visited Oct. 9, 2014).

114. *Id.*

115. PENNSYLVANIA COLONIZATION SOCIETY, REPORT OF THE BOARD OF MANAGERS OF THE PENNSYLVANIA COLONIZATION SOCIETY 35 (1830).

116. *Id.* at 36.

117. Nichols v. Burch, 18 F. Cas. 187 (C.C. D.C. 1839) (quoting bylaw of the corporation of Washington of 31st May, 1827, § 6).

118. *Legal Map: Accessible Version*, LOVINGDAY (quoting GA. CODE ANN. § 105–707 (1927)), http://www.lovingday.org/legal-map-accessible (last visited Feb. 20, 2015).

119. *Id.* (quoting GA. CODE ANN. § 79–103).

120. 60 U.S. 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

and federal laws that held the "African race" as a class separate and distinct from "people" and "citizen[s]."[121] For example, the Court pointed to an 1813 Act of Congress that separately identified citizens of the United States and persons of color:

> That from and after the termination of the war in which the United States are now engaged with Great Britain, it shall not be lawful to employ, on board of any public or private vessels of the United States, any person or persons except citizens of the United States, *or* persons of color, natives of the United States.[122]

The Court found this example "decisive" of the government's differentiation between citizens and persons of color, finding that "[p]ersons of color, in the judgment of Congress, were not included in the word citizens, and they are described as another and different class of persons."[123] The Court also relied on Attorney Generals William Wirt and Caleb Cushing's assessment that free persons of color were not a category of people contained within the meaning of citizens of the United States.[124]

It appears that, in the late 1800s, the term people of color lost its traction in official and popular discourse. That is not to say, however, that labels used to categorize Blacks and other non-White minorities were not utilized. In fact, the people of color classification is one in a long line of labels that have been used to define or include Blacks in America.[125] In the mid- to late- nineteenth century, the term colored dominated the landscape.[126] As seen in the legislative history cited earlier, the colored label competed with the term Negro as a reference to Blacks, depending on the speaker and intended meaning. The term Negro gained acceptance in the late nineteenth century, shepherded into popular

121. *Id.* at 393, 410.

122. *Id.* at 420 (quoting Act of 1813, 2 Stat. 809).

123. *Id.* at 420–21.

124. *Id.* at 421.

125. The language of categorizing Blacks in America is one of the most striking examples of the changing language of group categorization. It is not, however, the only example. In fact, the concept of shifting terms of categorization does not belong only to the spectrum of racial categorization. Those individuals who are members of or are perceived to be members of the LGBTI community, for example, have witnessed dramatic shifts in categorization, both external and internal. What's more, the changing use of the term "queer" from an external classification with offensive undertones to the language of self-categorization stands as a fascinating example of the way that language and the language of categorization has powerful meaning beyond the simple act of grouping. *See* Angela Clements, *Sexual Orientation, Gender Nonconformity, and Trait-Based Discrimination: Cautionary Tales from Title VII & an Argument for Inclusion*, 24 BERKELEY J. GENDER L. & JUST. 166, 200 (2009); Nancy J. Knauer, *Gender Matters: Making the Case for Trans Inclusion*, 6 PIERCE L. REV. 1, 37 (2007).

126. Tom W. Smith, *Changing Racial Labels: From "Colored" to "Negro" to "Black" to "African American,"* 56 PUB. OPINION Q. 496, 497 (1992). In 1992, at the time the article was published, Smith was Director of the General Social Survey, a flagship survey of the National Opinion Research Center. *Id.* at 496. His article traced the changing labels ascribed to and adopted by Blacks in America. *See id.* at 496–97. For a slightly different take, see Lerone Bennett Jr., *What's In a Name? Negro vs. Afro-American vs. Black*, 23 EBONY 46 (1967).

parlance by Booker T. Washington and W.E.B. DuBois.[127] Later, as the 1950s and 1960s marshaled in the civil rights movement, a desire to break from labels and identities placed on the Black community by Whites caused a shift in racial terminology from Negro to Black.[128] Tom W. Smith, former Director of the General Social Survey, explained that the Black label was applied to those deemed "progressive, forward-looking, and/or radical," but became largely accepted and lost its radical connotation by the early 1970s.[129] The term Black remained the self-identification label of choice, and was largely accepted by Whites as well, until 1988, when "Romana H. Edelin, president of the National Urban Coalition, proposed [a switch to the label] 'African-American.'"[130] Heralded by Jesse Jackson, the term "African-American" sought to "give Blacks a cultural identification with their heritage and ancestral homeland."[131] A decade later, in 2005, a study using data drawn from the National Survey of Black Workers from 1998–2000 showed that Blacks nearly equally preferred the labels "black" and "African-American."[132] It also established that "the popularity that 'African-American' achieved during the early 1990s did not grow during the ensuing decade and that, if anything, 'black' has enjoyed a modest resurgence."[133]

The term people of color has also enjoyed a comeback. Once disparaging to its members, the people of color label has been reappropriated by many who self-identify as members. In 1963, the Reverend Dr. Martin Luther King, Jr. resurrected the phrase when he referred to "citizens of color" in his famous "I Have a Dream" speech.[134] Dr. King asserted: "It is obvious today that America has defaulted on this promissory note, insofar as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check, a check which has come back marked 'insufficient funds.'"[135] Dr. King's use of the term "citizens of color" adopted and coopted it as a term of self-categorization. It was not used in a derogatory sense. Intentionally or not, Dr. King's use of the term collapsed the differentiation of

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127. Smith, *supra* note 126, at 497.

128. *Id.* at 499.

129. *Id.* at 499, 502.

130. *Id.* at 503; *see also* Bannai & Enquist, *supra* note 19, at 40 n.49 (explaining that the term African American has itself undergone transformation, used with and without the hyphen to consciously connote different meanings); Morris, *supra* note 19, at 543 n.25.

131. Smith, *supra* note 126, at 507.

132. Lee Sigelman, Steven A. Tuch & Jack K. Martin, *What's In a Name? Preference for "Black" Versus "African-American" Among Americans of African Descent*, 69 PUB. OPINION Q. 429, 430, 433–34 (2005). The study showed that neither gender nor level of education changed the preference of the "black" or "African-American" label, but that age, city size, and region had an impact; younger residents of large cities outside of the South preferred "African-American" to "black." *Id.* at 434.

133. *Id.* at 434.

134. Martin Luther King, Jr., I Have a Dream, Speech at the March on Washington (Aug. 28, 1963) (transcript available at http://www.americanrhetoric.com/speeches/mlkihaveadream.htm).

135. *Id.*

citizen and people of color that formed the basis of the *Dred Scott* decision.

Interestingly, and in tension with the way society generally defines the term today, Dr. King used the term "citizens of color" term interchangeably with "the Negro people." Such an insight is fascinating when placed in historical context. As set forth above, in 1963, Congress was hotly engaged in the debate over the law that would become the Civil Rights Act of 1964. The 88th U.S. Congress House of Representatives, which served from January 3, 1963, to January 3, 1965, had 435 members.[136] Together with the Senate, there were 535 legislators, yet only a handful of Black lawmakers.[137] Therefore, the language of racial categorization used by those members of Congress is seemingly representative of labels placed on one group by another group, rather than the self-categorization language utilized by Dr. King. The racial categorization language most regularly used by those members of Congress in the legislative history of the Civil Rights Act of 1964 was colored and Negro. Such choices represent both an overlap (with the use of the term Negro) and a contrast (with the use of the term colored) to Dr. King's self-categorization language of "citizens of color" and "the Negro people."

In the wake of Dr. King's use of the term "citizens of color" as self-definitional and exclusive of non-Black citizens, the term people of color has expanded over time to become more inclusive of non-Black communities generally regarded as ethnic or racial minorities. For example, in the 2008 *Encyclopedia of Race, Ethnicity and Society*, Salvador Vidal-Ortiz defines the phrases "people of color" and "person of color" as reference to "racial and ethnic minority groups."[138] Vidal-Ortiz also explicitly acknowledges the mutability of the terms over time and location. He notes that the terms have "a strong association to phenotype, skin color, and eye/hair/other physiological aspects that often defined Blacks in the United States," but also observes that the political and coalitional power of terms permit a person or group to self-identify, not only by their country of origin or panethnic label, but also by the more inclusive term person of color.[139] He insightfully notes,

136. U.S. JOINT COMM. ON PRINTING, POCKET CONGRESSIONAL DICTIONARY: EIGHTY-EIGHTH CONGRESS 181 (1963) [hereinafter POCKET CONGRESSIONAL DICTIONARY], http://babel.hathitrust.org/cgi/pt?id=mdp.39015073070453;view=1up;seq=1; *Black-American Representatives and Senators by Congress, 1870–Present*, UNITED STATES HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, http://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Black-American-Representatives-and-Senators-by-Congress/ (last visited Nov. 20, 2015).

137. POCKET CONGRESSIONAL DICTIONARY, *supra* note 136, at 181; *Black-American Representatives and Senators by Congress, 1870–Present*, *supra* note 136.

138. Salvador Vidal-Ortiz, *People of Color*, *in* ENCYCLOPEDIA OF RACE, ETHNICITY, AND SOCIETY 1037 (Richard T. Schaefer ed., 2008).

139. *Id.* at 1037–38.

> *People of color* is, however it is viewed, a political term, but it is also a term that allows for a more complex set of identity for the individual—a relational one that is in constant flux. Immigration, travel, and racial constructs—in general, people's social world—all have an impact on how changing these identifications may be. It is perhaps because of the flexibility in identification that the term has become significant in biracial and multiracial writings (and for individuals) as a term that better helps to identify people with multiple national origins, panethnic backgrounds, or so-called racial makeup.[140]

However complicated and changing the "of color" terms have been over the last few decades, they have enjoyed growing acceptance and popularity in mainstream society. In 1988, William Safire wrote an article for the *New York Times* noting that the phrase "people of color has never been more in vogue."[141] And, although seemingly still outpaced by the term "minorities,"[142] the term people of color is now considered a primary term of racial categorization.

Legal academic scholarship has embraced the label people of color and related terms, invoking the "of color" modifier with abandon. More than 200 law review and journal articles use a related term in their title.[143] Scholarship abounds about how communities of color, women of color, faculty of color, and students of color shape, and are shaped by, every facet of law and policy. And legal scholars of color have united, formally and informally, to offer support and energy to each other in the battle against institutional, social, and political forces that have kept the legal profession and legal academia exclusive and homogeneous. In her article, *From Tokenism to Emancipatory Politics: The Conferences and Meetings of Law Professors of Color*, Linda Greene traces the history of various "People of Color . . . [c]onferences" since 1967, a movement that led to "The First National Meeting of the regional People of Color Legal Scholarship Conferences" in 1999.[144] Greene identifies the critical nature of such meetings and conferences to be "catalytic forces in the breakdown of apartheid in American legal education, essential to the survival and prosperity of minority scholars in a continuing environment of tokenism, and central in the development of distinctive legal scholarly

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140. *Id.* at 1038.

141. William Safire, *On Language: People of Color*, N. Y. TIMES, Nov. 20, 1988, at A18.

142. Kee Malesky, *The Journey from 'Colored' to 'Minorities' to 'People of Color,'* NPR (Mar. 31, 2014, 4:00 PM), http://www.npr.org/sections/codeswitch/2014/03/30/295931070/the-journey-from-colored-to-minorities-to-people-of-color.

143. WESTLAW NEXT, http://next.westlaw.com (last visited Nov. 20, 2015) (searching "People of Color").

144. Linda S. Greene, *From Tokenism to Emancipatory Politics: The Conferences and Meetings of Law Professors of Color*, 5 MICH. J. RACE & L. 161, 161, 164–65 (1999) [hereinafter Greene, *Tokenism*]; *see also* Linda S. Greene, *From Sea to Shining Sea: The Midwestern Origins of the First National Meeting of the Regional People of Color Legal Scholarship Conferences*, 20 B.C. THIRD WORLD L.J. 29, 29 (2000); Neil G. Williams, *Two Men and Twenty Years of Meetings: Norman Amaker, Derrick Bell, and the Midwestern People of Color Legal Scholarship Conference from 1990-2010*, 42 LOY. U. CHI. L.J. i., i, v (2011).

voices unique to the 'outsider' perspective of minority professors."[145] In the last several years, many legal "People of Color conferences" have occurred as minority scholars continued to unite under the banner of people of color and scholars of all races continue to discuss the intersection of law, race, business, society, and politics.[146]

The label people of color and related terminology have also infused the mainstream lexicon, as represented in local and national news. Newspaper articles from just one week in 2014 (October 5–11) are filled with references to people of color and other, similarly identified groups. The *Associated Press* identified Laurel Richie as "the first woman of color to lead a professional sports league."[147] The *Washington Post* reported that a conference entitled "Moving Social Justice" is the "first-of-its-kind conference to be held by atheists of color."[148] And *USA Today* ran a story about the *New York Times'* commitment to diversifying its staff, after a "firestorm . . . about diversity" followed from a review of the television show *How to Get Away with Murder*, which raised questions "about diversity and how people of color are covered."[149] Outreach and grassroots organizations have adopted the modifier into their names: "For People of Color, Inc." provides law school admissions consulting services to prospective law school applicants;[150] "The People of Color Networks" helps adults and children with behavioral health diagnoses;[151] "Trans People of Color Coalition" promotes the interests of transgender persons of color;[152] and the "National Organization for People of Color

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145. Greene, *Tokenism*, *supra* note 144, at 164.

146. *See About Us*, SESWPOCC, http://www.seswpocc.org/about/ (last visited Feb. 20, 2015) (detailing Southeast/Southwest People of Color Legal Scholarship Conferences each year from 2005–2013 and 2015); *Northeast People of Color (NEPOC) Legal Scholarship Conference 2008*, B.U. SCH. L., http://www.bu.edu/law/nepoc/ (last visited February 20, 2015) (recognizing Northeast People of Color Legal Scholarship Conference in 2008 at University of Buffalo Law School); *The 20th Mid-Atlantic People of Color (MAPOC) Conference*, W. VA. U. C. L., http://law.wvu.edu/mapoc2015 (last visited February 20, 2015) (describing the recent 20th Mid-Atlantic People of Color Conference at West Virginia University School of Law held in January 2015); *Third National People of Color Conference*, SETON HALL U. S. L., http://law.shu.edu/About/News_Events/thirdnationalpoc/index.cfm (last visited February 20, 2015) (discussing the Third National People of Color Conference at Seton Hall Law School in 2010).

147. *Report: WNBA Industry Leader for Diverse Hiring*, ASSOCIATED PRESS (Oct. 8, 2014, 4:45 PM), http://www.foxsports.com/wnba/story/report-wnba-industry-leader-for-diverse-hiring-100814.

148. Kimberly Winston, *Black Atheists Say Their Concerns Have Been Overlooked for Too Long*, WASH. POST (Oct. 9, 2014), http://www.washingtonpost.com/national/religion/black-atheists-say-their-concerns-have-been-overlooked-for-too-long/2014/10/09/051d9e04-4fc9-11e4-877c-335b53ffe736_story.html.

149. Arienne Thompson, *'NYT' Editor: 'I Have an Obligation to Diversify The Staff*,*'* USA TODAY (Sept. 24, 2014, 3:29 PM), http://www.usatoday.com/story/life/people/2014/09/24/nyt-editor-i-have-an-obligation-to-diversify-the-staff/16163107/ (citation omitted).

150. *See About*, FOR PEOPLE OF COLOR, INC., http://forpeopleofcolor.org/about/ (last visited Nov. 20, 2015).

151. *See About Us*, PEOPLE OF COLOR NETWORK, http://www.pocn.com/cms/en_US/about-us.html (last visited Nov. 30, 2015).

152. *See* TRANS PEOPLE OF COLOR COALITION, http://www.glaad.org/tags/trans-people-color-coalition (last visited Nov. 20, 2015).

Against Suicide" addresses the issue of suicide prevention and intervention in communities of color.[153]

The history of the term people of color, set alongside the various other labels and classifications that have been employed to describe Blacks and other non-White minorities, is marked by variability. It began as a derogatory label employed to set apart those considered non-citizens and less than human. It was replaced by a number of other labels, both set upon the member group and chosen by the members themselves, over time. Ultimately, it reemerged, adopted by the most prominent African American leader of the civil rights movement to describe the impetus behind the movement—racial inequality assessed in a Black/White binary. Over time, in an effort to capture capacity and build solidarity, it has taken on a broader meaning, encompassing a large and shifting number of individuals who identify as non-White or minority.

As the meaning of the term people of color has varied depending on time, place, and speaker, the mutability of the term itself requires pause to consider the utility and benefit of employing such a label. As noted several times herein, there is a strong argument that the inclusive nature of such categorization promotes coalition building among historically disenfranchised groups.[154] Paulette Caldwell, for example, notes the common thread of White supremacy that has dominated American history and stands as a critical element of progressive race methodology across race and ethnicity.[155] She also warns, however, of the critical import of simultaneously "uncovering . . . specific group histories" and accounting for differing stories of White supremacy in each group's unique history.[156] Such an insight touches on the significant danger in employing the term people of color as a racial or ethnic label—the danger in essentializing the individuals and subgroups contained in the people of color construct.[157] That is especially the case here, where the history of the term people of color establishes that its meaning is mutable and the inclusivity of the term shifts and changes over time and depending on the context of its usage. Further, adoption of the term people of color does little to dislodge the binary assessment of race in America. Rather, Caldwell has argued that its use has simply shifted the focus from a

153. *See* NATIONAL ORGANIZATION FOR PEOPLE OF COLOR AGAINST SUICIDE, http://www.ncsp.org/nopcas.html (last visited Feb. 17, 2015).

154. *See* Caldwell, *supra* note 8, at 55; Deborah Ramirez & Jana Rumminger, *Race, Culture, and the New Diversity in the New Millennium*, 31 CUMB. L. REV. 481, 500 (2001); Vidal-Ortiz, *supra* note 138, at 1038.

155. Caldwell, *supra* note 8, at 77–78.

156. *Id.*

157. *Id.* at 62 (recognizing that "[c]ommon condition does not lead readily to common consciousness").

Black/White binary assessment of race to a non-White/White binary assessment of race.[158]

B. The Language of Racial Categorization is Meaningful

While the adoption of the term people of color carries potential benefits to those who identify as or are identified as members of the categorization, the effect of its adoption is not absolutely positive or negative. Labels have profound effects, both internally and externally. Depending on whether the label is self-imposed or imposed by those outside of the member groups, the impact may differ significantly.

The effect of labeling groups may especially be felt when categorization and labeling occurs in formal law and legislation. SpearIt argues:

> Among the most influential in the day-to-day American lexicon are words from constitutions, statutes, and U.S. Census survey questionnaires. This set of laws and institutions, formal and informal, work together and have a profound influence on the way Americans conceive and speak of one another. Law helps structure routine practices of life by generating compliance or acts of resistance and by providing a framework for legitimate discourse and action in the exercise of power.[159]

For minority groups underrepresented in government, racial labeling and categorization in formal legal structures, including the language used in the debates preceding the passage of the Civil Rights Act of 1964, generally invoke labels placed on groups rather than terms of self-definition.[160]

Omi Leissner recognizes that "names and naming reflect, and often reify relations of dominance and subordination."[161] That is not to say, however, that labels imposed on groups may not, in the end, be empowering to the identified group. Christine Hickman identifies the latent power in being labeled or defined as a member of a particular group. Her argument that the so-called "one drop rule" ultimately had profound benefit in creating solidarity and power in the Black community recognizes

158. *See id.* at 63 (arguing that much of the critique of the Black/White paradigm of racial assessment "does little more than substitute alternative binary or other constructions for the existing dominant paradigm without attending to the consequences of these reconstructions for the ultimate goal of ending racial subordination"); *see also* Martha Minow, Foreword, *Justice Engendered*, 101 HARV. L. REV. 10, 13–14, 70–73 (1987) (recognizing that "difference" is a relative comparison and that the language employed to categorize and define individuals and groups takes on implicit assumptions about "whose point of view matters").

159. SpearIt, *Enslaved by Words: Legalities & Limitations of "Post-Racial" Language*, 2011 MICH. ST. L. REV. 705, 710; *cf.* Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1666–67 (1990) (recognizing and detailing how words and word choice impact the way that society views family violence).

160. For further discussion, see Hickman, *supra* note 94, at 1165–67; SpearIt, *supra* note 159, at 710; Naomi Zack, *American Mixed Race: The U.S. 2000 Census and Related Issues*, 17 HARV. BLACKLETTER L.J. 33, 34, 41 (2001).

161. Omi Leissner, *Naming the Unheard Of*, 15 NAT'L BLACK L.J. 109, 109 (1997–1998).

the impact of labeling, both positive and negative, even when the label is externally imposed.[162] She notes:

> So it was with the one drop rule. The Devil fashioned it out of racism, malice, greed, lust, and ignorance, but in so doing he also accomplished good: His rule created the African-American race as we know it today, and while this race has its origins in the peoples of three continents and its members can look very different from one another, over the centuries the Devil's one drop rule united this race as a people in the fight against slavery, segregation, and racial injustice.[163]

One may make the same argument about the term people of color. Originally employed to exclude and dehumanize, over time, individuals who self-identify as people of color have co-opted the term as a symbol of broad-based cultural and political power.

It is worth pausing here to discuss the context of the increased use of the people of color label as it is set alongside the "People First" movement in the disability rights context. People First describes a self-advocacy movement of individuals previously labeled and identified as "retarded" or "mentally retarded."[164] Born out of the Swedish Parents Association for Mentally Retarded Children in the late 1960s, the seemingly simple concept is, at its heart, that people labeled retarded could, and should, have a role in making choices about their own lives.[165] The movement led to the passage of laws that specifically changed the words used in legislation to reflect a shift in thinking about persons with disabilities. Rosa's Law, for example, passed in 2010, identified specific statutes relevant to people with disabilities and amended certain words to explicitly reflect a language shift in labeling individuals with disabilities.[166] In Washington D.C., the People First Respectful Language Modernization Amendment Act, passed in 2012, amended more than twenty-five specific District of Columbia laws to formally and legally relabel "the handicapped" and "mentally retarded persons" as "persons with disabilities" and "persons with intellectual disabilities."[167] The ARC, a national organization that advocates for and serves people with intellectual and developmental disabilities and their families, describes the import of the language change:

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162. Hickman, *supra* note 94, at 1166.

163. *Id.*

164. *See* JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 195 (1993).

165. *Id.*

166. Rosa's Law, Pub. L. No. 111–256, 124 Stat. 2643, 2643–45 (2010); *See* Sarah E. Redfield & Theresa Kraft, *What Color is Special Education?*, 41 J.L. & EDUC. 129, 148 n.113 (2012).

167. People First Respectful Language Modernization Amendment Act of 2012, D.C. Law 19-169 (2012), 2011 Bill Text DC B. 169 (LEXIS). The People First Respectful Language Modernization Amendment Act of 2012 followed the original legislation, which was passed in 2006. People First Respectful Language Modernization Act of 2006, D.C. Law 16-169 (2006).

> The language a society uses to refer to persons with disabilities shapes its beliefs and ideas about them. Words are powerful; Old, inaccurate, and inappropriate descriptors perpetuate negative stereotypes and attitudinal barriers.
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> . . .
>
> Our words and the meanings we attach to them create attitudes, drive social policies and laws, influence our feelings and decisions, and affect people's daily lives and more. How we use them makes a difference. People First Language puts the person before the disability, and describes what a person has, not who a person is. Using a diagnosis as a defining characteristic reflects prejudice, and also robs the person of the opportunity to define him/herself.[168]

Like the People First movement in the disability rights context, self-identification as people of color symbolizes the members' control of their label and the authority to define the members of their category.[169]

Unlike the People First movement, however, people of color terminology has not been incorporated into formal law in the same way.[170] In fact, although there has been some recent movement to incorporate the term people of color and related terminology into formal legislation, the terms and their influence on the law remain generally marginalized. They

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168. *What is People First Langage?*, THE ARC, http://www.thearc.org/who-we-are/media-center/people-first-language? (last visited Nov. 20, 2015).

169. The "People First" movement has some similarities to the people of color movement, but there exist several differences that are important to an in-depth critical assessment of the two movements. Most importantly, the role of perception plays a different legal role when discussing a person with disabilities and a person of color in the context of civil rights laws. Both the Americans with Disabilities Act and the Rehabilitation Act explicitly provide protection for discrimination against one who is "perceived" as having a disability. *See* Americans with Disabilities Act of 1990 § 2(a)(1), 42 U.S.C. § 12101(a)(1) (2012); Rehabilitation Act of 1973 § 2(a)(4), 29 U.S.C. § 701(a)(4) (2012) (amended 2014). There is no similar protection in the Civil Rights Act of 1964. It may be possible to argue that perception of protected status (i.e., race or color) should create a cause of action under civil rights laws. For example, if a Caucasian person submits a resume for a job and is not interviewed for the position because the employer believes that her name is a name commonly associated with an African American, the applicant may have a cause of action for race discrimination. Some courts, however, have been reluctant to find that perception of protected status provides protection under Title VII and related laws. *See, e.g.*, Butler v. Potter, 345 F. Supp. 2d 844, 850 (E.D. Tenn. 2004) (granting summary judgment to employer defendant because: "Title VII protects those persons that belong to a protected class, *see* 42 U.S.C. § 2000e-2(a)(1), and says nothing about protection of persons who are *perceived* to belong to a protected class. . . . Congress has shown, through the Rehabilitation Act, and the Americans with Disabilities Act that it knows how to enact legislation that protects persons who are wrongly perceived to be in a protected class. Neither party has cited any controlling authority which would permit a claim for perceived race or national origin discrimination and this Court is unaware of any such precedent."); *see also* Lewis v. N. Gen. Hosp., 502 F. Supp. 2d 390, 401 (S.D.N.Y. 2007) ("[T]he protections of Title VII do not extend to persons who are merely 'perceived' to belong to a protected class." (citing Uddin v. Universal Avionics Sys. Corp., No. 1:05-CV-1115-TWT, 2006 U.S. Dist. LEXIS 47238, at *14 (N.D. Ga. June 30, 2006); Butler v. Potter, 345 F. Supp. 2d 844, 850 (E.D. Tenn. 2004))). Although additional analysis about the relationship between the two movements would be of value, it is outside the scope of this Article.

170. I make no comment here on whether the incorporation of the "People First" language in formal law has made any noticeable difference in the treatment of or discrimination against people with disabilities.

are located primarily in a statutory context that will not be binding in law. For example, in the "Findings" section proposed for the Women's Educational Equity Act of 2001, Congress found that "classroom textbooks and other educational materials do not sufficiently reflect the experiences, achievements, or concerns of women and, in most cases, are not written by women or persons of color."[171] And, whether a program would "address the needs of women and girls of color and women and girls with disabilities" is the first listed criterion for whether the Secretary can issue awards under the program.[172] Similarly, in a statute titled "Equal Access to the Administration's Education Programs," the Administrator is challenged to "bring more women of color into the field of space and aeronautics."[173] The Obama Administration created an Office of Minority Health to provide resources to communities of color; developed an Office of Minority and Women Inclusion to promote women and people of color in the banking industry; and established a White House Council on Women and Girls "to ensure that Federal programs and policies address and take into account the distinctive concerns of women and girls, including women of color and those with disabilities."[174] Policymakers today are seemingly walking a fine line—adopting the terminology of the of color modifier, but only in locations and ways that will have little to no influence on the implementation of law. Although there is value in the language employed in explanatory or aspirational findings or promotions, there is no legal accountability or remedy for failure to meet those goals.

While there is much to be said about the power of categorization and the language used to identify the relevant categories, there is not universal acceptance or appreciation of the benefit of labeling. In fact, activists and scholars have warned against giving any label too much power. In 1928, W.E.B. Du Bois, responded to the call that the term Negro be abandoned as a label:

> Do not . . . make the all too common error of mistaking names for things. Names are only conventional signs for identifying things. Things are the reality that counts. If a thing is despised, either because of ignorance or because it is despicable, you will not alter matters by changing its name. If men despise Negroes, they will not despise them less if Negroes are called "colored" or "Afro-Americans."
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> . . .

171. Women's Educational Equity Act of 2001, 20 U.S.C. § 7283(b)(3)(B) (2012).
172. *Id.* § 7283d(a).
173. 51 U.S.C. § 40906(c) (2012).
174. *See* 12 U.S.C. § 4520 (2012); 42 U.S.C. § 300u-6(a) (2012); Exec. Order No. 13,506, 74 Fed. Reg. 11271 (2009), *reprinted as amended in* 42 U.S.C. § 2000e (2012).

> [A] Negro by any other name would be just as black and just as white . . . . It is not the name--it's the Thing that counts.[175]

Nearly a century later, SpearIt catalogues and critiques the terms of racial categorization of the Black community in America throughout the decades.[176] He notes, for example, that use of the terms "nigger" and "Negro" used language to objectify by color.[177] And he makes no distinction with the application of the term "black" as a label of racial categorization, arguing that "the replacement term 'black' had the same import, since this word was like saying 'nigger' in English."[178] Ultimately, SpearIt concludes that the terms "person of color" and "people of color" fare no better.[179] Such terms, he avers, evoke a biased dichotomy of White (pure, good) versus non-White (impure, bad).[180] He argues that "[l]anguage facilitates the process of objectification as required by slavery and colonialism, and whiteness has been a defining part of culture for centuries, including the notion that white people are good and people of color are bad."[181] Tom Smith suggests that the importance and anxiety about racial labels for the American Black community is arguably connected to one or more of the following three theories: (1) enslaved Blacks were stripped of indigenous and varied identities and cultures and were long prohibited from developing their own institutions and community to advance their group identity; (2) because Blacks remain discriminated against, any name eventually becomes tainted by racial prejudice; and (3) some sense of an "inferiority complex."[182] If, as SpearIt and Smith suggest, all racial labels take on a disparaging meaning over time, is it worth the energy and effort necessary to change the labels? Does changing the label change the underlying racial bias or tension underlying the categorization?

Certainly, the history of changing labels affixed to and adopted by the American Black community over time suggests that labels do, in fact, carry great meaning. In fact, in the legal context, critical lawyering scholars and those advocating client-centered lawyering recognize the great importance of a client's agency in defining oneself and one's sto-

175. W.E.B. Du Bois, *The Name "Negro," in* THE CRISIS 96, 96–97 (1928). I pause to consider, here, whether Du Bois's sentiment could be applied to the debate about the difference between race discrimination and color discrimination. What is "the Thing" that counts in assessing the internal bias of one discriminating on the basis of race discrimination as compared to one discriminating on the basis of color? Such a query sits at the center of the scholarly debate on the relationship between racism and colorism. *See, e.g.*, Banks, *Colorism*, *supra* note 56, at 1708–13; Harris, *supra* note 56, at 62–65; Jones, *supra* note 55, at 665–68.

176. SpearIt, *supra* note 159, at 732, 738–39.

177. *Id.* at 738.

178. *Id.*

179. *Id.* at 745–47.

180. *See id.* at 732.

181. *Id.*

182. Smith, *supra* note 126, at 511–12.

ry.[183] A client's narrative, including her self-identification, sets out something more than the context for her legal claim; it establishes her place in the world relative to the other players in her legal story.

The rest of this part identifies a recent trend in adapting the people of color construct into civil rights challenges, a move in itself that implies the meaningfulness of reimagining one's racial identity. The final part then argues that inserting people of color into civil rights challenges, while perhaps meaningful to give the plaintiff agency to self-define her category and subclass, may actually be counterproductive to the goals of the civil rights movement.

C. Pleading "People of Color"

There has been a recent trend in civil rights complaints to include allegations of violations of law against people of color,[184] a trend this Article deems problematic for the advancement of racial equality through rights-based legal challenges. The great majority of the complaints discovered using such language were filed after 2000. Such allegations arise in three primary forms. The first iteration involves complaints that invoke the term person of color to label the plaintiff. The second contains complaints labeling the class or group of people impacted by defendant's allegedly discriminatory actions as people of color. The final category, which comprises the greatest number of complaints, uses the term person of color or people of color in factual allegations to provide circumstantial evidence of race or color discrimination against particular plaintiffs.[185] As will be seen in Part IV, the complaints' invocation of the term people of color generally is, at best, neutral to the case's resolution and, at worst, risks contraction of civil rights protections.

Certain civil rights complaints identify the plaintiff as a person of color. In *Green v. Topnotch at Stowe*,[186] for example, plaintiff, an Afri-

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183. *See, e.g.*, Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2118–22 (1991); Margaret Moore Jackson, *Confronting "Unwelcomeness" From the Outside: Using Case Theory to Tell the Stories of Sexually-Harassed Women*, 14 CARDOZO J.L. & GENDER 61, 62–63 (2007); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 485–89 (1994).

184. There any many constitutional challenges brought pursuant to Sections 1981 and 1983 that allege discrimination against people of color or persons of color. This particular analysis, however, focuses on complaints that assert claims under the Civil Rights Act of 1964 and the Fair Housing Act of 1968 or their relevant amendments. The explicit color protected class under the Civil Rights Act of 1964 and the Fair Housing Act, combined with the unique historical setting underpinning the legislative history of those laws, provides the most apt analysis for this Article.

185. There are also certain complaints that use the people of color term or similar terms in the factual allegations in reference to a statement made by the defendant as evidence of race or color discrimination. *See, e.g.*, Complaint at 4, United States v. French, No. 2:12-cv-15583-JCO-MJH (E.D. Mich. Dec. 20, 2012) ("Paula French stated that there were not many 'people of color' in the area where the subject property was located."); Complaint for Damages at 7, Rivers v. Cty. of Marin, No. 03-cv-01808 (N.D. Cal. May 1, 2003) ("The conduct included but was not limited to . . . (3) comments from supervisors stating that people of color and other disadvantaged 'nerthiwells' 'should be lined up and shot.'").

186. No. 1: 06-CV-00096, 2008 WL 345886 (D. Vt. Feb. 7, 2008).

can American female, asserted violations of Title II of the Civil Rights Act of 1964 and her constitutional rights based on claims that she was unfairly suspected of and arrested for a crime she did not commit based on her race and color.[187] In her complaint, Ms. Green self-identified as a "person of color" and "of the African-American race."[188] A plaintiff's self-identification of herself as a person of color is the clearest example of how a party may, in the absence of guidance from the legislature or courts, seek to define the meaning of color discrimination and the boundaries of the subclass through which she can seek civil rights protection. It inserts the cultural concept of person of color into civil rights jurisprudence.

The second category of complaints using the term people of color requests relief on behalf of people of color. In other words, the complaints assert violations of federal civil rights laws on behalf of a larger group of people defined by their inclusion in the group labeled people of color. Like the first category, it involves a plaintiff or class of plaintiffs defining an undefined and unbounded group termed people of color as a subclass of the protected class of race or color. In *Darensburg v. Metropolitan Transportation Commission*,[189] for example, the plaintiffs alleged discrimination on the basis of race and national origin in the funding of public transit services in the San Francisco, California Bay Area.[190] Individual plaintiffs, along with organizational plaintiffs who are comprised of "people of color who are riders of the Alameda-Contra Costa Transit District," aver that the "Defendant MTC has historically engaged, and continues to engage, in a policy, pattern or practice of actions and omissions that have the purpose and effect of discriminating against poor transit riders of color in favor of white, suburban transit users, on the basis of their race and national origin."[191]

The complaint sought class certification to include "all people of color who are current and potential patrons of AC Transit."[192] The complaint asserted three separate causes of action, including a cause of action

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187. *Id.* at *1–2.

188. Complaint with Demand for Jury Trial at para. 4, *Green*, No. 1:06-CV-00096 (D. Vt. May 11, 2006). The Plaintiff also alleged, in asserting violations under Section 1983, that "it was not a violation of [law] for Green to be a person of color, to possess maxipads, and/or to possess or use cornstarch for cosmetic purposes." *Id.* at para. 121; *see also* Second Amended Complaint for Violation of Civil Rights with Jury Demand at 7, Walker v. Hoppe, 239 F. App'x 998 (M.D. Tenn. Aug. 17, 2005) (suing for employment discrimination on the basis of race and sex, the plaintiff brought a Title VII complaint based on her allegedly illegal discharge on the basis of race "merely for offering the perspective of 'a person of color' with competency/integrity").

189. Darensburg v. Metro. Transp. Comm'n., 611 F. Supp. 2d 994 (N.D. Cal. 2009).

190. First Amended Complaint for Injunctive and Declaratory Relief Pursuant to Fourteenth Amendment to The United States Constitution, 42 U.S.C.§ 1983 Title VI of the Civil Rights Act of 1964 at para. 1, *Darensburg*, 611 F. Supp. 2d 994 (N.D. Cal. Oct. 11, 2005) (No. C-05-01597).

191. *Id.*

192. *Id.* at para. 24.

for violation of Title VI of the Civil Rights Act of 1964 for discrimination on the basis of race and national origin, but not color.[193]

The final category of complaints in which people of color is employed involves factual allegations against a broader category of people of color to provide support for, or circumstantial evidence of, defendant's discrimination against the particular plaintiff(s). Those complaints vary in the asserted causes of action, but many do assert color as a protected class. In *Harris v. Sutton Motor Sales & RV Consignments Corp.*,[194] for example, the plaintiff alleged violations of Title VII, Section 1981, and various state laws arising from differential treatment, hostile work environment, and retaliation claims.[195] The plaintiff, an African American male, alleged race and color discrimination on the basis of factual allegations that he was treated differently from his Caucasian counterparts and was subjected to racial slurs and retaliation.[196] He also claimed that one supervisor would make comments about other minority groups, calling Hispanics, for example, "Joses."[197] On the basis of those factual allegations, Mr. Harris alleged that "Defendant's actions created a hostile work environment toward people of color that Plaintiff was subjected to" and that "Defendant's hostile work environment toward Plaintiff, because he is a person of color, constitutes a violation of [Title VII]."[198] Similarly, in *Martin v. State University of New York*,[199] the plaintiff, an African American female, alleged violations of Titles VI and VII for discrimination on the basis of race and color.[200] Her factual allegations were based primari-

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193. *Id.* at paras. 70–78; *cf.* Class Action Complaint at paras. 2–3, Rodriguez v. Nat'l City Bank, No. 2:08-cv-02059, 2008 WL 2547584 (E.D. Pa. May 1, 2008). In *Rodriguez*, four plaintiffs brought suit against the defendant bank alleging discriminatory practices in obtaining residential mortgage loans, which is a violation of the Fair Housing Act, among other federal and state laws. *Id.* at para. 1. The plaintiffs brought a proposed class action "on behalf of themselves and a class of all other similarly situated Minority . . . homeowners subjected to Defendants' discriminatory practices . . . ." *Id.* at para. 2. The complaint defined "Minority" to be "persons who are African-American or Black, as well as persons who are Hispanic or Latino." *Id.* at para. 3. The complaint is based, in part, on various studies related to wealth and the disproportionality of subprime mortgages offered to borrowers "of color." *Id.* at paras. 4–18. Unlike the single plaintiff in *Green*, however, the proposed class in *Rodriguez* alleges discrimination on the basis of race but does not specify color as a basis for legal protection. It begs the question whether use of the term "Minority" (presumably a synonym to "people of color" under the facts of the complaint) has any particular meaning for establishing discrimination on the basis of a protected class. The complaint defines "Minority" to include a traditional race subclass (African American or Black) and a traditional national origin subclass (Hispanic or Latino). *See id.* at para. 3. Other than the plaintiffs' autonomy of self-defined labeling and the symbolic power of solidarity between the two protected classes, on the surface, there appears to be little to no additional meaning or legal weight behind use of the term "Minority."

194. No. 08-6308-HO, 2010 WL 143769 (D. Or. Jan. 9, 2010).

195. *Id.* at *1–4.

196. *Id.* at *1–5.

197. Complaint at 14, *Harris*, 2010 WL 143769 (D. Or. Oct. 6, 2008).

198. Complaint at paras. 31, 45, *Harris*, 2010 WL 143769 (D. Or. Oct. 6, 2008); *see also* Complaint at para. 38, Arevalo v. Or. Dep't of Transp., No. 08-06359-HO (D. Or. Nov. 5, 2008) (alleging employment discrimination on the basis of race, sex, and color in part because "Defendant's actions created a hostile work environment toward women and people of color that Plaintiff was subjected to").

199. 704 F. Supp. 2d 202 (E.D.N.Y. 2010).

200. *Id.* at 219.

ly on the retaliation she suffered for opposing the defendants' discriminatory treatment of a colleague.[201] The plaintiff asserted that "[t]he Defendant COLLEGE has maintained a pattern and practice of treating people of color . . . differently than [sic] it treated its White and/or American employees, and retaliated against persons who question and oppose the Defendants' repeated refusals to follow the Tripartite Committee's findings as to discrimination."[202]

Where there has been little guidance to litigants on the relationship between race and color discrimination or the defining boundaries of color discrimination and its relevant subcategories, it is unsurprising that parties themselves would fill the void by adopting the social and cultural term people of color in asserting violation of their civil rights. The way that a plaintiff pleads his or her case, however, is meaningful. At the very least, it sets the tone for the way that the court will assess the merits of the case.[203] Where the plaintiff self-identifies as a person of color in the body of the complaint, there is some sense that the label is meaningful for the assessment of the legal claim of discrimination. The same is true for plaintiffs who seek relief on a broader class of people of color or base their factual allegations on broad-based discrimination against people of color. Where the term acts primarily as shorthand for discrimination against multiple identifiable groups protected under the relevant statute(s), this Article questions it utility. Further, as the next part sets out, the Article ultimately argues that employment of the term may actually work in opposition to the goals of equality in civil rights.

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201. *Id.* at 215.

202. Amended Complaint at para. 43, Hedge v. State Univ. of N.Y., No. CV-06-05856 (E.D.N.Y. Nov. 10, 2006); *see also* Complaint at para. 12, Alex v. Gen. Elec. Co., No. 1:12-CV-01021-GTS-DRH (N.D.N.Y. June 25, 2012) (alleging that "defendant GE . . . have [sic] a long history of discriminating against African Americans and other employees of color"); Complaint at para. 7, Fenner v. News Corp., No. 09 CV 9832 (S.D.N.Y. Nov. 30, 2009) (including factual allegations by two self-identified African American plaintiffs asserting widespread discrimination against "other employees of color" in their civil rights complaint); Plaintiffs' Amended Complaint at para. 20, Phillips v. Minn. State Univ. Mankato, No. 09-cv-1659-DSD-FLN (D. Minn. Oct. 7, 2009) (alleging a hostile work environment in violation of Title VII and, in support, identifying a supervisor's response as "indicative of an overall racially discriminatory attitude that was hostile and dismissive she had towards [Plaintiff] and others of color at MSU"); Amended Complaint at para. 24, Kanhoye v. Altana Inc., No. 2:05-CV-04308-LDW-WDW (E.D.N.Y. Feb. 10, 2006) (asserting individual claims of discrimination on the bases of national origin, race, and color alleged that "[t]here existed at Altanta a 'glass ceiling' for people of color. . . . and when people of color . . . applied to work in . . . [the Validation] Department or expressed interest in working [in the Validation] Department, they were passed up for White, American-born individuals from outside the company"); Complaint for Declaratory, Injunctive, and Monetary Relief at paras. 27, 49, Thompson v. Southwest Airlines Co., No. 04-313-JM (D.N.H. Aug. 17, 2004) (alleging discrimination on the basis of race and color in violation of Title VI and, in support, asserting that she "observed that [a Southwest employee] stopped to speak to another person of color requesting to see her ticket" and"[o]n information and belief a disproportionate number of women and persons of color are subjects of Southwest's policy requiring a passenger to purchase a second ticket"); Complaint for Declaratory Relief, Injunctive Relief, and Damages at paras. 2, 4, Hubley v. CIC Corp., No. 3:02-cv-05566-FDB (W.D. Wash. Oct. 31, 2002) (asserting "a pattern and practice of discrimination against people of color and families with children, and retaliation against those who have opposed discriminatory practices" and alleging discriminatory treatment on the basis of race and familial status).

203. *See supra* Section II.C.

IV. THE CLASH OF "PEOPLE OF COLOR" AND "COLOR"

The flexibility of the term people of color, arguably so useful in social and political coalition building,[204] is exactly what may limit its usefulness in addressing entrenched bias through civil rights challenges. This Article has traced the history of the terms colored and color in the debates preceding the passage of the Civil Rights Act of 1964, the advent of colorism claims under that very law, and the movement toward alleging people of color discrimination as a civil rights claim. The parts, taken together, establish that the institutional actors' declination to identify the boundaries of the color protection and its subclasses has created an opening for self-definition. Flowing from that void, there has been a recent trend of employing the phrase people of color in defining a subclass of color or race in civil rights challenges. The problem is that the term people of color has no bounds. It is flexible and changing; its meaning is dependent on time, place, and speaker. Therefore, it has little utility in the legal framework of the Civil Rights Act and related anti-discrimination laws. In fact, in certain cases, it not only adds little to the claim but may work at cross-purposes to the goal of addressing discrimination through the current legal structure.

A. *White is a Color*

Set alongside the development of the shifting racial lexicon in the United States, it would seem that the prohibition against color discrimination would prohibit discrimination against people of color, defined as non-White minorities. But what if White is a color under the law? There is a strong argument under the law that White is, indeed, a color. If that is the case, the term people of color ceases to be a subclass of color; the subclass swallows the whole protected class category.

The legislative history and jurisprudence of Section 1981 of the Civil Rights Act of 1866 suggest that White people are protected under that statute. Section 1981 guarantees the same rights to all persons "to make and enforce contracts, to sue, be parties, and give evidence . . . and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens"[205] The statute was passed in 1866, in the wake of the Civil War. Its primary purpose was to protect the civil rights of African Americans, many of whom had recently been emancipated from slavery. The legislative history of Section 1981, however, indicates that the statute's proponents had an expansive concept of the class of people the legislation should protect. For example, Senator Trumbull described the bill as applying to "every race and color," and Senator Howard noted that the object of the bill was to give "to persons who are of different races or colors the same civil

204. Vidal-Ortiz, *supra* note 138, at 1037–39.
205. Civil Rights Act of 1866, 42 U.S.C. § 1981.

rights."[206] The legislative history of the Civil Rights Act of 1964 similarly establishes that Congress intended the legislation to protect against discrimination against Whites. Representative Celler noted, about the legislation, for example, that "there could be discrimination against White people and there could be against colored people."[207]

The courts have adopted the same rationale in civil rights jurisprudence. In the 1976 decision in *McDonald v. Santa Fe Trail Transportation Company*,[208] the Supreme Court held that the protections afforded by both Section 1981 and Title VII applied to Whites, as well as non-Whites.[209] The opinion cites Section 1981 legislative history establishing that "the bill was routinely viewed, by its opponents and supporters alike, as applying to the civil rights of whites as well as nonwhites."[210] The *McDonald* Court, relying on the plain language of the statute and guidance from the EEOC, also determined that Title VII protections extended to Whites as well as non-Whites. The Court cited legislative history from the Civil Rights Act of 1964 recording congressional intent that Title VII was "intended to 'cover white men and white women and all Americans,' and create an 'obligation not to discriminate against whites.'"[211]

Circuit court and Supreme Court decisions in *Al-Khazraji v. Saint Francis College* come to the same conclusion. In *Al-Khazraji*, a professor alleged discrimination by his employer college, claiming violations of Title VII and Section 1981 because he was denied tenure due to his Arab origin and Muslim religion.[212] After dismissing plaintiff's Title VII claims on statute of limitations grounds, the Third Circuit rejected the defendant's argument that Section 1981 did not apply to Arabs, who are "taxonomically Caucasians" and therefore "white citizens."[213] Rather, the Third Circuit, relying on concepts of ethnicity and physiognomy, found

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206. CONG. GLOBE, 39th Cong., 1st Sess. 211, 504 (1866). It is not clear whether the legislators' statements acknowledge a distinction between race and color. It is clear, however, that they acknowledge a preference for the protections embedded in the legislation to be read broadly.

207. 110 CONG. REC. 2579 (1964).

208. 427 U.S. 273 (1976).

209. *Id.* at 295–96.

210. *Id.* at 289; *see also* CONG. GLOBE, 39th Cong., 1st Sess. 211, 504 (1866) (remarks of Sen. Howard, a supporter: "[The bill] simply gives to persons who are of different races or colors the same civil rights"); *id.* at 505 (remarks of Sen. Johnson, an opponent: "[T]he white as well as the black is included in this first section . . . ."); *id.* at 601 (remarks of Sen. Hendricks, an opponent: "[The bill] provides, in the first place, that the civil rights of all men, without regard to color, shall be equal . . . .").

211. *McDonald*, 427 U.S. at 280 (first quoting 110 CONG. REC. 2578 (1964) (remarks of Rep. Celler); then quoting 110 CONG.REC. 2578 (1964) (remarks of Sen. Clark)). This is one place where the response of the bill's proponents to their opponents' challenges ostensibly resulted in the adoption of the opponents' agenda. Seemingly, in an effort to gain support for the bill's passage, proponents of the 1964 civil rights legislation answered challenges from opponents that the legislation was designed exclusively for the benefit of Blacks. In doing so, they promised the bill's opponents that the legislation was protection for all, explicitly including Whites. *See id.*; *see also* 110 CONG. REC. 2487 (1964) (remarks of Rep. Celler).

212. Al-Khazraji v. Saint Francis Coll., 784 F.2d 505, 506 (3rd Cir. 1986).

213. *Id.* at 514–17.

that the protections of Section 1981 "extend[] beyond those who are taxonomically members of the Negro race."[214] The majority concluded:

> Congress did not intend to limit Section 1981 solely to those who could demonstrate that they had been discriminated against because they belonged to a particular group identified and described by anthropologists. When Congress referred in the statute to "race," it plainly did not intend thereby to refer courts to any particular scientific conception of the term.[215]

The Supreme Court affirmed and, after reviewing various definitions of the term race and the legislative history of Section 1981, found that Congress intended to protect against discrimination based on "ancestry or ethnic characteristics."[216]

If White is a color under the law, then what does it mean to use the term people of color in alleging discrimination? Especially when recognizing the confused jurisprudence on color discrimination, under such an analysis, an allegation of discrimination against people of color would have no meaning whatsoever. If all people have a color under the law, then people of color is synonymous with people and the potential of the protected class falls away completely.

B. Problems of Proof

Even if people of color is not read to include Whites, its use in civil rights claims creates problems of proof. *United States v. Fountain View Apartments* provides a cautionary tale for pleading discrimination on the basis of membership in the people of color category.[217] Defense counsel attempted to redefine the government's color subclass to avoid liability. In doing so, defense counsel not only challenged the plaintiff's right of self-definition but also used the flexibility of the term people of color to seek to introduce arguably irrelevant exculpatory evidence. She specifi-

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214. *Id.* at 514–15. The *Al-Khazraji* court implicitly recognized the difficulties in separating the concepts of race and color, noting, "We believe that Congress's purpose was to ensure that all persons be treated equally, without regard to color or race, which we understand to embrace, at the least, membership in a group that is ethnically and physiognomically distinctive." *Id.* at 517. The Third Circuit court continued: "Discrimination based on race seems, at a minimum, to involve discrimination directed against an individual because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of *homo sapiens*." *Id.*

215. *Id.* at 516.

216. Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610–13 (1987); *see also* Jordan v. Whelan Sec. of Ill., Inc., 30 F. Supp. 3d 746, 752 (N.D. Ill. 2014). The *McDonald* and *Al-Khazraji* courts addressed the claims under theories of race discrimination. The analysis, however, translates to an assessment of whether White is a color for purposes of assessing color discrimination. *McDonald*, 427 U.S. at 289; *Al-Khazraji*, 784 F.2d at 519. In fact, the *Jordan* court cited *Al-Khazraji* for the same proposition in assessment of a color discrimination claim. *Jordan*, 30 F. Supp. 3d at 752–53.

217. The complaint in *Fountain View Apartments* did not use the term people of color. However, by pleading "race or color discrimination" as a single cause of action, the court applied the term to the singular cause of action. *See supra* Section II.C. Therefore, the lessons of *Fountain View Apartments* apply both to litigants pleading "race or color discrimination," which is a common way to plead discrimination, and those who evoke "people of color" membership.

cally argued that the Fair Housing Act statute does not define color and that persons of color should be read to include Hispanics as well as "Pakistanis and Indians and southern Italians for that matter."[218] If people of color is defined that broadly, it will be exceedingly difficult to prove exclusion of all members of that class.[219] And because the term people of color is mutable and has changed over time and place, the court or fact-finder's definition of people of color may not comport with plaintiff's definition. Under a people of color theory, defendants may be allowed to exploit the flexibility of the category to confuse and prejudice the jury.

Another potential barrier is the legal test that applies to an allegation of discrimination on the basis of membership in a subclass identified as people of color. Courts have primarily assessed Title VII employment discrimination claims under the test established in *McDonnell Douglas v. Green*.[220] If the protected class is people of color, the plaintiff will struggle to establish that she was replaced by someone outside of her protected class.[221] In other words, she will not only have to establish her membership in the people of color subclass of color but she will also have to establish that she was replaced by someone outside of that subclass. Because of the undefined boundaries of people of color, that may prove to be remarkably difficult. It would be impossible, in fact, if courts were to consider Whites as members of the people of color classification.

Finally, if membership in a people of color group imparts legal rights under civil rights laws, then someone or some entity must define inclusion. In other words, someone must determine whether plaintiff rightfully falls within the boundaries of the identified protected subclass. The law does not define who is responsible for that assessment or set the burden of proof.[222] And, as Taunya Lovell Banks argues, there are barri-

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218. Transcript of Final Pretrial Conference at 48, United States v. Fountain View Apartments, Inc. (*Fountain View*), No. 6:08-CV-891-ORL-22-DAB (M.D. Fla. Jan. 14, 2010), ECF No. 115. The *Fountain View* court did not ultimately rule on the government's motion in limine to exclude testimony of Hispanic tenants. Although she did not rule, at the pretrial conference, the judge indicated her willingness to consider defense counsel's definition of the relevant subclass of the government's color claim. *See id.* (requesting that "somebody needs to bring me some legal authority that tells me whether people who are Hispanic and brown or native American and red and Asian and yellow are not encompassed as a person of color"). After the court granted summary judgment for the United States on its familial status pattern or practice claim, the case settled. *See United States of America v. Fountain View Apartments, Inc. et al Docket*, PLAINSITE, http://www.plainsite.org/dockets/tjssns2e/florida-middle-district-court/united-states-of-america-v-fountain-view-apartments-inc-et-al/ (last visited Dec. 22, 2015).

219. The law, of course, does not require wholesale exclusion of a protected class in order to prevail. *See, e.g.*, Fair Housing Act § 804, 42 U.S.C. § 3604 (2012) (provision of Fair Housing Act setting forth criteria of discriminatory action); *see also* Children's Alliance v. City of Bellevue, 950 F. Supp. 1491, 1496 n.8 (W.D. Wash. 1997). The problems of persuasion and confusion of the fact-finder, however, persist.

220. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); *see also* Moore v. Dolgencorp, Inc., No. 1:05-CV-00107, 2006 WL 2701058, at *1–2 (W.D. Mich. Sept. 19, 2006).

221. *See, e.g.*, *Moore*, 2006 WL 2701058, at *4; *see also supra* Section II.B.

222. In *Barrella v. Village of Freeport*, 43 F. Supp. 3d 136, 177–78 (E.D.N.Y. 2014), the Court found that the determination of the race of the person promoted in plaintiff's stead was a question best left to the jury after having heard testimony about the witness's own self-identification, testimo-

ers to colorism claims and concerns with both self-identification and external assignment of skin tone.[223] Self-identification will invariably create confusion for the fact finder and engender distrust from those fighting the expansion of civil rights protections. External assignments, by judge or jury, will raise discomfort for the fact finder identified in *Sere* and *Moore*, remove the plaintiff's autonomy to self-designate, and run the risk of limiting the protection of the laws.

Herbst issues a broader challenge to the use of racial labels that further complicates the insertion of culturally relevant racial labels into civil rights jurisprudence. He argues that the language of group self-definition is problematic because it forces individuals to choose to be inside or outside of the group. He notes:

> [A] group will not necessarily agree on what it wishes to be named, if it wishes to be named—or even grouped—at all. Nor do many individuals (consider, for example, persons of multiracial background) identify with any particular ethnic group, or any single group. Nor does use of a self-descriptive term always mean true identification with a group; it could simply be a rhetorical choice. Ethnic naming is often a dicey business.[224]

Where a plaintiff asserts discrimination on behalf of an unnamed and undefined group of people of color, itself a vague categorical concept, she runs the risk of essentializing a group of varied individuals who may not wish to be so categorized.

C. Measuring Progress

Adapting the language of a social movement focused on solidarity and coalition building into civil rights legal challenges also jeopardizes the collection of critical data regarding discrimination. Because insertion of the people of color category into the legal framework raises the substantive and evidentiary hurdles identified above and further entangles the categories of race and color, its usage in that capacity is likely to artificially suppress data about discrimination.

In the 2000 Census, respondents were, for the first time, given the option to self-identify as more than one race.[225] The results were nomi-

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ny from others on their perception of the witness's race, and the jury's own assessment of the witness's race.

223. *See* Banks, *Multilayered*, *supra* note 56, at 218.

224. HERBST, *supra* note 112, at xii–xiii.

225. *See* Karen R. Humes, Nicholas A. Jones & Roberto R. Ramirez, *Overview of Race and Hispanic Origin: 2010*, U.S. CENSUS BUREAU 2 (2011), http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf. There are five racial categories: White, Black or African American, American Indian or Alaska Native, Asian, and Native Hawaiian or Other Pacific Islander plus Some Other Race. *Id.* Individuals may also self-identify as Hispanic or Latino, but such identification is a National Origin identification that is separate and distinct from the questions on race for purposes of the Census. *Id.*

nal; only 2.3% of the population so identified.[226] But the fight prior to the introduction of the 2000 Census questionnaire was disproportionate to the ultimate results.[227] On one side, certain advocacy groups argued for the right of self-definition and personal expression.[228] On the other side, civil rights advocates warned that allowing such self-categorization would dilute critical data the government relies on to fund and support civil rights advocacy.[229] Christine Hickman cites to the congressional testimony from a representative of one of the groups challenging the changes to the Census:

> Our society's ability to discourage . . . discrimination is based in part on the effective implementation of our civil rights laws. In this respect, the collection of race and ethnic data in the census is fundamental. Any changes to the data collection of race and ethnicity must be strictly scrutinized to ensure that the integrity of our civil rights laws are [sic] not compromised.[230]

Introducing people of color into the civil rights structure, with all of the problems of proof identified above, may threaten the collection of accurate data regarding discrimination faced by particular racial and ethnic groups in much the same way.

Similar concerns identified by the civil rights advocates hold true in assessing the effect of people of color claims in race discrimination or color discrimination causes of action. In 2013, the EEOC reported 3,144 claims of alleged color discrimination, up from 2,662 reported in 2012.[231] The government and advocates collect data on claims, settlements, and legal outcomes for various civil rights claims. Such data collection is critical in assessing trends in discrimination allegations and charges. Because of the inherent fluidity of the people of color definition and the problems of proof in asserting people of color discrimination, invoking people of color in discrimination lawsuits risks underestimating both race discrimination and color discrimination. Just as the incorporation of multi-racial and multi-ethnic choices on the U.S. Census may diminish the usefulness of the data to advance civil rights support and funding, the inclusion of the people of color construct in discrimination claims may

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226. *Id.* at 6.

227. Hickman, *supra* note 94, at 1254.

228. *Id.* at 1254–55.

229. *Id.* at 1254. For further discussion on the debate preceding the 2000 Census, see *id.* at 1254–64.

230. *Id.* at 1254 (alteration in original) (quoting Hearings Before the Subcomm. on the Census, Statistics, and Postal Personnel of the Comm. on the Post Office and Civil Service, 103d Cong. 182 (1993) (statement of Steven Carbo, Mexican American Legal Defense and Educational Fund)).

231. *See* EEOC CHARGE RECEIPTS BY STATE (INCLUDES U.S. TERRITORIES) AND BASIS FOR 2013, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www1.eeoc.gov/eeoc/statistics/enforcement/state_13.cfm?renderforprint=1; EEOC CHARGE RECEIPTS BY STATE (INCLUDES U.S. TERRITORIES) AND BASIS FOR 2012, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www1.eeoc.gov/eeoc/statistics/enforcement/state_12.cfm?renderforprint=1.

skew data relied upon to measure the success of, and continued need for, our civil rights legal tools.

D. A Brief Cost-Benefit Analysis

There is a cost to denying a plaintiff's desire to adapt the cultural concept of person of color into civil rights litigation. It denies a person who identifies as part of a group from asserting that identity in a particular legal context. As Katherine Kruse explains, "Critical lawyering theorists argue that attempting to force clients into existing legal doctrinal categories may ignore the reality of their lives and reinforce and reproduce patterns of oppression that subordinate them."[232] It is, therefore, a complicated analysis to determine the cost of limiting a plaintiff's agency in defining her identity in a civil rights challenge. One must weigh the costs of loss of agency against the potential risks, some of which are identified herein, associated with trying to adapt a cultural concept into a legal argument.[233]

This Article recognizes that, as Anthony Amsterdam and Jerome Bruner so convincingly tell us in *Minding the Law*, narrative storytelling is both the way we argue and understand the law, and that story is inextricably linked to and influenced by our cultural experience.[234] Amsterdam and Bruner acknowledge that, as part of culture, we continually reinterpret the past in response to new requirements.[235] This Article does explore a kind of reinterpretation of the past. It notes that the civil rights legal structure is built on assumptions about the interchangeability of race and color and a binary Black/White assessment of race. It challenges lawyers and advocates to think about how protection against color discrimination can stand as distinct from race discrimination to enhance the protections of the current structure. And yet it cautions that the risks inherent in adapting the concept of people of color into civil rights challenges may ultimately outweigh the benefits under the current legal doc-

232. Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 395 (2006) (citing Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 48 (1990)).

233. It may be that engaged client-centered counseling is the appropriate way to assess those risks and benefits for each particular client. *See* STEPHEN ELLMANN ET AL., LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING 72–98 (2009); Katherine R. Kruse, *Engaged Client-Centered Representation and the Moral Foundations of the Lawyer-Client Relationship*, 39 HOFSTRA L. REV. 577, 587 (2011) ("Engaged client-centered representation recognizes that clients do not arrive with static and pre-determined objectives to which lawyers can simply defer. Clients' objectives are tied to their feelings, relationships and experiences; their objectives often change over the course of representation; and their objectives are shaped in part by the information about the law and available legal options that their lawyers explain to them."). Regardless, it is worth engaging in the conversation about how making such a choice impacts patterns of subordination more broadly, a topic that is beyond the scope of this Article. This Article starts from the premise that, while perhaps flawed, the current civil rights structure offers some opportunity to challenge bias and discrimination in particular settings like employment. For further discussion about the utility of the civil rights model as a force of social change and racial equality, see sources cited *supra* note 15.

234. *See generally* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000).

235. *Id.* at 222.

trine. Despite the recognized value of the people of color concept in cultural and political spheres, this Article finds that there is limited space in the current civil rights legal structure for reimagining identity.

CONCLUSION

The Civil Rights Act of 1964 protects against discrimination on the basis of particular, generally immutable, characteristics. One such characteristic is color. Yet, neither the statute nor the legislative history provides guidance on the meaning of color, its relationship to race, or the bounds of any particular subcategories necessary to establish differential treatment. And the courts have failed to offer sufficient clarity. Therefore, it is not surprising that parties are seeking to define color, its relationship to race, and its subcategories in legal claims. One such effort is the recent inclusion of people of color as a proposed subclass of color or race when identifying plaintiff's protected class. Introduction of the term people of color into the civil rights jurisprudence, however, carries the risk of constricting protections that remain critical to the advancement of racial equality today.[236]

There is political and cultural coalitional power of bringing a greater number of people under one interest group. In fact, the political power of those who identified as Black in the 1960s was a strong motivator for the passage of the Civil Rights Act of 1964.[237] Although people of color have historically lacked political power, there is arguably more control and sway with larger and united numbers.[238] So it seems counterintuitive that utilizing the language of inclusion (i.e., people of color) in civil rights jurisprudence would be counter to the goal of racial equality. And yet that is exactly what this Article suggests.[239] The definitional void in

236. I recognize that eliminating the use of the terms person of color and people of color as means to challenge discrimination against all non-White persons under the Civil Rights Act of 1964 and the Fair Housing Act may leave a gap in protection. At the very least, it may dampen the efficient use of such complaints to redress discrimination against a wide swath of people, especially in class action litigation or a complaint akin to the complaint in *Darensburg*. *See supra* Section III.C. Strategies to address the fallout, such as pleading race discrimination and color discrimination as separate and distinct causes of action, are beyond the scope of this Article.

237. *See* Edward J. Erler, *Equal Protection and Personal Rights: The Regime of the "Discrete and Insular Minority,"* 16 GA. L. REV. 407, 443 (1982) ("The Civil Rights Act of 1964 and the Voting Rights Act of 1965, whatever altruism they may have displayed as remedies for 'historic' discrimination, were a large part of the attempt to keep the urban black vote solidly Democratic."); William N. Eskridge, Jr., *Is Political Powerlessness A Requirement for Heightened Equal Protection Scrutiny?*, 50 WASHBURN L.J. 1, 11 (2010) (noting that racial minorities had persuaded Congress to adopt the Civil Rights Act of 1964 and the Voting Rights Act of 1965). *But cf.* Crenshaw, *supra* note 15, at 1383 (noting that a consequence of the civil rights reforms of the 1960s "may be the loss of collectivity among Blacks" as Blacks moved into different spheres in American society).

238. *See* Ramirez & Rumminger, *supra* note 154, at 500 & n.77 (noting that "people of color" have a significant population and therefore have the potential to "wield their own political power," but recognizing that it would require creation of a single coalition).

239. This is certainly not the first time that a seemingly progressive topic has been criticized for its failure to provide sufficient specificity to provide meaning. *See, e.g.*, Trina Jones, *The Diversity Rationale: A Problematic Solution*, 1 STAN. J. C.R. & C.L. 171, 176–77 (2005) (criticizing the

civil rights jurisprudence left by the institutional actors should not be filled by insertion of the people of color concept. Because of the history of conflating the terms color and colored, joined with the difficulty in disentangling color from race, the existing legal structure for establishing civil rights claims leaves little room for reimagining identity. Inserting people of color into civil rights challenges will expose the claims to significant substantive and evidentiary challenges. Doing so will weaken the breadth of the law's protection against discrimination by stripping the potential of color discrimination claims and compromising claims of race discrimination.

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diversity rationale as a means to effect anti-subordination goals because the term's vagueness limits its utility).

REDEFINING REASONABLE SEIZURES

LAURYN P. GOULDIN†

ABSTRACT

The government's power to seize individuals who are suspected of crimes—by arresting, stopping, or otherwise detaining them—has expanded significantly in the twenty-first century. The Supreme Court's gradual redefinition of what constitutes a reasonable Fourth Amendment seizure has occurred without meaningful evaluation of whether the government needs additional seizure or detention power.

There are key differences between search and seizure doctrine that make the development of a general and unifying explanatory theory of modern Fourth Amendment search and seizure trends difficult, if not impossible. These differences suggest that a focused, independent analysis of Fourth Amendment seizure developments (uncoupled from search- and privacy-focused analyses) is overdue.

This Article documents the expansion of seizure power across the spectrum over the last fifteen years. These cases reveal missed opportunities to provide greater protection to individuals, and they identify spaces where new technologies might justify revisiting settled rules. In addition, these decisions reveal how the Court's reluctance to probe government motivations and to consider less intrusive alternatives undermines its efforts to balance individual rights against government interests.

The Article then outlines the individual rights and collective interests that are implicated in seizure cases. Finally, the Article analyzes the problems presented by the Court's approach to calculating necessity in seizure cases. Proposals for reform are focused on four areas: requiring precise statements of government needs in seizure cases; looking to existing laws, guidelines, and police norms to support (or refute) necessity claims; requiring greater proof of a need to seize in cases involving more minor offenses; and considering alternative approaches, technological changes, and long-term costs in calculating necessity.

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INTRODUCTION

In its landmark 1968 decision in *Terry v. Ohio*,[1] the Supreme Court emphasized the importance of the individual rights that are infringed by unlawful seizures of people: "No right is held more sacred, or is *more carefully guarded*, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[2] Nearly fifty years later, this idea that the Fourth Amendment right to be free from unreasonable seizures is one that the Court has "carefully guarded" seems woefully out of date.

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1. 392 U.S. 1 (1968).
2. *Id.* at 9 (emphasis added) (quoting Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891)).

Protests across the country during the past eighteen months against overly aggressive policing provide ready proof that the Court's potential as a meaningful constraint on the police has not been realized. The 2014 and 2015 protests were sparked by deaths during street encounters, stops, and arrests of unarmed black men at the hands of police officers, including Michael Brown in Ferguson, Missouri; Eric Garner in Staten Island, New York; Tamir Rice in Cleveland, Ohio; Walter Scott in North Charleston, South Carolina; Freddie Gray in Baltimore, Maryland; and Laquan McDonald in Chicago, Illinois.[3]

Brown and Garner were killed within weeks of each other during the summer of 2014.[4] Brown's death caused an immediate "eruption of protests and violence" in Ferguson;[5] those protests were reignited months later when the Ferguson grand jury announced its decision not to indict the officer who shot Brown.[6] When the Staten Island grand jury announced that it, too, was not indicting the officer who put Eric Garner in the chokehold that caused his death, New Yorkers angrily took to the streets.[7] People in cities across the country followed suit.[8] New protests

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3. Editorial, *The Lessons of Baltimore, and Ferguson, and Too Many Places*, L.A. TIMES (Apr. 29, 2015, 5:00 AM), http://www.latimes.com/opinion/editorials/la-ed-baltimore-20150429-story.html (describing protests); Mark Berman, *How the Response to Protests over Police Force Changed Between Ferguson and Baltimore*, WASH. POST (May 1, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/05/01/from-ferguson-to-baltimore-how-the-response-to-protests-over-police-force-has-changed-nationwide/ (describing protests); Tony Briscoe, *Laquan McDonald Protestors Call for Special Prosecutor*, CHI. TRIB. (Dec. 6, 2015, 5:24 PM), http://www.chicagotribune.com/news/local/breaking/ct-chicago-police-laquan-mcdonald-push-protest-met-20151206-story.html (describing protests).

4. *See* Nicole Crowder, *The Timeline of Events and Scenes in Ferguson, Mo., Since the Shooting of Michael Brown*, WASH. POST (Aug. 16, 2014), http://www.washingtonpost.com/news/post-nation/wp/2014/08/16/the-timeline-of-events-and-scenes-in-ferguson-mo-since-the-shooting-of-michael-brown/ (describing Michael Brown's death on August 9, 2014, and ensuing protests); *Staten Island Man Dies After Police Try to Arrest Him*, N.Y. TIMES (July 17, 2014), http://www.nytimes.com/2014/07/18/nyregion/staten-island-man-dies-after-police-try-to-arrest-him.html (announcing Eric Garner's death).

5. Elijah Anderson, *What Caused the Ferguson Riot Exists in So Many Other Cities, Too*, WASH. POST (Aug. 13, 2014), http://www.washingtonpost.com/posteverything/wp/2014/08/13/what-caused-the-ferguson-riot-exists-in-so-many-other-cities-too/; *see also* Mark Landler, *Obama Offers New Standards on Police Gear in Wake of Ferguson*, N.Y. TIMES (Dec. 1, 2014), http://www.nytimes.com/2014/12/02/us/politics/obama-to-toughen-standards-on-police-use-of-military-gear.html (describing a "wave of anger at law enforcement officials across the country").

6. Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y TIMES (Nov. 24, 2014), http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html.

7. J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html. In July 2015, four days before the anniversary of Garner's death, New York City announced that it had agreed to settle (for $5.9 million) the wrongful death claim brought by Garner's family. J. David Goodman, *Eric Garner Case Is Settled by New York City for $5.9 Million*, N.Y. TIMES (July 13, 2015), http://www.nytimes.com/2015/07/14/nyregion/eric-garner-case-is-settled-by-new-york-city-for-5-9-million.html.

8. Justin Wm. Moyer et al., *Protests in Support of Eric Garner Erupt in New York and Elsewhere*, WASH. POST (Dec. 4, 2014), http://www.washingtonpost.com/news/morning-mix/wp/2014/12/04/after-grand-jury-doesnt-indict-police-officer-who-choked-eric-garner-protests-erupt-in-new-york-and-elsewhere/ (noting that "[a] wave of protests erupted from Manhattan to

followed the deaths of Tamir Rice, Walter Scott, and Freddie Gray.[9] Most recently, in November 2015, protesters in Chicago took to the streets when officials (after delaying for more than a year) released video footage of the October 2014 police shooting of 17-year-old Laquan McDonald.[10]

These protests—while set in motion by specific incidents—were fueled by a broader set of concerns about the role and legitimacy of law enforcement in heavily policed communities.[11] Underlying these protests is a realization that police are increasingly using their power to stop or arrest individuals—not to investigate crimes, but as a means of regulating communities. Indeed, in New York, these protests flowed naturally from several years of debate and litigation to reform the city's aggressive stop-and-frisk policing program.[12]

In December 2014, with the objective of restoring community trust in the police, President Obama created a Task Force on 21st Century Policing.[13] FBI Director Jim Comey, in a February 2015 speech de-

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Oakland, Calif." including as examples, St. Louis, Philadelphia, Oakland, Washington, D.C., Seattle, Atlanta, and Baltimore, among many more). The anniversaries of the deaths of Garner and Brown led to more protests in the summer of 2015. Benjamin Mueller & Nate Schweber, *Eric Garner is Remembered One Year After His Death*, N.Y. TIMES (July 17, 2015), http://www.nytimes.com/2015/07/18/nyregion/eric-garner-death-anniversary.html; Wesley Lowery et al., *State of Emergency Declared in Ferguson After Police Shoot and Critically Injure Man During Protests*, WASH. POST (Aug. 10, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/08/10/shots-fired-during-protests-in-ferguson-mo-reports-say/.

9. Peter Hermann et al., *After Peaceful Start, Protest of Freddie Gray's Death in Baltimore Turns Violent*, WASH. POST (Apr. 25, 2015), https://www.washingtonpost.com/local/baltimore-readies-for-saturday-protest-of-freddie-grays-death/2015/04/25/8cf990f2-e9f8-11e4-aae1-d642717d8afa_story.html; Alan Blinder & Manny Fernandez, *North Charleston Prepares for Mourning and Protest in Walter Scott Death*, N.Y. TIMES (Apr. 10, 2015), http://www.nytimes.com/2015/04/11/us/north-charleston-prepares-for-weekend-of-mourning-and-protest-in-walter-scott-shooting.html; Mitch Smith, *Cleveland Officer Says He Shot Tamir Rice After Fake Gun Was Pulled*, N.Y. TIMES (Dec. 1, 2015), http://www.nytimes.com/2015/12/02/us/cleveland-officer-says-he-shot-tamir-rice-after-fake-gun-was-pulled.html (noting that the recent release of information surrounding the shooting has "prompted protests across the country and raised questions about how the police use force and interact with African-Americans").

10. Patrick M. O'Connell et al., *Laquan McDonald Shooting Protest Groups Plan Friday March*, CHI. TRIB. (Nov. 26, 2015, 4:54 PM), http://www.chicagotribune.com/news/ct-chicago-cop-shooting-laquan-mcdonald-protest-1127-met-20151126-story.html (last visited Dec. 22, 2015).

11. Anderson, *supra* note 5 (describing stop-and-frisk policies and the militarization of police as creating an atmosphere of "authoritarian oversight and normalized police harassment").

12. *See infra* Section III.A.1.

13. Press Release, Office of the Press Sec'y, The White House, Fact Sheet: Task Force on 21st Century Policing (Dec. 18, 2014) [hereinafter Fact Sheet], http://www.whitehouse.gov/the-press-office/2014/12/18/fact-sheet-task-force-21st-century-policing ("Recent events in Ferguson, Staten Island, Cleveland, and around the country have highlighted the importance of strong, collaborative relationships between local police and the communities they protect."); *see also* OFFICE OF CMTY. ORIENTED POLICING SERVS., FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 1 (2015) [hereinafter TASK FORCE] (explaining that President Obama formed the task force to respond to "recent events that have exposed rifts in the relationships between local police and the communities they protect and serve"). The Task Force issued its final report in May 2015 and many of its recommendations are being implemented in jurisdictions around the country. *Id.*; *see also* President Obama, Weekly Address: Continuing Work to Improve Community Policing

scribed by commentators as unprecedented in its candor,[14] echoed the importance of this mission and directly addressed the "disconnect between police agencies and many citizens—predominantly in communities of color."[15]

While this executive branch attention to policing is much needed, the Court's role in authorizing greater police contact with civilians, and its potential as a source of restraint, requires scrutiny.[16] A close examination of seizure cases decided by the Court over the last fifteen years reveals that the government's power to seize individuals suspected of crimes—by arresting, stopping, or otherwise detaining them—has expanded significantly.

The *Terry* Court emphasized that the Fourth Amendment's "reasonableness" standard required "balancing the need to search [or seize] against the invasion which the search [or seizure] entails."[17] Over time, and perhaps particularly in the twenty-first century, that balance has become skewed in the government's favor in seizure cases. Cases about arrests,[18] stops,[19] and search warrant seizures,[20] for example, illustrate that a gradual redefinition of what constitutes a reasonable seizure has occurred without meaningful evaluation of whether the government actually needed additional seizure or detention power.

(Aug. 15, 2015) (transcript available at https://www.whitehouse.gov/the-press-office/2015/08/15/weekly-address-continuing-work-improve-community-policing).

14. Michael S. Schmidt & Matt Apuzzo, *F.B.I. Chief Links Scrutiny of Police with Rise in Violent Crime*, N.Y. TIMES (Oct. 23, 2015), http://www.nytimes.com/2015/10/24/us/politics/fbi-chief-links-scrutiny-of-police-with-rise-in-violent-crime.html?_r=0 (describing it as an "unusually candid speech" and observing that "[m]ore than his predecessors, Mr. Comey has used his office as one of the nation's top law enforcement officials to bring attention to issues that state and local police departments are confronting").

15. James B. Comey, Dir., Fed. Bureau of Investigation, Address at Georgetown University (Feb. 12, 2015) (transcript available at http://www.fbi.gov/news/speeches/hard-truths-law-enforcement-and-race) ("Serious debates are taking place about how law enforcement personnel relate to the communities they serve, about the appropriate use of force, and about real and perceived biases, both within and outside of law enforcement."). More recently, Comey has sparked controversy by expressing concern that "increased attention on the police has made officers less aggressive and emboldened criminals." James B. Comey, Dir., Fed. Bureau of Investigation, Address at University of Chicago Law School (Oct. 23, 2015) (transcript available at https://www.fbi.gov/news/speeches/law-enforcement-and-the-communities-we-serve-bending-the-lines-toward-safety-and-justice) (recognizing that some behavior change is to be welcomed, but emphasizing the importance of "a strong police presence" to detect and deter violent crime); *see also* Schmidt & Apuzzo, *supra* note 14 (noting that Comey's opinions are not shared by top level Justice Department officials and outlining disagreement among law enforcement officials as to "whether there is any credence to the so-called Ferguson effect" (referring to the protests following the events in Ferguson, MO)).

16. See *infra* Part III for a discussion of the appropriate role of the Court in regulating police behavior.

17. Terry v. Ohio, 392 U.S. 1, 20–21 (1968) (alterations in original) (quoting Camara v. Mun. Court of S.F., 387 U.S. 523, 536–37 (1967)).

18. *See, e.g.*, Ashcroft v. al-Kidd, 131 S. Ct. 2074 (2011); Virginia v. Moore, 553 U.S. 164 (2008); Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

19. *See, e.g.*, Heien v. North Carolina, 135 S. Ct. 530 (2014); Navarette v. California, 134 S. Ct. 1683 (2014); Illinois v. Wardlow, 528 U.S. 119 (2000).

20. *See, e.g.*, Muehler v. Mena, 544 U.S. 93 (2005).

While other scholars have focused generally on the Court's struggle to weigh government interests in Fourth Amendment cases, these analyses focus principally on cases and developments regarding searches and privacy, as opposed to seizures of people.[21] In recent years, this focus on privacy and searches has also been driven by technological changes in the way information is created, maintained, and retrieved. Corresponding adjustments in societal privacy expectations shift the doctrine governing searches, demanding attention from the Court and from scholars attempting to predict and to reconcile Court decisions.[22] These questions of modern surveillance and information gathering are irresistibly complex and undeniably urgent.

In outlining his "equilibrium-adjustment theory," for example, Orin Kerr ambitiously sought to find a unifying theory to make sense of the "byzantine patchwork" of Fourth Amendment cases.[23] In Kerr's view, the Supreme Court responds to "changing technology or social practice" by "adjust[ing] the level of Fourth Amendment protection to try to restore the prior equilibrium."[24] Kerr claims that his theory "explains what judges do when they apply the Fourth Amendment . . . and explains a great deal of how Fourth Amendment law came to look as it does."[25] Kerr's analysis, however, is primarily focused on searches; he spends little time trying to explain seizure doctrine, and close analysis of the

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21. *See* STEPHEN J. SCHULHOFER, MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY 15–21 (2012) (including some discussion of seizures but principally focused on privacy, searches, and surveillance); CHRISTOPHER SLOBOGIN, PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT 22, 38–39 (2007) (advocating a more nuanced and precise scale of suspicion to better calibrate and balance Fourth Amendment interests but acknowledging focus on "regulating physical and transaction surveillance"); Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 GEO. L.J. 1, 42 (2013) ("Most Fourth Amendment cases balance the need for effective law enforcement against an individual's . . . [right to] privacy."); Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 506–07, 508 n.16, 528 n.123 (2007) (explaining that the article analyzes the four dominant models of defining what a "reasonable expectation of privacy" means in the context of Fourth Amendment searches and clarifying that seizures are beyond the scope of the article); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2040 (2011) ("The [Fourth] Amendment is primarily concerned with protecting individual privacy against arbitrary government intrusion."); *cf.* Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 104–05 (2008) (advocating focus on security instead of privacy, focusing on wiretapping and enemy combatant detentions).

22. *See, e.g.*, Riley v. California, 134 S. Ct. 2473, 2494–95 (2014) (warrantless search of cell phone incident to arrest held unconstitutional); Maryland v. King, 133 S. Ct. 1958, 1965–66 (2013) (DNA swabbing of arrestees held constitutional); United States v. Jones, 132 S. Ct. 945, 949 (2012) (warrantless GPS tracking held unconstitutional); Kyllo v. United States, 533 U.S. 27, 40 (2001) (warrantless use of thermal heat imager held unconstitutional).

23. Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 479–80 (2011) [hereinafter Kerr, *Equilibrium*] (describing the "dynamic" of "equilibrium adjustment" as means of reconciling conflicting Fourth Amendment cases); *see also* Orin S. Kerr, Response, *Defending Equilibrium-Adjustment*, 125 HARV. L. REV. F. 84, 90 (2011) [hereinafter Kerr, *Defending*] (explaining that one goal with the equilibrium theory "was to rescue Fourth Amendment law from this anarchic narrative").

24. Kerr, *Equilibrium*, *supra* note 23, at 480.

25. Kerr, *Defending*, *supra* note 23, at 90.

Court's recent seizure cases does not reveal any pattern of equilibrium.[26] The Court's seizure cases over the last fifteen years instead demonstrate a relatively consistent expansion of government seizure authority.[27]

So the protection against unreasonable seizures, although clearly understood by the Court to be a fundamental liberty protection, continues to be a neglected sibling.[28] In this way, little has changed since 1982, when Richard Williamson described the Court as "preoccupied with the task of defining the nature and scope of the individual privacy right secured by the amendment."[29] Scholars have also given the interests in liberty, freedom of movement, and autonomy—which are implicated by unlawful seizures—too little attention.[30]

This emphasis on searches by courts and scholars is only problematic if searches and seizures are different from each other in meaningful ways. They are. Seizures always involve restraining the movement of the person being seized.[31] Whether briefly at a checkpoint or, at the other end of the spectrum, as the function of a formal custodial arrest, seizures implicate fundamental liberty interests in bodily integrity and freedom of movement.[32] The government's corresponding interest in seizure cases always includes, but is not limited to, the need to restrain the movement of the person being seized for some period of time.[33]

Part I of this Article documents how Court decisions in the last fifteen years have expanded the definition of a "reasonable seizure." This has occurred for every category of seizures of people: arrests, stops,

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26. *See* Kerr, *Equilibrium*, *supra* note 23, at 481, 521–22 (describing Fourth Amendment events that can be explained by equilibrium-adjustment, asserting that the law of arrests has not changed, and asserting how the Court's automobile cases (including traffic stop decisions) reflect acclimation to automobile as new technology).

27. *See infra* Part I. Although Kerr views technology as a force driving his perceived equilibrium, it operates differently in the seizure context. As outlined below, changes in technology have a greater potential to weaken government claims of need in the seizure context. *See infra* Section III.D.

28. Richard A. Williamson, *The Dimensions of Seizure: The Concepts of "Stop" and "Arrest,"* 43 OHIO ST. L.J. 771, 771 (1982) (describing "the law governing seizures of people" as the "stepchild of fourth amendment jurisprudence").

29. *Id.*

30. Williamson's article is a notable exception. *See id.* Tracey Maclin's work includes others. *See, e.g.*, Tracey Maclin, *"Black and Blue Encounters" - Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 249–50 (1991) [hereinafter Maclin, *Encounters*]; Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1328–30 (1990) [hereinafter Maclin, *Locomotion*] (describing the Court's shift away from recognition of fundamental Fourth Amendment "rights of personal security and locomotion"). There are, of course, other thorough analyses of specific types of seizures that are discussed throughout this Article and particularly in Part I. The literature, however, has too few analyses of seizures collectively.

31. *See* Terry v. Ohio, 392 U.S. 1, 16 (1968) ("[T]he Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime—'arrests' in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person.").

32. *See infra* Part II.

33. *See infra* Section III.A.

search warrant seizures, checkpoints, encounters, and police use-of-force cases.

Part II focuses on the first part of the Fourth Amendment balance: the individual interests that are implicated by a seizure. This part details both the nature of the interests that are implicated and the costs (both to individuals and to the community) of unlawful seizures. This part also highlights why an analysis of seizures (uncoupled from search doctrine) is necessary.

The counterweight in the Fourth Amendment reasonableness balance—the government's need to seize—is the focus of Part III. There, I analyze four categories of problems with the Court's evaluation and calculation of necessity in seizure cases: (i) the Court's failure to press the government to articulate the need for a particular seizure; (ii) the Court's unwillingness to use existing laws, guidelines, or norms to evaluate claims of necessity; (iii) the Court's silence about the impact of overcriminalization on the government's seizure power; and (iv) the Court's reluctance to consider alternative approaches, developing technologies, and long-term impacts in calculating necessity.

In making this critique—that the Court must play a more assertive role in evaluating the strength of the government's asserted interests or needs—I join a chorus of other scholars who have made that point about the Fourth Amendment generally.[34] My contribution to this discussion is to focus on and isolate the seizure-specific aspects of this problem and to begin to identify proposals that would ensure a more robust necessity inquiry in cases involving seizures of people.

I. SEIZURES OF PEOPLE: AN OVERVIEW OF AN EXPANDING POWER

The law governing when and how the government can "seize" individuals who are suspected of committing crimes is rooted in the Constitution. Stripped of those passages that focus on searches, the Fourth Amendment provides "the people" with "[t]he right . . . to be secure in

34. *See, e.g.*, SCHULHOFER, *supra* note 21, at 44 (asserting that—at least in cases "outside the home"—justices have "abandoned" their Fourth Amendment obligations and, instead, prioritize "police convenience"); SLOBOGIN, *supra* note 21, at 21, 42–43 (advocating more rigorous Fourth Amendment balancing according to the "proportionality principle"); Baradaran, *supra* note 21, at 7 (proposing a new Fourth Amendment model of "informed balancing" to address the court's problematic reliance on "blind balancing"); Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness,"* 98 COLUM. L. REV. 1642, 1686–87 (1998) (describing the Court's approach to reasonableness balancing as "relaxed and deferential"); Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J. 1133, 1137 (2012) (advocating for "more stringent" reasonableness balancing in Fourth Amendment cases); Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1176 (1988) ("[The Court] regularly undervalues the fourth amendment interests jeopardized by every search and seizure, while overvaluing the countervailing law enforcement interests.").

their persons . . . against unreasonable . . . seizures."[35] The word "seizure" in the Amendment includes two very different concepts: the seizure of people, which is the focus of this Article, and the seizure of "houses, papers, and effects," which is not.[36] A broad spectrum of police conduct—ranging from full-blown custodial arrests to street stops to brief detentions at checkpoints—will meet the Court's definition of a seizure of a person.[37]

Although scholars like Orin Kerr describe the Supreme Court's Fourth Amendment jurisprudence as maintaining a steady balance of power between the state and the individual,[38] the Court's seizure cases—and, in particular, its twenty-first century seizure cases—do not fit that model. Decisions issued by the Supreme Court since 2000 have broadly expanded the government's power to seize people. The Court decided twenty-eight cases that relate to the seizure of a person during that fifteen-year window.[39] In twenty-two of those twenty-eight cases, the Court ruled in favor of the government, solidifying existing seizure authority and expanding the government's ability to arrest, stop, or otherwise detain individuals.[40] The government's overall success is probably understated by these numbers. As explained in more detail below, two of the decisions against the government, *Florida v. J.L.*[41] and *City of Indianap-*

35. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

36. *See* Payton v. New York, 445 U.S. 573, 584–85 (1980) ("The simple language of the Amendment applies equally to seizures of persons and to seizures of property."). This Article will often refer to "seizures of people" simply as "seizures." References to seizures of property or evidence will be explicitly identified.

37. *See infra* Sections I.A–I.F.

38. *See, e.g.*, Kerr, *Equilibrium*, *supra* note 23, at 480 (explaining equilibrium-adjustment theory).

39. This volume of seizure cases is, by itself, remarkable. In the ten years preceding (1990–99), the Court heard only eight cases involving seizures of people. All of these cases (the cases decided since 2000 and those decided from 1990–99) were located by running Westlaw searches for the terms "Fourth Amendment" and "seizure." (Other more targeted searches were also run.) The cases that were a "hit" for those search terms were reviewed by the author and by two research assistants before being counted in these numbers.

40. The twenty-two seizure cases decided in the government's favor include: Heien v. North Carolina, 135 S. Ct. 530 (2014); Plumhoff v. Rickard, 134 S. Ct. 2012 (2014); Navarette v. California, 134 S. Ct. 1683 (2014); Ashcroft v. al-Kidd, 563 U.S. 731 (2011); Arizona v. Johnson, 555 U.S. 323 (2009); Virginia v. Moore, 553 U.S. 164 (2008); L.A. Cty. v. Rettele, 550 U.S. 609 (2007); Scott v. Harris, 550 U.S. 372 (2007); Muehler v. Mena, 544 U.S. 93 (2005); Illinois v. Caballes, 543 U.S. 405 (2005); Brosseau v. Haugen, 543 U.S. 194 (2004); Devenpeck v. Alford, 543 U.S. 146 (2004); Hiibel v. Sixth Judicial Dist. Court of Nevada, 542 U.S. 177 (2004); Illinois v. Lidster, 540 U.S. 419 (2004); Maryland v. Pringle, 540 U.S. 366 (2003); United States v. Drayton, 536 U.S. 194 (2002); Saucier v. Katz, 533 U.S. 194 (2001), *receded from by* Pearson v. Callahan, 555 U.S. 223 (2009); Arkansas v. Sullivan, 532 U.S. 769 (2001); Atwater v. City of Lago Vista, 532 U.S. 318 (2001); Illinois v. McArthur, 531 U.S. 326 (2001); and Illinois v. Wardlow, 528 U.S. 119 (2000). Six seizure cases were decided against the government during this period. They include: Rodriguez v. United States, 135 S. Ct. 1609 (2015); Bailey v. United States, 133 S. Ct. 1031 (2013); Brendlin v. California, 551 U.S. 249 (2007); Kaupp v. Texas, 538 U.S. 626 (2003); City of Indianapolis v. Edmond, 531 U.S. 32 (2000); and Florida v. J.L., 529 U.S. 266 (2000).

41. 529 U.S. 266 (2000).

olis v. Edmond,[42] were significantly scaled back by later Court decisions (*Navarette v. California*[43] and *Illinois v. Lidster*,[44] respectively) during the same time period. The government's "loss" in *Bailey v. United States*[45] is similarly offset by the Court's earlier decision in *Muehler v. Mena*.[46]

In the search context, by contrast, there are several recent cases where the Court has notably restrained the government's power. *Riley v. California*,[47] *Florida v. Jardines*,[48] *United States v. Jones*,[49] and *Arizona v. Gant*[50] are ready examples.

The following sections provide a brief outline of the law in each of these seizure categories: arrests, stops, search warrant seizures, checkpoints, "consensual" seizures, and police use of force. The focus is, in particular, on Supreme Court decisions and other developments since the turn of the century that illustrate this expansion of the government's power.

A. Police Power to Arrest

1. Background: Endorsing Warrantless Arrests

The Framers clearly understood seizures of persons to include formal, custodial arrests.[51] The requirement that police must have probable cause to arrest criminal suspects is perhaps the hardest and fastest Fourth

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42. 531 U.S. 32 (2000).

43. 134 S. Ct. 1683 (2014).

44. 540 U.S. 419 (2004).

45. 133 S. Ct. 1031, 1042–43 (2013) (holding that *Michigan v. Summers*, 452 U.S. 692 (1981), did not justify the detention of occupants beyond the immediate vicinity of the premises covered by the search warrant). On remand, the Second Circuit upheld Bailey's conviction finding that the officers had reasonable suspicion to stop Bailey and that statements and evidence obtained during the initial part of the stop were properly introduced against him at trial. *See* United States v. Bailey, 743 F.3d 322, 345–46 (2d Cir. 2014) (finding Fourth Amendment violation only when officers handcuffed Bailey and that introduction of his subsequent statements was improper but resulted only in harmless error).

46. 544 U.S. 93, 102 (2005) (finding plaintiff's detention in handcuffs during execution of search warrant for two to three hours was reasonable in light of government interests; plaintiff was not a suspect and was not the target of the search).

47. 134 S. Ct. 2473, 2495 (2014) (holding warrantless search of arrestee's cell phone was unconstitutional).

48. 133 S. Ct. 1409, 1417–18 (2013) (bringing drug dog to suspect's porch to sniff front door was a Fourth Amendment "search").

49. 132 S. Ct. 945, 949 (2012) (holding installation of GPS tracker onto suspect's car was a Fourth Amendment "search").

50. 556 U.S. 332, 335 (2009) (narrowing circumstances justifying search incident to arrest of automobile).

51. *See* Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 69 (1996) (explaining that the Fourth Amendment (and its sister provision in the Massachusetts state constitution) specified seizures of "persons" to highlight the "heightened sensitivity government should show" when "bodily arrests" were involved and citing Wilkes and Entick as "paradigm cases" that influenced the framers and noting that both involved "bodily arrests").

Amendment rule.[52] Until relatively recently, it was a rule without any real exception.[53]

Arrest warrants, however, are not usually required. The Supreme Court's 1976 decision in *United States v. Watson*[54] endorsed the "ancient common-law" rule that a warrant is not required for any felony arrest that occurs in public and which is supported by probable cause.[55] Warrantless arrests for misdemeanors committed in the officer's presence are also permitted.[56]

The Court recognized in *Watson* and in *Gerstein v. Pugh*[57] "that maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest."[58] The cost of requiring arrest warrants, however, was viewed by both the *Watson* and *Gerstein* Courts as "an intolerable handicap for legitimate law enforcement."[59] Although the *Watson* Court counseled that seeking an arrest warrant would be, where "practicable," the "wise" course, in prac-

52. Dunaway v. New York, 442 U.S. 200, 208 (1979) (holding that the probable cause standard applies to all arrests). As the Court explained in *Kaupp v. Texas*, 538 U.S. 626, 629 (2003), as of 2003, the Court "[had] never sustained against a Fourth Amendment challenge the involuntary removal of a suspect from his home . . . absent probable cause." (quoting Hayes v. Florida, 470 U.S. 811, 815 (1985)).

The difficulty of quantifying probable cause, of course, means that even this core component of the rule is hardly fixed. *Compare* Sherry F. Colb, *Probabilities in Probable Cause and Beyond: Statistical Versus Concrete Harms*, 73 L. & CONTEMP. PROBS. 69, 71 (2010) ("We do not know exactly what the phrase 'probable cause' means, in strict numerical terms."), *with* Andrew E. Taslitz, Foreword, *The Death of Probable Cause*, 73 L. & CONTEMP. PROBS. i, ii (2010) (explaining that "for several decades, most judges understood probable cause's quantitative requirement to hover around a preponderance of the evidence," but asserting that the Court's recent decisions reflected a lower probability).

53. *See* discussion of material witness arrests *infra* Section I.A.3. It is perhaps more accurate to state that the rule has not had any lawful exception. For details about a long-term, unlawful practice in Detroit of arresting and detaining for "hours or even days" witnesses to homicides, see Pam Belluck, *Detroit Police Case Wide Net Over Homicide 'Witnesses,'* N.Y. TIMES (Apr. 11, 2001), http://www.nytimes.com/2001/04/11/us/detroit-police-cast-wide-net-over-homicide-witnesses.html?pagewanted=all (explaining that "[t]he law is clear" that "police cannot arrest" witnesses, but documenting dozens of reports (and eventual lawsuits) for witnesses detained by Detroit police).

54. 423 U.S. 411 (1976).

55. *Id.* at 418, 421, 422–23 (observing that the common-law rule had "survived substantially intact" at both the state and national level). According to Wayne LaFave, by 1965 (a decade before *Watson*), it was "routine [for officers] to make arrests without [a] warrant," and even when warrants were sought, "judicial participation . . . [was] infrequent and . . . perfunctory." WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 15–16 (Frank J. Remington ed., 1965).

56. *See Watson*, 423 U.S. at 422–23.

57. 420 U.S. 103 (1975) (preceding *United States v. Watson* by one year).

58. *Watson*, 423 U.S. at 417; Gerstein v. Pugh, 420 U.S. 103, 113 (1975).

59. *Watson*, 423 U.S. at 417, 423–24 (quoting *Gerstein*, 420 U.S. at 113–14) (stating that even if the Court might prefer that officers obtain warrants, "we decline to transform this judicial preference into a constitutional rule when the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause rather than to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like").

tice this is rarely done.[60] For arrests inside a suspect's home, however, the Court has required that the government obtain a warrant.[61]

2. Permitting Custodial Arrests for Minor Offenses

In the decades following *Watson*, the government's power to arrest criminal suspects otherwise remained relatively stable.[62] Since the turn of the century, however, the Court has decided several important cases—including *Atwater v. City of Lago Vista*,[63] *Virginia v. Moore*,[64] and *Ashcroft v. al-Kidd*[65]—that have effectively expanded the power of the police to arrest criminal suspects.

Twenty-five years after *Watson*, in *Atwater v. City of Lago Vista*, the Supreme Court turned its attention to the question of the reasonableness of arrests for "very minor" offenses.[66] In *Atwater*, the majority held that a police officer's decision to take the plaintiff into custody for a seat belt violation (her children were not properly seat belted) was constitutional.[67] This was true even where (i) the violation was punishable only by a fine and (ii) the record indicated that the officer's subjective intention was "gratuitous humiliation[]" of the arrestee.[68]

The *Atwater* Court purported to weigh the government's interest but without real scrutiny of the need to take low-level offenders like Atwater into custody. In fact, the Court ultimately rejected the idea that the government should have to make any specific showing:

> [A] responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review. . . . Courts attempt-

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60. *Id.* at 423–24 (noting that officers' "judgments about probable cause [to arrest] may be more readily accepted where backed by a warrant").

61. Payton v. New York, 445 U.S. 573, 586 (1980) (holding that warrantless arrests in the home are "presumptively unreasonable").

62. *Cf.* Kerr, *Equilibrium*, *supra* note 23, at 521–22 (following discussion of *Watson*, Kerr notes that "[t]he basic facts of an arrest by a government agent for a felony are the same today as they were at common law," and accordingly "the law of arrests has remained the same"). *But cf.* Thomas K. Clancy, *What Constitutes an "Arrest" Within the Meaning of the Fourth Amendment?*, 48 VILL. L. REV. 129, 157–66 (2003) (describing confusion resulting from the Court's shifting approach to defining the line between a stop and an arrest).

63. 532 U.S. 318, 340, 354–55 (2001) (holding that the Fourth Amendment does not prohibit warrantless custodial arrests for minor offenses).

64. 553 U.S. 164, 176 (2008) (establishing "that warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution" even where state law prohibited arrest for that offense).

65. 131 S. Ct. 2074, 2084–85 (2011) (finding no Fourth Amendment violation for the plaintiff's arrest and two-week detention under the Material Witness statute).

66. *Atwater*, 532 U.S. at 354.

67. *Id.* ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.").

68. *Id.* at 346–47 ("[T]he physical incidents of arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment.").

> ing to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules.[69]

The *Atwater* Court was reluctant to impose on officers in the field a new judicially drawn line between fine-only offenses and those punishable by any term of imprisonment.[70] This suggested a possible exception to the new *Atwater* rule. What if the rule forbidding arrests for fine-only offenses was a legislative directive? Several years later, in *Virginia v. Moore*, the Court held that there was no Fourth Amendment violation even when the decision to effect a custodial arrest directly contravened a state law requiring police to issue a summons for the particular infraction.[71]

The *Atwater* Court expressed doubt that there was any meaningful proliferation of custodial arrests for minor offenses.[72] In fact, however, misdemeanor arrests and prosecutions around the country were rapidly climbing.[73] Recent data from New York City document high numbers of arrests and prosecutions for "quality-of-life" offenses (including, e.g., gambling, loitering, making graffiti, disorderly conduct, and riding a bike on the sidewalk).[74] Even before *Atwater* was decided, scholars observed this phenomenon.[75] In the wake of Eric Garner's 2014 death, critics have asked why police would use force to subdue a person suspected of selling untaxed cigarettes.[76] Evidence of so much aggressive policing of misde-

69. *Id.* at 347 (citation omitted) (first citing United States v. Robinson, 414 U.S. 218, 234–35 (1973); then citing New York v. Belton, 453 U.S. 454, 458 (1981)).

70. *Id.*

71. Virginia v. Moore, 553 U.S. 164, 176 (2008).

72. *Atwater*, 532 U.S. at 353 (acknowledging that there were likely other examples of "comparably foolish, warrantless misdemeanor arrests" but expressing confidence that "the country is not confronting anything like an epidemic of unnecessary minor-offense arrests").

73. *See* Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 630 (2014) ("Between 1993 and 2010 the number of misdemeanor arrests [in New York City] almost doubled."); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1320 (2012) (highlighting a 2009 report from the National Association of Criminal Defense Lawyers "estimating that approximately 10.5 million nontraffic misdemeanor prosecutions occur nationally per year based on the extrapolation of caseload statistics collected from twelve states in 2006" compared to the "1.1 million persons convicted of a state felony and approximately 58,000 federal felony cases filed in the nation's largest urban counties" during the same year).

74. N.Y. STATE OFFICE OF THE ATTORNEY GEN., A REPORT ON ARRESTS ARISING FROM THE NEW YORK CITY POLICE DEPARTMENT'S STOP-AND-FRISK PRACTICES 2, app. J-1 fig.20 (2013) [hereinafter OAG ARREST REPORT], http://www.ag.ny.gov/pdfs/OAG_REPORT_ON_SQF_PRACTICES_NOV_2013.pdf (documenting high rates of quality-of-life arrests in NYC from January 2009–December 2012).

75. *See, e.g.*, Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows:* Terry, *Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 462, 476 (2000) (documenting an increase in the number of people arrested for low-level offenses as well as an increase in the numbers of those cases that were dismissed (i.e., a decrease in the quality of the arrests)); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 590 (1997) (noting that in New York City, "quality-of-life enforcement has been aggressively pursued by police executives invoking the Broken Windows idea" and predicting eventual community alienation).

76. *See supra* notes 4–7 and accompanying text; *see also* John Marzulli et al., *NYPD No. 3's Order to Crack Down on Selling Loose Cigarettes Led to Chokehold Death of Eric Garner*, N.Y.

meanors and quality-of-life offenses suggests that the Court's assumptions in *Atwater* about the lack of abuses ought to be revisited.

3. Arresting Criminal Suspects as Material Witnesses

The traditional arrests described above require that police have probable cause to believe that the arrestee committed a crime.[77] What ability do law enforcement officers have to arrest criminal suspects if their suspicion does not rise to the level of probable cause? The answer traditionally found in criminal procedure treatises and law school casebooks would have been none. But in most criminal procedure casebooks now, that black letter proposition is accompanied by an asterisk or qualified by a note about the federal Material Witness Statute[78]: explaining how it operates, documenting its use to arrest and detain terrorism suspects, and citing the Supreme Court's 2011 decision in *Ashcroft v. al-Kidd.*[79]

Ashcroft v. al-Kidd was the first and only Supreme Court case challenging the government's post-9/11 use of the Material Witness Statute.[80] The statute permits the arrest of individuals who have information that is "material in a criminal proceeding . . . if it is shown that it may become impracticable to secure [their] presence . . . by subpoena."[81] The statute has been interpreted broadly, allowing the arrest of witnesses to ongoing grand jury investigations as well as trial witnesses.[82] The heart of Abdullah al-Kidd's claim was that former Attorney General John Ashcroft had instituted a department-wide policy to use the federal Material Witness Statute pretextually to detain criminal suspects on less than probable

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DAILY NEWS (Aug. 7, 2014, 2:30 AM), http://www.nydailynews.com/new-york/nyc-crime/wife-man-filmed-chokehold-arrested-article-1.1893790; George F. Will, Editorial, *Eric Garner, Criminalized to Death*, WASH. POST, Dec. 11, 2014, at A21 ("Garner died at the dangerous intersection of something wise, known as 'broken windows' policing, and something worse than foolish: decades of overcriminalization."). In his editorial, Will quotes Professor Stephen Carter who observed that:

> It's unlikely that the New York Legislature, in creating the crime of selling untaxed cigarettes, imagined that anyone would die for violating it. But a wise legislator would give the matter some thought before creating a crime. Officials who fail to take into account the obvious fact that the laws they're so eager to pass will be enforced at the point of a gun cannot fairly be described as public servants.

Will, *supra*.

77. *See* Dunaway v. New York, 442 U.S. 200, 208 (1979).

78. 18 U.S.C. § 3144 (2012) ("Release or detention of a material witness.").

79. 131 S. Ct. 2074 (2011); *see, e.g.*, RONALD JAY ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 134 (3d ed. Supp. 2014) (citing *al-Kidd*, 131 S. Ct. 2074, and noting the case presented "an unusual context in which the arrest power may exist even *without* probable cause to believe the arrestee has committed an infraction, much less a crime"); YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 352–53 (13th ed. 2012) (citing *al-Kidd*, 131 S. Ct. 2074; United States v. Awadallah, 349 F.3d 42 (2d Cir. 2003)).

80. *al-Kidd*, 131 S. Ct. at 2079.

81. 18 U.S.C. § 3144 ("Release or detention of a material witness").

82. *See Awadallah*, 349 F.3d at 49–62 (providing detailed analysis of legislative history to support determination that 18 U.S.C. § 3144 applies to grand jury witnesses); *see also* Lauryn P. Gouldin, *When Deference is Dangerous: The Judicial Role in Material-Witness Detentions*, 49 AM. CRIM. L. REV. 1333, 1346–47 (2012) (analyzing legislative history and scholarly critiques of application of statute to material witnesses).

cause.[83] Al-Kidd's journey to the Supreme Court focused public attention on the government's novel and highly controversial use of the Material Witness Statute as an investigative detention tool.[84] In the years following September 11, scores of material witnesses were detained in maximum-security facilities for extended periods while their alleged connections to various terrorist plots were investigated.[85] Many were never called to testify before the grand jury (or in any other criminal proceeding).[86]

In media reports and in amicus briefs, government officials emphasized that the power to detain suspects as material witnesses was an essential counterterrorism tool.[87] This claim of necessity was not tested by the *al-Kidd* Court, however. Reversing the Ninth Circuit, the Court unanimously held that Ashcroft was entitled to qualified immunity because he had not violated a clearly established law.[88] A majority of five Justices also rejected al-Kidd's claim against Ashcroft on the merits, refusing to invalidate the warrant solely on al-Kidd's assertion of prosecutorial pretext.[89] In other words, when provided with an opportunity to prohibit the government from using the Material Witness Statute to detain criminal suspects, the Court declined to do so. Although the Court did not explicitly authorize the use of the Material Witness Statute as an investigative detention tool, the decision in *al-Kidd* implicitly facilitated the continued

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83. *al-Kidd*, 131 S. Ct. at 2079.

84. Gouldin, *supra* note 82, at 1336–37.

85. HUMAN RIGHTS WATCH, WITNESS TO ABUSE: HUMAN RIGHTS ABUSES UNDER THE MATERIAL WITNESS LAW SINCE SEPTEMBER 11, at 1–3 (2005), http://www.hrw.org/sites/default/files/reports/us0605_0.pdf. In a September 2014 Report, the Department of Justice Office of the Inspector General (OIG) suggested that the statute had been used to detain fewer than 100 material witnesses in international terrorism cases since September 2001. U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., A REVIEW OF THE DEPARTMENT'S USE OF THE MATERIAL WITNESS STATUTE WITH A FOCUS ON SELECT NATIONAL SECURITY MATTERS 14 (2014) [hereinafter OIG REPORT], https://oig.justice.gov/reports/2014/s1409r.pdf. OIG noted that this "represented a tiny fraction of [its] . . . overall use." *Id.* at v. The statute is used regularly in immigration and human trafficking cases and, from 2000 to 2012, over 58,000 material witnesses were arrested by the federal government. *Id.* at 1, 13.

86. *See* HUMAN RIGHTS WATCH, *supra* note 85, at 2.

87. Gouldin, *supra* note 82, at 1335–36, 1345 (collecting statements made by former Attorneys General, former White House Counsel and former United States Attorney for the Southern District of New York in support of the use of the statute to detain terrorism suspects).

88. The Court explained that "[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *al-Kidd*, 131 S. Ct. at 2085. Qualified immunity for Ashcroft was appropriate because "[a]t the time of al-Kidd's arrest, not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional.". *Id.* at 2083. Justice Ginsburg concurred in the judgment stating that "no 'clearly established law' renders Ashcroft answerable in damages." *Id.* at 2087 (Ginsburg, J., concurring). Justice Sotomayor also concurred "that Ashcroft did not violate clearly established law." *Id.* at 2089 (Sotomayor, J., concurring). Justice Kagan recused herself. *Id.* at 2085 (majority opinion).

89. *See id.* at 2085 ("[A]n objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive."). Whether al-Kidd had "concede[d]" the validity of the warrant for purposes of his suit against Ashcroft (or more broadly) was the subject of disagreement among the Justices and prompted several concurrences. *See id.* at 2083 & n.3.

use of the statute in this way, effectively broadening the government's seizure power.[90]

To be fair, the questions presented to the *al-Kidd* Court were limited in scope, and as Justice Kennedy explained in his concurrence, the Court's decision left "unresolved whether the Government's use of the Material Witness Statute in this case was lawful."[91] That issue continued to be litigated in the district court and at the Ninth Circuit until December of 2014 when an out-of-court settlement of the lawsuit was announced.[92]

Material witnesses are a very narrow category of federal arrestees, and the power to arrest material witnesses may for now be dormant—on reserve until the next emergency.[93] Nevertheless, as outlined in Part III, it is another example of an expansion of seizure power that seems to have resulted from (or been facilitated by) problems with the Court's evaluation of necessity in seizure cases.[94]

Although an arrest is the "quintessential[]" Fourth Amendment seizure of a person,[95] the definition of a seizure developed by the Supreme Court over the last five decades includes other less intrusive restraints on movement that are briefly addressed in the following sections.

B. Stopping Power

Until 1967, if an individual was not actually arrested by police, courts did not generally find that a Fourth Amendment seizure had oc-

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90. *See* OIG REPORT, *supra* note 85, at 77 ("Under the [*al-Kidd*] Court's Fourth Amendment analysis, if detention can be objectively justified by the need to secure the witness's testimony, it does not matter if the subjective intent of the relevant officials was something else, such as to detain the individual pending the development of probable cause to arrest him.").

91. *al-Kidd*, 131 S. Ct. at 2085 (Kennedy, J., concurring).

92. In al-Kidd's *Bivens* action against the FBI agents who effected his arrest, the District Court of Idaho granted al-Kidd summary judgment, finding that al-Kidd's detention did not comply with the requirements of the statute. *See* al-Kidd v. Gonzales, No. 1:05-CV-093, 2012 WL 4470782, at *1, *6 (D. Idaho Sept. 27, 2012). The government's appeal of that decision was pending before the Ninth Circuit when the case was settled. *See* Richard A. Serrano, *Muslim American Caught Up in Post-9/11 Sweep Gets an Apology*, L.A. TIMES (Feb. 14, 2015, 5:00 AM), http://www.latimes.com/nation/la-na-detainee-apology-20150214-story.html#page=1. Al-Kidd received $415,000 and an acknowledgment from Wendy J. Olson, the U.S. Attorney for the District of Idaho, that fell short of an actual apology (despite the *Times* headline). *Id.* Olson wrote that "[t]he government acknowledges that your arrest and detention as a witness was a difficult experience for you and regrets any hardship or disruption to your life that may have resulted from your arrest and detention." *Id.* (quoting Letter from Wendy J. Olson, U.S. Attorney, to Abdullah al-Kidd (Jan. 15, 2015)).

93. OIG found that the use of the statute to detain material witnesses in connection with terrorism investigations was "concentrated in the 2-year period immediately following the September 11 attacks" and that no witness had been detained in an international terrorism investigation since 2004. OIG REPORT, *supra* note 85, at 65–66.

94. *See infra* Part III.

95. Payton v. New York, 445 U.S. 573, 585 (1980) (quoting United States v. Watson, 423 U.S. 411, 428 (1976) (Powell, J., concurring)).

curred.[96] To arrest a criminal suspect, police had to have probable cause to suspect the person of having committed a crime,[97] but no suspicion was required for lesser police encounters (which included, for example, a police officer approaching an individual to request information).[98]

1. Terry and its Recent Progeny

The Supreme Court's 1967 decision in *Terry v. Ohio* made clear that street "stops"—ever after deemed *Terry* stops—were Fourth Amendment seizures even though the intrusion on individual rights fell short of a full-blown custodial arrest.[99] Cognizant of the realities facing street-level law enforcement, the *Terry* Court declined to require either probable cause or a warrant for the stop (and frisk) that were the focus of the case. Although Chief Justice Warren, who authored the majority opinion, carefully avoided explicitly defining the requirements of a "stop,"[100] Justice Harlan, in his oft-quoted concurring opinion, set out the reasonable suspicion standard for which the case would come to be known.[101] As Justice Harlan explained, because a stop is a lesser Fourth Amendment intrusion, less suspicion is required.[102] After *Terry*, a stop is justified if a police officer has a reasonable or "articulable suspicion" that "criminal activity may be afoot."[103] *Terry* is equally well-known for deeming a "frisk" to be a Fourth Amendment event. A *Terry* frisk—which is something less than a "full-blown search"—is justified if an officer has a reasonable suspicion that a person he or she has stopped is armed and dangerous.[104] Although stops and frisks, like their search and

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96. *See* Terry v. Ohio, 392 U.S. 1, 19 (1968) (explaining (and rejecting) prior view that "the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest'").

97. *See* Dunaway v. New York, 442 U.S. 200, 208 (1979) (noting that prior to *Terry*, "the requirement of probable cause [to make an arrest] . . . was treated as absolute").

98. *See Terry*, 392 U.S. at 16.

99. *Id.* ("It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."); *see also* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 369–70 n.16 (2011) (clarifying that before *Terry* these encounters were not constitutionally protected).

100. *Terry*, 392 U.S. at 19 & n.16 ("We thus decide nothing today concerning the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation.").

101. *Id.* at 32–33 (Harlan, J., concurring); *see also* John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court's Conference*, 72 ST. JOHN'S L. REV. 749, 793–821 (1998) (documenting the shift from probable cause to reasonableness in the drafting of the *Terry* opinions); Earl C. Dudley, Jr., Terry v. Ohio, *the Warren Court, and the Fourth Amendment: A Law Clerk's Perspective*, 72 ST. JOHN'S L. REV. 891, 895–96 (1998).

102. *Terry*, 392 U.S. at 31–32 (Harlan, J., concurring).

103. The concept of reasonable suspicion for which *Terry* is known is drawn from Justice Harlan's concurrence. *Terry*, 392 U.S. at 31, 33 (Harlan, J., concurring) (explaining the concept of an "articulable suspicion less than probable cause" and concluding that Officer McFadden's "justifiable suspicion afforded a proper constitutional basis for accosting Terry, restraining his liberty of movement briefly, and addressing questions to him"). The "criminal activity may be afoot" language is drawn from the majority opinion. *Id.* at 30 (majority opinion).

104. *Id.* at 19, 27.

seizure big siblings, are often conjoined in theory and practice, the focus of this Article is on the seizure component of the pair: the stop.

In seizure cases decided since *Terry* that involve something less than an arrest, the Court has generally evaluated the government's conduct using the sort of reasonableness balancing that the *Terry* Court employed.[105] As the *Terry* Court explained: "[T]here is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'"[106] In *Brown v. Texas*,[107] decided eleven years after *Terry*, the Court elaborated further on how to balance reasonableness in seizure cases:

> The reasonableness of seizures that are less intrusive than a traditional arrest, depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.[108]

In the nearly fifty years since *Terry*, the Court has significantly broadened the definition of reasonable suspicion and narrowed both (i) the circumstances that will be deemed a stop (instead of a mere encounter) and (ii) the circumstances that will convert a stop into an arrest (requiring probable cause).[109] As outlined below, decisions issued by the Court in the last fifteen years have continued this trend. The cumulative effect of these decisions—pulling back from the exigency presented in

105. *See, e.g.*, Brown v. Texas, 443 U.S. 47, 50–51 (1979).

106. *Terry*, 392 U.S. at 21 (alterations in original) (quoting Camara v. Mun. Court of S.F., 387 U.S. 523, 536–37 (1967)).

107. 443 U.S. 47 (1979).

108. *Id.* at 50–51 (citations omitted) (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975)).

109. *See, e.g.*, Florida v. Bostick, 501 U.S. 429, 439 (1991) (holding that an individual's consent to search is voluntary if, under the totality of the circumstances, a reasonable person would have felt free to refuse to cooperate with the police); Alabama v. White, 496 U.S. 325, 332 (1990) (holding that "under the totality of the circumstances the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop of respondent's car" when police observed and corroborated some of the innocent behaviors reported in the tip); United States v. Sharpe, 470 U.S. 675, 687–88 (1985) (holding that a 20-minute delay between the initial traffic stop and search of the vehicle was constitutionally permissible); Berkemer v. McCarty, 468 U.S. 420, 442 (1984) (holding that the only relevant inquiry as to custody is how a reasonable man in the suspect's position would have understood his situation); United States v. Place, 462 U.S. 696, 707 (1983) (holding that a narcotics dog "sniff test" was reasonable in a brief *Terry* stop situation); United States v. Mendenhall, 446 U.S. 544, 554 (1980) (giving examples of factors, the presence of which may indicate that exchange with police constitutes a seizure: "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled"); Dunaway v. New York, 442 U.S. 200, 216 (1979) (holding incriminating statements made in custody were fruits of an illegal seizure because the application of the Fourth Amendment's requirement of probable cause does not depend on whether an intrusion is termed an "arrest" under state law).

Terry, lengthening the time span and intrusiveness of *Terry* stops, and moving away from requiring specificity about the offense of suspicion—is readily seen in the dramatic increase in the use of stops and frisks as a regulatory or deterrent tool to manage crime in urban communities.[110] The story of the expansion of *Terry* in the twenty-first century includes several important Court decisions. It is also, however, the story of police exploiting the Court's deferential, laissez faire approach to regulating police conduct in this context.[111]

2. Reasonable Suspicion: Lowering the Bar

The Court's 2000 decision in *Illinois v. Wardlow*[112]—finding that an individual's flight from police in a high-crime neighborhood could justify a stop—significantly broadened the definition of reasonable suspicion.[113] Before *Wardlow*, the Court had held that if an individual was free to leave or terminate an encounter with the police, she was not "seized" under the Fourth Amendment.[114] The Court's pre-*Wardlow* decisions made clear that if the police did not have reasonable suspicion to subject a person to a *Terry* stop, that person had a right to walk away (or otherwise terminate an encounter with police).[115]

The *Wardlow* majority, however, curiously found that the speed with which a person exercised his right to leave an encounter could transform constitutionally legitimate behavior into articulable suspicion.[116] In other words, although prior cases provided a right to walk away, the *Wardlow* Court held that when Wardlow ran from police, his flight created reasonable suspicion for a stop.[117] *Wardlow* was perhaps as noteworthy for what the opinion omitted or downplayed: there was no crime of suspicion identified, it was unclear whether the officers were in unmarked cars (which is essential to determining the significance of the

110. *See Stop-and-Frisk Data*, N.Y.C.L.U., http://www.nyclu.org/content/stop-and-frisk-data (last visited Sep. 19, 2015) (documenting dramatic increase in stops and frisks in New York City); *see also* ACLU OF ILLINOIS, STOP AND FRISK IN CHICAGO 3 (2015), http://www.aclu-il.org/wp-content/uploads/2015/03/ACLU_StopandFrisk_6.pdf (providing data on stop-and-frisk practices in Chicago; claiming that rate of stops in Chicago outpaced New York by 4 to 1).

111. Frank Zimring has outlined the "basic methodology" of New York's "aggressive" street policing: officers conduct stops and frisks "of suspicious-looking persons" and then "mak[e] arrests for minor offenses as a way to remove perceived risks from the street and to identify persons wanted for other crimes." FRANKLIN E. ZIMRING, THE CITY THAT BECAME SAFE 118 (2012). See *infra* Section III.A.1 for a discussion of the issues presented in the New York City stop-and-frisk litigation.

112. 528 U.S. 119 (2002).

113. *Id.* at 124–25.

114. *See infra* Section I.E.

115. *See infra* Section I.E.

116. *Wardlow*, 528 U.S. at 125 ("[U]nprovoked flight is simply not a mere refusal to cooperate.").

117. *Id.* at 122–25. The *Wardlow* Court rejected the approach taken by the Illinois Supreme Court which had held that flight was an exercise of the *Royer* right to leave an encounter with police (and thus could not be a basis for reasonable suspicion). *Id.* at 122–23. Instead, the *Wardlow* Court deemed flight "the opposite" of "going about one's business." *Id.* at 125.

flight), and there was no data to support the claim that this was a high-crime neighborhood.[118]

In *United States v. Arvizu*,[119] decided two years later, a unanimous Court upheld a stop based on a combination of factors that the Court acknowledged would have been insufficient to establish reasonable suspicion independently.[120] In *Arvizu*, as in prior decisions, the Court emphasized the need to "give[] due weight to the factual inferences drawn by the law enforcement officer."[121]

More recently, in April 2014, the Supreme Court issued its decision in *Navarette v. California*, a case involving two brothers who were arrested and charged with felony drug charges by state authorities.[122] The central issue in the *Navarette* case was whether an anonymous tip from another driver, who claimed that the defendants had attempted to drive her off the road, was sufficient to establish the reasonable suspicion required for a lawful stop.[123]

In a split 5–4 decision, the Court held that it was.[124] *Navarette* significantly limits the Court's earlier decision in *Florida v. J.L.*, which held that an anonymous tip with limited description of the suspect and no predictive elements was insufficient to establish reasonable suspicion for a stop.[125] The tip in *J.L.* was that a young, black male wearing a plaid shirt standing at a bus stop was carrying a firearm.[126] The Court held that the information in the tip did not establish reasonable suspicion for the stop and frisk of J.L.[127]

Prior to *Navarette*, scholars viewed corroboration of an anonymous tip—and specifically of the criminal conduct alleged in the tip—as essential to a determination that an anonymous tip could qualify as reasonable suspicion.[128] After *Navarette*, not much is required to make an anony-

118. *Id.* at 138–39 (Stevens, J., dissenting).
119. 534 U.S. 266 (2002).
120. *Id.* at 275–77 (permitting reasonable suspicion for stop based on officer's observation that driver was stiff, children waved awkwardly, and car slowed at sight of officer (among other factors)).
121. *Id.* at 277.
122. Navarette v. California, 134 S. Ct. 1683, 1686–87.
123. *Id.* at 1688–89.
124. *Id.* at 1686.
125. Florida v. J.L., 529 U.S. 266, 268 (2000); *see also* Katie Barlow & Nina Totenberg, *Supreme Court Gives Police New Power to Rely on Anonymous Tips*, NPR (Apr. 22, 2014, 7:40 PM), http://www.npr.org/2014/04/22/305993180/court-gives-police-new-power-to-rely-on-anonymous-tips; Lyle Denniston, *Opinion Analysis: Big New Role for Anonymous Tipsters*, SCOTUSBLOG (Apr. 22, 2014, 9:10 PM), http://www.scotusblog.com/2014/04/opinion-analysis-big-new-role-for-anonymous-tipsters/ (observing "that the Court had added significantly to police authority to conclude that they must act because a crime is in progress").
126. *J.L.*, 529 U.S. at 268.
127. *Id.* at 274.
128. *See, e.g.*, Andrew Guthrie Ferguson, *Predictive Policing and Reasonable Suspicion*, 62 EMORY L.J. 259, 292 (2012) (explaining that for an anonymous tip to constitute reasonable suspicion, "the predictive tip must be corroborated by police observation, *which means corroboration of*

mous tip reliable enough to justify the stop of a vehicle. The *Navarette* majority was satisfied that the anonymous tipster's eyewitness account seemed to have been made roughly contemporaneously with the incident alleged by the tipster.[129] The Court assumed that most 911 callers have awareness of "technological and regulatory developments" that "relay the caller's phone number to 911 dispatchers."[130] As a result, "a reasonable [police] officer could conclude that a false tipster would think twice before using such a system."[131]

It is not difficult to imagine the language that will appear in new editions of police manuals to reflect this expanded power to detain motorists; it can largely quote the majority opinion. An anonymous tip that alleges any of the following "dangerous behaviors . . . would justify a traffic stop on suspicion of drunk driving": "weaving all over the roadway," "'cross[ing] over the center line' . . . and 'almost caus[ing] several head-on collisions,'" or "driving in the median."[132] Of course, having an officer observe any of these behaviors would immediately provide reasonable suspicion. Justice Scalia, in his dissent, described the key problem in the case:

> [The officers] followed the truck for five minutes, presumably to see if it was being operated recklessly. And that was good police work. . . . But the pesky little detail left out of the Court's reasonable-suspicion equation is that, for the five minutes that the truck was being followed (five minutes is a long time), [the defendant's] driving was irreproachable.[133]

Despite the fact that they could not corroborate the anonymous report, the officers stopped the vehicle.[134]

3. *Rodriguez v. United States*: Stopping Short

In its April 2015 decision in *Rodriguez v. United States*,[135] the Court ruled in favor of the defendant, strictly limiting the scope of a traffic stop

both the specific individual and the ongoing crime" (emphasis added)); *see also* Virginia v. Harris, 558 U.S. 978, 979, 981 (2009) (Roberts, C.J., dissenting) (arguing that the Court should have granted certiorari to the question of whether an officer must visually corroborate an anonymous tip of drunk driving).

129. Navarette v. California, 134 S. Ct. 1683, 1687 n.1, 1689 (2014). The majority opinion notes that the tipper had identified herself but that she was never called to testify. *Id.* at 1689 n.1. As a result, the call was treated as an anonymous tip. *Id.*

130. *Id.* at 1690.

131. *Id.*

132. *Id.* at 1690–91 (first and third alterations in original) (first quoting People v. Wells, 136 P.3d 810, 811 (Cal. 2006); then quoting State v. Prendergast, 83 P.3d 714, 715–16 (Haw. 2004); and then quoting State v. Walshire, 634 N.W.2d 625, 626 (Iowa 2001)).

133. *Id.* at 1696 (Scalia, J., dissenting) ("Had the officers witnessed the petitioners violate a single traffic law, they would have had cause to stop the truck, and this case would not be before us. And not only was the driving irreproachable, but the State offers no evidence to suggest that the petitioners even did anything suspicious, such as suddenly slowing down, pulling off to the side of the road, or turning somewhere to see whether they were being followed." (citation omitted)).

134. *Id.*

to those steps that further the officer's "mission."[136] As Justice Thomas emphasized in his dissent, the majority's decision is not readily compatible with the Court's prior Fourth Amendment cases.[137]

Rodriguez involved a traffic stop: state police officer Morgan Struble pulled Dennys Rodriguez over after Rodriguez veered onto the shoulder of the road while driving on a Nebraska highway.[138] Stops for traffic violations like the one at issue in *Rodriguez* are a sort of hybrid seizure. They involve probable-cause-level suspicion of wrongdoing, but because the detentions involved are generally "relatively brief," they are viewed as "more analogous to a so-called 'Terry stop' . . . than to a formal arrest."[139]

The *Rodriguez* stop really involved two phases. During the first twenty minutes of the detention, Officer Struble ran a records check on both Rodriguez and his passenger; he questioned the two men; he wrote a warning ticket; and eventually, he returned to the men their documentation.[140] The legality of this first phase of the stop was not disputed by the parties.

The *Rodriguez* Court focused on what happened next during the continued seizure of Rodriguez (in what can be viewed as the second phase of the stop). Although Officer Struble admitted that he "got all the reason[s] for the stop out of the way," he declined to let Rodriguez leave.[141] Instead, he asked for "consent"[142] to walk his dog around Rodriguez's car.[143] When Rodriguez refused, Struble ordered him to get out of the car, and they waited for backup.[144] When the second officer arrived, five or six minutes after the first phase of the stop ended, the officers led Officer Struble's dog around the car.[145] The dog alerted on the second

135. 135 S. Ct. 1609 (2015).

136. *Id.* at 1612 (quoting Illinois v. Caballes, 543 U.S. 405, 407 (2005)).

137. *Id.* at 1617 (Thomas, J., dissenting). Justice Thomas emphasized that *Illinois v. Caballes* held that "conducting a dog sniff [does] not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner." *Id.* at 1617 (alternation in original) (quoting *Illinois*, 543 U.S. at 408). Also, Justice Thomas cited *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977), to support his determination that Officer Struble's decision to call for backup (and protect his safety) was reasonable under the circumstances. *Rodriguez*, 135 S. Ct. at 1618.

138. *Rodriguez*, 135 S. Ct. at 1612 (majority opinion).

139. *Id.* at 1614 (alteration in original) (quoting Knowles v. Iowa, 525 U.S. 113, 117 (1998)).

140. *Id.* at 1613.

141. *Id.* (alteration in original) (quoting statement by Officer Struble) (clarifying that Struble "did not consider Rodriguez 'free to leave'" (quoting statement by Officer Struble)).

142. As noted in Section I.E, *infra*, in the text accompanying notes 176–90, if a person does not have the right to refuse a police request, he cannot truly be found to have "consented" to a search or seizure. Based on the way that the events transpired in this case, it is clear that Officer Struble did not believe that Rodriguez had a choice about the dog sniff.

143. *Rodriguez*, 135 S. Ct. at 1613.

144. *Id.*

145. *Id.*

pass around the car.[146] During the ensuing search of the interior of the car, the officers discovered methamphetamines.[147]

Reversing the Eighth Circuit, the majority held that absent reasonable suspicion the extended detention violated the Fourth Amendment.[148] In support of its holding, the Court emphasized that the "mission" or purpose of the traffic stop was completed at the end of the first phase (when the ticket issued and the suspect's documents were returned to him).[149] As the Court explained:

> Like a Terry stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission"—to address the traffic violation that warranted the stop and attend to related safety concerns. Because addressing the infraction is the purpose of the stop, it may "last no longer than is necessary to effectuate th[at] purpose." Authority for the seizure thus ends when tasks tied to the traffic infraction are—or should have been—completed.[150]

The Court cited its previous decision in *Florida v. Royer*[151] for the proposition that "[t]he scope of the detention must be carefully tailored to its underlying justification."[152] The majority's decision is cause for optimism that the Court may be willing to require the government to defend more specific and particularized needs for a seizure.[153] This is true even when that more rigorous scrutiny will create some tension with the Court's seizure (and search) precedents.

C. Search Warrant Seizures

Police officers are also permitted to detain individuals, without probable cause or reasonable suspicion, when those individuals are inside or near a place that is being searched pursuant to a validly executed search warrant.[154] This rule, known as the *Summers* rule, was expanded significantly by the Court in its 2005 decision in *Muehler v. Mena.*[155]

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146. *Id.*
147. *Id.*
148. *Id.* at 1616.
149. *Id.* at 1614 (quoting Illinois v. Caballes, 543 U.S. 405, 407 (2005)).
150. *Id.* (alteration in original) (citations omitted) (quoting *Illinois*, 543 U.S. at 407).
151. 460 U.S. 491 (1983).
152. *Id.* (quoting Florida v. Royer, 460 U.S. 491, 500 (1983)).
153. Tracey Maclin disagrees, cautioning that Rodriguez "does not expand Fourth Amendment protections for motorists." Tracey Maclin, *Perspectives*, 100 MINN. L. REV. (forthcoming 2016) (manuscript at 17) (on file with author). In fact, Maclin argues, the case misses the opportunity to state clearly that police questioning that is unrelated to the crime that is the basis for the stop is "unreasonable" and thus unconstitutional. *Id.* at 24, 28, 33–35.
154. Michigan v. Summers, 452 U.S. 692, 705 (1981) ("[A] warrant . . . founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." (footnote omitted)); *see also* Bailey v. United States, 133 S. Ct. 1031, 1034–35 (2013) (explaining the *Summers* rule).
155. 544 U.S. 93, 98–99 (2005) (noting that the detention in *Muehler* was "more intrusive than that which [was] upheld in *Summers*").

In *Muehler*, the Court held that it was reasonable for eighteen officers conducting a search warrant to detain for two to three hours, in handcuffs, four occupants of the premises being searched.[156] Those occupants were not the targets of the officers' investigation, and they were not otherwise suspected of criminal activity.[157] The duration of their detention and the use of handcuffs the entire time set the degree of the intrusion in *Muehler* well apart from what the *Summers* decision had authorized.[158] The Court upheld this additional intrusion without meaningful inquiry into the officers' need for these precautions. The purported safety-based need to handcuff Mena rested on the fact that the two officers watching the occupants were "outnumber[ed]."[159] This safety-based need, however, was as much the product of on-site staffing allocations as anything else: there were sixteen other officers searching the house while Mena and the others were handcuffed.[160] The Court shied away from second-guessing the officers' allocation of resources.[161]

In *Bailey v. United States*, decided in 2013, the government sought—but the Court rejected—a further spatial expansion of *Summers*.[162] After obtaining a warrant to search defendant Bailey's residence for a handgun, police observed someone matching Bailey's description drive away from the residence with another individual.[163] While one group of officers executed the search warrant at the residence, two other officers followed Bailey and pulled him over about one mile away from the residence.[164] The government argued—and both the district court and the Second Circuit agreed—that *Summers* "authorizes law enforcement to detain the occupant of premises subject to a valid search warrant when that person is seen leaving those premises and the detention is effected *as soon as reasonably practicable*."[165] The Supreme Court notably rejected that extension of the *Summers* rule, holding instead that *Summers* does not authorize "the detention of occupants beyond the immediate vicinity of the premises covered by a search warrant."[166]

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156. *Id.* at 98–100.
157. *Id.* at 96.
158. Amir Hatem Ali, Note, *Following the Bright Line of* Michigan v. Summers*: A Cause for Concern for Advocates of Bright-Line Fourth Amendment Rules*, 45 HARV. C.R.-C.L. L. REV. 483, 504 (2010) ("Had the [*Muehler*] Court . . . balanced the totality of the circumstances—that is, both the detention and the handcuffing together—it would have been balancing a detention that was significantly more intrusive than that in *Summers* against the aforementioned law enforcement interests."); *see also Muehler*, 544 U.S. at 104–12 (Stevens, J., concurring).
159. *Muehler*, 544 U.S. at 103 (Kennedy, J., concurring).
160. *Id.* at 110 (Stevens, J., concurring).
161. *See infra* Section III.D (challenging the government's allocation of resources as creating the "need" in *Muehler*).
162. Bailey v. United States, 133 S. Ct. 1031, 1040–42 (2013).
163. *Id.* at 1036.
164. *Id.*
165. United States v. Bailey, 652 F.3d 197, 208 (2d Cir. 2011), *rev'd*, 133 S. Ct. 1031 (2013).
166. *Bailey*, 133 S. Ct. at 1037, 1042.

D. Suspicionless Checkpoints

Seizure doctrine has evolved to encompass high volumes of suspicionless stopping as well. In *United States v. Martinez-Fuerte*[167] and in *Delaware v. Prouse*,[168] the Court expressly established that checkpoint stops (whether at permanent checkpoints or at temporary roadblocks) are "seizures" within the Fourth Amendment.[169] Police officers may briefly stop individuals at checkpoints without any suspicion of criminal wrongdoing if the officers' "primary purpose" is something other than traditional law enforcement.[170] The Court has held that "roadway safety" and "border protection" are valid non-law-enforcement purposes for DWI stops and immigration checkpoints respectively.[171] So long as the government can articulate these sorts of regulatory goals (like highway safety and border control), the Court has permitted it to reap law enforcement benefits in the form of drunk driving and immigration arrests when violators are detected.[172]

Once the primary-purpose condition is satisfied, the Court balances the government's need for a particular checkpoint against the individual's liberty interest.[173] The degree to which the government's checkpoint procedures advance its interests while also minimizing the intrusion on liberty is generally the focus of checkpoint cases.[174] Issues like the length

167. 428 U.S. 543 (1976).

168. 440 U.S. 648 (1979).

169. *Prouse*, 440 U.S. at 653 ("The Fourth and Fourteenth Amendments are implicated in this case because stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of those Amendments, even though the purpose of the stop is limited and the resulting detention quite brief."); *Martinez-Fuerte*, 428 U.S. at 556, 566–67 ("It is agreed that checkpoint stops are 'seizures' within the meaning of the Fourth Amendment.") (upholding warrantless stop at permanent immigration checkpoint); *see also* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 450, 455 (1990) ("[A] Fourth Amendment 'seizure' occurs when a vehicle is stopped at a checkpoint.") (upholding warrantless stop at temporary sobriety checkpoint).

170. City of Indianapolis v. Edmond, 531 U.S. 32, 40–41 (2000) (holding that checkpoint to find narcotics was invalid); *see also* Illinois v. Lidster, 540 U.S. 419, 424–28 (2004) (holding that stopping members of the public to obtain information about a crime they may have observed was constitutional).

171. *Sitz*, 496 U.S. at 451; *Martinez-Fuerte*, 428 U.S. at 557.

172. *Sitz*, 496 U.S. at 447–48 (holding that Michigan's use of highway sobriety checkpoints did not violate the Fourth Amendment; thereby upholding drunk driving arrests); *Martinez-Fuerte*, 428 U.S. at 566 (holding that "stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by warrant"; affirming immigration convictions of both defendants as a result). As Ricardo Bascuas has explained, this creates obvious opportunities for pretextual stops. Ricardo J. Bascuas, *Fourth Amendment Lessons from the Highway and the Subway: A Principled Approach to Suspicionless Searches*, 38 RUTGERS L.J. 719, 759 (2007) ("If criminal charges can be brought with evidence uncovered through administrative or 'special needs' searches, those searches can provide a convenient pretext for circumventing any requirement of individualized suspicion.").

173. *Lidster*, 540 U.S. at 427 ("[I]n judging reasonableness, we look to 'the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." (quoting Brown v. Texas, 443 U.S. 47, 51 (1979))); *Edmond*, 531 U.S. at 42–43 ("[I]n determining whether individualized suspicion is required, we must consider the nature of the interests threatened and their connection to the particular law enforcement practices at issue.").

174. *Lidster*, 540 U.S. at 427; *Edmond*, 531 U.S. at 42–43.

of the stop, the location of the stop, and the limits on any questions that are asked are part of this inquiry.[175] The linchpin of checkpoint cases, however, is whether there are meaningful constraints on officer discretion, including randomization.[176]

In its 2000 decision in *City of Indianapolis v. Edmond*, the Court held that a highway checkpoint to discover illegal narcotics was unconstitutional because its "primary purpose" was the general investigation of "ordinary criminal wrongdoing."[177] Although *Edmond* signaled to some that the Court was prepared to draw meaningful limits around the use of suspicionless checkpoints (and might revisit its prior broad ban on inquiries into officer intent),[178] the Court's decision in *Illinois v. Lidster*, four years later, blurred the *Edmond* line between regulatory aims and traditional law enforcement.[179] The *Lidster* Court held that an "information-seeking" checkpoint designed to locate possible witnesses to a vehicular homicide had a valid purpose that set it apart from checkpoints to stop likely perpetrators (like those at issue in *Edmond*).[180]

E. Mere Encounters and Consent

Not every police interaction with a civilian is a Fourth Amendment event.[181] The Court, in its 1983 decision in *Florida v. Royer*, made that clear:

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by

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175. *Lidster*, 540 U.S. at 427–28; *Sitz*, 496 U.S. at 450–55.

176. *Edmond*, 531 U.S. at 42–43; *see also* Tracey L. Meares, *The Distribution of Dignity and the Fourth Amendment*, *in* THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ 125–26 (Michael Klarman et al. eds., 2012) (describing the checkpoint model as the "lodestar for reasonableness under the Fourth Amendment" and explaining "that randomization is critical to promote the value of evenhandedness, which is necessary to promote the goal of discretion control at the heart of Fourth Amendment reasonableness").

177. *Edmond*, 531 U.S. at 40–41, 48 ("Because the primary purpose of the Indianapolis checkpoint program is ultimately indistinguishable from the general interest in crime control, the checkpoints violate the Fourth Amendment.").

178. *See, e.g.*, Craig Bradley, *The Middle Class Fourth Amendment*, 6 BUFF. CRIM. L. REV. 1123, 1135 (2003) ("*Edmond* called a halt to a series of Burger Court cases that had approved of roadblocks to apprehend illegal aliens and drunk drivers." (footnote omitted)); George M. Dery, III & Kevin Meehan, *Making the Roadblock a "Routine Part of American Life:"* Illinois v. Lidster*'s Extension of Police Checkpoint Power*, 32 AM. J. CRIM. L. 105, 113–14 (2004) (noting that "despite the government's valiant efforts, the *Edmond* Court remained unconvinced that the narcotics checkpoints served any purpose other than the prohibited one of 'general interest in crime control,'" and that accordingly, the roadblocks at issue "could not be justified under the Fourth Amendment without individualized suspicion" (footnote omitted) (quoting *Edmond*, 531 U.S. at 48)).

179. *Lidster*, 540 U.S. at 427–28.

180. *Lidster*, 540 U.S. at 426–27. Lower courts attempting to police the suspect/witness line that the Court observed between *Edmond* and *Lidster* have struggled. *See, e.g.*, Palacios v. Burge, 589 F.3d 556, 562, 564 (2d Cir. 2009) (recognizing, as identified in *Edmond*, that there are only limited circumstances where individualized suspicion is not necessary and holding that under *Lidster*, where police need to acquire more information about a recent crime in the vicinity, an identification procedure may be "reasonable in context" (quoting *Lidster*, 540 U.S. at 426)).

181. Florida v. Royer, 460 U.S. 491, 497 (1983).

> putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification.[182]

The distinction between a Fourth Amendment seizure and other lesser encounters with police was initially spelled out in *Terry*: "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."[183]

The test eventually developed by the Court established that a person is seized under the Fourth Amendment when a reasonable person in his or her shoes would not feel "free to leave"[184] or to "otherwise terminate the encounter."[185] In addition, unless the suspect is physically restrained or submits to a "show of authority" by police, the Court will not find that a seizure has occurred.[186]

In this way, a "consensual seizure" is an impossibility. For consent to be meaningful, a person must have the freedom to refuse to consent. Per the *Mendenhall–Royer–Bostick* line of cases, however, if a person has freedom to leave or to terminate the encounter, she is not, in fact, seized.[187] In other words, an individual who remains in an encounter with police when the law determines that she has the freedom to leave or terminate an encounter cannot claim to have experienced a Fourth Amendment event.[188] For this reason, no affirmative consent is required. This is distinguishable from the search context where officers routinely obtain

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182. *Id.* (citations omitted); *see also* INS v. Delgado, 466 U.S. 210, 215 (1984) ("Given the diversity of encounters between police officers and citizens, however, the Court has been cautious in defining the limits imposed by the Fourth Amendment on encounters between the police and citizens.").

183. Terry v. Ohio, 392 U.S. 1, 16 (1968).

184. United States v. Mendenhall, 446 U.S. 544, 554 (1980) ("[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."); *see also* Maclin, *Locomotion*, *supra* note 30, at 1299–1302 (criticizing *Mendenhall-Royer* free-to-leave test and asserting that Court's embrace of common law right of inquiry (i.e., police right to stop and ask questions of individuals on the street) significantly reduces Fourth Amendment protections and infringes the right of locomotion).

185. Florida v. Bostick, 501 U.S. 429, 434, 439–40 (1991) (enlarging *Mendenhall* test).

186. California v. Hodari D., 499 U.S. 621, 626, 629 (1991).

187. *Cf.* Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN DIEGO L. REV. 507, 515–16 (2001) (describing the "assumption that when an individual agrees to police requests to engage in conversation, she is not submitting to a 'show of authority' of the kind that would convey the message that she is not free to leave" (quoting *Hodari D.*, 499 U.S. at 625)).

188. *See* Florida v. Rodriguez, 469 U.S. 1, 5–6 (1984) (describing the type "of consensual encounter that implicates no Fourth Amendment interest"); *Bostick*, 501 U.S. at 434–35 ("We have stated that even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, ask to examine the individual's identification, and request consent to search his or her luggage—as long as the police do not convey a message that compliance with their requests is required." (citations omitted)).

affirmative consent to search and where the issue then litigated is the voluntariness of that consent.[189]

The *Mendenhall–Royer–Bostick* line of cases is controversial because the Court hypothesizes more freedom to terminate encounters with police than most people actually feel. As Tracey Maclin explained: "Common sense teaches that most of us do not have the chutzpah or stupidity to tell a police officer to 'get lost' after he has stopped us . . . ."[190] Even those of us who may know, as a legal matter, that we are free to leave or terminate certain encounters with police, may not actually feel free to do so.[191]

In decisions that attempted to address that concern, and which relied on language from the Court's earlier decision in *Bostick*, the Eleventh Circuit developed a test that arguably required officers conducting bus sweeps to alert passengers that they were not required to comply with the officers' requests.[192] As the Eleventh Circuit explained, "Absent some positive indication that they were free not to cooperate, it is doubtful a [bus] passenger would think he or she had the choice to ignore the police presence."[193] In its 2002 decision in *United States v. Drayton*,[194] however, the Supreme Court sharply rejected the idea that officers conducting bus sweeps should have to advise passengers of their right to terminate the encounter.[195]

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189. Schneckloth v. Bustamonte, 412 U.S. 218, 225–28 (1973) (explaining the test for determining the voluntariness of consent in search cases).

190. Maclin, *Encounters*, *supra* note 30 at 249–50.

191. *See id.*; *see also* Steinbock, *supra* note 187, at 528 ("Like other constitutional doctrines, the law of consensual encounters is hard enough for experts to decipher. Its counter-intuitive and largely inscrutable boundaries create a conundrum for law enforcement personnel and citizens alike. From the citizen's standpoint, uncertainty will almost surely breed compliance."); Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1794 (1994) ("An optimist who reads the Supreme Court's decisions finding that no seizure had occurred might focus on the inherent courage to stand up to authority that the Court presupposes in the citizenry. A passenger seated on a bus that is about to depart, for instance, apparently is sufficiently steeped in constitutional courage that he is capable of telling gun-toting police who have singled him out for questioning that he wishes to be left alone.").

192. United States v. Washington, 151 F.3d 1354, 1357 (11th Cir. 1998), *abrogated by* United States v. Drayton, 536 U.S. 194 (2002).

193. *Id.* at 1357 ("It seems obvious to us that if police officers genuinely want to ensure that their encounters with bus passengers remain absolutely voluntary, they can simply say so. Without such notice in this case, we do not feel a reasonable person would have felt able to decline the agents' requests."); *see also* United States v. Drayton, 231 F.3d 787, 790 (11th Cir. 2000) (coming to the same conclusion as *United States* v. *Washington*), *rev'd*, 536 U.S. 194 (2002); United States v. Stephens, 206 F.3d 914, 917–18 (9th Cir. 2000) (relying on *Washington* to hold that bus passenger should have been advised of right to terminate encounter with officer before being asked for consent to search).

194. 536 U.S. 194 (2002).

195. *Id.* at 207 ("[T]he Court has repeated that the totality of the circumstances must control, without giving extra weight to the absence of this type of warning."); *see also* Ohio v. Robinette, 519 U.S. 33, 35, 39–40 (1996) ("We are here presented with the question whether the Fourth Amendment requires that a lawfully seized defendant must be advised that he is 'free to go' before his consent to search will be recognized as voluntary. We hold that it does not. . . . [I]t [would] be unrealistic to require police officers to always inform detainees that they are free to go before a consent

Drayton was not the only decision in this time period that shifted the line between an encounter and a stop. As noted above, the Court's decision in *Wardlow*—which expanded the definition of reasonable suspicion to include flight from police—also served to restrict the manner in which an individual could exercise his or her freedom to leave an encounter with police.[196]

F. Excessive Force

The final category of Fourth Amendment seizure cases operates differently from the preceding categories of seizures. In all of the prior categories, the focus has been on defining the circumstances in which police may effect seizures of varying degrees—the *when* question. But the Fourth Amendment also governs the *how* question, regulating the force that can be used to effect seizures that are permitted. As the Court recently reiterated in *Plumhoff v. Rickard*,[197] "[a] claim that law-enforcement officers used excessive force to effect a seizure is governed by the Fourth Amendment's 'reasonableness' standard."[198]

The standard for use of deadly force to apprehend suspects was set by the Court in *Tennessee v. Garner*[199] in 1985. The *Garner* Court held that where there is no danger or threat to the officer or others, the government's interest in apprehending the individual does not justify the use of deadly force nor does it outweigh the suspect's interest in his own life.[200] Where there is probable cause to believe that the suspect poses a threat of serious physical harm to the officer or others, however, the Court indicated that the use of deadly force would not be unreasonable.[201]

The Court has issued two use-of-force decisions since 2000 that have expanded on its holding in *Garner*. In *Scott v. Harris*,[202] decided in 2007, the Court held that, given the high risk to bystanders, the officer's decision to ram his vehicle into a fleeing suspect's car to end a dangerous

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to search may be deemed voluntary."); INS v. Delgado, 466 U.S. 210, 216 (1984) ("While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response.").

For a thoughtful critique of the Court's conclusion (in the search context) that asking police officers to advise individuals of their right to refuse to consent to a search would create "practical difficulties," see Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 869–72 (2014) (characterizing the Court's conclusion as "highly suspect").

196. Illinois v. Wardlow, 528 U.S. 119, 124–25 (2000).

197. 134 S. Ct. 2012 (2014).

198. *Id.* at 2020; *see also* Tennessee v. Garner, 471 U.S. 1, 7 (1985) ("While it is not always clear just when minimal police interference becomes a seizure, there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." (citation omitted)).

199. 471 U.S. 1 (1985).

200. *Id.* at 11.

201. *Id.*

202. 550 U.S. 372 (2007).

high-speed chase was reasonable.[203] The majority was quick to reject the dissent's argument that the officers' continued pursuit of the suspect unnecessarily escalated the situation.[204]

In *Plumhoff v. Rickard*, decided in 2014, the Court held that police firing fifteen gunshots into a vehicle (and killing the two occupants) did not violate the Fourth Amendment.[205] The Court explained, relying on *Scott*, that this was a reasonable use of force to end the pursuit of a fleeing vehicle because the suspect's driving posed a public-safety risk.[206] These cases, relying on a case-by-case totality of the circumstances approach, have been criticized for failing to provide officers (and lower courts) with clear guidelines about how to resolve use-of-force questions.[207]

The question of the need for greater de-escalation of police encounters has come to the forefront in the wake of the series of highly publicized deadly force cases from 2014 and 2015.[208] Although police forces are significantly more professional (and professionalized) than they were in the past, that has not necessarily meant that they are less aggressive. Radley Balko argues that "as a matter of policy, police use more force today than they have in the past. SWAT tactics, for example, are increasingly used for credit card fraud and other low-level offenses, administrative warrants, or even regulatory enforcement."[209] He advocates for greater emphasis in "[u]se-of-force training . . . on conflict resolution and de-escalation."[210]

II. DEFINING LIBERTY AND CONTROL

Being precise about the nature and substance of the rights implicated by an unlawful seizure is essential. As this Article makes clear, the reasonableness of a particular seizure will ultimately turn on both the weight of the government's need for the seizure and the possibility of

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203. *Id.* at 386 ("A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.").

204. *Id.* at 385.

205. Plumhoff v. Rickard, 134 S. Ct. 2012, 2022 (2014).

206. *Id.* ("[I]t is beyond serious dispute that Rickard's flight posed a grave public safety risk, and here, as in *Scott*, the police acted reasonably in using deadly force to end that risk. . . . We reject th[e] argument [that petitioners acted unreasonably in firing fifteen shots]. It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.").

207. Rachel A. Harmon, *When is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1127 (2008) (asserting that *Garner*, *Graham*, and *Scott* have provided limited guidance to lower courts sorting out use of force claims).

208. *See supra* notes 3–7 and accompanying text.

209. Radley Balko, *Five Myths About America's Police*, WASH. POST (Dec. 5, 2014), http://www.washingtonpost.com/opinions/five-myths-about-americas-police/2014/12/05/35b1af44-7bcd-11e4-9a27-6fdbc612bff8_story.html ("The problem isn't cops breaking the rules—the rules themselves are the problem.").

210. *Id.*

protecting the government's interest in ways less intrusive than a Fourth Amendment seizure.

Reasonableness is a relative measure and the government's interest in effecting a particular seizure will be weighed against the individual interests that are infringed.[211] The important task of defining the individual interests at stake in seizure cases involves two steps. The Court must first clearly identify the nature of the rights that are infringed when a seizure occurs. As outlined below, those individual rights are generally defined in terms of both liberty (or freedom) and control (or autonomy). The second step is the calculation: the Court must try to value those rights by gauging the individual and collective costs of seizures.

A. *Individual Rights*

The text of the Fourth Amendment itself does not distinguish between searches and seizures: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[212] Nor does it differentiate between seizures of people and seizures of "houses, papers, and effects."[213] But the rights and liberties at issue in seizure cases differ in important ways from those implicated by searches.[214]

The Fourth Amendment's protection against unreasonable seizures of persons is, in fact, a bundle of rights and protections. The interests infringed when a person is seized have been described as rights to "free movement"[215] and "locomotion,"[216] rights to "personal security" and "bodily integrity,"[217] and rights to "personal dignity."[218] Taken together,

211. Terry v. Ohio, 392 U.S. 1, 20–21 (1968) (explaining that calculating Fourth Amendment reasonableness requires balancing the government's "need" against the "invasion" of a particular search or seizure (quoting Camara v. Mun. Court of S.F., 387 U.S. 523, 537 (1967))).

212. U.S. CONST. amend. IV.

213. *Id.*

214. The *needs* that the government must assert to justify a seizure are different, too. *See infra* Section III.A.

215. Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 346 (1998).

216. Maclin, *Locomotion*, *supra* note 30, at 1260–61 (describing the Fourth Amendment as protecting a "right of locomotion" that was grounded both in the right to be free from "government interference" and the Amendment's protection of "personal security").

217. Clancy, *supra* note 215, at 346 & nn.263–69 ("In referring to protected personhood interests, it has been sometimes stated that the Fourth Amendment protects the right to be left alone, individual freedom, personal dignity, bodily integrity, the 'inviolability of the person,' the 'sanctity of the person,' and the right of free movement." (footnotes omitted) (quoting first Wong Sun v. United States, 371 U.S. 471, 484 (1963); then quoting Sibron v. New York, 392 U.S. 40, 66 (1968)) (collecting Supreme Court cases in the footnotes); *see also* Davis v. Mississippi, 394 U.S. 721, 726–27 (1969) ("Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'").

218. Clancy, *supra* note 215, at 346. The concept of dignity has also been described as the "inviolability" or "sanctity of the person." *Id.* at 346 & nn.263–69 (first quoting *Wong Sun*, 371 U.S. at 484; then quoting *Sibron*, 392 U.S. at 66) (collecting Supreme Court cases in the footnotes); *see also* Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2089 (2011) (Ginsburg, J., concurring) (describing al-

these descriptions define both an intrinsic, essential, inalienable liberty or freedom and a means of restraining the government.[219]

In the search context, scholars like Stephen Schulhofer, Jed Rubenfeld, and Thomas Clancy have advocated characterizing the Amendment as affording a right to control or restrict government access to information as opposed to a mere privacy protection.[220] A similar emphasis in seizure cases on these concepts of security and control is important, but any suggestion that we should develop a unifying, autonomy-based explanation of the interests implicated in both search and seizure cases may be problematic.[221] In seizure cases, as noted above, the interest that is implicated—albeit to varying degrees—is the right to control the movement of one's own body.[222] Reframing that specific form of control as some more general autonomy interest that applies similarly or equally to searches and seizures may seem relatively harmless, but it risks—at least in seizure cases—making the interests at stake more vague or removed. Instead, a clearer articulation of the movement, locomotion, and liberty rights at stake in seizure cases might highlight for the Court (or even for law enforcement officers) alternative and less restrictive means of accomplishing the government's ends.[223]

With the right to control one's movement at its core, the right to be free from an unreasonable seizure is readily distinguishable from the property and privacy rights that are implicated by searches (or by seizures of evidence and property).[224] Nevertheless, it would be a mistake to

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Kidd's ordeal as a "grim reminder of the need to install safeguards against disrespect for human dignity, constraints that will control officialdom even in perilous times").

219. *See* Clancy, *supra* note 215, at 354 (asserting the Framers' focus on security reflected a desire "to exclude the government").

220. Stephen Schulhofer, for example, rejects the characterization of Fourth Amendment privacy as a form of *secrecy* and advocates replacing it with a view of privacy as a form of information *control*. SCHULHOFER, *supra* note 21, at 6–9. As Schulhofer explains, privacy defined only as secrecy is too easily dismissed as a protection that only the guilty would need. *Id.* at 6. This is a subtle shift—from emphasizing a desire to *hide* information to the desire to *control* one's information. *Id.* at 6–9 (explaining that Fourth Amendment privacy protection is not about "secrecy," it is about "personal autonomy," "security," and "control over personal information").

Jed Rubenfeld and Thomas Clancy have similarly argued against a privacy-centered view of Fourth Amendment search protections and for greater emphasis on "security." Clancy, *supra* note 215, at 367–68 ("[T]he ability and the right to exclude agents of the government is the essence of the security afforded by the Fourth Amendment. . . . It is not privacy which may motivate a person to assert his or her right. It is the right to prevent intrusions—to exclude—which affords a person security."); Rubenfeld, *supra* note 21, at 104 ("The Fourth Amendment does not guarantee a right of privacy. It guarantees—if its actual words mean anything—a right of security.").

221. Thomas Clancy has asserted that "[t]o look beyond the right to exclude and seek positive attributes to the right to be secure, whether those attributes be called privacy or something else, serves to limit—and ultimately defeat—that right." Clancy, *supra* note 215, at 367. Jed Rubenfeld's desire to jettison privacy and "revitaliz[e] the right to be secure" seems to suggest a similar approach. Rubenfeld, *supra* note 21, at 104–05.

222. *See supra* notes 215–19 and accompanying text.

223. *See infra* Section III.A.

224. *See* Horton v. California, 496 U.S. 128, 133 (1990) ("A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property."); *see also* Maclin, *Locomotion*, *supra* note 30, at 1330 (asserting that the "modern constitutional

insist on a bright line between searches and seizures or between privacy and personhood or movement. Searches and seizures overlap in many cases. Indeed, the need to get the seizure analysis correct is heightened because arrests are generally an automatic trigger for searches incident to arrest.[225] *Terry* stops, likewise, often lead to *Terry* frisks.[226] And a challenge to the evidentiary fruits of one of these seizure-triggered searches is the most frequent means by which the lawfulness of a stop or arrest is litigated.[227]

Nor is there a case being made here that seizures are always more intrusive or offensive than searches. Searches of a person—for example, frisks, pat downs, or other searches of a person's pockets; body cavity searches; or cheek swabs for DNA—may implicate similar personhood and dignity interests and, depending on the nature of the search, could be dramatically more intrusive than, say, a checkpoint stop.[228]

The point is simply that the interests implicated by a seizure of a person are different in important ways from other Fourth Amendment events: they always involve at least some restriction on movement that is not inherent in a search. Precision about the interests and rights implicated by police conduct is essential to evaluating the lawfulness of the government's conduct in any Fourth Amendment case. As outlined in Part III, in every seizure case, the Court must address whether the government can justify the restraint of a particular suspect's movements.

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fascination with the right of privacy [has] obscure[d]" the importance of a "meaningful right of locomotion"); Rubenfeld, *supra* note 21, at 103 (explaining that "expectations of privacy do not really speak to arrests or imprisonment—that is, to seizures of the person").

225. *See* United States v. Robinson, 414 U.S. 218, 235 (1973) (holding that a search incident to arrest authorizes extensive and thorough search of suspect's person); Chimel v. California, 395 U.S. 752, 763 (1969) (authorizing search of grab area around arrestee as an incident of an arrest), *abrogation recognized by* Davis v. United States, 131 S. Ct. 2419 (2011). In many states, arrests also trigger DNA swabs. *See, e.g.*, Maryland v. King, 133 S. Ct. 1958, 1970–71 (2013). Custodial arrests may also trigger intrusive searches at the jail. Florence v. Bd. of Chosen Freeholders of Burlington, 132 S. Ct. 1510, 1520 (2012).

226. *See* Terry v. Ohio, 392 U.S. 1, 30–31 (1968) (finding frisk of a constitutionally stopped person appropriate when the officer had reason to suspect the individual was armed).

227. *Cf.* Strossen, *supra* note 34, at 1189–90.

228. *Cf.* Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727, 737–42 (1993) (analyzing results of survey that asked respondents to rank the intrusiveness of a wide range of search and seizure categories). In a frequently quoted passage from his concurrence in *United States v. Watson*, Justice Powell grappled with this question and highlighted the conflict between logic and law in the Court's approach to regulating arrests:

> Since the Fourth Amendment speaks equally to both searches and seizures, and since an arrest, the taking hold of one's person, is quintessentially a seizure, it would seem that the constitutional provision should impose the same limitations upon arrests that it does upon searches. Indeed, as an abstract matter an argument can be made that the restrictions upon arrest perhaps should be greater.

United States v. Watson, 423 U.S. 411, 428 (1976) (Powell, J., concurring).

B. The Cost of an Unreasonable Seizure

Being specific about the nature of the interests at stake in seizure cases is only part of the process. Scholars have long documented the Court's struggle to accurately measure or value the cost of a particular Fourth Amendment intrusion, particularly when the individuals presenting the claim to the Court are either accused or convicted criminals. As Nadine Strossen has explained, the Court's efforts to weigh the "subjective intrusiveness" of a search or seizure are "particularly dependent upon value judgments" that are regularly made without citation to "any empirical evidence—either specific evidence regarding the reactions of particular individuals, or more generalized evidence such as expert opinions or public opinion surveys."[229]

While the Court's harm-estimation problems are common to both search and seizure cases,[230] there are reasons to think they may be amplified in the seizure context. Particularly in technology cases, Justices seem to be better able (or at least more willing) to put themselves in the position of the individual whose home is being surveilled,[231] whose car is being followed,[232] or whose phone is being searched.[233] There are not similar passages to cite in recent seizure cases. Justices do not seem to get stopped, to ride the bus, or to live in boardinghouses.

In *Atwater*, perhaps the seizure case most likely to strike close to home for the Justices, the Court did acknowledge the "pointless indignity" of Atwater's arrest and confinement for a mere seat belt violation.[234] As noted above, however, Atwater's experience was quickly (and inaccurately) dismissed as an anomaly.

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229. Strossen, *supra* note 34, at 1188; *see also* Baradaran, *supra* note 21, at 35–36.

230. Slobogin & Schumacher, *supra* note 228, at 774 (asserting that survey data reflected a mismatch between "commonly held attitudes about police investigative techniques" and the Court's perceptions of the intrusiveness of those techniques and recommending further empirical studies); *see also* Jeremy A. Blumenthal, Meera Adya & Jacqueline Mogle, *The Multiple Dimensions of Privacy: Testing Lay "Expectations of Privacy,"* 11 U. PA. J. CONST. L. 331, 339–42 (2009).

231. *See* Kyllo v. United States, 533 U.S. 27, 38 (2001) ("The Agema Thermovision 210 might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider 'intimate' . . . .").

232. At oral argument in *United States v. Jones*, Chief Justice Roberts famously asked the government attorney: "You think there would also not be a search if you put a GPS device on all of [the Justices'] cars, monitored our movements for a month?" Transcript of Oral Argument at 9, United States v. Jones, 132 S. Ct. 945 (2012) (No. 10-1259).

233. Riley v. California, 134 S. Ct. 2473, 2489–90 (2014) (describing cell phones as containing "[t]he sum of an individual's private life"; observing that "it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives-from the mundane to the intimate"; and enumerating the types of apps that are typically found on cell phones: "apps for Democratic Party news and Republican Party news; apps for alcohol, drug, and gambling addictions; apps for sharing prayer requests; apps for tracking pregnancy symptoms; apps for planning your budget; apps for every conceivable hobby or pastime; apps for improving your romantic life").

234. Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001).

The *Floyd* litigation from the Southern District of New York highlights that, as scholars like Song Richardson and Shima Baradaran emphasize, having concrete data is transformative for parties (criminal defendants or civil plaintiffs) asserting Fourth Amendment claims.[235] The events of the last year may have brought us to a moment where the government is more willing to develop and share that data. As FBI Director Jim Comey explained in February 2015: "The first step to understanding what is really going on in our communities and in our country is to gather more and better data related to those we arrest, those we confront for breaking the law and jeopardizing public safety, and those who confront us."[236]

The President's Task Force on 21st Century Policing emphasized the need for more data to support a "culture of transparency and accountability."[237] Indeed, in its action items, the Task Force called on law enforcement agencies to (i) "collect, maintain, and analyze demographic data on all detentions (stops, frisks, searches, summons, and arrests)"; and (ii) publish both their department policies and "information about stops, summonses, arrests, reported crime, and other law enforcement data aggregated by demographics."[238]

Even where data sets are hard to come by, detailed and descriptive ethnographic accounts of the experience of those who reside in heavily policed communities provide a clear-eyed view of the costs of aggressive stop-and-arrest policies. In their 2013–2014 analyses of the impacts of New York's aggressive policing on the community being policed, Amanda Geller, Jeffrey Fagan, Tom Tyler, and Bruce G. Link found that "young men reporting police contact, particularly more intrusive contact, also display higher levels of anxiety and trauma associated with their experiences."[239]

In his study of forty Black and Latino boys in East Oakland, California, Victor Rios argued that police perpetuated dislocation of boys in the community by "assuming that all the boys were actively engaged in

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235. The "hit rate" data in *Floyd* was essential to the plaintiffs' success in the District Court. *See* Floyd v. City of New York, 959 F. Supp. 2d 540, 575–77 (S.D.N.Y. 2013); *see also* Baradaran, *supra* note 21, at 8 (advocating "informed balancing [which] requires consideration of wider information contained in statistical data, clinical evidence, and experience, rather than common sense alone"); Richardson, *supra* note 21, at 2040 (having data helps courts "reconsider their behavioral assumptions about police decisionmaking and judgments of criminality").

236. Comey, *supra* note 15 ("'Data' seems a dry and boring word but, without it, we cannot understand our world and make it better.").

237. TASK FORCE, *supra* note 13, at 1.

238. *Id.* at 13, 24.

239. Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 24 AM. J. PUB. HEALTH 2321, 2324 (2014); *see also* CTR. FOR CONSTITUTIONAL RIGHTS, STOP AND FRISK: THE HUMAN IMPACT 1 (2012) ("These interviews provide evidence of how deeply this practice impacts individuals and they document widespread civil and human rights abuses, including illegal profiling, improper arrests, inappropriate touching, sexual harassment, humiliation and violence at the hands of police officers. The effects of these abuses can be devastating and often leave behind lasting emotional, psychological, social, and economic harm.").

criminal and violent activity or by providing the boys little choice."[240] Rios also observed that the experience of boys without criminal records in his study was disturbingly similar to the experience of those with criminal records: the boys who had not been arrested "expressed the same feelings and experiences as the boys who had been stigmatized, disciplined, and arrested."[241] Alice Goffman and Elijah Anderson have similarly illuminated the impacts of aggressive policing on communities.[242]

Finally, proposals for the Court to take a broader view of the interests being asserted are as important in the seizure context as they are in search and privacy cases.[243] Anthony Amsterdam cautioned, in 1974, against the more narrow conception of the Fourth Amendment as a "'safeguard' against violation of individuals' isolated spheres of fourth amendment rights."[244] Instead, he advocated a "conception of the amendment as a general command to government to respect the collective security."[245] The Court's failure to account for security as a collective community right is particularly problematic in cases like *Atwater*, where the Court balanced Atwater's individual complaint against the needs of police across the country.[246] As outlined in Section III.D, com-

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240. VICTOR M. RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS 72 (2011).

241. *Id.* at 148.

242. ELIJAH ANDERSON, STREETWISE: RACE, CLASS, AND CHANGE IN AN URBAN COMMUNITY 191–93 (1990) (describing the experiences and responses of an innocent black man who is stopped by the police in Philadelphia, PA); *see also* ALICE GOFFMAN, ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY, at xii–xiv (2014) (chronicling her experiences with the 6th Street Boys, a group of men "in a lower-income Black neighborhood" in Philadelphia).

243. Baradaran, *supra* note 21, at 8 (advocating that courts "consider not just the criminal defendant before them but also the constitutional rights of a broader swath of society"); Tracey Maclin, *Constructing Fourth Amendment Principles from the Government Perspective: Whose Amendment is it, Anyway?*, 25 AM. CRIM. L. REV. 669, 669–70 (1988) (criticizing Court's failure "to appreciate the implications of its rulings for persons not immediately involved in the cases before it. Though many may consider this argument an exhausted civil libertarian protest, whenever the Court upholds a challenged police practice against an obviously guilty individual, the Court is also licensing similar intrusions against not-so-obviously innocent persons as well."); Strossen, *supra* note 34, at 1196 (citing United States v. Martinez-Fuerte, 428 U.S. 543, 557–58 (1976)) (using *Martinez-Fuerte* as an example where the Court deemed the intrusion "quite limited" and failed to "take into account the intrusiveness experienced collectively by the thousands of motorists detained at the checkpoint each day, or the hundreds of thousands detained each week").

244. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 372 (1974); *see also* Strossen, *supra* note 34, at 1196 ("The Court's tendency to focus on individual fourth amendment litigants also causes it to neglect systematic evaluation of the collective harm to individual rights resulting from searches or seizures that are similar or identical to the one that gave rise to the case.").

245. Amsterdam, *supra* note 244, at 372; *see also* Sundby, *supra* note 191, at 1777 ("I would characterize the jeopardized constitutional value underlying the Fourth Amendment as that of 'trust' between the government and the citizenry. . . . Government action draws its legitimacy from the trust that the electorate places in its representatives by choosing them to govern.").

246. Strossen, *supra* note 34, at 1204 (criticizing "the Court's regular weighing of the privacy and liberty rights of a single individual against the law enforcement interests of the collective national community"); *see also* Barry Friedman & Cynthia Benin Stein, *Redefining What's "Reasonable": The Protections for Policing* (forthcoming 2016) (manuscript at 16–17) (draft on file with author) (explaining that the Court's balancing is "illusory" because "[w]hen the Court weighs the

munity effects and interests must also be considered when weighing the government's interests. Eventually, the consistent deprivation of individual liberties will create public-safety costs.[247]

III. DEFINING NECESSITY

The other side of *Terry*'s reasonableness balance—and the focus of this final part of the Article—is the government's need for the seizure in question. The sections that follow examine four categories of problems with the necessity calculus in seizure cases: (i) the Court's failure to press the government to articulate the need for a particular seizure; (ii) the Court's unwillingness to use existing laws, guidelines, or norms to guide its assessment of necessity; (iii) the Court's silence about the impact of overcriminalization on the government's seizure power; and (iv) the Court's struggle with its obligation to consider alternative approaches, developing technologies, and long-term impacts in calculating necessity.

A. Articulating the Need to Seize

The government's need to seize an individual is often different from its interest in conducting a search. This is why even searches of a person (which implicate some of the same individual interests as seizures) must be analyzed differently. The government's interest in conducting a seizure must always be justified by some need of the government to control or restrict the movement of a person's body,[248] while its purpose for a search is to obtain access to information, evidence, or weapons.[249] Of course, both of these specific, immediate interests may be in service of general investigative, crime prevention, or other public safety aims that are common to both searches and seizures.[250]

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government's and individual's competing interests, it almost always compares the overarching goal of the search scheme against a single individual's privacy interest"). This apples-to-oranges problem was starkly presented in *Atwater*, where the Court acknowledged that Atwater's individual interest "clearly outweigh[ed] anything the City [could] raise against it *specific to her case*." Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001) (emphasis added). The *Atwater* Court proceeded, however, to balance her interests against the government's universal need for readily-administrable rules across the full spectrum of factual scenarios. *Id.* at 347–49.

247. *See infra* Section III.D.2.

248. *See, e.g.*, *Atwater*, 532 U.S. at 347, 354; United States v. Watson, 423 U.S. 411, 417 (1976); Terry v. Ohio, 392 U.S. 1, 23–25 (1968).

249. *Cf.* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.4(c) (5th ed. 2013) (explaining that "one primary purpose" of searches of individuals "is to find evidence of the crime" under investigation); Baradaran, *supra* note 21, at 17 (finding that in search cases, the government's interests "include officer safety . . . public safety . . . and judicial economy" (footnotes omitted)).

250. *See* LAFAVE, *supra* note 249, at § 5.4(c); Williamson, *supra* note 28, at 774 ("A seizure of a suspected criminal, in other words, may not only serve the utilitarian function of making criminal prosecution possible by providing a body in court against whom to prosecute the case; it also may enhance investigatory goals by providing the opportunity to obtain evidence."); *see also* Michigan v. Summers, 452 U.S. 692, 702–03 (1981) (describing officer (and occupant) safety as a significant law enforcement interest driving detentions of occupants during execution of search warrants).

At the outset of any reasonableness analysis, the Court must clearly define the need for a particular seizure; vague assertions that a particular arrest or stop is "necessary for effective law enforcement" are insufficient. In too many Fourth Amendment cases, involving both searches and seizures, the Court has been imprecise about the government need at stake. In her 2013 article, *Rebalancing the Fourth Amendment*, Shima Baradaran explained that "effective law enforcement" was the government need or interest most often cited in Fourth Amendment search and seizure cases.[251] Baradaran and others, including Christopher Slobogin, argue persuasively that the Court's acceptance of these overly general and vague justifications for searches and seizures undermines the individual liberties protected by the Amendment.[252]

Courts cannot defer to the sort of intuitive, gut-level calculations that are pervasive in Fourth Amendment jurisprudence.[253] The Court's approach seems particularly problematic in light of social science research revealing the impact of cognitive biases on police decision-making.[254] Specificity and precision are particularly important when the government interest at issue is a combination of investigative, regulatory (deterrent), and preventive needs.[255]

Requiring more clear statements of necessity to justify Fourth Amendment seizures does not mean that every seizure must be adjudicated on a case-by-case, need-by-need basis. Throughout the cases re-

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251. Baradaran, *supra* note 21, at 16–17. This interest was identified in over fifty percent of the cases that she analyzed. *Id.*

252. *See* SLOBOGIN, *supra* note 21, at 31 (noting that the Court's efforts to make an "assessment of the invasiveness of the police action in question . . . have been abysmal"); Baradaran, *supra* note 21, at 20–25; *see also* Lee, *supra* note 34, at 1157; Strossen, *supra* note 34, at 1201 ("The Court's tendency to inflate the governmental stake in any search or seizure is augmented by its corresponding tendency to assume that the search or seizure will be uniquely successful in promoting law enforcement goals. This entails two separate assumptions, neither of which is supported by judicial analysis or evidence. The first is that the challenged law enforcement method will in fact effectively promote the law enforcement goal at issue. The second is that it will do so to a substantially greater degree than alternative law enforcement methods." (footnote omitted)).

253. *See* Richardson, *supra* note 21, at 2052–56 (focusing on problems with police intuition); Stoughton, *supra* note 195, at 849, 857 (noting that it is "common practice [for the Court] to make a statement without citation or support" regarding "its factual assertions about policing" and describing problems with Court's intuitions). *But see* Kerr, *Equilibrium*, *supra* note 23, at 481 (defending "existing [Fourth Amendment] doctrine [as] complex and fact-specific" but not a "mess": "[E]xisting [Fourth Amendment] doctrine . . . . is the product of hundreds of equilibrium-adjustments made over time. *Those adjustments were usually made intuitively in response to felt necessities*, but in rare cases were made out of a conscious recognition of the need for changes to keep the law in balance in the face of new practices and technological change." (emphasis added)).

254. *See* Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 984–87 (1999) (evaluating the role that cognitive biases play in driving law enforcement decisions). *See generally* Richardson, *supra* note 21, at 2035–36 (discussing cognitive biases).

255. *See* Friedman & Stein, *supra* note 246 (manuscript at 6–7) (explaining that "the very nature of policing has shifted – from a reactive crime-solving model towards intelligence gathering, regulation and deterrence," and emphasizing the importance of distinguishing between these categories of police behavior); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 418–20 (1988) (distinguishing between police-initiated searches and "responsive" searches).

viewed in Part I, the Court missed opportunities to narrow entire categories of seizures and rejected litigants' proposals to draw more liberty-protective, bright-line rules. Recent decisions in *Floyd*, *Navarette*, and *Moore* provide useful examples of the importance of requiring the government to articulate its need for a particular seizure.

1. The Need to Deter

The benefit of pressing the government to articulate the need for a seizure was recently made plain in the New York City stop-and-frisk litigation. On August 12, 2013, Judge Shira Scheindlin of the Southern District of New York issued a decision in *Floyd v. City of New York*,[256] holding that the New York City Police Department's (NYPD) stop-and-frisk practices (i) violated the Fourth Amendment because they were not based on the requisite reasonable suspicion and (ii) displayed a pattern and practice of racial profiling in violation of the Fourteenth Amendment.[257] Although *Floyd* is not a Supreme Court case, the developments in that litigation highlight the importance of interrogating the government's purported need for expanded seizure power.

Judge Scheindlin's decision relied heavily on data about stops that had been gathered by the NYPD for more than a decade.[258] This data showed a more than 600% increase in the number of stops over the span of ten years: from 97,296 stops reported in 2002[259] to 685,724 stops in 2011, the year the program peaked.[260] The data also included the number of stops that resulted in an arrest or summons (the hit rate).[261]

The class action plaintiffs relied heavily on the hit rate data to argue that they had been stopped without reasonable suspicion.[262] The dearth of guns found during NYC frisks revealed that early, decades-old predictions about the potential for abuse of *Terry* had been realized.[263] In de-

256. 959 F. Supp. 2d 540, 540, 553 (S.D.N.Y. 2013).

257. *Id.* at 562–65.

258. *Id.* at 582; *see also* U.S. COMM'N ON CIVIL RIGHTS, POLICE PRACTICES AND CIVIL RIGHTS IN NEW YORK CITY, at ch. 5 (2000), http://www.usccr.gov/pubs/nypolice/main.htm; N.Y. STATE OFFICE OF THE ATTORNEY GEN., CIVIL RIGHTS BUREAU, THE NEW YORK CITY POLICE DEPARTMENT'S "STOP & FRISK" PRACTICES 65 (1999), http://www.oag.state.ny.us/sites/default/files/pdfs/bureaus/civil_rights/stp_frsk.pdf.

259. *Stop-and-Frisk Data*, *supra* note 110.

260. Second Supplemental Report of Jeffery Fagan, Ph.D. at 10, Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08 Civ. 01034). In 2012, the number of stops dropped to 532,911 and the 2013 figure was 191,558. *Stop-and-Frisk Data*, *supra* note 110. 2014 data (46,235 stops) shows that the downward trend has continued. *Id.*; *see also* Mike Bostock & Ford Fessenden, *'Stop-and-Frisk' Is All But Gone From New York*, N.Y. TIMES (Sept. 19, 2014), http://www.nytimes.com/interactive/2014/09/19/nyregion/stop-and-frisk-is-all-but-gone-from-new-york.html?_r=0 (explaining downward trends in stop-and-frisks).

261. *See* Complaint at 10, Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08 Civ. 01034).

262. *Id.* at 13.

263. *See* Amsterdam, *supra* note 244, at 438 ("The pressures upon policemen to use the stop-and-frisk power as a device for exploratory evidence searches in these areas are intense. Police can

fense of the stop-and-frisk program, the City's expert argued that the low hit rate actually demonstrated the program's effectiveness:

> With the critical shift to a mission of finding crime patterns, deploying police where and when crime is occurring before it occurs, and reducing crime by proactive efforts to stop crime before it happens, i.e., preventing crime, the measure of success has changed. In contrast to the definition of success used in the Fagan Report, a downward trend in the number of weapons found, and even of arrests, by prevention standards, are evidence of success.[264]

In public statements defending the City's aggressive stop-and-frisk program, former New York City Mayor Michael Bloomberg also emphasized deterrence as one of the driving forces behind the program:

> Critics say the fact that we're 'only' finding 800 guns a year through stops of people who fit a description or are engaged in suspicious activity means that we should end stop and frisk.
>
> Wrong. That's the reason we need it—to deter people from carrying guns. We are the First Preventers.[265]

In other words, when pressed to justify the need for this dramatic, exponential increase in *Terry* stops, and when faced with highly problematic data about racial bias in the execution of the program, the City argued that the success of the stop-and-frisk program rested on a deterrence theory (and not on the traditional *Terry* justification for a stop—the investigation, interruption, or prevention of a crime in progress).

The City's deterrence arguments have intuitive appeal (even if they lack empirical support).[266] More aggressive policing creates a greater risk of detection that is generally expected to deter crime.[267] These arguments

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justify virtually any exercise of the power because these are 'high-crime' areas where all young males, at least, are suspect." (footnotes omitted)).

264. Report of Dennis C. Smith, Ph.D. at 20, Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08 Civ. 01034).

265. Michael R. Bloomberg, Mayor of N.Y.C., Address on Public Safety to NYPD Leadership (Apr. 30, 2013) (transcript available at http://www1.nyc.gov/office-of-the-mayor/news/151-13/mayor-bloomberg-delivers-address-public-safety-nypd-leadership); *see also* OAG ARREST REPORT, *supra* note 74, at 2 ("The NYPD identifies stop and frisk as a tool to combat violent and gun-related crime and deter future criminal conduct." (footnote omitted)).

266. ZIMRING, *supra* note 111, at 145 (concluding that, despite the beliefs of police (officials and patrol officers) "these aggressive tactics add significant value to patrol efforts" there is, at best, "mixed evidence of effectiveness"); *see also id.* at 149 ("Of all the undocumented elements of New York City's policing changes, the marginal value to crime reduction of a variety of aggressive tactics—stops, searches, misdemeanor arrests—should be at the very top of the priority for rigorous evaluation efforts but it isn't.").

267. The proposition that increasing the risk of apprehension increases deterrent benefits finds support as a general matter. *See* VALERIE WRIGHT, THE SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 1 (2010), http://www.sentencingproject.org/doc/deterrence%20briefing%20.pdf ("Research to date generally indicates that increases in the *certainty* of punishment, as opposed to the *severity* of punishment, are more likely to produce deterrent benefits.").

are also unconstitutional. The Court has never permitted officers (or entire departments) to justify stops as a form of general deterrence except at checkpoints where a brief detention is "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers."[268] In the street-stop context, officers are required to have individualized suspicion of criminal activity that "must be measured by what the officers knew before they conducted their search."[269] The *Floyd* case demonstrates that, when pressed to articulate the necessity for a particular category of seizures, the government may reveal policy motives or purposes that directly contravene the governing constitutional standard.[270]

2. Needs Versus Interests

The Court's vagueness may, in part, be attributable to the fact that, in some cases, the Court has described the Fourth Amendment as concerned with government interests as opposed to needs. The use of the term "interests" seems best intended as a contrast with the inalienable individual right it is being balanced against, not as some watered-down version of a government need.[271] The government's power to seize—in other words, its authority to infringe individual rights—is contingent on identifying its need for the seizure.[272] Relatedly, any power given to police must be limited according to the government's clearly defined need.[273] Justice Scalia zeroed in on this distinction in the *Bailey* decision

268. Brown v. Texas, 443 U.S. 47, 51 (1979). Other statements made by Mayor Bloomberg reflected some awareness of this problem with the City's argument. In a press conference held immediately after Judge Scheindlin issued her ruling against the City, Bloomberg described the "vital deterrent" benefit of stop and frisk as a "critically important byproduct" of the program. Michael R. Bloomberg, Mayor of N.Y.C., Press Conference on Floyd Decision (Aug. 12, 2013) (transcript available at http://www.nydailynews.com/news/politics/bloomberg-vows-appeal-federal-judge-ruling-stop-stop-and-frisk-policy-article-1.1424630); *cf.* Friedman & Stein, *supra* note 246 (manuscript at 59) (describing the New York City program as "arbitrary" and unconstitutional because it lacked "the safeguards of deterrent policing").

269. Florida v. J.L., 529 U.S. 266, 271 (2000).

270. *See* Friedman & Stein, *supra* note 246 (manuscript at 59) (explaining that the New York City stop-and-frisk program was "not investigative policing; it [was] *in terrorem* deterrence").

271. *See* Maclin, *supra* note 243, at 670 ("[T]he fourth amendment was designed not to facilitate governmental investigations, but rather to protect citizens from unjustified and arbitrary government invasions.").

272. The original reasonableness cases consistently referred to the government's "need" for a particular search or seizure. Quoting from *Camara*, which had been decided only a year before, the *Terry* Court described the Court's task as "balancing the need to search (or seize) against the invasion which the search (or seizure) entails." Terry v. Ohio, 392 U.S. 1, 20–21 (1968) (alterations in original) (quoting Camara v. Mun. Court of S.F., 387 U.S. 523, 537 (1967)). The *Terry* Court also referred to the "government interest" but made clear that the interest must "justif[y] official intrusion." *Id.* at 21. Later cases have similarly employed this sort of necessity language. *See, e.g.*, Illinois v. McArthur, 531 U.S. 326, 331 (2001) (upholding search-warrant seizure where the government articulated a "specially pressing or urgent law enforcement need" for the seizure and where "the restraint at issue was tailored to that need, being limited in time and scope"); Maryland v. Buie, 494 U.S. 325, 333–34 (1990) (explaining that the *Terry* Court permitted the frisk "which was *no more than necessary* to protect the officer from harm" (emphasis added)).

273. Amsterdam, *supra* note 244, at 437 ("[T]he fourth amendment is thought to tolerate [stop and frisk] power only as the result of a fine balance between its recognized intrusion upon personal

when he emphasized that "[c]onducting a *Summers* seizure incident to the execution of a warrant 'is not the Government's right; it is an exception—justified by *necessity*—to a rule that would otherwise render the [seizure] unlawful.'"[274]

The prospect of seizing a suspect in order to search her provides an example. In justifying a custodial arrest, the Court should not rely on an officer's interest in conducting incidental searches or frisks as part of the evaluation of the necessity for custody. In the course of upholding a custodial arrest in *Virginia v. Moore*,[275] however, the Court explained that "[a]rrest ensures that a suspect appears to answer charges and does not continue a crime, and it safeguards evidence and enables officers to conduct an in-custody investigation."[276] The Court was vague about the kind of "in-custody investigation" being referenced, but it reiterated shortly afterward that custodial arrests "enable officers to investigate [an] incident more thoroughly."[277] The Court cited Wayne LaFave's thorough treatise on arrests as support for this proposition.[278]

The LaFave citation does not support the idea that the desire to conduct a search incident to arrest (the search that ultimately revealed narcotics in Moore's case) could justify an arrest. Instead, in that section, LaFave describes, but does not endorse, the practical incentives that lead officers, who have "adequate grounds" for an arrest, to prefer to take a suspect into custody: "[A]n arrest is commonly made when a search is desired. Consequently, the suspect may be taken into custody under circumstances in which the risk of nonappearance would not be great."[279] Indeed, earlier in the book, LaFave notes that "neither courts nor legislatures have given sustained attention to . . . whether the initial taking into custody is necessary."[280]

Of course, stops and arrests give the government easy access to information (through the various warrantless frisks and searches that can accompany those seizures).[281] It is not entirely clear whether the *Moore* Court was including the power of police to conduct a protective search

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privacy and security and its justification by a specific police need. Exercised in excess of that need, the power makes the intrusion without the justification and destroys the balance." (footnote omitted)).

274. Bailey v. United States, 133 S. Ct. 1031, 1044 (2013) (second alteration in original) (emphasis added) (quoting Thornton v. United States, 541 U.S. 615, 627 (2004) (Scalia, J., concurring)).

275. 553 U.S. 164 (2008).

276. *Id.* at 173.

277. *Id.* at 173–74.

278. *Id.* at 173 (citing LAFAVE, *supra* note 55, at 177–202.)

279. LAFAVE, *supra* note 55, at 186–87 ("An officer who has adequate grounds may arrest a suspect to make it possible to conduct a lawful search of his person.").

280. *Id.* at 168.

281. Atwater v. City of Lago Vista, 532 U.S. 318, 372 (2001) (O'Connor, J., dissenting) (explaining that the majority's holding empowered officers faced with a traffic violation to "stop the car, arrest the driver, search the driver, search the entire passenger compartment of the car including any purse or package inside, and impound the car and inventory all of its contents" (citations omitted)).

incident to arrest of Moore as a constitutional justification for the arrest.[282] Although a protective frisk or search may frequently operate as a practical incentive for a police officer to conduct a stop or an arrest, these corollary searches should not be used by the Court as a constitutionally legitimate justification for the triggering Fourth Amendment seizure.[283]

3. Tying Necessity to a Specific Crime

Precedents that discourage consideration of law enforcement purposes or motives have complicated the inquiry into the need for a particular seizure.[284] After *Whren*, the Court has been excessively cautious about probing the government's actual motivations for a particular seizure.[285] The Court's pretext decisions effectively write the Court out of aiding in the solution of significant profiling problems. And they have the potential to undermine the Court's ability to calculate government needs: if police are not required to disclose their purposes, the Court will be unable to tailor seizure power to the government's actual needs.

In more recent cases, the Court has relaxed the requirement that an officer conducting a stop or an arrest must identify the crime of suspicion. That requirement was clearly articulated in the Court's 1979 decision in *Brown v. Texas*, where the Court emphasized that a *Terry* stop should be based on reasonable suspicion that an individual is involved with "specific misconduct."[286] Nevertheless, more recent decisions in cases like *Illinois v. Wardlow* have upheld *Terry* stops even where officers have been silent about the crime of suspicion.[287]

282. *Moore*, 553 U.S. at 174.

283. As Anthony Amsterdam explained in 1974: "When a frisk power allowed exclusively upon the predicate that the officer needs it to protect himself from deadly assaults by a person he has stopped for questioning becomes a motive to stop and question persons whom the officer would not stop at all except for the opportunity to use a frisk as an evidence-gathering device, surely fourth amendment values are seriously infringed." Amsterdam, *supra* note 244, at 437. The Court's decision in *Whren v. United States*, which permits pretextual stops, does not demand a different result because the pretext for the search was an independently legitimate basis for the stop. 517 U.S. 806, 813 (1996) (refusing to invalidate a pretextual traffic stop that was motivated by the officers' desire to search the car and its occupants for narcotics).

284. *Compare* Florida v. Jardines, 133 S. Ct. 1409, 1417 (2013) ("[W]hether the officers had an implied license to enter the porch [which was integral to whether there was a "search"] depends upon the purpose for which they entered."), *and* City of Indianapolis v. Edmond, 531 U.S. 32, 48 (2000) (holding that the programmatic purpose of the checkpoint—traditional narcotics enforcement—was the basis for Court's finding that it was unconstitutional), *with Whren*, 517 U.S. at 813 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

285. *See, e.g.*, Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080, 2082 (2011) (explaining that the Court generally "eschew[s] inquiries into intent" because "the Fourth Amendment regulates conduct rather than thoughts"); Brigham City v. Stuart, 547 U.S. 398, 404 (2006) (holding that an "officer's subjective motivation is irrelevant"); *see also Whren*, 517 U.S. at 813–14.

286. Brown v. Texas, 443 U.S. 47, 49, 51 (1979); *see also* Terry v. Ohio, 392 U.S. 1, 27 (1968) (explaining that reasonable suspicion required proof of something more than an "inchoate and unparticularized suspicion or 'hunch'"); Friedman & Stein, *supra* note 246 (manuscript at 61) ("In *Terry*, the stop was predicated on the perceived imminence of a specific crime.").

287. Illinois v. Wardlow, 528 U.S. 119, 123–25 (2000) (holding that a *Terry* stop was justified where the individual who was stopped was in a neighborhood known for heavy narcotics trafficking and ran away from police). The *Wardlow* Court noted that "the determination of reasonable suspi-

The shift from the Court's 1968 decision in *Terry*—where the exigency of the situation was what prompted the Court to uphold the stop and frisk[288]—to the regulatory and deterrent rationales driving current stop-and-frisk programs also highlights this problem.[289] The record presented in *Floyd* suggested that *Terry* stops on this sort of general suspicion of criminality had become increasingly routine: "Between 2004 and 2009, the percentage of stops where the officer failed to state a specific suspected crime rose from 1% to 36%."[290]

The Court's 2014 decision in *Navarette* provides another variation on this problem. In *Navarette*, the anonymous tip clearly described a past episode of reckless driving, but the caller did not allege ongoing drunk driving.[291] Under *Terry*, this subtle distinction carries weight. An investigative *Terry* stop is clearly justified when an officer has reasonable suspicion of ongoing criminal activity.[292] An officer's power to stop an individual on reasonable suspicion that they committed a past, completed crime is less clear.[293] The *Navarette* majority avoided resolving this question by finding that the anonymous tip of past conduct could have provided sufficient reasonable suspicion for ongoing criminal activity.[294] By basing that claim of reasonable suspicion on an anonymous tip that the officers could not confirm, the majority significantly broadened the definition of reasonable suspicion.[295]

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cion must be based on commonsense judgments and inferences about human behavior" and that the officer was "justified in suspecting that [defendant] was involved in criminal activity, and, therefore, in investigating further." *Id.* at 125 (noting that no crime of suspicion was identified).

288. *See Terry*, 392 U.S. at 20. Officer McFadden suspected that Terry and his two associates were "casing" a store for a potential burglary or robbery. *Id.* at 6; *see also* United States v. Sokolow, 490 U.S. 1, 13 (1989) (Marshall, J., dissenting) (asserting that a *Terry* stop must be investigation of "ongoing or imminent criminal activity"); LAFAVE, *supra* note 249, § 9.2(c) (explaining that the *Terry* decision "stressed that the officer acted 'to protect himself and others from possible danger, and took limited steps to do so'" and advocating that *Terry* stops "should be expressly limited to investigation of serious offenses" (quoting *Terry*, 392 U.S. at 28)).

289. *See* Nick Pinto, *The Point of Order*, N.Y. TIMES, Jan. 18, 2015, at MM13 ("Most people now think of the police primarily in their role of crime fighting. But it is at least as much their other original mandate, the prevention of disorder, that perpetuates the suspicion many hold for them. Order is a subjective thing, and the people who define it are not often the people who experience its imposition.").

290. Floyd v. City of New York, 959 F. Supp. 2d 540, 558–59 (S.D.N.Y. 2013) (these facts were not contested by the parties).

291. Navarette v. California, 134 S. Ct. 1683, 1690 (2014).

292. *See Terry*, 392 U.S. at 30. Some argue that *Terry* stops should be limited to investigations of serious crimes. *E.g.*, Colb, *supra* note 34, at 1692.

293. Justice Thomas, writing for the majority, explained that the Court was left to evaluate "whether the 911 caller's report of being run off the roadway created reasonable suspicion of an ongoing crime such as drunk driving as opposed to an isolated episode of past recklessness." *Navarette*, 134 S. Ct. at 1690; *see also id.* at 1695 n.3 (Scalia, J., dissenting) ("The circumstances that may justify a stop under [*Terry*] to investigate past criminal activity are far from clear and have not been discussed in this litigation." (citations omitted) (citing United States v. Hensley, 469 U.S. 221, 229 (1985)). *But see* Colb, *supra* note 34, at 1692–93.

294. *Navarette*, 134 S. Ct. at 1690.

295. *See id.* at 1695 (Scalia, J., dissenting) ("I fail to see how reasonable suspicion of a *discrete instance* of irregular or hazardous driving generates a reasonable suspicion of *ongoing intoxicated driving*.").

B. The Role of Guidelines, Statutes, and Norms

This Article is intentionally Court focused in its diagnoses and prescriptions. That focus reflects enduring optimism about the role that the judiciary can play and must play in repairing a criminal justice system that is desperately failing in many urban communities. While other scholars have ably suggested promising complementary legislative, prosecutorial, and departmental reforms,[296] the Court still has a fundamental role to play in restraining aggressive police power.[297] Our system is constructed on the premise that the Court can and will perform this function.[298] Furthermore, the Court's missteps in some of the cases documented in this Article are partly to blame for the categorical enlargement of seizure power.

This is not to say that state legislation and departmental guidelines are not important mechanisms for restraining police behavior. They clearly are, and they should play a more central role in guiding the Court's assessment of the necessity for and the reasonableness of a particular seizure. As Anthony Amsterdam observed four decades ago, the Court could require searches and seizures to comply with clearly articulated departmental guidelines or state laws in order to survive reasonableness challenges.[299] Scholars like John Rappaport, Rachel Harmon,

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296. *See, e.g.*, STUNTZ, *supra* note 99, at 294 (explaining that "urban police forces are more attentive to local preferences than a generation ago" but this requires investment in personnel; "Better styles of policing and less cash-strapped urban police forces are mutually reinforcing."); Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor's Role*, 47 U.C. DAVIS L. REV. 1591, 1594–95 (2014) (arguing that prosecutors "as executive officers should refrain from introducing evidence that they conclude was unconstitutionally obtained without regard to judicial admissibility—a duty of administrative suppression"); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 768–81 (2012) [hereinafter Harmon, *Policing*] (describing shortcomings of Court-focused and constitution-based solutions; advocating regulatory reforms and rigorous cost-benefit evaluations of police policy); Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 3–4 (2009) (arguing that 42 U.S.C. § 14141, which allows "the Justice Department to bring suits for equitable remedies against police departments that" show a pattern of police misconduct is underutilized, and if departments were compelled and induced to reform, by way of this statute, departments would be motivated to proactively reform); Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 101, 106–09 (2015) ("Rather than attempting to regulate policing primarily post hoc through episodic exclusion motions or the occasional action for money damages, policing policies and practices should be governed through transparent democratic processes such as legislative authorization and public rulemaking.") (collecting sources calling for more statutory or administrative rulemaking for police).

297. Amsterdam, *supra* note 244, at 439 ("In an age where our shrinking privacy and liberty would otherwise be enjoyable only at the sufferance of expanding, militaristically organized bodies of professional police, the fourth amendment demands that an independent judiciary play a direct, strong role in their regulation."). The two avenues of reform are complementary. The judiciary might more effectively regulate the police by, for example, only giving deference to police when their conduct comports with democratically authorized policing rules or giving clearer direction to legislatures about how to craft rules for police. *See* Friedman & Ponomarenko, *supra* note 296, at 179–83.

298. Even with greater reliance on administrative regulations or legislative action to constrain police, "courts still will need to adjudicate the constitutionality of whatever that process comes up with." Friedman & Stein, *supra* note 246 (manuscript at 26).

299. Amsterdam, *supra* note 244, at 416–29 (explaining that administrative rulemaking by police would supply "a needed check against arbitrariness," add clarity to the process of evaluating

Barry Friedman, and Maria Ponomarenko persuasively advocate using "legislators and law enforcement administrators" to "write the conduct rules" for street-level law enforcement.[300] The Court, however, in seizure cases like *Atwater*, *Whren*, *Muehler*, and *Moore* has explicitly rejected the option of using police norms, departmental regulations, or even state law to provide backbone to the constitutional concept of reasonableness.[301] This is so despite the fact that in numerous other Fourth Amendment contexts, the Court explicitly relies upon community norms and objective expectations to define what is reasonable.[302]

C. More Crimes, More Seizing

The Court is, regrettably, generally silent in seizure cases about the well-documented problem of overcriminalization in this country.[303] But the connection between the substantive criminal law and the power of police to seize criminal suspects is direct. As legislators write more criminal laws, they empower police to effect more seizures.

Given the growth in criminal codes, the seriousness of the underlying offense ought to be a relevant consideration when the need for a particular stop or arrest is being evaluated. In other words, an assumption that probable cause works as a reasonable proxy for the government's need for a particular seizure does not hold up as criminal codes become bloated. Justice Marshall articulated a version of this concern in his dis-

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police conduct, support "local autonomy," increase visibility of individual officer practices, and develop clearly articulated categories of standard police practice).

300. John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CAL. L. REV. 205, 208 (2015) (asserting, at least in some contexts, "law enforcement conduct will hew closer to constitutional norms if the Court gets political policy makers to write the conduct rules than if it writes the rules itself"); *see also* Friedman & Ponomarenko, *supra* note 296, at 106–09; Harmon, *Policing*, *supra* note 296, at 764.

301. Virginia v. Moore, 553 U.S. 164, 176 (2008) (rejecting the argument that an arrest was unreasonable because it contravened state law); Muehler v. Mena, 544 U.S. 93, 103 (2005) (Kennedy, J., concurring) (rejecting the argument that the use of handcuffs for a two to three hour detention was unreasonable because it "deviated from standard police procedure"); Atwater v. City of Lago Vista, 532 U.S. 318, 326, 354 (2001) (rejecting the argument that a custodial arrest for a seat belt violation was unreasonable because it contravened department norms); Whren v. United States, 517 U.S. 806, 816–17, 819 (1996) (rejecting argument that traffic stop was unreasonable because department regulations directed that narcotics officers should not make traffic stops).

302. *See, e.g.*, Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (explaining that in addition to manifesting an "actual (subjective) expectation of privacy," a person must establish that "the expectation be one that *society is prepared to recognize as 'reasonable'*" (emphasis added)).

303. Douglas Husak's seminal book outlined the broad expansion of potentially criminal conduct and developed "a normative framework to distinguish those criminal laws that are justified from those that are not." DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 3, 58 (2008) ("Too much criminal law will continue to produce too much punishment until we have a principled means to limit the scope of the criminal sanction."); *see also* Daniel Richman, *Overcriminalization for Lack of Better Options: A Celebration of Bill Stuntz*, *in* THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ 64, 71 (describing the "inexhaustible supply of criminal law in the United States"); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 712–19 (2005) (defining and documenting overcriminalization). *But see* Mila Sohoni, *The Idea of "Too Much Law,"* 80 FORDHAM L. REV. 1585, 1622 (2012) (cautioning against quick adoption of hyperlexis critiques).

sent in *Watson*.[304] The *Watson* majority—holding that police did not need to obtain warrants for public arrests—defended the decision as preserving "[t]he balance struck by the common law."[305] That characterization, however, glossed over an exponential increase (since the drafting of the Fourth Amendment) in the number of crimes that qualify as felonies.[306] This taxonomy shift meant that the arrest power authorized by *Watson* in 1976 was magnitudes greater than the arrest power that existed when the Fourth Amendment was drafted.[307]

In his dissent, Justice Marshall explained that the seriousness of the crimes defined as felonies at the founding ensured that the government was only afforded warrantless arrest power in cases where it most needed that authority. In Marshall's words:

> Applied in its original context, the common-law rule would allow the warrantless arrest of some, but not all, of those we call felons today. . . . As a matter of substance, the balance struck by the common law in accommodating the public need for the most certain and immediate arrest of criminal suspects with the requirement of magisterial oversight to protect against mistaken insults to privacy decreed that only in the most serious of cases could the warrant be dispensed with. This balance is not recognized when the common-law rule is unthinkingly transposed to our present classifications of criminal offenses.[308]

The majority rejected this view and did not elaborate on the government's need for greater warrantless arrest power other than to emphasize the general burdens of obtaining an arrest warrant.[309]

Watson, as an abiding precedent, continues to broaden police power every time a new crime is defined. The significant increase in the number

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304. United States v. Watson, 423 U.S. 411, 441–42 (1976) (Marshall, J., dissenting).

305. *Id.* at 418, 421 (majority opinion); *see also* Kerr, *Equilibrium*, *supra* note 23, at 522 (echoing the *Watson* majority; noting that "[w]hile there have been changes to what counts as a felony, and certainly to what happens after the arrest, the basic balance between liberty and public safety raised by taking a suspect into custody is the same today as it was at common law").

306. *See Watson*, 423 U.S. at 441–42 (Marshall, J., dissenting).

307. The fact that the Court was, in its view, simply sanctioning what the vast majority of state and federal jurisdictions had been doing does not alter this balancing question. Although *Watson* did not result in a transformation of the government's *de facto* seizure power, its cementing of federal and state practices set a new *de jure* baseline.

308. *Id.* at 442 (Marshall, J., dissenting); *see also id.* at 439–41 (Marshal, J., dissenting) ("Only the most serious crimes were felonies at common law, and many crimes now classified as felonies under federal or state law were treated as misdemeanors. . . . Applied in its original context, the common-law rule would allow the warrantless arrest of some, but not all, of those we call felons today. Accordingly, the Court is simply historically wrong when it tells us that '(t)he balance struck by the common law in generally authorizing felony arrests on probable cause, but without warrant, has survived substantially intact.'" (alteration in original) (quoting *id.* at 421 (majority opinion))); SCHULHOFER, *supra* note 21, at 51 (noting that the warrantless arrest rule, while "clear enough in the eighteenth century, has no straightforward meaning in modern circumstances"). Schulhofer explains that in 1792, "a roughly comparable crime" to the credit card theft and fraud committed by Watson "would have been a misdemeanor." SCHULHOFER, *supra* note 21, at 51–52.

309. *Watson*, 423 U.S. at 417.

of felony and misdemeanor arrests since *Watson* can be attributed both to the continued growth in the criminal code and to the continued professionalization of the police force (where arrests are tracked, counted, and used as performance measures).[310]

The Court's determination in *Atwater* that a custodial arrest was reasonable, even for a traffic violation punishable only by a fine, seems to foreclose the possibility of using the Fourth Amendment to help address what has since been described as a misdemeanor crisis.[311] Indeed, in 2001, the Court seemed unaware of the rising rates of arrests for minor offenses.[312] The idea that these low-level offenses might pose the greatest potential for discriminatory enforcement and abuse, however, was clearly articulated long before *Atwater* was decided.[313]

The Court's December 2014 decision in *Heien v. North Carolina*[314] was similarly silent about questions of overcriminalization. In *Heien*, the issue presented to the Court was whether an officer's mistake of law would invalidate a traffic stop.[315] Under the mistaken belief that driving with one broken taillight violated state law, the officer stopped Heien's

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310. *See* JOHN A. ETERNO & ELI B. SILVERMAN, THE CRIME NUMBERS GAME: MANAGEMENT BY MANIPULATION 8–9 (2012) (detailing the "story of police reform that has lost its way, gone astray, and succumbed to short-term numbers games" by departments that have "adopted the statistical performance crime model of police effectiveness"). The President's Task Force on 21st Century Policing expressed concern about the extent to which these kinds of performance incentives (and not real public safety needs) were driving tickets, summons, and arrests. TASK FORCE, *supra* note 13, at 26.

311. *See* Kohler-Hausmann, *supra* note 73, at 630; Natapoff, *supra* note 73, at 1320; *see also* Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1080 (2015) (explaining that *Atwater* complicates decriminalization efforts because despite "popular perception . . . legally speaking, the reclassification of an offense into a summons-only infraction does not necessarily take arrest and its concomitant burdens off the table").

312. *Compare* Atwater v. City of Lago Vista, 532 U.S. 318, 351–52 (2001) ("The very fact that the law has never jelled the way Atwater would have it leads one to wonder whether warrantless misdemeanor arrests need constitutional attention, and there is cause to think the answer is no."), *with* Natapoff, *supra* note 73, at 1320; *see also* Kohler-Hausmann, *supra* note 73, at 630. New York City's recent experience with marijuana arrests demonstrates the problem. From 1994 to 2010, the City witnessed an exponential increase in marijuana arrests (from approximately 8,000 to over 56,000 per year). Issa Kohler-Hausmann, *Misdemeanor Justice: Control Without Conviction*, 119 AM. J. SOC. 351, 367 (2013). This phenomenon has been a curiosity because it does not reflect public enforcement priorities. As Frank Zimring has observed, marijuana clearly did not become a law enforcement priority at this very late stage of the drug war. ZIMRING, *supra* note 111, at 122. Those arrests, instead, were a tool used to regulate other criminal activity. *Id.* ("These arrests are police on patrol concentrating effort in high-crime areas and with persons whom police regard as potential offenders for more serious crimes. But the threshold offense of marijuana provides the patrolman a method of obtaining fingerprints and removing the suspect from the street. Fundamentally, these arrests are attempts not of drug control but of crime control.").

313. *See* Amsterdam, *supra* note 244, at 415 ("A police officer will always arrest a murderer or an armed robber if he sees one, but whether he will arrest and search a brawler or a drunk or a loiterer, or make an investigative stop or a frisk or a street interrogation, or order people to 'move on,' . . . depends upon his mood and inclinations."); *see also* Fagan & Davies, *supra* note 75, at 462, 476 (describing increases in low-level arrests); Livingston, *supra* note 75, at 590 (describing aggressive "quality-of-life enforcement").

314. 135 S. Ct. 530 (2014).

315. *Id.* at 534.

car.[316] The Court held that the stop was lawful—even though the defendant was not, in fact, violating any traffic provision at the time of the stop—"[b]ecause the officer's mistake about the brake-light law was reasonable."[317]

The *Heien* decision does not seem particularly controversial or significant except perhaps in one respect. Drawing on strands from both *Atwater* and *Moore*—where the Court also sought to avoid imposing on officers in the field the burden of knowing the consequences of a particular violation—the *Heien* decision implicitly accepts as a premise the massive volume of criminal proscriptions. Although the Court asserted that its decision "does not discourage officers from learning the law,"[318] it said nothing about the burden the government arguably should bear for creating such a vast scheme of criminal laws and penalties.

Justice Sotomayor alluded to these concerns in her dissent in *Heien*, noting that "permitting mistakes of law to justify seizures has the perverse effect of preventing or delaying the clarification of the law."[319] None of the Justices acknowledged that the decision effectively rewarded the government for creating a complex and admittedly unknowable criminal code. In other words, if so much is criminalized that is not clearly morally wrong—for example, regulatory offenses like seat belting and broken taillights—we should not permit the government to rely on the bulk of the law to justify enhanced contact with citizens.[320]

D. Calculating Necessity: Alternatives, Technology, and Myopia

Calculating the need for a particular seizure also requires meaningful consideration of alternatives.[321] Court decisions that insist that the Court will never require the police to employ the least intrusive or restrictive alternative to a proposed seizure have been too readily applied to foreclose any consideration of alternatives, even when the Court

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316. The traffic code required only one operational taillight, so the officer was, in fact, mistaken about the law. *Id.* at 535 (citing N.C. GEN. STAT. § 20–129(g) (2007)). The North Carolina Supreme Court cited a nearby conflicting provision to support its conclusion that the mistake was reasonable. *Id.* (citing N.C. GEN. STAT. § 20–129(d) (2007)).

317. *Id.* at 534.

318. *Id.* at 539.

319. *Id.* at 543–44 (Sotomayor, J., dissenting) ("Giving officers license to effect seizures so long as they can attach to their reasonable view of the facts some reasonable legal interpretation (or misinterpretation) that suggests a law has been violated significantly expands this authority.").

320. It is worth distinguishing here between this concept of overcriminalization (which refers to the growth of the criminal codes) and the different concept of "hypercriminalization" which sociologist Victor Rios uses to describe a particular form of overaggressive police profiling. Hypercriminalization, according to Rios, is "the process by which an individual's everyday behaviors and styles become ubiquitously treated as deviant, risky, threatening, or criminal, across social contexts." RIOS, *supra* note 240, at xiv.

321. Nadine Strossen's 1988 critique of the Court's failures in this regard still rings true. Strossen, *supra* note 34, at 1176. As Strossen explained, "the Court's fourth amendment balancing analyses have neither systematically evaluated the marginal law enforcement benefits of challenged searches and seizures, nor regularly incorporated the 'least intrusive alternative' requirement, which is an integral component of other balancing tests . . . ." *Id.*

adopts categorical changes to the rules governing seizures.[322] While the Court may not want police to have to calculate in absolute terms the least restrictive alternative in any particular situation, the availability of less restrictive alternatives is always relevant to reasonableness balancing and to the calculation of necessity.[323]

The Court has also been reluctant, in cases like *Muehler v. Mena*, to second-guess the government's allocation of available resources in seizure cases. As noted above, Mena was detained when officers investigating one of her tenants came to her home with a search warrant.[324] The officers' need to detain her in handcuffs (and in her nightclothes) for the two to three hours that it took them to search the residence was never adequately explained.[325] In fact, details supplied in the concurrence made clear that any purported need was principally the product of the officers' decision to assign only two of the eighteen officers on the scene to monitor four detainees.[326] The Court upheld the detention as reasonable even after accepting the plaintiff's assertions that (i) she and the other detainees were not the targets of the search, (ii) they "posed no readily apparent danger," and (iii) "keeping them handcuffed deviated from standard police procedure."[327]

1. The Effect of Technology on Necessity

Because a search is about acquiring information, changes in technology (and behavior) about the collection, storage, maintenance, searching, and dissemination of information have had a significant impact on the definition and perceived intrusiveness of a search. In plain terms, developing technologies enable better hiding of information and more

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322. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 349–50 (2001) (rejecting defendant's request for a rule forbidding custodial arrest for minor, fine-only offenses and holding that requiring police to not arrest when they are unsure about severity of offense "would boil down to something akin to a least-restrictive-alternative limitation, which is itself one of those 'ifs, ands, and buts' rules, generally thought inappropriate in working out Fourth Amendment protection" (citation omitted)); United States v. Sokolow, 490 U.S. 1, 11 (1989) ("The reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques."); United States v. Sharpe, 470 U.S. 675, 686–87 (1985) ("A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished.").

323. Strossen, *supra* note 34, at 1238 ("If the benefits which flow from one measure could be substantially achieved through a second measure entailing lesser costs, the latter should surely be deemed more reasonable, on balance, than the former.").

324. Muehler v. Mena, 544 U.S. 93, 98–99 (2005).

325. *See id.* at 98–100.

326. *Id.* at 103–04 (Kennedy, J., concurring).

327. *Id.* ("Where the detainees outnumber those supervising them, and this situation could not be remedied without diverting officers from an extensive, complex, and time-consuming search, the continued use of handcuffs after the initial sweep may be justified, subject to adjustments or temporary release under supervision to avoid pain or excessive physical discomfort.").

sophisticated seeking.[328] The Court's recent search jurisprudence reflects its efforts to adapt to both sorts of changes.[329]

There are, however, no recent (or projected) technological changes in the seizure context that have impacted the individual's experience of a seizure. Indeed, his observation that the law of arrest is an example of a "law enforcement tool or fact pattern [that is] essentially impervious to change" is what prompted Orin Kerr to conclude that "the basic balance between liberty and public safety raised by taking a suspect into custody is the same today as it was at common law."[330] Kerr's conclusion, however, ignores an important variable: while the physical nature of a seizure may not vary with technology, the government's purported need for the intrusion might.

There are a number of available and evolving technologies that might affect the need for a seizure. For example, if the need to ensure an individual's appearance in court is driving the government need to take low-level offenders[331] and material witnesses[332] into custody, then sophisticated GPS tracking technologies can reduce that necessity. The increasing availability of body-scanning devices may make claims of urban police departments that regular street stops are necessary to detect and deter gun possession less compelling.[333] Use of cameras and other technology to detect traffic offenses (or development of other mechanisms for issuing citations for traffic offenses) makes car stops less necessary.[334] More extensive camera surveillance in high-crime neighborhoods ought to reduce the need for aggressive stop-and-frisk policing strategies. Indeed, significant advances in (and employment of) technology enabling physical surveillance and transaction surveillance[335] ought

328. *See* Kerr, *Equilibrium*, *supra* note 23, at 480. Of course, another key part of the equation, particularly, in the last fifteen years, is the heightened security environment and the government's aggressive deployment of novel technologies to detect and manage potential security threats. SLOBOGIN, *supra* note 21, at 3–4 ("A second difference between the surveillance of yesteryear and today is the strength of the government's resolve to use it. Especially since September 11, 2001, the United States government has been obsessed, as perhaps it should be, with ferreting out national security threats, and modern surveillance techniques . . . have played a major role in this pursuit.").

329. *See, e.g.*, Riley v. California, 134 S. Ct. 2473, 2484–85 (2014) (warrantless search of cell phone incident to arrest held unconstitutional); Maryland v. King, 133 S. Ct. 1958, 1980 (2013) (DNA swabbing of arrestees constitutional); United States v. Jones, 132 S. Ct. 945, 949 (2012) (warrantless GPS tracking unconstitutional); Kyllo v. United States, 533 U.S. 27, 40 (2001) (warrantless use of thermal heat imager unconstitutional).

330. Kerr, *Equilibrium*, *supra* note 23, at 517, 522.

331. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 323 (2001); Virginia v. Moore, 553 U.S. 164, 176 (2008).

332. *See* Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2083 (2011).

333. *But cf.* Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1372 (2008) (cautioning against the assumption that "technological restraints are always preferable to physical ones").

334. Elizabeth E. Joh, *Discretionless Policing: Technology and the Fourth Amendment*, 95 CALIF. L. REV. 199, 221 (2007) ("By remotely and automatically enforcing the laws normally used by police to conduct traffic stops, DSRC [dedicated short-range communication] systems could eliminate or drastically reduce the number of police-conducted traffic stops.").

335. SLOBOGIN, *supra* note 21, at 7–9 (describing five categories of physical surveillance, including "cameras, tracking devices, telescopic devices, illumination devices, and detection devices

to reduce or delay the need for seizures in criminal investigations. One simple way to improve a frequently used calculation of necessity is to require more data for establishing claims like "high-crime area."[336]

Other technologies might reduce the likelihood that a police encounter might result in excessive or deadly force. The President's Task Force on 21st Century Policing cited studies that found that the use of body-worn cameras seemed to act as a sort of deterrent for the officers who wore them: they "reduce[d] . . . officer[s'] use of force" in stops and arrests.[337] The same Task Force report described advances in "less than lethal" technology that are being developed to reduce the number of cases where police resort to deadly force.[338]

In general, the Court is more effective at articulating the burdens that technology imposes on law enforcement than it is at identifying those burdens that technology alleviates.[339] Sometimes, as in the warrant context, technology evolves in ways that could justify less intrusion than had been necessary to satisfy the needs of earlier police departments.

The Court's holding in *Watson*, discussed in Section I.A above, was premised, in part, on the perceived "encumbrance" that an arrest warrant requirement would impose on police.[340] Technology has changed, however, in ways that call into question the reasonableness balancing that yielded the *Watson* result. The possibility of obtaining, from the field, near-immediate telephonic warrants makes the consideration of the question presented in *Watson* a much different proposition today than it was in 1976 (and worlds apart from the situation in 1789).[341] As Oren Bar-Gill and Barry Friedman have recently observed:

> Feasibility and exigency are both functions of technology, which operates in today's world to favor warrants. . . . For too long we have lived with a caricature of the warrant process: a detective pounding out a warrant request in triplicate on a battered Smith Corona, assuredly a time-consuming task almost impossible to meet in the fast-paced arena of police work. We do not live in that world, however,

(i.e., devices capable of detecting concealed items)"); *see also id.* at 51–70 (discussing the limitations of current Fourth Amendment protections in these contexts); *id.* at 9–12, 168–91 (discussing "target-driven transaction surveillance" much of which can be obtained without either a warrant or even a third-party subpoena; this includes collection of decades of general financial and public records information from commercial data brokers, more specific financial transaction information, phone records, click-stream data, and email records, among other types of data).

336. *See* Andrew Guthrie Ferguson & Damien Bernache, *The "High-Crime Area" Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587, 1642–43 (2008).

337. TASK FORCE, supra note 13, at 32.

338. *Id.* at 37–38.

339. The role that technology should play in reducing the need for Fourth Amendment intrusions is the subject of a separate work in progress.

340. *See* United States v. Watson, 423 U.S. 411, 423–24 (1976).

341. Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1614–15 (2012).

> and have not for some time. . . . If a magistrate is not on hand, technology can often fill the gap; telephonic warrants are increasingly commonplace. . . . In short, today's technology makes obtaining permission from an official remote from the heat of the decision fast and easy.[342]

In the search context, the Court has begun to adjust the definition of reasonableness to reflect technological advances. The Court's recent decisions in *Missouri v. McNeely*[343] and *Riley v. California*[344] both acknowledged technological developments (and corresponding rule changes) that have increased the ability of officers to obtain warrants remotely.[345] As the *McNeely* Court explained: "[T]echnological developments that enable police officers to secure warrants more quickly, and do so without undermining the neutral magistrate judge's essential role as a check on police discretion, are relevant to an assessment of exigency."[346]

Although there is no suggestion (yet) that the Court is inclined to revisit the question of requiring more arrest warrants, any modern defense of (and reliance on) the *Watson* holding should acknowledge the Court's response to changing technologies in other Fourth Amendment contexts.

Similarly, one of the prevailing arguments in *Atwater* was that it would be too cumbersome to require officers to know which misdemeanor offenses were fine only.[347] The *Atwater* majority did not consider whether it was difficult for any officer to obtain that information through existing mechanisms—nor did it consider the possibility that a readily accessible police database could be easily developed. If not then, certain-

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342. *Id.* (footnote omitted).

343. 133 S. Ct. 1552 (2013).

344. 134 S. Ct. 2473 (2014).

345. In *McNeely*, the Court noted the changes over time of advancements in technology as they relate to obtaining warrants by looking at the amendments of the federal rules (a magistrate judge could once issue a warrant via a telephone conversation; the rules now permit issuance of a warrant via telephone *or other electronic communication*). *McNeely*, 133 S. Ct. at 1562 (allowing a magistrate judge to "consider 'information communicated by telephone or other reliable electronic means'" (quoting FED. R. CRIM. P. 4.1)). The *McNeely* Court also recognized that in some jurisdictions, prosecutors may apply for warrants via radio, telephone, email, and video conferencing and in some cases can receive a signed warrant in less than fifteen minutes. *Id.* at 1562; *see also id.* at 1573 (Roberts, C.J., concurring in part and dissenting in part) (describing warrants received via email to iPads). In *Riley*, while acknowledging that a warrant requirement may hinder police, the Court described the ease with which warrants can be obtained because of the advances of technology in recent years. *Riley*, 134 S. Ct. at 2493 ("Recent technological advances similar to those discussed here have, in addition, made the process of obtaining a warrant itself more efficient.").

346. *McNeely*, 133 S. Ct. at 1562–63 (acknowledging, however, the delays built into any warrant process).

347. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 348 (2001) ("It is not merely that we cannot expect every police officer to know the details of frequently complex penalty schemes but that penalties for ostensibly identical conduct can vary on account of facts difficult (if not impossible) to know at the scene of an arrest." (citation omitted)).

ly now. Indeed, as Chief Justice Roberts recently observed in the *Riley* case: "[T]here's an app for that."[348]

2. Necessity and Myopia

As the 2014 protests have made clear, aggressive stop-and-arrest practices also inflict broad, long-term damage by undermining the perceived legitimacy of the criminal justice system.[349] These approaches may actually backfire in the long run by alienating communities and by possibly increasing the delinquency rates among community members.[350] The President's Task Force on 21st Century Policing emphasized this need for "legitimacy" in its May 2015 report: "[P]eople are more likely to obey the law" when those who enforce it are perceived to be "acting in procedurally just ways."[351] In support of the goal of "build[ing] public trust and legitimacy," the Task Force emphasized the need for a shift in law enforcement culture from a more aggressive and confrontational "warrior—mindset" to a more protective "guardian" approach.[352]

Fourth Amendment questions are too often presented as zero-sum choices between competing (and never coextensive) public-safety and liberty interests.[353] The obvious liberty costs of expanding seizure authority are viewed by the Court as being offset by the asserted law enforcement interests. But what if the government is not particularly good at calculating its security interests—either because its community focus is too narrow or its time horizon is too short? Increasing executive branch awareness of this issue is reassuring. As the President's Task Force explained: "Crime reduction is not self-justifying. Overly aggressive law

348. *Riley*, 134 S. Ct. at 2490.

349. *See* FACT SHEET, *supra* note 13 ("As the nation has observed, trust between law enforcement agencies and the people they protect and serve is essential to the stability of our communities, the integrity of our criminal justice system, and the safe and effective delivery of policing services."); *see also* Anderson, *supra* note 5 (explaining that racial biases that are evident from stop and frisk data "extend to other forms of aggressive policing, causing black people to associate police officers with humiliation and injustice, and stirring distrust for police in black communities around the country"); *cf.* Stephen J. Schulhofer et al., *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 348 (2011) ("The research on cooperation finds that willingness to assist the police—for example, by reporting suspicious behavior or by participating in crime prevention programs—is strongly linked to a person's belief that police authority is legitimate. And that belief is strong only when officials exercise their authority fairly.").

350. JENNIFER FRATELLO ET AL., VERA INST. OF JUSTICE, COMING OF AGE WITH STOP AND FRISK: EXPERIENCES, PERCEPTIONS, AND PUBLIC SAFETY IMPLICATIONS 6 (2013) ("[I]ntensive policing can actually 'backfire' and weaken conventional norms among residents and their willingness to cooperate with police, eventually leading to higher levels of crime." (footnotes omitted)); Stephanie A. Wiley & Finn-Aage Esbensen, *The Effect of Police Contact: Does Official Intervention Result in Deviance Amplification?*, 25 CRIME & DELINQ. 1, 16–19 (2013).

351. TASK FORCE, *supra* note 13, at 1.

352. *Id.* at 1, 11–12.

353. *See* Alexander A. Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461, 1483 (criticizing "the Court's insistence in Fourth Amendment cases that collective interests are always in tension with individual interests, and never in tension with each other").

enforcement strategies can potentially harm communities and do lasting damage to public trust."[354]

This is a message that is too often missing in Court analyses of the government's power to seize individuals under the Fourth Amendment. The Court, too, has a more active role to play to ensure that longer term public-safety costs of broadened seizure authority are weighed in the balance.

CONCLUSION

Over the last fifteen years, the Court's reasonableness balancing in cases involving seizures of people has yielded greater authority to the government and significantly narrowed the protections of the Fourth Amendment. Police make more arrests for minor offenses. They employ stop-and-frisk policies in ways that far exceed the "carefully guarded" approach initially envisioned by the *Terry* Court. The Court has largely withdrawn from regulation of "consensual" encounters. Lines previously drawn in checkpoint cases, in search warrant-seizure cases, and in cases involving police use of force have shifted and blurred.

These trends are based, in some measure, on the Court's underestimation of the individual rights and community interests at stake in these cases. Close examination of the cases reveals that this expansion has been driven, in large part, by the Court's reluctance to scrutinize the other side of the balance: the government's need to detain a particular criminal suspect (or category of potential suspects). This must change. The Fourth Amendment protection against unreasonable seizures is meaningless if the Court does not play an active role in restraining aggressive police power.

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354. TASK FORCE, supra note 13, at 16; *see also id.* at 42 ("It must also be stressed that the absence of crime is not the final goal of law enforcement. Rather, it is the promotion and protection of public safety while respecting the dignity and rights of all.").

EXCEPTIONS MEET ABSOLUTISM: OUTLAWING GOVERNMENTAL UNDERREACH IN HEALTH LAW

CHRISTINA S. HO†

ABSTRACT

Health measures are sometimes struck, not for "overbreadth," but for "underbreadth." Short of an equal protection problem, a guaranteed right, an unconstitutional condition, or other constitutional problem, how does the effort to moderate a law by carving out exceptions to accommodate important concerns necessarily doom the underlying legal provision itself? Is there any pattern to the courts' use of relatively malleable administrative law review doctrines to strike down health rules, not just because of what they do, but ostensibly because of what they leave undone?

This Article tackles the underappreciated vulnerability of exceptions-based rules in health law. I look at three examples: New York City's notorious Soda Portion Cap Rule that exempted refills; the FDA's decision to allow age-restricted, over-the-counter (OTC) emergency contraception; and Pennsylvania's Medicaid rules providing eyeglasses, an optional benefit, to beneficiaries with eye disease but not to those with refraction error. Each case exhibits three common elements that characterize how a rule's exceptions, deliberately tailored to prevent overreach, can turn out to be the rule's Achilles' heel. The courts in each of these cases insist upon an extra-legal policy absolutism that challenges not only our assumptions of a default judicial posture favoring cost-benefit analysis but also deeper assumptions about the rule-based nature of law.

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INTRODUCTION

Health law perches at an intersection where disciplines and values collide. A longtime observer, in an article entitled *Can Health Law Become a Coherent Field of Law?*, opens with the following declaration: "I want to concede at the outset that health law, today, is not yet a coherent

field of law. It is, rather, a disjointed set of statutes and doctrines . . . based on different principles and paradigms . . . ."[1]

Major health laws, from Medicare to the recent Affordable Care Act, are products of intense normative struggle.[2] The results are often highly detailed statutory and regulatory regimes memorializing each round of combat over enactment and implementation. These regimes are inevitably littered with rules containing built-in exceptions.[3]

In this Article, I will show that this design, employed extensively throughout the health law field, is vulnerable in court. This Article identifies a phenomenon of judicial antagonism towards rules with built-in exceptions. This phenomenon exhibits a pattern, which spans the political spectrum, whereby judges intervene to strike such health-related rules precisely because the exceptions signal value conflict. Next under the pattern, judges divert the underlying disputes to extra-legal arenas of decision-making, such as politics, science, or medicine. Finally, they justify their intervention using distinctly rule-averse forms of reasoning derived from the self-same, extra-legal arenas that they anointed as the appropriate normative fora. The existence of this three-part judicial subroutine challenges some of our assumptions about the judicial default posture favoring cost-benefit analysis, as well as deeper assumptions about the rule-based nature of law.[4]

My thesis starts from the feature of exceptions built into a rule before the time of application.[5] I acknowledge that the parameters of a rule's applicability are sometimes framed linguistically as an exception and sometimes as one of the rule's conditions, requirements, or "elements."[6] I will refer to both as exceptions, stipulating that the phenomenon I am describing is a rule's "underinclusion," regardless of how it appears as an artifact of language.

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1. Einer R. Elhauge, *Can Health Law Become a Coherent Field of Law?*, 41 WAKE FOREST L. REV. 365, 365 (2006).

2. For the ACA's accommodation of multiple different goals and ideas, see, for example, Paul Krugman, *The Big Kludge*, N.Y. TIMES, Oct. 28, 2013, at A27 (describing the ACA as "a clumsy, ugly structure that more or less deals with a problem"); *see also* Atul Gawande, *Testing, Testing*, NEW YORKER, Dec. 14, 2009, http://www.newyorker.com/magazine/2009/12/14/testing-testing-2 (comparing the strategy of the ACA on health cost rationalization to agricultural policy at the turn of the twentieth century, not "a grand solution[,]" but "a hodgepodge").

3. The Supreme Court has declared ERISA "a 'comprehensive and reticulated statute[.]'" Great–W. Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 209 (2002) (quoting Mertens v. Hewitt Assocs., 508 U.S. 248, 251 (1993)). For the proposition that Medicare is filled with detailed, highly specified provisions, see Nicholas Bagley, *Bedside Bureaucrats: Why Medicare Reform Hasn't Worked*, 101 GEO. L.J. 519, 524 (2013).

4. For the default posture of cost-benefit analysis, see Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651, 1667–68 (2001). For the rule-based nature of law according to legal positivism, see *infra* notes 7, 19 & 23.

5. This is in contrast to those exceptions that result from rule defeasibility.

6. *See, e.g.*, Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871, 872–73 (1991). *But see* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 533–36 (1983) (differentiating between jurisdictional parameters that define a statute's applicability and proscriptive parameters that define the conduct to be prohibited).

Why should judges invalidate rules narrowly drawn to fit diverse considerations?[7] What account can we give for why judges limit lawmakers to a seemingly all-or-nothing range of action with no ability to trim a measure to accommodate different factors? My discussion of three illustrative health law cases will show that doctrine alone cannot answer these questions.

In seeking the unstated fit norms that rein in exceptions, I examine these cases and find that these judges disfavor rules in the face of the value conflict that is inevitable given the normative pluralism characterizing health law.[8] Exceptions are often indicators of a highly salient value conflict,[9] and the examples show that judges are hesitant to depend

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7. Throughout this Article, I will use "rule" in the thin, abstract sense, as a norm characterized by a certain degree of detailed specificity, and which applies pressure to conform where the reason for conforming is the fact of the rule itself. H.L.A. HART, THE CONCEPT OF LAW 21, 55–57 (1961). I will refer to such a norm as a "rule" whether it is in fact an agency "regulation," technically an "order" under the Administrative Procedure Act, a statutory or constitutional provision, or judge-made doctrine. This Article focuses on "rules" made at the agency level, but we observe such patterns in regimes that impose substantive review on legislation as well. *See, e.g.*, Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1310–11 (11th Cir. 2011) (declaring the ACA's individual mandate outside Congress's authority in part because of the exceptions carved out of the mandate), *aff'd in part, rev'd in part sub nom.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012); *see also* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 566 (2001) (invalidating ban on indoor tobacco advertising near schools if placed less than five feet from the ground, citing failure to protect children taller than five feet); Jones v. State Bd. of Med., 555 P.2d 399, 411, 416–17 (Idaho 1976) (explaining that a state malpractice damages cap might be constitutional under the equal protection clause of the Fourteenth Amendment but that the cap violated the state constitution in part because it did not cap liability for other types of defendants). *But see* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955) (declaring that "the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute . . . . The legislature may select one phase of one field and apply a remedy there"). For articles that document similar "exceptions" or all-or-nothing phenomena in non-health constitutional law fields, see Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at "The Greater Includes the Lesser,"* 55 VAND. L. REV. 693 (2002); John Fee, *Greater-or-Nothing Constitutional Rules*, 64 CASE W. RES. L. REV. 101 (2013); Michael Herz, *Justice Byron White and the Argument that the Greater Includes the Lesser*, 1994 BYU L. REV. 227 (1994); Elena Kagan, *The Changing Faces of First Amendment Neutrality:* R.A.V. v. St. Paul, Rust v. Sullivan, *and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29, 32.

8. These cases are not meant to be representative, but they are also not isolated examples of this phenomenon of invalidation for underinclusion. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133–36 (2000) (ruling that the regulation of cigarettes as a drug-delivery device is outside the statutory authorization because FDA only banned marketing to minors when such an unsafe product should have been banned entirely); *see also* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2779–82 (2014) (striking HHS regulation mandating for employer provision of contraceptive coverage as part of the ACA requirement that employers provide preventative care as contrary to the Religious Freedom and Restoration Act in part because carve outs from that mandate for grandfathered plans and for non-profits suggested a less restrictive alternative); Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1034–40 (D.C. Cir. 1999) (invalidating the 0.08 ppm ozone standard because the underlying statutory delegation, by prohibiting cost-benefit analysis with respect to public health, provided "no intelligible principle" for standard setting short of complete elimination), *aff'd in part, rev'd in part sub nom.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

9. Many scholars discuss this feature of exceptions, limitations, balancing, and underinclusion. *See, e.g.*, Claire Oakes Finkelstein, *When the Rule Swallows the Exception*, *in* Rules and Reasoning: Essays in Honour of Fred Schauer 147–49 (Linda Meyer ed., 1999), *reprinted in* 19 QUINNIPIAC L. REV. 505, 505–08 (2000); *see also* John F. Manning, *The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 4 (2014) (stating of the Court's fidelity to accommodations in Congressional text that "[b]y adhering, instead, to the

upon "rules" in these contexts—whether the rules are regulatory or judge-made, substantive or "jurisdictional." The reasons they give fit a pattern, suggesting that courts are eliding rules with their underlying justifications.[10] This phenomenon amounts to a policy-absolutist counter-strand to the implicit cost-benefit default principles that Cass Sunstein has identified, which purport to give agencies latitude to weigh competing concerns.[11]

A. Conventional Wisdom: Courts Employ Cost-Benefit Defaults

Sunstein has argued for an emerging "federal common law of regulatory policy" consisting of presumptions that federal courts, particularly the D.C. Circuit, employ to construe statutes in such a way as to allow agencies to accommodate countervailing costs and benefits.[12] Sunstein examines the case law to show that, absent clear congressional prohibition, agencies are by default permitted under a variety of statutory authorizations to make *de minimis* exceptions; to consider health-health tradeoffs; to weigh costs as well as benefits; and to reject nonfeasible regulation.[13] Indeed, he argues that at least some of these cost-benefit defaults, by placing a clear-statement burden on Congress when it prescribes "policy absolutism" to the exclusion of offsetting concerns, are part of an arsenal of nondelegation canons that limit unconfined agency action and thereby protect the values of Article I, Section I of the Constitution.[14] Thus, Sunstein's cost-benefit default principles reflect the judicial stance that rules are less arbitrary and more legitimate when they do acknowledge competing considerations.[15]

While Sunstein restricts his gaze to federal courts reviewing federal agency action, cost-benefit analysis is also prevalent, potentially even

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words of the statute as written, today's Court enables Congress more predictably to express its preference for outcomes that may not be so coherent — that include rough accommodations, take only baby steps toward some broader purpose, or adopt crisp rules that favor certainty over achieving a perfect means-ends fit"); Linda Ross Meyer, *Unruly Rights*, 22 CARDOZO L. REV. 1, 1–9 (2000) (discussing the significance of balancing and limitation in the context of "interest" based theories of rights); James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773, 773–75 (1995).

10. *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 3–6 (1977) (discussing the perennial jurisprudential question of whether law consists of rules or whether law consists in part of the underlying moral principles behind those rules).

11. *See* Sunstein, *supra* note 4, at 1667–68. I am not proposing these exceptions are precisely contoured for nor governed by utilitarian welfare calculations, but they do exhibit a kind of balancing, or trade-off orientation. And Sunstein's orientation toward trade-offs or accommodations reflects this broader perspective rather than a narrower utilitarianism. *See, e.g.*, Cass R. Sunstein, Commentary, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1739–41 (1995).

12. Sunstein, *supra* note 4, at 1654–56.

13. *Id.* at 1668–70.

14. *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 323, 334–35 nn.93–94 (2000).

15. *See* Sunstein, *supra* note 11 (advancing a view that law allows people in a society to proceed without forcing convergence or coherence on larger abstract values and principles).

normatively privileged, in states as well.[16] Yet in the three health law cases I examine, instead of following a common law that favors accounting for offsetting values, courts seem to be striking those rules that acknowledge competing considerations.[17] Such a view, if extended, would render rules unsuited to the management of plural values.

B. Contrasting Pattern

My approach in this project is to look at three cases, spanning both time and the political spectrum. These cases involve New York City's Soda Portion Cap Rule, the Food and Drug Administration's (FDA's) decision to allow age-restricted, over-the-counter status for emergency contraception, and Pennsylvania's Medicaid rule that provided eyeglasses to those with eye disease but not refraction error. In each case, the rule is struck because it contains a built-in exception. I identify the commonalities that underlie the decisions across three doctrinal areas, namely, the New York State separation of powers doctrine, the "arbitrary and capricious" standard under the Federal Administrative Procedure Act, and statutory interpretation of the federal Medicaid statute's "reasonableness" standard for state programs.

Three common elements emerge from the three examples:

1) First, the court in each instance identifies the exception-laden provision's ambition to confront value conflict as the crucial misstep that dooms the measure. The design of the soda portion cap balanced health against "economic" as well as political turf or even liberty considerations. The Plan B age-restricted switch decision balanced legitimate "safety and efficacy" considerations against sexual morality. Pennsylvania balanced health needs against cost considerations.

2) Next, each judge, having decided that the rule improperly handled value conflicts, assigned the decision to some extra-legal arena—politics in the soda portion cap, science in the Plan B OTC switch, and clinical medicine in the Pennsylvania eyeglasses benefits. The judge disabled positive law in each of these cases, preferring the governance of other, arguably more robust social institutions instead.

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16. Indeed in the New York state case I examine here, Judge Pigott declares, "[C]ost-benefit analysis is the essence of reasonable regulation; if an agency adopted a particular rule without first considering whether its benefits justify its societal costs, it would be acting irrationally." N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 16 N.E.3d 538, 546 (N.Y. 2014). And the dissent states, "Cost-benefit analysis has long been a staple of state and federal regulatory processes (*see e.g.*[,] State Administrative Procedure Act § 202–a [1] ['In developing a rule, an agency shall, to the extent consistent with the objectives of applicable statutes, consider utilizing approaches which are designed to avoid undue deleterious economic effects or overly burdensome impacts of the rule upon persons']." *Id.* at 559 n.3 (Read, J., dissenting) (second alteration in original) (emphasis omitted) (quoting N.Y. A.P.A. LAW § 202-a(1) (McKinney 2015)).

17. *See* Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation:* Erie *for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 755–58 (2013) (arguing that canons of statutory interpretation are a form federal common law).

3) Third, despite the ostensible deference of the judge to these other justificatory arenas, the judge in each case determines the outcome herself in the guise of a decision to divert jurisdiction over the matter away from the agency to her favored arena.[18] However, the judge never articulates a jurisdictional rule. Instead, the judge decides the jurisdictional question by applying her own conception of the methodology borrowed from the non-legal institution she has predetermined. The dispositive analysis was balancing in the soda portion cap case, extrapolation to an undersampled population in the emergency contraception OTC case, and reference to ophthalmologist affidavits in the Medicaid eyeglasses case.

This three-step maneuver is profoundly rule averse. Steps one and two are common enough insofar as legal institutions often sidestep the declaration of substantive rules and use jurisdictional rules instead to assign the substantive decision to another actor. However, step three in these cases shows that the jurisdictional decision is also decided by recourse to rule-averse reasoning.

I begin by examining the scholarship on the nature of rules and their justifications to discover what in our expectations surrounding rules might prompt resistance to exceptions.

I. RULES, COMPOUND JUSTIFICATIONS, AND EXTERNAL EXCEPTIONS

A. Legal Scholarship and Definitional Matters

Much has been written of exceptions, but mostly to identify the circumstances under which exceptions should be, or are likely to be, crafted.[19] The exceptions literature does not speak to the question of why, once a rule *has* been agreed upon through a process granted social authority, it should then be struck, especially when one of positive law's uses is held to be "the authoritative settlement of moral and political issues."[20]

B. Exceptions as a Superficial Category or as Underinclusion?

Above, I note that when I speak of exceptions, I am referring to ex ante exceptions written into the rule at its inception. Of course, as Frederick Schauer points out, an exception is hard to distinguish from any other

18. I use the term "jurisdiction" here not in the technical sense, but to refer to the substantive arena governing decision-making.

19. *See, e.g.*, Alfred C. Aman, Jr., *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 DUKE L.J. 277, 280 (1982); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 74–75 (1983); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 588–90 (1992); Peter H. Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process*, 1984 DUKE L.J. 163, 167 (1984); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 957–58 (1995).

20. Scott J. Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed*, *in* RONALD DWORKIN 22, 24 (Arthur Ripstein ed., 2007).

qualifying parameter set forth in the rule.[21] Thus, condemnation of a rule for having an exception is hard to distinguish from condemnation of any other aspect of the rule's scope or content. However, Claire Oakes Finkelstein shows that some exceptions or carve-outs can be identified with significance beyond linguistic fortuity or stylistic choice.[22] She suggests that certain exceptions are usefully thought of as external to the rule that they condition[23]: "An exception is a qualification of a rule that stands in a certain relation to it, namely it stands outside the rule it qualifies."[24] In her account, an exception's "outsider" status obtains if the exception can be said to have a different "justification" from that which underlies the rule.[25] She even ascribes this view to Schauer himself[26]: "The logic of exceptions . . . is more correctly understood in terms of what Schauer calls 'external' failure, namely conflict between a rule and something other than the rule's own background justification."[27]

C. Rules as Distinct from Justifications

Schauer also supplies the notions of underinclusion and compound justifications to help us specify the relationship of rules to exceptions. In his rigorously considered account of "rule-ness," Schauer tells us that a rule, by definition, diverges from its justification, and he explores the phenomena of underinclusion and overinclusion of rules relative to their justifications.[28] With these resources in hand, I contend that the type of ex ante exceptions I examine here can be understood as underinclusions relative to some justification.

Schauer tells us that for a rule to be a rule, it must apply some pressure distinct from what the justification would suggest if one were to rely directly on the justification to make decisions:

> If a rule applies even when its application would not serve the rule's justification, and if a rule does not apply even when application

21. Finkelstein, *supra* note 9, at 152–53 (describing Schauer's position on this point).
22. *Id.* at 149.
23. *Id.* at 149, 155 (conceding that Schauer recognizes external exceptions too).
24. *Id.* at 150 (emphasis omitted).
25. *Id.* at 155.
26. *Id.* (distinguishing internal and external exceptions).
27. *Id.*; *see also* FREDERICK SCHAUER, PLAYING BY THE RULES 117–18 (1991) ("By comparison, rules with some resistance to internal failure . . . might still be subject to being overridden by particularly exigent factors external both to the rule and *its* justification. When rules are inapplicable (or, more accurately, non-controlling) on the basis of such factors not themselves a function of what this rule itself is designed to accomplish, we can say that such rules are *externally defeasible*, subject to being defeated or rendered non-controlling by factors external to the rule itself."). Of course, under a single-valued justificatory system, like utilitarianism, this distinction collapses, as he points out. Schauer goes on to explain that rules should exert some resistance to external defeasibility: "[F]or a rule to be a reason for action" it must have "weight." SCHAUER, *supra*, at 118.
28. *See* SCHAUER, *supra* note 27, at 61–62; *see also id.* at 76 ("A rule exists . . . insofar as an instantiation of a justification is treated . . . as entrenched, having the power to provide a reason for decision even when that instantiation does not serve its generating justification. The form of decision-making that we can call rule-based, therefore, exists insofar as instantiations resist efforts to penetrate them in the service of their justifications.").

> would serve that justification, is it a bad rule? Or have we just misapplied the rule? Or is this just part of what rules are all about?[29]

Rules and justifications will inevitably diverge due in large part to the unavoidable generality of the rule. However, if one could anticipate the particular cases where the rule would prove overinclusive, or more to our purposes, underinclusive, one could then articulate and build in exceptions in advance.[30]

One reason that a rule's fit might be predictably bad is based on "internal" reasons, namely, where the rule does not fit the justification because the justification itself is undermined by the rule. An example would be what Sunstein calls "health-health trade-off[s]" when one of the justifications for the rule is health promotion, yet the health-promoting measure may itself have adverse side effects for health, justifying limitation of the rule based on "health" concerns as well.[31] Sunstein gives a hypothetical example where "the regulation of one risk, like . . . asbestos, may give rise to further risks as a result of the substituted products[,]" which may be just as harmful.[32] An "external" failure of the rule, by contrast, would arise where a different countervailing justification, e.g., a non-health reason such as economic cost, could be known in advance to exceed what we would consider justified by the health gains from regulating asbestos.[33] For example, we might find the countervailing cost justification convincing for some subset of instances, such as in small businesses with ten or fewer employees.

D. Plural Justifications

Thus, characterizing a failure of fit as "internal" or "external" to a rule, indeed framing the notion of fit at all, or even understanding whether a rule is even a rule, all depend on each rule having an identifiable "justification." Yet justifications are often plural. The phenomenon of compound justifications for any one rule has been noted in other contexts, including statutory interpretation, and with respect to rationality review under the Equal Protection Clause of the Constitution.[34] "If legislation is often a rough-hewn compromise, then testing its validity against 'actual' legislative purpose risks attributing unwarranted coherence to the legislative process, which may entail logrolling or other strategic voting,

29. *Id.* at 34. For a thorough consideration of the role of rules in various health-related decisions, using Schauer's account of rules, see DAVID ORENTLICHER, MATTERS OF LIFE AND DEATH: MAKING MORAL THEORY WORK IN MEDICAL ETHICS AND THE LAW 11–15 (2001).

30. SCHAUER, *supra* note 27, at 36–37.

31. *See, e.g.*, CASS R. SUNSTEIN, THE COST-BENEFIT STATE 124 (2002).

32. *Id.*

33. *See id.*

34. *See, e.g.*, Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 132 (1972) (criticizing the handling of cases under the rational review doctrine for formulating the purpose against which the statutory means would be measured for rationality as "a unit rather than as a mix of policies").

making concessions to strongly felt but outlying interests, or papering over disagreements to ensure the legislation's passage."[35]

In sum, justifications associated with a particular rule can be multifarious. Often, the limiting boundary narrowing the scope of the rule is justified by "external" values, or concerns that differ from the value or policy underlying the rule. To the extent the rule contains such narrowing parameters, one could say that the parameters render the rule "underinclusive" relative to that particular animating justification. In other words, even if the narrower rule better fits the constellation of justifications that might impinge in particular situations, it does not realize the single presumed animating value to the fullest extent possible because of a limiting parameter or "carve-out."

Schauer tells us that the nature of rule-based practice is to recognize that a rule presumptively governs, even when the rule-generated outcome is not congruent with the resolution of the situation were it to be decided by resort to the animating justification.[36] Thus, if such a narrowed rule (or exception) is applied, even when the animating justification might argue for fuller application, that is because in our system of law, we recognize the normative force of rules, rather than reverting in every instance to decision by justification.[37]

Yet as we will see, exceptions, if they arise from competing values limiting a rule, are sometimes not given effect. These are the examples we turn to next.

35. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2450 (2003) (footnote omitted). *See also* Easterbrook, *supra* note 6, at 540–41 ("Almost all statutes are compromises . . . . What matters to the balancers is reducing the chance that their work will be invoked subsequently to achieve more, or less, than they intended, thereby upsetting the balance of the package. . . . Legislators seeking only to further the public interest may conclude that the provision of public rules should reach so far and no farther . . . . No matter how good the end in view, achievement of the end will have some cost, and at some point the cost will begin to exceed the benefits."); Note, *supra* note 34, at 131–32 (citing John Hart Ely's suggestion that courts must be "restrict[ing] the range of acceptable goals"). The Note author then goes on to state that to strike a rule for underinclusion denies multiple justifications. If multiple justifications define the rules' contours, many rules may be "'tautologically' rational," unless the court privileges some of the justifications. *Id.*

36. SCHAUER, *supra* note 27, at 93–100.

37. *See generally* JOSEPH RAZ, PRACTICAL REASON AND NORMS (1990) (providing an account of rules as norms that substitute for the underlying justification). The project of this Article is to probe that assumption that our system of law is rule-based, rather than infused with what exclusive positivists would deem "extra-legal" elements. *C.f.*, Zadvydas v. Davis, 533 U.S. 678, 699 (2001) (demonstrating that natural law elements enter into judicial decisionmaking, where the court cites the maxim "[c]essante ratione legis cessat ipse lex" meaning that where a law's rationale ceases to apply, so does the law itself (quoting 1 EDWARD COKE, INSTITUTES 70b (1628))). In *Zavydas*, the Supreme Court granted habeas relief even though the statute set no limit on the length of time for detention beyond removal and "the applicability of due process to aliens subject to removal is at least questionable." Michael W. McConnell, *The Ninth Amendment in Light of Text and History*, 2009-2010 CATO SUP. CT. REV. 13, 25.

II. CASES

A. NY Statewide Coalition v. NYC Health Department: *Soda Portion Cap Rule*

1. Description

In May of 2012, then-mayor of New York City, Michael Bloomberg, publicly proposed to cap the containers that Food Service Establishments (FSEs) use to sell sugary drinks at sixteen ounces.[38] The provision defined a "sugary drink" as a nonalcoholic beverage sweetened with sugar or another caloric sweetener, with more than twenty-five calories per eight fluid ounces of beverage, and with milk or milk-substitute ingredients constituting fifty percent or less of the beverage by volume.[39]

On June 9, the City published a notice of public hearing to be held by the New York City Department of Health and Mental Hygiene (DOHMH) in late July.[40] Afterwards, DOHMH sent a memo to its rule-making arm, the City's Board of Health (BOH), summarizing the hearing.[41]

Shortly thereafter, on September 13, the BOH, composed of eleven members appointed by the mayor, passed New York City Health Code § 81.53 establishing the Soda Portion Cap Rule.[42]

Under the City Charter, the DOHMH has jurisdiction to regulate all "matters affecting health in the City, including conditions hazardous to life and health, by, among other things, regulating the food and drug supply of the City, and enforcing provisions of the New York City Health Code."[43] The BOH is charged with establishing the code of health with respect to anything within the DOHMH's jurisdiction.[44]

The soda portion cap measure met opposition throughout the process. Two days after it was announced, a group of city council members wrote to the mayor, objecting and demanding a council vote.[45] One month after it was adopted, a coalition of plaintiffs sued the DOHMH in state court over the rule.[46] The county court, in an opinion by Judge Tingling, invalidated the rule as both "arbitrary and capricious" and as improper "legislation" by an administrative entity in violation of the state

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38. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene (*New York Statewide II*), 970 N.Y.S.2d 200, 205 (N.Y. App. Div. 2013).
39. N.Y.C., N. Y., N.Y.C. HEALTH CODE § 81.53 (2012) (repealed 2013).
40. *New York Statewide II*, 970 N.Y.S.2d at 205.
41. *Id.*
42. *Id.* at 204–05.
43. *Id.* at 204.
44. N.Y.C. CHARTER §§ 553, 558 (2009).
45. *New York Statewide II*, 970 N.Y.S.2d at 204.
46. *Id.* at 206.

constitutional separation of powers test laid out in a prior case,[47] *Boreali v. Axelrod*.[48] This outcome was upheld on appeal by Judge Renwick, relying upon the separation of powers' grounds for invalidation and, therefore, declining to reach the issue of the rule's arbitrariness.[49] The highest court in New York then affirmed the intermediate appellate court decision 4–3 on June 26, 2014, with a majority opinion by Judge Pigott and dissent by Judge Read.[50]

2. Exceptions

The Soda Portion Cap Rule was characterized as riddled with exceptions. These exceptions were then blamed as the telltale sign that the health department improperly balanced political considerations, thus violating one of the four prongs of the *Boreali* test for forbidden legislation by an executive agency.

Judge Renwick describes the rule as follows: "The rule thus targeted non-diet soft drinks . . . but contained carve-outs for alcoholic beverages, milkshakes, fruit smoothies and mixed coffee drinks, mochas, lattes, and 100% fruit juices."[51]

These exclusions arose from the definition of "sugary drink."[52] The definition stipulates that a sugary drink is "non-alcoholic."[53] It also defines "sugary drinks" as "sweetened by the manufacturer or establishment," thus excluding 100% fruit juices.[54] The caloric threshold and stipulation of "caloric sweetener" presumably exclude diet soft drinks.[55] Finally, the definition excludes drinks that are constituted by more than fifty percent milk or milk substitute.[56] This parameter thus exempts some lattes, smoothies, mixed coffee drinks, and milkshakes.

Furthermore, because the Soda Portion Cap Rule stated that it applies to "food service establishments," whose scope is elsewhere defined,[57] the petitioners challenging the rule complained that the rule

47. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene (*New York Statewide I*), No. 653584/12, 2013 WL 1343607, at *7–8, *19–20 (N.Y. Sup. Ct. Mar. 11, 2013).

48. Boreali v. Axelrod, 518 N.Y.S.2d 440, 443–45 (N.Y. App. Div. 1987) (striking the New York Public Health Commission's indoor smoking ban as improper legislation by a state agency).

49. *New York Statewide II*, 970 N.Y.S.2d at 213.

50. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene (*New York Statewide III*), 16 N.E.3d 538, 540, 549–50 (N.Y. 2014).

51. *New York Statewide II*, 970 N.Y.S.2d at 205.

52. N.Y.C., N. Y., N.Y.C. HEALTH CODE § 81.53(a)(1)(A)–(D) (2012) (repealed 2013).

53. *Id.* § 81.53(a)(1)(A).

54. *Id.* § 81.53(a)(1)(B).

55. *Id.*

56. *Id.* § 81.53(a)(1)(D).

57. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene (*New York Statewide II*), 970 N.Y.S.2d 200, 204 (N.Y. App. Div. 2013) (quoting the code's definition of a "food service establishment" (FSE) as "a place where food is provided for individual portion service directly to the consumer whether such food is provided free of charge or sold, whether consumption occurs on or off the premises or is provided from a pushcart, stand or

"would appear to exempt grocery stores, convenience stores, bodegas and markets from having to comply with the Rule. . . . [Such exempt establishments would] includ[e] the 7-11 market chains and their famous, or infamous, Big Gulp containers . . . ."[58]

Finally, because the rule regulates size, but not number, of portions, the petitioners could characterize refills as an exception and persuade New York's highest court that the entire approach of capping portion size was underinclusive.[59]

3. *Boreali* Test

The principal complaint that emerges in the suit is that the health department, as an executive agency, has engaged in an act of impermissible "legislation." Petitioners contend that under the New York State Constitution, agencies like the BOH "may not bypass the legislature, under the guise of public health, and make fundamental policy choices and establish far-reaching new policy programs all by themselves, no matter how well-intentioned they may be."[60] How does the presence of exceptions pertain to whether the Soda Portion Cap Rule constitutes improper "legislation," violating state separation of powers doctrine? The answer is that *Boreali*, the seminal case defining the test for such a doctrine, contains a prong designating exceptions as a sign of such improper legislating.[61]

The *Boreali* test identifies four prongs, the first of which speaks most directly to the issue of exceptions. The first prong looks at "whether the challenged regulation is based upon concerns not related to the stated purpose of the regulation, i.e., is the regulation based on other factors such as economic, political or social concerns?"[62] In other words, "The first factor in *Boreali* probes whether the challenged regulation *carves out exemptions* based on economic, political and social considerations."[63]

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vehicle" (quoting N.Y.C., N.Y., N.Y.C. HEALTH CODE § 81.03(s))). The definition of FSEs also "excludes food processing establishments, retail food stores, private homes . . . and food service operations where a distinct group mutually provides . . . and consumes the food." N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene (*New York Statewide I*), No. 653584/12, 2013 WL 1343607, at *8 (N.Y. Sup. Ct. Mar. 11, 2013). According "to [the] 2010 Memorandum of Understanding (MOU) . . . [with] the State's Department of Agriculture and Markets, an FSE is subject to inspection by a local health department only if it generates 50% or more of its total annual dollar receipts from the sale of food for consumption on the premises or ready-to-eat for off-premises consumption." *New York Statewide II*, 970 N.Y.S.2d at 204.

58. *New York Statewide I*, 2013 WL 1343607, at *8.

59. *See id.*; *see also* N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene (*New York Statewide III*), 16 N.E.3d 538, 547 (N.Y. 2014).

60. *New York Statewide II*, 970 N.Y.S.2d at 206 (quoting Petition, *New York Statewide I*, No. 653584/12 (N.Y. Sup. Ct. Oct. 11, 2012), 2013 WL 1343607).

61. Boreali v. Axelrod, 517 N.E.2d 1350, 1355 (N.Y. 1987).

62. *New York Statewide I*, 2013 WL 1343607, at *8.

63. *Id.* (emphasis added).

The second prong asks whether the agency filled in the "interstitial" details of "legislation describing the over-all policies to be implemented" or if it "wrote on a clean slate, creating its own comprehensive set of rules without [the] benefit of legislative guidance."[64] The third prong inquires, "[D]id the regulation intrude upon ongoing legislative debate? In other words, did the regulation address a matter the legislature has discussed, debated or tried to address prior to this regulation?"[65] And finally, the fourth prong weighs whether "the regulation require[d] the exercise of expertise or technical competence on behalf of the body passing the legislation."[66]

Thus, if an agency engages in line drawing to pursue public health without excessive economic cost, the first *Boreali* prong would tend to characterize the agency's action as legislative because such a measure aims "to resolve difficult social problems by making choices among competing ends."[67]

The *Boreali* court, in striking a state public health regulation on indoor smoking, noted:

> The exemptions . . . carved out for bars, convention centers, small restaurants . . . as well as the . . . 'waivers' based on financial hardship, have no foundation in considerations of public health. Rather, they demonstrate the agency's own effort to weigh the goal of promoting health against its social cost and to reach a suitable compromise.[68]

Boreali declares that exemptions are a sign that this compromise is occurring because, precisely as Finkelstein argued, exemptions typically "run counter to such goals and, consequently, cannot be justified as simple implementations of legislative values."[69]

Even as the *Boreali* framework assumes that exceptions are "external," presupposing a justificatory value apart from and competing with the value embodied in the rule, the city health organs tried to argue that the soda portion cap's exceptions were "internal" and "based solely on health-related concerns."[70] While this argument does not account for all the exemptions,[71] the health agencies explained that the exceptions for milk or juice were justified insofar as each of these items have some nu-

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64. *Boreali*, 517 N.E.2d at 1356.
65. *New York Statewide I*, 2013 WL 1343607, at *8.
66. *Id.*
67. *Boreali*, 517 N.E.2d at 1356.
68. *Id.* at 1355.
69. *Id.*
70. *New York Statewide II*, 970 N.Y.S.2d at 209.
71. For instance, alcohol or convenience store Big Gulp drinks were exempted because other executive agencies had claims of jurisdiction. *See, e.g.*, Katherine Pratt, *The Limits of Anti-Obesity Public Health Paternalism: Another View*, 46 CONN. L. REV. 1903, 1921, 1928 (2014).

tritional value.[72] However, Judge Renwick remained unconvinced because she regarded the entire design of the provision as underinclusive: the rule, she observed, in manipulating portion size, does not ban sugary drinks entirely.[73] She said it instead "relies upon the behavioral economics concept that consumers are pushed into better behavior when certain choices are made less convenient."[74]

Remarkably, for Renwick and Pigott, it is this regulatory modesty which proves that the agency was balancing, not just considering health: "By restricting portions, the Board necessarily chose between ends, including public health, the economic consequences associated with restricting profits by beverage companies and vendors . . . and personal autonomy . . . ."[75]

The courts also found it damning that the health department framed the obesity toll in economic terms. The health department had observed that "[o]besity related health care expenditures in New York City now exceed $4.7 billion annually . . . Medicare and Medicaid programs funded by tax dollars, pay approximately 60 per cent [sic] of those costs."[76] This economic quantification spurred the court to say that the city was inappropriately considering economic counterweights to health concerns.[77]

The health agency also accommodated the jurisdiction of the New York State Department of Agriculture and Markets by avoiding direct regulation of grocery stores, which are otherwise under their sister agency's inspection purview. To Tingling, though, "[t]his could be construed as evidencing political considerations outside of the Statement of Basis and Purpose."[78] The vision that the judges furnish for proper agency behavior is quite puzzling. If agencies were to disregard jurisdiction, political considerations, economic costs, and all other ends, that tunnel vision would seem itself to pose threats in the form of agency overreach.[79]

4. Value Conflict

The Soda Portion Cap exceptions thus signify the resolution of conflicting purposes and prompt judicial invalidation of the rule.

72. *New York Statewide II*, 970 N.Y.S.2d at 209.

73. *Id.*

74. *Id.*

75. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene (*New York Statewide III*), 16 N.E.3d 538, 547 (N.Y. 2014); *see also New York Statewide II*, 970 N.Y.S.2d at 209.

76. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene (*New York Statewide I*), No. 653584/12, 2013 WL 1343607, at *9 (N.Y. Sup. Ct. Mar. 11, 2013) (alteration in original) (quoting N.Y.C. Health Commissioner Farley).

77. *Id.* at *9.

78. *Id.* at *8; *see also New York Statewide II*, 970 N.Y.S.2d at 210.

79. *See* Paul A. Diller, *Local Health Agencies, the Bloomberg Soda Rule, and the Ghost of Woodrow Wilson*, 40 FORDHAM URB. L.J. 1859, 1898–99 (2013).

The formulation of the *Boreali* prong illustrates that the way the rule confronts value conflict is one, if not *the* decisive issue in the case. But we also find support in the fact that the battle was joined precisely at the issue of whether the exception was "internal," serving other health needs, rather than a reflection of some external purpose.[80] With an internal justification, the value conflict dissolves to a mere question of which means one should use to pursue the unitary value of health. That judges in each of these cases refuse to recognize the exceptions as "internal" signals there is something more going on in these cases apart from the means-ends analysis associated with the ordinary fit tests of substantive review for rationality.

Instead, the courts seem wedded to showing that the exceptions are external and that each rule, despite its alignment with the constellation of ends that it is navigating, is "unfit." The courts are therefore positing a single, unalloyed justification for the rule. They then proceed to vigorously interrogate "fit" relative to the rule's posited justification. In this case, the court derived the requirement that health serves as the sole justification for BOH action from the state's constitutional separation of powers doctrine. What is curious about the unitary justification approach is that if it prevails, any standard setting is doomed, not just the delineation of a standard's scope through exceptions.[81] It simply fails the plausibility test to pretend that standard setting can avoid settling among competing ends.

Furthermore, the courts' insistence upon rationalization of every aspect of the rule to its one recognized justification seems to run counter to the very function of a rule. As Schauer clarifies, the nature of a rule is applicability even at the point where the justification would not fit.[82] Thus, the rule applied in some instances will not match the rule's justification. Even Ronald Dworkin, who includes background justifications along with rules as part of the corpus of law, distinguishes "rules," which have all-or-nothing force, from their supporting principles and policies, which merely exert "weight."[83] Of principles, he says, "When principles intersect . . . one who must resolve the conflict has to take into account the relative weight of each."[84] However, "[i]f the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to

80. *See supra* text accompanying note 71.

81. *See, e.g.*, Rick Hills, *Why Did Bloomberg's Soda Portion Ban Bite the Dust? Was it Mayoral Imperialism, Judicial Activism, or Both?*, PRAWFSBLAWG (Mar. 11, 2013, 8:23 PM), http://prawfsblawg.blogs.com/prawfsblawg/2013/03/bloombergs-soda-portion-ban-bites-the-dust-defeat-for-an-imperial-mayor-or-victory-for-activist-judg.html ("Is Justice Tingling really demanding that agencies jettison consideration of cost, administrative feasibility, personal privacy, or financial feasibility when they pursue their primary mandate?").

82. SCHAUER, *supra* note 27, at 75–76.

83. *See* DWORKIN, *supra* note 10, at 22–28, 71–80.

84. *Id.* at 26.

the decision."[85] Thus Dworkin, like Schauer, believes that rules apply even when an underlying principle runs out, or conversely, that the rule may stop short of an underlying principle, including in those situations when the rule accommodates a competing principle.[86]

That the soda portion cap's fatal flaw was its attempt to perform this very function of resolving value conflict by fiat is also paradoxically evident in that the argument against the rule was framed as a lack of limiting principle. On June 4, 2013, when the appellate court heard oral arguments, the judge repeatedly queried the scope of the Board's jurisdiction and asked whether there was any principle limiting the Board's jurisdiction.[87] This argument is ironic because, in fact, the health agency was trying to limit its jurisdiction and promote health while not overreaching. It was steering clear of other social and cultural practices while respecting the Memorandum of Understanding (MOU) that divided inspection and oversight between health and agriculture agencies. Why was the soda portion rule's limitation, ostensibly condemned as underinclusive relative to its health objectives, then viewed as an indication that its scope of purpose was too broad and lacking a "limiting principle?" Perhaps the key word is "principle." The judiciary demands that jurisdiction should not be limited or designated ad hoc, or even by ex ante decision rule, but by background principle.

Here, the argument of underinclusion is turned on its head. And we see the germ of the court's conception of rules, namely, its elision of rules and principles, which leads it to reject these particular measures.[88]

5. Assign to Non-Legal Sphere

Having invalidated rule-based line drawing, the courts' next maneuver is to assign the decision to another decision-making sphere. In the

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85. *Id.* at 24.

86. *Id.* at 26–27; *see also id.* at 77 ("[T]hese rules have a different shape than they would have had if the principle [that no man may profit from his wrongs] had not been given any weight in the decision at all. The long length of time generally required for acquiring title by adverse possession might have been much shorter, for example, had this not been thought to conflict with the principle. Indeed, one of my reasons for drawing the distinction between rules and principles was just to show how rules often represent a kind of compromise amongst competing principles in this way . . . ."); RONALD DWORKIN, LAW'S EMPIRE 180–84 (1986) (expressing Dworkin's views on compromise). Thus, Dworkin would recognize exceptions as binding even if they embodied a principle competing with the one underlying other parts of the rule; it would be binding because the exception would be part of the rule itself.

87. *See* Glenn Blain, *New York City's Soda Ban Bubbles Up to the State's Highest Court – Updated*, N.Y. DAILY NEWS (Jun. 4, 2014, 5:04 PM), www.nydailynews.com/blogs/dailypolitics/new-york-city-soda-ban-bubbles-state-highest-court-blog-entry-1.1817197.

88. *See* DWORKIN, *supra* note 10, at 73 (responding to Joseph Raz, of occasions for such elision "[b]ut I did not deny, in my original article, that conflicts in rules might exist. I said that in our legal system such conflicts would be occasions of emergency, occasions requiring a decision that would alter the set of standards in some dramatic way. . . . [H]e may amend one or both of them to provide for the conflict, or he may revise his attitude towards one or both so as to convert them from rules into principles").

opinions striking the Soda Portion Cap Rule, the courts' eagerness to offload this decision to another decision-making mode is not matched by clarity about what that mode might be.[89] The judges assume, rather than argue, that because the agency was improperly legislating, the politically accountable legislature should have been the appropriate arena. However, this assumption is perhaps too hasty on their part.

The prongs of the *Boreali* separation of powers test presuppose "politics" or the legislature as the mode of decision-making illegitimately displaced by the agency rule, and by extension, the default arena to which this decision would revert. After all, the court introduces the test as the means to judge whether the agency has "impermissibly trespassed on legislative jurisdiction."[90] Moreover, the test's second prong probing for "interstitial" gap filling or writing on "a clean slate" elevates the guiding instructions of the legislature as dispositive.[91] The third prong further asks whether the legislature has otherwise proposed or taken action such that the regulation at issue intrudes upon this ongoing debate.[92] The assumption is that the legislative sphere is proper.

Yet while the first prong, with which we are most concerned, designates economic, political, and social concerns as competing considerations, it does not necessarily command the political, rather than economic or social sphere, as the arena through which one should negotiate the resolution of those concerns. In this particular case, the courts do embrace political contest as the appropriate alternate mode; however, that choice is underdetermined, even by the very terms of the *Boreali* test.

Indeed, the judges in this case sporadically advert to what they conceive of as the alternate decisional mode of science.[93] Judge Renwick, in examining the fourth *Boreali* prong, which counts agency expertise as a factor favoring validity, chastises the BOH for failing to employ its public health expertise, rather than its political judgment.[94] Thus, "scientific expertise" could have been an alternate domain for resolving conflicting values. However, the judges choose not to assign the decision there, but rather to politics, without much in the way of explanation for their choice. The nostrum that "science" and "scientific reasoning" can objectively and conclusively recommend a course of action has been so thor-

89. For an explanation of why and how that offloading occurs in health law, see Christina S. Ho, *In Defense of Circular Reasoning: The Affordable Care Act and the Resilience of Law and Self-Reference*, 5 WM. & MARY POL'Y REV. 1 (2013).

90. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene (*New York Statewide I*), No. 653584/12, 2013 WL 1343607, at *6 (N.Y. Sup. Ct. Mar. 11, 2013)

91. Boreali v. Axelrod, 517 N.E.2d 1350, 1356 (N.Y. 1987).

92. *Id.*

93. *See* N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene (*New York Statewide II*), 970 N.Y.S.2d 200, 212–13 (N.Y. App. Div. 2013).

94. *Id.* (complaining that "the Board did not bring any scientific or health expertise to bear in creating the Portion Cap Rule").

oughly debunked that I need not do so here.[95] My argument depends not upon the truth but rather on the court's implicit use of that misconception, i.e., its lingering reliance upon the illusory notion of an objective and determinate realm of scientific decision-making.[96]

While the courts proffer "politics" and "science" as the two chief social decision-making institutions ostensibly distinct from and preferable to decision by legally promulgated rules, it is worth mentioning a distant third. Judges Pigott and Renwick also suggest that perhaps the appropriate decision-making arena should be private ordering. By this mode, the decision of portion size would fall not to health regulation but to individual choice. Renwick suggests this approach when she rebuts the health department's internal justification argument by insisting that the board must have balanced health concerns and concluded that they "outweigh the cost of infringing on *individual rights to purchase a product* that the Board has never categorized as inherently dangerous."[97] Pigott echoes the sentiment: "This preference for an indirect means of achieving compliance with goals of healthier intake of sugary beverages was itself a policy choice, relating to *the degree of autonomy a government permits its citizens to exercise* . . . ."[98]

The court never fully develops the argument that such background "rights" exist, but one can imagine a decision where the court defended the principle of open individual choice and that arena as the proper mode for prioritizing among health and other considerations. Had it done so, then the court would have had to deny the legislatively enacted instruction to the agency to protect health, which inevitably limits open individual choice, and has even recently been understood to include near-complete bans of substances like artificial trans fats.[99] The judges here opted for the other extreme instead, which is to maintain, rather remarkably, that health should have been protected without balancing and with-

95. *See, e.g.*, Cary Coglianese & Gary E. Marchant, *Shifting Sands: The Limits of Science in Setting Risk Standards*, 152 U. PA. L. REV. 1255 (2004).

96. Here my use of the category "science" or "scientific expertise" follows CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 7–10 (1990) (describing "the trichotomy of decision making paradigms—adjudicatory fairness, scientific expertise, and politics" which anchor the distinctions that judges implicitly and expressly draw upon in administrative law disputes). Edley fully recognizes that science cannot operate without the exercise of some judgment which is inevitably "political," acknowledging that "virtually all sciences, involve[] uncertainties of prediction and measurement. Science alone, to the extent one can conceive of it, cannot determine what to do with those uncertainties." *Id.* at 75. Instead he argues that despite the conceptual instability of "science" as a distinct paradigm, it is this confused notion that courts rely upon time and time again to discharge their duties in deciding administrative law cases. *Id.* at 72–77.

97. *New York Statewide II*, 970 N.Y.S.2d at 209 (emphasis added).

98. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene (*New York Statewide III*), 16 N.E.3d 538, 547 (N.Y. 2014) (emphasis added).

99. N.Y.C., N.Y., N.Y.C. HEALTH CODE § 81.08 (2012); *see also* Lindsay F. Wiley, Commentary, *Sugary Drinks, Happy Meals, Social Norms, and the Law: The Normative Impact of Product Configuration Bans*, 46 CONN. L. REV. 1877, 1881 n.9 (2014) (discussing the lack of principled distinction between trans fat ban and soda portion cap).

out regard to other concerns, including such "individual [background] rights to purchase a product."[100] Judge Pigott is accused by the dissent of the same but disclaims support for an absolute ban by invoking a rights-inflected argument that prohibition of sugary beverages altogether would also amount to "policy-making, not rule-making" because it "interferes with commonplace daily activities preferred by large numbers of people."[101]

What if the court had claimed squarely that this decision belonged to individual choice? Would such a presumptive "right" or principle come from the state separation of powers doctrine? Would it come from some extreme theory of due process? Meanwhile, we need hardly rehearse the arguments that just as "pure" objective scientific decision-making is a myth, no such unstructured realm of free individual choice exists either. Market dynamics constrain individual choice, and the market itself is already shaped by regulatory choices.[102] Indeed this market-norming argument underlies the soda portion cap measure itself. The notes accompanying the BOH proposal stated that "People tend to consume more calories at meals that include large beverage sizes. [This measure's] intent is to address the super-size trend and reacquaint New Yorkers with smaller portion sizes, leading to a reduction in consumption of sugary drinks among New York City residents."[103]

Thus, the availability of individual choice as an arena apart from law depends, among other things, on whether one believes that the individual can exercise her private preferences or whether market ordering permits exploitation of cognitive biases to manipulate individual choice. Indeed, the above-mentioned justification that the health department cites in its memo is the argument that an individual's true preferences are distorted by the super-sizing trend and that the rule is designed to give the individual the opportunity to choose consciously whether he or she wants additional amounts of beverage.[104]

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100. *New York Statewide II*, 970 N.Y.S.2d at 209; *see also New York Statewide III*, 16 N.E.3d at 558 (Read, J., dissenting) ("The Appellate Division . . . appears to conclude that the Board would have acted properly if only it had completely banned all sugary drinks within the City's borders.").

101. *New York Statewide III*, 16 N.E.3d at 548.

102. *See, e.g.*, CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 17 (1997) ("Whether people have a preference for a commodity, a right, or anything else is in part a function of whether the government has allocated it to them in the first instance. There is no way to avoid the task of initially allocating an entitlement (short of anarchy)." (footnote omitted)); *see also* Mark Kelman, *Legal Economists and Normative Social Theory* (1987), *reprinted in* FOUNDATIONS OF THE ECONOMIC APPROACH TO LAW 326, 330–32 (Avery Wiener Katz ed., 1998); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 479–81 (1923).

103. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene (*New York Statewide I*), No. 653584/12, 2013 WL 1343607, at *3 (N.Y. Sup. Ct. Mar. 11, 2013) (quoting notes accompanying N.Y.C., N.Y., N.Y.C. HEALTH CODE § 81.53 (2012) (repealed 2013)).

104. *New York Statewide II*, 970 N.Y.S.2d at 205 (providing the DOHMH's summary of the debate regarding the Soda Portion Cap Rule after the public hearing and quoting the DOHMH's

These alternate arenas of science or private ordering are never expressly analyzed by the courts, and the courts seem to designate the political arena as its favored arena by virtual acclamation.

6. Judge Arrogates the Decision and Simulates a Non-Legal Method

The court's adoption of politics as the preferred forum for this matter poses its own puzzles. When should the presence of value conflict require a diversion to "politics," much less some alternate decision-making arena for resolution? The mere presence of value balancing cannot be the answer because, if so, then all law would be legislative and the distinction that the *Boreali* factors attempt to draw would collapse. If the case is stripped of distracting and inconclusive doctrinal garb, we are left with merely a judge, deciding that a particular balance or configuration of competing values is unacceptable.[105] And perhaps to avoid the chagrin of nakedly substituting her own conception of balance, the judge then confers that task upon a different organ, in this case the legislature.[106]

To consider this explanation, we look at what the court claims to be doing to identify the instances of "improper" balancing that prompt diversion of the matter away from legal rule setting. The court uses the *Boreali* test, but the approach that test employs is one of balancing, which hardly allays our suspicions that the judge comes close to nakedly substituting her own preferred resolution of competing values. [107] Indeed, the *Boreali* test is particularly indeterminate because, as the court re-

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conclusion that "[i]f the proposal is adopted, customers intent upon consuming more than 16 ounces would have to make conscious decisions to do so").

105. The Court of Appeals dissent says as much: "With all due respect to my colleagues, their proposed ends-means test . . . harks back to long discredited formalistic approaches to administrative law, which were seemingly objective but instead served as camouflage for enforcement of judicial preferences." *New York Statewide III*, 16 N.E.3d at 560 (Read, J., dissenting).

106. *See* Jeremy Waldron, *Did Dworkin Ever Answer the Crits?*, *in* EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN 155, 173–76 (Scott Hershovitz ed., 2006) (discussing how the judge, in confronting the materials before him, each side with its own conflicting account of how to balance different competing values, is in the end choosing simply by conducting and insisting on his own balance, and imposing it as the tiebreaker). *But see* Ronald Dworkin, *Response*, *in* EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN 291, 304 (Scott Hershovitz ed., 2006) (responding that it is not Hercules' own balance but what he believes to be the balance dictated by the principle that best fits the rest of the law, assuming that there is such a fit to be found or constructed while maintaining political integrity).

107. T. Alexander Aleinikoff might characterize this "totality of the circumstances" test as less strictly a "balancing" method, but rather a factor checklist or "analogical" type of reasoning, where "one starts with [a] conception of what constitutes voluntariness and involuntariness and then asks whether the particular situation shares more of . . . [those] elements." T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 945 (1987). But Aleinikoff also classifies *Commodity Futures Trading Commission v. Schor* as a "balancing" case, Aleinikoff, *supra*, at 947, even though in *Schor*, O'Connor weighs factors to determine whether "the 'essential attributes of judicial power' are reserved to Article III courts" when the agency adjudicates. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986). If O'Connor's approach there constitutes balancing, rather than analogy, in a similar assessment under separation-of-powers doctrine of whether agency action too closely resembles that of a coordinate branch, then the distinction is much less meaningful than Aleinikoff assumes.

minds us, in this test no one factor is dispositive, and the test instead "must be viewed in combination and in totality."[108]

Admittedly, balancing factors in a legal test is not identical to first-order balancing of competing values.[109] There is a large and vigorous literature on proportionality and balancing, which I do not, for my purposes, need to enter here.[110] My argument merely depends upon the court engaging in its own version, if slightly deflected, of the analysis it denounces. It is enough that most would agree that it remains an open question whether such judicial balancing is conclusively distinct from political balancing.

Such judicial substitution for political balancing could not, of course, proceed too baldly. Indeed, the courts engage in a sleight of hand to disguise who decides. This imperative may explain why a profusion of non-legal realms is implicated. Ostensibly, the doctrine says the legislature should decide, yet the judge is deciding when the legislature decides. And what of the other realms we considered?

In deciding that science does not support the agency's decisions, insofar as the agency's clear authority to take strong public health measures either in the event of epidemic or to ban health hazards was not triggered, the judges employed their lay version of scientific reasoning to suggest that obesity is not an epidemic.[111] Judge Tingling attempted to ground his decision in "scientific" distinctions—that the obesity threat could not technically constitute an epidemic if the nature of the hazard was chronic rather than infectious disease.[112] This claim is fairly risible, as epidemic has been used to refer to noninfectious disease since the second half of the twentieth century.[113]

Renwick also treads on science when she argues that for the rule to be valid, sugary soda itself would have to be declared a health hazard without qualification.[114] Otherwise, the health department has long been understood as authorized to simply ban hazardous foods to protect health, well within the "interstices" of the power delegated to the agency. Indeed, the department exercised this authority in banning artificial trans

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108. *New York Statewide I*, 2013 WL 1343607, at *7.

109. *See, e.g.*, RAZ, *supra* note 37, at 35–40, 46–47 (discussing the problems of balancing first-order concerns against second-order concerns).

110. *See, e.g.*, Mark Antaki, *The Rationalism of Proportionality's Culture of Justification*, *in* PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING 284, 284 & n.1 (Grant Huscroft et al. eds., 2014); Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711 (1994).

111. *See, e.g.*, *New York Statewide I*, 2013 WL 1343607, at *16.

112. *See id.*

113. Paul M.V. Martin & Estelle Martin-Granel, *2,500-Year Evolution of the Term Epidemic*, 12 EMERGING INFECTIOUS DISEASES 976, 979 (2006).

114. *See* N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene (*New York Statewide II*), 970 N.Y.S.2d 200, 209 (N.Y. App. Div. 2013).

fats.[115] Renwick dismisses such authority as inapplicable to the current case, finding that soda cannot be a health hazard by virtue merely of consumption in "excess quantity."[116] What reasoning skill does she bring to bear in identifying hazards to health and the appropriate conditions under which they pose a hazard? And why should an exposure fail to constitute a health hazard if its effects require a threshold quantity? Some hazards have zero-threshold dose-response curves, and some have U-shaped curves.[117] Numerous substances like fluorine, selenium, and other nutrients are healthy at low doses and do not become hazards until they cross a certain threshold. Renwick must make these dubious technical claims to find that the rule fails prong two, namely, that it is not interstitial rulemaking within the authority clearly delegated to the agency over health hazards.[118] Scientific identification of a hazard and legal determination defining the statutory meaning of "health hazard" resemble distorted mirror doubles.

Renwick's approach to hazard identification is by no means a foregone conclusion, but instead a methodological choice. Other jurisdictions have chosen differently. As Sunstein has noted, federal administrative law takes a different approach to the question of hazard identification in the face of qualifying considerations.[119] In his account, federal courts grant federal agencies default permission to craft *de minimis* exceptions,[120] whereas Renwick requires a per se ban of even insignificant levels of risk from sugary soda.

Finally, while the court briefly mentions markets, i.e., private choice or ordering, as another regime, it did not pursue its own suggestion of private ordering as the proper mode. Had it chosen to do so, however, there is a ready-made form of judicial discourse, law and economics, which also involves the judicial performance of an ersatz methodology to approximate the efficient results that might emerge from market processes.[121]

In the soda portion cap case, the *Boreali* test itself is indeterminate, but the underinclusiveness of the rule, by exposing the unavoidable balancing of health against other ends, provokes the court to act upon its anxiety about the highly reticulated agency-crafted rule as the social tool

115. N.Y.C., N.Y., N.Y.C. HEALTH CODE §81.08(a) (2006); *see, e.g.*, Paul A. Diller, *Why do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219, 1238 (2014).

116. *New York Statewide II*, 970 N.Y.S.2d at 211.

117. *See* J.M. Davis & D.J. Svendsgaard, *U-Shaped Dose-Response Curves: Their Occurrence and Implications for Risk Assessment*, 30 J. TOXICOLOGY & ENVTL. HEALTH 71 (1990).

118. *See New York Statewide II*, 970 N.Y.S.2d at 210–11.

119. *See supra* notes 11–17 and accompanying text.

120. *See supra* notes 11–17 and accompanying text.

121. *See, e.g.*, A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (4th ed. 2011); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (8th ed. 2011); STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW (2004).

governing and accommodating value conflict. Politics, or even science or markets, would be preferable. Is distinction between portion size and number of portions somehow particularly irrational?[122] Are judges recognizing some presumptive "right" to health protection, or presumptive "right" to autonomy that ought not be easily outweighed by other considerations? But where would such a right come from? These cannot plausibly inhere in the separation of powers doctrine alone. Is it implicit in the delegation to the City Council? But the analysis used to identify when agencies ought not compromise was hardly a statutory analysis.

When we examine what judges use to determine when the matter should be deflected away from the domain of rules, we find, notably, a pidgin science, and a "balancing" test where no one or more prongs can be said to be dispositive and where no particular threshold has been articulated for satisfaction of the test. Rather than applying a clear rule, or even a consistent principle, the courts engage in an elaborate disguise of where rule-ness runs out.

B. Tummino v. Hamburg*: Plan B OTC Switch*[123]

Plan B is a drug approved by the FDA in 1999 for use as an emergency contraceptive.[124] The active ingredient in the drug, a synthetic progesterone called levonorgestrel, was approved decades ago for uses other than emergency contraception.[125] Levonorgestrel is a component of many daily oral contraceptives and intrauterine devices (IUDs).[126] These long-approved indications refer to the use of levonorgestrel prior to and during intercourse.[127] However, within a certain window of time post-intercourse, levonorgestrel is also effective in reducing the risk of unwanted pregnancy.[128] Thus, in 1997, the FDA solicited and approved applications to market prescription-only levonorgestrel in specific doses for this new post-intercourse, or "emergency contraception," use.[129] The approved product was called Plan B.

The chapter of this history that concerns us now arose in the mid-2000s. At that time, the FDA came under public pressure to make a product that was well-documented to be non-toxic available over-the-counter (OTC). Eventually, the FDA did approve a switch to OTC status for Plan B levonorgestrel as an emergency contraceptive, but only after

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122. *Cf.* Pac. Box & Basket Co. v. White, 296 U.S. 176 (1935).

123. I am indebted to Bernard Bell for suggesting this case.

124. Tummino v. Torti (*Tummino I*), 603 F. Supp. 2d 519, 522 (E.D.N.Y. 2009).

125. *See* Emergency Contraception Fact Sheet, WORLD HEALTH ORG. (July 2012), http://www.who.int/mediacentre/factsheets/fs244/en/. *See generally* Lisa Heinzerling, *The FDA's Plan B Fiasco: Lessons for Administrative Law*, 102 GEO. L.J. 927, 931–33 (2014).

126. *See id.* at 931.

127. *Id.* at 931–33.

128. *Tummino I*, 603 F. Supp. 2d at 522.

129. *Id.* at 525.

much delay, and crucially, only for women 18 and older.[130] This decision for age-restricted OTC availability was immediately challenged and resulted in extensive judicial action, memorialized in a series of opinions by Judge Korman of the Eastern District of New York, who was the presiding judge in the lawsuit over this matter.[131]

1. FDA Background: Narrow Indications and Scope of Regulatory Action

I pause to describe the drug approval regime in brief as it explains how the contours of FDA regulatory action, including regulatory "carve-outs," are generally defined with respect to particular drugs. Since 1962, drugs for humans have been subject to the modern pre-market approval regime in the United States.[132] Section 505(a) of the Food Drug & Cosmetic Act (FDCA) prohibits the introduction of an unapproved "new drug" into interstate commerce.[133] To obtain the approval of the FDA, a "new drug" must be demonstrated by substantial evidence to be safe and effective "for use under the conditions prescribed, recommended, or suggested in the proposed labeling thereof."[134]

This "use" is the key parameter. Some may also refer to it as the "claim," as "the effect [the product] purports or is represented to have," or the "indicated use."[135] Because the pre-approval requirements are only triggered for "a new drug," the definition of "new drug" is crucial. The FDCA defines a "new drug" as a drug "not generally recognized . . . as *safe and effective for use under the conditions prescribed*."[136] Thus, the "use" is the matter whose newness triggers regulatory requirements, not the chemical entity itself.

Moreover, the safety and efficacy required for approval are judged relative to that "use" or "indication."[137] Certainly a drug that is effective against headaches might not be effective against brain tumors. Moreover, a highly toxic drug that might be deemed "safe" for use in treating an otherwise life-threatening brain tumor could be too dangerous for mere headaches.

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130. This age range was subsequently expanded to women 17 and older. *See* Diana R. H. Winters, *Intractable Delay and the Need to Amend the Petition Provisions of the FDCA*, 90 IND. L.J. 1047, 1066 & 1067 n.148 (2015). On delay, see *id.* at 1067 & n.148.

131. Tummino v. Hamburg (*Tummino II*), 936 F. Supp. 2d 162 (E.D.N.Y. 2013); *Tummino I*, 603 F. Supp. 2d at 519; Tummino v. Hamburg (*Tummino III*), No. 12-CV-763, 2013 WL 2631163 (E.D.N.Y. June 12, 2013).

132. Drug Amendments of 1962 (Kefauver-Harris Amendment), Pub. L. No. 87–781, 76 Stat. 780, 784 (codified as amended at 21 U.S.C. § 355 (2012)).

133. Federal Food, Drug, and Cosmetic Act § 505(a), 21 U.S.C. § 355(a) (2012).

134. *Id.* § 355(d), (e).

135. *Id.* § 355(d)(5).

136. *Id.* § 321(p)(1) (emphasis added).

137. *See id.* § 355(d) ("If the Secretary finds . . . there is a lack of substantial evidence that the drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the proposed labeling thereof . . . he shall issue an order refusing to approve . . . .").

If the indication is the all-important reference for the approval regime, who then determines the indication? In practice, the drug manufacturers themselves, often called the "sponsors," define the indications.[138] The sponsor is held to the indication in the sense that they must prove safety and efficacy against that indication, must label adequately for that indication, and cannot, at least in theory, actively market their products for other indications.[139] However, the sponsor's ability to stipulate the indication has gone largely unchallenged with a few exceptions I describe below.[140]

The malleability of indication engenders regulatory difficulties. Clinical trial data is needed to supply evidence of drug's safety and efficacy for any given indication, so the clinical trial's parameters are usually narrowed to the indication's parameters.[141] However, those controlled parameters often fail to reflect circumstances of actual use in the general population. The FDA must engage in a particular type of inference, generalizing the results obtained in the enrolled clinical trial population to predict the results in the actual population. The threat that the clinical trial population might skew compared to the actual users of the drug once it is marketed always lurks in the background.[142] For this and many other reasons, drug approval requires judgment, rather than mechanical calculation of scientifically determinate outcomes. To inform and exercise this judgment, the FDA has a number of tools, including in-house experts in various offices within the Center for Drug Evaluation and Research (CDER).[143] They also have the authority to convene advisory committees to weigh in on the decision.[144]

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138. Ass'n of Am., Physicians & Surgeons, Inc. v. FDA, 226 F. Supp. 2d 204, 206, 216 (D.D.C. 2002); *see id.* at 218 (contending that it is "Congress' will . . . [that] the 'manufacturer . . . through his representations in connection with its sale . . . determine the use to which the article is to be put'" (quoting S. REP. NO. 73-493, at 3 (1934))).

139. However, they often approach promotion of the off-label use through various indirect means, and indeed are arguably protected by the First Amendment in engaging in at least as much. *See* United States v. Caronia, 703 F.3d 149, 160–62 (2d Cir. 2012); *see also* Wash. Legal Found. v. Henney, 202 F.3d 331, 337 n.7 (D.C. Cir. 2000) ("In disposing of the case in this manner, we certainly do not criticize the reasoning or conclusions of the district court."), *vacating in part* 56 F. Supp. 2d 81 (D.D.C. 1999); Wash. Legal Found. v. Friedman, 13 F. Supp. 2d 51, 60–61, 74 (D.D.C. 1998), *injunction amended by*, 36 F. Supp. 2d 418 (D.D.C. 1999).

140. *See, e.g.*, Michael J. Malinowski, *Doctors, Patients, and Pills—A System Popping Under Too Much Physician Discretion? A Law-Policy Prescription to Make Drug Approval More Meaningful in the Delivery of Health Care*, 33 CARDOZO L. REV. 1085, 1102 (2012) ("Industry sponsors hold broad discretion to tailor clinical research and to apply (or not) for approval of specific uses in applications for market access, which provides an incentive to limit the scope of applications for market access, get approval, and then exploit physician off-label use through sponsorship of research and conferences and the distribution of medical journal publications.").

141. *See* 21 U.S.C. § 355(d).

142. *See, e.g.*, Michelle N. Meyer, *Regulating the Production of Knowledge: Research Risk-Benefit Analysis and the Heterogeneity Problem*, 65 ADMIN. L. REV. 237, 241–42 (2013).

143. *See CDER Offices and Divisions*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/AboutFDA/CentersOffices/OfficeofMedicalProductsandTobacco/CDER/ucm075128.htm (last updated June 26, 2015).

144. 21 U.S.C. § 355(n).

Because the indication is often defined by the drug sponsor, it comes as no surprise that the indication's scope serves the sponsor's interests. For instance, if a drug is possibly effective in a broad, and thus high-revenue indication (such as depression or anxiety), but it is easier and cheaper to run trials and get approval for a narrow indication (such as schizophrenia), the sponsors may design a study for a narrow indication to get the drug to market.[145] Because the FDA approvals regulate labeling and how drugs are marketed, but do not limit the "practice of medicine" by physicians,[146] the drug sponsor may still reap profits if doctors happen to prescribe the drug "off-label" to patients with other conditions.[147]

Furthermore, indications, like rules, can be narrowed along a number of different dimensions, not merely along the lines of disease diagnosis. Indications are frequently narrowed to subpopulations to minimize the sponsor's cost and risk as well. Drug manufacturers maintain that they can define their chosen indication to exclude individuals with heart conditions or compromised immune systems from the use indicated in the labeling if they did not enroll those groups in the clinical trial.[148] It is risky and expensive to enroll pregnant women, for instance, in clinical trials, so drug manufacturers may often simply stipulate in the labeling that such product is not approved for use in pregnant women.[149]

Some of the same risks and difficulties in obtaining effective consent for pediatric patients led drug sponsors to decline to enroll children

145. There were a number of drugs, like gabapentin originally approved for narrow indications like schizophrenia or seizures, then sold more broadly in the 1990's for conditions like depression or anxiety. *See, e.g.*, Duff Wilson, *Side Effects May Include Lawsuits*, N.Y. TIMES, Oct. 3, 2010, at BU1. Such drugs have been the subject of recent litigation. *See, e.g.*, Neurontin Mktg. & Sales Practices Litig. v. Pfizer, Inc., 712 F.3d 60, 61 (1st Cir. 2013), *cert. denied sub nom.*, Pfizer, Inc. v. Kaiser Found., 134 S. Ct. 786 (2013).

146. *See, e.g.*, Aaron S. Kesselheim, *Off-Label Drug Use and Promotion: Balancing Public Health Goals and Commercial Speech*, 37 AM. J.L. & MED. 225, 225 (2011).

147. Much has been written on this subject of off-label use. *See id.* at 225–26; *see also* Ryan Abbott & Ian Ayres, *Can Bayesian Extrapolation Improve FDA Regulation of Off-Label Uses of Drugs and Devices?*, 4 FOOD & DRUG POL'Y FORUM 1, 1–2 (2014); Aaron S. Kesselheim & Michelle M. Mello, *Prospects for Regulation of Off-Label Drug Promotion in an Era of Expanding Commercial Speech Protection*, 92 N.C. L. Rev. 1539, 1539 (2014); Malinowski, *supra* note 140, at 1085–86.

148. *See* Ass'n of Am., Physicians & Surgeons, Inc. v. FDA, 226 F. Supp. 2d 204, 217–18 (D.D.C. 2002) ("I need to acknowledge the limits of FDA's authority. It is our job to review drug applications for the indications suggested by the manufacturer. We do not have the authority to require manufacturers to seek approval for indications which they have not studied. Thus, as a matter of law, if an application contains indications only for adults, we're stuck." (quoting a speech by FDA Commissioner, David Kessler)); David Loughnot, Note & Comment, *Potential Interactions of the Orphan Drug Act and Pharmacogenomics: A Flood of Orphan Drugs and Abuses?*, 31 AM. J. L. & MED. 365, 370–71 (2005) (calling this practice of testing treatments for medically differentiable subgroups of a disease "salami slicing"); *see also* Lars Noah, *Constraints on the Off-Label Uses of Prescription Drug Products*, 16 J. PRODUCTS & TOXICS LIABILITY 139, 144–45 (1994).

149. Barbara A. Noah, *The Inclusion of Pregnant Women in Clinical Research*, 7 ST. LOUIS U. J. HEALTH L. & POL'Y 353, 355–57 (2014).

in their clinical trials.[150] Meanwhile, because of physiological and other differences distinguishing children from adults, including developing organ systems or higher metabolism rates, drug sponsors and regulators were reluctant to generalize adult trial results to the pediatric population.[151] Often, they would simply narrow the indication to, for example, the treatment of depression in patients over the age of eighteen, making no claim as to the drug's safety or efficacy in children.[152]

These examples, however, suggest the limits of the prevailing paradigm that allows manufacturers by and large to control how the drug is presented for use and, therefore, the standards to which the manufacturers are subjecting themselves.[153] Should entire populations be denied information on safety, efficacy, and dosing simply because manufacturers can restrict indications at will? Does our food and drug law take no account of the social expectations of that drug's use? Are boundaries drawn along the lines of age, pregnancy, or immune function equivalent to line drawing based on other population parameters? As it turns out, the paradigm that defers to the manufacturers' stated claims in defining the indication has been checked to some extent by Congress and the FDA. Now, manufacturers must report certain demographics of their clinical trial enrollment.[154] Drug sponsors are prohibited from excluding men and women of reproductive age from their trials.[155] The FDA also tried to issue a regulation mandating pediatric testing and labeling for drugs that it deemed therapeutically meaningful, needed by substantial numbers of children, and feasible for study in the pediatric subpopulation.[156] The regulation was struck as ultra vires by a federal district court, but subsequently codified by Congress, which also authorized six-month addition-

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150. *See, e.g.*, Kurt R. Karst, Comment, *Pediatric Testing of Prescription Drugs: The Food and Drug Administration's Carrot and Stick for the Pharmaceutical Industry*, 49 AM. U. L. REV. 739, 748 n.44 (2000).

151. *See id.* at 748 & n.44.

152. *See id.* at 747.

153. Malinowski, *supra* note 140, at 1119 ("Similarly, using the regulatory process to attempt to impose commercial uses on new drug candidates or specific types of human clinical trials on drug developers would invite allegations of undue impediment on the commercial freedom that is the touchstone of our private market system and introduce susceptibility to legal challenges.").

154. Federal Food, Drug, and Cosmetic Act § 505(b)(1), 21 U.S.C. § 355(b)(1) (2012) ("The Secretary shall, in consultation with the Director of the National Institutes of Health and with representatives of the drug manufacturing industry, review and develop guidance, as appropriate, on the inclusion of women and minorities in clinical trials required by clause (A)."); *see also* U.S. FOOD & DRUG ADMIN. ET AL., GUIDANCE FOR INDUSTRY: COLLECTION OF RACE AND ETHNICITY DATA IN CLINICAL TRIALS 1–2 (2005). For a more recent example, see Food and Drug Administration Safety and Innovation Act, Pub. L. No. 112-144, § 907, 126 Stat. 993, 1092–93 (2012).

155. PETER BARTON HUTT ET AL., FOOD AND DRUG LAW: CASES AND MATERIALS 699 (4th ed. 2014).

156. *See* Karst, *supra* note 150, at 753–55. The FDA may waive the requirement if studies are impossible or highly impracticable, if the product is not likely to be used in substantial numbers of pediatric patients, or if it provides no meaningful therapeutic benefit over existing therapies, among other reasons. Federal Food, Drug, and Cosmetic Act § 505B(a)(4)(A), 21 U.S.C. § 355c(a)(4)(A) (2012).

al exclusivity to reward such pediatric studies.[157] These measures now give drug sponsors some duty and incentive to generate pediatric safety, efficacy, and dosing information.[158]

2. Plan B Background

When levonorgestrel was finally expressly approved for emergency contraception in 1999, this indication proved controversial—especially among abortion opponents and others who raised concerns about the incentives for sexual promiscuity.[159]

Progestin compounds, of which levonorgestrel is one, are similar to hormones naturally present in the body, especially during pregnancy.[160] Progestin has a number of effects, including "reduc[ing] the number of sperm cells in the uterine cavity, immobili[zing] sperm, and . . . delay[ing] or prevent[ing] ovulation."[161] While some of these effects occur prefertilization, some have contended that progesterone-like hormones could also change the uterine lining, possibly rendering it less hospitable to the implantation of a fertilized egg, an effect that could constitute a postfertilization event, though this has never been shown.[162] This implantation blockage is particularly controversial among those who consider human life to begin at fertilization, as they construe the postintercourse interference with implantation of a fertilized egg to be the termination of human life.[163]

However, it has been impossible to verify that levonorgestrel blocks postfertilization implantation. Judge Korman notes that "it would be 'unethical and logistically difficult to conduct the necessary research' to

157. See Karst, *supra* note 150, at 762–63.

158. Draft Guidance for Industry on the Pediatric Research Equity Act, 70 Fed. Reg. 53,233, 53,234 (Sept. 7, 2005); *see also* 21 U.S.C. § 355(i)(1)(D). The author helped to draft this Act as a legislative assistant to then-Senator Hillary Clinton.

159. *See, e.g.*, Russell Shorto, *Contra-Contraception*, N.Y. TIMES MAG., May 7, 2006, at 48.

160. Tummino v. Torti (*Tummino I*), 603 F. Supp. 2d 519, 522 (E.D.N.Y. 2009).

161. MARCIA CROSSE, U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-109, FOOD AND DRUG ADMINISTRATION: DECISION PROCESS TO DENY INITIAL APPLICATION FOR OVER-THE-COUNTER MARKETING OF THE EMERGENCY CONTRACEPTIVE DRUG PLAN B WAS UNUSUAL 12 (2005) [hereinafter GAO REPORT].

162. As would other contraceptives, including progesterone-containing daily oral contraceptives, as well as intrauterine devices, whether hormonal or copper. *But see* Tummino v. Hamburg (*Tummino II*), 936 F. Supp. 2d 162, 165 (E.D.N.Y. 2013) (explaining how Plan B labeling mentions the possibility of interference with implantation "without affirmative evidence" that the drug operates in this way); Pam Belluck, *No Abortion Role Seen for Morning-After Pill*, N.Y. TIMES, June 6, 2012, at A1 (citing experts explaining that it takes a long time to change the endometrium lining, and emergency contraception is a one-shot treatment).

163. *See The Human Life Bill Appendix, Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 97th Cong. 286 (1982) (statement of John D. Biggers, Professor of Physiology Harvard Medical School Laboratory of Human Reproduction & Reproductive Biology).

conclusively establish that levonorgestrel-based contraceptives do not interfere with implantation."[164]

In 1999, when the new drug application (NDA) for levonorgestrol used for the emergency contraception indication (Plan B) was first approved, it was initially approved for prescription use only.[165] Pharmaceuticals are often introduced in this way and later strategically switched to OTC status by drug sponsors to maximize the revenue generated by the drug,[166] especially since a switch involving a new clinical study can garner the sponsor an additional three-year exclusivity "after the exclusivity and patent periods for the prescription products have expired."[167]

3. *Tummino v. Hamburg*: The Case Description

In 2001, after Plan B had been on the market as an FDA-approved prescription drug for two years, outside citizens petitioned for an OTC switch.[168] Indeed, in 2003, the Plan B drug sponsors themselves also requested such a switch.[169] If initiated by someone other than the drug sponsor, such as citizens or the FDA, a switch can be conducted by means of a rulemaking.[170] If the plan sponsor initiates the switch, they generally do so through a process similar to a new drug approval application called a supplemental new drug application (SNDA).[171] Under either scenario, the standard governing such a switch is set forth in FDCA § 503B and its accompanying regulation.[172]

i. The Statutory Standard for OTC Switch

Under FDCA §503(b)(1)(a), prescription dispensation is required for a drug if "because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, [it] is not *safe* for use except under the supervision of a practitioner

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164. *Tummino II*, 936 F. Supp. 2d at 165 (quoting GAO REPORT, *supra* note 161, at 13). Any such post-implantation effect could also be the result of pre-conception use of birth control pills or an IUD. *See generally*, Judy Peres & Jeremy Manier, *"Morning-After Pill" Not Abortion, Scientists Say*, CHI. TRIB., June 20, 2005, at CN1.

165. *Tummino I*, 603 F. Supp. 2d at 525.

166. *See, e.g.*, Laura Mahecha, *Rx-to-OTC Switches: Trends and Factors Underlying Success*, 5 NATURE REV. DRUG DISCOVERY 380, 380 (2006).

167. RICHARD M. COOPER ET AL., FOOD AND DRUG LAW AND REGULATION 465 (David Adams et al. eds., 2d ed. 2011) [hereinafter FDLI] (referring to the regulatory exclusivities available under 21 U.S.C. § 355(c)(3)(E)(iii)–(iv)).

168. *Tummino I*, 603 F. Supp. 2d at 526. FDA had always recognized the prescription/OTC distinction under regulations promulgated in 1938 implementing FDCA § 502(f), requiring that labeling bear "adequate directions for use." HUTT ET AL., *supra* note 155, at 802. "Prescription" drugs were exempt from the requirement of adequate directions for use, but only if the product bore a label directing that the product be used only by or on the prescription of a physician. *Id.* Subsequently Congress, in the Durham-Humphrey Amendments of 1951, passed FDCA § 503B. *Id.*

169. The first SNDA submitted, unrestricted by age, was denied by FDA. *Tummino I*, 603 F. Supp. 2d at 523. The second SNDA was for women 16 and older. *Id.* The third submitted was for women 17 and older. *Id.* FDA then approved for 18 and older. *Id.*

170. Federal Food, Drug and Cosmetic Act § 503(e)(2)(B), 21 U.S.C. § 353(e)(2)(B) (2012).

171. *See Tummino I*, 603 F. Supp. 2d at 523.

172. Prescription-Exemption Procedure, 21 C.F.R. § 310.200(b) (2015).

licensed by law to administer such drug."[173] Section 503(b)(3) continues: "The Secretary may by regulation remove drugs . . . from the [prescription requirements in] paragraph (1) of this subsection when such requirements are not necessary for the protection of the *public health*."[174]

Judge Korman proceeds to quote the FDA regulation specifying that it will implement this language in such a way that:

> Any drug limited to prescription use . . . shall be exempted from prescription-dispensing requirements when the Commissioner finds such requirements are not necessary for the *protection of the public health* . . . and he finds that the drug is *safe and effective* for use in self-medication as directed in proposed labeling.[175]

Thus, public health, constituted by safety and efficacy, is understood to be the chief consideration justifying OTC switch.

ii. More Case Background

Here, the sponsor's switch request was accompanied by significant amounts of safety data; however, the FDA repeatedly hesitated to grant OTC status for Plan B.[176] The original citizen petition was filed in 2001, and the FDA did not issue a final response for over five years.[177]

In the meantime, however, the FDA was far from idle; multiple struggles played out behind the scenes. Despite the FDA's decision not to require pediatric pharmacokinetic studies for the SNDA, the FDA early in the process flagged the question of whether the OTC switch might present different risk-behavior concerns for patients of different ages.[178] The FDA thus considered the option that the switch might be undertaken only for those women above a certain age threshold. After five years of maneuvering and negotiation, including Senate obstruction of the confirmation of two successive FDA Commissioners pending progress on this issue, the FDA finally approved the switch for women eighteen and older shortly before the confirmation of Bush-appointed Commissioner Andrew Von Eschenbach.[179]

173. 21 U.S.C. § 353(b)(1)(A) (emphasis added).

174. *Id.* § 353(b)(3) (emphasis added).

175. *Tummino I*, 603 F. Supp. 2d at 524–25 (emphasis added) (quoting Prescription-Exemption Procedure, 21 C.F.R. § 310.200(b) (2015)).

176. *Tummino I*, 603 F. Supp. 2d at 526.

177. *Id.* at 536.

178. *See id.* at 529. Federal Food, Drug and Cosmetic Act §505B(a)(4), as discussed *supra* note 154, allows FDA to waive pediatric studies for reasons like lack of feasibility. Manufacturers may still voluntarily conduct such studies. In this case, pharmacokinetic, toxicity or dosing studies would not have answered the concerns raised, which asked for actual use data.

179. *See id.* at 535.

4. Exception

This age delimitation is the feature that renders the FDA's decision an example of the phenomenon of an ex ante exception ultimately judged invalid. OTC status for Plan B was effectively approved for all women except those under eighteen.[180]

A women's health coalition sued in January 2005 to contest the rejection of their petition for full OTC availability.[181] Despite the ban on underage purchase of smoking cessation products, plaintiffs claimed that OTC status had never been conditioned upon an age threshold before.[182] Even if this were true, it is worth noting that OTC status had been conditioned upon other characteristics before, including different diagnosis, strength, route of administration, dosage form, or even sex of the patient.[183] Moreover, other types of approval, such as new drug approvals, routinely contain age exclusions, as discussed above.[184]

Judge Korman found for the plaintiffs and declared the restricted OTC switch with the age-eighteen cutoff to be "arbitrary and capricious."[185] Korman remanded to the FDA, but in the period following remand, the Obama Administration succeeded the Bush Administration, ushering in new FDA and health department leadership with ostensibly different views on sexual morality.[186]

Yet the new Administration, on December 7, 2011, once again announced a decision to age restrict the OTC availability of emergency contraception, which had by now been reformulated by the manufacturer as a one-pill version.[187] The drug would be available OTC only to wom-

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180. In a practical sense, this exception was quite difficult to implement and entailed a number of other restrictions. The FDA maintained that in order to implement the age-related exception rigorously, all Plan B products had to be carried behind the pharmacist counter, rather than on the pharmacy shelves. Tummino v. Hamburg (*Tummino II*), 936 F. Supp. 2d 162, 180 (E.D.N.Y. 2013). This unusual arrangement was dubbed the "BTC" or "behind-the-counter," regime in contrast to rather than OTC, (over-the-counter). *See id.*

181. *Id.* at 165–66.

182. The FDA has created age-based restrictions when enacting an Rx-to-OTC switch for only one other class of drugs, nicotine products (such as Nicorette gum), for which only persons 18 years and older may obtain the products OTC. *See* GAO REPORT, *supra* note 161, at 7. Nicorette gum, incidentally, was given OTC status in 1996, long before the separate tobacco product regime recognizing age distinctions was passed by Congress. *See Information for Consumers (Drugs): Now Available Without Prescription*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/Drugs/ResourcesForYou/Consumers/ucm143547.htm (last updated Aug. 12, 2011).

183. FDLI, *supra* note 167, at 466 (citing examples including meclizine, which is available only by prescription for vertigo but OTC for nausea with motion sickness, clotrimoxazole in prescription form for certain types of candidiasis while OTC for "athlete's foot, ring worm, and jock itch," and loperamide which is prescription for chronic diarrhea, but OTC for acute diarrhea).

184. *See* HUTT ET AL., *supra* note 155, at 807 (identifying conditions on OTC availability, including gender).

185. Tummino v. Torti (*Tummino I*), 603 F. Supp. 2d 519, 523 (E.D.N.Y. 2009).

186. *See id.* at 549.

187. Tummino v. Hamburg (*Tummino II*), 936 F. Supp. 2d 162, 167 (E.D.N.Y. 2013) (referring to Plan B One-Step).

en age seventeen and above showing age verification. Among the remarkable aspects of this second OTC grant was that it was rendered not by the FDA, whose Commissioner, Margaret Hamburg, adjudged there to be "adequate and reasonable, well-supported, and science-based evidence that Plan B . . . is safe and effective and should be approved for nonprescription use for all females of child-bearing potential."[188] Instead, the decision to age restrict the OTC access was made by the supervening Secretary of Health and Human Services, Kathleen Sebelius, overriding the Commissioner and "invoking her authority under the Federal Food, Drug, and Cosmetic Act to execute its provisions."[189]

Judge Korman once again ruled the age-restricted grant to be "arbitrary" and "capricious,"[190] and instructed the FDA to grant the citizen petition "mak[ing] levonorgestrel-based emergency contraceptives available without a prescription and without point-of-sale or age restrictions within thirty days."[191]

In this case, the age-exception feature rendered the FDA's decision vulnerable as compared to blunter, less-contoured measures. Other emergency contraceptives, like ella, are prescription-only products.[192] Even the levonorgestrel birth control pill (the "mini pill") remains prescription-only, even though it is exactly the same chemical entity as Plan B.[193] The FDA is thus allowed to draw lines between one emergency contraceptive product and another, and may even distinguish preintercourse levonorgestrel from postintercourse levonorgestrel despite scant scientific support for the mini-pill's prescription status.[194] However, balancing access needs along the lines of adult and pediatric indications seemed to trigger doubt. The court seems to envision the FDA's range of action for postintercourse levonorgestrel as restricted to fully OTC or fully prescription but no ability to offer OTC access with an exception. Indeed, the judge ruled that the FDA's decision to exclude women under 18 from

188. *Id.* (quoting Statement from FDA Commissioner Margaret Hamburg, M.D., on Plan B One-Step (Dec. 7, 2011)).

189. *Id.* (quoting Statement from FDA Commissioner Margaret Hamburg, M.D., on Plan B One-Step (Dec. 7, 2011)).

190. *Id.* at 197.

191. *Id.*

192. News Release, U.S. Food & Drug Admin., FDA Approves ella™ Tablets for Prescription Emergency Contraception (Aug. 13, 2010), http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm222428.htm.

193. *See* Olga Khazan, *Birth Control Without a Prescription*, ATLANTIC, Sept. 19, 2014, http://www.theatlantic.com/health/archive/2014/09/toward-a-prescription-free-birth-control-pill/380464/ (citing the vice chair of the American College of Obstetricians and Gynecologists Committee on Gynecologic Practice Bulletins saying that the mini-pill should be the first to be offered over-the-counter because of its safety profile); *see also* Scout Richters, Note & Comment, *The Moral Interception of Oral Contraception: Potential Constitutional Claims Against the FDA'S Prescription Requirement for a Progestin-Only Birth Control Pill*, 22 J.L. & POL'Y 393, 408 (2013) (saying that levonorgestrel is the substance in many progestin-only mini-pills).

194. *See id.* Indeed, the AMA has passed a resolution calling for the OTC availability of the mini-pill. *See* AM. MED. ASS'N, 2013 ANNUAL MEETING MEMORIAL RESOLUTIONS 464 (2013), http://www.ama-assn.org/assets/meeting/2013a/a13-resolutions.pdf.

OTC availability was what rendered the decision "arbitrary and capricious" as it involved improper factors.[195]

5. Value Conflict

i. No Clear Statutory Foreclosure of Offsetting Values

Korman pointed to FDCA § 503B as stating that switches had to be determined by health standards such as "protection of public health" and "safety and effectiveness."[196] But the statutory text itself does not foreclose expansive interpretations of the factors relevant to public health or safety. If the statute is open to these other interpretations, then FDA's inclusion of behavioral risk compensation effects should enjoy *Chevron* deference.[197] Indeed, if we accept Sunstein's default canons, the courts should favor readings that allow consideration of harms that might offset the health benefits of drug availability. The statute requires the Secretary to consider whether prescription status is "necessary for public health" and suggests that broader social factors should be considered as part of the assessment of safety and effectiveness.[198] Section 503B instructs consideration of factors beyond toxicity, including "other potentiality for harmful effect" and any safety problems arising because of "collateral measures necessary to [the drug's] use."[199] This language has long included consideration of harms that arise not from the drug itself but from the changes in patient behavior, such as delayed health-seeking behavior, due to the drug's availability.[200]

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195. Tummino v. Torti (*Tummino I*), 603 F. Supp. 2d 519, 542, 544, 547–48 (E.D.N.Y. 2009) (reviewing the *State Farm* articulation of the standard).

196. *Id.* at 525, 548; *see also* Tummino v. Hamburg (*Tummino II*), 936 F. Supp. 2d 162, 169 (E.D.N.Y. 2013) ("[T]he standard for determining whether contraceptives or any other drug should be available over-the-counter turns solely on the ability of the consumer to understand how to use the particular drug 'safely and effectively.' . . . I decide this case based only on my understanding of the applicable standard." (citation omitted)).

197. *See* Chevron, U.S., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

198. Federal Food, Drug, and Cosmetic Act §§ 503B(b)(3), 505(d), 21 U.S.C.§§ 353(b)(3), 355(d) (2012).

199. *Id.* § 353(b)(1)(A).

200. *See* United States v. Article of Drug, Labeled Decholin, 264 F. Supp. 473, 482–84 (E.D. Mich. 1967) (refusing to grant summary judgment allowing OTC distribution, even if the drug itself is pharmacologically safe, because FDA may consider the risk behavior the drug's availability might induce, i.e., causing the patient to delay seeking professional diagnosis to discover an underlying condition that requires alternate treatment). The FDA's consideration of "risk substitution" or "risk compensation" behavior is also evident insofar as the approval of Truvada (a product for the prophylactic use of antiretrovirals among those at-risk of HIV infection) is conditioned upon postmarketing studies of whether Truvada affects behavior that might increase the chances of HIV transmission. *See* Kristen Underhill, *Risk-Taking and Rulemaking: Addressing Risk Compensation Behavior Through FDA Regulation of Prescription Drugs*, 30 YALE J. ON REG. 377, 382, 417–19 (2013). Similarly, the FDA's longstanding pre-2009 stance to apply the NDA paradigm to nicotine products that make therapeutic claims, like cessation products, but not to treat modified-risk cigarettes (like low-tar products) as therapeutic products, involves recognition that risk substitution (smoking more cigarettes, or taking longer drags to compensate) might nullify any therapeutic effects of the product. *Id.* at 395. This stance is echoed in the FDCA § 911(g) requirement that risk be measured by "actual use." 21 U.S.C.§ 387k(g).

Longtime food and drug law observers, including Peter Barton Hutt, have argued persuasively that that the statutory language thus accommodates broader societal concerns.[201] The FDA often requires "actual use studies" for OTC switches precisely to test for these broader concerns such as "compliance issues, including off-label usage . . . [and] overdose or abuse potential."[202] If the use of one drug, itself safe *in vivo*, would restrict patients' food or other medications, those considerations would be relevant.[203] None of these factors concern merely the physiological effects of the drug. They involve reasoning about value-laden human and social behavior, the dynamics of which may be more difficult to capture in a clinical study and may complicate the extrapolation of such study to a broader population.

Korman also points to the "purpose" of § 503B as proscribing the use of political values beyond public health narrowly construed to justify agency practice. But the Senate report he cites does not contemplate pure health justifications, unalloyed by other values.[204] Congress declared that its intent was "to 'relieve retail pharmacists and the public from burdensome and unnecessary restrictions on the dispensing of drugs that are safe for use without the supervision of a physician.'"[205] This statement acknowledges "burden" and a degree of "necessity" as broad factors apart from health that the FDA should consider when deciding whether to make an otherwise safe drug available OTC. None of this is to suggest that Judge Korman's requirement that the FDA extrapolate the data justifying OTC status for older women to younger age ranges is incorrect, but simply that deciding to extrapolate is a matter of judgment, indeed discretion, the scope of which, under statutory text and purpose, one can reasonably construe to encompass more than consistent technical application of health science standards.

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201. Peter Barton Hutt, *A Legal Framework for Future Decisions on Transferring Drugs from Prescription to Nonprescription Status*, 37 FOOD DRUG COSM. L.J. 427, 436 (1982). He identifies more than one statutory factor that must be considered, not just toxicity, but other potentiality for harmful effect, specifically, the "method of use or collateral measures necessary to use." *Id.* at 433. Of the last, he says, "Congress intended this factor to have the broadest possible scope. It encompasses all aspects of the circumstances under which a drug is used, including broad questions of social policy. There is perhaps no issue involving drug use that cannot properly be brought into consideration under this factor." *Id.* at 436.

202. FDLI, *supra* note 167, at 473.

203. Lars Noah, *Treat Yourself: Is Self-Medication the Prescription for What Ails American Health Care?*, 19 HARV. J.L. & TECH. 359, 366 (2006) ("Although the statute and regulations provide some general criteria for differentiating between prescription and OTC products, ultimately that determination must be made on an ad hoc basis and without clear guidance. . . Other harmful effects may include the risk of interactions with food or other drug products and the potential for abuse." (footnote omitted)).

204. Tummino v. Hamburg (*Tummino II*), 936 F. Supp. 2d 162, 173 (E.D.N.Y. 2013).

205. *Id.* (quoting S. REP. NO. 82-946, at 1 (1951)).

ii. Arbitrary and Capricious or Explained by Permissible Reasons?

Korman, in excluding these other social considerations, must rely less on text, and instead on doctrine that subjective "bad faith" will not only overcome the record rule but also support a finding of arbitrary and capricious action.[206]

What then does Korman classify as bad faith? It is not clear, and indeed other scholars have written of how this case highlights the muddled state of administrative law doctrine in this area.[207] Bad faith might be thought to consist of dissembling or duress, but what turns out to be bad faith in Korman's view is the consideration of additional "political" factors, which he defines as norms, policies, or preferences other than those of health science.[208] In other words, he manages to frame his opinion such that mere value conflict, rather than lying, is what renders an exemption "bad faith."

Whether the consideration of more than one norm is sufficient to relegate a decision to the "political" sphere is one that this Article seeks to probe more deeply, so Korman's decision to assume it here bears remark, especially when he could have based his decision on other grounds instead. Is it indeed a foregone conclusion that the agency must consider nothing other than health concerns? Surely agencies can also consider matters like priorities when it comes to enforcement.[209] Moreover, as health standards do not mechanically apply themselves, the FDA is expected to use judgment or "discretion," and one control upon discretion is political accountability.[210] The subjection of the FDA to the political processes of nomination and confirmation would suggest intention to employ this control.

Once one proves the existence of other considerations, political or otherwise, there is still some distance to go before the presence of non-health considerations constitutes decision by unreasoned and arbitrary caprice. What in Korman's decision carries us that extra distance? What administrative law doctrines do the work? Neither deceit nor falsehood

206. Tummino v. Torti (*Tummino I*), 603 F. Supp. 2d 519, 542 (E.D.N.Y. 2009) (noting that the finding of subjective bad faith will weigh in favor of finding arbitrary and capricious action (citing Latecoere Int'l, Inc. v. U.S. Dep't of the Navy, 19 F.3d 1342, 1356 (11th Cir. 1994); James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1096 (D.C. Cir. 1996))).

207. Heinzerling, *supra* note 125, at 958–59.

208. *See infra* text accompanying notes 259-66.

209. *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 831–32 (1985).

210. *See, e.g.*, Thomas O. McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA*, 67 GEO. L.J. 729, 732-36, 740-45, 750 (1979); *see also* David F. Cavers, *The Legal Control of the Clinical Investigation of Drugs: Some Political, Economic, and Social Questions*, 98 DAEDALUS 427, 430 (1969) ("[T]his evaluation does not call for simply a 'yes' or 'no' judgment. One dosage level may be safe, another questionable, but the safer dosage level may be of doubtful efficacy. A satisfactory answer may lie in between. Negotiation follows.").

was relied upon as the touchstone of bad faith.[211] Instead, Korman points to a series of arbitrary "departures" from prior agency practice.[212]

a) Substantive Transgression or Political Cooptation?

In condemning the first decision to age restrict, made by the Bush Administration FDA, Korman does marshal suggestions of "improper political influence . . . showing that the political pressure was intended to and did cause the agency's action to be influenced by factors not relevant under the controlling statute."[213] It is noteworthy that Korman does not go so far as to claim that any of the instances of political pressure rose to the level of procedural violations; he simply considers them as evidence that other substantive factors entered into the decision-making. Take for instance the first sign of political consideration that Korman cites, the involvement of the White House. On the day that the Plan B sponsor first submitted its SNDA requesting OTC status, then-FDA Commissioner Mark McClellan conversed with a White House domestic policy advisor about the matter and provided several status updates thereafter.[214] Korman declined to rule that these were ex parte communications: "Whether or not it was permissible for the FDA to discuss such questions with the White House, these discussions were not the norm for the FDA with respect to this type of decision."[215] In other words, the process was not the problem; the possible entry of a non-public health factor was measured, not only by the existence of a channel of external communication, but also by any departure from previous FDA practice which Korman presumes to then require justification in terms of public health to satisfy *State Farm* requirements for reasoned decision-making.[216]

The category of facts showing bad faith includes those instances throughout the process when the FDA personnel were answerable to political officers. Again, Korman slightly overstates the situation in a way that implausibly exiles conflicting values pressed by the public: the FDA leadership, subject to presidential appointment and congressional con-

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211. The magistrate judge allowed discovery beyond the record to look for just such evidence. *See* Heinzerling, *supra* note 125, at 953–54.

212. Tummino v. Hamburg (*Tummino II*), 936 F. Supp. 2d 162, 170 (E.D.N.Y. 2013).

213. Tummino v. Torti (*Tummino I*), 603 F. Supp. 2d 519, 543 (E.D.N.Y. 2009) (quoting Orangetown v. Ruckelshaus, 740 F.2d 185, 188 (2d Cir. 1984)).

214. *Id.* at 527. "Status reports" are excluded from barred ex parte communications under Administrative Procedure Act. 5 U.S.C. § 551(14) (2012).

215. *Tummino I*, 603 F. Supp. 2d at 547. Korman was presumably referring to 5 U.S.C. §§ 554(d), 557(d).

216. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 56–57 (1983) (explaining the arbitrary and capricious standard and requiring under such standard that NHTSA "supply a reasoned analysis" for revoking the passive restraints rules and not considering airbags or nondetachable passive belts (quoting Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970))); *Tummino I*, 603 F. Supp. 2d at 548 ("While it may have been rational for the FDA to consider adolescent cognitive development in its evaluation of Plan B as an OTC drug, plaintiffs have presented unrebutted evidence that the FDA's focus on these behavioral concerns stemmed from political pressure rather than permissible health and safety concerns.").

firmation, is expected to be politically accountable.[217] What is the political appointment and confirmation process for if not to inject a political dimension into the FDA's exercise of its discretion and interpretation of its governing law? Yet Korman disparages the role that the appointment and confirmation process played.

In the first confirmation battle over the elevation of Acting Commissioner Lester Crawford in 2005, Senators Hillary Clinton and Patty Murray put holds on his confirmation until receiving a commitment that the FDA would decide the Plan B OTC petition by a certain date.[218] However, once confirmed, Crawford backed out of the promise and missed the deadline.[219]

When the Senate next considered a nominee for Commissioner, the Senators again took a stand, demanding FDA action.[220] One day before the confirmation hearing, the FDA at long last announced the grant of OTC status, albeit restricted to women eighteen and over.[221]

Korman is unquestionably correct that politics and social considerations entered the FDA's decision-making in this case, and he hinges his decision upon the presence of those "political" considerations. What is harder to tell is if they entered in a way allowed by statute, process requirements, and permissible reasoning or not.

b) Departures Justified by the Limits of Inference from Sample?

For Korman, the chief facts showing lack of good faith reasoned decision-making lie in what he calls FDA's "[d]epartures from [i]ts [o]wn [p]olicies."[222]

The first departure he questions is the FDA's decision not to adopt the Advisory Committee's recommendations.[223] The Advisory Committee had voted unanimously that Plan B was safe for OTC use and voted 27–1 that the data from an "actual use study" (AUS) could be generalized or extrapolated to the overall population.[224] Finally, the committee voted 23–4 "to approve Plan B for over-the-counter status without age or point-of-sale restrictions."[225]

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217. *See* Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 262–63 & n.24 (noting the FDA's lack of independence and the periodic proposal that it should be made so); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1207–09 (2013) (discussing the agencies direct accountability to HHS).

218. *Tummino I*, 603 F. Supp. 2d at 523.

219. *Id.*

220. *Id.* at 523, 546.

221. *Id.* at 546.

222. *See id.* at 547–49.

223. *Id.* at 547.

224. *Id.* at 529, 547–48.

225. *Id.* at 529.

The FDA is not required to convene advisory committees.[226] Advisory committee decisions are therefore hardly expected to be conclusive, which Korman himself concedes: "While the Advisory Committee does not have the final say regarding the OTC switch applications, the FDA has followed advisory committee recommendations in every OTC switch application in the last decade . . . ."[227] Actually, in 2001, the FDA first ignored its advisory committees on the health-insurer led petitions to switch antihistamines, such as Claritin, to OTC status.[228] Meanwhile, it is not clear that ten years worth of decisions is the right subset from which to judge FDA's practices. Nor is it clear that the OTC switch decisions are the correct category of decision from which the FDA's policy toward advisory committees should be inferred. Certainly, if one looks at the FDA's drug decisions, including NDA approvals and revocations, there are numerous instances where the FDA has acted contrary to its advisory committees.[229] Again, the portrait of the FDA's past practice as deferring consistently to advisory committee decisions is overstated by Korman—not an unreasonable stance but also not a foregone conclusion. Despite my agreement with him on the outcome in this case, my point in this Article is to show that the outcome, and the grounds recited in the opinion, were choices Korman made, leading us to ask what motivates these choices. Here, we hypothesize that his choices are guided by dependence upon the notion that the FDA, or the author of such a drug availability decision, should pursue a simple unitary value and not resolve competing norms.

Another departure Korman cites was the FDA's selection of members for the Advisory Committee. Rather than leaving it to frontline staff, the Commissioner's staff directly circulated names, allegedly to achieve

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226. HUTT ET AL., *supra* note 155, at 1013 ("FDA's use of advisory committees in the review of NDAs, BLAs, and food additive petitions is entirely discretionary . . . ." (quoting Peter Barton Hutt, *The Regulation of Drug Products by the United States Food and Drug Administration*, *in* THE TEXTBOOK OF PHARMACEUTICAL MEDICINE (John P. Griffin & John O'Grady eds., 5th ed. 2006))). The Food and Drug Administration Amendments Act of 2007 (FDAAA), Pub. L. No. 110-85, § 918, 121 Stat. 823, 960–61, recently added FDCA § 505(s), which only requires advisory committees for new chemical entities, and even then, the FDA can waive the requirement in action letter explaining why it did not do so. *See* Federal Food, Drug, and Cosmetic Act § 505(s), 21 U.S.C. § 355(s) (2012); *see also Nonprescription Drugs Advisory Committee Charter*, U.S. FOOD & DRUG ADMIN. (Aug. 27, 2015), http://www.fda.gov/AdvisoryCommittees/CommitteesMeetingMaterials/Drugs/NonprescriptionDrugsAdvisoryCommittee/ucm105992.htm.

227. Tummino v. Torti (*Tummino I*), 603 F. Supp. 2d 519, 528 (E.D.N.Y. 2009).

228. Noah, *supra* note 203, at 360–61.

229. Cathryn Jakobson Ramin, *Why Did the F.D.A. Approve a New Pain Drug?*, NEW YORKER (Dec. 2, 2013), http://www.newyorker.com/business/currency/why-did-the-f-d-a-approve-a-new-pain-drug (discussing Zohydro ER, approved despite the advisory committee's opposition due to a lack of substance abuse deterrence); *see also* DIANA M. ZUCKERMAN, NATIONAL RESEARCH CENTER FOR WOMEN & FAMILIES, FDA ADVISORY COMMITTEES: DOES APPROVAL MEAN SAFETY? (2006), http://center4research.org/newsite/wp-content/uploads/2006/09/FDA-Report-v7.pdf ("The FDA also approved four (36%) of the 11 drugs that the drug advisory committees voted against, including products that were opposed by almost all the committee members. . . . [C]lose to half (43%) of the devices that were not recommended for approval obtained FDA approval anyway.").

"balance of opinion."[230] Though this procedural anomaly did not ultimately affect the decision of the advisory committee, the clash between health science criteria and other considerations is what Korman highlights as the problematic "departure."[231] Yet, balance is a statutorily inscribed consideration. The FDCA requires drug and device advisory committees to contain diverse perspectives.[232]

The level of decision-making, not just for the advisory committee selection, but also the OTC decision itself, troubled Korman. The line staff, such as the office directors within CDER, were "normally" the ones to make the decisions, but in this instance, Korman noted the involvement of the CDER Director, the Commissioner's participation, even the role of the White House, which served as a channel for the introduction of these external considerations.[233] However, the level of decision-maker was nowhere prescribed as the Office Director level, and key "Decisional Meeting[s]" have often included the CDER Director.[234] It is only since then that the statute has been modified by Congress to specify the "Division Director and Office Director's decision document" and command that "scientific review of an application is considered the work of the reviewer and shall not be altered by management or the reviewer once final."[235] Prior to 2007, the statute designated the decision to the Secretary of Health and Human Services (HHS), while the Secretary had in writing delegated to the Commissioner.[236] And because this was a licensing decision, the Administrative Procedure Act imposes fewer restrictions on the agency's choice of decision-maker.[237]

Evidence that these external considerations affected the timing of the decision was a third departure. There was deposition testimony that on January 15, 2004, the Commissioner expressed the view that the FDA would issue a non-approvable letter because of the insufficiency of data for those under sixteen, an insufficiency that was not likely to be addressed soon.[238] However, the formal office-level reviews would not be

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230. *Tummino I*, 603 F. Supp. 2d at 528.

231. *Id.* at 527–28.

232. Federal Food, Drug, and Cosmetic Act §§ 505(n)(3)(B)–(C), 513(b)(2), 21 U.S.C. §§ 355(n)(3)(B)–(C), 360c(b)(2) (2012) (requiring "diversified expertise" and consumer viewpoints); *see also id.* § 360e(g)(2)(B) (requiring "diversified professional backgrounds").

233. *Tummino I*, 603 F. Supp. 2d at 546–47.

234. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-402, DRUG SAFETY: IMPROVEMENT NEEDED IN FDA'S POSTMARKET DECISION-MAKING AND OVERSIGHT PROCESS 32 (2006).

235. Federal Food, Drug, and Cosmetic Act § 505(l)(2)(C)(v), (D), 21 U.S.C. § 355(l)(2)(C)(v), (D) (2012), *amended by* Food and Drug Administration Amendments Act of 2007, Pub. L. No. 110-85, § 916 (3), 121 Stat. 823, 958–59.

236. Tummino v. Hamburg (*Tummino II*), 936 F. Supp. 2d 162, 170 (E.D.N.Y. 2013) (citing 21 U.S.C. § 393(d)(2) (2006), *amended by* Tobacco Regulation, Federal Retirement Reform, Pub. L. No. 111-31, 123 Stat. 1776 (2009); *Delegations of Authority to the Commissioner Food and Drugs*, *in* FDA STAFF MANUAL GUIDE § 1410.10 (2005).

237. Administrative Procedure Act, 5 U.S.C. §§ 557(b), 554(d)(2)(A). Alternatively, it was a petition for rulemaking, with no particular APA-defined decision maker.

238. *Tummino I*, 603 F. Supp. 2d at 530.

completed until April of that year, after which a non-approvable letter was accordingly issued in May.[239] Thus, the U.S. Government Accountability Office (GAO) and others never found conclusive evidence that earlier statements by agency superiors constituted premature decision, rather than an exchange of provisional views.[240]

And the most crucial departure—the one at the crux of whether an internal health reason could justify the other departures, or whether the decision was motivated by "bad faith" external reasons—was the FDA's reluctance to extrapolate adult clinical data to the adolescent population despite previous instances of extrapolation to pediatric subpopulations. The outcomes of the actual use study (AUS) in particular showed that at least for the population enrolled in the AUS, the "frequency of unprotected sex did not increase, condom use did not decrease, and the overall use of effective contraception did not decrease [with use of plan B]."[241]

The AUS results formed the fulcrum of the case because the design of the AUS study producing these results lacked significant inclusion of younger girls in the adolescent age range. Twenty-nine of the 585 recruited subjects were aged fourteen to sixteen, and none were younger than fourteen, giving the FDA Commissioner room to declare that he was "not convinced the studies had enough power to determine if there were behavioral differences between adults and adolescents."[242] The sponsor supplemented its own study with existing literature that also looked at the behavioral effects of emergency contraception.[243] Yet, the numbers were still low, particularly for those in the younger adolescent range. Therefore, the CDER Acting Director concluded that the failure for any differences to show up with such low numbers did not conclusively counter the worry that it is generally "'very difficult to extrapolate data on behavior from older ages to younger ages' because of the diminished capacity of adolescents to make rational decisions and the 'large developmental differences,' between [younger and older adolescents]."[244] He signed the non-approvable letter and maintained that "although he 'consulted with the Office of the Commissioner,' he himself 'made the decision,' on the basis of the scientific data."[245]

239. *Id.* at 531–32.

240. *See* Heinzerling, *supra* note 125, at 951 (discussing how the GAO REPORT, *supra* note 161, at 21–22, found conflicting evidence on this matter).

241. *Tummino I*, 603 F. Supp. 2d at 528 (alteration in original) (quoting FDA Commissioner McClellan).

242. *Id.* at 528, 531, 547 (quoting FDA Commissioner McClellan).

243. *Id.* at 528.

244. *Id.* at 533 (quoting Dr. Galson, Acting Director of the Center for Drug Evaluation and Research).

245. Robert Steinbrook, *Waiting for Plan B—The FDA and Nonprescription Use of Emergency Contraception*, 350 NEW ENG. J. MED. 2327, 2327 (2004) (quoting Dr. Galson, Acting Director of the Center for Drug Evaluation and Research).

Korman pointed to the underlying refusal to extrapolate as an unjustified departure from a "long history" of generalizing data from older women to younger women for other contraceptives.[246]

But even Korman concedes that non-extrapolation is the shakiest ground upon which to stake a claim that the FDA's departure from past practice rendered its decision improper. Understandably, a judge would have qualms deciding that biomedical science requires inference to an under-sampled subpopulation. He allows that "[w]hile it may have been rational for the FDA to consider adolescent cognitive development in its evaluation of Plan B as an OTC drug, plaintiffs have presented unrebutted evidence that the FDA's focus on these behavioral concerns stemmed from political . . . rather than permissible health and safety concerns."[247]

Korman chooses to use this deviations analysis in a way that highlights his doctrinal focus on the agency's consideration of competing values as the central ground for rebuffing the FDA's explanation. It is notable that he does not invoke something like the *Accardi* doctrine, which holds agencies to the rules or principles they set forth themselves, even if those policies are not statutorily required.[248] Perhaps none of the "policies or practices" he cites rise to the threshold of clarity and consistency needed to bite with the force of law, though they are still background conditions that are relevant for substantive review for reasonableness and non-arbitrariness. But if they had risen to such a threshold, then the departures would be improper in and of themselves, rather than because they signal an improper consideration.

Instead, the purpose for Korman of tallying these departures is that any deviation from past practice suggests that something potentially "arbitrary" and unreasonable has entered unless such outlier action is justified by internal or statutorily permissible reasons, "supply[ing] a reasoned analysis" required by *Motor Vehicles Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Company*.[249] The defendants do in fact try to justify the deviations on that ground, saying that the key substantive considerations are the distinctive health concerns and the lack of data on those health concerns as affected by emergency contraception use in younger girls and women. As the lack of such data cannot be conclusively overcome by extrapolating the science from the older adults, the appropriateness of extrapolation becomes the decisive issue for whether deviations can be justified or not.

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246. *Tummino I*, 603 F. Supp. 2d at 533.
247. *Id.* at 548.
248. *See* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 265–66 (1954).
249. 463 U.S. 29, 42 (1983).

c) Internal Justification?

Thus, as with the soda ban, the line of scrimmage was whether the exception had an internal or external justification. Suggesting that the decision and its unique features were a response to the product's particular public health implications, an internal concern, would have then allowed the agency decision to stand. Such a position would have eliminated value clash.

How were these behavioral concerns for the adolescent population styled as internal justifications? At the outset of the FDA's process in April 2001, during review of the citizen petition, the Office of Drug Evaluation in CDER first reviewed and identified the concerns relating to younger women as follows:

- Whether availability of Plan B would crowd-out use of "more effective forms of birth control"[250]
- adolescents' comprehension of Plan B[251]
- the effect on adolescent girls' willingness to use condoms, testing, and other means of protecting against sexually transmitted diseases (STD's)[252]

Under this rubric, the concerns which arguably justified the carve-out for young women were not "pro-life" concerns or sexual morality concerns. The FDA framed these concerns as motivated by the underlying health concern over safety and contraceptive effectiveness and whether those policies should be differentially weighed for younger women and girls. These are paradigmatic "substitute risks" or "health-health tradeoffs," which Sunstein claims agencies are permitted to balance unless Congress has clearly said otherwise.[253] Cast this way, the defeasibility of the underlying health protection purpose of Plan B availability would be based not upon a competing norm but a judgment internal to the justification underlying prescription requirements for drugs.

However, the judge rejected this framing and described the concerns about the potentially different behavioral effects on younger women and girls, not strictly speaking as health concerns, but as concerns about promiscuity.[254]

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250. *Tummino I*, 603 F. Supp. 2d at 526.
251. *Id.*
252. *Id.* at 526, 533.
253. *See* Sunstein, *supra* note 4, at 1668, 1672–73.
254. *Tummino I*, 603 F. Supp. 2d at 533–34 (quoting an office-level director saying these concerns "are 'more applicable to the ability of adolescents to make reasoned decisions about engaging in sexual intercourse, not their ability to understand how to use Plan B safely and effectively as an emergency contraceptive should they engage in unprotected sexual intercourse'" (quoting Dr. Jenkins, Director of the Office of New Drugs)).

To dismiss the FDA's protests that their concerns were indeed health and safety-related, Korman again cited the AUS study results showing no change in unprotected sex or use of effective contraception.[255] Yet this response amounts to a non sequitur, as the low numbers of young adolescent subjects in the AUS study arguably offered no evidence either way for behavioral effects in that group.[256]

Thus, Korman concludes that the age-related line drawing was not justified by health reasons, but orthogonal aims, the consideration of which the judge deemed extraneous, political, and presumptively "bad faith," rendering the government's action arbitrary.

6. Assigns to Non-Legal Sphere

In contrast to the court's preference regarding NYC's soda portion cap, deferring to political decision-making is not Korman's favored answer. Indeed, Korman says the decision was illegitimate because the confirmation process politically influenced it.

Korman deplores the pressure that confirmation imposes on the FDA's Plan B actions. Is the FDA's decision therefore too political? Why isn't the erection of guidelines for the exercise of agency discretion by means of the confrontation of the President's politics with Congress's politics just exactly the degree of political that we intended?[257] Indeed, had confirmation not provided a channel for Senate pressure, the FDA might have withheld even a partial OTC grant, and the morality considerations would have prevailed utterly over health interests.

Two confirmation fights and a new Administration later, the FDA was still offering only an incrementally modified age-restricted OTC grant. With these extended battles achieving hard-won accommodations, and both political parties arriving at the same age-restricted approach, it seems quite plausible that the result represented some sort of political equipoise. The outcome was politically validated, even if not fully satisfying to any one side. Yet Korman would banish political accountability for agency decision-making.

What alternate arena does he imagine? Would he prefer that such decisions reflect private ordering, namely, the market? But market ordering entails the pure positivism of allowing the "indicated use" to be defined by the sponsor. Allowing sponsors to draw those lines is consistent with allowing the valuation of health versus other interests to be determined by the market. Thus, the age limitation would have prevailed had the sponsor decided to frame its SNDA application for OTC switch for

255. *Id.* at 532.

256. *See id.*

257. The courts recognize that agencies exist in a matrix of political accountability. *See, e.g.*, Sierra Club v. Costle, 657 F.2d 298, 405–06 (D.C. Cir. 1981).

an "age-restricted indication." Throughout the litigation, the government elected, sometimes to the limit of credulity, to present the age limitations not as conditions required by the government but as a request by the sponsor in their SNDA.[258] Even in the government's final hail-Mary attempt to stay the second invalidation granting the citizen petition, it did so by trying to grant an alternative approval to the drug sponsor's new SNDA on One-Step, limited to women and girls age fifteen and older.[259]

Korman, however, scorns the market logic of coping with the value clash in this way, at least insofar as it would implicate the FDA as a handmaiden.[260] If market incentives determined the availability of the drug, then the sponsor, through its age-restricted proposal, would earn market exclusivity for its research.[261] Korman denies any obligation to honor this incentive, calling this arrangement "a sweetheart agreement with the FDA."[262]

Instead, Korman's favored alternate arena is science. His discussion of the advisory board assumes scientific expertise, not diverse perspectives, as the requirement.[263] When he identifies the gravamen of the complaint against the FDA, he cites departure from scientifically-based review.[264] Korman approvingly cites the Pendergast Declaration, an amicus brief of sorts from a former FDA employee that stipulates the character of the FDA as "an expert scientific agency charged with making scientific and medical decisions within the boundaries set by the FDCA. Nothing in that statute suggests that scientific decisions may bend to political winds."[265] These assertions about the "character" of the FDA are presumed, rather than argued, from specific statutory text.[266]

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258. *See Tummino I*, 603 F. Supp. 2d at 523.

259. *See* Tummino v. Hamburg (*Tummino III*), No. 12–CV–763, 2013 WL 2631163, at *3 (E.D.N.Y. June 12, 2013).

260. *See id.*

261. *Id.*

262. Tummino v. Hamburg, 936 F. Supp. 2d 198, 206 (E.D.N.Y. 2013). The coda to this tussle is that in the end, the FDA complied with the order by making Plan B One-Step, Teva's product, available OTC, unrestricted by age, but continuing to age restrict OTC access to all other forms of emergency contraception. Deborah Kotz, *Teva Gets Exclusivity on Plan B Contraceptive*, BOS. GLOBE (July 24, 2013), https://www.bostonglobe.com/lifestyle/health-wellness/2013/07/23/fda-grants-exclusivity-plan-one-step-emergency-contraceptive-for-three-years/5ShlBCNplsJTGYzmkkr6MI/story.html. This exclusive arrangement was to last 3 years. *Id.*

263. *Tummino I*, 603 F. Supp. 2d at 527–28.

264. *See id.* at 523.

265. Tummino v. Hamburg (*Tummino II*), 936 F. Supp. 2d 162, 185 (E.D.N.Y. 2013) (quoting Declaration of Mary K. Pendergast, J.D., LL.M. in Support of Plaintiffs' Motion for Preliminary Injunction and Summary Judgment at ¶ 33, *Tummino II*, 936 F. Supp. 2d 162 (E.D.N.Y. 2013) (No. 12–CV–763)).

266. Dworkin says of the referee in a chess game where Tal deploys a disconcerting smile:

> The referee must select one or another of these conceptions, not to supplement the convention but to enforce it. He must *construct* the game's character by putting to himself different sets of questions. Given that chess is an intellectual game, is it, like poker, intellectual in some sense that includes ability at psychological intimidation? Or is it, like mathematics, intellectual in some sense that does not include that ability?

DWORKIN, *supra* note 10, at 103.

7. Judge Arrogates the Decision and Methodology

Yet many layers conceal Korman's answer for who should decide emergency contraception access. On the one hand, in making the drug available OTC, the result of the case stands for the proposition that the patient, not the doctor, should decide. At the same time, Korman declares that the judgment of whether health concerns should accommodate religious and sexual morality is "political," which might imply that political processes should decide the question. Yet he deplores the use of political negotiation to decide these matters. By his lights, scientific experts should control the outcome, but he is in a bind because by inserting himself, he necessarily conveys that judges, in reviewing administrative decisions, should decide.[267]

Should Korman himself apply the scientific standards, or should he enable the scientific decision-makers to do it? His choice of relief, rejecting remand, and ordering grant brings this vexed question to the fore. And what governs the judge's application of scientific standards? Korman attempts to sidestep these difficulties by proceeding as if he is engaged in methodologically familiar rule-based decision-making to conclude that science precluded the agency's decision.[268]

But to determine that the agency's decision was incompatible with science, he must define what science would require and in some sense perform his own scientific analysis.[269] Indeed, one plaintiff's lawyer noted that the judge "d[id] his own research . . . on scientific details in the case."[270] The pretense that rules are enough to decide is unconvincing.

Each "prior policy or practice" that he attempts to extend to this case turns out to fall short of a rule that would decide the case without doubling back to check the agency's work in performing the underlying "scientific" decision-making process. Rules, as we discussed before, distinctively apply pressure independently of their own justification. Something short of a rule will thus be inconclusive on the application of such prior treatment to this particular case with its particular circumstances, leaving Korman no choice but to take some position on the underlying scientific support for inference from adult to adolescent populations.

267. *See* Memorandum in Support of Defendants' Motion for Stay Pending Appeal at 12, *Tummino III*, 2013 WL 2631163 (E.D.N.Y. May 1, 2013) (No. 12–CV–763) (voicing this very concern about the relief of granting the petition, in Korman's April 5, 2013, order invalidating the Obama Administration's age-restriction, the government argued that the public and the brand of FDA will be irreparably harmed "if a drug product that purported to be 'FDA approved' were approved instead at the direction of a court.").

268. *See Tummino I*, 603 F. Supp. 2d at 548.

269. *See* Pam Belluck, *Behind Scolding of the F.D.A., a Complex and Gentle Judge*, N.Y. TIMES (June 14, 2013), http://www.nytimes.com/2013/06/15/health/behind-scolding-of-the-fda-a-complex-and-gentle-judge.html?_r=0.

270. *Id.*

The FDA is not bound to the recommendation of advisory committees.[271] The selection of advisory committee members to represent different perspectives was not foreclosed by rule.[272] The timing of the decision was not conclusively prior to the scientific review, and the level of decision-maker was hardly clearly and irrevocably prescribed.

Fidelity to "rule-based" decision-making should lead courts to encourage and honor rules of high formal realizability, precisely the kind that contain articulated ex ante exceptions.[273] This approach is at odds with how Korman rules. The outcome he reaches instead represents a view that the rule is sufficient to decide only when backed by health science, when congruent with what Korman has constructed as the underlying purpose. The naked rule is too vulnerable.

The reasoning that he employs is less an analysis of rules, but rather a simulation of scientific analysis instead. In the central deviations analysis, it turns out he spends much of his time arguing about whether statistical findings can be extrapolated from one population to another and why inferences about a younger population can justifiably be drawn from data describing an older population.[274] The defendants point out developmental differences in younger adolescents and present information showing that they do not always extrapolate drug efficacy to pediatric populations from adult data ("in 82.5% of the drug products"[275]).[276] The factors that affect the appropriateness of extrapolation are manifold. Just in this action alone, the FDA mentions the number of younger patients enrolled;[277] other sampling features, such as whether the study enrolled subjects in a setting or manner "that would be expected to capture a representative population of women who [are potential users];"[278] the number of potential individuals to be expected in the younger age group;[279]

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271. *See* discussion *supra* Section III.B.5.ii.b.

272. *See supra* note 232 and accompanying text.

273. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687–88 (1976) (identifying this feature of certain rules which makes them specific and determinate as compared to standards). The portrait I paint here departs in ascribing valences to rules as opposed to standards. Adhering to rules here can be "pro-health." More open-textured, policy-inflected Dworkinian decision making can turn out to be "individualistic," in the case of the soda portion cap case, or result in less "mutual support," as in the eyeglasses benefits.

274. Korman states that the defendants' position "centers on the argument that the FDA has no set policy of extrapolating data from adults to pediatric populations." Tummino v. Hamburg (*Tummino II*), 936 F. Supp. 2d 162, 169 (E.D.N.Y. 2013). Later, he states, "The FDA's failure to extrapolate involves . . . perhaps the most significant unexplained deviation from FDA practice ordered by the Secretary." *Id.* at 175.

275. *Id.* at 176.

276. Tummino v. Torti (*Tummino I*), 603 F. Supp. 2d 519, 533 (E.D.N.Y. 2009).

277. *Id.* at 531 (explaining that FDA Commissioner Mark McClellan said he was "not convinced the studies had enough power to determine if there were behavioral differences between adults and adolescents").

278. *Tummino II*, 936 F. Supp. 2d at 177 (emphasis omitted) (quoting Dr. John K. Jenkins, Director of the Office of New Drugs).

279. *Id.* (explaining that the Acting Director of the Division of Pediatric Drug Development stated that the minimal number of individuals of pediatric age potentially using a drug could justify

the particular physiological or other differences implicated by the drug mechanism; differing metabolism; different surface-to-mass ratio; developing organs; different growth or nutritional requirements;[280] and different cognitive development.[281]

Should the norms governing justifiable inference given the data sampling constraints operate like legal norms, which may require more presumptive consistency? Is Korman, in appealing to past extrapolation and inference, piggybacking on scientific practice norms, or adhering to a legal rule requiring generalization?[282]

Korman argues that none of the FDA's past refusals to extrapolate to the pediatric population involved safety data, only efficacy findings.[283] He reasons that because the determination of OTC status for Plan B for adolescents involved consideration of whether the *safety*, as well as efficacy, of Plan B for adults could be assumed to obtain in children, the past history of extrapolating safety data justifies extrapolation here.[284] In performing his extrapolation analysis by looking to whether the FDA has deviated from its historical practices in extrapolation, he does a fair amount of violence to scientific reasoning. The FDA's protests capture this well when it says, "Notwithstanding all of these departures, the FDA argues that there is no customary agency practice and '[e]very drug presents a unique collection of issues, and no two reviews will be identical.'"[285]

Levonorgestrel is remarkably well-tolerated, has been in longstanding use, and adverse reactions have been minor and few.[286] Thus, the findings of Plan B studies may well be generalizable, even to populations that are not well-sampled. However, it is hard to imagine that judges who do not know much about the differences in physiology and drug action among different populations are the ones to best correctly identify the data and study features that would justify extrapolation. Why would Korman know whether information about a drug's safety rather than findings about its efficacy were more likely to be similar between adult and pediatric subpopulations? Why should we trust his judgment that extrapolation to adolescent populations for previous products, without

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waiving the requirement of an additional pharmacokinetic or safety study in a pediatric population, consistent with the criteria outlined in the Pediatric Research Equity Act, 21 U.S.C. § 355(c)(4)).

280. *Id.* at 173 (citing the FDA's prior decision to label an OTC diet drug, Alli, as "not . . . for use by the pediatric population" because of nutritional concerns).

281. *See* Memorandum from Kathleen Sebelius, Sec'y of Health & Human Servs. to Margaret Hamburg, Comm'r of Food & Drugs (Dec. 7, 2011) (on file with author).

282. *See Tummino I*, 603 F. Supp. 2d at 532–33 (asserting FDA's long history of extrapolating from adults).

283. *Tummino II*, 936 F. Supp. 2d at 175–76.

284. *Id.*

285. *Id.* (alteration in original) (quoting Memorandum of Law in Opposition to Plantiff's Motion for Summary Judgment and in Support of Defendant's Cross-Motion to Strike at 32, Tummino v. Eschenbach, No. 05-CV-366 (E.D.N.Y. May 26, 2007)).

286. *Id.* at 166–68.

regard to behavioral implications, should entail such extrapolation to adolescents for oral postintercourse levonorgestrel? Surely different issues can arise in different products.

C. White v. Beal*: Medicaid Eyeglasses Coverage Restrictions*

Pennsylvania, under Title XIX of the Social Security Act (SSA), administers a Medicaid program, jointly funded by the federal and state governments to provide health benefits for certain populations in need of a medical safety net.[287] Title XIX requires any Medicaid program qualifying for federal matching funds to provide certain mandatory benefits, such as inpatient hospital care, or nursing, but then allows states—at the same federal match rate—to add certain optional benefits, including eyeglasses.[288] Pennsylvania decided to furnish glasses, but not for patients with refractive error, such as near-sightedness or far-sightedness.[289] The eligible patients were those whose need for glasses stemmed from an eye disease.[290] The state's failure to provide the optional benefit to those with refractive error, when they had no obligation to provide the benefit at all, was deemed to violate the Medicaid statute's requirement of reasonableness.[291]

1. Medicaid Coverage Background

Medicaid is a joint state and federal program to cover specified populations considered in need of a safety net.[292] States are not required to establish a program following federal standards for Medicaid, but if they do so, the federal government will provide them with matching funds for such expenditures.[293] Federal standards include the coverage of certain mandatory beneficiary categories and certain mandatory benefits, as well as some crosscutting general standards.[294] Medicaid features an approach whereby federal guidelines set a baseline for what a state program must cover to qualify as a Medicaid program.[295] Failure to reach the minimum standards will cause the state to lose matching funds, but states have considerable freedom in the other direction. They are permitted to go beyond the minimum required and layer more generous eligibility or benefits on top of the federally required floor. The provision of this

287. Social Security Act (SSA) § 1901, 42 U.S.C. § 1396 (2012).
288. *See* discussion *infra* Section III.C.ii.
289. White v. Beal, 555 F.2d 1146, 1148 (3rd Cir. 1977).
290. *Id.*
291. *Id.* at 1151–52.
292. ANDY SCHNEIDER ET AL., THE MEDICAID RESOURCE BOOK 4 (2002), http://kff.org/medicaid/report/the-medicaid-resource-book/.
293. Social Security Act § 1903, 42 U.S.C. § 1396b (2012).
294. *See* discussion *infra* Section III.C.ii–iii.
295. Nicole Huberfeld, *Bizarre Love Triangle: The Spending Clause, Section 1983, and Medicaid Entitlements*, 42 U.C. DAVIS L. REV. 413, 419–20 (2008).

optional assistance garners federal matching funds if it falls within the parameters of general Medicaid requirements.[296]

i. Eligibility

Eligibility for Medicaid had historically been tethered to the old Aid to Families with Dependent Children (AFDC) and Supplemental Security Income (SSI) categories of the "deserving poor."[297] Under this paradigm, mere poverty was insufficient to qualify; the program was targeted to beneficiaries who had "reason" to be poor.[298] In addition to meeting certain means-tests, one also had to fall into one of the eligibility "categories," such as single mothers (now single parents) and their dependent children, pregnant women, the aged, blind, and disabled.[299] For states to receive federal funds, they were required to cover specified low-income individuals in these categories.[300]

Beyond these mandatory groups, states had the option to cover certain additional individuals, including those who were somewhat less indigent, but because of high medical expenses, still lacked resources for adequate medical care.[301]

ii. Benefits

The statutory benefits standards were also structured as a mandatory baseline with a state option to provide more.[302] Mandatory benefits included family planning services, inpatient hospital care, outpatient hospital services, laboratory and x-ray services, and physician and nurse practitioner services.[303]

Other items and services, such as vision, dental, and prescription drugs, were designated as optional.[304]

Just as drug indications are not susceptible to unidimensional definition, benefits can be configured along various parameters. A number of

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296. SCHNEIDER ET AL., *supra* note 292, at 95.

297. TIMOTHY STOLTZFUS JOST, DISENTITLEMENT? THE THREATS FACING OUR PUBLIC HEALTH-CARE PROGRAMS AND A RIGHTS-BASED RESPONSE 73 (2003); David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541, 585–86 (2008).

298. *See* Super, *supra* note 297, at 585.

299. *See* Nicole Huberfeld, *Federalizing Medicaid*, 14 U. PA. J. CONST. L. 431, 438–39 (2011).

300. Social Security Act § 1902, 42 U.S.C. §1396a(a)(10)(A)(i) (2012).

301. *Id.*; 42 U.S.C. § 1396b(f)(2)(B).

302. 42 U.S.C. § 1396a(a)(10) ("A State plan for medical assistance must . . . provide . . . ."); 42 U.S.C. § 1396d(a)(1)–(5), (17), (21), (28).

303. 42 U.S.C. § 1396d(a)(1)–(5), (17), (21), (28); *see also* 42 U.S.C. § 1396a(a)(10)(A).

304. *See* 42 U.S.C. §1396a(a) (excluding those services itemized in § 1396d(a)(10)(A) (citing 42 U.S.C. § 1396d(a))). A number of developments have modified this framework. Now, Medicaid is delivered largely by managed care companies, and Congress has also reduced benefit requirements to benchmark or benchmark-equivalent coverage for children, working parents, and pregnant women above 133% of the federal poverty line. *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 6044 , 120 Stat. 4, 88–93 (2006) (codified as amended at Social Security Act § 1937, 42 U.S.C. § 1396u-7 (2012) (defining benchmark coverage based on certain commercial plans in the state)).

options exist for reducing benefits. Benefits could come with large co-pays.[305] Availability could be restricted to only a limited number of providers.[306] Home and community-based care could be made available for only those patients meeting certain diagnostic criteria for need.[307] Hospital days might be capped.[308] Prescription drugs might be restricted to those on a formulary.[309]

iii. Crosscutting Standards

Federal statute also imposes a few general crosscutting requirements upon state programs.[310] Title XIX contains a so-called equal access standard that stipulates that states must provide resources "sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area."[311] The so-called comparability standard derives from language that requires the provision of an equal "amount, duration, or scope" of medical assistance to any other individual in that category.[312]

The statute contains a number of other such standards,[313] but at issue in *White v. Beal*[314] was the "reasonable[ness]" requirement imposed by the statutory language that "[a] State plan for medical assistance must . . . include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which . . . are consistent with the objectives of this [Act]."[315]

The zone of state flexibility has been described thus: "[T]his court recognized the state's broad discretion to define the medical conditions for which treatment is 'necessary' within the meaning of the Act," but this broad discretion is not unbridled.[316] Indeed, it is bounded by the fair-

305. *See, e.g.*, Claus v. Smith, 519 F. Supp. 829, 831 (N.D. Ind. 1981).

306. 42 U.S.C. § 1396u-2(a)(1).

307. *See generally* Sidney D. Watson, *From Almshouses to Nursing Homes and Community Care: Lessons From Medicaid's History*, 26 GA. ST. U. L. REV. 937, 961, 963–65 (2010) (providing background into availability of community-based care under Medicaid).

308. *See, e.g.*, Alexander v. Choate, 469 U.S. 287, 306 (1985).

309. 42 U.S.C. § 1396r-8(d)(4)(C).

310. For general discussion, see Huberfeld, *supra* note 295, at 418–24.

311. 42 U.S.C. § 1396a(a)(30)(A).

312. 42 U.S.C. § 1396a(a)(10)(B)–(C)(i).

313. *See, e.g.*, 42 U.S.C. § 1396a(a)(1) (requiring state medical assistance plans to be offered statewide).

314. 555 F.2d 1146 (3rd Cir. 1977).

315. 42 U.S.C. § 1396a(a)(17). For managed care, 42 U.S.C. §1396b(i)(26) requires necessary, reasonable limits. *See also* 42 U.S.C. § 1396a(a)(19). Note that advocates sometimes warn against sourcing these standards for reasonableness in amount, duration, and scope to particular statutory provisions rather than to more diffuse federal common law. *See* Stan Dorn et al., *Maximizing Coverage for Medicaid Clients ("Bridges over Troubled Waters")*, 20 CLEARINGHOUSE REV. 411, 412 & n.11 (1986) (regarding case law that "relied on 42 U.S.C. §[ ] . . . 1396a(10)(C)(i), and 45 C.F.R. § 249.10(a)(5)(i), now 42 C.F.R. § 440.230(d)").

316. White v. Beal (*White II*), 555 F.2d 1146, 1150 (3d Cir. 1977). I am grateful to Nan Hunter for pointing me to this case.

ly open-textured, non-specific norms articulated above, such as "reasonableness," "equal access," and "comparability."[317]

What we explore in *White* is the curious and arguably "extra-legal" way by which courts choose to give content to those norms.

2. Exception

The Pennsylvania Department of Public Welfare added eyeglasses, clearly an optional benefit, to its Medicaid program.[318] But state law restricted the extent of coverage provided: if the need for eyeglasses stemmed from an eye disease, Medicaid would cover it, but not if the need stemmed from refraction error, such as myopia.[319]

The court declared this exception unreasonable under the Medicaid statute, which it read to prohibit the restriction of service based on matters other than "medical need."[320] The court opined that the benefit of federal matching funds comes with a corresponding constraint to scale the benefit in accordance with the federal purpose of addressing "need":

> We conclude that when a state decides to distribute a service as part of its participation in Title XIX, its discretion to decide how the service shall be distributed, while broad, is not unfettered: the service must be distributed in a manner which bears a rational relationship to the underlying federal purpose of providing the service to those in greatest need of it.[321]

Leaving aside whether the concept of "need," even "medical need," is sufficiently well-specified to settle concrete disputes over plan design, the court seems to understand the single purpose that governs the program as no mere social policy goal to be fulfilled to the extent possible but without requirement of consistency.[322] Instead, the court applies "need fulfillment" as a Dworkinian social principle, which furnishes an individualized claim: "By permitting the state plans to provide only part of the cost, the statute must be construed to envision an evenhanded sharing of benefits and burdens among those having the same needs."[323] Even if this principle of evenhandedness for those with the "same needs" were self-evident from the Medicaid statute, the identification of the relevant dimension in which needs would be considered "same" or "different" is

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317. *See* Huberfeld, *supra* note 299, at 446.

318. *White II*, 555 F.2d at 1148. Eyeglasses, however, would not be optional for children who enjoy mandatory Early Periodic Screening Diagnostic and Treatment (EPSDT) benefits under 42 U.S.C. §1396a(a)(43)(A).

319. *White II*, 555 F.2d at 1148 & n.1.

320. *Id.* at 1151.

321. *Id.*

322. *See* DWORKIN, *supra* note 10, at 91 (describing such a goal as a "nonindividuated political aim").

323. *White II*, 555 F.2d at 1151.

so underdetermined as to be empty.[324] "This is so because any set of human beings will resemble each other in some respects and differ from each other in others and, until it is established what resemblance and differences are relevant," the principle of equal treatment for sameness cannot be determinate.[325] In fact, the parameter of the relevant medical condition along which states are obliged to provide "necessary" treatment evenhandedly proved highly manipulable: "[T]he state argues that it chose to treat the 'condition of eye disease' and not refractive error" while the court, agreeing with the beneficiary plaintiff "on the other hand contends the 'condition' is visual impairment."[326]

Does the Medicaid statute tell us, by virtue of the availability of federal financing, that exclusions, or distinctions, can only take a certain shape? Is it inherent in the legal requirement of "reasonableness" that a determination should be based on need as determined "medically" rather than "politically"? Where do these ideas come from?

Ironically, the rejection of political need for "principled" medical need was delinked from any corresponding requirement that the state actually meet patients' medical needs. Indeed, the coda was not a happy one for the plaintiff. The result of the court ruling requiring Pennsylvania to provide eyeglasses more broadly was that Pennsylvania found eyeglasses would therefore be unaffordable and withdrew the benefit altogether.[327]

This case forced the state into an all-or-nothing choice. This case would not expose the exceptions problem in such stark relief were eyeglasses a mandatory benefit. But the state is not required to provide them at all, so how can it be required to provide them to both those with eye disease and those with refractive error? For the court to read the word "reasonable" to block a state's politically accountable determination of the extent to which it wishes to provide "extra" assistance to their Medicaid population is striking.[328] What then is at work?

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324. *See, e.g.*, Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 560 (1982).

325. HART, *supra* note 7, at 155.

326. *White II*, 555 F.2d at 1150–51.

327. White v. Beal (*White III*), 447 F. Supp. 788, 798 (E.D. Pa. 1978).

328. This case is not entirely idiosyncratic, but part of a line of precedent where medical need is privileged and used by courts to invalidate state attempts to cut back Medicaid benefits. *See, e.g.*, Lankford v. Sherman, 451 F.3d 496, 511–12 (8th Cir. 2006) (invalidating state's decision to provide partial DME, an optional benefit, to only certain categorical populations); Weaver v. Reagen, 886 F.2d 194, 197–98 (8th Cir. 1989) (finding state's decision to limit HIV drugs violates Medicaid); Pinneke v. Preisser, 623 F.2d 546, 548–49 (8th Cir. 1980) (finding Iowa's exclusion of sex reassignment surgery was unreasonable when it was the only available medical treatment for relief of patient's condition); Phila. Welfare Rights Org. v. Shapp, 602 F.2d 1114, 1122–23 (3d Cir. 1979) (finding mandatory EPSTD benefits include orthodontia if medically necessary); Preterm, Inc. v. Dukakis, 591 F.2d 121, 126–27 (1st Cir. 1979) (holding it inconsistent with Medicaid statute for a state to limit physician's medical judgment by prohibiting medically necessary abortions except those required to save pregnant woman's life, though superseded by Congress's action in adopting the Hyde Amendment); *see also* Alexander v. Choate, 469 U.S. 287, 302–03 (1985) (holding 14-day

3. Value Conflict

As with the soda portion cap and the Plan B OTC switch, what seems to be at work is an invalidation of rules when they have, through their exceptions, accommodated conflicting values.[329] The court here forbids the tailoring of a benefit rule to strike a balance between cost and health need.[330]

Cost was behind the state's rationale for the exclusion of patients with refractive error.[331] Cost limits forced prioritization, and the state prioritized according to a social norm constructing the "normal" as opposed to "pathological," a norm that, as we will see, runs somewhat aslant to the "medical necessity" norm. The state claimed that it was simply trying to allocate limited resources and, therefore, "restrict payment for eyeglasses to those individuals it considers most in need of aid, those having pathology or disease of the eye."[332] The state articulated its criterion of need thus: "[R]ecipients whose eye pathology could be treated or cured by providing glasses were the most immediately needy group of recipients."[333]

But the court rejects this type of underinclusion: "[W]e do not believe that the state has applied a permissible method of obtaining economies in its administration of the medical assistance program."[334] Through this particular benefit rule configuration, the state has improperly assumed the prioritization of competing values.

4. Assigns to a Non-Legal Sphere: Medical Necessity

The court proposes a different prioritization instead—by the norms of medical practice. "Assuming that medical need is a valid measurement of eligibility, the state's factual premise [that they have served the needi-

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limits on hospital stays consistent with the Rehabilitation Act declaring, "Medicaid programs do not guarantee that each recipient will receive that level of health care precisely tailored to his or her particular needs"). *But see* Maher v. Roe, 432 U.S. 464, 480 (1977) (holding that Connecticut can define the procedural hurdles for first trimester abortions to be determined "medically necessary"); Dexter v. Kirschner, 972 F.2d 1113, 1116–17 (9th Cir. 1992) (holding that Arizona can choose to cover only autologous, and not allogeneic bone marrow transplants given lack of facilities); Smith v. Rasmussen, 249 F.3d 755, 760–61 (8th Cir. 2001) (finding Iowa's exclusion of gender reassignment surgery not arbitrary if done by rulemaking and if professionals disagree on the necessity); Curtis v. Taylor, 625 F.2d 645, 652–53 (5th Cir. 1980), *modified*, 648 F.2d 946 (5th Cir. 1980) (upholding caps on physician visits per month); Dodson v. Parham, 427 F. Supp. 97, 108 (N.D. Ga. 1977) (finding the state can consider cost in imposing drug formularies, as long as prior authorization process is adequate).

329. *See supra* Sections III.A.4, III.B.5.

330. *White II*, 555 F.2d at 1150.

331. *Id.* (describing the state's explanation: "First, the Commonwealth was not and is not ready to provide the large amounts of money necessary to provide glasses to every recipient needing them 'to aid or improve vision.'" (quoting White v. Beal (*White I*), 413 F. Supp. 1141, 1149 (E.D. Pa. 1976))).

332. *Id.* at 1149.

333. White v. Beal (*White I*), 413 F. Supp. 1141, 1149–50 (E.D. Pa. 1976).

334. *White II*, 555 F.2d at 1149.

est of the group], is not supported by the record."[335] The court goes on to cite affidavits from two ophthalmologists declaring that sometimes people with refractive error may be "more visually handicapped than those who have a disease of the eye."[336]

Rather than relying on state law, the court apparently prefers the concept of "medical need," citing the authority of individual clinicians to determine the degree of "medical necessity."[337]

We must therefore examine the concept of medical necessity and, once it enters into the picture, how it functions as a standard for the scope of benefits.

"Medically necessary care" is the "almost-universal contractual standard for [health insurance] coverage."[338] According to Mark Hall's empirical findings, the specificity of the insurance contract has no significant effect on whether a patient can obtain coverage in legal disputes, leaving this placeholder term, "medical necessity" to do most of the work of demarcating what is covered under the plan.[339] When interpreting medical necessity, courts and legislatures do not rest determination of the standard solely with the agency or insurer providing coverage.[340] They preserve enormous latitude for physicians to determine its application. This latitude does not mean determination by the treating physician, but rather determination by professional clinical standards,[341] a second-order analysis of what treating physicians ought to do.

The term "medical necessity" is not explicit in the Medicaid statute, but has become judicially accepted as implicit to the legislative scheme and is apparently endorsed by the Supreme Court.[342] Indeed, *White* represents a crucial early step in that process.

The courts are not alone in reading "reasonable" to imply "medically necessary." HHS states that benefits: "[M]ust be sufficient in amount, duration, and scope to reasonably achieve [their] purpose." With respect to the required services for the "categorically needy" and the "medically needy" the State "may not arbitrarily deny or reduce the amount, dura-

335. *Id.* at 1150.

336. *Id.*

337. *Id.* at 1150–51 ("The plaintiffs submitted the affidavits of two qualified ophthalmologists stating that some persons with refractive error, but without eye pathology, may be far more visually handicapped than those who have a disease of the eye. Moreover, the physicians maintain that, while eyeglasses will correct a refractive error, they are not helpful in many cases of eye disease. The state has not controverted these affidavits." (footnote omitted)).

338. M. Gregg Bloche, *The Emergent Logic of Health Law*, 82 S. CAL. L. REV. 389, 413 (2009).

339. Mark A. Hall et al., *Judicial Protection of Managed Care Consumers: An Empirical Study of Insurance Coverage Disputes*, 26 SETON HALL L. REV. 1055, 1062–63 (1996).

340. *See id.* at 1063.

341. Timothy P. Blanchard, *"Medical Necessity" Determinations: A Continuing Healthcare Policy Problem*, 37 J. HEALTH L. 599, 619–20 (2004).

342. *See* Beal v. Doe, 432 U.S. 438, 444–45 & n.9 (1977).

tion, or scope of" such services to an otherwise eligible individual "solely because of the diagnosis, type of illness or condition. . . . [A]ppropriate limits [may be placed on] a service based on such criteria as medical necessity or [those contained in] utilization [or medical review procedures]."[343]

What does medically necessary mean, and how is the medical necessity determination made? In short, it involves significant deferral to other decision-makers, namely, to the social and institutional practice of clinical medicine. Under "medical necessity," coverage determinations depend on more than the policy terms in the contract or statute; they also involve a second query.[344] This second step asks: "[E]ven if the contemplated care is a type generally covered, is its use medically reasonable and necessary in this particular case and thus warranted?"[345] The answer to that question is determined by clinical standards, which in turn emerge from the practice of medicine. Thus, the courts' turn toward medical necessity to resolve the question of what to cover amid competing concerns is a diversion of the question away from governance by rule to another arena.

However, the concept of "medical necessity" does not determine its own domain and by no means precludes rule-governance in its entirety. The extent of coverage under public or private insurance has always included two analytical steps, the first of which identifies which categories of services are even eligible to be covered.[346] Initially, one must ascertain whether the plan covers surgically implanted artificial lenses, for instance. Only then does the "medical necessity" step determine the circumstances and patient conditions for which those services are justified.[347] For instance, just because lens implantation surgery is listed among the benefits does not mean that insurance will cover such a surgery if a patient simply wishes to correct her nearsightedness with an intraocular lens, or if her cataract is so mild that it does not yet affect the patient's vision and therefore does not yet justify the risks of surgery.

The Medicaid statute, like other health coverage schemes, lists broad categories of services to be included in or expressly excluded from benefits packages, while courts, through cases like *White*, have tasked the specification of those benefits to determination by any individual patient's clinician in accordance with her professional judgment.[348] Coverage decisions begin as a threshold matter by determining whether the type of item or service is within the policy. If physical therapy services

343. Sufficiency of Amount, Duration, and Scope, 42 C.F.R. § 440.230 (2012).

344. *See* Sara Rosenbaum et al., *Who Should Determine When Health Care is Medically Necessary?*, 340 NEW ENG. J. MED. 229, 230 (1999).

345. *Id.*

346. *See id.*

347. *Id.*

348. White v. Beal (*White II*), 555 F.2d 1146, 1150 (3d Cir. 1977).

are not within the policy, then the inquiry would end there.[349] But the *White* court glosses over the two-step character of any coverage determination and thereby represents the clinical practice step of the medical necessity inquiry as the only relevant inquiry.

The distinction between the listing of benefits and the determination of medical necessity is unquestionably fuzzy. Jessica Mantel, in considering Medicaid's sister program Medicare, observes that "[f]or example, HHS may provide that a plan's prescription drug benefits must include all drugs approved by the FDA . . . but not . . . drugs prescribed for the treatment of erectile dysfunction or infertility."[350] While such a regulation would not substitute for an individualized analysis of whether the patient's condition warrants use of a drug, it could begin to impinge upon such a determination, as the above example shows by allowing prescription drugs for some conditions but not others. A similar inclusion of therapies for some conditions and not others is arguably what Pennsylvania proposed here.

Thus, medical necessity cannot determine its own governing jurisdiction. It admits of some boundaries set by positive law. But the court aggressively redrew those boundaries.

5. Judge Arrogates Decision and Method

When the judge decides that medical necessity should govern, he is displacing another decision-maker's choice.

So how does he decide when to substitute for another's choice? Is there some legal rule distinguishing the first and second steps of the medical necessity determination? Judge Weis shows no signs of declaring such a rule. Instead, he appeals to medical norms and applies them in his own fashion.[351] Judge Weis, as we recall, "[a]ssum[es] that medical need is a valid measurement of eligibility,"[352] and he goes on to assess that need based on two ophthalmologists' affidavits. The ophthalmologists say that refractive error can be more visually handicapping and that "[eyeglasses] are not helpful in many cases of eye disease."[353] Yet Pennsylvania provides a long list of those eye diseases where glasses are helpful, such as with certain strabismuses, or asymmetries of vision, or conditions associated with lens dysfunction.[354] Is the judge really qualified to sift through medical information, especially when provided in the form

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349. *See, e.g.*, DeSario v. Thomas, 139 F.3d 80, 88 (2d Cir. 1998) ("No matter how medically necessary a thing may be to a particular person . . . the state need not (and in fact cannot) provide it unless it falls within a covered medical service.").

350. Jessica Mantel, *Setting National Coverage Standards for Health Plans Under Healthcare Reform*, 58 UCLA L. REV. 221, 229–30 (2010).

351. *See White II*, 555 F.2d at 1150; *see also* Hall et al., *supra* note 339.

352. *White II*, 555 F.2d at 1150.

353. *Id.* at 1150–51.

354. *Id.* at 1148 & n.1.

of individual clinician affidavits, to aver that patients with divergent squint or faulty lenses have less medical need?

In this case, neither the legally instantiated rule, nor the underlying political prioritization, prevail; state legislatures and Medicaid agencies are thus restricted in how they can weigh economic and other considerations. Judges seem to harbor some underlying view that prompts them to deflect situations where rules alone, unsupported by what they view as the proper extralegal norms, claim to resolve value conflict.

One might respond that this case result needs no such cloak-and-dagger account. In this case, the federal statute simply prohibits such a benefit limitation. But is this conclusion unambiguously commanded by the statute?[355] An examination of the actual language reveals that the most locally controlling statutory text concerning eyeglasses as a benefit, does not prohibit the qualification of the benefit for economic considerations.[356] The court even concedes that "[s]ignificantly, the only statutory restriction on furnishing eyeglasses is that they be prescribed by a physician or an optometrist."[357] Unable to rest on the statutory language concerning eyeglasses to impose its more stringent restriction, the court points instead to the more distant crosscutting language that the state's definition of benefits must be "reasonable."[358] With such capacious terms as "reasonable" defining the restriction on state legislatures, the argument that this result was compelled, rather than chosen by the court, falters.

Why can't the state prioritize what benefits to provide rather than acceding to judge's preferences, clad in the fig leaf of medicine? Medicine, the court seems to say, is the social institution robust enough to manage this value conflict. Thus, it reroutes the matter away from settlement by pedigreed legal rule, indeed away from the political process of legitimating rules, and engages in its own ventriloquy of medical norms to do so.

CONCLUSION

So far, I have identified a pattern—courts striking down exceptions in health rules when those exceptions seek to accommodate value conflict and then assigning the matter to an extralegal, non-rule-governed arena, all the while invoking non-rule like reasoning from that extralegal realm to do so.

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355. This case predates *Chevron, U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

356. Social Security Act § 1905(a)(xvii)(12), 42 U.S.C. § 1396d(a)(xvii)(12) (2012) ("[P]rescribed drugs, dentures, and prosthetic devices; and eyeglasses prescribed by a physician skilled in disease of the eye or by an optometrist, whichever the individual may select.").

357. *White II*, 555 F.2d at 1150.

358. *See id.* at 1150–51.

This pattern bespeaks a tendency in judicial reasoning to obscure value conflict, even at the expense of a most potent tool in the legal system's arsenal: rules. To strip rules of their ability to bind when even underlying reasons run out is a major sacrifice, and is it worthwhile or necessary to prop up an image of law as a realm of coherent, unitary principles? The premise of liberalism is the inevitability of disagreement.[359] People will have different policy preferences. We can agree to disagree, but we all agree to follow the rules. Why when we need clear dispositive rules the most, as the instruments of equipoise amid disagreement, are the judges loathe to allow them? Ex ante exceptions are a way to accommodate and grease social change, reducing the costs of the new rule, honoring the provisional, the plural, the incremental, acknowledging competing values, and resisting a winner-take-all form of hubris. But perhaps this tool is less available than we think.

Is the best we can hope for that law will offload these difficult settlements onto other social institutions, even as jurists engage in shadowboxing versions of those alternate normative practices to manage the jurisdictional decisions that are necessary to maintain these arrangements?[360]

The courts in each of these cases insisted upon false unitary justifications, as though each rule should embody one principle. But justification for any rule is compound. Health care is provided to the poor to the extent financially sustainable. We allow patients direct market access to a drug if the burden of prescription control is "unnecessary." We seek to moderate unhealthful sugary drinks to the extent compatible with other aspects of our lifestyle, including some measure of choice or hedonism. Are health ends more fully respected by health policy absolutism, or by a willingness to pursue those ends despite acknowledgment of the sometimes wrenching tradeoffs?

Perhaps these judges, facing too many disparate values, yearn for absolutes that would help them maintain their self-understood role as "integrating" the law. It is true that health care exists at the intersection of a number of practices—medical, scientific, actuarial, caregiving—all of which are tangent to an otherwise closed, internal, and pedigreed set of legal rules. Does health law alone exhibit this normative overload? This pluralism and interplay of norms and practices surely characterizes other topical areas as well.

As a future line of inquiry, we might look for this phenomenon in non-health cases and test our expectation that adjudication would similarly buckle under the strain of handling the concurrency of norms. We

359. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 450–51 (1971).
360. *See* DWORKIN, *supra* note 10, at 79.

would hypothesize the same desperate anxiety to restore the unitary, coherent "principle" that integrates the entire field.

One reading of these cases, or one candidate for a unifying principle, ignoring for the moment all the contrary case law, might be that health has a privileged justificatory weight. What if the implicit view that judges harbor is that health needs should prevail, that health values exert some resistance before they yield to another competing policy? What if the coherent principle that banishes the non-health values from the scene is an incipient canon privileging health, establishing what we can fairly call a "right to health?"[361]

What if a critical mass of courts is compelled by the internal logic of fairness specific to health, which I stipulate as follows: a principle that if calamity befalls a member of our community, threatening life and limb, or other existential preconditions (like pregnancy), and it is within the human arts to help, we resist limitations.[362] Perhaps we do not accept that health care needs can be weighed like any other policy. Perhaps they are in Dworkin's language, matters of principle, because the extension of health care in the face of mortality and suffering acknowledges of the individual dignity and worth of each individual.

Health interests in this regard should not differ with age, nor cede lightly to assertions of sexual morality. They obtain for those who buy their sugary drinks regardless of who vends or inspects the vendors of those drinks. They do not cleave along adventitious diagnostic distinctions, such as strabismus versus myopia. In *White*, the judge said as much: "In our view, the statute does not grant such discretion to the state. Rather, it requires an equitable distribution of the total funds available among all in need of the service, with a consequent sharing of benefit and hardship."[363]

The logic of fairness in law shies away from substantive standards of reasonableness and looks at whether the decision has authority, regardless of the content.[364] But perhaps substantive reasonability can be

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361. Such as Sunstein's non-delegation canons. *See* Sunstein, *supra* note 4, at 1668, 1683–84. Here, I am borrowing heavily from other scholars who have discussed such a canon, but primarily insofar as they lament the absence of one. *See, e.g.*, WENDY E. PARMET, POPULATIONS, PUBLIC HEALTH, AND THE LAW 267–68 (2009) (presenting a comprehensive argument for why there should be such a health norm throughout law—"*salus populi suprema lex*"—and what it might look like); *see also* Richard A. Daynard, *Regulating Tobacco: The Need for a Public Health Judicial Decision-Making Canon*, 30 J.L. MED. & ETHICS 281, 282 (2002).

362. As Mark Hall says, "the existential stakes" of death, disability, and one's personhood hang in the balance. Mark A. Hall, *The History and Future of Health Care Law: An Essentialist View*, 41 WAKE FOREST L. REV. 347, 358 (2006).

363. *White II*, 555 F.2d at 1150.

364. Waldron says this is key to Raz' positivism. JEREMY WALDRON, LAW AND DISAGREEMENT 37 (1999) ("Authority cannot exist, according to Raz, and legal authority (in whatever shape or form) cannot do its work, unless there is a basis for recognizing pronouncements as authoritative which stands apart from the content and merits of the issues that the authority addresses." (citing JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN 203 (1994))).

supplied by health norms—norms of what we are owed and owe one another in the face of suffering, vulnerability, and mortality.[365] Health care holds out a promise of acknowledgement under those circumstances, in the form of help and care, at the level of what arts and sciences our society has accumulated by its best efforts.

The more familiar logic of substantive rationality review prohibits judges from picking and choosing among competing norms, ranking and balancing them as the judges see fit. Instead, courts claim to engage in a means-ends fit analysis. But when multiple purposes are present, other observers have argued trenchantly and persuasively that a judge actually reach his or her result by manipulating the purpose, restricting permissible ends to the unitary one that the judge has selected.[366] Thus, the courts in performing the subconstitutional forms of substantive review we have examined here are also engaged in presumptively privileging certain purposes and declaring others less weighty as against their favored values. To the extent that judges are doing so here, they may be implicitly asserting a background health right—a privileged purpose, heretofore unacknowledged.[367]

Consistent with Dworkin:

> [W]e might, for simplicity, stipulate not to call any political aim a right unless it has a certain threshold weight against collective goals in general; unless, for example, it cannot be defeated by appeal to any of the ordinary routine goals of political administration, but only by a goal of special urgency.[368]

And indeed, these cases might be understood to illustrate exactly such an attitude toward health, an attitude recognizing health as a presumptive right. Of course, Dworkin does not claim that rights inhering in background principles would override legal rules, but the courts could be viewed as acting as though these hypothesized health rights inhere in the separation of powers rules, and the arbitrary and capricious standard, and the crosscutting statutory requirement of "reasonableness." While none of these cases strike a federal statute compromising health values,[369] we

365. This conception is broad enough that it is conceivably consistent with any one of the Health Promotion, Financial Security or Brute Luck conceptions of the purposes of health insurance articulated in Allison K. Hoffman, *Three Models of Health Insurance: The Conceptual Pluralism of the Patient Protection and Affordable Care Act*, 159 U. PA. L. REV. 1873 (2011).

366. *See* SUNSTEIN, *supra* note 31, at 127.

367. I draw from Dworkin to show the work that judges are performing to construct purpose, but this maneuver is also manifestly rooted in the Legal Process school, an important antecedent for Dworkin. Vincent A. Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks*, 29 ARIZ. L. REV. 413, 470–71 (1987) (drawing the connections between legal process theory and Dworkin's law as integrity).

368. DWORKIN, *supra* note 10, at 92.

369. Though the Eleventh Circuit, in the case that was appealed and would later become *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2011), did seek to declare Congress's power under the Necessary and Proper Clause invalid with respect to the mandate pre-

might still understand this privileged weight as a canon, much like Sunstein's nondelegation canons protecting special values such as federalism, or the common-law substantive canons Abbe Gluck has identified, privileging policies from taxation to international law norms.[370] But rather than default canons allowing cost-benefit analysis, we might posit instead a default canon resisting cost-benefit balancing in health care cases.[371]

I would be remiss if I implied by this view that recognizing a right to health would quell normative conflict over substance. First, the question of how much weight such a privilege exerts would move to the foreground.[372] Second, it is ironic that this health absolutist tendency is often used, as it was in the NYC soda portion cap case, to strike innovative, incremental measures to improve health.

Finally, under a "right to health," normative contest would relocate to the question of what belongs in the bundle that constitutes the "right." One final commonality these three cases all share is a demonstration that there is no underlying a priori concept called health, whose boundaries are self-evident. Health is what we construct, and it lies on a continuum. All of these cases founder on their attempts to represent health as some static identifiable principle. Judge Renwick hews to the notion that exposures are either a health hazard or not, but in the realm of food, nutrition, and obesity the questions are ones of extent. Dose-response curves need not be disjoint; some are U-shaped, and some are continuous without inflection points.[373] Meanwhile, what Judge Korman glosses over is that drug indications can be broader or narrower, and the prevailing paradigm denies that there should be any underlying "natural" category constraining what the drug sponsor posits.[374] And Judge Weis in *White* runs up against the malleability of the definition of benefits and the case law permitting states to trim benefits in myriad other ways.[375]

But that is a topic for another day. Even bracketing such complications, the task of evaluating my alternate explanation, that a right or priv-

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cisely because the mandate contained exceptions for low-income individuals. Florida *ex rel.* Att'y. Gen. v. U.S. Dep't. of Health & Human Servs., 648 F.3d 1235, 1310–11 (2011).

370. Gluck, *supra* note 17, at 765–66.

371. Sunstein, *supra* note 4, at 1692–94 (describing nondelegation canons requiring Congress to state unambiguously if it wishes a statute to be interpreted to apply extraterritorially, or to raise constitutional questions, or to implicate certain federalism concerns, etc.).

372. John F. Manning, *Lessons From a Nondelegation Canon*, 83 NOTRE DAME L. REV. 1541, 1562–65 (2008).

373. *See* Lawrence Alexander, *Scalar Properties, Binary Judgments* 7–9 (Univ. of San Diego Law Sch., Research Paper No. 07-19, 2005) (discussing how many matter subject to legal determination have this aspect of scaling according to degree, while legal determination may require the drawing of a binary line along the scale).

374. *See supra* text accompanying notes 138–59, 181–84.

375. *See, e.g.*, Dexter v. Kirschner, 972 F.2d 1113, 1118 (9th Cir. 1992); Curtis v. Taylor, 625 F.2d 645, 653 (5th Cir. 1980); Charleston Mem'l Hosp. v. Conrad, 693 F.2d 324, 332–33 (4th Cir. 1982); Va. Hosp. Ass'n v. Kenley, 427 F. Supp. 781, 786 (E.D. Va. 1977).

ilege for health might drive these cases, is somewhat outside the bounds of this piece. Perhaps one could compare this exceptions phenomenon in health-related cases to exceptions-based invalidations in other topical areas, and measure, if one could, whether the invalidations were more idiosyncratic in fields constituted by "interests" rather than "rights."

If one were to find the phenomenon sounding in other non-rights arenas, one might conclude that the condemnation of underreach in these cases has less to do with judicial concern for health and instead justifies a generalization of my proposed explanation: that this exceptions phenomenon is a late-mannerist expression of the style of adjudication along the model of Hercules, an elision of rule and principle that emerges as a function of regarding background policies as part of the law and as a direct consequence of the imperative to impose coherence over pluralism.

A MARKET ANALYSIS OF RACE-CONSCIOUS UNIVERSITY ADMISSIONS FOR STUDENTS OF COLOR

ADRIANE KAYOKO PERALTA†

ABSTRACT

Recently, students of color and their supporters have raised considerable attention surrounding the racial inequalities that exist on college campuses across the country. Students are protesting against hostile racial climates and demanding colleges to respond to racial discrimination. This campaign for improved racial dynamics comes at the same time that the Supreme Court is considering its latest case on affirmative action. *Fisher v. University of Texas at Austin* could potentially end race-conscious admissions and dramatically decrease the number of students of color admitted to public universities.

Prominent opponents of affirmative action in higher education have focused on the supposed detriments to students of color who attend universities with race-conscious admissions policies. Allegedly, students of color will be stigmatized as "affirmative action admits" and "mismatched" by matriculating at a school where they are unprepared to succeed. Justice Scalia most recently articulated this view during oral arguments this term in *Fisher*:

> [T]here are those who contend that it does not benefit African Americans to . . . get them into the University of Texas where they do not do well, as opposed to having them go to a less-advanced school, . . . a slower-track school where they do well. One of . . . the briefs pointed out that . . . most of the . . . black scientists in this country don't come from schools like the University of Texas.
>
> . . .
>
> . . . They come from lesser schools where they do not feel that they're . . . being pushed ahead in . . . classes that are too . . . fast for them.[1]

Affirmative action opponents contend that these costs are so serious that students of color benefit from bans on affirmative action, such as those

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1. Transcript of Oral Argument at 67, Fisher v. Univ. of Tex., No. 14-981 (Dec. 9, 2015).

recently upheld by the Supreme Court in *Schuette v. Coalition to Defend Affirmative Action.*

These arguments, however, ignore the significant harms associated with race-neutral environments. Such harms for students of color include racial isolation, stereotype threat, racial microaggressions, identity performance, and forced racial labor. Although these detriments arguably occur at almost all predominately white institutions, race-neutral environments greatly exacerbate these injuries because there are so few people of color on campus. These costs are not only intrinsic but also have economic consequences.

This Article is the first-ever cost-benefit analysis of affirmative action in higher education for students of color. It argues that the economic and intrinsic benefits of attending race-conscious universities greatly outweigh the costs for students of color.

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INTRODUCTION

Throughout the affirmative action in higher education debate, much attention has focused on the possible harms students of color incur when they attend a university that practices affirmative action (race-conscious

colleges).[2] Opponents contend that race-conscious colleges stigmatize students of color as "affirmative action admits" and, as a result, impair future employment opportunities.[3] Additionally, prominent opponents argue that students of color admitted through affirmative action are "mismatched" because they are not prepared for the rigors of selective universities.[4] In contrast, the harms associated with attending colleges that ban affirmative action (race-neutral colleges)[5] practically go unnoticed.

I first noticed that there was something different about race-neutral universities when I enrolled at UCLA School of Law.[6] My initial impression as a first-year student was distress and disappointment that there were so few students of color in my classes; in fact, my large section of eighty students had just one black student, and I was the only Japanese-American student. As my first year commenced, I observed little things that really bothered me. In Constitutional Law, students stared at me when we came to a case about Japanese Internment, and I felt pressured to speak on behalf of all Japanese-Americans. One student asked where I was from, and when I told him Los Angeles, he responded with, "No, where are you *really* from?" I often found myself in groups of all white students or in rooms where I counted the number of students of color on one hand. I was consistently uncomfortable and anxious by the lack of diversity.

In 2012, during my first year, the UCLA School of Law Diversity Action Committee conducted a survey in which 76% of students of color agreed that "[n]on-white students face challenges at UCLA Law that white students do not face."[7] Only 49% of students of color agreed with the statement, "The classroom environment at UCLA Law is welcoming to students regardless of race," compared to 74% of white students who agreed.[8] These survey results made me think about the experiences of students of color attending race-neutral schools and the added pressures

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2. For the remainder of this Article, I will refer to these colleges as "race-conscious colleges."

3. *See, e.g.*, Angela Onwuachi-Willig et al., *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 CALIF. L. REV. 1299, 1301–02 (2008).

4. *See, e.g.*, Brief Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party at 3–10, Fisher v. Univ. of Tex., 133 S. Ct. 2411 (2013) (No. 11-345).

5. For the remainder of this Article, I will refer to these colleges as "race-neutral colleges."

6. Proposition 209 banned universities within the UC System from practicing affirmative action. *See infra* Section I.A.

7. Jonathan Feingold & Doug Souza, *Measuring the Racial Unevenness of Law School*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 71, 105 (2013); *see also* Gina Kass, *The Personal Take of "Student Speak Out" Effectively Addresses Antagonism*, DAILY BRUIN (Apr. 12, 2012), http://dailybruin.com/2012/04/12/_the_personal_take_of_student_speak_out_effectively_addresses_antagonism_/.

8. Feingold & Souza, *supra* note 7.

and burdens that students of color face.[9] I reflected on all the times when I was too distracted and anxious by the racial dynamics of the environment to focus on studying, and I wondered if I had made the right decision to attend a race-neutral law school.

In educational settings, students of color experience racial isolation, stereotype threat, racial microaggressions, identity performance, and racial labor. Admittedly, students of color will face these issues at any predominately white college or university. Race-neutral colleges, however, exacerbate these harms because there are so few students of color. Moreover, these harms translate into economic costs because they distract from and interfere with academic performance. In commoditized terms, a degree from a race-conscious college is worth more than a degree from a race-neutral college because there are exacerbated costs to attending a race-neutral school.

This Article is unique in that it discusses affirmative action from the perspective of students of color. Unfortunately, much of the affirmative action debate, especially the diversity rationale,[10] discusses what is best for white students.[11] White students are the primary beneficiaries of diversity because they profit the most from being around students of color in higher educational setting. Much of this has to do with the intense levels of K-12 school segregation in which most white students rarely have the opportunity to interact with classmates of color before college.[12]

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9. Throughout this Article, I refer to both undergraduate degrees and law degrees. The reason is that most of the affirmative action debate has surrounded around both undergraduate and law school admissions.

10. Grutter v. Bollinger, 539 U.S. 306, 329–30 (2003) ("[S]tudent body diversity is a compelling state interest . . . . [T]hese [educational] benefits [that diversity is designed to produce] are substantial . . . . [T]he Law School's admissions policy promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.' These benefits are 'important and laudable,' because 'classroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds' . . . . [N]umerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'" (sixth alteration in original) (citations omitted) (first quoting Appendix to Petition for Writ of Certiorari, *Grutter*, 539 U.S. 306 (No. 02-241); then quoting Brief of the American Educational Research Association et al. as Amici Curiae, *Grutter*, 539 U.S. 306 (No. 02-241))). For more on the constitutionality of the diversity rationale, see generally Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381 (1998).

11. *See* Tara J. Yosso et al., *From Jim Crow to Affirmative Action and Back Again: A Critical Race Discussion of Racialized Rationales and Access to Higher Education*, 28 REV. RES. EDUC. 1, 8 (2004) ("Because of the resistance to enrolling students of color in historically White institutions, the diversity rationale articulates these benefits in relation to White students. The unquestioned majoritarian story within this rationale is that students of color are admitted so that they can help White students become more racially tolerant, liven up class dialogue, and prepare White students for getting a job in a multicultural, global economy. How this scenario enriches the education of students of color remains unclear.").

12. *See* GARY ORFIELD ET AL., *E PLURIBUS* . . . SEPARATION: DEEPENING DOUBLE SEGREGATION FOR MORE STUDENTS 41–51 (2012), http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_omplete_2012.pdf.

College students of color, on the other hand, typically have had much more exposure to people of other races before coming to college.[13] Thus, college students of color are more likely to have already acquired the skills derived from diversity before entering college. Therefore, the diversity rationale in affirmative action is really about using students of color to teach and provide diversity skills to white students. This Article, however, is about what is in the best interest for students of color. It places students of color at the center of the analysis in hopes of developing legal solutions that benefit students of color, as opposed to only considering what is best for white students.

Part I provides a background on state bans against race-conscious college admissions and explores the recent issues before the Supreme Court. Part I also challenges and disagrees with the notion that race-neutral or colorblindness equates to equal opportunity. Race-neutral is not neutral at all, and in fact, race-neutral policies benefit whites and disadvantage students of color. Part II discusses stigma and mismatch arguments, and how those arguments lead to economic claims relating to the diminished value of race-conscious college degrees. Part III reports on the effects of race-neutral college admissions in the market for students of color and shows that students of color prefer to attend race-conscious colleges. Part III also looks at comparative studies regarding stigma at race-neutral and race-conscious colleges. Part IV investigates why students of color are choosing race-conscious colleges over race-neutral colleges by exploring the hidden costs of attending race-neutral schools. Part V argues that stigma and mismatch theorists are incorrect; affirmative action actually increases both the intrinsic and economic value of a college degree for students of color.[14]

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13. Research has shown that students of color "who attend diverse K-12 schools have a higher college attendance rate than those who do not." Brief of Amici Curiae American Council on Education and 20 Other Higher Education Organizations in Support of Respondents at 14, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*Parents*), 551 U.S. 701 (2007) (Nos. 05-908, 05-915). In California, the "racial composition of public schools is strongly associated with the likelihood of gaining access to [the] UC [System]." Brief of 19 Former Chancellors of the University of California as Amici Curiae in Support of Respondents at 21, *Parents*, 551 U.S. 701 (2007) (Nos. 05-908, 05-915). More specifically, studies prove that a negative correlation exists "between concentrated black and Latino enrollment and UC eligibility." *Id.* at 22.

14. Some may argue that I have approached stigma and mismatch theorists all wrong, by engaging in a conversation that commodifies college degrees. Perhaps some make a corruption argument that by commodifying higher education degrees, I have cheapened what it means to earn a college or professional degree. Conceivably, college degrees should be more about receiving a well-rounded education and growing into a thoughtful citizen, and not about the worth of a piece of paper and its signaling effect to future employers. Although I am very sympathetic to this argument, I also understand higher education to already be a commodified system that people often discuss in market terms. Attempting to change the way that we frame higher education would only distract from my central thesis.

In addition, affirmative action jurisprudence also considers higher education as part of the labor market system. In finding that diversity is a compelling state interest in *Grutter*, Justice O'Connor writes:

I. RACE-NEUTRAL VS. RACE-CONSCIOUS ADMISSIONS

Considering race in college admissions is a hotly contested political and legal debate. For the most part, the debate is exclusive to public universities because they are subject to the Equal Protection Clause of the Fourteenth Amendment.[15] As it stands today, public universities can—but are not required to—consider race as a factor among many in college admissions, so long as the admissions policy does not amount to a quota system.[16] Although public universities can consider race, eight states have completely banned the practice through voter propositions, executive order by the state governor, or statute.[17] Arguments for state bans on affirmative action include the following: claims of reverse discrimination against whites; the desire to be a colorblind society; preferential treatment is unfair; and stigma and mismatch are detrimental to students of color. This part begins with a background on state bans on affirmative action and a discussion of the debate recently held before the Supreme Court. Additionally, this part challenges race-neutrality and explores how race-neutrality is actually a preference for whites.

A. State Bans on Race-Conscious Admissions

Currently, eight states ban race-based affirmative action in admission to public universities.[18] In 1996, California was the first state to ban race-conscious admissions through voter initiative, which appeared on the ballot as Proposition 209 (Prop 209).[19] Prop 209 was an amendment to the state constitution, which proposed, "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the opera-

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> [N]umerous studies show that student body diversity promotes learning outcomes, and "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals."
>
> These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.

Grutter, 539 U.S. at 330 (citations omitted) (quoting Brief of the American Educational Research Association et al. as Amici Curiae in Support of Respondents at 3, *Grutter*, 539 U.S. 306 (No. 02-241)). Thus, people situate the affirmative action debate as part of the larger labor economy. By discussing college degrees in commodified terms, I have merely contributed to the debate in the language in which people traditionally discuss affirmative action.

15. Private universities, however, are not subject to the Equal Protection Clause, and thus, are able to practice various forms of race-conscious admissions free from the Supreme Court's scrutiny.

16. *See Grutter*, 539 U.S. at 322–23. There are other narrow tailoring requirements to meet the demands of strict scrutiny, but that discussion is outside the scope of this paper.

17. These states include: California, Florida, Washington, Arizona, Oklahoma, Nebraska, New Hampshire, and Michigan. Drew Desilver, *Supreme Court Says States Can Ban Affirmative Action; 8 Already Have*, PEW RES. CTR. (Apr. 22, 2014), http://www.pewresearch.org/fact-tank/2014/04/22/supreme-court-says-states-can-ban-affirmative-action-8-already-have/.

18. *Id.*

19. Coal. for Econ. Equity v. Wilson (*Econ. Equity II*), 122 F.3d 692, 697 (9th Cir. 1997). Proposition 209 was called the California Civil Rights Initiative. "Proposition 209 passed by a margin of 54 to 46 percent; of nearly 9 million Californians casting ballots . . . ." *Id.*

tion of public employment, public education, or public contracting."[20] Although the amendment itself does not mention affirmative action, the California Ballot Pamphlet explained Prop 209 to voters as an initiative that would eliminate race-based affirmative action programs.[21] Various progressive organizations[22] challenged the constitutionality of Prop 209 in federal court.[23] The case made its way up to the Ninth Circuit Court of Appeals in which the court upheld the proposition.[24]

In 2006, a similar proposition appeared on the Michigan statewide ballot. The initiative, commonly known as Proposal 2 (Prop 2), proposed to amend the Michigan constitution to read that any "public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting."[25] Although the initiative passed,[26] the Sixth Circuit Court of Appeals eventually struck down the initiative as unconstitutional[27] and created a circuit split between the Sixth and Ninth Circuits. In April 2014, the Court reversed the Sixth Circuit opinion and upheld the ban.[28]

In both the California and Michigan cases, proponents of the bans created a narrative in which race-neutrality, or colorblindness, results in fairness and equality.[29] Ward Connerly, one of the major political advo-

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20. CAL. CONST. art. I, § 31(a).

21. *Econ. Equity II*, 122 F.3d at 696. The California Ballot Pamphlet, produced by the California Legislative Analyst's Office, explained:

> A **YES** vote on [Proposition 209] means: The elimination of those affirmative action programs for women and minorities run by the state or local governments in the areas of public employment, contracting, and education that give "preferential treatment" on the basis of sex, race, color, ethnicity, or national origin.
>
> A **NO** vote on this measure means State and local government affirmative action program would remain in effect to the extent they are permitted under the United States Constitution.

Id. (alteration in original).

22. These progressive organizations included: The Coalition for Economic Equity; California NAACP; Northern California NAACCP; California Labor Federation; AFL-CIO; Council for Asian American Business Associations, California; Chinese American Citizens' Alliance; Women Construction Business Owners and Executives, California Chapter; United Minority Business Entrepreneurs; Chinese for Affirmative Action; Black Advocates in State Service; Asian Pacific American Labor Alliance; La Voz Chicana; and Black Chamber of Commerce of California. *See Econ. Equity II*, 122 F.3d at 692.

23. Coal. for Econ. Equity v. Wilson (*Econ. Equity I*), 946 F. Supp. 1480, 1488 (N.D. Cal. 1996), *vacated sub nom. Econ Equity II*, 122 F.3d 692.

24. *See Econ. Equity II*, 122 F.3d at 710–11 (finding no likelihood of success on equal protection or preemption challenges to Proposition 209).

25. MICH. CONST. art. I, § 26.

26. "Michigan voters [passed Proposition 2] by a margin of 58% to 42%." Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich., 701 F.3d 466, 471 (6th Cir. 2012), *rev'd sub nom.* Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. by Any Means Necessary, 134 S. Ct. 1623 (2014).

27. *Id.* at 491 (holding the proposed amendment unconstitutional).

28. *Schuette*, 134 S. Ct. at 1638.

29. *See, e.g.*, Pete Williams & Daniel Arkin, *Supreme Court Takes on Affirmative Action in Michigan Ban Case*, NBC NEWS (Oct. 15, 2013, 5:13 PM),

cates for both propositions, responded to a federal court upholding California's affirmative action ban, "'I'm pleased, but not surprised' . . . . 'The country is clearly going to have to move in the direction of treating everybody fairly.'"[30] Michigan's attorney general, Bill Schuette, whose office defended Prop 2 before the Supreme Court, commented on the case, "It's wrong to treat people differently based on your race or the color of your skin."[31]

Importantly, many contest whether bans on affirmative action actually promote equality. Mark Rossenbaum, a prominent civil rights attorney who argued to strike down Prop 2 before the Supreme Court, pointed out that other groups (for example, legacy students[32]) could seek preferential treatment by the university, but Prop 2 prevents students of color from doing the same.[33] He contends, "I want the same rule book. I want the same playing field. The problem with Proposal 2 is that it creates two playing fields."[34] Rossenbaum's comments shed light on an important way in which state bans on affirmative action, or colorblind policies, provide a preference to whites: White students are more likely to benefit from legacy policies since historically there have been more white college graduates, and during segregation, many colleges did not admit students of color. Rarely does anyone question these policies as an unfair preference.[35] Considering that there is sizeable debate regarding the fairness of race-neutrality, this narrative deserves further attention.

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http://usnews.nbcnews.com/_news/2013/10/15/20975390-supreme-court-takes-on-affirmative-action-in-michigan-ban-case; Anthony York, *State Affirmative Action Ban Upheld by Federal Court*, L.A. TIMES (Apr. 2, 2012, 3:16 PM), http://latimesblogs.latimes.com/california-politics/2012/04/state-affirmative-action-ban-upheld-by-federal-court.html; *see also* Karthick Ramakrishnan, Opinion Editorial, *Affirmative Action at California Colleges: A Debate Based on Fear*, L.A. TIMES (Mar. 7, 2014), http://articles.latimes.com/2014/mar/07/opinion/la-oe-0307-ramakrishnan-prop209-affirmative-action-20140307 ("[Affirmative action] [o]pponents argue for equal treatment in how rules are applied across racial groups.").

30. York, *supra* note 29 (quoting statement by Ward Connerly).

31. Williams & Arkin, *supra* note 29 (quoting statement by Bill Schuette, Mich. Att'y Gen.).

32. Legacy students are the sons or daughters of alumni. It is well known throughout higher education that legacy students receive some degree of preferential treatment in the admissions process to most schools. In fact, most college applications include a section in which prospective students can indicate whether a parent or relative is an alumnus of the college. Interestingly, stigma theorists are not concerned with the stigmatization of legacy students. Perhaps this is because legacy students do not have clear markers, such as skin color. Interestingly, stigma theorists seem to only focus on students of color in their attack on "preferential treatment." Student-athletes are another category of students in which one can claim preferential treatment; however, those students do not concern stigma theorists either.

33. Williams & Arkin, *supra* note 29.

34. *Id.* (quoting statement attributed to Mark Rosenbaum by the Associated Press).

35. *See* Edmund Zagorin, *Race-Blind Admissions are Affirmative Action for Whites*, AM. PROSPECT (Apr. 21, 2014), http://prospect.org/article/race-blind-admissions-are-affirmative-action-whites ("[N]o group experiences more affirmative action than white people. Michigan's formal pro-white affirmative action policy, colloquially known as 'legacy preference,' puts the children of alumni ahead of other applicants. It unquestionably favors the white and the wealthy, at the expense of the poor and the black."); *see also* Evan J. Mandery, Opinion, *End College Legacy Preferences*, N.Y. TIMES (Apr. 24, 2014), http://www.nytimes.com/2014/04/25/opinion/end-college-legacy-preferences.html; *see generally* AFFIRMATIVE ACTION FOR THE RICH: LEGACY PREFERENCES IN

B. Race-Neutral = A Preference for Whites

Certain conservative members of the Supreme Court throughout affirmative action jurisprudence have produced colorblind rhetoric,[36] and this rhetoric has traveled into other areas of the law,[37] including K-12 school desegregation,[38] voting,[39] and antidiscrimination law.[40] In *Parents Involved in Community Schools v. Seattle School District No. 1*,[41] a case concerning race-conscious school assignments in K-12 public schools, Chief Justice Roberts famously said, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[42] His implication here is that any amount of race-consciousness is discrimination in the form of reverse discrimination against whites and, thus, we should prefer a colorblind approach. This move toward colorblindness has allowed conservative justices to apply the Equal Protection Clause to protect whites. The underlying assumption is that colorblindness, or the nonrecognition of race, is always nondiscriminatory.[43] In the affirmative action context, proponents of colorblindness contend that a race-neutral admissions process will be purely meritorious because it does not consider race.[44]

Although race-conscious admissions have survived for roughly fifty years,[45] the Court has largely scaled back on affirmative action programs

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COLLEGE ADMISSIONS (Richard D. Kahlenberg ed., 2010) (discussing legacy preference in college admissions and its impact on immigrant and minority groups).

36. I use the terms "colorblind" and "race-neutral" interchangeably to reference the nonrecognition of race.

37. Civil rights activists and social justice minded citizens should be very troubled by arguments of colorblindness and preference in the context of affirmative action. These arguments are not contained within the realm of just affirmative action, but rather, they challenge "ethnic and women's studies programs, identity-based student organizations, ethnic alumni associations, outreach and noticing requirements, and even breast cancer screenings and domestic violence shelters as forms of preference." Kimberlé W. Crenshaw, *"Framing Affirmative Action,"* 105 MICH. L. REV. FIRST IMPRESSIONS 123, 126 (2006). Thus, affirmative action jurisprudence has much greater consequences for not only people of color, but also women, the LGBT community, the disabled, and the poor.

38. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 551 U.S. 701, 762–63 (2007) (Thomas, J., concurring).

39. *See* Shelby County v. Holder, 133 S. Ct. 2612, 2628–29 (2013).

40. *See* Washington v. Davis, 426 U.S. 229, 245–48 (1976).

41. 551 U.S. 701 (2007).

42. *Parents Involved*, 551 U.S. at 748.

43. *See* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 17 (1991) ("Decisions that use color-blind nonrecognition are often regarded as superior to race-conscious decisions. Proponents of nonrecognition argue that it facilitates meritocratic decisionmaking by preventing the corrupting consideration of race. They regard race as a 'political' or 'special interest' consideration, detrimental to fair decisionmaking.").

44. *See* sources cited *supra* note 29.

45. Interestingly, the origins of affirmative action stem back to President Lyndon B. Johnson and his social programs of the 1960s that targeted the advancement of people of color. *See* Mario L. Barnes, Erwin Chemerinsky & Angela Onwuachi-Willig, *Judging Opportunity Loss: Assessing the Viability of Race-Based Affirmative Action After* Fisher v. University of Texas, 62 UCLA LAW REV. 272, 278–79 (2015). In 1965, during the height of the Civil Rights Movement, President Johnson had this to say in a speech at Howard University:

with the use of colorblind ideals. Justice Thomas, perhaps the strongest colorblind opponent to affirmative action, writes, "The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all."[46] Justice Thomas prefers that the government never consider race or even acknowledge that different races exist. To disregard race, however, is to ignore the systemic and historic discrimination that people of color have faced in this country.

When the Supreme Court employs a colorblind doctrine, the justices are essentially maintaining the status quo, including the existing racial hierarchy. Colorblind jurists contend that race-conscious policies discriminate against white students because the consideration of race provides a preference for students of color.[47] This conclusion fails to recognize the systemic inequalities that permeate society, especially in education,[48] and assumes that institutional racism is nonexistent. In order for one to think that race-conscious admissions policies are a preference for students of color, then one would have to believe that white students and students of color are competing on equal footing and that systemic racism does not exist in education. In reality, by the time students apply to college, most white students have gained a systemic educational advantage over students of color.[49] Thus, considering race is not a preference for students of color, it is an attempt to compensate for systemic inequality.

This is precisely the problem with the diversity rationale in affirmative action jurisprudence. The diversity rationale presumes an equal start-

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> But freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please.
>
> You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair.
>
> Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates.

Lyndon B. Johnson, President, United States, Commencement Address at Howard University: "To Fulfill These Rights" (June 4, 1965), http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp. It is important to note that the original purpose of affirmative action programs was to account for past harms and systemic discrimination against people of color.

46. Grutter v. Bollinger, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part), *superseded on other grounds by constitutional amendment*, MICH. CONST. art. I, § 26.

47. *See Parents Involved*, 551 U.S. at 748.

48. *See generally* JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1991) [hereinafter KOZOL, INEQUALITIES]; JONATHAN KOZOL, THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA (2005) [hereinafter KOZOL, SHAME].

49. *See* KOZOL, INEQUALITIES, *supra* note 48, at 75–77; KOZOL, SHAME, *supra* note 48, at 280–82.

ing point and ignores social inequalities, which allows colorblind opponents to make claims of reverse discrimination and preferential treatment. The purpose of such race-conscious policies should be to address social inequalities. Nevertheless, colorblind advocates refuse to recognize systemic racism, and thus, they interpret policies that attempt to ameliorate racism as an unfair preference for students of color.[50]

In their article *The New Racial Preferences*, Professors Devon Carbado and Cheryl Harris point out how state bans on affirmative action provide a preference to white students in writing personal statements.[51] Carbado and Harris explain how strict adherence to colorblind ideals in college admissions prevents students of color from discussing their racial identity in personal statements.[52] This proves to be a real disadvantage for students of color because they are unable to tell their entire stories; students of color are not be able to explain how race has affected their lives or even reference what their cultural background means to them.[53] On the other hand, such a strict colorblind policy does not burden white students in the same way. For many white students, race is not an important factor of their identity, at least not in the same way as it is for students of color.[54] One of the most significant privileges of being white is that white students can choose when and whether to think about race.[55] In contrast, students of color consider race on an almost daily basis.[56] There is no question that colorblind ideals of preventing students from discussing race disproportionately burdens students of color and results in a preference for white students.[57]

Education reform policies that hope to achieve educational equity must be race-conscious.[58] Professor Michelle Alexander writes, "Although colorblind approaches to addressing the problems of poor people of color often seem pragmatic in the short run, in the long run they are counterproductive. Colorblindness, though widely touted as the solution,

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50. *See* Crenshaw, *supra* note 37, at 126–28.

51. *See* Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139, 1147–48 (2008).

52. *Id.* at 1148.

53. Notably, this could also hurt white students interested in racial justice issues as well because they would also likely want to discuss race in their personal statements.

54. *See* Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1124–25 (2008).

55. *Cf.* Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, CIRTL NETWORK, http://www.cirtl.net/files/PartI_CreatingAwareness_WhitePrivilegeUnpackingtheInvisibleKnapsack.pdf (last visited Nov. 21, 2015).

56. *See* Robinson, *supra* note 54. Of course there are exceptions; for instance, a white student who goes to a predominately black school. These types of students, however, are very few considering the very low numbers of white students attending schools with majority students of color. *See* ORFIELD ET AL., *supra* note 12, at 10.

57. *See* Carbado & Harris, *supra* note 51, at 1147.

58. *See* Khiara M. Bridges, *Class-Based Affirmative Action, or the Lies That We Tell About the Insignificance of Race*, 95 BOSTON U. L.R. (forthcoming 2016) (on file with author).

is actually the problem."[59] If education policies remain within the confines of colorblindness, they will never be far-reaching enough to attack the underlying problem in public education: institutional racism.[60] Instead, policies will try to close the achievement gap and integrate schools through other mechanisms, such as socioeconomic status, but these policies are ineffective because they do not address the root of the problem.[61] Professor Neil Gotanda contends, "[M]odern color-blind constitutionalism supports the supremacy of white interests and must therefore be regarded as racist. There is no legitimate rationale for the automatic rejection of all governmental consideration of race."[62]

II. THE SUPPOSED COSTS OF RACE-CONSCIOUS ADMISSIONS

Opponents to affirmative action claim that there are costs or harms to students of color who attend race-conscious colleges. The two most widely discussed costs are stigma and mismatch, both of which this part explores.

A. Stigma

For over thirty-five years, opponents to affirmative action programs have relied heavily on the claim of stigma to argue against race-conscious admissions in higher education. The stigma argument is quite simple: Affirmative action programs harm all students of color because (1) they create an environment in which others will assume that they are not deserving of admission,[63] and (2) admitted students of color will also doubt their own abilities and merit.[64] In market terms, stigma theorists contend that students of color will prefer race-neutral colleges, instead of race-conscious colleges, because their degree will be free from stigma and, thus, worth more. These conservative voices make claims of both internal stigma (the stigma that students of color place on themselves) and external stigma (the stigma that others place on students of color).

No one is more famous for the stigma claim as an argument against affirmative action than Justice Thomas. In *Adarand Constructors, Inc. v.*

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59. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 240 (rev. ed. 2012).

60. *See* Bridges, *supra* note 58.

61. *See id.*

62. Gotanda, *supra* note 43, at 62–63.

63. There are many assumptions embedded in this argument regarding the relationship between merit and test scores that are and are worth challenging, but outside the scope of this Article. *See generally* Brief Amicus Curiae of Kimberly West-Faulcon in Support of Respondents, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (No. 11-345).

64. For an article examining the strength of this argument, see Onwuachi-Willig et al., *supra* note 3 (finding via surveys comparing law students at schools practicing and not practicing affirmative action that "1), minimal, if any, internal stigma felt by minority law students, regardless of whether their schools practiced race-based affirmative action; 2) no statistically significant difference in internal stigma between minority students at affirmative action law schools and non-affirmative action law schools; and 3) no significant impact from external stigma").

Pena,[65] Justice Thomas condemns such race-conscious policies on grounds of internal stigma:

> [T]here can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete . . . . These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences.[66]

Additionally, Justice Thomas strongly contends that external stigma is a worthy argument for the abolishment of affirmative action. In *Grutter v. Bollinger*,[67] a case upholding the consideration of race as a factor among many in college admissions, Justice Thomas dissents:

> It is uncontested that each year, the Law School admits a handful of blacks who would be admitted in the absence of racial discrimination. Who can differentiate between those who belong and those who do not? The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the "beneficiaries" of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed "otherwise unqualified," or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.[68]

Justice Thomas repeats this sentiment in *Fisher v. University of Texas at Austin*,[69] a more recent affirmative action case decided by the Supreme Court. He opines briefly, "Although cloaked in good intentions, the University's racial tinkering harms the very people it claims to be helping."[70]

Justice Thomas's consistent reliance on the stigma argument in affirmative action cases makes the stigma claim worthy of consideration

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65. 515 U.S. 200 (1995).

66. *Id.* at 241 (Thomas, J., concurring). The *Pena* Court required the use of heightened scrutiny in determining whether the consideration of disadvantaged groups, including women and employees of color, in the awarding of government contracts was a violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 237–39 (majority opinion).

67. 539 U.S. 306 (2003).

68. *Id.* at 373 (Thomas, J., dissenting) (citation omitted).

69. 133 S. Ct. 2411 (2013).

70. *Id.* at 2432 (Thomas, J., concurring) The Court remanded the case to the lower court so that a proper analysis of the narrow tailoring requirement of strict scrutiny can be applied. *Id.* at 2415 (majority opinion).

and analysis. Moreover, he is not alone in his disdain for race-conscious policies due to the supposed harm of stigma. Another black conservative to argue the stigma claim is political activist, and former member of the University of California Board of Regents, Ward Connerly.[71] In his amicus brief in *Grutter*, Connerly contends that race-conscious admissions policies "treat black and Hispanic students differently," and thus, "they will be marginalized and presumed to be inadequate."[72] Notice that the blame is always on the race-conscious policy and not on the people making accusations regarding qualifications. The stigma claim lets the accusers go unchecked, as if they have every right to make such an accusation. The underlying assumption that considering race means candidates of color are unqualified is simply not true.[73] Considering race in college admissions, as one factor among many, does not mean that admits of color are unqualified.

In deciding between a higher ranked college that practices affirmative action and a less reputable race-neutral college, stigma theorists would advocate that a student of color select the race-neutral college so that they avoid any hint of stigmatization.[74] This assertion, however, has very little faith in the intelligence of students of color, whom stigma theorists purport to be so concerned. By arguing that stigma should be the reason to end all affirmative action programs, stigma theorists assume that students of color are incapable of properly weighing their options and making an informed decision. It is as if stigma theorists think stu-

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71. Connerly is the founder and chairman of the American Civil Rights Institute. *About Mr. Ward Connerly*, AM. C.R. INST., http://acri.org/about-ward-connerly/ (last visited Sept. 20 2015).

72. Brief Amicus Curiae of Ward Connerly in Support of Petitioners at 13–14, *Grutter*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516) (quoting prior statement of Ward Connerly). Connerly states:

> Although the intentions of universities and professional schools may be benign, is there nonetheless a resulting stigma of inferiority on every black and Hispanic student, even those who don't need preferences? This is clearly a message that perpetuates, as opposed to eliminates, the most intractable source of racial inequality in America today, which is the small number of preferred minorities who sufficiently excel academically in order to apply and be admitted to the nation's universities and professional schools without the use of preferences.

Id. at 13; *see also* Brief Amici Curiae of the Center for Equal Opportunity et al. in Support of Petitioner at 17–18, *Grutter*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516) ("[T]he liabilities attendant to the use of racial and ethnic preferences are substantial . . . they stigmatize the so-called beneficiaries in the eyes of their classmates, teachers, and themselves . . . ." (footnote omitted)); Brief Amicus Curiae of Pacific Legal Foundation et al. in Support of Petitioner at 20, *Fisher*, 133 S. Ct. 2411 (2012) (No. 11-345) ("Racial preferences stigmatize recipient groups by implying that the recipients are inferior and need special protection, thus generating the 'politics of racial hostility.'" (quoting PETER WOOD, DIVERSITY: THE INVENTION OF A CONCEPT 173–74 (2003)).

73. *See* Dennis O. Ojogho, *Affirmative Reaction*, HARV. CRIMSON (Mar. 13, 2014), http://www.thecrimson.com/article/2014/3/13/ojogho-harvard-affirmative-action/ ("The fundamental problem with . . . [affirmative action critics] is that [they are] tragically misinformed about how affirmative action works. [They] assume[] that unqualified people of color are being admitted to this university in droves to meet some kind of quota. The implication is that there are not enough brilliant, young black and Latino minds in this country—that Harvard is forced to admit the first application it receives that has the correct ethnicity box checked. This is simply untrue.").

74. *See* Kate L. Antonovics & Richard H. Sander, *Affirmative Action Bans and the "Chilling Effect,"* 15 AM. L. & ECON. REV. 252, 259 (2013).

dents of color are too naïve to know what is best for them in deciding whether to risk stigmatization or go to a less reputable school.[75]

Stigma is not a convincing argument to end all affirmative action in higher education because students of color are well aware of the problem and are fully capable of determining for themselves what is in their best interest.[76] It is ridiculous to take away one of the options (of attending a higher ranked affirmative action school) because stigma theorists do not think that students of color are capable of making informed decisions.

B. Mismatch

A related claim to the stigma argument that has gained traction in the last decade is mismatch theory—primarily advanced by Richard Sander, law professor, and Stuart Taylor, journalist.[77] Sander and Taylor assert that students of color suffer academically in two ways when they attend race-conscious law schools. First, they argue that affirmative action at highly selective law schools admits students of color who are unqualified, and thus, these students suffer academically because they cannot compete against their more qualified classmates—they get worse grades and, thus, worse employment outcomes.[78] Sander and Taylor also argue that students of color learn less because they are unable to keep up with rest of the class and, therefore, underperform post-graduation on the bar exam and in career advancement.[79]

An extension of the mismatch argument is that admitted students of color face both external and internal stigma because of their inability to compete academically. Sander and Taylor explain:

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75. *See* JOHN K. WILSON, THE MYTH OF POLITICAL CORRECTNESS: THE CONSERVATIVE ATTACK ON HIGHER EDUCATION 151 (1995) ("Conservatives' attacks on affirmative action often adopt a paternalistic tone. Critics say they are helping minorities escape the stigma that (they claim) is the inevitable result of affirmative action.").

76. *See infra* Part III for more on student enrollment choices and comparative stigma.

77. *See* Brief Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party, *supra* note 4, at 3–10; RICHARD SANDER & STUART TAYLOR, JR., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT 4–5 (2012); Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 449–54 (2004).

78. *See* sources cited *supra* note 77. It is important to note, there is a lot of published research and scholarship that refutes and disagrees with Sander and Taylor's claim of mismatch. *See, e.g.*, Ian Ayres and Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807, 1808–09 (2005); Cheryl I. Harris and William C. Kidder, *The Black Student Mismatch Myth in Legal Education: The Systemic Flaws in Richard Sander's Affirmative Action Study*, J. BLACKS HIGHER EDUC., http://www.jbhe.com/features/46_black_student_mismatch.html (last visited Dec. 3, 2015); Daniel E. Ho, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 YALE L.J. 1997 (2005); William C. Kidder & Angela Onwuachi-Willig, *Still Hazy After All These Years: The Data and Theory Behind "Mismatch,"* 92 TEX. L. REV. 895 (2014). Although I find the mismatch theory unconvincing, I am assuming its validity for the purposes of this Article.

79. *See* Brief Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party, *supra* note 4, at 8–9.

> Large preferences often place students in environments where they can neither learn nor compete effectively—even though these same students would thrive had they gone to less competitive but still quite good schools. We refer to this problem as "mismatch," a word that largely explains why, even though blacks are more likely to enter college than are whites with similar backgrounds, they will usually get much lower grades, rank toward the bottom of the class, and far more often drop out. Because of mismatch, racial preference policies often stigmatize minorities, reinforce pernicious stereotypes, and undermine the self-confidence of beneficiaries, rather than creating the diverse racial utopias so often advertised in college campus brochures.[80]

Moreover, Sander and Taylor argue that students of color would be better off going to less competitive race-neutral colleges and universities (even if a race-neutral college is not as prestigious as a race-conscious college).[81] They advocate for affirmative action bans, not only because they believe students of color will do better academically, but they will also avoid the stigmatizing effects of underperformance at a race-conscious colleges.[82]

Interestingly, mismatch and stigma theorists are not as concerned about unqualified legacy students.[83] One could also regard the students who are the sons and daughters of alumni, and receive additional consideration by way of a preference, unqualified.[84] Mismatch and stigma theorists conveniently do not discuss this group of students and are not concerned at all with their performance.[85] One could argue that by neglecting to discuss legacy students, mismatch and stigma theorists are not well-intentioned and are in fact making bad faith arguments about students of color.[86] Mismatch and stigma theorists like to argue that they are just looking out for the best interests of students of color. Though, if mismatch and stigma theorists really cared about the best interests of students, then they would also show concern for legacy students or even athletes.[87]

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80. Richard Sander & Stuart Taylor Jr., *The Painful Truth About Affirmative Action*, ATLANTIC (Oct. 2, 2012), http://www.theatlantic.com/national/archive/2012/10/the-painful-truth-about-affirmative-action/263122/.

81. *See id.*

82. *See id.*

83. *Id.* ("The mismatch effect happens when a school extends to a student such a large admissions preference -- sometimes because of a student's athletic prowess or legacy connection to the school, *but usually because of the student's race* . . . ." (emphasis added)).

84. *See* Kidder & Onwuachi-Willig, *supra* note 78, at 936.

85. *See* Brief Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party, *supra* note 4, at 5.

86. *See* Kidder & Onwuachi-Willig, *supra* note 78, at 936 (pointing out how Sander and Taylor are only concerned with black student underperformance and not mismatched white students).

87. *See id.* at 936 n.178 ("In their brief supporting Supreme Court review of the Fisher case, Sander and Taylor begin a discussion of mismatch by briefly noting that 'admissions preferences—

Further, mismatch and stigma arguments extend into an economic analysis. In financial terms, mismatch and stigma theorists contend that race-neutral colleges provide for better economic opportunity for students of color.[88] First, students of color will earn better grades at race-neutral colleges, which will lead to better job opportunities. Second, their degree will be free from stigma and thus translate into enhanced job opportunities.

Put together, stigma and mismatch theorists' claims lead to a remarkable economic assertion that a degree from a race-neutral college is worth more than a race-conscious college degree.[89] Considering these anti-affirmative action arguments of stigma and mismatch, it is worth investigating whether students of color would be better off, economically speaking, going to a race-neutral college.

III. THE MARKET SAYS RACE-NEUTRAL COLLEGES ARE STRUGGLING

One of the arguments invoked by stigma scholars is that students of color will avoid race-conscious colleges and instead prefer to attend race-neutral colleges. The argument is that students of color at public universities under affirmative action bans are free from stigma and will not have to face questions of whether they deserve to be there. In other words, affirmative action bans ensure that all students gained admission based on merit alone, and thus, stigma does not exist on race-neutral campuses. Kate Antonovics and Richard Sander write:

> A black candidate deciding between Berkeley and Stanford, for example, might conclude after Proposition 209 that the signaling value of a degree from Berkeley, where there is little or no suspicion of racial preferences in admission, is greater than the signaling value of a degree from Stanford, where the suspicion of racial preferences in admissions is substantially higher.[90]

Studies suggest, however, that this hypothesis is incorrect. Affirmative action bans have caused students of color to increasingly prefer race-conscious colleges to race-neutral ones.[91] In addition, studies show that

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regardless of whether these are based on race, 'legacy' considerations, or other factors' cause lower grades, but this is a rhetorical pivot and the thrust of their book and Supreme Court briefs focus on race/ethnicity." (citation omitted) (quoting Brief Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party, *supra* note 4, at 5)).

88. *See id.* at 897–98.

89. *See* Antonovics & Sander, *supra* note 74.

90. *Id.*

91. *See* William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the* Fisher *Case*, 39 J.C. & U.L. 53, 70 (2013) ("Contrary to recent claims by groups opposing affirmative action, Proposition 209 triggered a series of educationally harmful 'chilling effects' [for underrepresented students of color]. Data on UC's freshman admit pools spanning a dozen years show that underrepresented minorities (more so for those with the strongest credentials, and especially for African Americans) are more likely to spurn an offer from UC than they were before Prop 209, and the difference compared to whites and Asian Americans has gradually widened under Prop 209."); Symposium, *From Proposition 209 to Proposal 2: Examining the Effects of Anti-Affirmative Action*

students of color face less racism, stigma, and hostility at race-conscious colleges because these colleges are more likely to have a critical mass of students of color.[92]

A. Students of Color Prefer Race-Conscious Colleges

In an article, William Kidder took several data points from various studies and disproved stigma theorists' argument that banning affirmative action in California would encourage students of color to attend public universities (race-neutral colleges).[93] In fact, Kidder shows that in the years after Prop 209, black and Latino students increasingly preferred private colleges that had affirmative action admissions policies (race-conscious colleges).[94] When examining the enrollment percentages of admitted students of color, black and Latino students "were less likely to choose to enroll at the University of California in the years after Prop. 209."[95] Kidder notes that the "most pronounced case [was] African Americans at UCLA, where the yield rate in the top third of UCLA's admit pool dropped from 24% to 8%, a decline of two-thirds," after Prop 209.[96] To provide some context, "for White/Asian American/Other admits in the top third of the pool [for all UCs] the yield rate was essentially flat before and after Prop. 209 (57% versus 58%)."[97] Thus, Prop 209 had the opposite effects of what stigma theorists predicted. After Prop 209, black and Latino students increasingly spurned offers from UC schools and chose private universities with race-conscious admissions instead.

Not only are students of color increasingly choosing race-conscious colleges over race-neutral colleges, but the number of applicants of color has also decreased at race-neutral schools since Prop 209. In 1995, before the implementation of Prop 209, 21.5% of applicants to the UC sys-

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Voter Initiatives, 13 MICH. J. RACE & L. 461, 478–79 (2008) [hereinafter Symposium] (transcription of welcome and introductory remarks).

92. *See* Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1199 (2010) ("Underrepresented minority students in states that *permit* affirmative action encounter far less hostility and internal and external stigma than students in anti-affirmative action states. . . . One of the key arguments in support of affirmative action is that it can create a critical mass of minority students who are viewed not as a token aesthetic, but first and foremost as legitimate citizens of the classroom to be engaged with on their own terms. This research suggests that critical mass is more likely to occur in university settings that use race-based admissions and those students are the ones least likely to report stigma or overt racism. Conversely, those underrepresented minority students who are racially isolated bear the greatest burden of overt racism and external and internal stigma. Furthermore, they are most likely to be found in states that have adopted *anti*-affirmative action policies." (emphasis added) (footnote omitted)).

93. Kidder, *supra* note 91, at 70–85.

94. *See id.* at 78 ("[A]mong those in the top third of the UC admit pool African Americans are typically twice as likely as UC admits overall (39% average versus 18% overall) to attend a private selective college or university, and Latinos (25%) are also more likely to enroll at private selective institutions.").

95. *Id.* at 74–75.

96. *Id.* at 77.

97. *Id.*

tem were underrepresented students of color.[98] In 1998, after Prop 209, this percentage dropped to 17.5%.[99] In addition, "the evidence is unambiguous and consistent that affirmative action bans led to substantial drops in African American applications at the most selective law schools," including UC Berkeley, UCLA, and UC Davis law schools.[100]

Unfortunately, bans on affirmative action have significantly decreased the number of black and Latino students enrolling at race-neutral colleges. Kidder reports, "More than a decade after Prop. 209 took effect African Americans remained 3.7% of new freshman enrolling in the UC system, and the figures are lower at UC Berkeley (2.9%), UC Santa Cruz (2.6%), UC Irvine (2.1%), and UC San Diego (1.2%)."[101] UC system-wide, black enrollment dropped from 7.8% to 3.9%.[102] To provide a broader context, race-neutral colleges ranked last in the percentage of black freshman among the nation's top twenty-nine colleges in 2011—(27) University of Michigan (4.6%); (28) UCLA (3.9%); (29) UC Berkeley (2.7%).[103] As for Latinos, in 1990 (before Prop 209), Latinos were 22% of the incoming class at UC Berkeley.[104] After Prop 209, Latinos have maintained around 12% to 13% of the freshman class at UC Berkeley.[105] UC system-wide, Latino enrollment dropped from 14.6% to 10.8%.[106] These numbers are even more depressing considering that in 1990, Latinos were only 23% of graduating public high school students in California, but in 2010, Latinos were 44% of public high school graduates in California.[107]

Black student enrollment at UCLA particularly suffered after the implementation of Prop 209. In 2006, UCLA admitted just 210 black students (2%) out of 10,487 total admitted applicants.[108] That year, black student enrollment at UCLA dropped 57% from pre-Prop 209 average enrollment numbers.[109] In fact, in 2006, UCLA had the lowest percentage of black students, only 96 out of 4,852 entering freshman, since 1973.[110]

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98. Symposium, *supra* note 91, at 474.
99. *Id.*
100. Kidder, *supra* note 91, at 86. Studies show that black applicants to UC Berkley and UCLA law schools dropped two-fifths after Prop 209 went into effect. *Id.*
101. *Id.* at 88.
102. Symposium, *supra* note 91, at 475.
103. *See JBHE Annual Survey: Black First-Year Students at the Nation's Leading Research Universities*, J. BLACKS HIGHER EDUC. (Dec. 5, 2011), http://www.jbhe.com/2011/12/jbhe-annual-survey-black-first-year-students-at-the-nations-leading-research-universities/. The top schools with the most black students were: (1) Columbia (12.5%); (2) Duke (11.1%); (3) North Carolina (10.7%); and (4) Stanford (10.7%). *Id.*
104. Kidder, *supra* note 91, at 89.
105. *Id.*
106. Symposium, *supra* note 91, at 475.
107. Kidder, *supra* note 91, at 89.
108. *See* Elaine Korry, *Black Student Enrollment at UCLA Plunges*, NPR (July 24, 2006, 12:01 AM), http://www.npr.org/templates/story/story.php?storyId=5563891.
109. *See id.*
110. *See* Rebecca Trounson, *A Startling Statistic at UCLA*, L.A. TIMES (June 3, 2006), http://articles.latimes.com/2006/jun/03/local/me-ucla3.

Today, UCLA still struggles to enroll black students (in fall 2015, 4.3% of freshman) and has never fully recovered from Prop 209.[111] With so few black students, it is easy to see how these students will have classes in which they are the only black student, or just one of two. It is important to keep this perspective in mind when considering the hidden costs of attending race-neutral colleges (discussed *infra* Part IV).

B. Comparative Stigma

Two studies based on student surveys found that stigma theorists are incorrect in their hypothesis that affirmative action increases stigmatization. The first study involved students at seven law schools (four schools with affirmative action policies and three under affirmative action bans) and contained questions regarding stigma.[112] The study found that "among students of color at the four schools that do have affirmative action programs and the three that do not, there is *no* statistically significant difference in their responses to questions about feeling stigmatized."[113] In other words, the study found that the presence of an affirmative action ban had no statistically significant effect on whether students of color felt stigmatized.[114] This at least suggests that race-conscious colleges are not more harmful to students of color than race-neutral colleges.

The second study surveyed undergraduate and graduate students at race-conscious colleges and schools subject to an affirmative action ban.[115] This study included questions regarding racism, stigma, and hostility. With regards to "overt acts of racism from other students, students attending school in the states that ban affirmative action experienced overt racism at nearly twice the rate as students in those states that permit affirmative action."[116] It is regrettable that any student reported experiencing overt acts of racism, but it is notable that such a wide discrepancy exists between race-conscious and race-neutral college environments. It is also contrary to what some may believe—that students of color are more likely to experience overt racism in race-neutral environments.

The survey results for questions about stigma were also contrary to what stigma theorists would predict. As for internal stigma, the first two questions regarding stigma had no statistical difference between the students at the two types of schools.[117] The third question, however, whether

111. *See Enrollment Demographics, Fall 2015*, UCLA OFF. ANALYSIS & INFO. MGMT., http://www.aim.ucla.edu/tables/enrollment_demographics_fall.aspx (last visited Dec. 19, 2015).

112. *See* Onwuachi-Willig et al., *supra* note 3, at 1325–26.

113. *Id.* at 1332 (emphasis added).

114. *See id.* at 1332–33.

115. *See* Bowen, *supra* note 92, at 1214–15.

116. *Id.* at 1221 (footnote omitted). 43.4% of students of color at race-neutral colleges reported experiencing overt racism from other students; compared to 20.9% of students of color from race-conscious colleges. *Id.* at 1222.

117. *See id.* at 1223.

students of color "felt pressure to prove themselves academically because of their race," had a statistically significant result: "Almost three-fourths of students in states that *bar* race-based admissions reported feeling pressure to prove themselves because of their racial group membership compared to less than half of students who attend schools with race-based admissions."[118]

As for external stigma, when asked whether white "students had questioned their qualifications to be at the school, surprisingly, only about one-quarter of students at affirmative action schools responded affirmatively to this question, while almost one-half of students who were admitted without race considerations answered 'yes.'"[119] In addition, when asked if professors "had lower expectations of them compared to their white peers . . . . One-third of students attending schools in states that ban raced-based admissions answered 'yes' while only one-fifth of students in affirmative action states answered affirmatively."[120] These results are directly opposite to what a stigma theorist would expect. More specifically, stigma theorists assume that race-conscious schools have more students of color experiencing stigma. Conversely, this study found the exact opposite: Students of color were more likely to experience stigma at race-neutral colleges. According to this study, race-neutral colleges are in fact harmful to students of color when compared to race-conscious schools.

Some might attempt to discredit these studies by arguing that the respondents are expressing false consciousness. That is, students of color at race-conscious colleges are attempting to justify their decisions by denying that they experience stigma, but deep down they may feel stigmatized; and students at race-neutral colleges may be invested in feeling stigmatized because it helps them excuse poor performance. Unfortunately, one can always make a claim of false consciousness for every survey because questioning motives and truthfulness is universal to the method of surveying. Nevertheless, there is no better way of getting this type of data, and there is no data to the contrary. Therefore, we should not discredit these studies out of concerns for false consciousness.

Another study on the racial climates of race-neutral and race-conscious colleges surveyed close to ten thousand black and Latino students at eight UC campuses and three race-conscious colleges, all similar

118. *Id.* (emphasis added). 74.1% of students of color at race-neutral colleges reported feeling pressure to prove themselves academically because of race; compared to 40.5% of students of color from race-conscious colleges. *Id.* at 1222. This question is very much related to stereotype threat, and will be further discussed in, *infra* Section IV.B.

119. *Id.* at 1224 (footnote omitted). 46.3% of students of color at race-neutral colleges reported experiencing their qualifications questioned by white students; compared to 25.5% of students of color from race-conscious colleges. *Id.* at 1222. These results were statistically significant.

120. *Id.* at 1224. 31.5% of students of color at race-neutral colleges reported faculty members had lower expectations of them compared to their white counterparts; compared to 19.2% of students of color from race-conscious colleges. *Id.* at 1222. These results were statistically significant.

in size and ranking.[121] The survey asked students whether students of their race were respected on campus.[122] Black and Latino students in the UC system agreed that students of their race were respected on campus at statistically significant lower rates than at all three of the race-conscious colleges.[123] One possible explanation for this phenomenon is the critical mass, or lack of critical mass, of students of color on campus.[124] All three of the race-conscious colleges had higher percentages of black students than seven of the UC schools.[125] The only UC school, UC Riverside, to have a higher percentage of black students (7.8% in 2010, more than any other school in the study) agreed that they were respected on campus at a higher rate than any other school.[126] The report concludes, "[H]igher levels of racial diversity are generally better for the campus climate faced by African American students, whereas racial isolation in combination with an affirmative action ban is associated with a more inhospitable racial climate."[127] This study suggests that there is something different about the racial climates at race-neutral and race-conscious colleges, and racial isolation is a factor. I argue that racial isolation is just one of the several harms students of color face at race-neutral colleges. The next part uncovers what these potential harms are for students of color.

IV. THE HIDDEN COSTS OF RACE-NEUTRAL COLLEGES FOR STUDENTS OF COLOR

Considering that students of color are increasingly choosing to attend race-conscious colleges over race-neutral schools, an understanding of why this is will help to evaluate the worth of each college degree.[128] Stigma and mismatch theorists implicitly contend that a race-conscious college degree is worth less than a race-neutral degree. In contrast, college students of color do not seem to agree. This could be because there

121. *See* WILLIAM C. KIDDER, THE SALIENCE OF RACIAL ISOLATION: AFRICAN AMERICANS' AND LATINOS' PERCEPTIONS OF CLIMATE AND ENROLLMENT CHOICES WITH AND WITHOUT PROPOSITION 209, at 2, 5 (2012).

122. *See id.* at 11.

123. *See id.* ("The data revealed that across eight UC campuses only 62.2% of African American students in 2008-10 report feeling that students of their race are respected on campus, compared to over 92% of whites. At UT Austin in 2010-11 72.3% of African Americans reported feeling that students of their race are respected on campus. While the UT Austin data indicate a less than ideal racial climate for African Americans, the ten-point advantage over UC is nonetheless significant on both a statistical and a practical level. Across the UC campuses 77.2% of Latinos feel that students of their ethnicity are respected, compared to an impressive 89.9% at UT Austin. AAU University #1 likewise reports higher levels of African American (75.0%) and Latino (79.6%) students feeling respected on campus. The same is true at AAU University #2, where African American (76.3%) and Latino (90.0%) students are more likely to feel respected.").

124. *See id.* at 12–14.

125. *See id.* at 12.

126. *See id.*

127. *Id.* at 13.

128. I acknowledge that some may contest the validity of the Kidder's analysis and the studies that he cites. Even considering that there are criticisms of the Kidder article, it is still worthwhile to explore why students of color may want to choose a race-conscious college over a race-neutral college in order to contribute to and better understand the affirmative action debate.

are hidden costs to attending a race-neutral college. Race-neutral colleges have fewer students of color[129] and, thus, problems of racial isolation,[130] stereotype threat,[131] racial microaggressions,[132] identity performance,[133] and racial labor[134] are exacerbated. These costs are not only intrinsic but also cause economic harms to students of color.

Some may argue that during the admissions phase, high school students cannot possibly be aware of these hidden costs, and thus, these costs are not a part of the decision-making process between a race-neutral and a race-conscious college. High school students are actually more aware of these costs than some might assume.[135] High school students have experienced the world as a person of color for eighteen years and in various educational environments. This is plenty of time for a student to understand that these harms exist in educational settings. Not all high school students may fully understand these costs or be able to articulate them, but most will have felt these costs before.

Furthermore, social media greatly contributes to the reputation of a college's racial dynamics in the eyes of prospective students. For example, at UCLA (a race-neutral college due to Prop 209) there have been two widely publicized and viewed YouTube videos in recent years that have garnered a lot of attention regarding the school's racial climate. First, there was the infamous "Asians in the Library" video posted on YouTube by a white female student at UCLA.[136] In her video, she complains about Asian students talking on their cell phones in the library

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129. *See* discussion *supra* Section III.A.

130. Racial isolation is the lack of having a critical mass of students of color on campus and, thus, resulting in the burdens of having to represent your entire race in class or being singled out based on your race. This concept is discussed further in, *infra* Section IV.A.

131. Stereotype threat is the added pressure of having to represent your race because there are so few people of your race in the educational setting. Stereotype threat often results in depressed academic performance and the student of color not performing to their true potential or understanding of the material. This concept is discussed further in, *infra* Section IV.B.

132. Racial microaggressions are forms of unconscious or colorblind racism that contributes to a hostile learning environment for students of color. Racial microaggressions are difficult to address because often it is impossible to prove intentionality on the part of the perpetrator. This concept is discussed further in, *infra* Section IV.C.

133. Identity performance is the energy that students of color expend on attempting to fit in or assimilate into white institutions. This concept is discussed further in, *infra* Section IV.D.

134. Racial labor is the extra work in which students of color must perform because they are students of color. This can be due to tokenism or increasing diversity efforts on campus, but this is extra work in which white students are not asked to perform at the same rate. This concept is discussed further in, *infra* Section IV.E.

135. Carla Rivera, *African American Students Weigh Campus Attitudes in Picking Colleges*, L.A. TIMES (Apr. 30, 2014, 9:20 PM), http://www.latimes.com/local/la-me-college-choice-20140501-story.html#page=1.

136. Alexandra Wallace, the creator of the original video, removed the video from YouTube. There are, however, various copies of the video on YouTube. For news coverage of the video, see Larry Gordon & Rick Rojas, *UCLA Won't Discipline Creator of Controversial Video, Who Later Withdraws from University*, L.A. TIMES (Mar. 19, 2011), http://articles.latimes.com/2011/mar/19/local/la-me-ucla-speech-20110319; Ian Lovett, *U.C.L.A. Student's Video Rant Against Asians Fuels Firestorm*, N.Y. TIMES (Mar. 15, 2011), http://www.nytimes.com/2011/03/16/us/16ucla.html.

after the tsunami in Japan and mocks Asian languages by imitating Asian students in saying, "Ching chong, ling long."[137] The student goes on to say, "'The problem is these hordes of Asian people that U.C.L.A. accepts into our school every single year, which is fine.' . . . 'But if you're going to come to U.C.L.A., then use American manners.'"[138] When the student says "hordes of Asian people" and "our school," she implicitly means that UCLA is for white students and Asian students do not belong, nor are they welcomed, at UCLA.

In 2013, another video contributing to UCLA's racial climate reputation surfaced on YouTube and has over two million views.[139] The video includes a group of black male students providing embarrassing statistics regarding the lack of black male students at UCLA.[140] In addition, Sy Stokes, the creator of the video, performs a spoken word poem criticizing UCLA, while nine black male students stand silently behind him.[141] The influential video sends a clear message that the black male students are

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137. *See* Gordon & Rojas, *supra* note 136. For an interesting response to this video, see Jimmy Wong, *Ching Chong! Asians in the Library Song (Response to UCLA's Alexandra Wallace)*, YOUTUBE (Mar. 15, 2011), http://www.youtube.com/watch?v=zulEMWj3sVA, which has been viewed over five million times.

138. Lovett, *supra* note 136.

139. Sy Stokes, *The Black Bruins [Spoken Word]*, YOUTUBE (Nov. 4, 2013), http://www.youtube.com/watch?v=BEO3H5BOlFk. For news coverage of the video, see Kendal Mitchell, *Student Posts Video to Spark Discussion About Lack of Diversity at UCLA*, DAILY BRUIN (Nov. 8, 2013, 1:42 AM), http://dailybruin.com/2013/11/08/student-posts-video-to-spark-discussion-about-lack-of-diversity-at-ucla/; Akane Otani, *Black UCLA Students Decry Lack of Diversity in Video*, USA TODAY (Nov. 19, 2013, 9:43 PM), http://www.usatoday.com/story/news/nation/2013/11/14/youtube-ucla-lack-diversity/3518373/; *UCLA has More NCAA Championships than Black Male Freshmen*, HUFFINGTON POST (Nov. 8, 2013, 5:07 PM), http://www.huffingtonpost.com/2013/11/08/ucla-black-enrollment-freshmen_n_4242213.html.

140. *See* Stokes, *supra* note 139.

141. Part of the spoken word lyrics are:

> Now you tell me that I should be proud to be at UCLA?
> When only 35 of us are predicted to walk across that stage?
> When most of us are dropping out from the lack of financial aid
> While Judy Olian, Dean of Anderson School of Management just spent $647,000 on first class flights and hotel stays
> But waiting for an apology is asking for the impossible
> Because no snowflake in an avalanche ever feels responsible
> But you tell me I should be proud to be a Bruin
>
> When we have more national championships than we do black male freshmen
> It's evident that our only purpose here is to improve your winning percentage
> So now black high school kids can care less about grades, just as long as the number on the back of their jersey doesn't fade
> And you tell me I should be proud to be a Bruin
>
> . . . .
>
> Stop pretending that the wounds of our past have healed
> We're not asking for a handout, we're asking for a level playing field
> Those with less opportunity are fighting for their position trying to find their place
> But those with privilege are hitting triples when they were already born on third base
>
> So with all of my brothers' hopes and dreams that this university has tried to ruin
> How the hell am I supposed to be proud... to call myself... a Bruin

Id.

unsatisfied by the lack of diversity at UCLA. In turn, this message informs and influences prospective students of color in their decision to attend UCLA.

In addition, a high school student is usually not making this decision alone. There are often several adults (parents, older siblings, family members, mentors, counselors, and teachers) who share their opinions of certain schools. These adults not only bring their own life experiences and education to the discussion but may also be more aware of current news stories covering the racial climate of prospective colleges.[142] For instance, many people in Los Angeles heard about the discrimination lawsuit filed by a black UCLA surgeon.[143] The surgeon alleged that "he was routinely publicly humiliated and once was depicted as a gorilla being sodomized in a slide show presentation during a resident graduation event."[144] The UC Board of Regents ultimately settled the case for $4.5 million.[145] Others may have heard about a prominent black judge who "filed a complaint against two UCLA police officers, accusing them of using excessive force when they pulled him over for not wearing a seat belt."[146] In addition, some may have read about the several racist and sexist slurs posted about women of color.[147] One sign posted on the Vietnamese Student Union board read, "[A]sian women R Honkie white-boy worshipping Whores [sic]."[148] The next day, another a student found a sign in the library bathroom that said, "Asian Women are White-Boy

142. *See* Rivera, *supra* note 135.

143. *See* Hailey Branson-Potts, *UCLA Doctor Sues Regents, Alleging Racial Bias*, L.A. TIMES (Apr. 20, 2012), http://articles.latimes.com/2012/apr/20/local/la-me-0420-ucla-lawsuit-20120420.

144. Stephen Ceasar, *Black Surgeon to Get $4.5 Million in Racial Bias Suit*, L.A. TIMES (July 18, 2013) [hereinafter Ceasar, *Racial Bias*], http://articles.latimes.com/2013/jul/18/local/la-me-ucla-settle-20130719. Interestingly, this lawsuit was followed by a study that found "UCLA's policies and procedures are inadequate to deal with increasing complaints of racial bias among faculty—nearly all of whom surveyed said they had experienced some level of discrimination . . . ." Stephen Ceasar, *Study Faults UCLA's Handling of Faculty's Racial Bias Complaints*, L.A. TIMES (Oct. 18, 2013), http://www.latimes.com/local/la-me-ucla-discrimination-20131019,0,2297269.story#axzz2mGLQBE6J. Additionally, this incident has led to a petition on *Change.org* urging the California Attorney General, Kamala Harris, to investigate UCLA to see if any state laws were broken regarding claims of discrimination and retaliation by faculty members. As of August, 30, 2015, the petition was "Closed," but had gathered 67,376 supporters. Ron Hasson, *CA Attorney General Kamala Harris: Investigate UCLA for Ignoring Discrimination and Retaliation Complaints by Faculty Members*, CHANGE.ORG, http://www.change.org/petitions/ca-attorney-general-kamala-harris-investigate-ucla-for-ignoring-discrimination-and-retaliation-complaints-by-faculty-members (last visited Nov. 23, 2015).

145. *See* Ceasar, *Racial Bias*, *supra* note 144.

146. Richard Winton, *Black Judge Says UCLA Cops Used Excessive Force in Seat-Belt Stop*, L.A. TIMES (Nov. 25, 2013, 1:44 PM), http://www.latimes.com/local/lanow/la-me-ln-black-judge-ucla-police-20131125,0,7110117.story#axzz2mGLQBE6J.

147. *See* Sara Gates, *UCLA Off-Campus Student Apartment Defamed with Racial Slurs*, HUFFINGTON POST (Mar. 1, 2012, 10:22 AM), http://www.huffingtonpost.com/2012/02/29/ucla-graffiti-racial-slurs_n_1311463.html; Kathleen Miles, *At UCLA, Racist, Sexist Signs Called Asian Women 'White-Boy Worshipping Whores,'* HUFFINGTON POST (Nov. 29, 2012, 2:09 PM), http://www.huffingtonpost.com/2012/11/29/ucla-racist-sexist-signs-asian-women-video_n_2212311.html.

148. Miles, *supra* note 147.

Worshipping Sluts."[149] Such racist stories signal to prospective students that UCLA is not a welcoming place for people of color, and thus, they may decide to go to another school.[150]

In 2014, another highly publicized campaign recently took place at UCLA School of Law.[151] The Black Law Students Association organized an awareness campaign called "33/1100"—the fraction is the number of black students out of the total number of students at UCLA Law.[152] The goal of the campaign was to "raise awareness of the disturbing emotional toll placed upon students of color due to their alarmingly low representation within the student body."[153] The campaign included a YouTube video of black law students describing what it is like to be black at UCLA Law.[154] The formidable video immediately went viral[155] and garnered significant news coverage.[156] Regrettably, the campaign also resulted in

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149. *Id.*

150. Some may argue that although UCLA may have a racial climate problem, this is not common among most public universities banning affirmative action. I chose to focus on UCLA because I know most about this environment. These types of racial incidents, however, happen at various other UC campuses including UC Berkeley, UC Irvine, and UC San Diego. *See* Randal C. Archibold, *California Campus Sees Uneasy Race Relations*, N.Y. TIMES (Feb. 26, 2010), http://www.nytimes.com/2010/02/27/education/27sandiego.html?_r=0 ("Students at the University of California, San Diego, held an off-campus 'Compton Cookout' Feb. 15 to mock Black History Month, with guests invited to don gold teeth in the style of rappers from Los Angeles suburb of Compton, eat watermelon, and dress in baggy athletic wear."); Jeremiah Dobruck, *Second Racial Incident at UC Irvine Roils Campus*, L.A. TIMES (May 11, 2013), http://articles.latimes.com/2013/may/11/local/la-me-ln-second-racial-incident-at-uc-irvine-roils-campus-20130511 ("Police said Friday that someone put a note in a black student's backpack that read, 'Go back 2 Africa slave.' . . . Police say they are unaware of any connection between the note and the fraternity YouTube video that was blasted for racial insensitivity two weeks ago. The parody music video featured a member of the Asian fraternity Lambda Theta Delta wearing black face."); Tony Perry, *U.S. Ends Probe of Racial Bias at UC San Diego*, L.A. TIMES (Apr. 14, 2012), http://articles.latimes.com/2012/apr/14/local/la-me-0414-ucsd-harassment-20120414 ("The university will take steps to prevent harassment after several incidents, including a noose left in the library and an off-campus 'Compton Cookout' fraternity party during Black History Month."); Lee Romney & Larry Gordon, *Diversity Satire is a Little Too Biting*, L.A. TIMES (Sept. 26, 2011), http://articles.latimes.com/2011/sep/26/local/la-me-berkeley-bake-sale-20110927 ("UC Berkeley Republican club draws nationwide protests and support with a bake sale in which items are priced according to a buyer's race, ethnicity and gender.").

151. *See* Samantha Tomilowitz & Sam Hoff, *UCLA Law Students Protest Lack of Diversity*, DAILY BRUIN (Feb. 10, 2014, 4:10 PM), http://dailybruin.com/2014/02/10/ucla-law-students-protest-lack-of-diversity/.

152. *Id.*

153. RecordtoCapture, *33*, YOUTUBE (Feb. 10, 2014), https://www.youtube.com/watch?v=5y3C5KBcCPI.

154. *Id.*

155. *See id.* (gathering more than 400 comments and over 80,000 views).

156. *See* Rhonesha Byng, *Video Shines Light on the 'Disturbing Emotional Toll' of Being Black at UCLA Law School*, HUFFINGTON POST (Feb. 18, 2014, 5:59 PM), http://www.huffingtonpost.com/2014/02/14/ucla-law-school-diversity_n_4789763.html; Melissa Harris-Perry, *'Hyper-Visible, but Also Invisble,'* MSNBC (Apr. 26, 2014), http://www.msnbc.com/melissa-harris-perry/watch/hyper-visible-but-invisible-238007363694; Julianne Hing, *How Does it Feel to Be a Black Student at UCLA Law School? [Video]*, COLORLINES (Feb. 10, 2014, 4:10 PM), http://colorlines.com/archives/2014/02/how_does_it_feel_to_be_a_black_student_at_ucla_law_school_video.html; Elie Mystal, *Racism Abounds at UCLA School of Law*, ABOVE THE LAW (Feb. 24, 2014, 6:18 PM), http://abovethelaw.com/2014/02/racism-abounds-at-ucla-school-of-law/; Tamara

racist backlash, including one black student receiving hate mail in her student mailbox and people tearing down posters for law school events sponsored by identity organizations.[157] The backlash only sparked even more national media coverage surrounding the events.[158] Undoubtedly, the negative publicity has influenced perspective students of color in their decision to attend UCLA Law. As a UCLA Law student of color, I received several emails from prospective students of color asking what was going on and whether they should attend UCLA Law. It is evident that the racial climate of a campus goes into the calculus for prospective students in deciding between schools.

Moreover, colleges also feel the need to appear nonracist by displaying and highlighting diversity as a means of attracting students of color.[159] In a recent study investigating the promotional materials of 371 colleges, researchers found that students of color were considerably overrepresented in photographs.[160] For example, Asians accounted for 3.3% of the student body but 5.1% of the students appearing in promotional photos; black students made up 7.9% of student enrollment but 12.4% of the photographed students.[161] Some colleges have gone as far as to Photoshop pictures of students of color into promotional photos where the student was not actually present.[162] Universities do this to attract students to their school and avoid appearing racist.[163] Clearly then, colleges understand that diversity issues and educational climate are important factors of the decision-making process for a prospective student of color—otherwise, why would they go through the trouble?

Tabo, *On Racism at UCLA Law and False Dichotomies*, ABOVE THE LAW (Feb. 27, 2014, 4:12 PM), http://abovethelaw.com/2014/02/on-racism-at-ucla-law-and-false-dichotomies/.

157. Rhonesha Byng, *Racial Tensions Grow at UCLA Law After Black Student Receives Hate Mail*, HUFFINGTON POST (Feb. 27, 2014, 11:59 AM), http://www.huffingtonpost.com/2014/02/27/ucla-law-school-racism-diversity_n_4860406.html.

158. *See* Jayson Flores, *UCLA Law Students Move to Improve Campus Culture After Racist Incident*, USA TODAY (Feb. 27, 2014, 10:05 AM), http://college.usatoday.com/2014/02/27/ucla-law-students-move-to-improve-campus-culture-after-racist-incident/; Jonathan P. Hicks, *Tense Times for Black Students at UCLA's Law School*, BET (Feb. 28, 2014, 6:41 PM), http://www.bet.com/news/national/2014/02/28/tense-times-for-black-students-at-ucla-s-law-school.html; Julianne Hing, *Racial Harassment Picks Up After Video About Being Black at UCLA Law School*, COLORLINES (Feb. 27, 2014, 12:39 PM), http://colorlines.com/archives/2014/02/racial_harassment_picks_up_after_the_release_of_video_about_being_black_at_ucla_law_school.html.

159. *See* Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2191–94 (2013).

160. Scott Jaschik, *Viewbook Diversity vs. Real Diversity*, INSIDE HIGHER ED (July 2, 2008, 4:00 AM), http://www.insidehighered.com/news/2008/07/02/viewbooks; *see also* Matthew Hartley & Christopher C. Morphew, *What's Being Sold and to What End? A Content Analysis of College Viewbooks*, 79 J. HIGHER EDUC. 671, 686–87 (2008).

161. Jaschik, *supra* note 160.

162. *See* William Claiborne, *School's Diversity Too Good to Be True*, SFGATE (Sept. 21, 2000, 4:00 AM), http://www.sfgate.com/education/article/School-s-Diversity-Too-Good-to-Be-True-2737946.php.

163. There are many other reasons why colleges and universities highlight students of color in their promotional material, but these reasons are outside the scope of this paper. For a more thorough discussion of this phenomenon, see Leong, *supra* note 159.

Even if one is still not convinced that a prospective student makes these calculations before accepting an offer, it is still an important exercise to uncover the costs associated with attending a race-neutral college. These intrinsic and economic costs are significant to the comparison of valuing a degree from a race-neutral and a race-conscious university. This part explores each of the costs, mentioned above.

A. Racial Isolation

As discussed earlier, race-neutral colleges tend to have lower percentages of students of color.[164] As such, race-neutral schools have a heightened risk of racial isolation for students of color because of the lack of a critical mass of students of color.[165] Racial isolation occurs when there are so few students of color that often a student of color may be the only student, or one among a very few, of their racial background that is present in class.[166] For example, during my first year of law school, my section had eighty students, but only one black student. This would qualify as racial isolation. The topic of racial isolation was of huge concern during oral arguments in *Fisher v. University of Texas at Austin*.[167] Both sides appeared to agree that racial isolation is a valid concern for a university to attempt to alleviate.[168] Part of this concern over racial isolation is due to the negative effects that it has on students of color.[169]

There are several serious detriments to students of color that face racial isolation on campus and in the classroom.[170] Most of these psychological and academic consequences stem from feelings of distinctiveness or unbelonging.[171] More specifically, racial isolation increases the likelihood that others will view students of color as a representative or spokesperson for their entire race.[172] Experts often refer to this phenome-

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164. *See* Sander & Taylor, *supra* note 80.

165. *See* Brief of the American Educational Research Association et al. as Amici Curiae in Support of Respondents at 18–19, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (No. 11-345).

166. *See id.* at 18.

167. *See* Oral Argument, *Fisher*, 133 S. Ct. 2411 (2013) (No. 11-345), http://www.oyez.org/cases/2010-2019/2012/2012_11_345.

168. Mr. Rein, Fisher's attorney, explained during oral arguments:

> [T]o be within [the] Grutter framework, the first question is, absent the use of race, would we be generating a critical mass? To answer that question, you start -- you've got to examine in context the so-called soft factors that are in Grutter. You know, are -- is there an isolation on campus? Do members of minority [groups] feel that they cannot speak out?

Transcript of Oral Argument at 10, *Fisher*, 133 S. Ct. 2411 (2013) (No. 11-345). The University's attorney affirmed, "[W]hat we look to, and we think that courts can review this determination, one, we look to feedback directly from students about racial isolation that they experience. Do they feel like spokespersons for their race." *Id.* at 46.

169. *See* Brief of Amicus Curiae the American Psychological Association in Support of Respondents at 5–11, *Fisher*, 133 S. Ct. 2411 (2013) (No. 11-345).

170. *Id.*

171. *Id.* at 8.

172. *Id.* at 8–10

non as "tokenism."[173] The American Psychological Association (APA) reports, "Tokenism heightens the undue attention paid to minorities, fosters stereotyping, and reduces perceptions of individuality. Further, tokenism can foment social stigma and inhibit student achievement."[174] The effects of tokenism are not just theoretical, but rather, they are substantive and real for students of color at racially isolated campuses. Chrystal James, one of only two black students in her class at UCLA Law, describes:

> I remember being upset almost every single day . . . I remember students feeling free enough that when anything was mentioned about color, to turn in their seat and stare at me . . . I had students sit there and turn to me, and stare at me, to wait for my reaction . . . I remember Lena [the other Black student] getting up and leaving the classroom, running out crying.[175]

Racial isolation can also preclude a sense of belonging for students of color.[176] The APA explains:

> Isolated members of minority groups also "experience relatively greater uncertainty about their belonging in school." This uncertainty can be detrimental to "well-being and performance," and it can ultimately discourage students from persisting in an academic setting. However, when minority students experience a greater sense of belonging and less sensitivity to racial rejection, their interpersonal relationships improve and they achieve higher grade point averages throughout college.[177]

Even worse, daily experiences of discrimination can exacerbate a sense of unbelonging.[178] Research shows that students in racially isolated settings face increased overt and implicit discrimination.[179] For example, Marky Keaton, one of only five black students in his first-year class at UCLA Law, illustrates such discrimination in describing an incident from law school:

> One day I was approached in the law school courtyard by a couple of UCLA campus police officers. One of the officers insisted repeatedly that I specifically had been identified by a student as being in the vi-

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173. *Id.* at 10.

174. *Id.* (footnote omitted).

175. Brief of Amici Curiae UCLA School of Law Students of Color in Support of Respondents at 6, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) (alterations in original) (quoting Jodie-Marie Masley, *Testimony of Chrystal Blossom James*, 12 BERKELEY LA RAZA L.J. 433, 436 (2001)).

176. *See* Brief of Amicus Curiae the American Psychological Association in Support of Respondents, *supra* note 169, at 8–9.

177. *Id.* at 9 (footnotes omitted) (quoting Gregory M. Walton & Geoffrey L. Cohen, *A Brief Social-Belonging Intervention Improves Academic and Health Outcomes of Minority Students*, 331 SCIENCE 1447, 1448 (2011)).

178. *See* Brief of the American Educational Research Association et al. as Amici Curiae in Support of Respondents, *supra* note 165, at 20–21.

179. *Id.*

> cinity when some money was allegedly stolen from her two days earlier. Of course, when I asked the officer if the girl had said my name, he said no. Instead, she had merely described a Black male with white shoes and a long sleeve shirt. Apparently, since I'm one of the only Black males walking around this school, this was enough for the officer to say affirmatively that I was the male she had identified. It was around lunchtime so there were a lot of students in the courtyard who witnessed the incident. I was absolutely humiliated. I had been trying hard to fit in with the rest of my classmates and to get them to see me as more than just "the Black man in the class." Because I was the only Black man in the class, I felt that the police singled me out. I also felt like the other students were looking at me as if I was guilty. I was so emotionally distraught that I was not even able to go to class that day. It will be a long time before I am ever comfortable in the law school environment again.[180]

As one can see, racial isolation can have very damaging and lasting effects on students of color. These consequences not only affect students emotionally but also academically.[181] James describes how upsetting and uncomfortable it was for her to attend class, while Keaton describes how the effects of racial isolation made him unable to go to class.[182] If students of color are distracted in class or incapable of attending class, they will suffer academically. Not only that, but racial isolation arguably exacerbates other harms (discussed herein) at race-neutral colleges.

B. Stereotype Threat

One of the most well researched effects of racial isolation is stereotype threat.[183] "Stereotype threat is the pressure that people feel when they fear that their performance could confirm a negative stereotype about their [racial] group," and as a result, "[t]his pressure manifests itself in anxiety and distraction that interferes with intellectual functioning."[184] This causes some students of color to not perform to their true academic potential on exams, resulting in test scores and grades that of-

180. Brief of Amici Curiae UCLA School of Law Students of Color in Support of Respondents, *supra* note 175, at 7–8 (quoting testimonial of Marky Keaton, UCLA School of Law, Class of 2003).

181. Brief of Amicus Curiae the American Psychological Association in Support of Respondents, *supra* note 169, at 8–9 ("Social isolation also makes underrepresented minorities especially vulnerable to psychological impediments to performance. . . . Solo status 'lead[s] racial minorities to construe the self in terms of race and to perceive being seen as a race representative,' which can hinder intellectual performance." (quoting Denise Sekaquaptewa et al., *Solo Status and Self-Construal: Being Distinctive Influences Racial Self-Construal and Performance Apprehension in African American Women*, 13 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 321, 326 (2007))).

182. *See* Brief of Amici Curiae UCLA School of Law Students of Color in Support of Respondents, *supra* note 175, at 6–8.

183. *See* Brief of Experimental Psychologists as Amici Curiae in Support of Respondents at 6, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (No. 11-345).

184. *Id.* at 3.

ten underestimate their knowledge or ability.[185] Increasing the number of students of color in the classroom and on campus reduces stereotype threat because students of color are less likely to feel as though they are representing their racial group.[186]

Stereotype threat is "one of the most widely studied topics of the past decade in social psychology," and "a large body of work now testifies to the reliability and generalizability of stereotype threat effects on performance."[187] Claude Steele and Joshua Aronson were the first to test stereotype threat under laboratory conditions.[188] Steele and Aronson gave the same test to groups of black and white students at Stanford University under two different conditions.[189] In one setting, researchers told students that the test was an evaluation of their intellectual ability, and in the other, researchers told students that the test was a mere problem-solving task.[190] Under the first condition, black students performed considerably worse than white students with the same incoming SAT scores.[191] Under the second condition, however, in which researchers told students it was a mere problem-solving exercise, black students performed significantly better, almost closing the racial achievement gap.[192] Steele and Aronson concluded that black students under the first condition "became anxious that a poor performance could seem to confirm the negative stereotype of intellectual inferiority, and this anxiety disrupted their test performance."[193]

Subsequent research has shown that stereotype threat also applies to other groups, including Latino students,[194] women on math tests,[195] and even white men, when researchers gave them a math test and told them that their performance would be compared to Asian men.[196] Interestingly, whites also succumb to stereotype threat when given tasks where they

185. *Id.* at 3–5.

186. Brief of Amicus Curiae the American Psychological Association in Support of Respondents, *supra* note 169, at 8.

187. Toni Schmader et al., *An Integrated Process Model of Stereotype Threat Effects on Performance*, 115 PSYCHOL. REV. 336, 336 (2008).

188. *See* Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 797–99 (1995).

189. *See id.* at 799.

190. *See id.*

191. *See id.* at 800.

192. *See id.*

193. Brief of Experimental Psychologists as Amici Curiae in Support of Respondents, *supra* note 183, at 8.

194. *See* Patricia M. Gonzalez et al., *The Effects of Stereotype Threat and Double-Minority Status on the Test Performance of Latino Women*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 659, 666 (2002).

195. *See* Diane M. Quinn & Steven J. Spencer, *The Interference of Stereotype Threat with Women's Generation of Mathematical Problem-Solving Strategies*, 57 J. SOC. ISSUES 55, 57–58 (2001); Steven J. Spencer et al., *Stereotype Threat and Women's Math Performance*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 4, 16–17 (1999).

196. *See* Joshua Aronson et al., *When White Men Can't do Math: Necessary and Sufficient Factors in Stereotype Threat*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 29, 34–40 (1999).

are concerned with corroborating the stereotype that whites are racists.[197] Another study showed that under the threat of appearing racist, white participants distanced themselves more from black conversation partners.[198] Thus, although it seems counterintuitive, whites behave in more stereotype-affirming ways (racist) when they are concerned with appearing racist.[199]

Stereotype threat occurs because the task at hand and concerns of being viewed stereotypically divide the student's attention.[200] In an amicus brief filed in *Fisher*, experimental psychologists explain the cognitive effects of stereotype threat:

> Research finds that anxiety about negative stereotypes can trigger physiological changes in the body and the brain (especially an increased cardiovascular profile of threat and activation of brain regions used in emotional regulation), cognitive reactions (especially a vigilant self-monitoring of performance), and affective responses (especially the suppression of self-doubts). These effects all divert cognitive resources that could otherwise be used to maximize task performance.[201]

It is important to note that students do not need to believe that the stereotype is true, but rather only know that the stereotype exists and care about their performance.[202]

Some may argue that stereotype threat does not exist within the college setting because students are not primed in the same way that they are in the laboratory setting.[203] Studies have shown, however, that even subtle communication of low expectations can result in stereotype threat effects.[204] This is especially concerning for students of color at race-

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197. *See* Cynthia M. Frantz et al., *A Threat in the Computer: The Race Implicit Association Test as a Stereotype Threat Experience*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1611, 1621 (2004).

198. *See* Phillip Atiba Goff et al., *The Space Between Us: Stereotype Threat and Distance in Interracial Contexts*, 94 J. PERSONALITY & SOC. PSYCHOL. 91, 104 (2008).

199. Considering that race-neutral colleges (largely white institutions made up of white leaders) are concerned with not appearing racist (see conversation earlier in this part about colleges over representing and photo-shopping in students of color in promotional material), I would hypothesize that race-neutral colleges suffer from white stereotype threat and exacerbate racial hostilities for students of color.

200. *See* Brief of Experimental Psychologists as Amici Curiae in Support of Respondents, *supra* note 183, at 10.

201. *Id.* (citing Schmader et al., *supra* note 187, at 342–46; Toni Schmader & Michael Johns, *Converging Evidence that Stereotype Threat Reduces Working Memory Capacity*, 85 J. PERSONALITY & SOC. PSYCHOL. 440, 451 (2003)).

202. *Id.* at 4.

203. *See* Joshua Aronson & Thomas Dee, *Stereotype Threat in the Real World*, *in* STEREOTYPE THREAT: THEORY, PROCESS, AND APPLICATION 264, 264–65 (Michael Inzlicht & Toni Schmader eds., 2011).

204. *See e.g.* Michael Inzlicht & Talia Ben-Zeev, *A Threatening Intellectual Environment: Why Females are Susceptible to Experiencing Problem-Solving Deficits in the Presences of Males*, 11 PSYCHOL. SCI. 365, 369–70 (2000); Jessi L. Smith & Paul H. White, *An Examination of Implicitly*

neutral schools, considering one of the studies[205] discussed earlier in this Article, *supra* Section III.B, regarding the expectations of professors. When asked if professors had lower expectations of students of color compared to their white peers, "[o]ne-third of students attending schools in states that ban race-based admissions answered 'yes' while only one-fifth of students in affirmative action states answered affirmatively."[206] Believing that a professor has lower expectations for students of color would certainly be a primer for stereotype threat.

Admittedly, students of color face stereotype threat at all types of colleges, but stereotype threat is arguably more likely to occur at race-neutral colleges because those educational settings have smaller percentages of students of color. Just look to the study discussed earlier in this Article, *supra* Section III.B.[207] When researchers asked students of color whether they "felt pressure to prove themselves academically because of their race," there was a statistically significant result: "Almost three-fourths of students in states that *bar* race-based admissions reported feeling pressure to prove themselves because of their racial group membership compared to less than half of students who attend schools with race-based admissions."[208] This is an expected result when considering the dismal percentages of students of color at race-neutral colleges. Psychologists agree that "[o]ne way to mitigate stereotype threat is to provide a racially diverse environment, so that minority students do not feel that they are seen or evaluated as representatives of their group."[209] Until race-neutral colleges are able to create racially diverse campuses, where students of color do not feel pressure to represent their race, stereotype threat will continue to harm students of color on race-neutral campuses.

C. Racial Microaggressions

Another cost of attending race-neutral colleges has to deal with intense racial microaggressions on campus.[210] Racial microaggressions are a form of unconscious racism that is pervasive on college campuses.[211]

Activated, Explicitly Activated, and Nullified Stereotypes on Mathematical Performance: It's Not Just a Woman's Issue, 47 SEX ROLES 179, 179–81 (2002).

205. Bowen, *supra* note 92, at 1224–25.

206. *Id.* at 1224. 31.5% of students of color at race-neutral colleges reported faculty members had lower expectations of them compared to their white counterparts; compared to 19.2% of students of color from race-conscious colleges. *Id.* at 1222. These results were statistically significant.

207. *Id.* at 1220.

208. *Id.* at 1223 (emphasis added). 74.1% of students of color at race-neutral colleges reported feeling pressure to prove themselves academically because of race; compared to 40.5% of students of color from race-conscious colleges. *Id.* at 1222.

209. Brief of Experimental Psychologists as Amici Curiae in Support of Respondents, *supra* note 183, at 2–3; *see also* Brief of Amicus Curiae the American Psychological Association in Support of Respondents, *supra* note 169, at 8–9.

210. *See* Daniel Solórzano et al., *Critical Race Theory, Racial Microaggressions, and Campus Racial Climate: The Experiences of African American College Students*, 69 J. NEGRO EDUC. 60, 60, 62–63 (2000); Tanzina Vega, *Everyday Slights Tied to Race Add Up to Big Campus Topic*, N.Y. TIMES, Mar. 22, 2014, at A1.

211. Solórzano et al., *supra* note 210, at 60.

They are essentially "subtle insults (verbal, nonverbal, and/or visual) directed toward people of color, often automatically or unconsciously."[212] Students of color face various racial microaggressions on an almost daily basis—"[e]xamples of typical microaggressions include being ignored for service, assumed to be guilty of anything negative, treated as inferior, stared at due to being of color, or singled out in a negative way because of being different."[213] Racial microaggressions are difficult to address because they often lack intentionality, but the effects of racial microaggressions can be devastating in creating a hostile learning environment for students of color. Although racial microaggressions happen all the time and in various settings, race-neutral colleges have an especially difficult time in responding to these acts of unconscious racism because they are confined to colorblind solutions and norms.

A perfect example of a notable microaggression happened at UCLA School of Law in the fall of 2013.[214] For an upcoming 1L section softball game, students in Professor Sander's property class decided to make t-shirts that read "Team Sander" with a picture of Sander's face.[215] Sander's section was the only 1L section that created t-shirts and wore them to class, so when other students saw the shirts, they had no clue that the section had created the shirts for purposes of a softball game.[216] Instead, many students assumed that the shirts were in reference to Sander's scholarship and opinions of mismatch and stigma theories.[217] Justifiably, the t-shirts greatly offended several students of color and allies.[218] Students of color interpreted the t-shirts as saying that they did not belong at the law school.[219] Reanne Swafford, a black law student, posted a picture of a student wearing the shirt on her Facebook page with the following caption:

> So this is happening at the law school today . . . yes he & other 1Ls are wearing shirts that say "Team Sander" as in Richard Sander - - UCLA faculty who believes Black students can "neither learn nor compete effectively" at institutions such as UCLA. Thanks colleagues for yet ANOTHER signal of how I don't "belong" here.[220]

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212. *Id.*

213. Daniel Solórzano et al., *Keeping Race in Place: Racial Microaggressions and Campus Racial Climate at the University of California, Berkeley*, 23 CHICANO-LATINO L. REV. 15, 16–17 (2002).

214. *See* Elie Mystal, *Racists' T-Shirts on Campus? Only If You Bother to Think About It*, ABOVE THE LAW (Nov. 22, 2013, 1:05 PM), http://abovethelaw.com/2013/11/racists-t-shirts-on-campus-only-if-you-bother-to-think-about-it/; *Are You on Team Sander?*, ABOVE THE LAW (Nov. 22, 2013, 5:18 PM), http://abovethelaw.com/2013/11/are-you-on-team-sander/.

215. Mystal, *supra* note 214.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. Reanne Swafford-Harris, FACEBOOK (Nov. 20, 2013), https://www.facebook.com/reanne.swafford.

Online coverage of the incident shared the same sentiment. On *Above the Law*, a popular website covering all things related to law school and the legal profession, one contributor wrote in response to the incident:

> In any event, if you are a 1L wearing a "Team Sander" t-shirt, you are making a pretty bold statement about how you view your African-American classmates. It's not as overt as walking around in a pointy hood. But it's a pretty ballsy statement on a campus full of educated black people. Black law students know that Richard Sander doesn't think they belong.[221]

Although some of the students wearing the shirts knew of Sander's scholarship and the effects that wearing the shirts might have on other students, Sander's section was able to go unpunished and hide behind unintentionally.[222] Because they could argue that the primary intention was to show support for the upcoming softball game, others could not accuse them of racism. Regardless of intentionality, however, the effects were still the same—the shirts were highly offensive to students of color and allies, and the microaggression contributed to a hostile learning environment.[223] This example also shows the difficulty in responding to microaggressions.[224] The contributor covering the "Team Sander" story on *Above the Law* explained, "All you can do in response to a microaggres-

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221. Mystal, *supra* note 214.

222. *See id.*; Elie Mystal, *Racism at UCLA is Slightly Out of Control*, ABOVE THE LAW REDLINE (Feb. 26, 2014, 4:20 PM), http://www.atlredline.com/racism-at-ucla-is-slightly-out-of-control-1531867754.

223. Another effect of this incident will be prospective students of color deciding not to apply or attend UCLA Law. On *Top-Law-Schools*, a website focusing on law school admissions, the "Team Sander" story hit the Underrepresented Minority 2013-2014 Cycle Thread. In response to the story, there were numerous posts regarding not even applying to UCLA Law. Some of them include:

- "I might not need to consider UCLA if this is the norm." toshiroh (Nov. 25, 2013, 9:30 PM);
- "Yeah I'm probably gonna save my little dollars and not apply there." mandyjay11 (Nov. 25, 2013, 10:49 PM);
- "I really hope black ppl stop applying to this school. I wouldn't even feel comfortable being there . . . . you can count the diversity on one hand." NanaP (Nov. 25, 2013, 11:44 PM);
- "I can't imagine the stress of finals compounded with racial BS. UCLA seems like a toxic environment for African Americans." californiauser (Nov. 26, 2013, 12:23 AM);
- "UCLA is a great school . . . but this is too much even for me. There's simply too much hostility with too much formal backing out way too far in the open for me to tolerate. I couldn't imagine spending money to apply there, much less fly across the country and attend." Futuregohan14 (Nov. 26, 2013, 12:45 AM).

URM 2013-2014 Cycle Thread, TOP-LAW-SCHOOLS.COM, http://www.top-law-schools.com/forums/viewtopic.php?f=14&t=211454&st=0&sk=t&sd=a&start=3125 (last visited Nov. 24, 2015).

224. For a better response to a racial microaggression on another campus, see Peter Jacobs, *Two Kenyon Students Offered an Incredibly Sincere and Thoughtful Apology After Accusations of Racial Insensitivity*, BUS. INSIDER (Nov. 25, 2013, 5:44 PM), http://www.businessinsider.com/two-kenyon-students-offered-an-incredibly-sincere-and-thoughtful-apology-after-accusations-of-racial-insensitivity-2013-11#ixzz2mZVBQjX4 (reporting on an apology given to the entire student body by two students who wore white sheets intending to dress up as ghosts, but mistakenly interpreted to be KKK members).

sion is bitch, and hope that one day people in the majority don't ignore you just because they're not personally affected by your struggles."[225]

Racial microaggressions also translate into very serious costs for students of color.[226] In their study of racial microaggressions, Professors Daniel Solórzano, Miguel Ceja, and Tara Yosso found, "The sense of discouragement, frustration, and exhaustion resulting from racial microaggressions left some African American students in our study despondent and made them feel that they could not perform well academically."[227] Additionally, racial microaggressions are particularly problematic at race-neutral colleges because these campuses endorse colorblind policies.[228] Although white students and faculty cannot explicitly or intentionally discriminate against students of color, the school may have a more difficult time in encouraging interracial interactions or addressing microaggressions.[229] Colorblind notions attempt to avoid the recognition of race, and thus, any school policy or program that recognizes race may be considered suspect. Solórzano, Ceja, and Yosso report that black students highly valued "counter-spaces" as a response to racial microaggressions.[230] Counter-spaces are places where black students can receive validation and emotional and academic support;[231] for example, a Black Student Union or a Black Law Students Association. Unfortunately, creating exclusive spaces for black students can prove to be problematic at race-neutral schools.[232] Under colorblindness, opponents can equate counter-spaces for black students to preferential or special treatment.[233]

225. Mystal, *supra* note 214.

226. *See* Solórzano et al., *supra* note 210, at 69 ("Racial microaggressions in both academic and social spaces have real consequences, the most obvious of which are the resulting negative racial climate and African American students' struggles with feelings of self-doubt and frustration as well as isolation. This means that the African American students on the campuses studied must strive to maintain good academic standing while negotiating the conflicts arising from disparaging perceptions of them and their group of origin. Additionally, they must navigate through a myriad of pejorative racial stereotypes that fuel the creation and perpetuation of racial microaggressions.").

227. *Id.*

228. *See* discussion *supra* Section I.B.

229. *See* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1285–86 (2000) ("Under a colorblind norm, whites cannot intentionally discriminate against people of color based on race. They cannot use racial slurs or otherwise engage in over racial conduct that creates a hostile work environment for people of color. The colorblind idea does not, however, place an affirmative duty on whites to interact with people of color, or a negative duty to dissociate and disidentify themselves from other whites.").

230. *See* Solórzano et al., *supra* note 210, at 70; *see also* Meera E. Deo, *Separate, Unequal, and Seeking Support*, 28 HARV. J. ON RACIAL & ETHNIC JUST. 9, 47 (2012).

231. *See* Solórzano et al., *supra* note 210, at 70.

232. *See* Christopher Metzler, *Banning Affinity Groups Shows Lack of Understanding*, DIVERSE: ISSUES IN HIGHER EDUC. (Apr. 29, 2008), https://diverseeducation.wordpress.com/2008/04/29/banning-affinity-groups-shows-lack-of-understanding/ (discussing Arizona legislators attempts to ban affinity groups on college campuses).

233. *See id.* ("In the Ward Connerly tradition, [banning affinity groups] is an attempt to move to further advance the ideological argument that American college campuses should be color-blind and that the presence of organizations formed by students of color on campuses threaten[s] the myth of color blindness.").

D. Identity Performance

Identity performance is the way in which people of color negotiate and present their identity in order to fit in at predominately white institutions.[234] Most of the scholarship in this area relates to workplace antidiscrimination law,[235] however, it is a small step to transport that argument to students of color in higher education—students of color often face the same costs of identity performance while in college (largely white institutions).[236] Students of color at race-neutral colleges, which often lack a critical mass of one or more racial groups, are likely to feel subject to negative stereotypes[237] that result in "the need to do significant amounts of 'extra' identity work to counter those stereotypes."[238] This extra work takes away energy and focus that students of color might otherwise use towards studying.[239] In competitive settings, such as law schools that use a curved grading system,[240] white students have an advantage because the costs of identity performance do not distract them. White norms predominate the academy, and therefore, white students do not need to adjust their identity performance to succeed.[241]

The costs of identity performance are both physically expressive and internalized. For instance, there are grooming costs in which students of color must present themselves in a way that is socially acceptable to whites.[242] This could include a black woman straightening her hair, instead of wearing it naturally.[243] This could also include a Latino student trading in his comfortable basketball shorts for slacks out of fear that his peers and professors will not take him seriously. Other expressive costs are language and accent.[244] Often, students of color must change the way they speak to adapt to white vernacular, or hide a certain accent as much as possible, out of concern for being considered intellectually inferior. In

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234. *See, e.g.*, DEVON W. CARBADO & MITU GULATI, ACTING WHITE?: RETHINKING RACE IN "POST-RACIAL" AMERICA 1–4 (2013); KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS ix–xii (2006); Carbado & Gulati, *supra* note 229, at 1262; Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 879 (2002).

235. *See* Carbado & Gulati, *supra* note 229, at 1261–63, 1276–77.

236. *See* Bowen, *supra* note 92, at 1237–40.

237. *See* discussion *supra* Section IV.B.

238. Carbado & Gulati, *supra* note 229, at 1262.

239. *See id.* ("Depending on the context, that extra work may not only result in significant opportunity costs, but may also entail a high level of risk.").

240. LANI GUINIER ET AL., BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE 2 (1997) ("Because law school's educational mission is so intertwined with the goal of selecting students for entry into a competitive profession, much of its pedagogy, including examination formats, is designed to rank students. The idea is that those who succeed in this highly competitive and individualistic culture will do well as lawyers.").

241. *See* Bowen, *supra* note 92, at 1238 ("Minority students are asked to assimilate to white codes of conduct. They are asked to examine their behavior for white conformity.").

242. *See* Yoshino, *supra* note 234, at 889–96.

243. *See, e.g.*, Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079, 1112–15 (2010).

244. *See* Yoshino, *supra* note 234, at 896–900; *see also* CARBADO & GULATI, *supra* note 234, at 47–67.

this way, identity performance can be both monetarily and psychologically costly.

The internal costs of identity performance can be much harder to quantify. Internal identity performance "might be referred to as compromising moments of identity performance—moments in which a person's performance of identity contradicts some political or social image that person has of herself."[245] For example, a student of color might hear a joke or comment that she finds racist. Instead of pointing out the offense, she might just laugh along with the rest of the group out of fear of appearing overly sensitive or a bitch.[246] Nevertheless, the student of color may continue to feel angry or uncomfortable because she must hide her true opinions.

Race-neutral colleges particularly exacerbate the costs of identity performance because these environments practice and promote colorblindness.[247] When colorblindness is the institutional norm, students of color bear the burden of conforming to or maintaining colorblindness.[248] Colorblind norms work one-directionally in that whites are free to perform their identity without consequences because the colorblind status quo is based off of white norms;[249] whereas, students of color are forced to think about and adjust their identity performance to the white hegemonic norms of colorblindness.[250] Additionally, identity performance primarily caters to white students in making them feel comfortable in being around students of color.[251] Students of color must adjust and adapt (do the work of identity performance) so that white students will feel at

245. Carbado & Gulati, *supra* note 229, at 1289.

246. *See id.* at 1290–91.

247. *See* discussion *supra* Section I.B.

248. *See* Carbado & Gulati, *supra* note 229, at 1279 ("[T]he pervasiveness of a colorblind institutional norm might shape how an outsider attorney interacts with and performs his identity for insider associates. To the extent that an institution expects its workplace culture to be colorblind, people of color bear the brunt of the burden of maintaining this colorblindness. The reason is that the question of whether the workplace is colorblind will turn primarily on the racial associations that people of color (per)form at work, assuming few, if any, acts of intentional race discrimination will occur.").

249. *See* discussion *supra* Section I.B.

250. Carbado & Gulati provide an example of this in phenomenon in discussing associations among colleagues at colorblind workplaces:

> The colorblind norm does not require whites to avoid other whites or to associate with people of color. This norm does, however, require people of color to avoid other people of color (the negative racial duty) and to associate with whites (the affirmative racial duty). In fact, the colorblind norm operates as a color conscious burden. Colorblindness, therefore, does not actually mean colorblindness. Specifically, it racially regulates the workplace association of people of color, but not those of white people. A colorblind workplace norm requires people of color, but not white people, to think and be careful about their racial associations. The question of whether the workplace norm of colorblindness is violated turns on whether people of color associate with each other or with whites. Consequently, white-with-white and white-with-people-of-color associations are perceived as colorblind. People of color-people-of-color associations are not.

Carbado & Gulati, *supra* note 229, at 1287–88 (footnotes omitted).

251. *See id.* at 1288.

ease.[252] Identity performance also reminds students of color that "they are outsiders who must be socialized into the institution."[253]

E. Racial Labor

Another phenomenon that I witnessed during law school is the additional work performed by students of color, which I have called racial labor. Racial labor is extra work that colleges ask students of color to perform, but not white students. For example, in an effort to convince prospective black students to attend the college, the admissions office may ask a black student to perform additional recruiting activities. This could entail meeting with the prospective student, hosting her for an overnight stay, or conducting campus tours. Although the admissions office may also ask white students to perform these recruiting tasks, white students do not feel the added pressure to do the recruiting efforts because there are plenty of other white students who can do it. Whereas, the black student feels pressure to do the recruiting activities because she knows that there are only a few black students on campus. In addition, the black student may feel that it is her responsibility to increase black student enrollment since she is just one of a few black students.

Another example of racial labor is the public relations office asking students of color to pose for promotional materials. As discussed earlier, college promotional materials disproportionately represent students of color.[254] Although some of these photos are candid shots taken at various events, many others are staged photo shoots that take a student's time away from her studies. Again, no one forces students of color to take part in this work, but they may feel pressure to do it. For example, I have a friend of color who received a scholarship from his law school.[255] The school was developing materials to send to donors to encourage scholarship donations, and of course, the school wanted to represent a diverse student body of scholarship recipients. My friend reported that he felt pressured to do the photo shoot as a gesture of gratitude and out of concern for renewing his scholarship for the following year.[256] Although a school may also ask white students to perform this type of work, schools ask students of color at disproportionate rates so that schools appear more diverse.[257]

Another form of racial labor is the school asking students of color to address issues of diversity or enhance diversity efforts on campus. For illustration, on the day of the "Team Sander" incident, discussed *supra*

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252. *See id.*
253. Bowen, *supra* note 92, at 1238.
254. *See supra* note 160 and accompanying text.
255. This was a classmate of mine at UCLA School of Law.
256. My friend did in fact participate in the photo shoot, and UCLA Law prominently featured him in development materials.
257. *See* Jaschik, *supra* note 160.

Section IV.C, I was in the library studying for my next class when one of my professors called me. She said that she was reaching out to student leaders who could spread the word that there would be a meeting the next day to discuss the matter. I believed that the school community needed to address this racial incident, so I felt that it was my duty as a student of color to help galvanize students to attend the meeting. Thus, instead of reading for my next class, I drafted an email to my fellow classmates and responded to their questions. This was an act of racial labor.

Racial labor occurs at all colleges, but the work is likely to be more of a burden at race-neutral colleges in which there are fewer students of color to do the work. When schools lack a critical mass, there is an enhanced pressure to perform racial labor because students know that there is not an abundance of students of color to share the workload.

V. RACE-CONSCIOUS COLLEGES INCREASE THE VALUE OF A DEGREE FOR STUDENTS OF COLOR

This part argues that, to a student of color, a degree from a race-conscious college is actually worth more than a degree from a race-neutral college. As discussed in the previous part, the costs of attending a race-neutral college have very serious academic harms. These real academic consequences translate into economic harms. If a student attends a race-neutral college with few students of color, the chances of racial isolation, stereotype threat, racial microaggressions, identity performance, and racial labor are immense. Students of color at race-neutral colleges must feel like a representative or a spokesperson for their race, and they likely feel uncomfortable in class and on campus.[258] As a result, students of color at race-neutral schools probably perform worse than had they attended a race-conscious school, where the costs discussed above would not be as prominent. Therefore, higher academic performance at a race-conscious school would likely transfer into better job opportunities, making the race-conscious degree worth more in both economic and intrinsic value.

Additionally, even when students of color attend colleges that ban affirmative action, they still face the costs of stigma and assumptions that they do not deserve to be there.[259] After the "Team Sander" incident, discussed *supra* Section IV.C, Reanne Swafford, a black second-year law student, posted this comment to her Facebook page:

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258. *See supra* Section IV.A.

259. *See* Alexia Boyarsky, *Findings by Law Professor Suggest That UCLA Admissions May Be Violating Prop 209*, DAILY BRUIN (Oct. 23, 2012, 1:21 AM), http://dailybruin.com/2012/10/23/findings-by-law-professor-suggest-that-ucla-admissions-may-be-violating-prop-209/.

> To attend a public institution as a minority student in a state that banned Affirmative Action, your merits and accomplishments are still diminished because you are told by some professors and peers that you do not belong here. Everyday you live and carry the added pressure of 'proving yourself' when your white colleagues simply do not.[260]

Two studies support this sentiment, discussed *supra* Section III.B, which found that students of color face stigma at equal or higher levels at race-neutral schools.[261]

A few years ago, Sander produced a report positing that UCLA was violating Prop 209 by accepting less qualified students of color based on their lower holistic admissions scores (as compared to white students).[262] In an interview with the UCLA student newspaper, *The Daily Bruin*, Sander contends, "'What seems to be happening is that there is discrimination [against white applicants] after the holistic scores are generated' .... '(Admissions officials) seem to be making discriminatory decisions with lots of black and Hispanic students with poor holistic scores being admitted.'"[263] The article also cited a study published by UCLA sociology Professor Robert Mare, who makes the same contention that "the university admitted more than 100 black students who would not have been admitted based on the holistic admissions process alone."[264] The article points out that this is around one-third of the total number of admitted black students.[265] Mare states, "There are some extra African-American students on campus that we can't account for ...."[266]

Importantly, scholars have since discredited Sander's methodology in drawing his conclusions.[267] Even still, this type of rhetoric only perpetuates stigmatic harms against students of color and, in particular, black and Latino students. In a statement in response to the news article, a coalition of various student organizations described the article as "making the broader statement that certain communities of color do not deserve to be on this campus."[268] The numerous comments left on the arti-

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260. Reanne Swafford-Harris, FACEBOOK (Nov. 22, 2013), https://www.facebook.com/reanne.swafford.

261. *See* Bowen, *supra* note 92, at 1223–25; Onwuachi-Willig et al., *supra* note 3, at 1343.

262. *See* RICHARD SANDER, THE CONSIDERATION OF RACE IN UCLA UNDERGRADUATE ADMISSIONS 6 (2012), http://www.seaphe.org/pdf/uclaadmissions.pdf.

263. Boyarsky, *supra* note 259 (second alteration in orginal).

264. *Id.* (quoting statement by Professor Robert D. Mare, UCLA); *see also* ROBERT D. MARE, HOLISTIC REVIEW IN FRESHMAN ADMISSIONS AT UCLA 74–75 (2012), http://www.senate.ucla.edu/committees/cuars/documents/UCLAReportonHolisticReviewinFreshmanAdmissions.pdf.

265. *See* Boyarsky, *supra* note 254.

266. *Id.* (quoting statement by Professor Robert D. Mare, UCLA).

267. Ricardo Vazquez, *External Reviews Cast Doubt on UCLA Professor's Analysis of Campus Admissions Practices*, UCLA NEWSROOM (Feb. 25, 2013), http://newsroom.ucla.edu/stories/two-external-reviews-cast-doubt-243753.

268. *'How Close to Zero Do They Want Us to Get?' Students of Color Under Attack! We Will Not Be Silenced!*, LA GENTE (Oct. 26, 2012), http://lagente.org/?p=4100.

cle's *Daily Bruin* website only support this contention. One online user, going by the name Elizabeth Warren, questions whether President Obama deserved to go to Harvard Law:

> We need to STOP AFFIRMATIVE ACTION. Barack Obama got into Harvard Law despite being a mediocre student. He didn't even graduate with honors from undergrad and he only applied to Harvard, Stanford, and Yale, and Columbia Law school. Which student applies only to those schools even with a low GPA? Answer: A minority who is playing the system.[269]

Another commenter posts, "As an American, I don't care what a student's race is, as long as they *earned* their spot. That's the point of [Sander's] work: UCLA is making admissions decisions off of race when it appears to be impossible to sort by merit . . . ."[270] One more writes, "We need diversity on campus to bring those midterm/final curves down!"[271] These types of comments go on for pages, but the point is that even at UCLA, which is under an affirmative action ban, people still make students of color feel as though they do not deserve to be there. One black student, going by BlackBruin, felt the need to defend his place at UCLA by commenting, "I have a 3.7 GPA, I study well."[272]

Considering students of color at race-neutral colleges still encounter claims that they do not deserve to be there, the supposed costs of race-conscious admissions (in particular, stigma) are not really costs of affirmative action. The stigmatization of students of color is prevalent in all educational settings because of racist notions of inferiority. Thus, the stigma problem is not affirmative action; the problem is racism.[273] Moreover, if students of color have to face the cost of stigma at both race-neutral and race-conscious colleges, then clearly the benefits of a race-conscious college are going to outweigh the costs because the stigma costs are present in both settings.

As for the mismatch theorists who contend that students of color at race-conscious colleges are not prepared to adequately compete with their more qualified colleagues (presumably admitted based on nonracial factors), a race-conscious college experience is still worth more than facing the harms exacerbated at race-neutral colleges. Although I disagree with the underlying assertion made by mismatch theorists, for the purposes of this Article, I will suppose that mismatch is valid. The proposed harms of mismatch are that students of color at race-conscious schools will place at the bottom of their class because they are not quali-

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269. Boyarsky, *supra* note 259.
270. *Id.*
271. *Id.*
272. *Id.*
273. *See* WILSON, *supra* note 75, at 151 ("But it is racism, not affirmative action, that stigmatizes minorities.").

fied for the rigors of the university. As the APA explains, however, "The academic mismatch hypothesis . . . ignores alternative explanations for minority underperformance in certain academic settings, such as stereotype threat and uncertainty about belonging."[274] Mismatch theorists fail to recognize that students of color at race-neutral schools still have to confront threats of underachievement because of intensified harms at race-neutral schools that affect academic performance.

In addition, race-conscious schools can provide targeted academic support or opportunities to students of color if they are truly concerned with mismatch. Whereas, a race-neutral college will be required to remain colorblind and may have a more difficult time in directly addressing concerns for students of color. For instance, mismatch theorists would contend that mismatch prevents students of color from effectively competing for law review membership at highly selective law schools. If a law review wanted to increase members of color, a race-neutral college cannot consider race in the application process nor can they directly recruit or provide extra training to students of color.[275] If a race-conscious college were in the same position, however, they could easily consider race during the application and recruiting process. Some may contend that people will stigmatize law review members of color at race-conscious schools as not qualified for law review membership. Nevertheless, as discussed above, law review members of color are assumed unqualified even at race-neutral schools. As a former law review member of color at a race-neutral law school, I can attest that each year there are always rumblings that the law review favors students of color. Even though the law review forbids the consideration of race and only a small handful of students of color even make the law review,[276] others still questioned whether the students of color "deserved" to be on law review.[277]

274. Brief of Amicus Curiae the American Psychological Association in Support of Respondents, *supra* note 169, at 31.

275. *See generally* Adriane Kayoko Peralta, *The Underrepresentation of Women of Color in Law Review Leadership Positions*, 25 BERKELEY LA RAZA L.J. 69 (2015).

276. *See* N.Y. LAW SCH. LAW REVIEW, 2012-2013 LAW REVIEW DIVERSITY REPORT 3, 5, 13 (2013), http://www.nylslawreview.com/wp-content/uploads/sites/16/2013/12/Law-Review-Diversity-Report-2013.pdf; David Lat, *Minorities and Women and Law Reviews, Oh My!*, ABOVE THE LAW (Aug. 17, 2010, 1:53 PM), http://abovethelaw.com/2010/08/minorities-and-women-and-law-reviews-oh-my/.

277. My class year at UCLA Law, 55 students made the *Law Review*: one Latino student, one Native American student, one black student, fourteen Asian/Asian American students, and 38 white students. *UCLA Law Review Volume 61 2013-2014*, UCLA L. REV., http://www.uclalawreview.org/?p=4228 (last visited Sept. 11, 2015). Some students thought that this was a high proportion of students of color and there was no way that so many of us made the *Law Review* without race-conscious selection. *See also Law Review and Diversity*, WHO OWNS THE FOX? (Mar. 14, 2008, 1:43 AM), http://uclaw.blogspot.com/2008/03/law-review-and-diversity.html (speculating, in a blog post by an anonymous UCLA alum, whether the *UCLA Law Review* violated Prop. 209 when for the first time all five chief positions are occupied by students of color).

Race-conscious schools are also better situated to address the emotional needs of students of color because colorblind ideals do not influence race-conscious settings. For example, during the fall semester of 2014, the police killings of Michael Brown, Eric Garner, and Tamir Rice affected many students of color. Students of color at Harvard Law School, Columbia Law School, and Georgetown Law Center petitioned school administrators to allow for those affected to postpone their final exams.[278] Columbia granted the students' request and extended deadlines for those affected.[279] Harvard and Georgetown allowed those affected to petition on an individual basis.[280] "Columbia and Harvard also . . . offer[ed] students special sessions with trauma counselors, mental health professionals and professors to talk about the lack of indictments in the Brown and Garner cases."[281] If a race-neutral school were to grant such requests, colorblind activists would certainly accuse them of providing an unearned advantage to students of color and potentially violating bans on considering race.

Meanwhile, during the same time, a professor at UCLA Law drew criticism for using an insensitive prompt during his final exam.[282] Students reported that the exam prompt asked students to write a memorandum to the district attorney "on the constitutional merits of indicting Michael Brown's stepfather for advocating illegal activity when he yelled 'Burn this bitch down,' after [the district attorney] announced the grand jury's decision."[283] The exam question was not only an example of poor judgment on the part of the professor but also displayed how these types of situations unfairly burden students of color. As one reporter puts it, "[T]his particular question places an unfair burden on African-American students to emotionally detach from still-recent acts of essentially legalized terrorism against the African-American community."[284] Shyrissa Dobbins, a law student who took the final exam, said, "Daily I think about Michael Brown and Eric Garner, and I have a challenge. . . . Every day I think about this injustice and how I'm in a law school that won't even make a statement about it."[285] Hussain Turk, another law student

278. Philip Marcelo, *Law Schools Delay Exams for Students Upset by Ferguson, Eric Garner Decisions*, HUFFINGTON POST (Dec. 10, 2014, 9:59 AM), http://www.huffingtonpost.com/2014/12/10/law-schools-exams-ferguson_n_6301282.html.

279. Jacob Gershman, *Columbia Law School Lets Students Postpone Exams Due to Grand Jury Decisions*, WALL ST. J.L. BLOG (Dec. 8, 2014, 1:03 PM), http://blogs.wsj.com/law/2014/12/08/columbia-law-school-lets-students-postpone-exams-due-to-grand-jury-decisions/.

280. Marcelo, *supra* note 278.

281. *Id.*

282. Shreya Maskara, *Law School Exam Question on Ferguson Shooting Draws Criticism*, DAILY BRUIN (Dec. 11, 2014, 2:01 AM), http://dailybruin.com/2014/12/11/law-school-exam-question-on-ferguson-shooting-draws-criticism/.

283. Elie Mystal, *Controversial Exam Question at UCLA Law Sparks Outrage*, ABOVE THE LAW REDLINE (Dec. 9, 2014, 6:00 PM), http://www.atlredline.com/racist-exam-question-at-ucla-law-sparks-outrage-1668856105.

284. *Id.*

285. Maskara, *supra* note 282.

who took the exam, said, "These kinds of questions create a hostile learning environment for students of color, especially black students who are already disadvantaged by the institution."[286]

Race-neutral schools are more susceptible to claims of hostile learning environments for students of color because they are restricted in their ability to respond to racism. Affirmative action bans instill a value system that schools must treat all students the same. These colorblind notions prevent race-neutral schools from adopting policies with the needs of students of color in mind. Race-conscious schools, on the other hand, can target policies and support systems that are particular to students of color. As a result, race-conscious schools can better support students of color.

The costs of stigmatization and mismatch are the same in both race-conscious and race-neutral settings. Race-conscious schools, however, are able to better counterbalance these costs through academic opportunities, support programs, and race-conscious policies. Race-conscious colleges can also consider race when awarding scholarships and financial aid. This is another financial advantage to attending a race-conscious college. Furthermore, the hidden costs of racial isolation, stereotype threat, racial microaggressions, identity performance, and racial labor are greater in race-neutral settings because there are fewer students of color. Considering all of these factors, a student of color has a better chance at thriving at a race-conscious college.

CONCLUSION

Considering what I know now, I second-guess whether I made the right decision by attending a race-neutral law school. I wonder if I might have had a more enjoyable experience or better academic performance at a race-conscious law school with a critical mass of students of color. I certainly know that I have experienced huge costs in attending a race-neutral university, and I know that these costs have translated into lost opportunities (both intrinsic and economic). It is understandable that students of color increasingly prefer race-conscious colleges. A market analysis of the costs and benefits associated lean in favor of race-conscious environments. A degree is simply worth more from a race-conscious college for students of color.

286. *Id.*

CHOICE AT WORK: *YOUNG V. UNITED PARCEL SERVICE*, PREGNANCY DISCRIMINATION, AND REPRODUCTIVE LIBERTY

MARY ZIEGLER†

ABSTRACT

In deciding *Young v. United Parcel Service*, the Supreme Court has intervened in ongoing struggles about when and whether the Pregnancy Discrimination Act of 1978 (PDA) requires the accommodation of pregnant workers. Drawing on original archival research, this Article historicizes *Young*, arguing that the PDA embodied a limited principle of what the Article calls meaningful reproductive choice. Feminist litigators first forged such an idea in the early 1970s, arguing that heightened judicial scrutiny should apply whenever state actors placed special burdens on women who chose childbirth or abortion.

A line of Supreme Court decisions completely rejected this understanding of reproductive liberty. However, choice arguments rejected in the juridical arena flourished in Congress, during debate about the PDA. For a variety of strategic and ideological reasons, legal feminists and antiabortion activists turned to legislative constitutionalism to give meaning to the idea of reproductive liberty. While not requiring employers to provide any accommodations, the PDA prohibited employers from placing special burdens on women's procreative decisions.

The history of the meaningful-choice principle suggests that while the Court reached the right outcome, *Young* still falls short of providing women the protection intended by the framers of the PDA. By a 6-3 vote, the Court vacated a Fourth Circuit decision vindicating United Parcel Service's "pregnancy-blind" employment policy—that is, the policy effectively excluded pregnant workers but did not formally categorize them on the basis of pregnancy. In its application of the *McDonnell-Douglas* burden-shifting analysis, *Young* removed some of the obstacles previously faced by pregnant workers relying on disparate treatment theories. However, the Court still assumes that employers could have legitimate reasons for discriminating against pregnant workers beyond their ability to do a job, creating precisely the kind of burdens on reproductive decision-making that the PDA was supposed to eliminate.

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The history of the meaningful-choice principle strengthens the arguments against pregnancy-blind policies that are available after *Young*, including disparate treatment, disparate impact, and disability accommodation under the Americans with Disabilities Act. Ultimately, however, the history studied here shows that the promise of litigation after *Young* may well still be limited. Legislation, rather than litigation, may be the most promising path for expanding protections for pregnant women.

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INTRODUCTION

In recently deciding *Young v. United Parcel Service*,[1] the Supreme Court has intervened in ongoing struggles about when and whether the Pregnancy Discrimination Act of 1978 (PDA) requires the accommoda-

1. Young v. United Parcel Serv., Inc. (*Young II*), 135 S. Ct. 1338 (2015).

tion of pregnant workers.[2] In *Young*, a United Parcel Service (UPS) employee asked for a light-work assignment after her doctor advised her not to lift more than twenty pounds for the first twenty weeks of pregnancy.[3] UPS refused, citing a company policy of accommodating only employees covered by the Americans with Disabilities Act (ADA), workers who lost driving certification from the Department of Transportation (DOT), or workers injured on the job.[4] UPS's policy stands as a prominent example of the "pregnancy-blind" policies previously approved by many federal circuit courts—policies that exclude all pregnant workers without formally classifying on the basis of pregnancy.[5] The Supreme Court vacated the Fourth Circuit's opinion in *Young*, transforming the legal landscape surrounding pregnancy-blind policies.[6]

Drawing on original archival research, this Article historicizes *Young*, revealing the promise and limits of the Court's decision. While the Court removed some of the practical obstacles in the way of challenges to pregnancy-blind policies, *Young* still fails to capture one of the purposes underlying the PDA—preventing employers from placing special burdens on women's procreative decisions. The PDA embodied a limited principle of what the Article calls meaningful reproductive choice—a guarantee that women would have neither special protections nor special burdens placed on their reproductive decisions. By ignoring this principle, *Young* may sometimes allow employers to ignore the mandate of the PDA.

The Article proceeds in four parts. Part I situates *Young* historically, chronicling the successful legislative constitutional project pursued by the proponents of the PDA. The idea of meaningful choice embodied in the PDA first took shape in the early 1970s when feminist litigators argued that heightened judicial scrutiny applied when the State placed special burdens on women either because they chose to bring a pregnancy to term or to terminate it. More ambitiously, some feminists suggested that the State may have to act to affirmatively support some fundamental rights.

2. For examples of court decisions elaborating on pregnancy-blindness theory under Title VII, see *Young v. United Parcel Serv., Inc.* (*Young I*), 707 F.3d 437, 447–51 (4th Cir. 2013), *amended and superseded by* Young v. United Parcel Serv., Inc., 784 F.3d 192, *subsequent determination*, 2015 WL 2058940 (2015); *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 548–49 (7th Cir. 2011); *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 641 (6th Cir. 2006); *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1312–13 (11th Cir. 1999); *Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204, 207–08 (5th Cir. 1998), *abrogated by Young II*, 135 S. Ct. 1338 (2015).

3. *Young I*, 707 F.3d at 441.

4. *Id.*

5. *See supra* note 2 and accompanying text.

6. *Young II*, 135 S. Ct. 1338 (2015).

A line of Supreme Court decisions completely rejected this understanding of reproductive liberty.[7] However, choice arguments rejected in the juridical arena flourished in Congress during debate about the PDA. For a variety of strategic and ideological reasons, legal feminists and antiabortion activists turned to the legislative arena to give meaning to the idea of reproductive liberty. While not requiring employers to provide any accommodations, the PDA prohibited employers from placing special burdens on women's procreative decisions.

As Part I shows, the story of the PDA makes apparent the transformative potential of choice arguments widely derided by academic commentators. The history presented here reveals the lost potential and complexity of choice arguments, particularly outside the abortion context. These claims allowed feminists to flesh out the relationship between poverty and reproductive healthcare. Significantly, such arguments also helped to build an influential, if troubled, coalition between women on opposing sides of the abortion issue.

Part II examines the reasons for the decline of meaningful-choice arguments. Starting in the late 1970s, as abortion opponents scored victories in Congress and the states, and as Ronald Reagan successfully popularized arguments centered on small government and individualism, feminists sought out a more compelling justification for abortion rights. In the process, commentators and activists highlighted the shortcomings of framing reproductive rights as a matter of privacy or choice.

Drawing on the history of the meaningful-choice principle, Part III evaluates contemporary judicial interpretations of the PDA, including both the Supreme Court and Fourth Circuit's opinions in *Young*. Prior to the Supreme Court's decision in *Young*, the federal circuit courts generally upheld pregnancy-blind policies—employer rules that excluded pregnant workers but did not facially discriminate against them.[8] In *Young*, the Supreme Court rejected both the employer and the employee's interpretations of the PDA.[9] UPS argued that the PDA had nothing to do with accommodation, simply adding pregnancy to the protected classes covered by Title VII.[10] By contrast, Peggy Young claimed that

7. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 322–26 (1980) (rejecting a constitutional challenge to a federal ban on publicly funded abortions); Maher v. Roe, 432 U.S. 464, 478–80 (1977) (rejecting constitutional challenge to state ban on publicly funded abortions); General Electric Co. v. Gilbert, 429 U.S. 125, 142–46 (1976) (rejecting a challenge to a pregnancy exclusion under Title VII of the Civil Rights Act of 1964), *superseded by statute as recognized in* General Electric Company v. Gilbert, 429 U.S. 125 (1976); Geduldig v. Aiello, 417 U.S. 484, 494–97 (1974) (rejecting an equal-protection challenge to the exclusion of pregnancy in California state disability policy), *superseded by statute as recognized in* Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669 (1983).

8. For examples of court decisions elaborating on pregnancy-blindness theory under Title VII, see *supra* note 2 and accompanying text.

9. *Young II*, 135 S. Ct. at 1352–54.

10. Brief for Respondent at 11–12, *Young II*, 135 S. Ct. 1338 (No. 12-1226).

the PDA required employers accommodating any employee to offer similar protections to pregnant workers so long as they were "similar in their ability or inability to work."[11] Finding neither interpretation persuasive, the Court focused on how employees could demonstrate disparate treatment.[12] Whereas challenges to pregnancy-blind policies previously failed at the prima facie case stage,[13] under *Young*, a policy treating pregnant workers differently from other workers similar in their inability to work may help a worker make out a prima facie case of discrimination under *McDonnell Douglas Corp. v. Green*'s[14] burden-shifting framework.[15] *Young* also changed how employees could rebut an employer's proffered, neutral reason for discrimination. The Court laid out factors to balance in evaluating pretext, namely, the burden a policy imposed against pregnant workers and the employer's compelling reasons for exclusion.[16] Again, *Young* makes it easier for pregnant workers to prove pretext, requiring employers to offer more convincing explanations for policies that leave out all or most pregnant workers.[17]

Other scholars have explained how decisions vindicating pregnancy-blind policies ignore the history of the PDA's antidiscrimination mandate.[18] However, this Article breaks new ground by showing that *Young* only partly remedied the errors of lower court decisions on pregnancy-blind policies. The PDA wrote into law an intermovement consensus that reproductive liberty required more than freedom from state interference. To be sure, the PDA only partly embraced the constitutional commitments of pro-lifers and feminists. The law did not clearly require

11. Petitioner's Brief at 3–4, *Young II*, 135 S. Ct. 1338 (No. 12-1226) (quoting 42 U.S.C. § 2000e(k) (2012)).

12. *Young II*, 135 S. Ct. at 1353–55.

13. *See, e.g.*, Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 YALE J.L. & FEMINISM 15, 36–37 (2009) (describing court decisions of this kind).

14. 411 U.S. 792 (1973).

15. *Young II*, 135 S. Ct. at 1352–55.

16. *Id.* at 1353–55.

17. *See id.*

18. *See, e.g.*, Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1, 27–32 (1995); Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 483–84 (2011) (explaining that pregnancy blindness arguments do "not recognize two lessons that we may glean from historical debates about the costs of reproduction"); Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 614–15 (2010) (criticizing the pregnancy-blindness line of cases); Grossman & Thomas, *supra* note 13, at 49–50; Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 978–1004, 1022 (2013). Other studies explore the best legal solutions to the problem of pregnancy discrimination. *See, e.g.*, Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1, 21–37 (1985) (generally supporting pregnancy-specific benefits); Linda J. Krieger & Patricia N. Cooney, *The* Miller-Wohl *Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513, 538–62 (1983) (generally supporting pregnancy-specific benefits); Christine A. Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043, 1052–59 (1987) (generally supporting pregnancy-specific benefits); *cf.* Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2214–20 (1994) (proposing an insurance system for pregnancy leave).

employers to accommodate any employees, including pregnant women.[19] Just the same, as this Article argues, if an employer elected to accommodate any worker, the mandate of the PDA made clear that employers had a duty to provide pregnant women with the accommodations available to those with a similar physical capacity to work. By requiring only pregnancy-blind policies, the courts have allowed employers to burden women's reproductive decisions in precisely the way the PDA sought to prevent.

The history considered here supports the outcome in *Young*, questions core premises of the decision, and strengthens the case against pregnancy-blind policies in the courts under a variety of theories, including disparate impact and disability accommodation under the ADA.[20] Just the same, historical context exposes the limitations of litigating for pregnant workers. In the future, as in the past, legislation, rather than litigation, may prove to be a more promising path for women seeking protection against pregnancy discrimination.

I. CREATING A RIGHT TO MEANINGFUL CHOICE

Young figures centrally not only in the evolving story of employment discrimination law but also in the evolution of arguments about the meaning of reproductive liberty. In the 1970s, as the Article shows, feminists and certain abortion opponents rallied around an idea of choice at work, contending that the government could not constitutionally burden one reproductive choice available to women more than another. By the end of the 1970s, in cases involving pregnancy, disability, and abortion, the Supreme Court cast doubt on the validity of this approach, particularly in the context of reproductive liberty.[21] At first, it seems that decisions like *Geduldig v. Aiello*[22] and *Maher v. Roe*[23] hollowed out protections of

19. *See, e.g.*, Dinner, *supra* note 18, at 464 ("The text and legislative history of the PDA did not clarify whether the PDA requires, or even allows, measures beyond equal treatment to accommodate pregnancy and childbirth.").

20. Under Title VII, disparate treatment cases prohibit intentional discrimination against a member of the protected class on the part of the employer and her agents. *See, e.g.*, Michelle A. Travis, *The PDA's Causation Effect: Observations of an Unreasonable Woman*, 21 YALE J.L. & FEMINISM 51, 64 (2009) ("In disparate treatment claims, pregnant women allege that their employers intentionally took an adverse action against them because of their pregnancy."). By contrast, disparate impact cases ask whether a facially neutral employment practice has an unjustifiably disproportionate impact on members of a protected class unless that practice is "'job-related' and 'consistent with business necessity.'" *Id.* at 70–72 (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012)). The ADA and the Americans with Disabilities Amendments Act (ADAA) mandate that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability" in hiring, firing, compensation, training, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a) (2012). A "qualified individual" with a disability is one who "with or without reasonable accommodation, can perform the essential functions" of a job. 42 U.S.C. § 12111(8). The ADA and ADAA require that employers reasonably accommodate their disabled employees as part of its nondiscrimination scheme. 42 U.S.C. § 12112(b)(5)(A).

21. *See infra* notes 22–25 and accompanying text.

22. 417 U.S. 484 (1974).

23. 432 U.S. 464 (1977).

reproductive liberty. *Geduldig* held that pregnancy discrimination did not count as sex discrimination under the Equal Protection Clause,[24] while *Maher* concluded that states could choose to fund childbirth, but not abortion, without running afoul of the privacy right recognized in *Roe*.[25] These decisions blocked efforts to flesh out the relationship between reproductive liberty and equality; *Geduldig* ratified sex stereotypes surrounding pregnancy and undermined any challenge to them, and *Maher* upheld laws banning the use of public monies for abortion, reasoning that the right to privacy did not entitle women to the means to exercise their rights.[26] These decisions stood in the way of attempts to recognize rights to state support as well as freedoms from state intervention.[27]

However, as this Part argues, *Geduldig* and *Maher* did not undercut efforts to secure meaningful reproductive choice. Instead, failures in the courts forced legal feminists and pro-life activists to express their constitutional commitments in the legislative arena.

This Part charts the evolution of meaningful-choice arguments, beginning with their development in pregnancy disability litigation in the early 1970s. After the Supreme Court's decision in *Roe v. Wade*,[28] feminists developed an argument that substantive due process limited the State's ability to burden reproductive decision-making.[29] Some went further, suggesting that in the case of certain crucial rights, the government had to ensure that individuals could effectuate the rights they had.[30]

As the Part examines next, the Supreme Court ultimately found these arguments unconvincing. Just the same, the Part shows that in the battle for the PDA, pro-life and abortion-rights activists rejected the Court's understanding of reproductive privacy, insisting that meaningful choice existed only when the government protected women from workplace discrimination and the burdens of poverty. These arguments helped to shape the PDA and influenced some of its most powerful supporters in

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24. *Geduldig*, 417 U.S. at 495–96.

25. *Maher*, 432 U.S. at 474–75.

26. *See, e.g.*, Dinner, *supra* note 18, at 467 ("The majority opinion in *Geduldig* reflected an emerging reluctance, in both the race and the sex contexts, to interpret the constitutional prohibition on discrimination to reach structural inequality as well as discriminatory intent."); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 985 (1984) ("*Geduldig* has made it more difficult to claim that reproductive freedom is an aspect of sex-based equality.").

27. *See, e.g.*, Susan Frelich Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 COLUM. L. REV. 721, 725, 748–50 (1981); Nicole Huberfeld, *Conditional Spending and Compulsory Maternity*, 2010 U. ILL. L. REV. 751, 759 & n.39 ("[A] Constitution of negative rights does not require the government to fund the exercise of positive rights.").

28. 410 U.S. 113 (1973).

29. *See, e.g.*, Deborah Dinner, *Recovering the* LaFleur *Doctrine*, 22 YALE J.L. & FEMINISM 343, 404–05 (2010).

30. *See, e.g.*, Motion for Leave to File Brief Amici Curiae and Annexed Brief of the American Public Health Ass'n, Planned Parenthood Federation of America, Inc., the National Organization for Women and Certain Medical School Deans, Professors and Individual Physicians at 11–12, Maher v. Roe, 432 U.S. 464 (1977) (No. 75-1440).

Congress. Significantly, as embodied in the PDA, this reasoning stands in obvious tension with the Fourth Circuit's decision in *Young* and the federal courts' embrace of pregnancy blindness.

A. Feminists Bridge the Gap Between Poverty Law and Reproductive Liberty

In the late 1960s and early 1970s, to an unprecedented extent, the welfare rights movement challenged the constitutional distinction between a right and a privilege.[31] Grassroots activists organized groups like the National Welfare Rights Organization (NWRO) and demanded not only fair procedures governing welfare benefits but also asserted a right to live connected to state support.[32] Similar arguments caught on in the legal academy. Citing the "increasing size of government as an economic unit," Professor William Van Alstyne called for the abolition of the right-privilege distinction in the context of certain state-created "privileges" involving employment, housing, income replacement, and food stamps.[33] Charles Reich's "new property" theory proposed that certain government-created statuses—such as professional licenses and public benefits—should count as forms of property protected by the Due Process Clause—property that could be taken away only after a benefits-holder took advantage of crucial procedural protections.[34] Welfare rights proponents like Frank Michelman interrogated the distinction between positive and negative rights, suggesting that the Fourteenth Amendment might actually guarantee some minimum standard of living for the poor.[35]

As feminists began to explore the limits of reproductive liberty, they echoed the reasoning of Supreme Court cases that fueled poverty lawyers' demands for positive rights: *Shapiro v. Thompson*[36] and *Dandridge v. Williams*.[37] In *Griswold v. Connecticut*[38] and *Eisenstadt v. Baird*,[39] the

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31. *See, e.g.*, Brenna Binns, *Fencing Out the Poor: The Constitutionality of Residency Requirements in Welfare Reform*, 1996 WIS. L. REV. 1255, 1259 ("As a result of the welfare rights movement, the Court gave welfare litigation higher scrutiny and recognized welfare benefits as a right, rather than a privilege, of the poor.").

32. *See* MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973, at 76 (1993); FELICIA KORNBLUH, THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA 143 (2007).

33. William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1442, 1461–62 (1968).

34. *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 734, 783–84 (1964).

35. *See, e.g.*, Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9–13 (1969). For further discussion of the history of the welfare rights movement, see, for example, DAVIS, *supra* note 32; KORNBLUH, *supra* note 32; PREMILLA NADASEN, WELFARE WARRIORS: THE WELFARE RIGHTS MOVEMENT IN THE UNITED STATES (2005). On the history of welfare rights litigation in the Supreme Court, see, for example, ELIZABETH BUSSIERE, (DIS)ENTITLING THE POOR: THE WARREN COURT, WELFARE RIGHTS, AND THE AMERICAN POLITICAL TRADITION (1997).

36. 394 U.S. 618 (1969).

37. 397 U.S. 471 (1970).

38. 381 U.S. 479 (1965).

39. 405 U.S. 438 (1972).

Supreme Court had suggested that the Constitution offered some protection for crucial decisions involving reproduction.[40] By turning to poverty law, some feminists asked whether reproductive liberty was among the "rights . . . so fundamental that the state must provide . . . the means to exercise them."[41]

These efforts began in the litigation of *Dandridge* itself, a case involving a constitutional challenge to Maryland's maximum-grant law.[42] The statute capped payments under the state's Aid to Dependent Families with Children regardless of the size of a beneficiary's family.[43] While the Maryland law did nothing to stop women from having children, the maximum-grant policy penalized those with larger families.[44] The *Dandridge* appellees argued before the Supreme Court that such a penalty violated the Constitution:

> This Court has left no doubt that, while under certain exceptional circumstances infringement, by government, of this right of procreation and marital privacy will be upheld, it constitutes impermissible invidious discrimination to discourage one class of individuals from exercising these basic rights while zealously safeguarding the exercise of those rights by others similarly situated.[45]

When the Court decided *Dandridge*, the justices made no mention of fundamental rights to procreate, indeed retreating from positions taken in earlier poverty-law decisions.[46] *Dandridge* rejected poverty lawyers' challenge to the Maryland maximum grant law, but in spite of the decision, the premise of the appellees' brief—that some form of heightened scrutiny ought to apply to laws that burdened procreative rights—inspired legal feminists intent on testing the boundaries of reproductive liberty.[47]

Prior to 1974, these arguments figured centrally in the litigation of discriminatory leave policies affecting public school teachers and Air

40. On the state of the privacy right in the aftermath of *Eisenstadt*, see DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 542–97 (1994).

41. Motion for Leave to File Brief as Amici Curiae and Annexed Brief of the American Public Health Ass'n, Planned Parenthood Federation of America, Inc., the National Organization for Women and Certain Medical School Deans, Professors and Individual Physicians at 11–12, Maher v. Roe, 432 U.S. 464 (1977) (No. 75-1440) [hereinafter Annexed Brief].

42. *Dandridge*, 397 U.S. at 473.

43. *Id.* at 473–74.

44. *See id.* at 473–75

45. Brief for Appellees at 32, *Dandridge*, 397 U.S. 471 (No. 131) (footnote omitted).

46. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 264–66 (1970). *Dandridge* rejected challenges to the Maryland law involving both the federal Social Security Act and the Equal Protection Clause of the Fourteenth Amendment. *Dandridge*, 397 U.S. at 482–83, 486–87.

47. On the history of these efforts, see Dinner, *supra* note 18, at 445–47, 449–57. For more on *LaFleur* and reproductive liberty, see Tracy A. Thomas, *The Struggle for Gender Equality in the Northern District of Ohio*, *in* JUSTICE AND LEGAL CHANGE ON THE SHORES OF LAKE ERIE: A HISTORY OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO 165, 165–83 (Paul Finkelman & Roberta Sue Alexander eds., 2012).

Force service personnel, including *Struck v. Secretary of Defense*,[48] a case famously litigated by ACLU attorney Ruth Bader Ginsburg.[49] In her brief in *Struck*, Ginsburg contended:

> The discriminatory treatment required by the challenged regulation, barring pregnant women and mothers from continued service in the Air Force, reflects the discredited notion that a woman who becomes pregnant is not fit for duty, but should be confined at home to await childbirth and thereafter devote herself to child care. Imposition of this outmoded standard upon petitioner unconstitutionally encroaches upon her right to privacy in the conduct of her personal life.[50]

Other pregnancy discrimination cases elaborated on Ginsburg's claim that discriminatory policies unconstitutionally burdened women's substantive due process rights. In *Cleveland Board of Education v. LaFleur*,[51] Jane Picker and her colleagues challenged a maternity leave policy requiring schoolteachers to take eight months of leave without pay.[52] Picker argued that "[t]he waiting period in *LaFleur* thus penalize[d] Respondents' fundamental right to bear children."[53]

These arguments represented an early form of what the Article calls meaningful-choice reasoning. Even if hirers had no constitutional duty to assist women seeking to effectuate their procreative rights, feminists argued that the Equal Protection Clause prevented employers from conditioning a woman's economic security on her surrender of procreative rights.[54] Insofar as the Constitution protected reproductive liberty, employers could not force women to choose between bearing children and attaining the economic security available to other workers. When the courts identified such an unfair choice, heightened judicial scrutiny should apply.

More ambitiously, legal feminists joined poverty lawyers in questioning the logic underlying the right-privilege distinction in constitutional law. In 1892, Justice Oliver Wendell Holmes articulated the distinction between a protected right and a mere privilege.[55] In *McAuliffe v.*

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48. Struck v. Sec'y of Def., 460 F.2d 1372 (9th Cir.), *vacated*, 409 U.S. 1071 (1972). The Supreme Court would ultimately dismiss Struck's appeal as moot. Struck v. Sec'y of Def., 409 U.S. 1071, 1071 (1972).

49. On the history and importance of the *Struck* litigation, see generally Neil S. Siegel & Reva B. Siegel, *Struck By Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771 (2010).

50. Brief for the Petitioner at 52, Struck, 409 U.S. 1071 (No. 72-178) (footnotes omitted).

51. 414 U.S. 632 (1974).

52. Brief for Respondents at 44, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (No. 72-777).

53. *Id.* at 45.

54. *See, e.g.*, Brief for the Petitioner at 50–56, *Struck*, 409 U.S. 1071 (No. 72-178).

55. On Holmes' early framing of the right-privilege distinction, see Deborah Dinner, *Recovering the* LaFleur *Doctrine*, 22 YALE J.L. & FEMINISM 343, 384 (2010).

City of New Bedford,[56] Holmes rejected the claim of a policeman, who had been fired for violating a law restricting certain political activities: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[57] In the late 1960s and early 1970s, the right-privilege distinction came under fire, as legal academics and attorneys sought to carve out exceptions to it.[58] Feminist litigators hinted at the existence of a hierarchy of constitutional rights: some were so fundamental that the State had an affirmative duty to guarantee their effectuation.[59]Feminists suggested that reproductive liberty might occupy a place at the top of that hierarchy of rights.[60]

In the juridical arena, meaningful-choice arguments peaked during the litigation of *Geduldig*, a challenge to the constitutionality of the pregnancy exclusion in the California Disability Fund.[61] Significantly, *Geduldig* came before the Supreme Court in the aftermath of *Roe v. Wade*. In that case, the Court had invalidated the abortion restrictions then on the books, suggesting that the constitutional right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[62] The *Roe* Court limited the abortion right in several ways: by assigning it at least equally to the woman's physician and by creating a trimester framework that gave the states more regulatory authority in the second and third trimesters of pregnancy.[63] Just the same, legal feminists read their victory in *LaFleur* as an extension—and clarification—of the right announced in *Roe*. In *LaFleur*, the Supreme Court had struck down an eight-month mandatory leave policy because it "employ[ed] irrebuttable presumptions that unduly penalize a [woman] . . . for deciding to bear a child."[64] While resting on procedural due process, *LaFleur* fueled feminist arguments about the scope of reproductive liberty.[65]

Feminist attorney Wendy Webster Williams, who argued *Geduldig* before the Supreme Court, read *LaFleur* as an expansion of the liberty recognized in *Roe*.[66] Citing *LaFleur*, Williams's brief reasoned that "[t]he strict scrutiny test is applicable not only where the denial of a fun-

56. 29 N.E. 517 (Mass. 1892), abrogation recognized by O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712 (1996).

57. *Id.* at 517.

58. *See, e.g.*, Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970*, 53 VAND. L. REV. 1389, 1428–34 (2000) (describing the attacks that convinced "the Court [to] repudiate[] the rights/privileges distinction").

59. *See, e.g.*, Annexed Brief, *supra* note 41, at 11–12.

60. *See, e.g.*, *id.*

61. Geduldig v. Aiello, 417 U.S. 484, 486 (1974), *superseded by statute as recognized in* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983).

62. Roe v. Wade, 410 U.S. 113, 153 (1973).

63. *Id.* at 152–63.

64. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 648 (1974).

65. *See, e.g.*, Dinner, *supra* note 55, at 404–05 (recovering the "multiple, expansive meanings" of *LaFleur* for legal feminists).

66. *See* Brief for Appellees at 52–54, *Geduldig*, 417 U.S. 484 (No. 73-640).

damental right is absolute, but also where state regulation penalizes its free exercise."[67] In Williams's account, pregnancy discrimination counted as the kind of penalty on reproductive choice forbidden by the Constitution:

> Unlike *any other* disabled worker in the State of California covered by the state disability insurance program, the woman who suffers a disability in connection with her pregnancy is left to bear the economic consequences of her inability to work. As a result of her pregnancy, a woman faces medical bills, the possible cost of temporary help and, if her pregnancy is successfully concluded, a new child to support at the very time she is unable to bring home wages to pay for these expenses. . . . The denial of benefits available to other workers therefore constitutes a substantial burden upon her exercise of her right to bear a child and the State must demonstrate a compelling interest in its classification.[68]

An ACLU brief co-signed by Ruth Bader Ginsburg similarly concluded that *Roe* and *LaFleur* had transformed reproductive liberty:

> Under due process principles, the state is required to show that a compelling interest justifies the substantial burden placed upon exercise of the fundamental freedom to decide whether to bear a child. Appellant has not demonstrated any such compelling interest; therefore the treatment of pregnancy-related disabilities violates the due process clause.[69]

Roe had recognized that "the decision whether to continue or to terminate a pregnancy . . . must be left up to the individual . . . lest the state unconstitutionally intrude into the zone of privacy protected by the Constitution."[70] *LaFleur* further narrowed the State's power to regulate reproductive liberty insofar as it "recognized that this zone of privacy with respect to child bearing is unconstitutionally infringed by governmental action which has the effect of burdening women who chose to continue pregnancy rather than terminate it."[71]

Geduldig represented an important opportunity for legal feminists seeking a more robust jurisprudence of reproductive liberty. Feminists highlighted the particularly harsh impact of pregnancy discrimination on poor women—an argument carried forward in challenges to state bans on the Medicaid funding of abortion.[72] For example, in *Klein v. Nassau*

67. *Id.* at 53.
68. *Id.* at 53–54.
69. Brief Amici Curiae for the American Civil Liberties Union et al. at 7, *Geduldig*, 417 U.S. 484 (1974) (No. 73-640).
70. *Id.* at 25.
71. *Id.*
72. *See, e.g.*, MARY ZIEGLER, AFTER *ROE*: THE LOST HISTORY OF THE ABORTION DEBATE 121 (2015).

County Medical Center,[73] a federal district court struck down a directive prohibiting the use of Medicaid funding for abortion, explaining that women choosing abortion "alone are subjected to State coercion to bear children which they do not wish to bear."[74] Constitutionally, as *Klein* recognized, Medicaid bans imposed the same kind of impermissible condition at work in *Geduldig*, denying a woman "medical assistance unless she resigns her freedom of choice and bears the child."[75] Together, abortion and pregnancy disability litigation promised to entrench a much broader understanding of reproductive liberty.

B. The Supreme Court Rejects Meaningful Choice

The Supreme Court rejected the expansive understanding of choice advanced by feminists, adopting the position staked out by both business organizations and some abortion opponents. In *Geduldig*, industry groups and corporations had argued that, under *Roe* and *LaFleur*, pregnancy had become a choice controlled entirely by a woman—something entirely different from the illnesses and injuries often covered by disability policies.[76] For example, in an amicus brief in *Geduldig*, the General Electric Company, a company that did not cover pregnancy under its disability policy, argued:

> Thus pregnancy, unlike any sickness or accident, results from the cumulative, four-fold exercise of free will necessary for a woman to bear a child: (1) there must be a voluntary decision to marry, as marriage still reflects by far the current standard of morality; (2) the couple must elect to have sexual intercourse—a two-person decision; (3) the couple must elect that conception will result—i.e., must elect to reject the various alternative methods available for avoiding pregnancy; and (4) if conception takes place, the couple must elect to accept the pregnancy and have the baby, and not to terminate the pregnancy by abortion. It should also be noted that even for the unmarried, the latter three choices are viable alternatives to the pregnant state.[77]

As General Electric understood it, women already enjoyed true reproductive liberty. As a result, women could not fairly expect an employer to subsidize their procreative decisions, particularly since other workers could not enjoy the same benefits.[78]

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73. 347 F. Supp. 496 (E.D.N.Y. 1972), *vacated by* 412 U.S. 925 (1973).

74. *Id.* at 500. For post-1973 decisions in the same vein, see Doe v. Rose, 499 F.2d 1112 (10th Cir. 1974); Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554, 579–82 (E.D. Pa. 1975); Doe v. Westby, 383 F. Supp. 1143 (D.S.D. 1974), vacated sub nom. Westby v. Doe, 420 U.S. 968 (1975).

75. Klein, 347 F. Supp. at 500.

76. *See, e.g.*, Brief for General Electric Co. as Amicus Curiae at 21–22, *Geduldig*, 417 U.S. 484 (1974) (No. 73-640).

77. *Id.*

78. *See id.* at 6–8.

Later in the 1970s, antiabortion attorneys borrowed from this vision of choice in defending Medicaid funding bans. Defending such a funding restriction in Connecticut, pro-life attorneys stressed that nothing in the law "prevent[ed] a woman from making a choice to have an abortion."[79] The State's responsibility ended with its duty not to prohibit abortion. Beyond that, women themselves bore the costs of indigence and lack of access to medical services. "[U]nder *Roe*," pro-life attorneys explained in *Maher*, "an indigent woman was *not* given *an additional fundamental right* to have an abortion paid for from public funds."[80]

In both *Geduldig* and *Maher*, the Supreme Court thoroughly rejected the meaningful-choice reasoning on which feminists had relied. Decided in 1974, *Geduldig* found that California's disability policy did not discriminate on the basis of sex since there was "no risk from which men [were] protected and women [were] not."[81] Neither the majority nor the dissent mentioned the reproductive-liberty claims emphasized by feminists.[82]

While *Geduldig* failed to mention reproductive liberty, *Maher*, a case involving the constitutionality of bans on the public funding of abortion, suggested that abortion rights guaranteed only a right to be left alone.[83] By conditioning the receipt of support on a woman's surrender of her abortion right, Connecticut placed "no obstacles absolute or otherwise in the pregnant woman's path to an abortion."[84] As *Maher* explained, "An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires."[85]

Taken together, *Maher* and *Geduldig* limited the promise of reproductive-liberty doctrine in the courts. In 1980, the Court confirmed its rejection of the doctrine in *Harris v. McRae*,[86] upholding the Hyde Amendment, a federal ban on the Medicaid funding of abortion.[87]

However, failure in the courts did not mark the end of efforts to advance meaningful-choice arguments. Indeed, after 1976, in *General*

79. Brief of the Appellant at 14, Maher v. Roe, 432 U.S. 464 (1977) (No. 75-1440).

80. *Id.*

81. *Geduldig*, 417 U.S. at 496–97.

82. On *Geduldig*'s obscuring of the importance of equal sexual liberty, see Kim Shayo Buchanan, Lawrence v. Geduldig: *Regulating Women's Sexuality*, 56 EMORY L.J. 1235, 1236–38 (2007). The *Geduldig* dissent failed to make any mention of women's reproductive liberty. *See Geduldig*, 417 U.S. at 498–505 (Brennan, J., dissenting).

83. *Maher*, 432 U.S. at 473–74.

84. *Id.* at 474.

85. *Id.*

86. 448 U.S. 297 (1980).

87. *Id.* at 326–27.

Electric Company v. Gilbert,[88] when the Court rejected arguments that Title VII of the Civil Rights Act of 1964 prohibited pregnancy discrimination,[89] those on opposing sides of the abortion issue revived the constitutional arguments for meaningful reproductive choice rejected by the Court, this time acting in the legislative arena.

Significantly, in the later 1970s, antiabortion activists as well as feminists made some version of meaningful choice a centerpiece of their legal agenda. In the aftermath of the *Roe* decision, antiabortion leaders turned to a variety of constitutional strategies to outlaw most or all abortions, including an Article V amendment campaign.[90] In formulating these responses to *Roe*, pro-lifers defined a new class deserving protection under the Fourteenth Amendment: vulnerable and dependent persons.[91] For the members of groups like American Citizens Concerned for Life (ACCL) and Feminists for Life, pregnant women fit this category perfectly.[92] These pro-life activists recognized that some women turned to abortion because they faced sex discrimination at work.[93] Poor women often faced an impossible choice between exercising procreative liberty and guaranteeing themselves economic security.[94] Recognizing this dilemma, some pro-lifers presented protection from pregnancy discrimination as a precondition for meaningful reproductive choice.[95] Conversely, when the government refused to ensure women protection from sex discrimination, as pro-lifers argued, the government put unconstitutional burdens on women's reproductive choice. Thoroughly rejected by the courts, this understanding of choice reappeared as a robust legislative constitutional norm—one on which activists deeply divided by the abortion issue agreed.

C. Pro-Lifers Work to Redefine Equal Protection of the Law

From the outset, the pro-life movement defined its cause as a constitutional one, based on a fundamental right they identified in the Fourteenth Amendment.[96] At the state and local level, pro-life organizations

88. 429 U.S. 125 (1976), *superseded by statute as recognized in* Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983).

89. *See id.* at 136–40.

90. For an overview of pro-life constitutional strategy in the period, see Mary Ziegler, *Ways to Change: A Reevaluation of Article V Campaigns and Legislative Constitutionalism*, 2009 B.Y.U. L. REV. 969, 973–84; *see also* ZIAD W. MUNSON, THE MAKING OF PRO-LIFE ACTIVISTS: HOW SOCIAL MOVEMENT MOBILIZATION WORKS 85–87 (2008); Keith Cassidy, *The Right to Life Movement: Sources, Development, and Strategies*, *in* THE POLITICS OF ABORTION AND BIRTH CONTROL IN HISTORICAL PERSPECTIVE 128, 143–50 (Donald T. Critchlow ed., 1995).

91. *See, e.g.*, ZIEGLER, *supra* note 72, at 28–29, 34, 45.

92. For a study of these groups and their influence on pro-life constitutionalism, see Mary Ziegler, *Women's Rights on the Right: The History and Stakes of Modern Pro-Life Feminism*, 28 BERKELEY J. GENDER L. & JUST. 232, 237–46 (2013).

93. *See* Mary Ziegler, *Beyond Backlash: Legal History, Polarization, and* Roe v. Wade, 71 WASH. & LEE L. REV. 969, 993–98 (2014).

94. *See id.*

95. *See id.*

96. *See* Mary Ziegler, *Originalism Talk: A Legal History*, 2014 B.Y.U. L. REV. 869, 884–86.

mobilized in the late 1960s to preserve existing bans on abortion.[97] Groups like the Southern California Right to Life League, New York State Right to Life, and the Illinois Right to Life Committee chose names that referred to the "right to life" mentioned in the Declaration of Independence.[98] The same constitutional commitment defined the pre-1973 agendas of national organizations like the National Right to Life Committee (NRLC) and Americans United for Life (AUL). "Protecting the right to life of the unborn child," the NRLC Statement of Purpose asserted, "is a central issue to the National Right to Life Committee."[99] Similarly, the AUL's Declaration of Purpose similarly explained: "Believing with those who hold that all men are created equal, we proclaim that among our precious civil and natural liberties and rights is the responsibility of society to safeguard the integral life of every human being from conception to natural death."[100]

Over the course of the late 1960s and early 1970s, antiabortion activists began to ground their normative commitments in existing constitutional doctrine. Significantly, abortion opponents identified their cause with both substantive due process and equal protection doctrine.[101] Working in emerging national groups like the NRLC and the AUL, pro-lifers forged an argument based on the overlap of liberty and equality norms, training their fire on laws that denied vulnerable groups the implicit right to life.[102]

Activists like Robert Byrn, a grassroots organizer and Fordham law professor, presented dependency as a classic suspect classification, and Byrn argued that abortion represented precisely the kind of invidious discrimination that the Equal Protection Clause was designed to root out.[103] In particular, Byrn compared fetuses to illegitimate children, a group afforded some protection by the Supreme Court in the late 1960s.[104] For example, in 1968, in *Levy v. Louisiana*,[105] the Court had

97. On the mobilization of pro-life activists, see *supra* note 90 and accompanying text.

98. On the naming of the Right to Life League of Southern California and New York State Right to Life, see Fred C. Shapiro, *'Right to Life' Has a Message for New York State Legislators*, N.Y. TIMES, Aug. 20, 1972, at SM10, SM34. On the early activity of the Right to Life League of Southern California, see Keith Monroe, *How California's Abortion Law Isn't Working*, N.Y. TIMES, Dec. 29, 1968, at SM10–12. On the founding of the Illinois Right to Life Committee, see SUZANNE STAGGENBORG, THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT 35 (1991).

99. National Right to Life Committee Statement of Purpose (on file with The American Citizens Concerned for Life Papers in the University of Michigan Gerald Ford Memorial Library).

100. Americans United for Life, Declaration of Purpose (1974) (on file with Concordia Seminary, St. Louis, Missouri in The Executive File).

101. ZIEGLER, *supra* note 72, at 29, 85.

102. *See id.* at 28–35, 85.

103. *See, e.g.*, Robert M. Byrn, *Demythologizing Abortion Reform*, 14 CATH. LAW. 180, 183 (1968). For further examples of pro-lifers' reliance on the Equal Protection Clause, see David W. Louisell, *Abortion, The Practice of Medicine and the Due Process of Law*, 16 UCLA L. REV. 233, 234 (1968–69).

104. Byrn, *supra* note 103, at 183.

105. 391 U.S. 68 (1968).

first struck down an illegitimacy classification, explaining, "We start from the premise that illegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment."[106]

Byrn saw abortion as the type of discrimination that *Levy* condemned. *Levy* suggested that any child qualified as a legal person if she was human and alive[107]—criteria which, in Byrn's view, clearly applied to the unborn child.[108] The traits that differentiated the unborn child from other Americans—age, vulnerability, and dependency—made no constitutional difference.[109] Indeed, the dependent required additional constitutional and other legal protections. Highlighting President Lyndon Johnson's War on Poverty, Byrn insisted: "The more dependent and helpless a person is, the more solicitous the law is of his welfare."[110]

Like Byrn, other pro-lifers deployed a theory of equal liberty, insisting that the Constitution recognized an implicit right to life that had to be equally available to the unborn child. For example, Martin McKernan of the NRLC emphasized: "All in all, the law has consistently established certain procedural safeguards around fundamental rights to which the unborn was entitled. That most fundamental of rights - not to be deprived of life without due process of the law - cannot be ignored."[111]

Activists like Byrn and McKernan did not address the ways in which unborn children did not resemble a suspect class: there was no obvious history of discrimination against fetuses, and neither age nor dependency was immutable—as Byrn acknowledged, both represented phases experienced by every citizen who reached adulthood.[112] Moreover, like some gender distinctions, physical disability and dependency could constitute real biological differences.[113] From the standpoint of conventional equal protection law, a fetus may not be similarly situated to a child, and a person in a persistent vegetative state may not be comparable to a legally competent adult.

While claiming that protections for unborn children fit within a conventional equal-protection framework, pro-lifers like Byrn actually

106. *Id.* at 70 (footnote omitted).

107. *See id.*

108. *See* Byrn, *supra* note 103, at 183.

109. Robert M. Byrn, *Abortion in Perspective*, 5 DUQ. U. L. REV. 125, 127–34 (1966–67).

110. *Id.* at 133.

111. Legal Report from Martin F. McKernan, Jr., Nat'l Right to Life Comm. 4 (Jul. 1970) (on file with The American Citizens Concerned for Life Papers in the University of Michigan Gerald Ford Memorial Library).

112. *See* Byrn, *supra* note 109, at 128.

113. Indeed, in determining whether disability discrimination warranted heightened scrutiny under the Equal Protection Clause, the Court emphasized that disabled persons had real impairments that justified different legislative treatment. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442–45 (1985).

demanded a bold reconceptualization of the doctrine. Conventional equal-protection doctrine focused on whether vulnerable individuals had an immutable trait, like race or gender.[114] Activists like Byrn implicitly conceded that the unborn children had no such trait. Indeed, pro-lifers presented abortion as discriminatory precisely because it deprived unborn children of life, notwithstanding the fact that they resembled other rights-holders in every constitutionally salient way.[115] Strategically, this move allowed antiabortion activists to respond to claims that fetuses did not count as legal persons under the Fourteenth Amendment.[116] At the same time, by stressing the similarities between fetuses and other persons, antiabortion activists like Byrn expressed deeply held beliefs that abortion would lead the nation down a slippery slope to euthanasia and discrimination against the disabled.[117]

In 1973, the *Roe* Court rejected many of the premises of pro-life constitutionalism—including the personhood of the fetus and the conclusion that life began at conception—while pushing others entirely below the surface.[118] The district court in *Roe* had applied conventional strict scrutiny in analyzing an abortion regulation, asking whether such a ban was narrowly tailored to serve a compelling justification.[119] This framing set the terms of the Supreme Court's own discussion. In resolving whether the State's interest in protecting life was compelling, the Court highlighted disagreements between medical, philosophical, and religious authorities, concluding that "the unborn have never been recognized in the law as persons in the whole sense."[120] The Court touched only indirectly on the question of a right to life, assuming that "[i]f . . . [fetal] personhood is established," the case for abortion rights would collapse, "for the fetus' right to life would then be guaranteed specifically by the [Four-

114. *See* Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 496 (1998) (describing the Court's former requirement that, in order to be considered a suspect class, a group must have "obvious, immutable, or distinguishing characteristic[s]" (quoting Bowen v. Gilliard, 483 U.S. 587, 602 (1987))).

115. *See, e.g.*, Louisell, *supra* note 103, at 247 ("Medical evidence would indicate that the various stages of development [were] merely labels which have been placed upon what is in fact the steady, constant growth of the human being.").

116. *See, e.g.*, Motion and Brief Amicus Curiae of Certain Physicians, Professors and Fellows of the American College of Obstetrics and Gynecology in Support of Appellees at 26, Roe v. Wade, 410 U.S. 113 (1973) (Nos. 70-18, 70-40) ("When one views the present state of medical science, we find that the artificial distinction between born and unborn has vanished."); Motion for Leave to Submit a Brief Amici Curiae Brief of Women for the Unborn et al. in Support of Appellees at 9, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18) ("Modern genetics has confirmed scientifically what women have long felt intuitively—the presence of another human life, a life to be reverenced and protected.").

117. *See, e.g.*, Press Release, Nellie J. Gray, Chairman, Nat'l March for Life Comm. (Jan. 22, 1974) [hereinafter NMLC Press Release] (on file with The American Citizens Concerned for Life Papers in the University of Michigan Gerald Ford Memorial Library).

118. *See Roe*, 410 U.S. at 153–64.

119. Roe v. Wade, 314 F. Supp. 1217, 1222–23 (N.D. Tex. 1970), *rev'd*, 410 U.S. 113 (1973).

120. *Roe*, 410 U.S. at 157–63.

teenth] Amendment."[121] By dismissing the idea that the framers of the Fourteenth Amendment defined fetuses as persons, the Court went no further in exploring whether the Constitution recognized a right to life.[122]

Movement leaders responded by working harder than ever to revolutionize equal-protection jurisprudence, pushing powerlessness and helplessness as the center of constitutional analysis. Nellie Gray's March for Life, an organization leading a major pro-life protest of the same name, issued materials explaining: "If our Constitution, as now interpreted, cannot guarantee the right to be secure in one's person in order to be born, it cannot long protect the right to be secure in one's person during illness, physical and mental disability, [and] senility . . . ."[123]

Partly for this reason, the fetal-protective amendment preferred by many pro-lifers advanced a right to equal treatment not only for the unborn but also for any similarly vulnerable individuals.[124] A variety of Article V amendments proposed in Congress would have changed the meaning of the Fourteenth Amendment, explicitly including the unborn as persons.[125] However, leaders of groups like the NRLC and AUL insisted that their movement demanded protection for all vulnerable and dependent persons. The NRLC endorsed an amendment that would require protection of life regardless of age, health, function or condition of dependency.[126] Dr. John Willke of the NRLC insisted that "civil rights [under the Fourteenth Amendment] mean nothing if they do not protect the weakest and most helpless of the humans among us."[127] He asked: "[S]hould we allow the Supreme Court to define the right to life on the basis of age and place of residence?"[128]

D. Pro-Life Activists Contest the Meaning of Dependency and Vulnerability

While antiabortion activists shared a vision of the Equal Protection Clause, movement members disagreed intensely about who counted as vulnerable and dependent persons. Some movement members focused exclusively on the abortion issue, while others also mobilized to battle living-will and death-with-dignity laws.[129] Still others viewed pregnant women, and perhaps all women, as vulnerable, dependent, and deserving

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121. *Id.* at 156–57.
122. *See id.*
123. NMLC Press Release, *supra* note 117.
124. ZIEGLER, *supra* note 72, at 29.
125. *See, e.g.*, *id.* at 43–45.
126. *See* NMLC Press Release, *supra* note 117.
127. *Proposed Constitutional Amendments on Abortion: Hearings on Proposed Constitutional Amendments on Abortion Before the Subcomm. on Civil and Constitutional Rights of H. Comm. on the Judiciary*, 94th Cong. 399 (1976) (Statement of Dr. John Willke).
128. *Id.* at 405.
129. On the diversity of motives and tactics characterizing pro-life activism in the period, see, for example, MUNSON, *supra* note 90, at 192; and see also CAROL J. C. MAXWELL, PRO-LIFE ACTIVISTS IN AMERICA: MEANING, MOTIVATION, AND DIRECT ACTION 2, 8, 21 (2002).

of protection. These activists expressed themselves in the conventional rhetoric of the pro-life movement, demanding a reworking of equal-protection doctrine. However, as this Part shows, these advocates moved toward a radical reconceptualization of the movement's goals, one centered partly on women's constitutional interests in liberty and equality. These activists turned to meaningful choice in advocating what they viewed as both protections against sex discrimination and alternatives to abortion. To be sure, antiabortion advocates disagreed with feminists about the meaning of reproductive liberty.[130] They insisted that the State should ban all, or most, abortions—and could do so without denying women constitutional autonomy.[131] At the same time, some influential pro-life activists maintained that women did not have the freedom to choose childbirth or procreation unless the State protected them against sex discrimination.[132]

During the battle for an Article V amendment recognizing a right to life, members of ACCL , an influential antiabortion organization, began to develop an argument that combined antidiscrimination and reproductive-liberty reasoning. In testifying in favor of an Article V amendment banning abortion, Dorothy Czarnecki of the ACCL argued:

> It is my opinion that women are equal to but not the same as men. In the natural order of things, this will never change. Women deserve equal rights, equal pay, equal job opportunities, and equal[ity] under the law. Women ought to have the right over their own bodies, insofar as they can determine whether or not they shall become pregnant. They deserve to be educated. Equal opportunity means that, rich or poor, black or white, they shall [be able] . . . to receive sex education, and contraceptive information . . . . It does not mean that we shall supply abortion to those who cannot afford it.[133]

Czarnecki endorsed an idea of choice that seemed incoherent to feminists who saw the connection between abortion rights, autonomy, and equality for women. At the same time, Czarnecki agreed with feminists that formal equality was not enough to guarantee women meaningful reproductive choice. "Equal opportunity" involved neither abortion nor identical treatment: women's special vulnerability meant that they needed and deserved assistance in accessing sex education and contraception.[134] Czarnecki's vision of equality for women would drive pro-life support for the PDA. Members of groups like the ACCL concluded that pregnancy made women biologically and culturally different, vulnerable

130. *See* Ziegler, *supra* note 93, at 982.
131. *See id.*
132. *See id.*
133. *Abortion—Part 2: Hearing on S.J. Res. 119 and S.J. Res. 130 Before the Subcomm. on Constitutional Amendments of the S. Judiciary Comm.*, 93d Cong. 312 (April 1974) (Statement of Dorothy Czarnecki).
134. *See id.*

to pernicious forms of discrimination.[135] Equal treatment for pregnant women would require some affirmative intervention on the part of the State—to end discrimination and to ensure pregnant women a minimum level of income, healthcare, and child care.

In 1975, while still pushing an Article V amendment, Marjory Mecklenburg of the ACCL modified the reproductive-liberty reasoning used in the litigation of *Geduldig*.[136] First, Mecklenburg testified that pregnant women represented a key example of the vulnerable persons currently denied the protection of the Constitution. Asking Congress to pay more attention to the women who wanted to continue a pregnancy, Mecklenburg asserted that such women constituted "a disadvantaged class."[137] Pregnant women were vulnerable partly because the government denied them meaningful reproductive choice. "It is sad indeed," she testified, "that women are making choices about whether to give their children the right to life or to terminate based on economic conditions. If they feel pressured because of the economic situation, we can ask what kind of a choice do they really have?"[138]

By 1975, activists like Mecklenburg had elaborated on this idea of choice, translating it into a powerful vision for legislative change. Mecklenburg lobbied for a number of laws designed to help pregnant women and new mothers: amendments to the Social Security Act allowing pregnant women to claim unborn children as dependents; "federal and individual state legislation . . . providing that pregnancy, parenthood, or marital status cannot constitute grounds for denial of education"; and social welfare programs designed to help indigent, adolescent mothers.[139] In February 1975, Mecklenburg came out in favor of the School Age Mothers and Children Act of 1975, an ultimately unsuccessful social welfare bill sponsored by abortion-rights champions Birch Bayh (D-IN) and Ted Kennedy (D-MA).[140] The law would have guaranteed a variety of family planning, childcare, and healthcare services for adolescent mothers and their children.[141] Guaranteeing adolescent mothers meaningful reproductive choice would, in Mecklenburg's view, reduce abortion rates, since the mother of a fetus was the "first line of defense against pre-birth ag-

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135. *See, e.g.*, ZIEGLER, *supra* note 72, at 195–200.

136. *See Abortion—Part IV: Hearings on S.J. Res. 6, S.J. Res. 10, S.J. Res. 11, and S.J. Res. 91 Before the Subcomm. on Constitutional Amendments of the S. Judiciary Comm.*, 94th Cong. 644–46, 648, 650, 653, 694 (June 1975) (Statement of Marjory Mecklenburg).

137. *Id.* at 654.

138. *Id.* at 648–49.

139. *See id.* at 646, 655–56. This part later discusses several of these lobbying efforts at greater length.

140. *See School-Age Mother and Child Health Act, 1975: Hearing Before the Subcomm. on Health of the S. Comm. on Labor and Pub. Welfare*, 94th Cong. 495–96 (Nov. 1975) [hereinafter *School-Age Mother and Child Act*] (Statement of Marjory Mecklenburg) (on file with author); MARIS A. VINOVSKIS, AN "EPIDEMIC" OF ADOLESCENT PREGNANCY?: SOME HISTORICAL AND POLICY CONSIDERATIONS 50 (1988).

141. *See* VINOVSKIS, *supra* note 140, at 51.

gression."[142] But Mecklenburg went further, endorsing her own understanding of constitutional choice:

> [M]any poor women, pressed by financial circumstances, presently have only the "freedom" to abort . . . .
>
> . . . .
>
> Alternatives to abortion must be real if freedom of conscience and responsibility are to be more than rhetoric. This means that society must offer good health care, both pre and post-natal; daycare facilities; . . . [and] maternity and paternity leave . . . .[143]

The vision of meaningful choice written into laws like the School Age Mother and Child Act assumed that the State had to refrain from burdening women's decisions. Mecklenburg explained: "Americans must examine the pregnant woman's life situation, assess what is necessary to preserve her personal dignity and her mental and physical health, and then provide for these needs. . . . Women must not be forced by circumstances to seek an abortion . . . ."[144]

Prior to 1976, members of the ACCL borrowed heavily from the special-burden reasoning rejected by the courts, giving it new life as a legislative constitutional norm. For legal feminists, special-burden reasoning served a different purpose: rebutting claims that women demanded preferential treatment. As the battle against pregnancy discrimination moved to Congress, business leaders and industry groups insisted that pregnancy disability policies themselves represented discrimination against men.[145] Given the right of reproductive choice, women bore children and then unfairly demanded that someone else foot the bill. For legal feminists responding to these charges, it became crucial to show that women wanted equal, rather than special, opportunities. Reworking the reproductive-liberty reasoning used by some pro-lifers offered feminists a valuable strategy for achieving this task.

E. Feminists Shift from Juridical to Legislative Constitutionalism

In the aftermath of their defeat in *Geduldig*, feminists turned to Title VII of the Civil Rights Act of 1964 as a source of protection against pregnancy discrimination, this time, working with an unlikely set of allies. As the *New York Times* reported in September 1975, "A cause that has managed to unite women from feminists to members of the Right to Life movement is the right to disability benefits for time lost due to

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142. *School-Age Mother and Child Act*, *supra* note 140, at 511.

143. *Id.* at 499, 501 (quoting National Council of Churches Study Paper (Mar. 2, 1972)).

144. *Id.* at 511.

145. *See, e.g.*, *Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the S. Comm. on Human Resources*, 95 Cong 1st Sess. (1977) 481–88 [hereinafter *Discrimination on the Basis of Pregnancy*] (statement of Brockwell Heylin).

pregnancy."[146] Progress in the courts made Title VII litigation an attractive option: the Second and Third Circuit held that pregnancy discrimination violated Title VII notwithstanding the holding of *Geduldig*.[147] Relying on *LaFleur*, the Supreme Court itself had struck down a Utah law disqualifying women from receiving unemployment insurance for an eighteen-week period preceding and following pregnancy because they were "unable to work."[148] As Kathy Willert Peratis of the ACLU explained: "We're really making headway now."[149]

This progress came to an abrupt halt in 1976 when the Supreme Court decided *General Electric Co. v. Gilbert*. Rejecting the interpretation of Title VII adopted by the Equal Employment Opportunity Commission and many lower courts, the *Gilbert* Court decided that pregnancy discrimination did not count as sex discrimination.[150] *Gilbert* reasoned that what women demanded was not protection against discrimination but rather special treatment, since "pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded *inclusion* of risks."[151]

For legal feminists, *Gilbert*'s reasoning was deeply disappointing. Peratis put the point bluntly, telling the *New York Times*: "We bombed out in court, so we'll have to go to Congress."[152] However, feminists did far more then switch from the juridical to the legislative arena. Instead, organizations like the ACLU and the Women's Legal Defense Fund (WLDF) continued litigating, seeking to carve out a space for Title VII protections in the aftermath of *Gilbert*. In cases like *Nashville Gas Co. v. Satty*,[153] feminists had to work within a *Gilbert* framework that denied women's right to "special treatment" in the context of pregnancy.[154] In turn, *Satty* and *Gilbert* helped to shape the arguments used by both business lobbyists and legal feminists in the battle for the PDA. Business leaders popularized the idea of pregnancy disability as reverse discrimination against men.[155] Since women had the freedom to terminate preg-

146. Virginia Lee Warren, *The Fight for Disability Benefits in Pregnancy*, N.Y. TIMES, Sept. 16, 1975, at 36.

147. On the perceived promise of Title VII litigation in the period, see, for example, *id.*

148. Turner v. Dep't of Emp. Sec. of Utah, 423 U.S. 44, 45 (1975).

149. Warren, *supra* note 146.

150. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 145–46 (1976).

151. *Id.* at 139 (emphasis added).

152. Keith Love, *Pregnancy Sick Benefits: Call for Action on Court Ruling*, N.Y. TIMES, at 46 (Dec. 10, 1976), http://0-search.proquest.com.bianca.penlib.du.edu/docview/122937067?accountid=14608 (quoting Statement by Kathleen Peratis of the ACLU).

153. 434 U.S. 136 (1977).

154. On the constraints faced by feminists after *Geduldig*, see, for example, Deborah Dinner, *Strange Bedfellows at Work: Neomaternalism in the Making of Sex Discrimination Law*, 91 WASH. U. L. REV. 453, 490–500 (2014).

155. *Discrimination on the Basis of Pregnancy*, *supra* note 145.

nancies, as business leaders asserted, women should have to bear the costs of any children they bore.[156] Forcing employers to do so would result in discrimination against both male employees and business owners. Legal feminists responded by drawing on an idea of impermissible burdens similar to the one set forth in *Satty*.[157] The reliance on the benefit-burden distinction ultimately encouraged feminists working in Congress to turn back to the reproductive-liberty reasoning rejected by the Court.

F. Satty *Plays Up the Benefit-Burden Distinction*

Nora Satty worked as a clerk in the accounting department of the Nashville Gas Company when she became pregnant.[158] The company required Satty to take maternity leave and refused to give her sick pay during her absence.[159] Worse, while she was on leave, the company took away the seniority Satty had already earned.[160] When she reapplied for work, the company placed her in a temporary position and, pursuant to its policy, denied her every permanent position she applied for because other, more senior employees had bid for them.[161] After Satty completed her temporary assignment, the company terminated her "due to lack of work and job openings."[162]

When Satty's case came before the Supreme Court, both her counsel and amici curiae, including the ACLU and the Women's Legal Defense Fund, focused on how Satty's case differed from *Gilbert*. While that case denied "special benefits," Nora Satty's defenders insisted that they wanted nothing more than equal treatment.[163] In a brief signed by Ruth Bader Ginsburg and Susan Deller Ross, the ACLU and WLDF argued that "no 'extra compensation' issue [was] present" in *Satty*.[164] Instead of directly challenging the validity of *Gilbert* or *Geduldig*, the brief shifted the focus to the special burdens imposed on the liberty of Satty and other pregnant women. As the brief explained:

> Although Title VII does not require that greater economic benefits be paid to one sex or the other "because of their different roles in the scheme of existence", [sic] by the same token Title VII hardly permits an employer specifically to burden female employees throughout their working lives because of their different role.[165]

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156. *See, e.g.*, *id.* at 95–97 (statement of the National Association of Manufacturers).
157. *See, e.g.*, *id.* at 451–52 (statement of Letty Cottin-Pogrebin, Editor for *Ms.* magazine).
158. *Satty*, 434 U.S. at 139.
159. *Id.* at 138–39.
160. *Id.*
161. *Id.* at 139.
162. *Id.* at 139.
163. *See, e.g.*, Brief Amici Curiae of American Civil Liberties Union and Women's Legal Defense Fund at 6–8, *Satty*, 434 U.S. 136 (No. 75-536).
164. *Id.* at 7.
165. *Id.*

The brief insisted that Satty and other pregnant women did not request accommodation of their pregnancies.[166] Rather, Satty asked the Court to stop the employer from burdening their ability to work because they had chosen to have children.[167]

In a terse opinion written by Justice William Rehnquist, *Satty* held that some, but not all, pregnancy discrimination violated Title VII.[168] Holding that the Nashville Gas Company's policies violated Title VII, Rehnquist distinguished pregnancy disability policies, which afforded pregnant women "a benefit that men cannot and do not receive," from the burdens imposed in *Satty*.[169] "We held in *Gilbert* that [Title VII] did not require that greater economic benefits be paid to one sex or the other 'because of their differing roles in "the scheme of human existence,"'" Rehnquist explained.[170] "But that holding does not allow us to read [the statute] to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role."[171]

Publicly, legal feminists interpreted *Satty* as a signal that legislative, rather than juridical, constitutionalism represented the most promising path for women seeking equal treatment or reproductive liberty.[172] Since *Satty* did not provide clear guidance about when pregnancy disability policies would run afoul of Title VII, Susan Deller Ross of the ACLU called the decision "confused," reasoning that it "showed the importance of a new Federal law to make all discrimination against pregnant workers illegal."[173]

Rather than simply reinforcing the importance of amending Title VII, *Satty* encouraged feminists to change the temporary-disability paradigm used for much of the early 1970s.[174] Defining pregnancy as a mere temporary disability had worked to dispel the myth that women who bore children necessarily left work to raise them.[175] At the same time, "[c]lassifying pregnancy within the temporary disability framework . . . represented an effort to extend socioeconomic protection to childbearing workers without discouraging women's employment."[176] After *Gilbert*, skeptical members of Congress and business leaders denounced any effort to provide socioeconomic protection for women, pre-

166. *Id.* at 15–17.

167. *See id.* at 7–9.

168. *See Satty*, 434 U.S. at 143–46.

169. *Id.* at 142.

170. *Id.* (quoting Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 139 (1976)).

171. *Id.*

172. *See, e.g.*, Warren Weaver Jr., *Justices, 9-0, Block a Loss of Seniority in Maternity Leave*, N.Y. TIMES, Dec. 7, 1977, at A1, A18.

173. *Id.* at A18 (quoting Statement by Susan Deller Ross, Clinical Director, ACLU).

174. For a study of the temporary disability paradigm, see Dinner, *supra* note 18, at 449–56.

175. *See id.* at 454–55.

176. *Id.* at 455.

senting it as the kind of unfair special accommodation that *Gilbert* rejected.[177] During and after *Satty*, legal feminists responded by reframing the PDA not only as "an effort to extend socioeconomic protection"[178] but also as a guarantee that employers could not impose unique burdens on either women's decision to work or procreate.

G. Business Groups, Pro-Lifers, and Feminists Contest the Benefit-Burden Distinction

The benefit-burden distinction central to *Satty* also shaped debate about the PDA in 1977. Testifying on behalf of the Chamber of Commerce, Brockwell Heylin insisted that the issue was whether Congress was willing to provide special benefits to pregnant women that other workers could never enjoy.[179] Testimony highlighted statistics suggesting that only 40%–50% of pregnant workers returned to work after maternity leave,[180] while "almost 100% of other workers taking disability leave do return to work."[181] Insofar as pregnancy was sui generis, the PDA would not provide protection against discrimination; it would in fact discriminate against other employees. Heylin reasoned: "The pregnancy disability benefits would become a severance pay which other (non-pregnant) employees cannot receive."[182]

Testimony on behalf of the National Association of Manufacturers (NAM) made more explicit the connection between framing pregnancy as a choice and denouncing the PDA as a form of special treatment.[183] NAM representatives emphasized that men and women chose when they married, chose when they had sexual intercourse, chose when they used contraception, and chose when they turned to abortion.[184] "Within this climate, it is appropriate to ask how much of the economic responsibility for parenthood will be assumed by those men and women who choose to have children" the NAM asked, "and how much responsibility will be [placed on] society . . . ."[185] The central issue was not whether Congress should countenance discrimination but rather "how far society chooses to go in subsidizing parenthood."[186]

As both pro-lifers and legal feminists recognized, the PDA would create some socioeconomic security for pregnant women. Importing special-burden reasoning into the PDA allowed both groups to avoid the charge that they demanded special treatment for women. Instead, sup-

177. *See, e.g.*, *id.* at 431–32.
178. *Id.* at 455.
179. *Discrimination on the Basis of Pregnancy*, *supra* note 145.
180. *Id.* at 101 (Statement on National Association of Manufacturers).
181. *Id.* at 482, 488 (statement of Brockwell Heylin).
182. *Id.* at 482.
183. *See id.* at 95–97 (statement of the National Association of Manufacturers).
184. *See id.* at 96.
185. *Id.*
186. *Id.*

porters of the PDA contended that the law protected women from unfair and potentially unconstitutional burdens on their reproductive decision-making that men never faced.

Moreover, meaningful-choice reasoning allowed pro-life activists to present their movement as reasonable, moderate, and willing to advance real reproductive choice—a major goal of ACCL leaders.[187] Lobbying for meaningful choice showed that some pro-lifers could work in broad legislative coalitions, advancing interests (beyond abortion bans) that other Americans held dear.[188]

More broadly, pro-lifers seized on pregnancy discrimination as an issue, hoping to "promote[] motherhood."[189] Some movement members believed that poor women terminated their pregnancies in order to preserve their livelihood.[190] Protecting women against pregnancy discrimination would ensure that more women could afford to bring their pregnancies to term. Pro-life activist and obstetrician-gynecologist Andre Hellegers told Congress that the PDA would deter coercive abortions.[191] "Let's call it a pro-choice bill," Hellegers quipped, "in which . . . the choice, if it goes in any direction, is going to go in the childbirth way."[192]

Other pro-life witnesses developed a more comprehensive vision of meaningful-choice reasoning. Jacqueline Nolan-Haley of the ACCL attacked *Gilbert* as a "dangerous precedent with respect to the exercise of fundamental rights."[193] Nolan-Haley identified four rights at stake in pregnancy discrimination: "The decision to procreate, the decision not to terminate a pregnancy, the decision to prevent [pregnancy] through contraception, and the decision to terminate a pregnancy."[194] According to Nolan-Haley, *Gilbert* unjustly—and perhaps unconstitutionally—"penalized women who chose to exercise the first two rights to the exclusion of the latter."[195]

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187. The ACCL, for example, stressed the need to create "a reasonable, rational, national pro-life organization" in order to attract the support of those "unable to identify themselves with the [current] highly polarized organizations." Memorandum from ACCL on Purposes and Objectives of ACCL (on file with The American Citizens Concerned for Life Papers in the University of Michigan Gerald Ford Memorial Library).

188. *See, e.g.*, Brochure, Am. Citizens Concerned for Life, No Other Vehicle Quite Like Ours (on file with The American Citizens Concerned for Life Papers in the University of Michigan Gerald Ford Memorial Library).

189. Thea Rossi Barron, *Insurance Bill Includes Pregnancy Clause*, NAT. RIGHT TO LIFE NEWS, Feb. 1978, at 8.

190. *See* ZIEGLER, *supra* note 72, at 193–201.

191. *See Discrimination on the Basis of Pregnancy*, *supra* note 145, at 67–68 (statement of Andre E. Hellegers, Professor, Georgetown University).

192. *Id.* at 68.

193. *Id.* at 437 (statement of Jacqueline M. Nolan-Haley, Special Counsel, Am. Citizens Concerned for Life, Inc.).

194. *Id.* at 432–33.

195. *Id.* at 438.

Legal feminists like Wendy Williams and Letty Cottin-Pogrebin, a feminist author, relied on meaningful-choice reasoning for a quite different reason: countering claims that the PDA required expensive and unfair special treatment. In testifying in favor of the PDA, Williams spotlighted what she called "[a] necessary side effect" of pregnancy discrimination: "the burden placed upon a woman's choice to bear a child."[196] She reasoned that Congress did not (and should not) intend that any citizen "forgo a fundamental right, such as a woman's right to bear children, as a condition precedent to the enjoyment of . . . employment free from discrimination."[197]

Cottin-Pogrebin articulated the connection between pregnancy discrimination and reproductive choice more forcefully, explaining that women asked for nothing more than protection against burdens society never imposed on men:

> Pregnancy discrimination forces us to choose between brain and uterus; between making money and making babies; between being productive or being reproductive. It is a false dilemma. Men do not have to make this choice; they can be both parents and workers without suffering a social, personal, or economic penalty.[198]

In spite of deep differences about the nature of motherhood and the need for legal abortion, the PDA campaign led pro-lifers and legal feminists to adopt a strikingly similar and transformative understanding of reproductive choice. As Deborah Dinner has shown, legal feminists began highlighting the uniqueness of motherhood in justifying protection from the government.[199] Pro-lifers like Mecklenburg had long emphasized the uniqueness of motherhood in asserting that abortion severed a particularly valuable bond between mother and child, thereby traumatizing any woman who terminated a pregnancy.[200]

Conversely, pro-life activists like Mecklenburg and Czarnecki gravitated toward a definition of meaningful reproductive choice that would prevent discrimination against women who took leave after an abortion as well as a pregnancy. The ACCL's change in position was striking. After all, leaders of the group had endorsed an Article V amendment banning abortion, asserting that the Constitution did not recognize rights for women "to choose to destroy their unborn children."[201] In the PDA campaign, ACCL leaders argued that they would support the PDA regardless of whether employers had to cover post-abortion leave, because

196. *Id.* at 115 (statement of Wendy W. Williams, Assistant Professor of Law, Georgetown University).

197. *Id.*

198. *Id.* at 451–52 (statement of Letty Cottin-Pogrebin, Editor for *Ms.* magazine).

199. *See* Dinner, *supra* note 154, at 499–500.

200. Mecklenburg, for example, called for post-abortion counseling to address women's regret and to prevent "recidivism." *School-Age Mother and Child Act*, *supra* note 140, at 504–06.

201. *Id.* at 498.

the law "would encourage a woman to keep a pregnancy or do what she wants. It gives women a choice."[202] If anything, the ACCL favored a version of the PDA that did not exclude post-abortion treatment, since some within the organization believed that the law would garner more support if no abortion exclusion applied.[203] As an ACCL leader explained: "ACCL supports H.R. 6075 [the PDA] as a pro-life bill with or without an abortion amendment and urges its prompt passage."[204]

This understanding of meaningful reproductive choice made an impact on the larger society. A variety of religious organizations, including the progressive National Council of Churches, endorsed a more robust concept of a right to choose—one that required affirmative support for women seeking to procreate or avoid procreation.[205]

More importantly, this understanding of meaningful choice influenced many of the key supporters of the PDA. Key sponsors of the PDA across the ideological spectrum echoed this idea of reproductive choice. Senator Thomas Eagleton (D-MO) argued that sex discrimination could effectively coerce women into terminating a pregnancy:

> [T]here are a number of reasons why a woman would want to have an abortion. One of the reasons is that she cannot afford the expenses attendant to a prolonged pregnancy and childbirth. . . . We are removing that [situation] where the price tag of a baby determines whether it is born or not.[206]

Representative Ronald Sarasin (R-CT) similarly argued that women with real reproductive choice would be better able to participate in the economic and social life of the nation.[207] The PDA gave a woman "the right to choose both, to be financially and legally protected before, during, and after her pregnancy."[208] According to a Democratic supporter of the bill, the PDA would "put an end to an unrealistic and unfair system that forces women to choose between family and career."[209]

Those on opposing sides of the abortion issue understood meaningful reproductive choice in varying ways and described it differently over time. In the early-to-mid-1970s, feminist litigators first used the idea to

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202. *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy Part 2: Hearing on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the H. Comm. on Education and Labor*, 95th Cong. 66 (1977) (statement of Dorothy Czarnecki).

203. *See id.* at 63–66; *see also* ZIEGLER, *supra* note 72, at 197–99.

204. Letter from Marjory Mecklenburg, President of American Citizens Concerned for Life to Pro-Life Leaders and News Media Representatives (on file with author).

205. *School-Age Mother and Child Act*, *supra* note 140, at 501 (quoting National Council of Churches Study Paper (Mar. 2, 1972)).

206. *Legislative History of the Pregnancy Discrimination Act of 1978, Committee on Labor and Human Resources*, 96th Cong. 115–16 (1980) [hereinafter *Legislative History of the PDA*] (statement of Sen. Thomas F. Eagleton).

207. *See id.* at 208–09 (statement of Rep. Ronald Sarasin).

208. *Id.* at 208.

209. *Id.* at 185 (statement of Paul E.Tsongas, Massachusetts).

demand both abortion rights and freedom from sex discrimination. These attorneys framed meaningful choice as a justification for heightened judicial scrutiny. Feminist litigators also used meaningful choice to expose understudied connections between equality and liberty for women.

Forced to negotiate in the legislative arena, in the mid-1970s, feminists redefined meaningful choice, playing up connections between poverty, sex equality, and the costs of reproduction. In responding to business lobbyists, feminists also emphasized the language of benefits and burdens to counter accusations that pregnant women were seeking special treatment.

In the mid-1970s, feminists' troubled partnership with pro-lifers also transformed arguments about meaningful choice. Pro-life advocates understood meaningful choice in different terms than did feminists, obscuring any connection between abortion, equality, and liberty. Whereas many feminists saw protective legislation as a reflection of damaging sex stereotypes, these antiabortion activists also viewed women as vulnerable and deserving of protection. Over time, however, some pro-lifers developed a fuller account of why women were vulnerable—one that focused heavily on sex stereotyping and discrimination. By the later 1970s, some pro-lifers found more common ground with feminists, favoring the PDA even if it did not prohibit abortion coverage.

The idea of meaningful reproductive choice underlying the PDA had radical implications. Women in favor of and opposed to abortion brought to the surface often-ignored connections between liberty and equality, presenting protection from sex discrimination as a necessary precondition for any true exercise of reproductive liberty. Both feminists and pro-lifers defined choice as much more than freedom from state interference. Indeed, calling for meaningful reproductive choice allowed activists on either side of the abortion question to navigate difficult questions about "special treatment" and "reverse discrimination" plaguing the civil rights movement and the women's movement in the late 1970s.[210] By presenting private acts of discrimination—and even poverty—as impermissible burdens on a woman's reproductive liberty, opposing activists found a powerful new way of demanding economic security for working women.

Superficially, this understanding of meaningful choice seems consistent with the position taken by most federal courts that employers can satisfy the PDA by creating pregnancy-blind disability policies.[211] Legal

210. On the politics of reverse discrimination in the period, see TERRY H. ANDERSON, THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION 135–57 (2004); NICHOLAS LAHAM, THE REAGAN PRESIDENCY AND THE POLITICS OF RACE: IN PURSUIT OF COLORBLIND JUSTICE AND LIMITED GOVERNMENT 20–25 (1998).

211. For a sample of court decisions on pregnancy blindness, see *supra* note 2 and accompanying text.

feminists, pro-life activists, and legislators sympathetic to either group generally rejected the idea that the PDA created special benefits for pregnant women. However, the history of arguments for meaningful reproductive choice revealed a more complex legislative purpose underlying the PDA. Meaningful-choice arguments forced Congress to evaluate pregnant women based on their ability to work rather than the "cause" of their disability. By penalizing pregnant women for the cause of their disability, employers would impose burdens on women's reproductive decision-making that other workers completely avoided. Pregnancy-blind policies impose precisely the kind of harsh burden the framers of the PDA—and activists on both sides of the abortion question—sought to prevent.

Why did meaningful reproductive choice arguments fade from view in the aftermath of the PDA battle? Part II argues that these contentions lost influence not because of any inherent flaw but because of changes to the larger political landscape.

II. THE DECLINE OF MEANINGFUL REPRODUCTIVE CHOICE

Since the 1980s, both antiabortion leaders and feminist commentators have pointed out fundamental flaws in the use of choice as a framework for reproductive liberty. Before and after her nomination to the Supreme Court, Ruth Bader Ginsburg described the privacy rationale for abortion rights as unconvincing, reasoning that the Court might have rendered the abortion conflict less intense had it grounded abortion rights in the Equal Protection Clause.[212] Commentators have pointed out that a privacy rationale laid the foundation for later Supreme Court decisions upholding bans on abortion funding.[213] Historian Rickie Solinger has argued that a choice framework ratified existing race and class divisions governing access to reproductive healthcare.[214]

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212. *See* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198–99, 1208 (1992) ("[*Roe*] halted a political process that was moving in a reform direction and thereby . . . prolonged divisiveness and deferred stable settlement of the issue").

213. *See, e.g.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 930 (1973) (arguing that outlawing abortion is not about "governmental snooping" into citizens' private lives); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 386 (1985) ("Overall, the Court's *Roe* position is weakened, I believe, by the opinion's concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective."); Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 HARV. C.R.-C.L. L. REV. 329, 331, 371, 373 (2010); Law, *supra* note 26, at 1020 ("The rhetoric of privacy, as opposed to equality, blunts our ability to focus on the fact that it is *women* who are oppressed when abortion is denied. . . . The rhetoric of privacy also reinforces a public/private dic[h]otomy that is at the heart of the structures that perpetuate the powerlessness of women."); Catharine MacKinnon, Roe v. Wade*: A Study in Male Ideology*, *in* ABORTION: MORAL AND LEGAL PERSPECTIVES 45, 52–53 (Jay L. Garfield & Patricia Hennessey eds., 1984) (criticizing *Roe*'s emphasis on choice and privacy instead of equality).

214. *See, e.g.*, RICKIE SOLINGER, BEGGARS AND CHOOSERS: HOW THE POLITICS OF CHOICE SHAPES ADOPTION, ABORTION, AND WELFARE IN THE UNITED STATES 4–6 (2001).

This Part contends that choice arguments lost influence in the abortion debate not because of any of the flaws identified by feminist commentators but rather because of a rapidly changing political reality. First, pro-life arguments for meaningful choice came into growing tension with the campaign to preserve bans on abortion funding. In the context of funding bans, antiabortion activists, including those like Mecklenburg, came to argue that rights to choose guaranteed only freedom from state interference. Increasingly, the abortion funding issue divided the coalition that had successfully pushed the PDA.

Moreover, as the Part shows next, coalition politics undermined meaningful-choice reasoning. With the emergence of the New Right and Religious Right, antiabortion activists allied with partners who rejected both a strong antidiscrimination policy and a broadening of the social welfare net. The 1980 election of Ronald Reagan and a slate of pro-life Republicans reinforced antiabortion activists' dependence on allies opposed to the central premises of meaningful-choice reasoning.

Finally, as the Part shows, facing setbacks in the Supreme Court, Congress, the academy, and state legislatures, feminists began searching for a more constitutionally sound and popularly resonant justification for abortion rights. As progressives developed what many saw as sounder defenses of abortion rights, academics and grassroots activists lost sight of the transformative understandings of choice used in the PDA campaign.

A. The Abortion Funding Battle Divides Supporters of Meaningful Reproductive Choice

In the mid-1970s, as the battle for bans on publicly funded abortion picked up pace, pro-life legislators and grassroots activists deployed two key arguments involving a right to choose. First, some activists and politicians charged that taxpayers had a right to conscientiously object to the funding of what they saw as the "murder [of] the unborn."[215] To some extent, Representative Henry Hyde (R-IL), the sponsor of an ultimately successful funding ban, described both poverty and abortion as acute social injustices:

> "Let the poor women of America make a list of those things that society denies them and which are enjoyed by rich women" . . . "Decent housing, decent education, . . . decent income, and then say to them, 'Now [sic] those will take second place. But we will encourage you to kill your . . . children."[216]

Hyde also insisted that poor women had no right to government assistance of any kind. While admitting that he would ban all abortions if

215. *Abortions: Should Taxpayers Foot the Bill?*, DESERET NEWS, Sept. 29, 1976, at 3A.
216. *Id.* (quoting Statement by Rep. Henry J. Hyde).

he could, Hyde emphasized that the right to choose recognized in *Roe* in no way required the State to pay for abortion.[217] In the Supreme Court, attorneys representing Americans United for Life Legal Defense and Education Fund similarly explained: "If the abortion decision is so private . . . it follows that government should not itself be compelled to respond to the demand of the exercise of that private right . . . ."[218] Under *Roe*, the state could not interfere with a woman's decision-making but had no obligation to fund abortion.[219]

By 1978, the year Congress passed the PDA, the war over funding bans had intensified. Congress passed the Hyde Amendment in 1976, and in 1977, the Supreme Court upheld several similar state laws.[220] Almost as soon as it passed, the Hyde Amendment sparked intense conflict about exceptions for rape, incest, and health.[221] Locked in a constant struggle to preserve funding bans, pro-lifers like Marjory Mecklenburg retreated from their earlier positions on meaningful choice.[222] In pushing the PDA, Mecklenburg and the ACCL had defended an idea of choice that required protection against sex discrimination, going so far as to support a bill that required employers to give women post-abortion leave.[223] By 1978, Mecklenburg again joined Planned Parenthood in lobbying for an ultimately successful bill, the Adolescent Health, Services, and Pregnancy Care Act of 1978, requiring state support for both family planning and for adolescents seeking to bear and raise children.[224] This time, however, Mecklenburg argued that women's right to meaningful choice did not extend to abortion access. "'Freedom to choose' implies that it is equally possible for a woman to choose to give birth as well as to abort," Mecklenburg argued.[225] "Today frightened, confused and dependent adolescents often have little freedom to continue a pregnancy unless the kind of

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217. *See* CAROL A. EMMENS, THE ABORTION CONTROVERSY 68–69 (rev. ed. 1991).

218. Motion and Brief Amicus Curiae of Americans United for Life, Inc. in Support of Petitioner John H. Poelker at 13, Poelker v. Doe, 432 U.S. 519 (1977) (No. 75-442).

219. *See id.* at 12–13.

220. For the Supreme Court's decisions on the public funding of abortion, see *Maher v. Roe*, 432 U.S. 464, 470–78 (1977) (upholding a Connecticut Medicaid funding ban on abortion); *Poelker v. Doe*, 432 U.S. 519, 420–21 (1977) (sustaining a ban on the use of St. Louis public hospitals for abortion); *Beal v. Doe*, 432 U.S. 438, 445–54 (1977) (upholding a Pennsylvania law that limited Medicaid funding for abortions).

221. Karen De Witt, *Foes of Abortion Seek to Tighten Restrictions on Medicaid Funds*, N.Y. TIMES, at B20 (Mar. 1, 1979), http://0-search.proquest.com.bianca.penlib.du.edu/docview/120940075/C6EB024E86C94119PQ/1?accountid=14608; Martin Tolchin, *Financing Bill and Abortion: Both Sides Emphasize Questions of Conscience*, N.Y. TIMES, at A19 (Oct. 2, 1980), http://0-search.proquest.com.bianca.penlib.du.edu/docview/121031543/752E5F0422104BBEPQ/1?accountid=14608; Martin Tolchin, *On Abortion, the Houses Still Remain Miles Apart*, N.Y. TIMES, Nov. 27, 1977, at 176.

222. *See* ZIEGLER, *supra* note 72, at 200.

223. *See id.* at 197–99.

224. *Adolescent Health, Services, and Pregnancy Prevention and Care Act of 1978: Hearings on S. 2910 Before the Comm. on Human Resources*, 95th Cong. 433–34 (1978) (statement of Marjory Mecklenburg).

225. *Id.* at 434.

services this bill details are readily available."[226] When addressing the scope of reproductive freedom, however, Mecklenburg concluded that meaningful choice should not include abortion.[227] Reversing an earlier position, she maintained that the public would not support a meaningful-choice law if it included abortion services. "If abortion is interjected in this bill," argued Mecklenburg, "I believe it will reduce or eliminate its chances of passage . . . ."[228]

B. Political Party Realignment Undercuts Support for Meaningful Choice

Before the late 1970s, both the antiabortion and abortion-rights movements appealed to politicians and activists across the ideological spectrum. By the late 1970s, pro-life positions had become a calling card of grassroots conservatism.[229] The mobilization of organizations identifying with the New Right and Religious Right, members of which opposed abortion, represented a potent new source of allies and political influence for pro-life leaders.[230] Organizations like the Moral Majority and Christian Voice provided much-needed financial support and political connections for a struggling pro-life movement.[231] Political operatives frustrated with the mainstream Republican Party, including Paul Weyrich and Richard Viguerie, united fragmented single-issue groups, forging a powerful social-conservative coalition.[232] By backing Ronald Reagan and other Republican candidates who endorsed antiabortion positions, pro-lifers bid for unprecedented political influence.[233] Even though many antiabortion voters had long supported the Democratic Party and contin-

226. *Id.*

227. *See id.* at 431.

228. *Id.*

229. On the growing relationship between the Democratic Party and the women's movement in the 1970s and 1980s, see, for example, KIRA SANBONMATSU, DEMOCRATS, REPUBLICANS, AND THE POLITICS OF WOMEN'S PLACE 64 (2002); LISA YOUNG, FEMINISTS AND PARTY POLITICS 10, 32 (2000).

230. *See generally* Mary Ziegler, *The Possibility of Compromise: Antiabortion Moderates After* Roe v. Wade, *1973-1980*, 87 CHI.-KENT L. REV. 571 (2012).

231. On the emerging alliance between the New Right and Religious Right, see, for example, DANIEL K. WILLIAMS, GOD'S OWN PARTY: THE MAKING OF THE CHRISTIAN RIGHT 165–74 (2010) ("As New Right political operatives looked for controversial issues to highlight in their campaigns against congressional liberals, they turned with increasing frequency to the subject of abortion."); Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade: *New Questions About Backlash*, 120 YALE L.J. 2028, 2060–65 (2011).

232. On the formation of this coalition, see, for example, Reva B. Siegel & Linda Greenhouse, *Afterword*, *in* BEFORE *ROE V. WADE*: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING 259–60 (Reva B. Siegel & Linda Greenhouse eds., 2010).

233. On the importance of Reagan and Republican support to pro-lifers in the period, see, for example, DONALD T. CRITCHLOW, THE CONSERVATIVE ASCENDANCY: HOW THE GOP RIGHT MADE POLITICAL HISTORY 148–97 (2007); Cassidy, *supra* note 90, at 146–48.

ued to do so well into the 1980s, pro-lifers had more reason than ever to forge a partnership with the Religious Right and the Republican Party.[234]

Meaningful-choice arguments no longer fit in the new agenda crafted by the antiabortion movement and its allies. Reagan's presidential campaign had popularized neoliberalism, a theory highlighting the merits of deregulation, welfare cuts, and free markets.[235] "Reaganomics" translated these ideas into an overarching economic philosophy.[236] When it came to welfare, Reagan worked with the New Right to reframe dependency as a vice rather than a source of vulnerability.[237] New Right politics promised to shrink the social safety net activists like Mecklenburg had promoted as a precondition for true reproductive choice.

Whereas pro-lifers had long demanded equal treatment for all dependent Americans, Reagan described dependency as dangerous. In a 1981 speech, Reagan related the story of a victim of the welfare state—a young woman who "had become so dependent on the welfare check that she even turned down offers of marriage."[238] Reagan's story echoed statements made by the New Right connecting the welfare state and the decline of the traditional family. A healthy dose of economic self-sufficiency, Reagan suggested, would save the family and revive an ailing economy.[239] More importantly, "ideas previously seen as distinctly conservative had become mainstream."[240] Abortion opponents joined a political coalition committed to dismantling the welfare state. American voters appeared increasingly hostile to the idea that welfare counted as a right for children or anyone else. In this environment, meaningful-choice arguments lost momentum.

Reagan's Justice Department also scaled back on antidiscrimination protections, particularly when those policies required affirmative action.[241] While continuing to enforce an existing affirmative-action executive order, Reagan Administration officials filed suit seeking to overturn

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234. On the continued loyalty of some pro-life voters toward the Democratic Party into the 1980s, see, for example, DAVID KAROL, PARTY POSITION CHANGE IN AMERICAN POLITICS: COALITION MANAGEMENT 67 (2009).

235. *See, e.g.*, DANIEL STEDMAN JONES, MASTERS OF THE UNIVERSE: HAYEK, FRIEDMAN, AND THE BIRTH OF NEOLIBERAL POLITICS 4–7 (2012).

236. REBECCA DOLHINOW, A JUMBLE OF NEEDS: WOMEN'S ACTIVISM AND NEOLIBERALISM IN THE COLONIAS OF THE SOUTHWEST 14 (2010).

237. MARISA CHAPPELL, THE WAR ON WELFARE: FAMILY, POVERTY, AND POLITICS IN MODERN AMERICA 199 (2010).

238. *Id.* (quoting Statements by President Ronald Reagan (1981)).

239. *See* Adam Clymer, *Reagan Urges Party to Support Tax Cuts*, N.Y. TIMES, at 27 (June 25, 1978), http://0-search.proquest.com.bianca.penlib.du.edu/docview/123657465/76E71B388C414A49PQ/1?accountid=14608.

240. DANIEL BÉLAND & ALEX WADDAN, THE POLITICS OF POLICY CHANGE: WELFARE, MEDICARE, AND SOCIAL SECURITY REFORM IN THE UNITED STATES 44 (2012).

241. On the Reagan Administration's opposition to affirmative action, see ANDERSON, *supra* note 210, at 162–85.

quotas in some fifty affirmative-action decrees.[242] Ideologically, administration officials developed a stinging criticism of "special treatment."[243] In 1987, in *California Federal Savings and Loan Ass'n. v. Guerra*,[244] the Reagan Administration crystallized its position. *Guerra* asked whether Title VII preempted any state law requiring employers to provide certain benefits to pregnant workers.[245] In arguing against the California policy, the Reagan Administration described laws mandating accommodations for pregnancy as the kind of "reverse discrimination" that Title VII prohibited and that the administration opposed.[246] The pro-life movement's allies in the New Right and Religious Right strongly opposed affirmative action.[247]

Arguments for meaningful choice no longer made sense to a pro-life movement working so closely with opponents of gender-based affirmative action. When antiabortion activists like Marjory Mecklenburg defended reproductive choice, they demanded protection for pregnant women and mothers—those they saw as members of a particularly vulnerable and dependent class.[248] New Right activists responded that since women already enjoyed special privileges, antidiscrimination protections represented a step down, a threat to "conventional culture, established institutions, and customary social roles."[249] When the antiabortion movement partnered with the political right, prior commitments to the expansion of antidiscrimination law seemed profoundly out of step.

C. Feminists Seek Better Justifications for Abortion Rights

As pro-lifers moved away from support for meaningful reproductive choice, attacks on legal abortion encouraged feminists to develop new arguments for abortion rights, including claims relying on the Equal Protection Clause of the Fourteenth Amendment. Starting in 1973, legal academics from across the ideological spectrum attacked the constitu-

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242. On the retention of the affirmative-action executive order, see HUGH DAVIS GRAHAM, COLLISION COURSE: THE STRANGE CONVERGENCE OF AFFIRMATIVE ACTION AND IMMIGRATION POLICY IN AMERICA 173 (2002). On the effort to eliminate racial quotas from consent decrees, see ANDREW E. BUSCH, RONALD REAGAN AND THE POLITICS OF FREEDOM 27 (2001).

243. *See* ANDERSON, *supra* note 210, at 184.

244. 479 U.S. 272 (1987). *Guerra* ultimately held that the California law did not violate Title VII. *Id.* at 280.

245. *Id.* at 277–80.

246. RICHARD L. PACELLE, JR., BETWEEN LAW AND POLITICS: THE SOLICITOR GENERAL AND THE STRUCTURING OF RACE, GENDER, AND REPRODUCTIVE RIGHTS LITIGATION 149, 240–41 (2003).

247. *See, e.g.*, JEROME L. HIMMELSTEIN, TO THE RIGHT: THE TRANSFORMATION OF AMERICAN CONSERVATISM 83 (1990); LAURA KALMAN, RIGHT STAR RISING: A NEW POLITICS, 1974–1980, at 189, 191–92 (2010).

248. *See* ZIEGLER, *supra* note 72, at 197–99.

249. DONALD T. CRITCHLOW, PHYLLIS SCHLAFLY AND GRASSROOTS CONSERVATISM: A WOMAN'S CRUSADE 214 (2005).

tional underpinnings of the *Roe* decision.[250] Starting with John Hart Ely's *The Wages of Crying Wolf*, legal academics presented the substantive due process reasoning of *Roe* as unconvincing, intellectually underwhelming, and even results-oriented.[251] By the early 1980s, academic attacks on *Roe* prompted a powerful response from legal feminists committed to abortion rights. Commentators from Ruth Bader Ginsburg to Catherine MacKinnon argued that the problem with *Roe* lay not in its recognition of abortion rights but rather in the rationale offered for those rights.[252] As legal feminists worked to develop a better explanation for abortion rights, the transformative uses of choice that appeared in the 1970s faded from view.[253]

At least in the 1970s, however, the framers of the PDA (and a variety of laws guaranteeing protections for low-income mothers) advanced an idea of reproductive choice dramatically at odds with the narrow understanding now linked to the *Roe* decision. The framers of the PDA emphasized this idea of meaningful choice, presenting antidiscrimination law as a crucial protection against reproductive coercion.

Placing the PDA in a broader historical context spotlights the shortcomings of current judicial interpretations of the law. Courts have generally interpreted the PDA to include three interrelated rights: the right to an individualized judgment of capacity, the right to work if not incapacitated, and the right to whatever accommodations an employer offers workers who have the same physical capacity to work.[254] By contrast, women have fared poorly when seeking light-duty work or some other modification that would allow them to work throughout pregnancy.[255] As Joanna Grossman has argued, "The failure of current law to acknowledge a pregnant woman's right to work despite temporary, partial impairments or risks systematically undermines the ability of women to attain workplace equality."[256] As the history of struggles for meaningful choice

250. *See* Jack M. Balkin, Roe v. Wade*: An Engine of Controversy*, *in* WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION 3, 21 (Jack M. Balkin ed., 2005).

251. *See, e.g.*, Ely, *supra* note 213, at 940 (arguing that *Roe* had revived a discredited and dangerous substantive due process doctrine). For further exploration of criticisms of *Roe* in the period, see GARROW, *supra* note 40, at 609–17 (surveying critical responses to the *Roe* decision).

252. *See, e.g.*, Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 143–44 (2001); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 821 (1983).

253. Some scholars maintained that privacy or liberty, although not in the form envisioned by the *Roe* Court, represented the most promising foundation for abortion rights. *See, e.g.*, Anita Allen, *Allen, J., Concurring in the Judgment*, *in* WHAT *ROE V. WADE* SHOULD HAVE SAID, *supra* note 250, at 92, 98–107; Jed Rubenfeld, *Rubenfeld, J., Concurring in* Roe v. Wade *and Concluding that the Writ of Certiorari Should be Dismissed as Improvidently Granted in* Doe v. Bolton, *in* WHAT *ROE V. WADE* SHOULD HAVE SAID, *supra* note 250, at 109, 118–19.

254. *See* Grossman, *supra* note 18, at 607–13.

255. *See id.* at 570 ("A pregnant woman who seeks to continue working through pregnancy, but experiences a temporary diminishment or alteration of capacity due to the physical effects of pregnancy, will encounter limited protection in the law.").

256. *Id.* at 621. Part I, *supra*, discusses this literature at greater length.

makes apparent, that same failure undermines the idea of reproductive liberty written into the PDA.

Part III examines how—and how much—*Young* transformed pregnancy-discrimination jurisprudence. While the Court removed some of the barriers in the way of individual disparate treatment claims, employers can still impose the kind of burdens on reproductive decision-making that the PDA was designed to rule out.

III. *YOUNG*, ACCOMMODATION, AND MEANINGFUL REPRODUCTIVE CHOICE

The theory of meaningful choice developed by abortion opponents and legal feminists stands in obvious tension with decisions interpreting the PDA to require only what the courts call "pregnancy blindness." Where does the Supreme Court's decision in *Young* leave pregnancy-blind policies and meaningful choice more broadly? After briefly laying out the theory of meaningful reproductive choice underlying the PDA, this Part begins by examining pre-*Young* analysis of light-work and other accommodation requests. Next, the Part explores what *Young* did and did not change about the judicial treatment of pregnancy-blind policies. Finally, in the aftermath of *Young*, the Part considers the best strategy for advancing the norm of meaningful choice that feminists and antiabortion activists embraced.

A. The Legislative Constitutional Norm of Meaningful Choice

The story of the PDA underlying the *Young* litigation spotlights the importance of what Reva Siegel and Robert Post have called legislative constitutionalism,[257] a process that "delivered what even a more generous American [juridical] Constitutionalism could not: affirmative rights applicable to private as well as public workplaces."[258] Often, scholars describe the rights created by the PDA as formal-equality protections, that is, guarantees that pregnant women enjoy protection from stereotyping and rights to access the benefits employers provide to similarly disabled employees.[259] Understanding the role of meaningful-choice reasoning reveals a more radical purpose advanced by the framers of the PDA and their supporters.

It is worth explaining why an idea of choice thoroughly rejected by the Court gained currency in Congress. While some constitutional rights require particular remedies or entailments, others "function as values that

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257. *See generally* Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003).

258. WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 33 (2010).

259. *See, e.g.*, Grossman, *supra* note 18, at 570; Issacharoff & Rosenblum, *supra* note 18, at 2204 (describing the PDA as adopting a "formal equality model").

courts seek to realize, rather than as principles that mandate specific remedial entailments."[260] Siegel and Post offer the example of judicially ordered school desegregation orders.[261] Although these orders may not be specifically required by the Equal Protection Clause, they count as a crucial attempt to give it meaning.[262] The guarantee of meaningful choice recognized in the PDA operates in a similar way. While the Court has made clear that the Constitution protects a woman's freedom to make certain reproductive decisions, the Court has found that the Fourteenth Amendment requires no specific remedial steps to vindicate that right.[263] Through the PDA, Congress attempted to work out the meaning of constitutional reproductive choice from the "distinct standpoint of [the] legislature."[264] The story of the PDA makes clear important differences between legislative constitutionalism and the work of the courts and between the reproductive-liberty principles each embraced.

Legislative constitutionalism differs from judicial decision-making in ways that mattered to the recognition of meaningful reproductive choice. Because of the case-or-controversy requirement, judicial decisions address only those constitutional questions at stake in the litigation.[265] By contrast, Congress can take on larger issues, writing into statutes a more robust vision of what constitutional rights could mean.[266] In particular, Congress can test the distinction between positive and negative rights, creating redistributive remedies.[267] Congress effectively experiments with such capacious notions of rights and remedies partly because it can act more cautiously in articulating its constitutional commitments. Legislative constitutionalism can unfold incrementally, setting forth a principle and developing a remedial scheme over time.[268] Crucially, Congress is also democratically accountable, and voters can respond to any perceived misstep in the articulation of important constitutional commitments.[269]

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260. Post & Siegel, *supra* note 257, at 2006.

261. *Id.* at 2006–07.

262. *See* id.

263. If anything, the Court's recent jurisprudence focuses on the permissible burdens states can place on abortion rights. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876 (1992) ("Not all burdens on the right to decide whether to terminate a pregnancy will be undue.").

264. Post & Siegel, *supra* note 257, at 2007.

265. *Id.* at 2006.

266. William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 167 (2001) ("Congress's constitutional duties were not only to safeguard the constitutional bounds and fairness of social and economic legislation, but also to interpret and secure these new positive social and economic rights.").

267. *See* ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 314–15 (1994); Lawrence G. Sager, Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law, 88 NW. U. L. REV. 410, 420–22 (1993).

268. Post & Siegel, *supra* note 257, at 2006-07.

269. *See, e.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 182–83 (1999) ("[I]ts constitutional tasks of debate, discussion, and authorization inevitably make Congress a more deliberative [and] public . . . body.").

Key features of legislative constitutionalism made it much more effective for those arguing for meaningful reproductive choice. Courts may have neither the competence nor the will to fashion redistributive remedies of the kind demanded by some proponents of reproductive choice.[270] Judicial precedents establishing a strong tradition of negative constitutionalism do not bind Congress as they do the Court.[271] A Congress accountable to the people felt freer to experiment with different ideas of reproductive choice.

The PDA modified the reasoning underlying meaningful-choice arguments. As its legislative history makes plain, framers of the PDA set out not only to guarantee women individualized treatment but also to "put an end to an unrealistic and unfair system that forces women to choose between family and career."[272] The framers of the PDA described as coercive disability policies that penalized women for taking pregnancy-related leave.[273] As the PDA's sponsors framed it, these penalties burdened an unquestionably constitutional right—a right for women "to continu[e] their pregnancy and maintain[] their jobs at the same time."[274] While the courts may not view such policies as unconstitutional, Congress concluded that pregnancy discrimination created an impermissible burden on women's reproductive choice.[275]

Just the same, in passing the PDA, Congress proceeded incrementally, forging a compromise between feminists, pro-lifers, and business lobbyists. Under the PDA, if the employer chooses to accommodate any employee, that accommodation must be "administered equally for all workers in terms of their actual ability to perform work."[276] While employers had no affirmative duty to support a woman's reproductive decision-making, they could not impose special burdens. As the House Report for the PDA explained, the law required that "pregnant women be treated the same as other employees on the basis of their ability or inability to work."[277]

Although incomplete, the PDA's original guarantee of meaningful choice stands in obvious tension with current judicial interpretations of the law. The federal courts interpret the PDA to require "pregnancy-

270. Post & Siegel, *supra* note 257, at 2007 (highlighting "problems of redistribution that would be quite beyond the bounds of judicial remedies").

271. Just the same as Gordon Silverstein has argued, judicial decisions shape Congress's engagement with constitutional issues in unpredictable ways. *See* GORDON SILVERSTEIN, LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS 35–41, 63–67 (2009).

272. *Legislative History of the PDA*, *supra* note 206, at 185 (statement of Paul E. Tsongas).

273. *Id.* at 203 (statement of Sen. J. Javits).

274. *Id.* at 202–03 (statement of Sen. J. Javits).

275. *See id.* at 208–09 (statement of Rep. Ronald A. Sarasin); *id.* at 178 (statement of Rep. Baltasar Corrada); *id.* at 125–27 (statement of Sen. Biden); *id.* at 208 (statement of Rep. James M. Jeffords).

276. H.R. REP. NO. 95-948, at 5 (1978).

277. *Id.* at 4.

blind[ness].”[278] That is, a policy passes muster as long as it “does not grant or deny light work on the basis of pregnancy, childbirth, or related medical conditions.”[279] Viewed in pure formal-equality terms, pregnancy-blind policies seem valid, since such policies do not appear to single out pregnancy, at least superficially. Understood in the context of the liberty norms at work in the PDA, however, pregnancy-blind policies create just the kind of special burden on women’s reproductive decision-making that the PDA attempts to rule out.

The Fifth Circuit first clearly articulated the pregnancy-blindness defense in 1998, in *Urbano v. Continental Airlines, Inc.*[280] Mirtha Urbano, a Continental employee, mostly worked as a ticket agent.[281] While she performed a number of tasks, Urbano sometimes had to perform physical tasks, such as lifting customers’ luggage.[282] After learning she was pregnant, Urbano began experiencing lower back pain and visited her physician.[283] Because she had not been injured on the job, Continental found Urbano ineligible for a light-work assignment, forcing her to exhaust her family leave and go without pay.[284] Urbano brought suit under Title VII.[285]

Several years earlier, the Sixth Circuit found that a similar light-duty policy violated the PDA, since the law expressly required “that employers provide the same treatment of such individuals as provided for ‘other persons . . . similar in their ability or inability to work.’”[286] The *Urbano* Court disagreed.[287] The formal terms of the employer’s policy, not its substantive effect, dictated the court’s analysis.[288] Unless Urbano could show that Continental’s policy was a “pretext for discrimination against pregnant women or that it had a disparate impact on them,” the policy satisfied Title VII.[289] The Fifth Circuit suggested that Title VII might mandate pregnancy blindness since a contrary “policy would treat a male employee ‘in a manner which but for that person’s sex would be different.’”[290]

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278. *See* Widiss, *supra* note 18, at 964, 1022.
279. Reeves v. Swift Transp. Co., 446 F.3d 637, 641 (6th Cir. 2006), *abrogated by* Young v. United Parcel Serv., Inc., 135 S. Ct. 1338 (2015).
280. 138 F.3d 204, 206–08 (5th Cir. 1998), *abrogated by* Young v. United Parcel Serv., Inc., 135 S. Ct. 1338 (2015).
281. *Id.* at 205.
282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.*
286. Ensley-Gaines v. Runyon, 100 F.3d 1220, 1226 (6th Cir. 1996) (quoting 42 U.S.C. § 2000e(k) (2012)).
287. *Urbano*, 138 F.3d at 207–08.
288. *See id.*
289. *See id.*
290. *Id.* at 208 n.2 (quoting Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 683 (1983)).

The Fourth Circuit's decision in *Young* elaborated on the justification for pregnancy blindness under the PDA. Peggy Young began working for UPS in 1999, and by 2002, she had secured a position driving a delivery truck.[291] By 2006, Young had shifted to a part-time position as an air driver, working in the early morning and picking up packages delivered by air carrier the night before.[292] In July 2006, after two rounds of unsuccessful in vitro fertilization, Young received leave from her employer to try a third time.[293] When she finally became pregnant, several doctors told her not to lift more than twenty pounds for the first twenty weeks of her pregnancy.[294] Armed with her doctors' advice, Young requested a light-work accommodation.[295]

As a matter of official policy, UPS's applicable Collective Bargaining Agreement allowed accommodation only when workers were injured on the job or when employees had a disability cognizable under the ADA.[296] UPS's occupational health specialist, Cynthia Martin, concluded that Young's pregnancy did not warrant ADA protection and had not occurred on the job, and as a result, Martin denied Young's request.[297] In November, when refused again by UPS's Capitol Division Manager, Young had to exhaust her leave under the Family Medical Leave Act.[298] Between November 2006 and 2007, Young received no pay and eventually lost her medical coverage. [299] After April 2007, when she gave birth, she returned to work, filing a charge of discrimination with the Equal Employment Opportunity Commission (EEOC).[300] Young alleged race and sex discrimination under Title VII, as well as disability discrimination under the ADA.[301]

In rejecting Young's claim, the Fourth Circuit zeroed in on the second clause of the PDA, which provides, "women affected by pregnancy . . . shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."[302] While acknowledging that the second clause of the PDA seemed clear on its face, the Fourth Circuit tried to reconcile it with the first clause.[303] "Although the second clause can be read broadly," the court explained, "we conclude that its placement in the definitional sec-

291. Young v. United Parcel Serv., Inc. (*Young I*), 707 F.3d 437, 440 (4th Cir. 2013), *amended and superseded by* Young v. United Parcel Serv., Inc., 784 F.3d 192, *subsequent determination*, 2015 WL 2058940 (2015).
292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.* at 440–41.
296. *Id.* at 439–40.
297. *Id.* at 440–41.
298. *Id.* at 441.
299. *Id.*
300. *Id.* at 442.
301. *Id.*
302. *Id.* at 447–48 (quoting 42 U.S.C. § 2000e(k) (2012)).
303. *See id.* at 447–49.

tion of Title VII, and grounding within the confines of sex discrimination under § 703, make clear that it does not create a distinct and independent cause of action."[304] To do otherwise, as the court reasoned, would make pregnant workers a favored class, receiving special treatment other employees did not receive.[305]

The same reasoning informed the court's analysis of Young's *McDonnell-Douglas* claim. "Under this framework, Young must establish a prima facie case of sex discrimination on her pregnancy claim by showing '(1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action; and (4) that similarly-situated employees outside the protected class received more favorable treatment.'"[306]

The court focused on the fourth element—particularly, who counted as an appropriate comparator.[307] Young urged the court to compare her to other workers similarly able to perform certain on-the-job tasks.[308] By contrast, UPS primarily analyzed the source of different workers' disability.[309] As the court explained, "Young is not similar to employees injured on the job because, quite simply, her inability to work does not arise from an on-the-job injury."[310] Finding that Young had not presented enough evidence of circumstances "giving rise to an inference of unlawful discrimination," the court rejected her PDA claim.[311]

B. Pregnancy Blindness After Young

In vacating the Fourth Circuit's decision in *Young*, the Supreme Court tried to carve out a middle-ground position that differed from the stands taken by both UPS and the Fourth Circuit on the one hand and Peggy Young on the other.[312] The dispute turned on the meaning of the second clause of the PDA, which states that pregnant workers shall be treated the same "as other persons not so affected but similar in their ability or inability to work."[313] Young argued that "[t]he PDA . . . seeks to ensure that 'women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job.'"[314] In Young's reading, the second clause did not require courts to set aside a conventional disparate-treatment analysis but did mandate that judges identifying a discriminatory intent compare pregnant workers to

304. *Id.* at 447.
305. *Id.* at 448.
306. *Id.* at 449–50 (quoting Gerner v. Cty. of Chesterfield, 674 F.3d 264, 266 (4th Cir. 2012)).
307. *See id.* at 450–51.
308. *See id.* at 450.
309. *See id.* at 450–51.
310. *Id.*
311. *Id.* at 451 (quoting Mackey v. Shalala, 360 F.3d 463, 468 (4th Cir. 2004)).
312. *See* Young v. United Parcel Serv., Inc. (*Young II*), 135 S. Ct. 1338, 1352–54 (2015).
313. 42 U.S.C. § 2000e(k) (2012); *see also Young II*, 135 S. Ct. at 1352–54.
314. Petitioner's Brief, *supra* note 11, at 19–20 (quoting International Union v. Johnson Controls, Inc., 499 U.S. 187, 204 (1991)).

others with a similar capacity to do a job, regardless of the source of their disability.[315] Amici representing a variety of women's rights and civil rights groups went further, arguing that "[t]he text of the Second Clause leaves no room for a distinction based on the source of the condition to masquerade as a legitimate non-discriminatory reason."[316] By contrast, UPS argued that the second clause simply reaffirmed that pregnant workers counted among the protected classes covered by Title VII and said nothing about whether employers could accommodate some workers while leaving pregnant employees out.[317] In individual disparate-treatment analysis, courts were free to compare pregnant workers to others on the basis of disability.[318] If UPS excluded all employees not injured on the job, the company would necessarily comply with the PDA.[319]

Writing for a 6-3 majority, Justice Breyer found none of these interpretations persuasive. Like the lower courts, the majority found that Young's interpretation would "grant[] pregnant workers a 'most-favored-nation' status."[320] With little analysis of the purpose or history of the PDA, the Court dismissed the idea that Congress would have intended to mandate equal treatment of pregnant workers "irrespective of the nature of their jobs, the employer's need to keep them working, their ages, or any other criteria."[321] In reaching this result, the majority relied on language in the House and Senate Reports, which stated in pertinent part that the PDA "reestablish[ed] the law as it was understood prior to" the *Gilbert* decision in 1976.[322] Since the Court applied the *McDonnell-Douglas* framework prior to *Gilbert*, the majority concluded that employers could deny pregnant workers accommodations as long as they had "a legitimate, non-discriminatory, nonpretextual reason for doing so."[323]

Nor did the majority find that the text of the PDA required a different interpretation. The second clause compared pregnant workers to "other persons" similarly unable to work.[324] Because the clause did "not say that the employer must treat pregnant employees the 'same' as '*any* other persons' (who are similar in their ability or inability to work),

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315. *See id.* at 20–21.
316. Brief of Law Professors and Women's and Civil Rights Organization as Amici Curiae in Support of Petitioner at 24, *Young II*, 135 S. Ct. 1338 [hereinafter Brief for Law Professors] (No. 12-1226).
317. *See* Brief for Respondent, *supra* note 10, at 11–12.
318. *See id.* at 14.
319. *See id.* at 11–12.
320. *Young II*, 135 S. Ct. at 1349.
321. *Id.* at 1349–50.
322. *Id.* at 1350 (quoting S. REP. NO. 95-331, at 8 (1978)).
323. *See id.*
324. *Id.* at 1348.

[or] . . . specify *which* other persons Congress had in mind," the majority found Young's reading unpersuasive.[325]

However, the majority found UPS's interpretation of the second clause equally unconvincing. As Justice Breyer explained, Congress intended to overrule both the holding and reasoning of *Gilbert*.[326] UPS's reading would do nothing to a core premise of the *Gilbert* decision—"that an employer can treat pregnancy less favorably than diseases or disabilities resulting in a similar inability to work."[327]

The *Young* majority further outlined what a worker could do to succeed in an individual disparate-treatment claim.[328] At the prima facie case stage, a worker could prove "that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work.'"[329] If the employer offered a legitimate, nondiscriminatory reason for the exclusion, a worker could raise an inference of pretext by showing that a policy created "a significant burden on pregnant workers, and that the employer's 'legitimate, nondiscriminatory' reasons are not sufficiently strong to justify the burden."[330] To show a material issue of fact as to whether a burden exists, a worker could demonstrate that "the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers."[331]

Concurring in the judgment, Justice Alito analyzed in greater depth to whom pregnant workers could be compared as part of individual disparate-treatment analysis.[332] Alito concluded that "pregnant employees must be compared with employees performing the same or very similar jobs."[333] Alito also offered some clues about how such a comparison would unfold by analyzing one of UPS's accommodations.[334] The company had accommodated drivers who lost their DOT certification.[335] UPS and the Fourth Circuit distinguished pregnant workers from those accommodated on two bases. First, workers who lost DOT certification faced a legal obstacle while pregnant workers did not.[336] Second, workers without DOT certification theoretically still had the ability to perform a variety of physical tasks that pregnant women requiring accommodation

325. *Id.* at 1349–50.
326. *Id.* at 1353.
327. *Id.*
328. *Id.* at 1353–54.
329. *Id.* at 1354.
330. *Id.*
331. *Id.*
332. *See id.* at 1357–59 (Alito, J., concurring).
333. *Id.* at 1357–58.
334. *See id.* at 1360–61.
335. *Id.* at 1360.
336. *See id.*

did not.[337] For Alito, neither of these distinctions made sense.[338] At least on some occasions, workers losing DOT certification would have the same incapacity to work as pregnant employees.[339] UPS offered no explanation as to why pregnant drivers did not receive accommodations afforded to other workers.[340]

Where do pregnancy-blind policies stand in the aftermath of *Young*? This Part next explores the impact of *Young* on three strategies available to pregnant workers: those involving disparate treatment, disparate impact, and disability under the ADA. By providing a partial roadmap for workers challenging pregnancy-blind policies, *Young* will make it easier to bring disparate-treatment claims. At the same time, by reinforcing the idea that providing workers meaningful choice constitutes impermissible "special treatment," *Young* exposes the persistent disadvantages of using litigation to protect pregnant workers.

C. Individual Disparate Treatment Claims

After *Young*, employees will most likely challenge pregnancy-blind policies using either direct or indirect evidence of discrimination. In direct-evidence cases,[341] employees have conventionally (and unsuccessfully) turned to light-work policies themselves as proof of discriminatory intent.[342] The logic here is straightforward: employers use light-work policies that, by their very terms, exclude all pregnant women from accommodations available to employees similarly able (or unable) to work. Prior to *Young*, the circuit courts refuted this logic by relying on a narrow definition of who counts as a proper comparator for pregnant women.[343] In particular, courts compare pregnant women to other workers on the basis of the source of their injury or disability, rather than their capacity to work. On their face, pregnancy-blind policies treat pregnant women the same as all other workers not injured on the job or not considered disabled under the terms of the ADA.

Young is silent on whether pregnancy-blind policies can ever qualify as direct evidence of discrimination, but the logic of the majority opin-

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337. *See id.*

338. *See id.* at 1360–61.

339. *See id.*

340. *Id.* at 1361.

341. *See, e.g.*, Jones v. Res-Care, Inc., 613 F.3d 665, 671 (7th Cir. 2010).

342. *See, e.g.*, Serednyj v. Beverly Healthcare, LLC, 656 F.3d 540, 548–49 (7th Cir. 2011), *abrogated by Young II*, 135 S. Ct. 1338; Reeves v. Swift Transp. Co., 446 F.3d 637, 641 (6th Cir. 2006), *abrogated by Young II*, 135 S. Ct. 1338; Spivey v. Beverly Enters., Inc., 196 F.3d 1309, 1312–13 (11th Cir. 1999), *abrogated by Young II*, 135 S. Ct. 1338; Urbano v. Cont'l Airlines, Inc., 138 F.3d 204, 206 (5th Cir. 1998), *abrogated by Young II*, 135 S. Ct. 1338.

343. *See, e.g.*, *Serednyj*, 656 F.3d at 548–49 (upholding a pregnancy-blind policy because it treated pregnant workers the same as non-pregnant employees not injured on the job); *Spivey*, 196 F.3d at 1312–13 (upholding a pregnancy-blind policy because it treated pregnant workers the same as non-pregnant employees not injured on the job); *Urbano*, 138 F.3d at 206 (upholding a pregnancy-blind policy because it treated pregnant workers the same as non-pregnant employees not injured on the job).

ion stands in obvious tension with this argument. The Court explicitly allowed the employer to accommodate some workers with an identical inability to work while excluding pregnant workers so long as employers had a legitimate, nondiscriminatory reason for doing so.[344] Under *Young*, without more, a policy denying accommodation to pregnant workers would likely not constitute direct evidence of discrimination. The fact of the discrimination would not change the analysis. What matters under *Young* is the employer's motivation and intent.[345]

Young will make a greater difference to the courts' analysis under the *McDonnell-Douglas* burden-shifting framework. In the lower courts, the central problem in light-work cases has involved the final element: whether denying light work to pregnant women creates a special burden or whether granting pregnant women light work constitutes special treatment.[346]

Before *Young*, courts answering this question focused on who counts as a relevant comparator—a person "similarly situated" or nearly identical to a pregnant woman whom an employer treats more favorably.[347] Workers ask the court to compare workers in terms of their ability to do a job, while employers ask the courts to spotlight the cause of a worker's disability.[348] Again, for the most part, the courts endorsed the latter position.[349]

On the rare occasions that women made it past the prima facie stage, employees tried to show that an employer's purportedly neutral reason for using a pregnancy-blind policy was a pretext for sex discrimination.[350] Before *Young*, proving pretext was hard. The Sixth Circuit rejected a PDA challenge because the employee lacked strong enough evidence that employers had adopted a pregnancy-blind policy for discriminatory reasons.[351] Establishing such an evidentiary foundation was often likely to be difficult and expensive. Employees might need to conduct "an examination of how the policy came to be enacted and why," to locate "evidence about women's status generally within the employer's ranks," and to conduct "interviews . . . [of] current and past employees about employer attitudes concerning pregnancy or women in the workplace."[352] As Joanna Grossman and Gillian Thomas recognize, however,

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344. *Young II*, 135 S. Ct. at 1354.
345. *See id.*
346. *See* Grossman & Thomas, *supra* note 13, at 36–37.
347. *See id.* at 37.
348. *See, e.g.*, *id.* For examples of decisions on this point, see, e.g., *Spivey*, 196 F.3d at 1313; *Urbano*, 138 F.3d at 206.
349. *See, e.g.*, Grossman & Thomas, *supra* note 13, at 36–37.
350. *See, e.g.*, Reeves v. Swift Transp. Co., 446 F.3d 637, 641–42 (6th Cir. 2006), *abrogated by Young II*, 135 S. Ct. 1338.
351. *Id.*
352. Grossman & Thomas, *supra* note 13, at 40–41.

even workers who can bring forth this kind of evidence must counter arguments that they demand "special treatment."[353]

Young provides some reassurance for pregnant workers proceeding under *McDonnell-Douglas*. To make out a prima facie case, *Young* made clear that workers needed only to show that the employer accommodated other workers similar in their inability to work. If an employer adopts a pregnancy-blind policy that accommodates nonpregnant workers with similar physical disabilities, most lower courts would have rejected a disparate treatment claim out of hand. After *Young*, if an employer uses a similar pregnancy-blind policy, a worker should make it to the last step of the burden-shifting analysis.

Young also makes it easier for pregnant workers to show pretext. Both the majority and Justice Alito's concurrence draw attention to the impact of an exclusionary policy and the stated reasons for it. If a policy excluded most pregnant workers while covering all others, the majority reasoned that a jury could reasonably infer a discriminatory intent, particularly when the employer's justification did not seem strong enough to rationalize such a significant impact.[354] Under Justice Alito's approach, courts applying the burden-shifting framework would compare pregnant workers to others assigned the same job and similar in their inability to work. Alito's skepticism about UPS's accommodation of workers who lost their DOT certification stemmed from the kind of mismatch between the employer's stated means and ends that troubled the majority. At least some of the time, pregnant workers and drivers without DOT certification could perform the same tasks. For Alito, UPS had simply not offered a good enough reason for providing an accommodation to the latter group of workers while denying one to the former.

Just the same, after *Young*, real obstacles still stand in the way of pregnant workers relying on individual disparate treatment. The majority's reasoning presupposes that there are nondiscriminatory reasons for treating pregnant workers differently beyond their inability to perform certain tasks.[355] The Court specifically mentioned distinctions based on "special duties, special service, or special needs," but left the door open for employers to identify more nondiscriminatory reasons to single out pregnant workers.[356] As a result, *Young* still allows employers to circumvent the principle of meaningful choice written into the PDA. Under the PDA, after choosing to accommodate any employee, the employer can exclude pregnant workers only if they differ from others in their inability to perform certain tasks. By allowing employers more room to exclude

353. *Id.* at 41.
354. *Young II*, 135 S. Ct. at 1354–55.
355. *See id.* at 1354.
356. *Id.* at 1350.

pregnant workers, *Young* still does too little to guard against the burdens on reproductive decision-making targeted by the PDA.

To defeat a plaintiff's claim at the summary judgment stage after *Young*, an employer may simply have to offer a persuasive reason for leaving pregnant workers out. The majority countenanced the possibility that some pregnancy-blind policies—including UPS's own rules—would pass muster.[357] *Young* makes clear that as a policy more heavily burdens pregnant women, employers must bring forth more persuasive reasons for discriminating.[358] However, the burden on pregnant workers is relative. If employers exclude all pregnant workers and many nonpregnant workers, the kind of significant burden that the *Young* Court describes may not exist. Even a burden as onerous as the one created by UPS may still survive as long as the employer makes a sufficiently compelling argument for it. Theoretically, employers could have good reason to reward only those injured on the job for the hazard incurred during service. Accommodations for those injured on the job effectively exclude all pregnant women, but under *Young*, such a defect may not be fatal. For Justice Alito, a pregnancy-blind policy excluding workers who do not have a disability under the ADA would present no problem under the PDA.[359] After *Young*, pregnancy-blind policies will less often absolve employers of responsibility for pregnancy discrimination. However, given the circuit courts' receptivity to these policies, *Young* still allows employers to treat pregnant workers differently because of the source of their disability—their pregnancy.

Worse, *Young* reinforced the "most-favored-nation" reasoning underlying the lower courts' treatment of pregnancy-blind policies.[360] Both the majority and concurrence reasoned that the PDA could not require employers to treat pregnant women the same as others based on their inability to work without requiring the kind of special treatment Title VII prohibits.[361]

The reproductive-liberty analysis favored by feminists and pro-lifers in the 1970s may help workers overcome the hurdles created by *Young*. Presenting the law as a protection against special burdens on reproductive liberty gave both movement and countermovement activists in the 1970s a way out of the reverse-discrimination dilemma. Activists successfully reframed the PDA as a protection against special burdens on women's reproductive liberty rather than a guarantee of preferential treatment.

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357. *See id.*
358. *See id.* at 1354.
359. *Id.* at 1360–61 (Alito, J., concurring).
360. *See id.* at 1349–50 (majority opinion); *id.* at 1357–59 (Alito, J., concurring).
361. *See id.* at 1349–50 (majority opinion); *id.* at 1357–59 (Alito, J., concurring).

Now, reviving the liberty analysis used in the PDA debate may also help the courts understand individual disparate treatment analysis in different terms. Under *Young*, at the pretext stage, the courts effectively balance competing considerations, evaluating the strength of an employer's justification against the impact a policy has on pregnant women. That impact should include not only the number of women affected by a policy but also the burden on reproductive decision-making that a policy imposes. Giving employers an out so long as they exclude a sufficient number of nonpregnant workers does nothing to remedy the special burden prohibited by the PDA. Nor should many justifications for excluding pregnant workers be considered sufficiently weighty to justify the reproductive burden inherent in pregnancy-blind policies. To define comparators too narrowly would once again ensure, contrary to the intent of the PDA, that "women workers would face serious obstacles to continuing their pregnancy and maintaining their jobs at the same time."[362]

Justice Alito suggested that UPS's policy of accommodating only disabled employees would likely qualify as a sufficient, nondiscriminatory purpose under *Young*.[363] However, the majority mentioned that the Americans with Disabilities Amendments Act of 2008 might change the courts' analysis of whether pregnancy itself may constitute a disability. This Part turns next to the disability-discrimination challenges that may be available to pregnant workers after *Young*.

D. *Pregnancy as a Disability Under the ADAAA*

The ADA prohibits discrimination on the basis of qualified disability status and demands that employers provide "reasonable accommodations" for qualified individuals unless doing so would impose an "undue hardship."[364] The ADA treats an individual as disabled when she either has or is regarded as having "a physical or mental impairment that substantially limits one or more major life activities of such individual."[365] After the Supreme Court substantially narrowed the definition of a qualifying disability, Congress responded by enacting the 2008 ADA Amendments Act (ADAAA).[366] The ADAAA clarified that the statutory definition of disability should be "construed in favor of broad coverage" and explicitly repudiated the Court's prior interpretations.[367] The ADAAA also required a court to treat a condition as a disability regardless of the effect of mitigating measures, such as medication or hearing

362. 124 CONG. REC. 36,818 (1978).
363. *See Young II*, 135 S. Ct. 1338, 1360 (Alito, J., concurring).
364. 42 U.S.C. § 12112(b)(5)(A) (2012).
365. 42 U.S.C. § 12102(1) (2012).
366. Widiss, *supra* note 18, at 1006.
367. ADA Amendments Act of 2008 (ADAAA) §§ 2, 4, 42 U.S.C. § 12102(4)(a)–(e) (2012); *see also* 29 C.F.R. § 1630.2(j)(1)(iii) (2012) ("[T]he threshold issue of whether an impairment 'substantially limits' a major life activity should not demand extensive analysis.").

aids, and regardless of the fact that a condition was episodic or in remission.[368]

As Jeannette Cox has shown, the ADAAA provides a strong foundation for efforts to define "normal" pregnancy, and not just pregnancy complications, as a disability.[369] The ADAAA makes explicit that "impairment[s]" that cause "substantial" limitations in "walking, standing, . . . lifting, [or] bending" qualify as disabilities.[370]

Although the ADAAA has significantly expanded the definition of a disability, the few courts to consider the issue have responded with ambivalence to claims that "normal" or even "abnormal" pregnancy counts as a qualified disability.[371] Consider, for example, the case of Victoria Serednyj, an activity director at a nursing home operated by Beverly Healthcare, LLC (Beverly).[372] Serednyj's job sometimes required her to perform physical tasks, like rearranging chairs, transporting residents to activities, or carrying shopping bags.[373] Serednyj had previously suffered a miscarriage, and when she became pregnant again, she had complications that required her to avoid strenuous physical labor.[374] Her employer refused to transfer her to a light-duty position because she had not been injured on the job.[375]

Serednyj argued, among other things, that Beverly's failure to grant her request constituted both disability discrimination and a failure to accommodate under the ADA, since her pregnancy prevented her from doing daily tasks like bending and lifting.[376] While acknowledging that pregnancy may count as a physical impairment, the Seventh Circuit concluded that Serednyj could not show that her impairment "substantially limited" a "major life activity."[377] Finding that "[p]regnancy is, by its very nature, of limited duration" and that "any complications which arise from a pregnancy generally dissipate once a woman gives birth," the Seventh Circuit rejected Serednyj's claim.[378] Regardless of the impact of the ADAAA, as *Serednyj* shows, courts may reject any disability claim based on the fact that pregnancy and its complications have only a temporary effect.

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368. *See* 42 U.S.C. § 12102(4)(A)–(E) (2009).
369. Jeannette Cox, *Pregnancy as "Disability" and the Amended Americans with Disabilities Act*, 53 B.C. L. Rev. 443, 444–45 (2012).
370. 29 C.F.R. § 1630.2(i)(1)(i), (j)(1)(viii–ix) (2012).
371. *See, e.g.*, Serednyj v. Beverly Heathcare, LLC, 656 F.3d 540, 554–57 (7th Cir. 2011); Payne v. State Student Assistance Comm., No. 1:07–cv–0981–DFH–JMS, 2009 WL 1468610, at *3 (S.D. Ind. May 22, 2009).
372. *Serednyj*, 656 F.3d at 545.
373. *Id.*
374. *Id.* at 545–46.
375. *Id.* at 546–47.
376. *See id.* at 552.
377. *See id.* at 554–56.
378. *Id.*

Young itself offers few clues about how the Court would view claims that pregnancy would constitute a disability after the ADA Amendments Act. Just the same, the history provided here bolsters Cox's analysis. During the battle for the PDA, business lobbyists urged Congress to distinguish "normal" pregnancy from other disabilities because it was temporary and (at least often) voluntary. Reproductive-liberty analysis allowed legislators to see through this argument. Assume that an employer wishes to accommodate only nonpregnant workers. She can do so as long as she does not formally categorize workers on the basis of pregnancy or related conditions. Achieving the same result—excluding pregnant workers from generally available accommodations—would be easy. Accommodating only workers injured on the job effectively disqualifies any pregnancy-based request, since women rarely conceive at work. To be sure, the PDA did not require employers who provided no accommodations to do so for pregnant employees.[379] However, as the Article shows, the diverse constituencies supporting the PDA did demand that pregnant women be judged on their ability to work, not their pregnancy—the "source" of their disability. Ignoring this consensus allows employers to burden women's reproductive decisions in precisely the way the PDA forbids.

E. Disparate Impact Claims

Joanna Grossman and Gillian Thomas point to the promise of disparate impact claims for women challenging pregnancy-blind policies.[380] Because the plaintiff did not explicitly pursue such a claim, *Young* did not consider the merits of such a strategy. To make out a prima facie case, workers must show a specific and identifiable employment practice (here, a pregnancy-blind policy) that had a statistically significant effect on a protected class.[381] As Grossman and Thomas recognize, the courts appear to have loosened the evidentiary burden in the light-duty context, allowing pregnant workers to rely on general statistics about "the number of women who can be expected to become pregnant during their working lives . . . as well as the extensive literature concerning pregnancy's physical effects."[382]

However, the disparate-impact theory mostly remains untested, since courts have not yet fully addressed the employer's business necessity defense: that is, whether pregnancy-blind policies are job-related and serve a business necessity.[383] Grossman and Thomas convincingly argue

379. See 123 CONG. REC. 29,660 (1977).
380. Grossman & Thomas, *supra* note 13, at 41–49.
381. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994–95 (1988).
382. Grossman & Thomas, *supra* note 13, at 45–47.
383. *Id.* at 47–48.

against several likely defenses, including claims based on cost and the volume of available, "real" light work.[384]

However, the biggest problem with disparate impact claims may lie in the "special treatment" trap set by early opponents of the PDA and reinforced by the *Young* majority. The *Urbano* Court concluded that Title VII forbids all policies that are not pregnancy blind.[385] By granting women a benefit that men could not receive, as the courts concluded, the employer may discriminate on the basis of sex.[386] The Supreme Court's decision in *Ricci v. DeStefano*[387] reinforces this analysis of pregnancy-based accommodations. Although decided in the context of race discrimination, *Ricci* expressed skepticism about the legality of affirmative efforts on the part of the employer to address disparate impacts, particularly when those efforts resemble "reverse discrimination."[388] In that case, the City of New Haven set aside the results of a written test for the promotion of city firefighters since it had a racially disparate impact.[389] Applying the strong-basis-in-the-evidence standard from equal-protection jurisprudence, the Court held that New Haven's decision constituted impermissible treatment under Title VII.[390]

Scholars read *Ricci* in a variety of ways: from suggesting that the Court requires color- (or pregnancy-) blindness in all but the rarest cases to arguing that *Ricci* creates a new defense for employers in disparate-impact cases who were not aware that a policy would have a disparate impact.[391] What seems clear is that *Ricci* narrowed the scope of disparate-impact claims, providing a powerful weapon for those who frame pregnancy accommodation as special treatment. On its face, *Young* offers little comfort to those relying on a disparate-impact theory. The majority and concurrence give ammunition to employers framing requests for accommodations as demands for "most-favored nation status."

The liberty analysis set forth here may help strengthen the case for disparate impact in a post-*Ricci* world. In debate surrounding the PDA, feminists and pro-lifers convinced members of Congress that demands

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384. *See id.* at 47–49.

385. Urbano v. Cont'l. Airlines, Inc., 138 F.3d 204, 208 & n.2 (5th Cir. 1998), *abrogated by* Young v. United Parcel Serv., Inc. (*Young II*), 135 S. Ct. 1338 (2015).

386. *See id.*

387. 557 U.S. 557 (2009).

388. *See* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1343–44 (2010) (discussing the constitutional implications of *Ricci*); Amy L. Wax, *Disparate Impact Realism*, 53 WM. & MARY L. REV. 621, 675 (2011) (explaining that *Ricci* "casts doubt on the legality of the disparate impact doctrine").

389. *Ricci*, 557 U.S. at 561–62.

390. *See id.* at 584–87.

391. *See, e.g.*, Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1871–74 (2012) (using *Ricci* as evidence that "[t]he Roberts Court seems determined to fully enforce past colorblind reasoning—indeed, to expand its reach"); Primus, *supra* note 388, at 1363–75 (canvassing other interpretations of *Ricci*); Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 58 (2013) (arguing that *Ricci* allowed "majority plaintiffs to challenge a civil rights law by standards not available to minority plaintiffs challenging the criminal law").

for "special treatment" in fact constituted calls for protection against the unique burdens imposed on women balancing childbearing and careers.

The federal courts—and the Supreme Court—should overrule decisions relying on the principle of pregnancy blindness. The history of the PDA makes clear that it requires much more. Just the same, as the Part next explains, the courts may not be the most promising place to challenge pregnancy-blind policies.

F. The Return to Legislative Constitutionalism

The history of the battle for meaningful choice illustrates not only the constitutional values realized by the PDA but also the shortcomings of litigation as a tool for seeking accommodations for pregnant workers. Because of courts' reliance on precedent, judicial decision-making remains more path-dependent.[392] As a conservative plurality on the Supreme Court reads color-blindness into the Equal Protection Clause, courts are more likely to view Title VII as a guarantee of sex and pregnancy blindness—one centered on formal equality and fundamentally opposed to any accommodations. The *Young* Court's hostility to "special treatment" ignores the meaning and history of the PDA, but the Court's discomfort with the very idea of accommodation flows naturally from recent Equal Protection and Title VII jurisprudence.

Congress's institutional advantages—an ability to work incrementally, democratic accountability, and the capacity to create redistributive remedies—make the legislative arena a more promising place for contemporary proponents of meaningful choice. Superficially, Congress may not seem to be a promising place to do much of anything. Defined by gridlock, partisan polarization, and astonishingly low poll ratings, Congress seems unlikely to advance any legislative agenda, let alone one related to either equality or liberty.[393]

Moreover, an accommodation-centered policy has drawbacks of its own. Some scholars worry that an accommodation-centered policy would reinforce gender-paternalist attitudes or encourage employers to avoid hiring women in the first place.[394] Michael Selmi, for example, has

392. *See, e.g.*, Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 605 (2001) (noting that judicial decisions are "path dependen[t]" in the sense "that courts' early resolutions of legal issues can become locked-in and resistant to change" due to a variety of factors, including stare decisis, even when change in legal rules is needed "to respond to changing underlying conditions").

393. This Congress is the most gridlocked in history. *See* Jonathan Weisman, *In Congress, Gridlock and Harsh Consequences*, N.Y. TIMES (Jul. 7, 2013), http://www.nytimes.com/2013/07/08/us/politics/in-congress-gridlock-and-harsh-consequences.html?pagewanted=all&_r=0 ("At this time in 2011, Congress had passed 23 laws on the way toward the lowest total since those numbers began being tracked in 1948.").

394. *See, e.g.*, Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 115 (1989) (expressing concern that accommodation might "simply reconstitute [women's] role in a new and more oppressive patriarchy"); Michelle A. Travis, *Equality in the Virtual Workplace*,

argued that disparate-impact theory, an approach sympathetic to accommodation rights, has "stunted the evolution of a more robust definition of intentional discrimination."[395] Samuel Bagenstos contends that broad, structural, accommodation-centered remedies lack the "generally accepted normative underpinnings of antidiscrimination law."[396]

However, as the history presented here makes clear, the PDA mattered to members of Congress and grassroots supporters because it helped to give meaning to important constitutional values surrounding reproductive liberty. As Joanna Grossman argues, an accommodation regime would "create a counter-narrative of a woman's proper place."[397] As importantly, an accommodation law would more accurately reflect the movement–countermovement consensus on reproductive liberty that emerged in debate on the PDA. A new legislative constitutional campaign might represent the next logical step in the expression of those values.

At a minimum, grassroots activists could pursue an amendment to the PDA prohibiting discrimination by pregnancy-blind policies. More ambitiously, feminists and antiabortion activists could pursue legislation like the proposed federal Pregnant Workers Fairness Act (PWFA), a law that would force employers to make reasonable accommodations for pregnant workers much like those employers must make available to the disabled.[398] The PWFA would make it unlawful for employers to deny accommodation to pregnant women unless doing so would represent an "undue hardship."[399] Seven states have already passed such accommodation legislation, as have some local governments like the New York City Council.[400]

Legislative constitutionalism may well be the most promising path for legislators and grassroots activists who want to give further meaning

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24 BERKELEY J. EMP. & LAB. L. 283, 327–28 (2003) (noting that a mandate to accommodate caregiving obligations could "translate into paternalism, as the beneficiaries are viewed as uniquely in need of extra assistance or protection. Paternalism, like resentment, could lead to further limits on women's opportunities and roles." (footnote omitted)).

395. Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 U.C.L.A. L. REV. 701, 781 (2006).

396. Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 3 (2006).

397. Grossman, *supra* note 18, at 625.

398. Co-sponsored by members of Congress on either side of the abortion issue, the bill has been introduced in both the 113th and 112th Congress but has not been moved beyond committee in either the House or the Senate. *See* Pregnant Workers Fairness Act, S. 942, 113th Cong. (2013); Pregnant Workers Fairness Act, S. 3565, 112th Cong. (2012); Pregnant Workers Fairness Act, H.R. 5647, 112th Cong. (2012).

399. *See supra* note 364 and accompanying text.

400. *See, e.g.*, Sean P. Lynch, *Philadelphia Enacts Pregnancy Accommodation Law*, NAT'L. L. REV. (Feb. 11, 2014), http://www.natlawreview.com/article/philadelphia-enacts-pregnancy-accommodation-law (summarizing state laws passed). For discussion of the New York City law, see, for example, Rachel L. Swarns, *Placed on Unpaid Leave, a Pregnant Employee Finds Hope in a New Law*, N.Y. TIMES (Feb. 2, 2014), http://www.nytimes.com/2014/02/03/nyregion/suspended-for-being-pregnant-an-employee-finds-hope-in-a-new-law.html.

to the reproductive-liberty norm written into the PDA. Legislative constitutionalism allowed feminists and antiabortion activists to make gradual progress in the realization of their constitutional commitments. Fundamentally, however, legal feminists and pro-lifers in the PDA battle concluded that women required accommodation, not equal treatment, to exercise true reproductive liberty. The PDA requires only that employers treat pregnant women the same as other workers with similar physical limitations. A hirer can circumvent the PDA by providing no accommodations at all. Obviously, such a policy may force a woman to choose between economic security and childbearing. So too may pregnancy-blind policies. Indeed, amici on either side of the abortion issue recognized the purpose of the PDA and unsuccessfully urged the Court to require employers to accommodate workers equally based on their inability to work rather than the source of their disability.[401] To give meaning to the values embraced by the PDA, activists may have to turn once again to the legislative arena.

CONCLUSION

Arguments for reproductive choice have few supporters, but widespread criticism of choice-based arguments in the courts has obscured their transformative potential. Dissatisfied with juridical constitutionalism, grassroots groups on either side of the abortion issue turned to Congress in expressing their constitutional commitments. Choice served as the touchstone of demands to analyze reproductive liberty and sex equality as inextricably linked—demands that blurred the distinction between negative and positive rights. The PDA emerged from debate between antiabortion activists, feminists, and business lobbyists about the meaning of the right to choose and the remedies appropriate for violations of that right. The law represented an incremental step on the path to guaranteeing women meaningful, rather than formal, reproductive choice.

Tracing the history of liberty norms and the PDA calls into question prevailing judicial interpretations of the protections the statute requires—including the Court's analysis in *Young*. But perhaps the fact that courts have relied on so narrow an interpretation of Title VII should come as no surprise. Now as before, for those seeking workplace fairness, the courts may not be the best place to look.

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401. *See, e.g.*, Brief of Amicus Curiae Black Woman's Health Imperative, Joined by Other Black Women's Health Organizations in Support of Petitioner at 13–15, Young v. United Parcel Serv., Inc. (*Young II*), 135 S. Ct. 1338 (2015) (No. 12-1226); Brief of Amici Curiae 23 Pro-Life Organizations and the Judicial Education Project in Support of Petitioner Peggy Young at 10–16, *Young II*, 135 S. Ct. 1338 (No. 12-1226); Amicus Curiae Brief of the American Civil Liberties Union and a Better Balance, et al., in Support of Petitioner at 6–12, *Young II*, 135 S. Ct. 1338 (No. 12-1226); Brief for Law Professors, *supra* note 316.