COLUMBIA LAW REVIEW

ARTICLES

NOTES

ESSAY

VOL. 123 **NOVEMBER 2023** **NO. 7**

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ABSTRACTS

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State constitutional law is in the spotlight. As federal courts retrench on abortion, democracy, and more, state constitutions are defining rights across the nation. Despite intermittent calls for greater attention to state constitutional theory, neither scholars nor courts have provided a comprehensive account of state constitutional rights or a coherent framework for their adjudication. Instead, many state courts import federal interpretive practices that bear little relationship to state constitutions or institutions.

This Article seeks to begin a new conversation about state constitutional adjudication. It first shows how in myriad defining ways state constitutions differ from the U.S. Constitution: They protect many more rights, temper rights with attention to communal welfare, include positive rights that identify government action as necessary to liberty, and emphasize rights required to sustain democracy. These distinctive founding documents, prizing individual and collective self-determination alike, require their own implementation frameworks—not federal mimicry.

Although state constitutions differ markedly from their federal counterpart, they share features with constitutions around the world that courts adjudicate using proportionality review. Perhaps unsurprisingly, practices associated with proportionality already appear in some state decisions. Synthesizing and building on these practices, this Article argues for democratic proportionality review as a state-centered approach to adjudication. Such review tailors proportionality's decisional framework to state constitutions committed to popular, majoritarian self-government, and it recognizes state courts as democratically embedded actors, not countermajoritarian interlopers. After explaining how democratic proportionality review operates, the Article sketches some implications for contemporary debates about abortion, voting, occupational licensing, and more.

Recent technological developments related to the extraction and processing of data have given rise to concerns about a reduction of privacy in the workplace. For many low-income and subordinated racial

minority workforces in the United States, however, on-the-job data collection and algorithmic decisionmaking systems are having a more profound yet overlooked impact: These technologies are fundamentally altering the experience of labor and undermining economic stability and job mobility. Drawing on a multi-year, first-of-its-kind ethnographic study of organizing on-demand workers, this Article examines the historical rupture in wage calculation, coordination, and distribution arising from the logic of informational capitalism: the use of granular data to produce unpredictable, variable, and personalized hourly pay.

The Article constructs a novel framework rooted in worker on-the-job experiences to understand the ascent of digitalized variable pay practices, or the importation of price discrimination from the consumer context to the labor context—what this Article identifies as algorithmic wage discrimination. Across firms, the opaque practices that constitute algorithmic wage discrimination raise fundamental questions about the changing nature of work and its regulation. What makes payment for labor in platform work fair? How does algorithmic wage discrimination affect the experience of work? And how should the law intervene in this moment of rupture? Algorithmic wage discrimination runs afoul of both longstanding precedent on fairness in wage setting and the spirit of equal pay for equal work laws. For workers, these practices produce unsettling moral expectations about work and remuneration. The Article proposes a nonwaivable restriction on these practices.

NOTES

Against rising calls to expand carceral psychiatry and increasingly pervasive mischaracterizations of neurodivergence in law, this Note accurately introduces the neurodiversity paradigm to call for the abolition of psychiatric incarceration. This Note challenges empirical narratives that render Neurodivergent people incapable of producing knowledge and holding expertise on their own embodied experiences by rejecting dominant conceptions of "mental illness" as an incompetence-inducing pathology that impairs an underlying "normal cognitive function." Rather, by positioning neurodivergence as integral to and indistinguishable from the self, this Note corrects the longstanding removal of expertise on neurodivergence from Neurodivergent people and misplacement of that expertise within the intersection of medical and legal professions. By severing the assumed causal connection between "mental illness" and legal competence, this Note argues that all people, as the experts on their own self-concept, retain the final and unilateral legal authority to define the support they need in crisis and beyond.

Recent years have seen the dramatic growth of Buy Now, Pay Later (BNPL), a class of unregulated fintech products that permit consumers to finance purchases by dividing payments into several interest-free installments. BNPL presents novel regulatory challenges because it is primarily marketed to consumers as an interest-free alternative to credit. BNPL has a distinctive market structure that is characterized by lender–merchant agreements to promote financing at the point of sale. In the American context, the Consumer Financial Protection Bureau (CFPB) has announced plans to analogize treatment of BNPL to existing credit card regulations, which generally emphasize disclosure requirements.

Though undoubtedly an improvement over the unregulated status quo, this regulatory response is hardly a panacea to the industry's risks, as it would not account for the crucial role that merchants play in driving the industry or the fact that consumers often do not even view BNPL as credit in the first place. This Note proposes a novel framework for the regulation of BNPL under the CFPB's rulemaking authority to regulate actions undertaken by both lenders and merchants in promoting BNPL financing to consumers. This approach would provide the CFPB with the flexibility to ensure that regulations continue to stay abreast of developments in the market and the necessary tools to calibrate consumer financial protection to a landscape that is increasingly shaped by fintech.

ESSAY

Jurisdiction stripping is seen as a nuclear option. Its logic is simple: By depriving federal courts of jurisdiction over some set of cases, Congress ensures those courts cannot render bad decisions. To its proponents, it offers the ultimate check on unelected and unaccountable judges. To its critics, it poses a grave threat to the separation of powers. Both sides agree, though, that jurisdiction stripping is a powerful weapon. On this understanding, politicians, activists, and scholars throughout American history have proposed jurisdiction-stripping measures as a way for Congress to reclaim policymaking authority from the courts.

The conventional understanding is wrong. Whatever the scope of Congress's Article III power to limit the jurisdiction of the Supreme Court and other federal courts, jurisdiction stripping is unlikely to succeed as a practical strategy. At least beyond the very short term, Congress cannot use it to effectuate policy in the face of judicial opposition. Its consequences are chaotic and unpredictable, courts have

tools they can use to push back on jurisdiction strips, and the judiciary's active participation is ultimately necessary for Congress to achieve many of its goals. Jurisdiction stripping will often accomplish nothing and sometimes will even exacerbate the problems it purports to solve.

Jurisdiction stripping can still prove beneficial, but only in subtle and indirect ways. Congress can regulate jurisdiction to tweak the timing of judicial review, even if it cannot prevent review entirely. Jurisdiction stripping also provides Congress a way to signal to the public and the judiciary the importance of an issue—and, possibly, to pressure courts to change course. But these effects are contingent, indeterminate, and unreliable. As a tool to influence policy directly, jurisdiction stripping simply is not the power that its proponents hope or its critics fear.

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COLUMBIA LAW REVIEW

VOL. 123 **NOVEMBER 2023** **NO. 7**

COLUMBIA LAW REVIEW

VOL. 123 NOVEMBER 2023 NO. 7

ARTICLES

STATE CONSTITUTIONAL RIGHTS AND DEMOCRATIC PROPORTIONALITY

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State constitutional law is in the spotlight. As federal courts retrench on abortion, democracy, and more, state constitutions are defining rights across the nation. Despite intermittent calls for greater attention to state constitutional theory, neither scholars nor courts have provided a comprehensive account of state constitutional rights or a coherent framework for their adjudication. Instead, many state courts import federal interpretive practices that bear little relationship to state constitutions or institutions.

This Article seeks to begin a new conversation about state constitutional adjudication. It first shows how in myriad defining ways state constitutions differ from the U.S. Constitution: They protect many more rights, temper rights with attention to communal welfare, include positive rights that identify government action as necessary to liberty, and emphasize rights required to sustain democracy. These distinctive founding documents, prizing individual and collective self-determination alike, require their own implementation frameworks—not federal mimicry.

Although state constitutions differ markedly from their federal counterpart, they share features with constitutions around the world that courts adjudicate using proportionality review. Perhaps unsurprisingly, practices associated with proportionality already appear in some state decisions. Synthesizing and building on these practices, this Article argues for democratic proportionality review as a state-centered approach

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to adjudication. Such review tailors proportionality's decisional framework to state constitutions committed to popular, majoritarian self-government, and it recognizes state courts as democratically embedded actors, not countermajoritarian interlopers. After explaining how democratic proportionality review operates, the Article sketches some implications for contemporary debates about abortion, voting, occupational licensing, and more.

INTRODUCTION

All eyes are on the states. As the U.S. Supreme Court retrenches, state courts are taking up many issues that matter most to Americans.[1] From abortion to voting, state constitutions are defining the content and scope of rights across the nation.[2]

For all that rides on state constitutional law, there has been little attention to some of its most basic questions. Since Justice William Brennan famously revived the field in the 1970s,[3] scholars of the "new judicial federalism"[4] have focused on whether state constitutional provisions should be interpreted in lockstep with cognate federal provisions.[5] There is limited discussion of other state constitutional

1. See, e.g., Alicia Bannon, Opinion, The Supreme Court Is Retrenching. States Don't Have To., Politico (June 29, 2022), https://www.politico.com/news/magazine/2022/06/29/supreme-court-rights-00042928 [https://perma.cc/28MN-SPMQ] ("[I]n an era of federal rights reversal, state courts and state constitutions are about to be more important than ever."); Reid J. Epstein, 2023's Biggest, Most Unusual Race Centers on Abortion and Democracy, N.Y. Times (Jan. 25, 2023), https://www.nytimes.com/2023/01/25/us/politics/wisconsin-supreme-court-election.html (on file with the *Columbia Law Review*) (discussing the political significance of the Wisconsin Supreme Court election).

2. See, e.g., Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022) (holding that the federal "Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion"); Rucho v. Common Cause, 139 S. Ct. 2484, 2506–08 (2019) (holding that "partisan gerrymandering claims present political questions beyond the reach of the federal courts," but that "state constitutions can provide standards and guidance").

3. See William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 503 (1977) [hereinafter Brennan, Protection of Individual Rights] (encouraging state courts to "thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms"). Justice Brennan foregrounded a revival already underway in state courts. See Hans A. Linde, First Things First: Rediscovering the States' Bills of Rights, 9 U. Balt. L. Rev. 379, 396 n.70 (1980) [hereinafter Linde, First Things First] (collecting commentary). Justice Hans Linde was an early and influential proponent of independent state constitutional interpretation, both in his opinions for the Oregon Supreme Court and in his scholarship. E.g., Hans A. Linde, Book Review, 52 Or. L. Rev. 325, 335 (1973) (reviewing Bernard Schwartz, The Bill of Rights: A Documentary History (1971)) (arguing that state courts should interpret state constitutions independently of the U.S. Constitution).

4. See G. Alan Tarr, The New Judicial Federalism in Perspective, 72 Notre Dame L. Rev. 1097, 1097 (1997) (defining "new judicial federalism" as "the increased reliance by state judges on state declarations of rights to secure rights unavailable under the United States Constitution").

5. Important contributions to this literature have explored alternatives to "lockstepping," including "primacy" or "supplementary" models. See Robert F. Williams, The Law of American State Constitutions 140–42 (2009) [hereinafter Williams, Law of State Constitutions]. Scholars have also debated whether state constitutional interpretation should turn on state identities and state-specific sources of law. Compare Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law 17–18 (2018) (yes), with James A. Gardner, Interpreting State Constitutions 79 (2005) (no), Paul W. Kahn, Interpretation and Authority in State Constitutionalism, 106 Harv. L. Rev. 1147, 1147–48 (1993) (no), and Goodwin Liu, State Courts and Constitutional Structure, 128 Yale L.J. 1304, 1311 (2019) (book review) (no).

clauses, the distinctiveness of state constitutions collectively, or what those differences might mean for adjudication.

While scholars and jurists have debated substantive lockstepping, a subtler but more concerning practice of methodological lockstepping has begun to take hold. Many state courts are deciding cases using techniques developed by federal courts to implement the federal Constitution. For example, they read state constitutional clauses in isolation, as if keyed to the spare federal document, despite state constitutions' layers of interacting provisions created through popular amendment.[6] They apply federal implementation frameworks, such as the tiers of scrutiny, that are based on inapposite assumptions about legislatures, courts, and democracy.[7] And they invoke the countermajoritarian difficulty and an attendant imperative of judicial restraint even though most state judges are popularly elected.[8]

Consider two recent examples. In January 2023, the Idaho Supreme Court upheld, under the state constitution, a "Total Abortion Ban."[9] After taking a narrow view of the interests at stake and concluding that a right to abortion as such was not "'deeply rooted' . . . at the time of statehood,"[10] the court defaulted to federal-style rational basis review.[11] Such review, it explained, is highly deferential to the legislature given the properly limited role of courts.[12] Under the toothless standard it applied, the court even accepted the law's ostensible exception for lifesaving treatment—an affirmative defense that doctors can invoke only after going to prison—as "rationally advanc[ing] the government's legitimate interests in maternal health and safety."[13]

Wisconsin Supreme Court rulings on redistricting also reveal reflexive importation of federal adjudicative approaches. When the state court accepted the task of devising new legislative maps after lawmakers reached an impasse, it concluded that the proper metric was a "least change" approach, rather than any measure of partisan fairness,[14] and that it should hew as closely as possible to existing maps that were among the most gerrymandered in the country.[15] The court decided on this approach by

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6. See infra section II.A.1.

7. See infra section II.A.2.

8. See infra section II.A.3.

9. Planned Parenthood Great Nw. v. State, 522 P.3d 1132, 1147 (Idaho 2023).

10. Id. at 1148.

11. Id. at 1195.

12. See id. at 1196–97 ("Critically, the Idaho Constitution does not require that the Total Abortion Ban employ the *wisest* or *fairest* method of achieving its purpose.").

13. Id. at 1196.

14. See Johnson v. Wis. Elections Comm'n, 967 N.W.2d 469, 490 (Wis. 2021).

15. See Robert Yablon, Gerrylaundering, 97 N.Y.U. L. Rev. 985, 998 (2022) ("In Wisconsin, Republicans controlled the redistricting process during the post-2010 cycle, and they used a 'sharply partisan methodology' to tilt the state legislative map in their favor."

selectively attending to constitutional clauses, without considering provisions concerning voting and free government, and by relying on federal sources for the proposition that judges must exercise restraint in a democracy.[16] Parroting federal maxims, the court managed to hold that doubling down on a partisan gerrymander is the best way to serve democracy.

Although these examples are especially salient, problems of methodological lockstepping and a lack of state-focused constitutional adjudication are widespread. Adopting suitable doctrines, tests, and presumptions to guide our new era of state constitutional law requires greater attention to state founding documents themselves.

This Article offers a framework for understanding state constitutional rights and their adjudication. It describes how the state constitutional rights tradition differs from the federal one in multiple material ways. It then proposes a corresponding approach to state constitutional adjudication, *democratic proportionality review*, already immanent in many state cases.

Consider, first, some defining features of state constitutional rights. In contrast to the spare enumeration of rights in the federal Constitution, state constitutions contain plentiful individual rights, from the pursuit of happiness to the enjoyment of clean air to the right to hunt and fish.[17] At the same time, state constitutions temper expansive rights with obligations to the community.[18] A similar balance appears in state constitutions' approach to the relationship between individuals and government. While the federal Constitution is proverbially a charter of negative liberties, all state constitutions include both positive and negative rights; they impose affirmative duties on government and cast it as a necessary guarantor of liberty as well as a potential threat.[19] Finally, state constitutions are fundamentally committed to democracy and furnish numerous rights, as well as structural requirements, to ensure popular majority rule by political equals.[20]

Each of these parts of the state constitutional rights tradition differs from the federal. Taken together, they underlie a distinctive commitment to self-determination. State constitutions at once seek to guarantee the ability of individuals to direct their lives, free from domination and arbitrary interference or neglect, and the ability of the people to direct

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(quoting Baldus v. Members of Wis. Gov't Accountability Bd., 849 F. Supp. 2d 840, 844 (E.D. Wis. 2012))).

16. See *Johnson*, 967 N.W.2d at 487–88 ("To construe Article I, sections 1, 3, 4, or 22 as a reservoir of additional requirements would violate axiomatic principles of interpretation . . . while plunging this court into the political thicket lurking beyond its constitutional boundaries.").

17. See infra section I.A.

18. See infra section I.B.

19. See infra section I.C.

20. See infra section I.D.

government so that it remains responsive to the popular will. They propose, moreover, that individual and collective self-determination are intertwined. State constitutions furnish more, and more expansive, individual rights than the U.S. Constitution while also imposing more public-regarding limits on such rights to protect the autonomy of all. They place more, and more explicit, emphasis on the good of the community while also obligating the community to attend to the welfare of each member. They demand more, and more affirmative, activity from government while also creating more checks on government to foreclose arbitrary decisions and to facilitate popular responsiveness. Embracing abundance and complexity, state constitutions suggest the possibility of mutually constitutive individual freedom and collective self-rule.

It is not only states' founding documents but also the institutions that interpret them that differ from their federal counterparts in ways that should inform constitutional adjudication. Most notably, in the states, legislatures may face a greater countermajoritarian difficulty than popularly elected courts.[21] And unlike the sleeping popular sovereign at the federal level, state citizens play an active and ongoing role in amending their constitutions.[22]

If a state-centered framework for constitutional adjudication is needed, so too is it within reach. Notwithstanding federal mimicry, all fifty state high courts already profess to read their constitutions as a whole.[23] Many state courts have analyzed individual rights and government purposes in a thorough, contextual way, instead of relying on federal tiers of scrutiny to generate answers. And they have engaged in balancing when rights or interests conflict, drawing on their common law remedial tradition to do justice in individual cases.[24]

This Article synthesizes these and related practices and describes them as together constituting a form of proportionality review. Widely used around the world,[25] proportionality review involves a set of judicial

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21. See Steven P. Croley, The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law, 62 U. Chi. L. Rev. 689, 694 (1995) (noting that elected state courts present not the familiar countermajoritarian difficulty but rather a "majoritarian difficulty," which "asks not how unelected/unaccountable judges can be justified in a regime committed to democracy, but rather how elected/accountable judges can be justified in a regime committed to constitutionalism"); Miriam Seifter, Countermajoritarian Legislatures, 121 Colum. L. Rev. 1733, 1735 (2021) ("[S]tate legislatures are typically a state's least majoritarian branch. Often they are outright countermajoritarian institutions.").

22. See Jessica Bulman-Pozen & Miriam Seifter, The Right to Amend State Constitutions, 133 Yale L.J. Forum (forthcoming Nov. 2023) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4555738 [https://perma.cc/MSN9-3RWP] [hereinafter Bulman-Pozen & Seifter, Right to Amend].

23. See infra note 208 and accompanying text.

24. See infra sections II.B, IV.A.

25. See, e.g., Alec Stone Sweet & Jud Mathews, Proportionality Balancing and Global Constitutionalism, 47 Colum. J. Transnat'l L. 72, 112 (2008) (describing the global reach of proportionality analysis).

inquiries "designed to discipline the process of rights adjudication on the assumption that rights are both important and, in a democratic society, limitable."[26] It recognizes a wide range of interests as rights deserving protection; demands engaged, contextual review of government infringements; and proposes balancing to mediate individual and collective interests. Proportionality review can be—and has been—molded to particular legal systems, and we explain how the signature steps of rights discernment, means–ends fit, minimal impairment, and balancing should be tailored to the states.[27] In particular, while most proportionality jurisdictions emphasize human rights such as dignity, state courts should pay particular attention to core self-determination rights of autonomy and democratic participation. While most proportionality jurisdictions equate the legislature with the collective democratic public, state constitutions' skepticism of unrepresentative legislatures and distinct channels for the expression of popular will demand meaningful review of state laws for arbitrariness as well as engagement with positive rights claims. And while most proportionality jurisdictions understand law as "a practice distinct from politics,"[28] state judges' elected position and the ease of popular constitutional amendment mean that state courts should balance interests and explain their judgments with an eye to public engagement.[29]

Although democratic proportionality review is a workable whole, we stress that its components can be adopted individually. It would be an improvement for state courts to discard clause-bound readings in favor of more holistic ones, to abandon unreflective reliance on tiers of scrutiny in favor of more meaningful consideration, or to acknowledge their position as democratically embedded actors with the authority to craft policy and the duty to justify their decisions. Moreover, it is critical that state courts protect rights foundational to individual autonomy and collective self-rule even as they engage in more comprehensive and discretionary review.

The Article proceeds in four Parts. In Part I, we offer a synoptic account of state constitutional rights. In Part II, we describe recurring mistakes of methodological lockstepping. In Part III, we provide an

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26. Jamal Greene, Foreword: Rights as Trumps?, 132 Harv. L. Rev. 28, 58 (2018).

27. See infra Part III.

28. Vicki C. Jackson, Constitutional Law in an Age of Proportionality, 124 Yale L.J. 3094, 3125 (2015) [hereinafter Jackson, Age of Proportionality].

29. The democratic proportionality review we describe is thus responsive to the call for "a modern theory of majoritarian review" in the states. See Developments in the Law, The Interpretation of State Constitutional Rights, 95 Harv. L. Rev. 1324, 1502 (1982). Although our account is specific to state constitutions, it shares common ground with a broader literature that urges a fit between adjudication frameworks and underlying constitutional values, including democracy. For one generative example, see Rosalind Dixon, Responsive Judicial Review: Democracy and Dysfunction in the Modern Age 13 (2023) ("[T]he underlying logic of judicial review will be . . . a commitment to representation-reinforcement that involves protecting and promoting the capacity of a democratic system to respond both to minority rights claims and considered majority understandings under a range of real-world, non-ideal conditions.").

account of democratic proportionality review that better aligns with the state constitutional rights tradition. Finally, in Part IV, we sketch some implications of democratic proportionality review for current debates, including those over voting, occupational licensing, and abortion. State constitutions are not pale imitations of the federal document, and the new era of state constitutional rights jurisprudence we are entering should proceed accordingly.

I. STATE CONSTITUTIONAL RIGHTS

We start with a simple, but often overlooked, point: State constitutions differ significantly from the U.S. Constitution. Although reams of state constitutional law literature have focused on the few clauses common to the state and federal documents,[30] most state constitutional provisions have no federal analogue, and state constitutions have a different orientation toward individual rights, the relationship between the individual and the community, and the role of government. Before addressing how courts should engage with state constitutions, this Part canvasses some of the most notable ways state constitutional rights differ from the familiar federal model.

Although we focus on provisions widely shared across the states, we do not deny that there are important differences among state constitutions themselves. For instance, some state constitutions contain express privacy protections, some contain equal rights amendments prohibiting sex discrimination, some include both privacy provisions and equal rights amendments, and some include neither type of provision.[31] To resolve any particular dispute, constitutional interpreters must attend to a state's specific text, history, practice, and more. But we should not let state-specific nuance obscure how much can be said about state constitutions as a body.[32] There is widespread, verbatim copying of provisions across these documents, and periods of nationwide mobilization have made their mark

30. See, e.g., supra notes 3–5 and accompanying text.

31. See infra notes 53–54.

32. That state constitutions can be productively discussed and analyzed as a group notwithstanding variation is a widely shared premise in the field of state constitutional law. See generally John J. Dinan, The American State Constitutional Tradition 6 (2006) [hereinafter Dinan, State Constitutional Tradition] (noting that the book's "principle purpose" is "to identify, explain, and draw lessons from the ways in which the dominant trends of state constitutional development have departed from the federal constitutional model"); 1 Jennifer Friesen, State Constitutional Law (4th ed. 2006) [hereinafter Friesen, State Constitutional Law] (collecting and analyzing constitutional case law from all fifty states); G. Alan Tarr, Understanding State Constitutions 4 (1998) [hereinafter Tarr, Understanding State Constitutions] ("Explaining the distinctiveness of the state constitutional experience and assessing its implications both for state constitutional interpretation and for understanding American constitutionalism are the tasks of our book."); Williams, Law of State Constitutions, supra note 5, at 8 ("Many common themes appear in the constitutional law of all states. . . . It is the purpose of this book to focus on these common themes and issues . . . .").

on many state constitutions at once. So too, these constitutions are all in dialogue with the U.S. Constitution.[33] Recognizing the U.S. Constitution as a shared backdrop and foil, the distinctive features of state constitutions emerge more clearly.

The discussion that follows emphasizes four such features. First, in contrast to the spare enumeration of rights in the U.S. Constitution, state constitutions list numerous individual rights, from the pursuit of happiness to the enjoyment of clean air to the right to hunt and fish. These constitutions specify a large domain for state citizens to direct their lives as rights-bearing individuals and spell out their rights in considerable detail.

Second, and tempering such rights, state constitutions situate individuals in the community. Even as these constitutions guarantee extensive individual rights, they balance and integrate such rights with obligations to others. In the state constitutional landscape, individuals are never entirely independent actors; they are citizens in the republican tradition, responsible for the public welfare as well as their own.

Third, state constitutions understand government action to potentially facilitate as well as impede the exercise of individual rights. While they partially credit the familiar paradigm that individual rights follow from restraints on government, state constitutions also embrace affirmative government activity in the service of individual rights. Most notably, every state constitution contains positive rights and articulates government duties.[34] State constitutions cast the government as simultaneously a potential threat and a necessary provider.

Finally, state constitutions contain many rights focused on democratic processes and participation. As we have elsewhere described, state constitutions are oriented around popular sovereignty, majority rule, and political equality.[35] Not content to leave questions of political representation and self-government to structural provisions, state constitutional drafters have long relied on rights to guarantee democracy. From voting to altering or abolishing government to proposing and deciding on initiatives, many constitutional rights are directed toward maintaining popular control over government. In turn, state constitutions suggest, rule by the people may safeguard individual rights in the face of unrepresentative or self-serving government actors.

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33. See Jessica Bulman-Pozen & Miriam Seifter, The Democracy Principle in State Constitutions, 119 Mich. L. Rev. 859, 866–67 (2021) [hereinafter Bulman-Pozen & Seifter, Democracy Principle].

34. See Helen Hershkoff, "Just Words": Common Law and the Enforcement of State Constitutional Social and Economic Rights, 62 Stan. L. Rev. 1521, 1523–24 (2010) [hereinafter Hershkoff, Just Words]; Helen Hershkoff, Positive Rights and State Constitutions: The Limits of Federal Rationality Review, 112 Harv. L. Rev. 1131, 1135 (1999) [hereinafter Hershkoff, Positive Rights]; Mila Versteeg & Emily Zackin, American Constitutional Exceptionalism Revisited, 81 U. Chi. L. Rev. 1641, 1645 (2014).

35. Bulman-Pozen & Seifter, Democracy Principle, supra note 33, at 864.

As these four points underscore, state constitutions contain rights that are abundant and sometimes crosscutting, they recognize government as both a potential violator and guardian of liberty, and they always privilege democracy. We refer to this as a rights tradition of self-determination, with intertwined individual and collective components.

A. *Rights, Rights, Rights*

Start with "first things first."[36] Every state constitution contains a declaration or bill of rights, and the vast majority begin with these provisions before turning to such matters as the structure of government. If individual rights were a postscript to the framing of the U.S. Constitution, state constitutions that both preceded and followed the federal document have always foregrounded such rights.[37] In keeping with this textual primacy, the field of state constitutional law has long emphasized state protections for individuals.[38] Much commentary addresses rights that are also recognized by the U.S. Constitution, including freedom of speech, due process, and freedom from unreasonable search and seizure.[39] But state constitutions seek to foster autonomy and human flourishing across a wider range of affairs than their federal counterpart. These constitutions recognize, and spell out in detail, numerous rights that have no express analogue at the federal level.

As eighteenth-century framers sought, for the first time, to mark state constitutions as fundamental law, one way they did so was to begin with bills of rights,[40] each of which guaranteed some rights that came to be included in the U.S. Constitution as well as rights that have never been extended at the federal level.[41] For example, the influential 1776 Virginia Declaration of Rights opened with a proclamation "that all men are by nature equally free and independent, and have certain inherent rights . . . ; namely, the enjoyment of life and liberty, with the means of

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36. Linde, First Things First, supra note 3, at 396.

37. See Daniel J. Elazar, The Principles and Traditions Underlying State Constitutions, Publius, Winter 1982, at 11, 15.

38. E.g., Friesen, State Constitutional Law, supra note 32, at v (noting that "state constitutions frequently are more protective of civil liberties than federally based decisions"); Emily Zackin, Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights 14 (2013) (describing the "existence of a coherent rights tradition" in the states); Brennan, Protection of Individual Rights, supra note 3, at 503 (explaining the important role that states play in protecting fundamental rights).

39. See, e.g., Sutton, supra note 5, at 42–172 (considering search and seizure, due process, and free speech).

40. See Gordon S. Wood, Foreword: State Constitution-Making in the American Revolution, 24 Rutgers L.J. 911, 920–21 (1994) [hereinafter Wood, State Constitution-Making] (discussing early state bills of rights).

41. Tarr, Understanding State Constitutions, supra note 32, at 81 ("All state declarations of rights adopted during the 1790s guaranteed some specific rights not found in the federal Bill of Rights.").

acquiring and possessing property, and pursuing and obtaining happiness and safety."[42] During the ensuing decade, Pennsylvania, Vermont, Massachusetts, and New Hampshire adopted similar language, and more states followed in subsequent years.[43] Even in their earliest incarnations, these happiness and safety provisions were both a guarantee of negative rights against governmental interference and a commitment to more affirmative ends including "self-realization" and popular well-being.[44] Although the pursuit of happiness and safety never became part of the federal Constitution, it is today an express clause in most state constitutions[45] and has been further elaborated through more specific rights provisions.

Over the past 250 years, as state constitutional replacement and amendment have enlarged the recognized political community and extended rights beyond propertied white men, they have also yielded altogether new rights protections. For example, mid-nineteenth-century conventions adopted novel equality provisions in response to concerns about government capture and favoritism.[46] Reconstruction conventions recognized the need for government provision in the form of state-funded public education and poor relief.[47] And across the nineteenth century, as state constitutions enumerated more rights, they also began to adopt "unenumerated rights" guarantees to underscore that named rights should not be understood to exhaust individual rights protection.[48]

State constitutional rights have particularly expanded across the twentieth and twenty-first centuries. During the Progressive Era, for instance, many states adopted protections for workers, from western rights

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42. Va. Const. of 1776, Declaration of Rights, § 1.

43. See Joseph Grodin, Rediscovering the State Constitutional Right to Happiness and Safety, 25 Hastings Const. L.Q. 1, 2–4 (1997).

44. See id. at 16–17; see also Pauline Maier, American Scripture: Making the Declaration of Independence 134 (1997) ("For Jefferson and his contemporaries, happiness no doubt demanded safety or security, which would have been in keeping with the biblical phrase one colonist after another used to describe the good life.").

45. See infra note 52.

46. See Jonathan L. Marshfield, America's Misunderstood Constitutional Rights, 170 U. Pa. L. Rev. 853, 895–96 (2022).

47. See Tarr, Understanding State Constitutions, supra note 32, at 131. Although many of these developments were undone by white supremacist conventions held in the late 1800s, they resurfaced in other constitutions and in later periods. See, e.g., Zackin, supra note 38, at 67–196 (describing multiple states' adoptions of positive rights to education, labor, and a clean environment, especially in the twentieth century).

48. See Steven G. Calabresi & Sarah E. Agudo, Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?, 87 Tex. L. Rev. 7, 89 (2008) ("Eighteen out of thirty-seven state constitutions in 1868 . . . contained clauses analogous to the Ninth Amendment of the federal Constitution."); Louis Karl Bonham, Note, Unenumerated Rights Clauses in State Constitutions, 63 Tex. L. Rev. 1321, 1325 (1985) (examining state court recognition of unenumerated individual rights).

for miners to New York's collective bargaining provisions.[49] In subsequent decades, constitutional conventions turned their attention to social and economic rights, and many adopted positive rights, including rights to welfare and to clean air and water.[50] Between 1968 and 2016, Professor Jonathan Marshfield recounts, more than 330 rights amendments caused "state bills of rights to balloon in length, scope, and detail."[51]

Consider just some of the rights that appear in state constitutions and lack a federal analogue. The following do not all appear in every state constitution, but every state constitution contains at least some of them, and many have been widely adopted:

- The right to pursue happiness or safety[52]
- The right to privacy[53]
- The right to sex equality or freedom from sex-based discrimination.[54]
- The right to dignity[55]
- The right to hunt and fish[56]

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49. John Dinan, State Constitutional Politics: Governing by Amendment in the American States 188–205 (2018) [hereinafter Dinan, State Constitutional Politics]; Tarr, Understanding State Constitutions, supra note 32, at 148–49.

50. Dinan, State Constitutional Politics, supra note 49, at 205–21; see also infra section I.C (discussing positive rights).

51. Marshfield, supra note 46, at 868. If amendments related to elections and suffrage are included, there were more than 200 additional amendments during this period. See id. at 868 n.74; see also Dinan, State Constitutional Politics, supra note 49, at 3–5 (describing a wide range of state constitutional amendments); infra section I.D (discussing democratic rights).

52. Ala. Const. art. I, § 1; Alaska Const. art. I, § 1; Ark. Const. art. II, § 2; Cal. Const. art. I, § 1; Colo. Const. art. II, § 3; Fla. Const. art. I, § 2; Haw. Const. art. I, § 2; Idaho Const. art. I, § 1; Ill. Const. art. I, § 1; Ind. Const. art. I, § 1; Iowa Const. art. I, § 1; Kan. Const. Bill of Rights, § 1; Ky. Const. Bill of Rights, § 1; Me. Const. art. I, § 1; Mass. Const. amend. art. CVI; Mo. Const. art. I, § 2; Mont. Const. art. II, § 3; Neb. Const. art. I, § 1; Nev. Const. art. I, § 1; N.H. Const. pt. I, art. 2; N.J. Const. art. I, para. 1; N.M. Const. art. II, § 4; N.C. Const. art. I, § 1; N.D. Const. art. I, § 1; Ohio Const. art. I, § 1; Okla. Const. art. II, § 2; Or. Const. art. I, § 1; Pa. Const. art. I, § 1; R.I. Const. art. I, § 2; S.D. Const. art. VI, § 1; Tenn. Const. art. I, §§ 1–2; Vt. Const. ch. I, art. 1; Va. Const. art. I, § 1; W. Va. Const. art. III, § 1; Wis. Const. art. I, § 1; Wyo. Const. art. 1, §§ 1–2.

53. Alaska Const. art. I, § 22; Ariz. Const. art. II, § 8; Cal. Const. art. I, § 1; Fla. Const. art. I, §§ 12, 23; Haw. Const. art. I, § 6; Ill. Const. art. I, §§ 6, 12; La. Const. art. I, § 5; Mont. Const. art. II, § 10; N.H. Const. pt. I, art. 2-b; S.C. Const. art. I, § 10; Wash. Const. art. I, § 7.

54. Alaska Const. art. I, § 3; Cal. Const. art. I, §§ 8, 31; Colo. Const. art. II, § 29; Conn. Const. art. V; Del. Const. art. I, § 21; Fla. Const. art. I, § 2; Haw. Const. art. I, § 3; Ill. Const. art. I, § 18; Iowa Const. art. I, § 1; Md. Const. Declaration of Rights, art. 46; Mass. Const. amend. art. CVII; Mont. Const. art. II, § 4; Nev. Const. art. I, § 24; N.H. Const. pt. I, art. 2; N.M. Const. art. II, § 18; Okla. Const. art. II, § 36A; Or. Const. art. I, § 46; Pa. Const. art. I, § 28; R.I. Const. art. I, § 2; Tex. Const. art. I, § 3a; Utah Const. art. IV, § 1; Va. Const. art. I, § 11; Wash. Const. art. XXXI, § 1; Wyo. Const. art. 1, §§ 2–3.

55. Ill. Const. art. I, § 20; La. Const. art. I, § 3; Mont. Const. art. II, § 4.

56. Ala. Const. art. I, § 36.02; Alaska Const. art. VIII, §§ 3–4; Cal. Const. art. I, § 25; Ga. Const. art. I, § I, para. XXVIII; Idaho Const. art. I, § 23; Ind. Const. art. I, § 39; Kan.

- The right to public education[57]
- The right to public welfare[58]
- The right to enjoy clean air and water or a healthy environment[59]
- Workers' rights, including minimum-wage and maximum-hour provisions[60]
- Victims' rights[61]

Const. Bill of Rights, § 21; Ky. Const. § 255A; La. Const. art. I, § 27; Mont. Const. art. IX, § 7; N.C. Const. art. I, § 38; N.D. Const. art. XI, § 27; Okla. Const. art. II, § 36; R.I. Const. art. I, § 17; S.C. Const. art. I, § 25; Tenn. Const. art. XI, § 13; Tex. Const. art. I, § 34; Utah Const. art. I, § 30; Vt. Const. ch. II, § 67; Va. Const. art. XI, § 4; Wis. Const. art. I, § 26; Wyo. Const. art. 1, § 39.

57. See Alaska Const. art. VII, § 1; Ariz. Const. art. XI, § 1; Ark. Const. art. XIV, § 1; Cal. Const. art. IX, § 1; Colo. Const. art. IX, § 2; Conn. Const. art. VIII, § 1; Del. Const. art. X, § 1; Fla. Const. art. IX, § 1; Ga. Const. art. VIII, § I, para. 1; Haw. Const. art. X, § 1; Idaho Const. art. IX, § 1; Ill. Const. art. X, § 1; Ind. Const. art. VIII, § 1; Kan. Const. art. VI, § 1; Ky. Const. § 183; La. Const. art. VIII, § 1; Me. Const. art. VIII, pt. 1, § 1; Md. Const. art. VIII, § 1; Mass. Const. pt. II, ch. V, § II; Mich. Const. art. VIII, § 2; Miss. Const. art. VIII, § 201; Mo. Const. art. IX, § 1(a); Mont. Const. art. X, § 1(3); Neb. Const. art. VII, § 1; Nev. Const. art. XI, § 2; N.H. Const. pt. II, art. 83; N.J. Const. art. VIII, § IV, para. 1; N.M. Const. art. XII, § 1; N.Y. Const. art. XI, § 1; N.C. Const. art. IX, § 2; N.D. Const. art. VIII, § 1; Ohio Const. art. VI, § 2; Okla. Const. art. I, § 5; Or. Const. art. VIII, § 3; Pa. Const. art. III, § 14; R.I. Const. art. XII, § 1; S.C. Const. art. XI, § 3; S.D. Const. art. VIII, § 1; Tenn. Const. art. XI, § 12; Tex. Const. art. VII, § 1; Utah Const. art. X, § 1; Vt. Const. ch. II, § 68; Va. Const. art. VIII, § 1; Wash. Const. art. IX, §§ 1–2; W. Va. Const. art. XII, § 1; Wis. Const. art. X, § 3; Wyo. Const. art. 7, § 1.

58. Alaska Const. art. VII, § 5; Kan. Const. art. VII, § 1; Mich. Const. art. IV, § 51; N.Y. Const. art. XVII, § 1; N.C. Const. art. XI, §§ 3–4; S.C. Const. art. XII, § 1; Wyo. Const. art. 7, §§ 18, 20. Some states protect a public welfare right by requiring the legislature to provide forms of public assistance. See Ala. Const. art. IV, § 88; Haw. Const. art. IX, § 1; Ky. Const. § 244A; Miss. Const. art. IV, § 86; Nev. Const. art. VIII, § 1; Ohio Const. art. VII, § 1; Okla. Const. art. XXI, § 1; Wash. Const. art. XIII, § 1.

59. Haw. Const. art. XI, §§ 1, 3, 7, 9; Ill. Const. art. XI, §§ 1–2; La. Const. art. IX, § 1; Mass. Const. amend. art. XLIX; Mich. Const. art. IV, § 52; Mont. Const. art. IX, § 1; N.M. Const. art. XX, § 21; N.Y. Const. art. XIV, §§ 1, 4; N.C. Const. art. XIV, § 5; Pa. Const. art. I, § 27; Va. Const. art. XI, § 1.

60. Ala. Const. art. I, § 36.05; Ariz. Const. art. XXV; Haw. Const. art. XIII, § 1; Idaho Const. art. XIII, § 2; Miss. Const. art. VII, § 198A; Mo. Const. art. I, § 29; Neb. Const. art. XV, § 13; N.J. Const. art. I, para. 19; N.Y. Const. art. I, § 17; Okla. Const. art. XXIII, § 1A; S.D. Const. art. VI, § 2; Utah Const. art. XVI, §§ 1, 6–8; Wyo. Const. art. 1, § 22.

61. Ala. Const. art. I, § 6.01; Alaska Const. art. I, § 24; Ariz. Const. art. II, § 2.1; Cal. Const. art. I, § 28; Colo. Const. art. II, § 16a; Conn. Const. amend. art. XXIX(b); Ga. Const. art. I, § I, para. XXX; Idaho Const. art. I, § 22; Ill. Const. art. I, § 8.1; Kan. Const. art. XV, § 15; Ky. Const. § 26A; La. Const. art. I, § 25; Md. Const. Declaration of Rights, art. 47; Mich. Const. art. I, § 24; Mo. Const. art. I, § 32; Neb. Const. art. I, § 28; Nev. Const. art. I, § 8A; N.J. Const. art. I, para. 22; N.M. Const. art. II, § 24; N.C. Const. art. I, § 37; N.D. Const. art. I, § 25; Ohio Const. art. I, § 10a; Okla. Const. art. II, § 34; Or. Const. art. I, §§ 42–43; R.I. Const. art. I, § 23; S.C. Const. art. I, § 24; S.D. Const. art. VI, § 29; Tenn. Const. art. I, § 35; Tex. Const. art. I, § 30; Utah Const. art. I, § 28; Va. Const. art. I, § 8-A; Wash. Const. art. I, § 35; Wis. Const. art. I, § 9m.

- The right to vote and participate in free elections[62]
- The right to participate in initiatives and referenda[63]
- The right to access government records and deliberations[64]

Beyond recognizing the sheer number of rights given constitutional protection in the United States only at the state level, two points bear emphasis. First, these rights are often spelled out in detail. Even guarantees shared with the federal Constitution, such as liberty and equality, frequently find more expansive and specific elaboration in state constitutions. For example, while the Fourteenth Amendment to the U.S. Constitution recognizes "equal protection of the laws," many state equality clauses specify relevant characteristics (such as race, color, religion,

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62. Ala. Const. art. VIII, § 177; Alaska Const. art. V, § 1; Ariz. Const. art. VII, § 2; Ark. Const. art. III, §§ 1–2; Cal. Const. art. II, § 2; Colo. Const. art. VII, § 1; Conn. Const. art. VI, § 1; Del. Const. art. V, § 2; Fla. Const. art. VI, § 2; Ga. Const. art. II, § I, para. II; Haw. Const. art. II, § 1; Idaho Const. art. VI, § 2; Ill. Const. art. III, § 1; Ind. Const. art. II, § 1; Iowa Const. art. II, § 1; Kan. Const. art. V, § 1; Ky. Const. § 145; La. Const. art. I, § 10; Me. Const. art. II, § 1; Md. Const. art. I, § 1; Mass. Const. Declaration of Rights, art. IX; Mich. Const. art. II, § 1; Minn. Const. art. VII, § 1; Miss. Const. art. XII, § 241; Mo. Const. art. VIII, § 2; Mont. Const. art. IV, § 2; Neb. Const. art. I, § 22; Nev. Const. art. II, § 1; N.H. Const. pt. I, art. 11; N.J. Const. art. II, § 1, para. 2; N.M. Const. art. VII, § 1; N.Y. Const. art. II, § 1; N.C. Const. art. VI, § 1; N.D. Const. art. II, § 1; Ohio Const. art. V, § 1; Okla. Const. art. III, § 1; Or. Const. art. II, §§ 1–2; Pa. Const. art. VII, § 1; R.I. Const. art. II, § 1; S.C. Const. art. I, § 5; S.D. Const. art. VI, § 19; Tenn. Const. art. IV, § 1; Tex. Const. art. VI, § 2; Utah Const. art. IV, § 2; Vt. Const. ch. I, art. 8; Va. Const. art. I, § 6; Wash. Const. art. VI, § 1; W. Va. Const. art. IV, § 1; Wis. Const. art. III, § 1; Wyo. Const. art. 6, §§ 1–2.

63. For initiative provisions, see Alaska Const. art. XI, § 1; Ariz. Const. art. IV, pt. 1, § 1; Ark. Const. art. V, § 1; Cal. Const. art. II, § 8; Colo. Const. art. V, § 1; Fla. Const. art. XI, § 3; Idaho Const. art. III, § 1; Ill. Const. art. XIV, § 3; Me. Const. art. IV, pt. 3, § 18; Mass. Const. amend. art. XLVIII; Mich. Const. art. II, § 9; Miss. Const. art. XV, § 273; Mo. Const. art. III, § 49; Mont. Const. art. III, § 4; Neb. Const. art. III, § 1; Nev. Const. art. XIX, § 2; N.D. Const. art. III, § 1; Ohio Const. art. II, § 1; Okla. Const. art. V, §§ 1–2; Or. Const. art. IV, § 1; S.D. Const. art. III, § 1; Utah Const. art. VI, § 1; Wash. Const. art. II, § 1; Wyo. Const. art. 3, § 52. For referendum provisions, see Table 1.2: States With Legislative Referendum (LR) for Statutes and Constitutional Amendments, Initiative & Referendum Inst., http://www.iandrinstitute.org/docs/Legislative-Referendum-States.pdf [https://perma.cc/PU5U-G4NJ] (last visited Oct. 21, 2023) (identifying states with constitutional or legislative referenda).

64. Ark. Const. art. V, § 13; Colo. Const. art. V, § 14; Conn. Const. art. III, § 16; Fla. Const. art. III, § 4(b)–(c), (e); Ga. Const. art. III, § IV, para. XI; Haw. Const. art. III, § 12; Idaho Const. art. III, § 12; Ill. Const. art. IV, § 5(c); Ind. Const. art. IV, § 13; Iowa Const. art. III, § 13; La. Const. art. III, § 15; Md. Const. art. III, § 21; Mich. Const. art. IV, § 20; Minn. Const. art. IV, § 14; Miss. Const. art. IV, § 58; Mo. Const. art. III, § 20; Mont. Const. art. V, § 10(3); Nev. Const. art. IV, § 15; N.H. Const. pt. II, art. 8; N.M. Const. art. IV, § 12; N.Y. Const. art. III, § 10; N.C. Const. art. II, § 17; N.D. Const. art. IV, § 14; Ohio Const. art. II, § 13; Or. Const. art. IV, § 14; Pa. Const. art. II, § 13; S.C. Const. art. III, § 23; S.D. Const. art. III, § 15; Tenn. Const. art. II, § 22; Tex. Const. art. III, § 16; Utah Const. art. VI, § 15; Vt. Const. ch. II, § 8; Wash. Const. art. II, § 11; Wis. Const. art. IV, § 10; Wyo. Const. art. 3, § 14. For more specific rights to information, see Haw. Const. art. I, § 24; Mont. Const. art. II, § 9; N.H. Const. pt. I, art. 8; N.D. Const. art. XI, §§ 5–6.

national origin, sex, and disability) and domains (such as civil and political rights, employment, and property).[65]

Second, these rights have been added to state constitutions at different times by different publics. Some of these layered rights reflect concerns of Jacksonian democracy, others of Progressivism, others of the Civil Rights movement, and more, and the amendment process has generally been one of addition rather than replacement.[66] Given the number of state constitutional rights protections adopted during different periods, it is unsurprising that these rights do not point in a single direction. State constitutions contain rights to collective bargaining but also the "right to work";[67] they contain rights for criminal defendants but also victims' rights;[68] they include rights to privacy but also rights to know.[69] In some instances, constitutional provisions themselves seek to resolve such tensions, delineating a balance between individual and community, as we discuss in next section. Other times, the work of reconciling multiple rights provisions falls to judges or other constitutional expositors, part of the interpretive project we address in Part III. The simple starting observation is that state constitutions contain abundant rights provisions that address a wide and ever-expanding range of human affairs. Understanding state constitutions requires considering the full extent of these provisions.

B. *Community-Regarding Rights*

Even as state constitutions protect individual rights, they also seek to advance the public good, and they situate the individual in the community as a rights-bearing citizen who in turn bears responsibilities to others. Differing from the federal Constitution, state constitutions offer a meditation not only on the relationship between the people and their government but also on the relationship between the individual and the community.

From their inception, state constitutions have expressed commitments to the public welfare. Eighteenth-century bills of rights were not limited to individual protections but also included the community as a whole.[70] In part, this followed from the project of creating republican governments: Constitutions, including Virginia's and Pennsylvania's,

65. E.g., Conn. Const. art. I, § 20; Ill. Const. art. I, § 17.

66. See Tarr, Understanding State Constitutions, supra note 32, at 193 (noting "the influence of disparate political movements" over time and pointing out that "[t]he amendment process often involves neither deletion nor replacement but rather the addition of provisions").

67. See id. at 149.

68. See, e.g., S.D. Const. art. VI, § 7 (providing right for the accused); id. § 29 (providing rights to victims).

69. E.g., Haw. Const. art. I, §§ 6, 24; Mont. Const. art. II, §§ 9–10; id. art. V, § 10; N.H. Const. pt. I, arts. 2-b, 8.

70. See Tarr, Understanding State Constitutions, supra note 32, at 77.

insisted that government existed "for the common benefit, protection, and security of the people, nation or community" rather than for the benefit of any "man, or set of men."[71] They also specifically recognized the right of the people to consult for the "common good."[72]

These early state constitutions went further in recognizing mutual obligations among the individuals who constituted the community. Pennsylvania's Declaration of Rights, for example, provided: "That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal service when necessary, or an equivalent thereto . . . ."[73] Like other constitutions of its time, Pennsylvania's "considered the communal right to qualify liberties as important as the individual's right to be free from government interference. . . . Liberties in this constitution were social contract liberties, all qualified by entry into society."[74]

Over time, state constitutions have continued to recognize individual liberty in the context of communal welfare. Both "common benefit" and "common good" provisions widely appear in contemporary state constitutions.[75] Some state constitutions also expressly designate limits on individual rights based on social needs. For instance, New Hampshire's constitution provides: "When men enter into a state of society, they surrender up some of their natural rights to that society, in order to ensure the protection of others; and, without such an equivalent, the surrender is

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71. Va. Const. of 1776, Declaration of Rights, §§ 3–4; see also Pa. Const. of 1776, ch. I, art. V; Vt. Const. of 1777, ch. I, art. VI ("That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community . . . .").

72. E.g., Pa. Const. of 1776, Declaration of Rights, art. XVI ("That the people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address petition, or remonstrance.").

73. Id. art. VIII.

74. Robert C. Palmer, Liberties as Constitutional Provisions: 1776–1791, *in* William E. Nelson & Robert C. Palmer, Liberty and Community: Constitution and Rights in the Early American Republic 55, 64, 68 (1987) (footnotes omitted).

75. For common benefit clauses, see Ark. Const. art. II, § 1; Conn. Const. art. I, § 2; Idaho Const. art. I, § 2; Iowa Const. art. I, § 2; Kan. Const. Bill of Rights, § 2; Me. Const. art. I, § 2; Mich. Const. art. I, § 1; Minn. Const. art. I, § 1; Nev. Const. art. I, § 2; N.H. Const. pt. I, art. 10; N.J. Const. art. I, para. 2.a; N.D. Const. art. I, § 2; Ohio Const. art. I, § 2; Okla. Const. art. II, § 1; S.D. Const. art. VI, § 26; Tenn. Const. art. I, § 2; Tex. Const. art. I, § 2; Utah Const. art. I, § 2; Vt. Const. ch. I, art. 7; Va. Const. art. I, § 3; W. Va. Const. art. III, § 3. For rights to assemble for the common good, see Ala. Const. art. I, § 25; Colo. Const. art. II, § 24; Conn. Const. art. I, § 14; Ky. Const. Bill of Rights, § 1; Mo. Const. art. I, § 9; N.D. Const. art. I, § 5; Pa. Const. art. I, § 20; Tenn. Const. art. I, § 23; Tex. Const. art. I, § 27; Wash. Const. art. I, § 4. For rights to consult for the common good, see Ark. Const. art. II, § 4; Idaho Const. art. I, § 10; Ill. Const. art. I, § 5; Ind. Const. art. I, § 31; Iowa Const. art. I, § 20; Kan. Const. Bill of Rights, § 3; Me. Const. art. I, § 15; Mass. Const. pt. I, art. XIX; Mich. Const. art. I, § 3; Neb. Const. art. I, § 19; Nev. Const. art. I, § 10; N.H. Const. pt. I, art. 32; N.J. Const. art. I, para. 18; N.C. Const. art. I, § 12; Ohio Const. art. I, § 3; Or. Const. art. I, § 26; S.D. Const. art. VI, § 4; Vt. Const. ch. I, art. 20; W. Va. Const. art. III, § 16; Wis. Const. art. I, § 4.

void."[76] Illinois's "Fundamental Principles" section similarly provides that the "blessings of liberty" "cannot endure unless the people recognize their corresponding individual obligations and responsibilities."[77] More recently adopted provisions recognize individual obligations alongside specific individual rights. For instance, the two newest states, Alaska and Hawaii, protect individual liberty, property, happiness, and equality rights at the same time that they expressly insist upon "corresponding obligations" of individuals.[78] Montana's 1972 constitution added to its inalienable rights provision a clause recognizing "corresponding responsibilities" at the same time that it enumerated more such rights, including a clean and healthful environment.[79]

Most state constitutions also qualify particular rights to ensure that "these rights should be construed to promote the common good, rather than to 'trump' it."[80] For example, in recognizing free speech rights, state constitutions hold individuals "responsible for the abuse of the right."[81] Some states protect free exercise of religion insofar as it is consonant with public safety and peace.[82]

Consistent with the understanding that individuals bear responsibilities to the community, a number of states have recognized that their constitutions limit private interference with other individuals' rights.[83] Unlike the federal Constitution's express framing of most rights as

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76. N.H. Const. pt. I, art. 3.

77. Ill. Const. art. I, § 23; cf. Dinan, State Constitutional Tradition, supra note 32, at 224 (noting that, across the centuries, there has been a consistent "state constitutional commitment to the formation of citizen character that stands in marked contrast to the dominant understanding of the American constitutional tradition," which is more libertarian).

78. Alaska Const. art. I, § 1; Haw. Const. art. I, § 2.

79. Mont. Const. art. II, § 3.

80. G. Alan Tarr, Constitutional Theories and Constitutional Rights: Federalist Considerations, Publius, Spring 1992, at 93, 105.

81. E.g., Ohio Const. art. I, § 11; see also Alaska Const. art. I, § 5; Ariz. Const. art. II, § 6; Ark. Const. art. II, § 6; Cal. Const. art. I, § 2; Fla. Const. art. I, § 4; Idaho Const. art. I, § 9; Ind. Const. art. I, § 9; Iowa Const. art. I, § 7; Kan. Const. Bill of Rights, § 11; La. Const. art. I, § 7; Mich. Const. art. I, § 5; Minn. Const. art. I, § 3; Mont. Const. art. II, § 7; Nev. Const. art. I, § 9; N.J. Const. art. I, para. 6; N.M. Const. art. II, § 17; N.Y. Const. art. I, § 8; N.D. Const. art. I, § 4; Okla. Const. art. II, § 22; Or. Const. art. I, § 8; S.D. Const. art. VI, § 5; Utah Const. art. I, § 1; Va. Const. art. I, § 12; Wash. Const. art. I, § 5; Wis. Const. art. I, § 3; Wyo. Const. art. 1, § 20.

82. E.g., N.Y. Const. art. I, § 3; Wash. Const. art. I, § 11.

83. This is commonly called "horizontal effect" in other legal systems. See, e.g., Helen Hershkoff, Horizontality and the "Spooky" Doctrines of American Law, 59 Buff. L. Rev. 455, 456 (2011) (describing the "principle of horizontality," which applies public rights to private conduct "depending on the relationships and interests involved"); Helen Hershkoff, State Common Law and the Dual Enforcement of Constitutional Norms, *in* New Frontiers of State Constitutional Law: Dual Enforcement of Norms 151, 154 (James A. Gardner & Jim Rossi eds., 2010) ("One such practice, in Europe and elsewhere . . . concerns the enforcement of constitutional rights in private disputes between nongovernmental litigants[,] [v]ariously called the *horizontal* or *third-party* application of constitutional rights . . . .").

limitations on government, state constitutions often enumerate rights without specifying who must respect them,[84] and some rights have accordingly been deemed enforceable against private as well as governmental actors.[85] For instance, state courts have recognized that "threats to the complete enjoyment of freedom of speech and to privacy from other private entities are fully as serious as threats from elected and appointed officials."[86]

C. *Positive Rights*

State constitutions also adopt a distinctive understanding of the relationship between the individual and government. In keeping with the federal model, they seek to guard against government infringement of individual rights. As they spell out negative rights in considerable detail, however, state constitutions also recognize that individual enjoyment of rights depends on exercises of government power.[87] Consistent with the eighteenth-century emphasis on government facilitation of happiness and safety—but supplemented by waves of amendment—today, "every state constitution in the United States . . . contains some explicit commitment to positive rights."[88] In contrast to the prevailing understanding that the U.S. Constitution does not impose any requirement on the government to take affirmative action to guarantee negative rights,[89] state constitutions broadly impose duties on government and mandate its intervention in a number of domains. Every state constitution seeks to strike a balance between prohibiting government infringement and requiring government provision.

The earliest specific positive rights guaranteed in state constitutions concerned public schooling. To inculcate moral citizenship, twelve

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84. Friesen, State Constitutional Law, supra note 32, § 9.02.

85. See id. §§ 9.01–.07; John Devlin, Constructing an Alternative to "State Action" as a Limit on State Constitutional Rights Guarantees: A Survey, Critique and Proposal, 21 Rutgers L.J. 819, 833–34 (1990) ("In the wake of [the California Supreme Court's decision in] *PruneYard*, the highest courts of New Jersey, Pennsylvania and Washington rendered decisions abandoning a threshold requirement of state action for claims arising under their state guarantees of speech, assembly and petition.").

86. Friesen, State Constitutional Law, supra note 32, § 9.02; see also, e.g., State v. Robertson, 649 P.2d 569, 589 (Or. 1982) ("The right of free expression is as important to many people in their personal and institutional relationships as it is in the narrower 'civil liberties' related to politics, and nothing in [the state constitution's free expression clause] suggests that it is limited to the latter.").

87. See Zackin, supra note 38, at 67–196 (discussing positive rights arising under state constitutions to education, workers' rights, and environmental protection).

88. Hershkoff, Just Words, supra note 34, at 1523.

89. See, e.g., DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989) (rejecting the argument that the Due Process Clause of the Fourteenth Amendment imposes an affirmative obligation on states to protect life, liberty, and property).

eighteenth-century state constitutions included education clauses.[90] Pennsylvania, for example, required the state legislature to establish and fund common schools in each county of the state.[91] During the Jacksonian period, new concerns about child labor, economic inequality, and the assimilation of immigrants supplemented the republican concern with citizen character, and increasing numbers of states began to adopt common-school provisions guaranteeing free public education.[92] Today, every state constitution provides in some way for public schools, and most include affirmative funding requirements.[93]

Between Reconstruction and the New Deal, a number of state constitutions also began to require government financial assistance for the poor.[94] In 1938, for example, New York adopted amendments recognizing state provision for "the aid, care, and support of the needy" and authorizing state-provided housing for low-income citizens.[95] Today, approximately half of the states recognize a positive right of welfare provision.[96]

In addition, state constitutions recognize other positive rights, including a range of labor protections[97] and government mandates for the "protection and promotion of the health of the inhabitants of the state"[98] and protection of the environment.[99] In their approach to government and embrace of positive rights, state constitutions more closely resemble constitutions around the globe than they do the U.S. Constitution.[100]

D. *Democratic Rights*

State constitutions seek to guarantee not only individuals' ability to direct their own lives while attending to the common good but also the people's collective ability to direct government. Democratic self-rule lies

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90. Hershkoff, Just Words, supra note 34, at 1535; see also, e.g., Mass. Const. pt. II, ch. V, § II.

91. See Pa. Const. of 1776, § 44.

92. See Versteeg & Zackin, supra note 34, at 1689–90.

93. See Zackin, supra note 38, at 67–68.

94. See Dinan, State Constitutional Tradition, supra note 32, at 211–12.

95. N.Y. Const. art. XVII; id. art. XVIII; see also Ohio Const. art. VIII, § 16.

96. See Hershkoff, Just Words, supra note 34, at 1536 n.72 (citing William C. Rava, State Constitutional Protections for the Poor, 71 Temp. L. Rev. 543, 551–52, app. A (1998)).

97. See supra note 60 and accompanying text; see also Zackin, supra note 38, at 106–45 (discussing state constitutional provisions concerning working conditions and other labor rights).

98. N.Y. Const. art. XVII, § 3; see also Elizabeth Weeks Leonard, State Constitutionalism and the Right to Health Care, 12 U. Pa. J. Const. L. 1325, 1347–68 (2010) (surveying state constitutional provisions regarding health).

99. See supra note 59 and accompanying text; see also Tarr, Understanding State Constitutions, supra note 32, at 149–50 ("[E]very state constitution[] written from 1959 to the present has committed the state to protection of the environment, and six states have also amended their constitutions to do so."); Zackin, supra note 38, at 146–96.

100. See Versteeg & Zackin, supra note 34, at 1698. The same is true with respect to state constitutions and horizontal effect. See supra note 83 and accompanying text.

at the "heart" of the state constitutional project.[101] These constitutions are oriented around majoritarian democracy in a way the federal Constitution is not,[102] and they are shot through with rights provisions directed at maintaining popular control over government.

As we have elaborated in prior work, a "democracy principle"[103] animates state constitutions. Unlike the federal Constitution that celebrates "We the People" but sharply constrains the people's ability to engage in self-rule, state constitutions have always contained operative clauses recognizing that political power resides in the people, and they have been repeatedly amended to expand channels for unmediated, popular self-rule.[104] Today, forty-nine constitutions include an express commitment to popular sovereignty, most commonly stating that "all political power is inherent in the people."[105] State constitutions also seek to facilitate ongoing popular control of government institutions, attempting to "approximate direct democracy in their systems of representative government."[106] They provide for popular majority vote for numerous positions in the executive and judicial branches, from

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101. See N.C. State Conf. of the NAACP v. Moore, 876 S.E.2d 513, 527 (N.C. 2022) ("[W]e begin and end with the principles codified in numerous provisions of our constitution that function as the beating heart of North Carolina's system of government: the principles of popular sovereignty and democratic self-rule.").

102. Bulman-Pozen & Seifter, Democracy Principle, supra note 33, at 887–89.

103. Id. at 861–62; see also Jessica Bulman-Pozen & Miriam Seifter, Countering the New Election Subversion: The Democracy Principle and the Role of State Courts, 2022 Wis. L. Rev. 1337, 1340 [hereinafter Bulman-Pozen & Seifter, Countering the New Election Subversion].

104. Bulman-Pozen & Seifter, Democracy Principle, supra note 33, at 896.

105. Ala. Const. art. I, § 2; Alaska Const. art. I, § 2; Ariz. Const. art. II, § 2; Ark. Const. art. II, § 1; Cal. Const. art. II, § 1; Conn. Const. art. I, § 2; Fla. Const. art. I, § 1; Idaho Const. art. I, § 2; Iowa Const. art. I, § 2; Kan. Const. Bill of Rights, § 2; Ky. Const. Bill of Rights, § 4; Mich. Const. art. I, § 1; Nev. Const. art. I, § 2; N.J. Const. art. I, para. 2.a; N.D. Const. art. I, § 2; Ohio Const. art. I, § 2; Okla. Const. art. II, § 1; S.D. Const. art. VI, § 26; Tex. Const. art. I, § 2; Utah Const. art. I, § 2; Wash. Const. art. I, § 1. Other states provide slightly different formulations, including that "all political power is vested in and derived from the people" or that "all power is inherent in the people." Colo. Const. art. II, § 1; Ga. Const. art. I, § II, para. I; Ind. Const. art. I, § 1; La. Const. art. I, § 1; Mass. Const. pt. I, art. V; Me. Const. art. I, § 2; Minn. Const. art. I, § 1; Miss. Const. art. III, § 5; Mo. Const. art. I, § 1; Mont. Const. art. II, § 1; N.H. Const. pt. I, art. 8; N.M. Const. art. II, § 2; N.C. Const. art. I, § 2; Or. Const. art. I, § 1; Pa. Const. art. I, § 2; S.C. Const. art. I, § 1; Tenn. Const. art. I, § 1; Va. Const. art. I, § 2; Vt. Const. ch. I, art. 6; W. Va. Const. art. III, § 2; Wyo. Const. art. 1, § 1. For other formulations of the principle, see Del. Const. pmbl.; Ill. Const. art. I, § 1; Md. Const. Declaration of Rights, art. 1; Neb. Const. art. I, § 1; R.I. Const. art. I, § 1; Wis. Const. art. I, § 1.

106. G. Alan Tarr, For the People: Direct Democracy in the State Constitutional Tradition, *in* Democracy: How Direct? Views From the Founding Era and the Polling Era 87, 91 (Elliott Abrams ed., 2002) [hereinafter Tarr, For the People]; see also Gordon S. Wood, The Creation of the American Republic 1776–1787, at 165 (1998) (noting that state constitutional drafters wanted representative government to "be in miniature an exact portrait of the people at large" (internal quotation marks omitted) (quoting then-Massachusetts delegate John Adams)).

governors and lieutenant governors to attorneys general and secretaries of state to judges.[107] So too, they constrain the exercise of government power in the service of popular accountability.[108] Experience with unrepresentative legislatures in the nineteenth century yielded an ongoing focus on making legislators responsive to the popular will, including by imposing term limits and detailed procedural requirements on lawmaking.[109]

In privileging popular majority rule, state constitutions also endorse political equality in both the inputs and outputs of government decisionmaking.[110] A salient fear driving state constitutional drafting and revision over time has been that the few might capture government and use it to serve their own ends. This concern with "[m]inority faction"[111] led eighteenth-century constitution writers to guarantee equal participation in government elections among those understood to constitute the political community.[112] State constitutions have also required equal treatment of members of the political community by the government. For example, provisions widely adopted during the nineteenth century sought to check legislative favoritism.[113] Today, most state constitutions limit special legislation and seek to foreclose other forms of government partiality.[114]

The democracy principle bears directly on how state constitutions frame individual rights. State constitutions recognize popular sovereignty, majority rule, and political equality as cornerstones for rights as well as government structure, and they reject a common premise that individual rights and majoritarian democracy stand in tension with one another. Not

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107. See Bulman-Pozen & Seifter, Democracy Principle, supra note 33, at 872–73 & nn.62–66.

108. See, e.g., Williams, Law of State Constitutions, supra note 5, at 258.

109. See Bulman-Pozen & Seifter, Democracy Principle, supra note 33, at 874–75 & nn.74–79 (describing state constitutional mechanisms that attempt to keep legislators responsive to the popular will); Tarr, For the People, supra note 106, at 93 ("By the 1830s, citizens in most states . . . believed that state legislators remained more responsive to the wealthy and well-connected than to the general public. This prompted a wave of constitutional reform.").

110. See Bulman-Pozen & Seifter, Democracy Principle, supra note 33, at 890 ("Together with their commitments to popular sovereignty and majority rule, state constitutions also embrace a commitment to political equality, a commitment that entails both equal access to political institutions by members of the political community and equal treatment of members of the political community by those institutions in turn.").

111. Tarr, Understanding State Constitutions, supra note 32, at 78.

112. See Bulman-Pozen & Seifter, Democracy Principle, supra note 33, at 890 & nn.178–80 (collecting examples).

113. See id. at 892–94 ("[P]rovisions guaranteeing equality, prohibiting special legislation, and imposing public-purpose requirements attempt to foreclose special treatment for the privileged few.").

114. See id. at 875 n.80 (collecting provisions); Marshfield, supra note 46, at 859 ("[I]f there is a single thread that connects state constitutions across jurisdictions and time, it is a populist fear that government is prone towards capture and recalcitrance.").

only do state constitutions seek to guarantee democracy through robust guarantees of the right to vote, participate in direct democracy, and more, but they also propose that popular majority rule is the best way to safeguard individual rights in the face of unrepresentative or otherwise untrustworthy government actors.[115]

From the start, state constitutions have insisted on a tight connection between democracy and rights. Eighteenth-century bills of rights, for example, framed statements of political principle as rights.[116] Virginia's widely emulated Declaration of Rights not only provided that "government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community"[117] but also recognized that "whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal."[118] Nearly every eighteenth-century bill of rights similarly recognized the people's right to abolish or alter the governments they had created.[119] These provisions remain in place to this day and have also been adopted by states that joined the Union in later centuries.[120]

Eighteenth-century state constitutions likewise recognized the right of the people to remove public officials from office. In the words of the Massachusetts Declaration of Rights, "In order to prevent those who are vested with authority from becoming oppressors, the people have a right . . . to cause their public officers to return to private life."[121] In a similar spirit, these early bills of rights declared that government officials are but the people's agents and recognized a popular right to petition and instruct representatives.[122] As Marshfield concludes based on his study of

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115. See, e.g., Hershkoff, Just Words, supra note 34, at 1539–40; Marshfield, supra note 46, at 890–91.

116. See Tarr, Understanding State Constitutions, supra note 32, at 76–77.

117. Va. Const. of 1776, Declaration of Rights, § 3.

118. Id.

119. See Marshfield, supra note 46, at 884–85.

120. See Ark. Const. art. II, § 1; Cal. Const. art. II, § 1; Colo. Const. art. II, § 2; Conn. Const. art. I, § 2; Del. Const. pmbl.; Ga. Const. art. I, § II, paras. I–II; Idaho Const. art. I, § 2; Ind. Const. art. I, § 1; Iowa Const. art. I, § 2; Ky. Const. Bill of Rights, § 4; Me. Const. art. I, § 2; Md. Const. Declaration of Rights, art. 1; Mass. Const. pt. I, art. VII; Minn. Const. art. I, § 1; Miss. Const. art. III, § 6; Mo. Const. art. I, § 3; Mont. Const. art. II, § 2; Nev. Const. art. I, § 2; N.H. Const. pt. I, art. 10; N.J. Const. art. I, para. 2.a; N.D. Const. art. I, § 2; Ohio Const. art. I, § 2; Okla. Const. art. II, § 1; Or. Const. art. I, § 1; Pa. Const. art. I, § 2; R.I. Const. art. I, § 1; S.C. Const. art. I, § 1; S.D. Const. art. VI, § 26; Tenn. Const. art. I, § 1; Tex. Const. art. I, § 2; Utah Const. art. I, § 2; Vt. Const. ch. I, art. 7; Va. Const. art. I, § 3; W. Va. Const. art. III, § 3; Wyo. Const. art. 1, § 1.

121. Mass. Const. pt. I, art. VIII; see also Vt. Const. of 1777, ch. I, art. VII ("[T]he people have a right, at such periods as they may think proper, to reduce their public officers to a private station . . . ."); Md. Const. of 1776, Declaration of Rights, § XXXI (requiring rotation in office).

122. Marshfield, supra note 46, at 883 & nn.177–178.

early state constitutional conventions, "state bills of rights were designed to facilitate popular control over wayward government officials and policy,"[123] and over time the states have converged "on an approach that prioritizes rights as instruments of popular control over government."[124]

As state constitutions have been amended across the decades, drafters have continued to rely on rights provisions to advance democratic government. Most significantly, today every state constitution confers an affirmative right to vote.[125] At state conventions, participants have recognized that voting rights are "foundational" rights "'without which all others are meaningless.'"[126] State constitutions have also bolstered the right to vote through linked provisions, including rights to participate in free, or free and open, elections[127] and rights not to be arrested while participating in elections.[128] Approximately half of the states have also adopted the initiative or referendum to enable direct lawmaking by the people.[129] Although direct democracy provisions are often framed as carve-outs to the legislature's power, state courts have recognized these guarantees of popular lawmaking as "fundamental rights."[130] Both by locating democracy protections in bills of rights and by expressly casting many of these protections as rights, state constitutions propose a mutually constitutive relationship between democracy and rights.

Indeed, the connections state constitutions propose between rights and democratic self-rule are not limited to rights directly concerning elections, political representation, or even equality. The state constitutional tradition is imbued with the recognition that rights and democracy are more deeply intertwined. In their opening clauses, illustratively, state constitutions routinely recognize that governments exist to protect individual rights and welfare[131] and also that such rights are the

123. Id. at 877.

124. Id. at 862; see also id. at 887–89 (reviewing early convention records and showing that participants saw bills of rights as facilitating the people's ability "to realize and perpetuate their sovereignty over government").

125. See supra note 62 and accompanying text.

126. Mont. Democratic Party v. Jacobsen, 518 P.3d 58, 65 & n.13 (Mont. 2022) (quoting James Grady, Mont. Const. Convention Comm'n, Suffrage and Elections: Constitutional Convention Study No. 11, at 25 (1971)).

127. Bulman-Pozen & Seifter, Democracy Principle, supra note 33, at 871 & n.59 (collecting provisions).

128. Id. at 871–72 & n.61 (collecting provisions).

129. See supra note 63 and accompanying text.

130. Reclaim Idaho v. Denney, 497 P.3d 160, 181–82 (Idaho 2021) ("[L]ike voting, the Idaho Constitution plainly expresses the initiative and referendum power as a positive right—'*The people reserve to themselves the power* . . . .' This alone requires us to interpret the people's initiative and referendum rights as fundamental rights." (citation omitted) (quoting Idaho Const. art. III, § 1)).

131. See, e.g., Mich. Const. art. I, § 1 ("All political power is inherent in the people. Government is instituted for their equal benefit, security and protection."); supra note 75.

foundation of rule by the people.[132] Amendments adopted over the centuries have been intended to guarantee rights for workers, women, welfare recipients, and others—and to guarantee such rights in part by ensuring government responsiveness to popular control rather than special interests.[133] Because the people always stand apart from their representatives, rights provisions may at once protect individuals from government and protect popular self-rule. If a defining aim of federal constitutional rights is to shield individuals from the whims of majorities,[134] a defining aim of state constitutional rights is to simultaneously enhance individual autonomy and majoritarian democracy.

E. *In Sum: Individual and Collective Self-Determination*

Now we are in a position to see state constitutional rights in full. In the number and kind of rights they elaborate, their attention to community as well as individual, and their conceptualization of government power and constraint, state constitutions differ markedly from the U.S. Constitution. They furnish more individual rights while imposing public-regarding limits on these rights. They place more emphasis on communal welfare while obligating the community to attend to each of its members. They demand more activity from government while creating checks to ensure popular responsiveness. And they do all of this while structuring state institutions to guarantee democratic self-governance.

As a result, state constitutions do not mimic the federal Constitution in emphasizing fundamental rights and the fear of majority faction, but

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132. See, e.g., Wis. Const. art. I, § 1 ("All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.").

133. See, e.g., Hershkoff, Just Words, supra note 34, at 1540–41 (arguing that twentieth-century state constitutional amendments guaranteeing social and economic rights sought to "ensure enactment of majoritarian reforms despite opposition by special interest groups"); Versteeg & Zackin, supra note 34, at 1664 (proposing that the detail included in state constitutions, including positive rights provisions, "reflects constitutional drafters' attempts to maintain tighter control over their governments"); see also Tarr, Understanding State Constitutions, supra note 32, at 94–101 (describing nineteenth-century state constitutional changes designed to protect the people from the wealthy, well-connected few and government capture); James A. Henretta, Foreword: Rethinking the State Constitutional Tradition, 22 Rutgers L.J. 819, 820 (1991) (exploring how Progressive-era reformers adopted amendments "to reestablish popular sovereignty in an urban and industrial society in which concentrations of power and wealth had corrupted the democratic process" and to secure "'popular rights'" in state constitutions (quoting James Quayle Dealey, Growth of American State Constitutions 258 (1915))).

134. See, e.g., William J. Brennan, Jr., Why Have a Bill of Rights?, 26 Val. U. L. Rev. 1, 12 (1991) (arguing that the federal Bill of Rights' "salient purpose is to . . . protect minorities . . . from the passions or fears of political majorities"); see also Marshfield, supra note 46, at 863–67 (contrasting this federal approach with the state constitutional approach).

neither do they resemble populist constitutions that privilege political decisions at the expense of individual rights. They embrace both individual and collective will.[135] State constitutions conceive of rights robustly—not as a sparse set of negative liberties but as an expansive framework allowing individuals to direct their lives, free from domination and arbitrary interference or neglect. At the same time, they contemplate an active popular sovereign; they prioritize the ability of the people in their collective capacity to direct government and to continually revise their fundamental law.

Following state courts, we adopt the label "self-determination" to describe these intertwined commitments.[136] Although the term does not itself appear in any state constitution—an absence that underscores our focus on these documents as a whole—many state courts have recognized constitutional principles of both individual[137] and collective[138] self-determination. In the words of one supreme court, "[a]bove all, the Florida Constitution embodies the right of self-determination for *all* Florida's citizens."[139] By valuing individual and collective self-determination alike, state courts carry forward the republican traditions that gave rise to early state constitutions[140] while accommodating traditions

135. See generally Rodrigo Uprimny, The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges, 89 Tex. L. Rev. 1587, 1607 tbl.1 (2011) (typologizing constitutional democracies in terms of their weak or strong protection of fundamental rights and their weak or strong protection of democratic participation).

136. E.g., Advisory Op. to the Att'y Gen. re Right to Treatment & Rehab. for Non-Violent Drug Offenses, 818 So. 2d 491, 494 (Fla. 2002) ("[T]he Florida Constitution embodies the right of self-determination for *all* Florida's citizens.").

137. See, e.g., Hodes & Nauser, MDs, P.A. v. Schmidt, 440 P.3d 461, 466 (Kan. 2019); Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 426 (Mass. 1977); In re Brown, 478 So. 2d 1033, 1039 (Miss. 1985); Armstrong v. State, 989 P.2d 364, 379 (Mont. 1999); see also infra notes 259–263 and accompanying text (discussing these cases).

138. See, e.g., *Right to Treatment*, 818 So. 2d at 494; see also infra notes 256–257 (discussing this and related cases).

139. *Right to Treatment*, 818 So. 2d at 494 (noting further that the court has therefore "been reluctant to interfere with this right by barring citizens from formulating their own organic law"). As the description of the constitutional initiative as a form of self-determination suggests, self-determination is also a term that speaks to processes of constitutional change in the states, where constitutions are readily and frequently amended by the people. We explore this facet of self-determination in other work. See Bulman-Pozen & Seifter, Right to Amend, supra note 22 (manuscript at 2) ("Together with other democratic rights that appear in state constitutions but not the federal charter—from affirmative rights to vote to rights to alter and abolish government—the right to amend recognizes the people's sovereignty as an active, ongoing commitment. It is a cornerstone of state constitutions.").

140. See, e.g., Tarr, Understanding State Constitutions, supra note 32, at 90 (discussing republican influences on early state constitutions); Wood, State Constitution-Making, supra note 40, at 914 (same).

that have informed their development, including the negative liberties of natural rights and the affirmative obligations of civil and human rights.[141]

The state constitutional commitment to individual and collective self-determination underscores a few basic points that adjudication should accommodate and that Parts III and IV further explore. First, individual autonomy ("liberty to follow one's will"[142]) is the starting point for analysis across the wide range of activity protected by state constitutions. State constitutions contain robust and plentiful rights, and the layering of provisions over time indicates that courts should read these documents holistically rather than piecemeal, assuming a generous posture when first ascertaining the rights at stake in a dispute.

At the same time, state constitutional rights are not absolute and may be subject to limitations. Even beyond rights articulated together with community-regarding constraints,[143] individual rights may be limited through certain exercises of the popular will. But government action is not to be automatically equated with the popular will; the people always stand apart from their representatives, and state constitutions express particular concern with unrepresentative and otherwise arbitrary government action. Any framework seeking to understand, or to make decisions about, state constitutional rights must offer balanced attention to the people in both their individual and collective capacities.

Finally, to say that state constitutional rights are abundant and complex is not to say that they are all the same. Certain core rights are prerequisites to individual and collective self-determination and properly receive special weight in state constitutional analysis.[144] As described

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141. For philosophical accounts of self-determination that are particularly resonant in the state constitutional context, see generally Philip Pettit, Republicanism: A Theory of Freedom and Government 51–79 (1997) (proposing freedom as nondomination and arguing that domination consists in someone's capacity to interfere on an arbitrary basis in another's choices); Iris Marion Young, Justice and the Politics of Difference 37–38 (1990) (arguing that self-determination consists in "participating in determining one's action and the conditions of one's action" and that its contrary is domination). Professor Iris Marion Young emphasizes the connection between individual and collective forms of self-determination. See Iris Marion Young, Inclusion and Democracy 33 (Will Kymlicka, David Miller & Alan Ryan eds., 2000) (arguing that "participation in making the collective regulations designed to prevent domination" is necessary to individual self-determination, and that "[d]emocracy in that respect is entailed by self-determination, though the value of self-determination does not reduce to democratic participation").

142. Autonomy, Oxford English Dictionary (3d ed. 2023).

143. See supra notes 80–85 and accompanying text.

144. See In re C.H., 683 P.2d 931, 940 (Mont. 1984) (discussing rights "without which other constitutionally guaranteed rights would have little meaning"); Nelson Tebbe & Micah Schwartzman, The Politics of Proportionality, 120 Mich. L. Rev. 1307, 1319 (2022) ("[S]ome rights are closely associated with the status of free and equal members of a democracy—especially rights to bodily integrity, freedom of conscience, free expression, [and] the right to vote . . . [—while others] may not be tied as closely to guaranteeing the conditions necessary for cooperative self-governance.").

further below, state courts have convincingly located voting[145] and bodily integrity,[146] among other rights, in this category, though they have worked out the contours of the category incrementally and contextually.[147] There is, then, much that state courts can do to implement state constitutions committed to self-determination. What they should not do is adopt inapt federal frameworks, as the next Part explains.

II. FROM METHODOLOGICAL LOCKSTEPPING TO STATE-CENTERED ADJUDICATION

Despite the distinctive state constitutional rights tradition, state courts liberally import practices, doctrinal frameworks, and rhetoric from the pages of the *U.S. Reports* when deciding state constitutional rights claims. This sort of methodological lockstepping has gone largely unremarked.[148] Although substantive lockstepping in the interpretation of particular constitutional provisions has been a preoccupation of state constitutional law scholars for decades, there has been no sustained attention to the problem of state interpreters copying federal methods of judicial decisionmaking.

Insofar as state constitutional rights claims are litigated through federal frameworks, courts are likely to make mistakes. This Part highlights three of particular importance. Rather than focus on federally fashionable debates over originalism and textualism—which would replicate the problem of reflexive federal mimicry—we focus on three errors that are likely to receive less attention and to be more outcome-determinative.[149]

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145. See, e.g., Tully v. Edgar, 664 N.E.2d 43, 48 (Ill. 1996) ("[T]he right to vote is a fundamental constitutional right, essential to our system of government."); League of Women Voters of Kan. v. Schwab, 525 P.3d 803, 820 (Kan. Ct. App. 2023) (explaining that all "basic civil and political rights depend on the right to vote," which serves as the "foundation of a representative government"); Mont. Democratic Party v. Jacobsen, 518 P.3d 58, 65 (Mont. 2022) ("[The right to vote] is perhaps the most foundational of our Article II rights and stands, undeniably, as the pillar of our participatory democracy.").

146. See, e.g., Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 424 (Mass. 1977) (recognizing every person's "strong interest in being free from nonconsensual invasion of his bodily integrity"); In re Brown, 478 So. 2d 1033, 1039 (Miss. 1985) ("Each of us has a right to the inviolability and integrity of our persons, a freedom to choose or a right of bodily self-determination, if you will."); Armstrong v. State, 989 P.2d 364, 379 (Mont. 1999) (noting that the right to personal autonomy is "a long-standing and . . . integral part of this country's jurisprudence").

147. See infra sections III.A.2, IV.B.

148. A notable exception is Helen Hershkoff, State Courts and the "Passive Virtues": Rethinking the Judicial Function, 114 Harv. L. Rev. 1833, 1838 (2001) [hereinafter Hershkoff, Passive Virtues] (arguing that federal justiciability doctrine is inappropriate for state courts and proposing a state-centered approach).

149. As scholars and jurists across the ideological spectrum have recognized, state constitutional text and history are too abundant and complex to make approaches sounding in original intent, original public meaning, or plain text decisive. See State v. Roundtree, 952 N.W.2d 765, 793 (Wis. 2021) (Hagedorn, J., dissenting) (noting that while "[j]udicial application of the original public meaning is sometimes quite easy, . . . the more vaguely

First, state courts may engage in clause-bound interpretations of the interests at stake instead of reading constitutional provisions together. The abundance of state constitutional rights and the popular amendment processes that have shaped these rights underscore that clauses must often be combined to recognize the full scope of a right as well as its limits.

Second, state courts following the federal lead may use rigid tiers of scrutiny rather than more balanced frameworks. Federal rational basis review is too deferential to state legislatures and executives, whom state constitutions sharply distinguish from the people themselves, while strict scrutiny is often too absolutist in its conception of rights and fails to situate the individual within the community as state constitutions require.

Third, following federal approaches may lead state courts to shy away from appearances of policymaking or discretion. These decisions are misplaced to the extent they rely on a purported countermajoritarian difficulty, which does not exist as such in the states. State courts are generally majoritarian, elected institutions, and their decisions are readily countermanded. They are entries in an ongoing popular conversation, not the final word on constitutional questions.

A. *Ill-Fitting Federal Approaches*

1. *Clause-Bound Interpretation.* — One way reflexively following federal practice stunts state constitutional adjudication is by artificially limiting the understanding of rights at stake in a particular controversy. Despite calls to interpret the U.S. Constitution holistically or synthetically[150] and

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worded protections in the Bill of Rights[] often demand some legal framework or test that enables a court to apply the law to the facts of a case"); Jack L. Landau, A Judge's Perspective on the Use and Misuse of History in State Constitutional Interpretation, 38 Val. U. L. Rev. 451, 452 (2004) ("[I]t must be recognized that resorting to history unavoidably involves a number of value judgments that cannot be resolved by reference to history itself."); Caleb Stegall, Assoc. Just., Kan. Sup. Ct., Keynote Address to the Society for Law & Culture: Originalism and the Individual Jurist (May 2018), https://kirkcenter.org/essays/originalism-and-the-individual-jurist/ [https://perma.cc/N3PT-9UPF] ("I find it vitally important to dispel the myth that originalism is a panacea that can easily solve the dilemmas facing the constitutional interpreter. . . . I say that as a committed original public meaning jurist."); see also Jane Schacter, The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy, 105 Yale L.J. 107, 150, 153 (1995) (explaining that it is "futile" for courts to attempt to uncover popular intent behind state constitutional amendments and that it is "problematic" to rely on the plain meaning of text that "voters neither read, nor necessarily comprehend"); Glen Staszewski, Interpreting Initiatives Sociologically, 2022 Wis. L. Rev. 1275, 1279 (arguing that initiatives seldom support a single original public meaning).

150. See, e.g., Vicki C. Jackson, Holistic Interpretation: *Fitzpatrick v. Bitzer* and Our Bifurcated Constitution, 53 Stan. L. Rev. 1259, 1262 (2001) ("[H]olistic interpretation . . . will make for better constitutional interpretation than one that narrowly focuses on particular clauses or words considered apart from their position and presence in the overall constitutional structure."); Reva B. Siegel, She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 Harv. L. Rev. 947, 949 (2002) (advocating a "synthetic reading of the Fourteenth and Nineteenth Amendments").

occasional examples of "combination analysis" in federal courts,[151] federal constitutional adjudication tends to proceed in a more clause-bound fashion. As Professor Michael Coenen describes, in the ordinary federal case, "[c]onstitutional adjudication . . . involves the tasks of identifying the constitutional provision most relevant to the case, looking up the clause-specific doctrinal rules associated with that provision, and then resolving the case in accordance with those rules."[152]

Recent state court decisions offer examples of a similar clause-bound approach. In the Idaho abortion litigation, for example, the petitioners asked the court to consider state clauses concerning due process, inalienable rights, privacy, and unenumerated rights[153]—a request the court side-stepped.[154] In the Wisconsin gerrymandering decision, similarly, the court rejected the idea that redistricting might be informed by the state constitution's provisions regarding equality and inherent rights, freedom of expression, freedom of association, and maintenance of free government.[155] It instead considered only provisions concerning the equipopulation and compactness of electoral districts.[156]

Whatever the merits of such a clause-bound approach to the U.S. Constitution, it is an error when it comes to state constitutions. Rigid, clause-bound readings ignore state constitutions' emphasis on democratic constitutional change, their expansive commitment to rights, and their recognition of relationships among individual, community, and government. As these constitutions have been amended over time, more and more rights provisions have been introduced. Sometimes, state constitutional provisions—and in rarer circumstances, state constitutions as a whole—have been replaced altogether. But far more commonly, state constitutional amendment is an accretive process; rights first guaranteed in the eighteenth century sit alongside twentieth- and twenty-first-century provisions.[157]

For some distinguished state constitutional commentators, this very complexity cuts in favor of clause-bound interpretation. Thirty years ago, Professor Alan Tarr argued that state constitutional interpreters do best to

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151. Michael Coenen, Combining Constitutional Clauses, 164 U. Pa. L. Rev. 1067, 1070 (2016); see also, e.g., Obergefell v. Hodges, 576 U.S. 644, 670–76 (2015) (citing both the Due Process and Equal Protection Clauses to recognize federal constitutional protection for gay marriage). Perhaps unsurprisingly, the Court's combining of these clauses tracked an earlier state constitutional law decision. See infra text accompanying note 237 (discussing Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003)).

152. See Coenen, supra note 151, at 1069.

153. See Petitioners' Brief in Support of Verified Petition for Writ of Prohibition and Application for Declaratory Judgment at 2, Planned Parenthood Great Nw. v. State, 522 P.3d 1132 (Idaho 2023) (No. 49615-2022), 2022 WL 1462971.

154. See *Planned Parenthood Great Nw.*, 522 P.3d at 1161.

155. See Johnson v. Wis. Elections Comm'n, 967 N.W.2d 469, 485–87 (Wis. 2021).

156. See id. at 481, 487.

157. See Tarr, Understanding State Constitutions, supra note 32, at 193.

consider provisions in isolation, with attention to "the historical circumstances out of which the constitutional provision arose" but without trying to make sense of multiple provisions together or of the constitution as a whole.[158] Although we agree with Tarr that reading provisions together can be a demanding and sometimes indeterminate inquiry, we do not find that reason enough to shrink from the project.

To the contrary, as many state courts have themselves recognized, it will frequently be only by considering multiple provisions that state courts can effectuate the popular will, expressed by the people over time in response to multiple political and social movements and different salient concerns. In principle, all fifty state high courts have committed to reading state constitutional provisions together to achieve "constitutional harmony," in the formulation of the North Carolina Supreme Court.[159] Such harmony-seeking not only is relevant to identifying constitutional rights—it is, for example, also a way to think about the balancing of such rights and justifications for government action[160]—but also is an important component of articulating the constitutional interests at stake in the first instance. Section III.A discusses this practice further.

2. *Tiers of Scrutiny.* — Properly identifying the rights at stake in litigation is an important piece of the constitutional puzzle, but state courts must also decide whether a law or policy challenged as infringing such rights is permissible. Generally, this will mean applying an established framework—and in federal adjudication the choice of framework is often decisive. Courts and scholars alike recognize the significance of such implementing frameworks; they subsume much of what colloquially passes for constitutional interpretation.[161] Because implementation doctrines are

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158. Id. at 194 (noting that "[f]or state judges, the penetration of the state constitution by successive political movements makes the task of producing coherence even more difficult than it has been for federal judges seeking coherence in the federal Constitution," meaning "something much closer to 'clause-bound' interpretation is required" for state constitutions).

159. Hoke Cnty. Bd. of Educ. v. State, 879 S.E.2d 193, 229 (N.C. 2022); see also Gessler v. Smith, 419 P.3d 964, 969 (Colo. 2018) ("We consider a constitutional amendment 'as a whole and, when possible, adopt an interpretation of the language which harmonizes different constitutional provisions . . . .'" (quoting Zaner v. City of Brighton, 917 P.2d 280, 283 (Colo. 1996))); Ocean Energy, Inc. v. Plaquemines Par. Gov't, 880 So. 2d 1, 7 (La. 2004) (suggesting that constitutional "provisions should be harmonized if possible"); State ex inf. McKittrick v. Bode, 113 S.W.2d 805, 808 (Mo. 1938) (discussing "the rule that the provisions of the Constitution should be harmonized"); We the People Nev. ex rel. Angle v. Miller, 192 P.3d 1166, 1171 (Nev. 2008) ("This court has recognized that '[t]he Nevada Constitution should be read as a whole, so as to give effect to and harmonize each provision.'" (alteration in original) (quoting Nevadans for Nev. v. Beers, 142 P.3d 339, 348 (Nev. 2006))); infra note 208.

160. See infra section III.C.

161. See, e.g., State v. Roundtree, 952 N.W.2d 765, 793 (Wis. 2021) (Hagedorn, J., dissenting) (noting the need for a "legal framework or test that enables a court to apply the law to the facts of a case" and suggesting that the law "is replete with these implementing doctrines"). For accounts discussing the importance of these implementing frameworks,

judicial creations, they rely not only on constitutional text or history but also on "empirical and predictive assessments."[162] They reflect the court's understanding of its own role and the legislature's, pragmatic concerns about administrability, and policy views about who should get the benefit of the doubt.

Federal implementation approaches are a poor fit for the state constitutional rights tradition that Part I describes. Yet, for decades, many state courts have simply borrowed federal frameworks.[163] Despite the "new judicial federalism" literature's concern with substantive lockstepping, it has not attended to such methodological lockstepping. And the current movement of federal litigation into state high courts threatens to make state practice still more closely track the federal model.

We focus here on the most prevalent and well-known implementation doctrine: the federal tiers of scrutiny, under which there is strict scrutiny for fundamental rights and suspect classifications, and rational basis review for most everything else.[164] State litigants and courts frequently invoke this framework, but it is ill suited to state constitutions. It is too deferential to state legislatures and executives, whom state constitutions task state courts with monitoring on behalf of the people, and too absolutist in its conception of individual rights, which must be understood in the context of other rights and communal welfare.

Consider first the deferential end of the tiers of scrutiny. In federal constitutional adjudication, rational basis usually amounts to a free pass to the government.[165] Although courts sometimes engage in more searching variants, the hallmarks of rational basis review, which ostensibly asks whether the government's action is reasonably related to a legitimate governmental purpose, are that the purpose need not in fact be real (a

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see, e.g., Richard H. Fallon, Jr., Implementing the Constitution 76 (2001) (noting that "it is largely through the formulation (and subsequent application) of tests that the Court discharges its responsibilities for constitutional implementation"); Mitchell N. Berman, Constitutional Decision Rules, 90 Va. L. Rev. 1, 8 (2004) ("[S]cholars and courts have come increasingly to appreciate that judge-created constitutional doctrine is not identical to judge-interpreted constitutional meaning . . . ."); Lawrence B. Solum, The Interpretation–Construction Distinction, 27 Const. Comment. 95, 96 (2010) (arguing that there is a "real and fundamental" difference between how courts "discover[] linguistic meaning or semantic content of the legal text" and "give[] a text legal effect").

162. See Fallon, supra note 161, at 31.

163. See Jennifer Friesen, State Courts as Sources of Constitutional Law: How to Become Independently Wealthy, 72 Notre Dame L. Rev. 1065, 1067 (1997) (criticizing the practice); Hans A. Linde, Are State Constitutions Common Law?, 34 Ariz. L. Rev. 215, 225 (1992) (criticizing state courts for "replacing state constitutions with generic Supreme Court formulas").

164. See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (introducing twentieth-century tiers of scrutiny).

165. See, e.g., Maria Ponomarenko, Administrative Rationality Review, 104 Va. L. Rev. 1399, 1408–12 (2018).

purpose can be hypothesized post-hoc by the court) and that understandings of legitimacy are very thin.[166]

The potential for ludicrous rulings under this framework is well known.[167] So it was that the Idaho Supreme Court was able to agree that the Total Abortion Ban was rationally related to the state's interests, which included women's health and safety, when the law included lifesaving exceptions to the ban only as an affirmative defense.[168] Under the relevant provision, a doctor could raise the defense only after being "charged, arrested, and confined until trial."[169] Rational basis weighed heavily in the court's analysis: Citing its case law on rational basis review, the court stressed that "the Idaho Constitution does not require that the [ban] employ the *wisest* or *fairest* method of achieving its purpose."[170]

At the federal level, a deferential test for judicial review of most federal legislation makes sense. Among other reasons, Congress is a representative body, and the federal courts are not.[171] But this is not true in the states, where judges are generally elected statewide and participate in a common law tradition of policymaking, and where legislatures are frequently the least representative branch of government because of districting, geographical clustering, and extreme gerrymandering.[172] State constitutions task state courts with reviewing the legislature's work on behalf of the people, and state courts should not simply accept "any plausible justification—however speculative, and however minimally furthered by the state's chosen means."[173]

Rational basis review is also a poor fit for state constitutions because of their inclusion of positive rights. As Professor Helen Hershkoff has convincingly explained, rational basis review is not a sensible way to review

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166. See, e.g., Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–88 (1955).

167. See, e.g., Ponomarenko, supra note 165, at 1411.

168. Planned Parenthood Great Nw. v. State, 522 P.3d 1132, 1152–53 (Idaho 2023) ("[I]n place of exceptions, the Total Abortion Ban allows for *legally justified abortions* through affirmative defenses to prosecution . . . [including when] '[t]he physician determined, in his good faith medical judgment . . . that the abortion was necessary to prevent the death of the pregnant woman' . . . ." (quoting Idaho Code § 18-622 (2023))).

169. Id. at 1196 ("[A] physician who performed an 'abortion' . . . could be charged, arrested and confined until trial *even if* the physician initially claims they did it to preserve the life of the mother . . . . Only later, at trial, would the physician be able to raise the affirmative defenses available in the Total Abortion Ban . . . .").

170. Id.

171. Federalism concerns might likewise justify rational basis review of state legislation by federal courts, although that argument is not as strong.

172. See Seifter, supra note 21, at 1762–68 (explaining that state legislatures are frequently controlled by the state's minority party while state governors and state courts are generally chosen by simple statewide elections); cf. Jessica Bulman-Pozen, Executive Federalism Comes to America, 102 Va. L. Rev. 953, 1009–15 (2016) (arguing that political representation may be furthered by state and federal executive policymaking).

173. Ponomarenko, supra note 165, at 1411.

positive rights claims, such as a right to welfare.[174] These rights demand affirmative government provision and require courts to elaborate norms and foster compliance by other institutions.[175] Given that many positive rights may be read conjointly with negative rights—for instance, in the example of educational opportunity and equality[176]—state courts play this role more often than the relatively small number of positive rights in most constitutions might suggest.[177]

At the other end of the tiered approach, reflexive importation of strict scrutiny is also inappropriate. State constitutional rights are often multifaceted, including both individual and collective aspects. Instead of giving particular rights automatic victory, state courts do state constitutions (and litigants) more justice if they acknowledge competing interests at stake. As we have described above, a number of rights provisions in state constitutions contain their own community-regarding limits that effectively demand balancing in particular applications.[178] More generally, the conjunction of individual rights clauses with common-good and communal welfare provisions, and the overarching insistence on both individual and collective self-determination, suggests the need for possible accommodation of and reconciliation among competing interests rather than the treatment of rights as trumps.[179] To be sure, as we elaborate below, there are some rights on which burdens will be significantly harder to justify,[180] but that does not require absolutism.

The need for a more flexible approach is especially apparent when the rights involved are expressed as principles rather than rules, as are many of the most significant state constitutional rights. From liberty to the pursuit of happiness to dignity, some of the most foundational state constitutional rights are not rules that can be satisfied. Instead, and consistent with the state positive rights tradition, they are better seen as what German political theorist Robert Alexy calls "optimization requirements": "norms which require that something be realized to the greatest extent possible given the legal and factual possibilities."[181] Just as rational basis

174. See Hershkoff, Positive Rights, supra note 34, at 1169 ("A cluster of arguments concerning positive rights, democratic legitimacy, and federalism supports the view that federal rationality review fails to comport with the institutional position of state courts that are asked to review state constitutional welfare claims.").

175. See id.

176. See infra notes 233–236 and accompanying text.

177. See generally Helen Hershkoff & Stephen Loffredo, State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis, 115 Penn St. L. Rev. 923 (2011) (exploring state court enforcement of constitutional socio-economic rights and lessons that can be learned from their remedial approaches).

178. See supra notes 80–86 and accompanying text.

179. See Greene, supra note 26, at 32 (describing the U.S. Supreme Court's categorical approach to federal constitutional rights).

180. See infra section III.A.2.

181. Robert Alexy, A Theory of Constitutional Rights 47 (Julian Rivers trans., Oxford Univ. Press 2002) (1986).

review does not allow courts to meaningfully engage with positive rights, so too a strict scrutiny framework may short-circuit meaningful judicial engagement with constitutional principles.

3. *The Countermajoritarian Difficulty.* — If there is one constitutional "obsession" that holds rhetorical sway over federal implementation frameworks, it is the countermajoritarian difficulty.[182] Time and again, federal courts applying deferential rational basis review invoke their relative lack of democratic legitimacy.[183] So too, they decline to engage in judgments that may sound like policymaking[184] or to recognize positive rights[185] because of their institutional position. However disingenuous scholars may believe these invocations of judicial restraint to be, they have substantially shaped federal doctrine and discourse.

State judges now regularly parrot these ideas. They invoke the dreaded possibility of "judicial activism"[186] or equate policy consideration with self-evidently inappropriate judicial lawmaking,[187] often contrasting the state court with the democratic state legislature. The recent Wisconsin gerrymandering opinion offers an example. There, the court insisted that, although it had an obligation to serve as a fallback decisionmaker when the legislature and governor reached an impasse, it lacked "a prerogative to make law."[188] Citing Justice Neil Gorsuch's book, the majority emphasized that "the judicial power has long been kept distinct from the legislative power"[189] and that the court must adhere to a "properly limited role in redistricting."[190] Based on these premises—and unlike other courts

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182. See generally Barry Friedman, The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty (pt. 5), 112 Yale L.J. 153, 155–59 (2002) ("For decades, legal academics have struggled with the 'countermajoritarian difficulty': the problem of justifying the exercise of judicial review by unelected and ostensibly unaccountable judges in what we otherwise deem to be a political democracy.").

183. See, e.g., Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–88 (1955) ("[I]t is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. . . . 'For protection against abuses by legislatures the people must resort to the polls, not to the courts.'" (quoting Munn v. Illinois, 94 U.S. 113, 134 (1876))).

184. See, e.g., Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019) ("Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role.").

185. See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 41 (1973) ("[T]he Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues.").

186. E.g., Brandt v. Pompa, 200 N.E.3d 286, 287–88 (Ohio 2022) (Fischer, J., dissenting from the denial of motion for reconsideration).

187. See Judith S. Kaye, State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions, 70 N.Y.U. L. Rev. 1, 9 & nn.46–48 (1995) (describing this attitude among state courts).

188. Johnson v. Wis. Elections Comm'n, 967 N.W.2d 469, 488 (Wis. 2021).

189. Id. at 489 (citing Neil Gorsuch, A Republic, If You Can Keep It 52–53 (2019)).

190. Id. at 490.

that have enlisted experts to draw neutral maps when the legislature and executive cannot agree[191]—the Wisconsin Supreme Court claimed itself bound to accept the maps that marked the "least change" from the legislature's prior gerrymander.[192]

Such echoes of the federal judicial role are inapt in the states. Today, the vast majority of state judges are chosen or retained through popular election,[193] and their rulings can be revisited through popular processes of constitutional amendment. In critical respects, then, state courts do not resemble their federal counterparts: They are majoritarian, not countermajoritarian; their judges are elected and recallable rather than insulated; and their decisions are readily countermanded rather than "infallible [because they] are final."[194]

The popular cast of state courts is itself a product of state constitutional revision. In the eighteenth century, state and federal selection models resembled one another: All state judges were appointed by governors or legislatures.[195] Beginning in the nineteenth century, however, reformers proposed judicial elections largely to constrain unrepresentative state legislatures.[196] Consistent with other constitutional reform efforts of the period, tying state judges to the people was thought

191. See Rob Yablon, Explainer: Wisconsin's New State Legislative Maps Compare Unfavorably to Other Court-Adopted Maps on Partisan Equity, State Democracy Rsch. Initiative (Apr. 18, 2022), https://statedemocracy.law.wisc.edu/featured/2022/explainer-wisconsins-new-state-legislative-maps-compare-unfavorably-to-other-court-adopted-maps-on-partisan-equity/ [https://perma.cc/L6N5-C9AH].

192. *Johnson*, 967 N.W.2d at 490–91.

193. The Council of State Gov'ts, Book of the States 203–05 tbl.5.6 (2021), https://issuu.com/csg.publications/docs/bos_2021_issuu [https://perma.cc/96Y4-DRMM]; Judicial Selection: Significant Figures, Brennan Ctr. for Just. (May 8, 2015), https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures [https://perma.cc/WD3G-CNHP] (last updated Apr. 14, 2023).

194. See Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the judgment) ("We are not final because we are infallible, but we are infallible only because we are final."). On the different role of state courts, see generally Jed Handelsman Shugerman, The People's Courts: Pursuing Judicial Independence in America (2012) (exploring the relationship between state judicial elections and judicial independence); Croley, supra note 21, at 694 (considering whether "elected/accountable judges can be justified in a regime committed to constitutionalism"); David E. Pozen, Judicial Elections as Popular Constitutionalism, 110 Colum. L. Rev. 2047, 2050 (2010) (arguing that elective judiciaries at the state level provide a "systemic and pervasive mechanism for popular constitutionalism"); Douglas S. Reed, Popular Constitutionalism: Toward a Theory of State Constitutional Meanings, 30 Rutgers L.J. 871, 887–88 (1999) (explaining that the main difference between federal and state judiciaries is the "penetrability by democratic majorities" of state judiciaries).

195. See Caleb Nelson, A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America, 37 Am. J. Legal Hist. 190, 190 (1993) ("While every state that entered the Union before 1845 had done so with an appointed judiciary, every state that entered between 1846 and 1912 provided for judicial elections.").

196. See id. at 203.

to facilitate intergovernmental checks.[197] In the words of one proponent, "[U]nless your judges are elected by the sovereign body, by the constituent, you will look in vain for judges [who] can stand by the constitution of the State against the encroachments of power."[198] After Mississippi adopted partisan elections in 1832, numerous other states amended their constitutions, and by the early twentieth century, thirty-five states used partisan elections to select judges.[199] Constitutional revision continued apace, as Progressive-era concerns about partisanship yielded new worries about judicial selection. At a spate of constitutional conventions in the 1910s and 1920s, twelve additional states adopted nonpartisan elections.[200] Later in the century, reformers proposed merit selection in the form of gubernatorial appointment of judges vetted by nominating commissions, as well as periodic retention elections.[201] By the 1980s, nearly half of the states had adopted a version of this so-called Missouri Plan for their highest courts.[202]

Today, most state judges run in popular elections to obtain or retain their positions: Thirty-eight states use some form of judicial election for their high courts.[203] In the small number of states that rely on appointment alone, term limits, rather than life tenure, are the norm.[204] Judges in almost half of the states are also subject to recall by popular vote.[205]

In addition to choosing judges, state populations also respond to their decisions, including by countermanding them through constitutional amendment. From maximum-hour protections to prohibitions on same-sex marriage, there is a long history of popular mobilization in response to judicial constitutional interpretations.[206] This interplay between judicial rulings and electoral responses has yielded a distinct state "popular constitutionalism" described by Professor Douglas Reed as a "dialectical ex-

197. See id.

198. Shugerman, supra note 194, at 97 (alterations in original) (internal quotation marks omitted) (quoting Michael Hoffman); see also Croley, supra note 21, at 718 n.86, 720.

199. See Charles Gardner Geyh, Methods of Judicial Selection and Their Impact on Judicial Independence, Dædalus, Fall 2008, at 86, 88.

200. See id.

201. See id. at 88–89.

202. See Shugerman, supra note 194, at 197, 208; Geyh, supra note 199, at 89.

203. See Judicial Selection: Significant Figures, supra note 193.

204. Rhode Island is the only state with life-tenured appointments. See id.

205. See The Council of State Gov'ts, supra note 193, at 266–67 tbl.6.18. We do not include this history to endorse judicial elections as such. State judicial elections not only raise a possible "majoritarian difficulty," Croley, supra note 21, at 694, but also present serious questions about campaign finance, politicization, and a lack of diversity on the bench. See Alicia Bannon, Brennan Ctr. for Just., Rethinking Judicial Selection in State Courts 1 (2016), https://www.brennancenter.org/sites/default/files/publications/Rethinking_Judicial_Selection_State_Courts.pdf [https://perma.cc/YZ9G-S7X8]. The point is simply that state judges occupy a distinct electoral position as a result of centuries of popular constitutional revision.

206. See, e.g., Henretta, supra note 133, at 826–31; Reed, supra note 194, at 873–74.

change between judicial rulings based on state constitutional provisions and popular initiative politics that seek to redefine or reinterpret those same or other provisions."[207] If federal Supreme Court decisions are generally regarded as the endgame of constitutional meaning, state supreme court decisions are often closer to opening moves.

For all of these reasons, it does not make sense to speak of state courts as sharing the democratic profile of the federal courts. Federal countermajoritarian anxieties have no place in state constitutional decisionmaking. And without them, it likewise makes little sense to assume that state courts should not meaningfully review legislative enactments, express judgments about competing interests, or draw difficult lines. State constitutional adjudication instead requires frameworks that recognize state courts' democratically embedded role.

B. *Toward Proportionality Review*

Although methodological lockstepping with federal courts is common, some state courts have already begun to embrace more apt implementation frameworks. For example, all fifty state high courts purport to interpret their state constitutions as a whole, rather than clause by clause.[208] A number of state courts have rejected toothless rational basis

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207. Reed, supra note 194, at 890; see also Pozen, supra note 194, at 2090–91 (arguing that "the mutability of constitutional text, the prevalence of direct democracy, and the frequency of legislative and popular reversal of judicial interpretations" in the states "yield a fundamentally different model of constitutionalism").

208. See Hornsby v. Sessions, 703 So. 2d 932, 939 (Ala. 1997); Forrer v. State, 471 P.3d 569, 585 (Alaska 2020); Kilpatrick v. Super. Ct. in & for Maricopa Cnty., 466 P.2d 18, 24 (Ariz. 1970); Richardson v. Martin, 444 S.W.3d 855, 858 (Ark. 2014); Kennedy Wholesale, Inc. v. State Bd. of Equalization, 806 P.2d 1360, 1362 (Cal. 1991); Bruce v. City of Colo. Springs, 129 P.3d 988, 992 (Colo. 2006); Sheff v. O'Neill, 678 A.2d 1267, 1281 (Conn. 1996); State ex rel. Biggs v. Corley, 172 A. 415, 417 (Del. 1934); Physicians Healthcare Plans, Inc. v. Pfeifler, 846 So. 2d 1129, 1134 (Fla. 2003); Thompson v. Talmadge, 41 S.E.2d 883, 896–97 (Ga. 1947); Hanabusa v. Lingle, 93 P.3d 670, 677 (Haw. 2004); Boise-Payette Lumber Co. v. Challis Indep. Sch. Dist. No. 1 of Custer Cnty., 268 P. 26, 27 (Idaho 1928); Gregg v. Rauner, 124 N.E.3d 947, 953 (Ill. 2018); State v. Monfort, 723 N.E.2d 407, 411 (Ind. 2000); Gallarno v. Long, 243 N.W. 719, 725 (Iowa 1932); State ex rel. Arn v. State Comm'n of Revenue & Tax'n, 181 P.2d 532, 540 (Kan. 1947); Wood v. Bd. of Educ. of Danville, 412 S.W.2d 877, 879 (Ky. 1967); Succession of Lauga, 624 So. 2d 1156, 1166 (La. 1993); In re Op. of the Justs., 16 A.2d 585, 586 (Me. 1940); Miles v. State, 80 A.3d 242, 250 (Md. 2013); Op. of the Justs. to the House of Representatives, 32 N.E.3d 287, 297 n.26 (Mass. 2015); In re Probert, 308 N.W.2d 773, 780 (Mich. 1981); Butler Taconite v. Roemer, 282 N.W.2d 867, 870 (Minn. 1979); Van Slyke v. Bd. of Trs. of State Insts. of Higher Learning, 613 So. 2d 872, 876 (Miss. 1993); State ex rel. Mathewson v. Bd. of Election Comm'rs of St. Louis Cnty., 841 S.W.2d 633, 635 (Mo. 1992); Jones v. Judge, 577 P.2d 846, 849 (Mont. 1978); Banks v. Heineman, 837 N.W.2d 70, 78 (Neb. 2013); Educ. Freedom PAC v. Reid, 512 P.3d 296, 302 (Nev. 2022); Carrigan v. N.H. Dep't of Health & Hum. Servs., 262 A.3d 388, 397 (N.H. 2021); Gangemi v. Berry, 134 A.2d 1, 7 (N.J. 1957); Griego v. Oliver, 316 P.3d 865, 870 (N.M. 2014); People ex rel. McClelland v. Roberts, 42 N.E. 1082, 1084 (N.Y. 1896); Harper v. Hall, 868 S.E.2d 499, 558–59 (N.C. 2022); State ex rel. City of Minot v. Gronna, 59 N.W.2d 514, 540 (N.D. 1953); City of Cleveland v. State, 136 N.E.3d 466, 475 (Ohio 2019); Okla. Nat. Gas Co. v. State ex

review, refusing to "ride the vast range of conceivable purposes," and have insisted instead on actually reasonable and nonarbitrary government purposes.[209] Other courts have adopted sliding scales of scrutiny, considering in a "fluid" manner both "the importance of the individual rights asserted" and "the degree of suspicion with which [the court] view[s] the resulting classification scheme."[210] Many state courts also engage in case-specific, contextual balancing to determine outcomes and remedies, accepting that their democratically embedded and common-law role differs from that of federal courts.[211]

Courts and scholars have yet to describe an approach to state constitutional adjudication that makes sense of these practices. State cases that decline to isolate clauses and that eschew rigid all-or-nothing implementing frameworks are readily overlooked. One aim of our discussion is, accordingly, to theorize and defend existing practices, showing that

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rel. Vassar, 101 P.2d 793, 796 (Okla. 1940); Bd. of Dirs. of Payette-Or. Slope Irrigation Dist. v. Peterson, 128 P. 837, 840 (Or. 1912); In re Bruno, 101 A.3d 635, 660 (Pa. 2014); In re Request for Advisory Op. from House of Representatives (Coastal Res. Mgmt. Council), 961 A.2d 930, 936 n.8 (R.I. 2008); Johnson v. Piedmont Mun. Power Agency, 287 S.E.2d 476, 479 (S.C. 1982); In re Daugaard, 801 N.W.2d 438, 440 (S.D. 2011); Barrett v. Tenn. Occupational Safety & Health Rev. Comm'n, 284 S.W.3d 784, 787 (Tenn. 2009); Collingsworth County v. Allred, 40 S.W.2d 13, 15 (Tex. 1931); Univ. of Utah v. Shurtleff, 144 P.3d 1109, 1114 (Utah 2006); State v. Lohr, 236 A.3d 1277, 1281 (Vt. 2020); City of Portsmouth v. Weiss, 133 S.E. 781, 785 (Va. 1926); Grp. Health Coop. of Puget Sound v. King Cnty. Med. Soc'y, 237 P.2d 737, 764 (Wash. 1951); Howard v. Ferguson, 180 S.E. 529, 531 (W. Va. 1935); Wagner v. Milwaukee Cnty. Election Comm'n, 666 N.W.2d 816, 831 (Wis. 2003); In re Neely, 390 P.3d 728, 744 (Wyo. 2017).

209. E.g., Att'y Gen. v. Waldron, 426 A.2d 929, 950 (Md. 1981); see also, e.g., Elk Horn Coal Corp. v. Cheyenne Res., Inc., 163 S.W.3d 408, 419 (Ky. 2005) (describing Kentucky's "reasonable basis" or "substantial and justifiable reason" tier), modified by Calloway Cnty. Sheriff's Dep't v. Woodall, 607 S.W.3d 557, 564 (Ky. 2020); State v. Russell, 477 N.W.2d 886, 889 (Minn. 1991) (rejecting crack/powder disparity under test in which the court has "required a reasonable connection between the actual, and not just the theoretical, effect of the challenged classification and the statutory goals"); Butte Cmty. Union v. Lewis, 712 P.2d 1309, 1312–13 (Mont. 1986) (noting the problems of a "two-tier system" and developing the state's "own middle-tier test").

210. E.g., State, Dep't of Revenue, Permanent Fund Dividend Div. v. Cosio, 858 P.2d 621, 629 (Alaska 1993) (internal quotation marks omitted) (quoting State v. Otrosky, 667 P.2d 1184, 1192–93 (Alaska 1983)) (describing its "sliding scale" approach to equal protection as "considerably more fluid than under its federal counterpart"); see also Comm. to Def. Reprod. Rts. v. Myers, 625 P.2d 779, 791–92 (Cal. 1981) (describing analysis for burdens on "procreative choice" in which courts "realistically assess the importance of the state interest . . . and the degree to which the restrictions actually serve such interest," "carefully evaluate the importance of the constitutional right," and gauge the practical burdens on the right); In re T.R., 731 A.2d 1276, 1280 (Pa. 1999) ("Privacy claims must be balanced against state interests. . . . [The] 'government's intrusion into a person's private affairs is constitutionally justified when the government interest is significant and there is no alternate reasonable method of lesser intrusiveness to accomplish the governmental purpose.'" (quoting Denoncourt v. Pa. State Ethics Comm'n, 470 A.2d 945, 949 (Pa. 1983))).

211. See infra section IV.A.

they comport with state constitutional rights and urging their wider adoption.

In the pages that follow, we synthesize several existing practices and describe them as together constituting a state-specific form of proportionality review. Widely used around the world, proportionality is both a general principle demanding justifications for government intrusions on rights and a specific doctrinal approach to constitutional adjudication.[212] Although the precise questions the doctrinal framework poses are differently articulated, and to some extent differently understood and weighted,[213] a shared commitment of the many jurisdictions that employ such review is that proportionality "discipline[s] the process of rights adjudication on the assumption that rights are both important and, in a democratic society, limitable."[214]

In light of the "global ascendancy" of proportionality review,[215] a number of scholars have considered its place in the United States. Although some distinguished commentators have drawn attention to latent proportionality approaches in the *U.S. Reports* and advocated greater reliance on proportionality principles,[216] most deem proportionality review a poor fit for U.S. constitutional law.[217] But they have

212. See Jackson, Age of Proportionality, supra note 28, at 3098–99 ("Proportionality can be understood as a legal principle, as a goal of government, and as a particular structured approach to judicial review."). As a method of constitutional interpretation, proportionality review involves a shared sequence of questions. In brief, courts first seek to delineate the right at issue; if a right has been infringed, they ask whether the government has a legitimate and sufficiently important purpose and if the means by which it is pursuing this purpose are rational and minimally impair the right; finally, if these questions are answered in the affirmative, courts engage in "proportionality as such," asking whether the intrusion is justified by the benefits of the government action. See, e.g., R. v. Oakes, [1986] 1 S.C.R. 103, 139–40 (Can.); Aharon Barak, Proportionality: Constitutional Rights and Their Limitations 179–210 (2012) [hereinafter Barak, Rights and Their Limitations].

213. E.g., Jackson, Age of Proportionality, supra note 28, at 3120–21 n.118 ("Although the three doctrinal components of proportionality review of means are similarly framed in most jurisdictions that use the doctrine, these elements may be applied somewhat differently by different courts or judges."); see also, e.g., Dieter Grimm, Proportionality in Canadian and German Constitutional Jurisprudence, 57 U. Toronto L.J. 383, 389–95 (2007) (noting "striking difference[s]" between German and Canadian approaches); Niels Petersen, Proportionality and the Incommensurability Challenge in the Jurisprudence of the South African Constitutional Court, 30 SAJHR 405, 406–07 (2014) (comparing German, Canadian, and South African approaches to proportionality review).

214. Greene, supra note 26, at 58.

215. Id. at 38; see also Stone Sweet & Mathews, supra note 25, at 159–60 (considering the diffusion of proportionality review across "most of the world's most powerful high courts" in the late twentieth century).

216. See Greene, supra note 26, at 58, 65 ("The core claim of this Foreword is that a proportionality-like approach is better suited to adjudication of rights disputes within a rights-respecting democracy."); Jackson, Age of Proportionality, supra note 28, at 3098 ("U.S. constitutional law would benefit from a moderate increase in the use of proportionality.").

217. See, e.g., Kai Möller, U.S. Constitutional Law, Proportionality, and the Global Model [hereinafter Möller, U.S. Constitutional Law], *in* Proportionality: New Frontiers, New

ignored the states.[218] The features of the U.S. Constitution that they cite as reasons for proportionality's ill fit—its small list of rights, lack of horizontal effect, and conception of rights as negative[219]—do not hold at the state level. To the contrary, among the most distinctive features of state constitutions are abundant rights, community-regarding rights, and positive rights that impose affirmative duties of provision on government.[220] Proportionality review is deployed worldwide to make sense of constitutions that share these features, by courts that share some other doctrinal approaches with state, but not federal, courts.[221]

In the next Part, we draw on well-established proportionality approaches as well as existing state case law to propose a form of review tailored to state constitutional democracy. State courts need not adopt a Canadian, or German, or South African model. Proportionality is a family of principles rather than one particular approach, and it can be "custom

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Challenges 130, 130–31 (Vicki C. Jackson & Mark Tushnet eds., 2017) [hereinafter New Frontier, New Challenges].

218. For instance, an important recent volume includes five chapters considering proportionality and the American legal system, but not one explores state constitutions. See New Frontiers, New Challenges, supra note 217. For a brief and persuasive argument that state courts should use proportionality review, see Jud Mathews & Stephen Ross, Proportionality Review in Pennsylvania Courts, 92 Pa. Bar Ass'n Q. 109, 112 (2021); see also Hershkoff, Just Words, supra note 34, at 1551 (noting that state courts "explicitly engage in a form of interest balancing that sits comfortably with European-style proportionality analysis").

219. See Möller, U.S. Constitutional Law, supra note 217, at 131–33; see also Jackson, Age of Proportionality, supra note 28, at 3121–29 (offering an "account for why proportionality as a general principle or doctrine has not emerged in the United States," including the U.S. Constitution's smaller number of rights, failure to include positive rights, and absence of positive obligations).

220. See supra Part I; see also Versteeg & Zackin, supra note 34, at 1644–45 (arguing that state constitutions are more similar to constitutions around the world than to the U.S. Constitution). Limitations clauses are a common, though not universal, feature of constitutions in proportionality jurisdictions and bear a resemblance to state constitutions' community-regarding provisions. See supra section I.B; see also Canadian Charter of Rights and Freedoms § 1, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.) (guaranteeing rights "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"); S. Afr. Const., 1996, § 36(1) ("The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors . . . ."); Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, para. 2, Nov. 4, 1950, 213 U.N.T.S. 221 ("Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."); Stone Sweet & Mathews, supra note 25, at 90–91 (quoting constitutional rights clauses containing limitations).

221. E.g., Greene, supra note 26, at 64 ("Proportionality jurisdictions tend to have muted or nonexistent political question doctrines and often have much lower standing requirements than would be conceivable in U.S. federal courts.").

fit" to different legal systems.[222] State courts have already begun to experiment with forms of proportionality review, and we seek to build on their work, highlighting components most resonant for the states.

III. DEMOCRATIC PROPORTIONALITY REVIEW

Defining features of state constitutions—including their extensive catalogues of rights, community-regarding limitations on individual liberties, and recognition of affirmative government duties—distinguish them from the U.S. Constitution and reveal why proportionality review is a better fit than familiar federal approaches. Even as they share these features with jurisdictions committed to proportionality review, however, states are distinctively oriented around popular, majoritarian democracy. In this Part, we consider how proportionality review should be tailored to the states. Beginning with proportionality's standard decisional framework, we explore how the inquiry should account for state constitutions' commitment to democracy as well as rights and for the position of state courts and other government actors. In brief, we propose a *democratic proportionality review* suited to state constitutions and institutions.

Proportionality review begins with the identification of the right at issue.[223] Even as proportionality frameworks ratchet down the pressure on identifying a particular interest as a right—because recognition of the right does not mean it is untouchable—this stage presents an opportunity to clarify the scope and weight of constitutional rights. Most proportionality jurisdictions adopt a human rights orientation of post–World War II constitutional drafting and emphasize values such as dignity. State constitutions prioritize a different, if often overlapping, set of rights: those core to autonomy and democratic participation. In state constitutions, these self-determination rights stand apart from the many less significant enumerated rights (such as rights to play bingo[224]), even if both sorts of rights may elicit proportionality review when infringed.

The next several stages of proportionality review turn to the infringing action, asking whether the government is pursuing an acceptable purpose and whether its means are rational and minimally impair the right. Although these inquiries constitute distinct steps of proportionality review, we explore them together because each concerns the legitimacy of the government's action. As we have discussed, the popular, democratic commitments of state constitutions make federal rational basis review a poor fit;[225] proportionality review's thorough engagement with government action is more appropriate. Here too,

222. E. Thomas Sullivan & Richard S. Frase, Proportionality Principles in American Law 7 (2009).

223. See supra note 212 (describing the usual steps of proportionality review).

224. See State v. $223,405.86, 203 So. 3d 816, 843 (Ala. 2016) (listing seventeen bingo amendments in Alabama's constitution).

225. See supra notes 165–177 and accompanying text.

however, states differ from most proportionality jurisdictions. In particular, as proportionality jurisdictions seek to strike a balance between protecting rights and recognizing legitimate democratic limits on those rights, they generally equate democratic limits with the legislature. These jurisdictions further recognize that, as a less representative institution, the reviewing court should partially defer to the legislature even as it establishes bounds for that body's reasoned decisions. State constitutions, meanwhile, always distinguish the people themselves from their governments. They express skepticism of unrepresentative legislatures and recognize distinct channels for the expression of popular will, including through direct democracy and judicial elections. In the states, legislatures are not necessarily more democratic actors than courts, and courts are tasked with monitoring legislatures on behalf of the people. These institutional characteristics inform state proportionality, demanding meaningful review of laws for arbitrariness and facilitating engagement with positive rights claims.

This observation about state courts, legislatures, and direct democracy also bears on the final stage of proportionality review: proportionality as such. In many proportionality systems, comfort with judicial balancing follows from an "epistemological optimism"[226] about "the possibility of law as a practice distinct from politics."[227] Even if judging is not a technocratic exercise, on such accounts it may rely upon reasoned inquiry and values understood to lie beyond political contestation. American legal culture does not embrace such epistemological optimism,[228] but state constitutions neither expect nor celebrate an insulated judicial role. They generally make state judges elected officials, and they furnish ready channels for the people to amend their constitutions. These features suggest that the dialogic function of proportionality review is different in the states and that state courts should understand their role as creating a conversation not only with legislatures[229] but also with the broader public.

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226. Moshe Cohen-Eliya & Iddo Porat, Proportionality and Constitutional Culture 90 (2013).

227. Jackson, Age of Proportionality, supra note 28, at 3125.

228. See Cohen-Eliya & Porat, supra note 226, at 82–94 (identifying "American epistemological skepticism" in contrast to European optimism).

229. See, e.g., Jackson, Age of Proportionality, supra note 28, at 3144–47 (noting that "structured proportionality" can "provide a bridge between decision making in courts and decision making by the people, legislatures, and public officials"); Mattias Kumm, The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review, 4 Law & Ethics Hum. Rts. 140, 163 (2010); see also Peter W. Hogg & Allison A. Bushell, The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All), 35 Osgoode Hall L.J. 75, 101–04 (1997).

A. *Understanding Rights*

The first step of proportionality review requires identifying the right at issue. Although this step generally receives less attention than the ensuing review of the government's action for rationality, suitability, and necessity, it is a critical inquiry. In the state context, this step requires judges to consider constitutional rights holistically and to assess their content and scope before considering infringements. The substantive commitments of state constitutions suggest, moreover, that courts have correctly given special weight to a set of rights that undergird democratic self-governance.

1. *Reading Provisions Together.* — As they ascertain the right at issue, state courts properly engage in more holistic, rather than clause-bound, consideration. All fifty state high courts have recognized that the ongoing enterprise of collective constitution-making requires reading these documents as a whole rather than piecemeal.[230] Within state declarations of rights, abundant provisions, added over time by amendments, may work together to enhance a right.[231] For instance, the Tennessee Supreme Court has explained how reading multiple provisions of its Declaration of Rights—including rights to due process, rights to alter government and resist oppression, and rights to freedoms of worship, speech, and conscience—yields the conclusion that "the concept of liberty plays a central role" in the state's constitutional order and must be given special treatment.[232]

In other contexts, too, state courts have recognized that the conjunction of multiple clauses may define and deepen a right. Cases concerning educational opportunity have frequently offered "conjoint"[233] readings of constitutional provisions.[234] From West Virginia to California, courts have held that children's educational rights are informed not only by clauses focused on schools and educational adequacy but also by clauses requiring equal protection or prohibiting segregation.[235] For instance, in *Sheff v. O'Neill*, the Connecticut Supreme Court held that the state's education obligation was "informed by" the separately enumerated prohibition on segregation and that, accordingly, "the existence of extreme

230. See supra note 208.

231. Robert F. Williams, Enhanced State Constitutional Rights: Interpreting Two or More Provisions Together, 2021 Wis. L. Rev. 1001, 1001 [hereinafter Williams, Enhanced Rights] (offering a "preliminary analysis" of "applying two or more state constitutional provisions together as 'enhancing' each other").

232. Davis v. Davis, 842 S.W.2d 588, 599 (Tenn. 1992), reh'g in part granted on other grounds, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992).

233. Sheff v. O'Neill, 678 A.2d 1267, 1281 (Conn. 1996).

234. See, e.g., Serrano v. Priest, 557 P.2d 929, 949–50, 950 n.42 (Cal. 1976) (looking to "three sections of our state Constitution"); Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979) ("[B]oth our equal protection and thorough and efficient constitutional principles can be applied harmoniously to the State school financing system.").

235. See, e.g., Williams, Enhanced Rights, supra note 231, at 1004.

racial and ethnic isolation in the public school system deprives schoolchildren of a substantially equal educational opportunity."[236]

The path-marking state court role with respect to gay marriage likewise involved reading provisions together to recognize the full scope of a right. As the Supreme Judicial Court of Massachusetts explained in *Goodridge v. Department of Public Health*, the state constitution's liberty and equality clauses "overlap," because "[t]he liberty interest in choosing whether and whom to marry would be hollow if the Commonwealth could, without sufficient justification," limit only certain individuals from marrying their chosen partners.[237]

Courts have also attended to how later-added provisions supplement existing rights. For example, Montana's supreme court has recognized that the state constitutional right to privacy, added in the 1970s, "augments" the earlier-adopted protection against unreasonable searches and seizures.[238] And it has held that the dignity provision, also ratified in the 1970s, should be read "together with" the prohibition on cruel and unusual punishment to confer greater protection for state citizens.[239]

Joint readings may also limit the scope of particular rights. Even before factoring in government justifications for limiting a right, that is, multiple rights clauses may themselves present tensions that courts must reconcile. Sometimes this will involve addressing conflicts between two or more rights as such; other times, courts will work to resolve conflicts internal to the definitions of particular rights.[240] In either case, the need to resolve tensions follows from the number and specificity of rights contained in state constitutions.

State courts have already grappled with these challenges as well. For example, they have considered how rights to privacy may be tempered by rights to know information held by the government, and vice versa.[241] They have addressed constitutional speech rights that run into a constitutional

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236. *Sheff*, 678 A.2d at 1281–84 (focusing on the "special nature of the affirmative constitutional right embodied in article eighth, § 1" and the "explicit prohibition of segregation contained in article first, § 20[,]" and noting that the "contemporaneous addition" of the two provisions evinced a commitment to end segregation through "interrelated constitutional rights").

237. 798 N.E.2d 941, 953, 959 (Mass. 2003).

238. See State v. $129,970, 161 P.3d 816, 821 (Mont. 2007) ("The right to privacy in Article II, Section 10 of the Montana Constitution augments the protection against unreasonable searches and seizures."); see also State v. Siegal, 934 P.2d 176, 183 (Mont. 1997) (finding that the right to privacy in Montana's Constitution grants greater protections in search and seizure cases than the federal Constitution).

239. See Walker v. State, 68 P.3d 872, 882–83 (Mont. 2003).

240. See infra section IV.A (providing examples of conflicts between individual rightsholders).

241. See, e.g., Havre Daily News, LLC v. City of Havre, 142 P.3d 864, 870 (Mont. 2006) (considering the interaction between the Montana Constitution's right of privacy and right to know, which gives the people a right to examine public documents).

"right of reputation."[242] They have explored tensions between state provisions supporting hunting and others supporting resource conservation.[243] And more.[244]

The task state courts face in combining clauses is not mechanical but requires judgment. In asking state judges to consider possible synergies and tensions across state constitutional provisions, we acknowledge that this will generally be a more demanding task than addressing a single clause. But, as we address below, this task is suited to state judges' institutional position.[245] And, however difficult, only such a synthetic approach honors the fact that each state constitution is best understood not as a "cook book of disconnected and discrete rules" but rather as "a cohesive set of principles."[246]

2. Core Rights. — Although state courts should read their constitutions holistically to determine the content and scope of rights at issue, it does not follow that all rights must be treated the same in the ensuing review. Global proportionality review is often associated with "rights inflation"—the use of constitutional rights to protect a wide range of interests rather than particularly important ones.[247] But recognizing a broad set of rights need not mean a one-size-fits-all treatment. As proportionality scholars have noted, and tend to endorse, courts around the world recognize some rights as weightier than others even as they decline to replicate rigid tiers of scrutiny.[248]

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242. See Norton v. Glenn, 860 A.2d 48, 58 (Pa. 2004) (citing Sprague v. Walter, 543 A.2d 1078, 1084–85 (1988)) (observing that the "free expression rights guaranteed by the Pennsylvania Constitution . . . are in tension with another right guaranteed by our commonwealth's constitution, namely the right to protect one's reputation").

243. Cf. McDowell v. State, 785 P.2d 1, 10 (Alaska 1989) (discussing the "tension between the limited entry clause of the state constitution and the clauses of the constitution which guarantee open fisheries" (internal quotation marks omitted) (quoting Johns v. Com. Fisheries Entry Comm'n, 758 P.2d 1256, 1266 (Alaska 1988))); Pa. Game Comm'n v. Marich, 666 A.2d 253, 256 (Pa. 1995) (noting that the state constitution's environmental conservation amendment informs the scope of an alleged due process right to hunt).

244. See, e.g., State ex rel. Herald Mail Co. v. Hamilton, 267 S.E.2d 544, 551–52 (W. Va. 1980) (addressing the conflict between the state constitution's fair trial and public trial provisions).

245. See infra section III.C.

246. Armstrong v. State, 989 P.2d 364, 383 (Mont. 1999).

247. See George Letsas, A Theory of Interpretation of the European Convention on Human Rights 126 (2007); Möller, U.S. Constitutional Law, supra note 217, at 137.

248. See, e.g., Stephen Gardbaum, The Myth and the Reality of American Constitutional Exceptionalism, 107 Mich. L. Rev. 391, 418–19 (2008) ("The German and South African constitutional courts, together with the ECtHR, have made clear that infringements of certain (i.e., the most important) rights carry a more rigorous burden of justification under the proportionality test than others."); Neomi Rao, On the Use and Abuse of Dignity in Constitutional Law, 14 Colum. J. Eur. L. 201, 235–36 (2008) ("Canadian and European courts have developed a sort of hierarchy of rights—favored rights receive more judicial protection than others.").

In particular, around the world, most proportionality jurisdictions are oriented around a post–World War II human rights framework that prioritizes human dignity and related rights. Some constitutions and commentators describe human dignity as "inviolable"[249] or understand it as an absolute right not subject to any limit;[250] others recognize the propriety of balancing without derogating the right to dignity.[251] Despite such differences, there is a widely shared understanding that human dignity is central to the constitutional order.[252]

Although a handful of state constitutions recognize an express right to dignity[253] (and others might be said to recognize it through combinations of liberty and equality, or other enumerated rights as described above[254]), a right to dignity does not similarly animate state constitutional law. But other rights do. As we have described, state constitutions prioritize individual autonomy and collective self-government. Although there will always, and properly, be contestation about this category of self-determination rights, there is clarity at the poles. For example, no one would reasonably place Alabama's seventeen constitutional amendments recognizing rights to play bingo within the

249. E.g., Grundgesetz [GG] [Basic Law], art. 1 (Ger.), translation at http://www.gesetze-im-internet.de/englisch_gg/index.html [https://perma.cc/P3WG-G45N] ("Human dignity shall be inviolable."). Constitutional limitations clauses sometimes expressly invoke "dignity." See, e.g., § 2, Basic Law: Human Dignity and Liberty, SH 1391 (1992) (Isr.), https://www.refworld.org/docid/3ae6b52618.html [https://perma.cc/3ZXJ-3YES] ("There shall be no violation of the life, body or dignity of any person as such."); S. Afr. Const., 1996, § 36(1) (guaranteeing an "open and democratic society based on human dignity, equality and freedom").

250. E.g., Barak, Rights and Their Limitations, supra note 212, at 27–29 (explaining that some jurisdictions view human dignity as an absolute right that cannot be limited).

251. See Mattias Kumm & Alec D. Walen, Human Dignity and Proportionality: Deontic Pluralism in Balancing, *in* Proportionality and the Rule of Law 67, 89 (Grant Huscroft, Bradley W. Miller & Grégoire Webber eds., 2014) ("Human dignity is not primarily about rule-like absolutes and balancing is not primarily about simple interest balancing. . . . Once the potentially complex nature of the balancing exercise is understood, there is no tension between human dignity and balancing. Indeed, respect for human dignity requires balancing.").

252. See, e.g., State v. Makwanyane 1995 (3) SA 391 (CC) at para. 144 (S. Afr.) ("The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in [the Bill of Rights]."); Jackson, Age of Proportionality, supra note 28, at 3158 (noting that on some accounts, "core" aspects of rights are considered non-abrogable, and including as examples "[j]udicial elaborations of human dignity" in Germany and Israel).

253. See supra note 55.

254. See, e.g., Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948, 959 (Mass. 2003) (recognizing the intertwinement of liberty and equality clauses and stating that "[t]he Massachusetts Constitution affirms the dignity and equality of all individuals"); see also supra text accompanying note 237.

category.[255] A wide range of constitutional rights may trigger proportionality review without being core self-determination rights.

Meanwhile, other rights are widely recognized as the sort of rights "without which other constitutionally guaranteed rights would have little meaning."[256] With respect to democratic processes, such rights most clearly include rights to vote, as well as rights of free expression and association.[257] More distinctively, in the states, core collective self-determination rights also include rights to participate in popular processes of constitutional amendment, as well as the statutory initiative and referendum in states that have adopted these direct-democracy processes.[258]

State constitutional interpreters have also recognized autonomy as essential to individual self-determination and as a necessary precondition for democratic self-government. State courts have focused especially on the "core right of personal autonomy—which includes the ability to control one's own body [and] to assert bodily integrity."[259] Indeed, bodily autonomy is the domain in which state courts have most often invoked "self-determination" as such. In the words of the Massachusetts Supreme Judicial Court, the right to autonomy in declining medical treatment follows from "the sanctity of individual free choice and self-determination as fundamental constituents of life."[260] The Mississippi Supreme Court has emphasized the constitutional "right to the inviolability and integrity of our persons, a freedom to choose or a right of bodily self-determination,"[261] while the Kansas Supreme Court has asserted that "self-determination" in the form of "one's control over one's own person stands at the heart of the concept of liberty."[262] The Montana Supreme Court has aligned itself with "America's historical legal tradition acknowledging the

255. This is not to deny that disputes over the definition of bingo have been highly charged. See Recent Case, State v. $223,405.86, 203 So. 3d 816 (Ala. 2016), 130 Harv. L. Rev. 1064 (2017) (describing the "bingo wars").

256. In re C.H., 683 P.2d 931, 940 (Mont. 1984); cf. Tebbe & Schwartzman, supra note 144, at 1318 ("Some rights are closely associated with the status of free and equal members of a democracy.").

257. See, e.g., Alderwood Assocs. v. Wash. Env't Council, 635 P.2d 108, 116–17 (Wash. 1981).

258. See Advisory Op. to the Att'y Gen. re Right to Treatment & Rehab. for Non-Violent Drug Offenses, 818 So. 2d 491, 494 (Fla. 2002) (describing the deep commitment to "self-determination" in the context of initiated constitutional amendments); see also Pope v. Gray, 104 So. 2d 841, 842 (Fla. 1958) ("There is no lawful reason why the electors of this State should not have the right to determine the manner in which the Constitution may be amended. . . . Sovereignty resides in the people and the electors have a right to approve or reject a proposed amendment . . . ."). See generally Bulman-Pozen & Seifter, Right to Amend, supra note 22 (exploring the right to amend state constitutions).

259. Hodes & Nauser, MDs, P.A. v. Schmidt, 440 P.3d 461, 492 (Kan. 2019).

260. Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 426 (Mass. 1977) (recognizing right to decline life-prolonging medical treatment).

261. In re Brown, 478 So. 2d 1033, 1039–40 (Miss. 1985).

262. *Hodes & Nauser*, 440 P.3d at 480.

fundamental common law right of self-determination" by understanding "the right to make personal medical decisions as inherent in personal autonomy."[263]

Although rights to vote, to participate more broadly in democratic processes, and to enjoy control over one's body are core self-determination rights, they can also be framed as human rights. So it is unsurprising that judges around the world have also prioritized rights of political participation and individual autonomy.[264] But rights that merit special consideration in European, South African, Canadian, and other proportionality systems because of a human rights orientation receive special weight in the states because of their commitment to self-determination.[265] This has implications not only for the scope, content, and weight of such rights but also for how individual rights should be understood in relation to the collective will—as potentially but not necessarily reflected in acts of government—the issue we now take up.

B. *Evaluating Government Action and Inaction*

Once the constitutional right at issue is discerned, several stages of proportionality review focus on the government before turning to proportionality in the sense of balancing. In various formulations, these intermediate steps ask whether there is a legitimate governmental objective, whether the government is pursuing this objective through appropriate means, and whether the government could have adopted a less rights-impairing approach.[266] These contextual inquiries are a better fit for state constitutional law than are rigid tiers of scrutiny.

In this section, at the expense of highlighting the orderly progression of proportionality review, we do not work through the specific steps of such review but rather direct attention to distinctive considerations for state courts. Although proportionality review demands inquiry into governmental objectives and means, courts around the world tend to defer to the legislature as a relatively more democratic institution, even as courts establish the boundaries of the legislature's choices.[267] For similar reasons,

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263. Armstrong v. State, 989 P.2d 364, 379 (Mont. 1999).

264. See, e.g., Stephen Gardbaum, Limiting Constitutional Rights, 54 UCLA L. Rev. 789, 836 (2007) (noting that the European Court of Human Rights "is developing a hierarchy of rights with those at the top including political expression, the right to private life (at least regarding 'a most intimate part of an individual's private life'), and freedom of association to form political parties").

265. But see Mattias Kumm, Is the Structure of Human Rights Practice Defensible? Three Puzzles and Their Resolution, *in* New Frontiers, New Challenges, supra note 217, at 51, 74 (describing a "requirement internal to universalist human rights practice itself to respect the values of democratic self-government and sovereign self-determination").

266. See supra note 212; see also, e.g., R. v. Oakes, [1986] 1 S.C.R. 103, 139–40 (Can.) (describing the proportionality test).

267. See, e.g., Irwin Toy Ltd. v. Quebec (Att'y Gen.), [1989] 1 S.C.R. 927, 991–94 (Can.) ("[A]s courts review the results of the legislature's deliberations, particularly with

courts have proven reluctant to extend proportionality review to affirmative government duties.[268] But state constitutions express skepticism of legislatures as representative institutions and recognize distinct channels for the expression of popular will, including through judicial elections. These constitutions task state courts with monitoring state legislatures on behalf of the people. In reviewing a state law's objectives and means, then, state courts must engage in meaningful review for arbitrariness rather than assume the legislature speaks for the people. They must also enforce affirmative government duties, recognizing government inaction as well as action as potentially problematic.

1. *Nonarbitrariness.* — Although proportionality review requires careful inquiry into both the ends and means of government action, courts and commentators around the globe have noted the relative democratic legitimacy of legislatures as compared to courts and suggested an appropriately cabined review. In offering a "democratic defense of constitutional balancing," for instance, Professor Stephen Gardbaum argues that constitutional rights are properly limited, in some circumstances, by political institutions because of a deep normative commitment to democracy.[269] On his account, consistent with the makeup of most governments around the world, allowing the legislature to place (appropriately justified) limits on rights recognizes popular self-rule and also reduces the "disabling of today's citizens from deciding how to resolve many of the most fundamental moral-political issues that they face."[270] More generally, scholars argue, when a case demands empirical predictions or accommodations among competing values, "legislatures may be more empirically competent and democratically legitimate than courts."[271]

Understanding the legislature as more democratic than the courts is appropriate in most jurisdictions, including the United States, but the calculus is more complicated in the states. Most state judges are elected and many are also recallable; in many states, judicial elections are arguably better gauges of popular sentiment than legislative elections because judges are elected in popular majoritarian votes statewide, while legislators

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respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function.").

268. See Stephen Gardbaum, Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?, *in* New Frontiers, New Challenges, supra note 217, at 221, 222 [hereinafter Gardbaum, Positive and Horizontal Rights] ("[Proportionality] is employed far less in the types of rights cases that help to define the 'global model' than in the more conventional ones pitting a negative individual right against the state's conflicting public policy reasons for limiting it.").

269. Stephen Gardbaum, A Democratic Defense of Constitutional Balancing, 4 Law & Ethics Hum. Rts. 79, 89–90 (2010).

270. Id. at 90–91.

271. Jackson, Age of Proportionality, supra note 28, at 3145 (citing Alexy, supra note 181, at 399–401, 411–18).

come from gerrymandered districts.[272] If this does not necessarily make courts superior democratic actors (for instance, because of their smaller size and decisionmaking processes), it at least complicates the legislature's claim.

Moreover, judicial elections are just one of many changes that have been made to state constitutions because of skepticism about legislative representation of the people. The direct democracy institutions of initiative, referenda, and recall that were widely adopted beginning in the Progressive Era reflect similar concerns; they underscore the limits of the legislature as the voice of the people and seek to allow the people to speak for themselves.[273] As Professor Robert Williams has shown, "one of the most important themes in state constitutional law" is skepticism of state legislative power.[274] Time and again, constitutions have been amended to empower other actors—including state courts—to act as popular checks on the legislature and to provide avenues for the people to override and circumvent their representatives.[275]

State constitutions also impose restraints directly on the legislature, evidencing special concern with partial or arbitrary government action. From the start, state bills of rights sought to limit oppressive or corrupt government action. For instance, Virginia provided for frequent elections of legislatures and executives to restrain them "from oppression, by feeling and participating the burdens of the people."[276] During the nineteenth century, many states adopted prohibitions on legislative grants of special privileges and immunities.[277] Some also adopted express prohibitions on arbitrary power.[278]

The ways in which state constitutions distinguish the people from their representatives and never treat the legislature as an unproblematic democratic actor—at the same time that state constitutions generally make state courts themselves democratic (if also not unproblematic) actors—underscore why federal anything-goes rational basis review is inappropriate at the state level.[279] State constitutions require courts to inquire into the actual justifications for a particular action, relying on reasons

272. See Seifter, supra note 21, at 1771–74.

273. See supra notes 106–109, 129–130, and accompanying text.

274. Robert F. Williams, State Constitutional Law Processes, 24 Wm. & Mary L. Rev. 169, 201 (1983).

275. See Bulman-Pozen & Seifter, Democracy Principle, supra note 33, at 881–87.

276. Va. Const. of 1776, Declaration of Rights, § 5; see also Pa. Const. of 1776, ch. I, art. VI.

277. See, e.g., Robert F. Williams, Equality Guarantees in State Constitutional Law, 63 Tex. L. Rev. 1195, 1207 (1985) (describing state constitutional amendments responding to legislative abuses).

278. See, e.g., Ky. Const. Bill of Rights, § 2 ("Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."); see also Md. Const. Declaration of Rights, art. 6; N.H. Const. pt. I, art. 10; Tenn. Const. art. I, § 2.

279. See supra Part II.

articulated by the legislature and not simply judicially imagined. They also require courts to interrogate the reasons the legislature offers. To ensure that government remains an agent of the people and does not arbitrarily interfere in their lives or self-governance, state courts must distinguish the legislature from the collective democratic public, and they should demand only nonarbitrary government regulation, even when the right involved is not a core self-determination right but a relatively frivolous one like playing bingo. Indeed, as we discuss below, a focus on arbitrariness offers a better way to think about recent cases involving economic rights than efforts to cast such rights as fundamental.[280]

Democratic proportionality review does not mean that courts should decline to grant any deference to the legislature or assume its functions. In contrast to the democratic legitimacy argument, for instance, an institutional competence argument for deference may be persuasive, particularly with respect to empirical questions. That determination is a contingent one, as the relative resources and competencies of courts and legislatures vary by state. But even when deference is appropriate, a prohibition against arbitrary government action stands in all fifty states.

2. *Affirmative Provision.* — State constitutions' refusal to equate democratic representation with the legislature also bears on affirmative government duties. Although positive rights appear in constitutions administered through proportionality review worldwide,[281] scholars find that proportionality is meaningfully employed far less with respect to such rights in practice.[282] There are a number of plausible reasons for this, but to the extent at least one is "legitimacy/separation of powers concerns" about courts requiring legislatures to act,[283] the relative democratic positions of state courts and legislatures suggest these concerns should not similarly derail state proportionality review.

As we have described, state constitutions contain many, and many expansive, rights guarantees, most of which are cast as negative rights.[284] At the same time, state constitutions do not treat government action only as a threat but also as a necessary prerequisite to the possession and enjoyment of individual rights. The real threat is not government action as such, but arbitrary government. And in some instances, a lack of government provision or other affirmative measures may be just as harmful as government overreach to individuals' ability to direct their

280. See infra section IV.B.2.

281. See generally Kai Möller, The Global Model of Constitutional Rights (2012) (noting positive rights as part of this emerging global model associated with proportionality).

282. See, e.g., Gardbaum, Positive and Horizontal Rights, supra note 268, at 234–35.

283. Id. at 243.

284. See supra section II.A. Some state constitutions also furnish rights enforceable against private actors, described as "horizontal effect" in the comparative literature. See supra note 83 and accompanying text.

lives.[285] Although positive rights provisions generally require government action rather than foreclose it, they too reflect a popular interest in ensuring nonarbitrary, responsive government.[286] To guarantee popular rights in the face of potentially hostile or apathetic government actors, state constitutional provisions spell out positive, as well as negative, rights with specificity and connect these rights to the project of popular self-government.[287]

State courts should not shy away from using democratic proportionality review to condemn legislative inaction as well as action. In many contexts, they have not. In cases involving education, welfare, and the environment (among other things), state courts have recognized constitutional problems of inadequate government provision as well as government overreach—problems that may be as much about means as ends. As Hershkoff has explained, it is entirely appropriate for state courts to "share explicitly in public governance, engaging in the principled dialogue that commentators traditionally associate with the common law resolution of social and economic issues."[288] To be sure, requiring legislatures to act as well as abstain may place the court in a sort of policymaking role that is discordant with federal conceptions, but for the reasons we have begun to elaborate—and more that we turn to now—state judicial policymaking is neither novel nor inherently problematic.[289]

C. *Balancing*

The ultimate step in proportionality analysis, often called "proportionality as such," requires balancing the achievement of the government's objectives against the harm to rights.[290] In most proportionality systems, comfort with judicial balancing follows from recognizing "law as a practice distinct from politics."[291] This is not a plausible account in the states, which do not insulate judges or their opinions from the rough and tumble of political contestation. But the institutional position of state courts suggests a different, public-engaging

285. Cf. State v. Schmid, 423 A.2d 615, 627 (N.J. 1980) ("[T]he State Constitution imposes upon the State government an affirmative obligation to protect fundamental individual rights.").

286. See Hershkoff, Just Words, supra note 34, at 1540–41.

287. See supra section I.C.

288. Hershkoff, Positive Rights, supra note 34, at 1138.

289. Cf. David Landau, Aggressive Weak-Form Remedies, 5 Const. Ct. Rev. 244, 253 (2014) (describing how courts can condemn legislative inaction and noting that they tend to encounter problems only when they require specific, and costly, solutions).

290. Aharon Barak, Proportionality (2), *in* The Oxford Handbook of Comparative Constitutional Law 739, 746 (Michel Rosenfeld & András Sajó eds., Joel Linsider trans., 2012) [hereinafter Barak, Proportionality] (describing balancing as the "central element of proportionality"); see also, e.g., R. v. Oakes, [1986] 1 S.C.R. 103, 139–40 (Can.).

291. Jackson, Age of Proportionality, supra note 28, at 3125. See generally Jacco Bomhoff, Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse (2013) (comparing U.S. and German understandings).

justification for such balancing, as well as a set of expositional commitments that attend this project.

1. *From Expertise to Popularity.* — Around the world, proportionality review sits comfortably within legal and political cultures that Professors Moshe Cohen-Eliya and Iddo Porat label "epistemologically optimistic."[292] In these systems, judges may impose "rationality and reasonableness" because they are "insulated from populism" and the legal culture is optimistic about "the human capacity to discern right from wrong and to achieve moral progress" and less suspicious of "intellectual elites."[293] The study of constitutional law is "a science."[294] And proportionality review—including balancing—may "compare and evaluate interests and ideas, values and facts, that are radically different in a way that is both rational and fair."[295]

American legal culture is not epistemologically optimistic in these ways. To the contrary, whether at the state or federal level, it is more "epistemologically skeptical" about top-down or expert-imposed conceptions of the good.[296] But precisely insofar as state constitutions seek to make courts politically accountable rather than insulated, they suggest that proportionality review may be part of broader political contestation rather than a practice falling outside of it. If proportionality review always reflects a balance between protecting rights and allowing democratic publics to limit those rights, state courts undertake this project as participants.

Begin with the fact that many state courts already have recognized that, at least in some cases, balancing individual rights and government purposes in a thoroughgoing way, instead of allowing tiers of review to furnish answers, better comports with state constitutions—even if they have not called what they are doing proportionality.[297] As the Supreme Court of California described, a state court should "realistically assess the importance of the state interest" and the degree to which the law "actually serve[s] such interest" and then "carefully evaluate the importance of the constitutional right at stake and gauge the extent to which the individual's ability to exercise that right is threatened or impaired, as a practical matter, by the specific statut[e] . . . at issue."[298] This sort of proportionality review acknowledges potential conflicts and tensions between individual and collective that permeate state constitutions and seeks to engage them

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292. Cohen-Eliya & Porat, supra note 226, at 90 (focusing on German legal culture).

293. Id.

294. Robert C. Post, Constitutional Scholarship in the United States, 7 Int'l J. Const. L. 416, 422 (2009) (discussing Continental scholarship).

295. David M. Beatty, The Ultimate Rule of Law 169 (2004).

296. See Cohen-Eliya & Porat, supra note 226, at 82–90 (identifying "American epistemological skepticism" in contrast to European optimism).

297. See supra notes 209–210 and accompanying text.

298. Comm. to Def. Reprod. Rts. v. Myers, 625 P.2d 779, 791–92 (Cal. 1981); cf. Davis v. Davis, 842 S.W.2d 588, 603 (Tenn. 1992).

rather than shy away from them. As an Ohio court similarly explained, "under the Constitution, there are no absolutes; each right, no matter how fundamental or basic it may appear to be, must be balanced against the rights of others, including the rights of the public generally."[299]

Such balancing may elicit a common criticism of proportionality review: that it gives judges excessive discretion and usurps legislators' role.[300] To the extent these concerns demand an answer, the response is different in the states from the "epistemologically optimistic" answers that may be furnished abroad. State judges do not stand outside of democracy but are always active participants in it. As elected and often recallable actors, we should expect most state judges to take into account popular sentiment as they engage in balancing, especially in politically charged cases. Their gauge of popular opinion need not determine their decisions, but, in the words of former Justice Otto Kaus of the California Supreme Court, "ignoring the political consequences of visible decisions is 'like ignoring a crocodile in your bathtub.'"[301] The design of state courts makes state constitutional adjudication a relatively majoritarian, popular enterprise.[302]

Importantly, though, even the strong form of this claim need not align state judges with the government's side in proportionality review. State constitutions always conceptualize the people as distinct from legislatures, and by making state judges elected they seek to provide a direct connection between the people and their courts.[303] If state judges are considering political consequences, they should be attending to the views of the people who elect them, not those of other government actors. Insofar as they act in accordance with popular sentiment rather than government views, this is consistent with the state conception of rights as popular guarantees against government rather than individual guarantees against majorities.[304] Even in the small number of states with appointed

299. Preterm Cleveland v. Voinovich, 627 N.E.2d 570, 575 (Ohio Ct. App. 1993).

300. See Barak, Proportionality, supra note 290, at 750 (describing, though not endorsing, this common critique); see also Francisco J. Urbina, A Critique of Proportionality and Balancing 2 (2017) (criticizing proportionality tests applied by judges in the human rights context).

301. Julian N. Eule, Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal, 65 U. Colo. L. Rev. 733, 739 (1994) (quoting Paul Reidinger, The Politics of Judging, A.B.A. J., Apr. 1, 1987, at 52, 58); see also Chris W. Bonneau & Melinda Gann Hall, In Defense of Judicial Elections 15 (2009) (calling on "justices to draw upon public perceptions and the prevailing state political climate when resolving difficult disputes"); Neal Devins, How State Supreme Courts Take Consequences Into Account: Toward a State-Centered Understanding of State Constitutionalism, 62 Stan. L. Rev. 1629, 1659–71 (2010) (arguing that state justices have both the incentive and capacity to consider public opinion in rendering decisions).

302. See Pozen, supra note 194, at 2050.

303. See supra notes 193–205 and accompanying text.

304. See Marshfield, supra note 46, at 857–59.

judiciaries, this distinction between democratic majorities and government counsels attention to the people's views.

Moreover, state constitutions can be popularly amended; if state courts get the balance of individual rights and government regulation wrong, the people can respond.[305] We do not mean to overstate the ease of amendment. Certainly, the public cannot be expected to monitor, let alone respond to, every constitutional decision. But popular amendment occurs in the states in a way that is simply not plausible at the federal level. For the approximately 12,000 amendments proposed to the federal Constitution and the approximately 12,000 proposed to state constitutions, 27 federal amendments have been ratified, while more than 7,500 state amendments have been ratified.[306] And state judicial decisions have been a particular spur to popular amendment over time.[307] In part, this suggests, state court decisions may contribute to popular ownership of the state constitution by provoking a contrary response. Backlash may be where the people's collective will resides.[308] But the people may also refine or reinforce a right recognized by the court; if a popular right appears vulnerable, or simply unclear, the attention litigation has provided may generate more affirmative mobilization.[309] Mindful of these possibilities, as well as their institutional place, state courts should attend to several expositional obligations as they go about their work.

2. *A Culture of Justification.* — Proportionality review is celebrated for its discursive and dialogic possibilities. For example, because judges at the balancing stage seek to ensure that all factors of significance on both sides have been considered, proportionality's proponents argue that it allows courts to demonstrate respect and consideration for the losing side.[310] So

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305. E.g., Mathews & Ross, supra note 218, at 118–19 (noting that proportionality review's "transparent approach will facilitate constitutional amendment if the judicial balancing is fundamentally inconsistent with Pennsylvanians' values").

306. See, e.g., Dinan, State Constitutional Politics, supra note 49, at 23–24 ("As of the start of 2017, the current state constitutions have been amended 7,586 times, an average of just over 150 amendments per state.").

307. See, e.g., Reed, supra note 194, at 873 ("State constitutions and state supreme courts now stand as key elements in activists' strategies for legal, political and social change.").

308. See Robert Post & Reva Siegel, *Roe* Rage: Democratic Constitutionalism and Backlash, 42 Harv. C.R.-C.L. L. Rev. 373, 374–75 (2007) ("If courts interpret the Constitution in terms that diverge from the deeply held convictions of the American people, Americans will find ways to communicate their objections and resist judicial judgments. These historically recurring patterns of resistance reflect a deep logic of the American constitutional order . . . .").

309. See, e.g., infra section IV.B.3 (discussing abortion initiatives).

310. E.g., Stone Sweet & Mathews, supra note 25, at 89 (noting that proportionality review "provides ample occasion for the balancing court to express its respect, even reverence, for the relative positions of each of the parties" and to state "in effect, that each side has some significant constitutional right on its side"); see also Jud Mathews, Proportionality Review in Administrative Law, *in* Comparative Administrative Law 405, 412–13 (Susan Rose-Ackerman, Peter L. Lindseth & Blake Emerson eds., 2d ed. 2017) ("In

too, many argue that proportionality review promotes the consideration of constitutional principles outside of the courts, creating a rights-regarding conversation between courts and legislatures.[311] These values may readily be served at the state level as well, but courts should be mindful of audiences beyond the parties and the legislature. In particular, they should attend to the broader public, both in offering accounts of their decisions and in stirring popular engagement with the constitutional project of democratic self-government.

Around the world, proportionality review has come to be associated with a "culture of justification," a term introduced by South African human rights attorney and scholar Etienne Mureinik.[312] According to Mureinik, government must justify all acts, not only those infringing on fundamental rights, and government legitimacy inheres in the provision of reasons, not the authority of government actors.[313] These ideas resonate with proportionality review, which "requires that the government provide substantive justification for all of its actions, in that it must show the rationality and reasonableness of those actions and the tradeoffs they necessarily entail."[314] Courts, on such accounts, deploy proportionality review to ensure that other government actors, especially legislatures, justify their actions.

Moreover, courts not only demand reason-giving from others through proportionality review but also directly participate in this project.[315] As they assess individual and governmental interests and balance them against one another, courts must explain their reasoning and considerations. This may be especially salient when judges are reviewing positive rights claims or insisting on affirmative government action and the judicial policymaking role becomes more apparent, but it is a pervasive requirement. This reason-giving constitutes a form of nonarbitrary judicial action, and, in the states, it must be directed at the public. Rather than hide

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working their way through the proportionality subtests, courts can build a reasoned justification for their rulings, acknowledging the competing interests on either side and explaining why, ultimately, one side prevails." (citation omitted)).

311. See, e.g., Hogg & Bushell, supra note 229, at 101 ("Canadian legislators are engaging in a self-conscious dialogue with the judiciary."); Jackson, Age of Proportionality, supra note 28, at 3146 ("Legislators who understand that statutes will be evaluated under proportionality standards if challenged as infringing on individual constitutional rights will have reason to give attention to the rationality of the means . . . ."); Mathews & Ross, supra note 218, at 117 ("Proportionality review's transparency encourages constitutional dialogue between courts and legislatures.").

312. Etienne Mureinik, A Bridge to Where? Introducing the Interim Bill of Rights, 10 SAJHR 31, 32 (1994) ("If [South Africa's 1993 Interim] Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification—a culture in which every exercise of power is expected to be justified . . . .").

313. See id.

314. Cohen-Eliya & Porat, supra note 226, at 7. Cohen-Eliya and Porat argue that the U.S. legal culture is one of authority rather than justification.

315. See Jackson, Age of Proportionality, supra note 28, at 3142 ("[S]tructured proportionality review provides a stable framework for persuasive reason-giving . . . .").

behind claims of judicial restraint of the sort that populate the *U.S. Reports* and are best understood as part of a "culture of authority,"[316] state courts should embrace a culture of justification vis-à-vis the public.

As they do so, moreover, state judges can facilitate the ongoing project of constitutional self-rule. Proportionality's proponents argue that this form of review can "provide a better bridge between courts and other branches of government, offering criteria for constitutional behavior that are usable by, and open to input from, legislatures and executives."[317] This is plausible in the states as well: Insofar as legislatures and executives recognize that courts will review their ultimate actions under proportionality standards, they may attend more closely to the rationality of their proposed actions, to the fit between these actions and the interests they are seeking to serve, and to the burdens such actions will impose and whether such burdens can reasonably be understood as justified.[318] But the dialogue may also invite more popular participation in the states.

Unlike their federal counterpart, which issues constitutional decisions assuming they will be final, state supreme courts issue decisions knowing they are subject to popular revision or countermand.[319] They should take this possibility of public engagement seriously and not only justify their decisions but also explain them in a way that facilitates the public's evaluation and deliberation. Explicating their work through a framework like proportionality that clearly spells out the respective rights and interests involved as well as their relative weights and interaction is one way to do so. On a basic level, this sort of judicial reason-giving may serve as a means of electoral and popular accountability. Former Oregon Supreme Court Justice Jack Landau, for example, has urged state judges to "be candid about the elements of judgment."[320] He concludes, "[B]ecause of the fact that so many state court judges are elected, it becomes especially important for them to lay bare their decisions in a candid way, so that those decisions may be fairly evaluated by the electorate."[321]

More ambitiously, beyond enabling the people to change their judges, thorough and transparent decisions can help the people become better at constitutional self-governance, including by amending their constitutions.

316. Mureinik, supra note 312, at 32.

317. Jackson, Age of Proportionality, supra note 28, at 3103.

318. Cf. Mathews & Ross, supra note 218, at 117 (arguing that proportionality encourages legislators to consider alternative approaches with a lesser impact on rights).

319. See Helen Hershkoff, Foreword: Positive Rights and the Evolution of State Constitutions, 33 Rutgers L.J. 799, 803, 805 (2002) (describing "the state constitutional text as a site of political contest and social meaning" and arguing that the "state constitution amendment processes create important occasions for public dialogue, value formation, and social reform"); Hershkoff, Positive Rights, supra note 34, at 1163 (describing state decisions as "only the opening statement in a public dialogue with the other branches of government and the people").

320. Jack L. Landau, Some Thoughts About State Constitutional Interpretation, 115 Penn St. L. Rev. 837, 838 (2011).

321. Id. at 873–74.

Insofar as judicial decisions offer a framework to consider individual rights, government action, and communal welfare, they may shape the thinking and argumentation not only of other government actors but also of the broader public. Proportionality frameworks, that is, may be used by the people themselves as they consider how to advance constitutional government. In this way, state courts can honor the state judicial role "not . . . to thwart, but . . . to advance [the state constitution's] main object, the continuance and orderly conduct of government by the people."[322]

IV. CONTEMPORARY DEBATES

In this Part, we illustrate democratic proportionality review with examples, drawing on both the substantive commitments and adjudicative frameworks described above. We first show, with reference to familiar cases, that democratic proportionality review is already playing out in state courts. In cases involving conflicts between individual rightsholders, courts have carefully ascertained the rights at stake, sensitively balanced competing interests, and offered public-facing explanations of their decisions. Looking beyond existing cases, we take up three active areas of litigation—voting, occupational licensing, and abortion—to argue that democratic proportionality review would enrich state constitutional adjudication. Even with respect to contentious debates, this Part suggests, democratic proportionality may foster both personal security and greater public reason.

A. *Existing Cases*

We begin by emphasizing a point we have noted throughout: Although methodological lockstepping has permeated much state constitutional practice, the components of democratic proportionality review are already part of state case law. More fully recognizing such review does not require stark departures from accepted practice. Moreover, the techniques we urge are widely applicable, not limited to specific issues or specific states, even as they must be tailored to particular cases and jurisdictions. Here, we describe three prominent conflicts between individual rightsholders. In such cases—the heartland of proportionality review[323]—state courts have already demonstrated their capacity to carefully ascertain and prudently balance constitutional rights and to deploy broad remedial powers, rooted in the common-law tradition.[324]

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322. In re Op. of the Justs., 16 A.2d 585, 586 (Me. 1940).

323. See Greene, supra note 26, at 84 (endorsing proportionality review as an approach to rights–rights conflicts).

324. See Hershkoff, Passive Virtues, supra note 148, at 1875–76 (describing distinctive state justiciability doctrines); see also Bulman-Pozen & Seifter, Countering the New Election Subversion, supra note 103, at 1356 (discussing the role of state courts).

Take first a clash of rights familiar from first-year property courses: What happens when state constitutional speech rights come into conflict with the rights of property owners? In *State v. Schmid*, the New Jersey Supreme Court famously considered an individual's argument that he had a state constitutional right to distribute political literature on the campus of Princeton University.[325] The court engaged in state-focused interpretation, finding "exceptional vitality" in the state constitution's speech and assembly provisions[326] and concluding that state speech rights may apply against private actors.[327] But those rights were not absolute, and they did not automatically trigger a decisive tier of scrutiny. Rather, the court recognized that "the heart of the problem" was "the need to balance within a constitutional framework legitimate interests in private property with individual freedoms of speech and assembly."[328]

The court noted its "strong traditions which prize the exercise of individual rights and stress the societal obligations that are concomitant to a public enjoyment of private property."[329] And so it adopted a "multi-faceted test" focused on both the property and the speech at issue, with attention to the reasonableness of the property owner's exclusion and the speaker's alternatives for expressive activity.[330] Considering the details of Schmid's and Princeton's respective interests, the court concluded that a trespass conviction could not be sustained.[331] Rather than resort to clause-bound readings, absolute pronouncements, or judicial minimalism, the court engaged directly with the rights on both sides of the case and expressly justified its nuanced resolution.

Or take another prominent state case: *Davis v. Davis*, an early case involving assisted reproduction in which the Tennessee Supreme Court faced a conflict between two individuals' rights to procreative autonomy.[332] The plaintiff and defendant had used in vitro fertilization services prior to their divorce but then reached an impasse as to what to do with the frozen embryos. Junior Davis wanted them discarded while Mary Sue wanted to donate them to another couple.[333] Bioethics and health scholars have considered the case's implications for the emerging law of reproductive technologies;[334] we reference it here because of its decisional structure.

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325. 423 A.2d 615 (N.J. 1980).

326. Id. at 626.

327. Id. at 628.

328. Id. For a similar approach, see Alderwood Assocs. v. Wash. Env't Council, 635 P.2d 108, 117 (Wash. 1981) (adopting a balancing approach that could accommodate the rights to free speech and ballot-initiative participation as well as property rights).

329. *Schmid*, 423 A.2d at 630.

330. Id. at 630.

331. Id. at 633.

332. 842 S.W.2d 588, 589 (Tenn. 1992).

333. See id. at 590.

334. See, e.g., I. Glenn Cohen, The Constitution and the Rights Not to Procreate, 60 Stan. L. Rev. 1135, 1144 & n.25 (2008) (citing *Davis*, 842 S.W.2d at 603–04, in discussion of

The court began by discerning the rights at stake, noting that the Tennessee Constitution's multiple liberty-inflected provisions protect procreative autonomy, even though that phrase does not appear in the text.[335] But the case was a classic rights clash: Each party possessed a procreative autonomy right. The court accordingly balanced their rights, noting that "[r]esolving disputes over conflicting interests of constitutional import is a task familiar to the courts" and observing that "[o]ne way of resolving these disputes is to consider the positions of the parties, the significance of their interests, and the relative burdens that will be imposed by differing resolutions."[336] In deciding for Junior Davis, the court considered these interests and burdens quite concretely[337] and elaborated the bases for its decision. Providing guidance for lower courts, it also cautioned that the guidance should not serve as an "automatic veto" in future cases,[338] consistent with proportionality principles that require attention to context.

Finally, consider a state case loosely resembling *Masterpiece Cakeshop*.[339] A municipal court judge in Wyoming refused to perform same-sex marriages based on her "sincere belief that marriage is the union of one man and one woman."[340] The Wyoming Commission on Judicial Conduct and Ethics recommended that the judge be removed from her position as a result; the judge responded that her state constitutional right to religious freedom prohibited any discipline for her refusal.[341]

The Wyoming Supreme Court first considered together multiple clauses of the state constitution to determine the rights involved. On one hand, it recognized that the state's two express clauses dedicated to the freedom of religion "may offer broader protections than does the United States Constitution."[342] On the other hand, the court doubted that the judge's freedom of belief (as opposed to judicial conduct) was really at issue, a conclusion that was "reinforced by an examination of the entire Wyoming Constitution," which also "recognizes the importance of equal

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one solution to conflicts between "various conceptions of procreative rights"); Dov Fox, Reproductive Negligence, 117 Colum. L. Rev. 149, 175 (2017) ("Courts have similarly held that people's 'interest in the nature of ownership' over embryos lies in 'decision-making authority concerning [their] disposition.'" (quoting *Davis*, 842 S.W.2d at 597)).

335. *Davis*, 842 S.W.2d at 600.

336. Id. at 603.

337. E.g., id. at 604 ("In light of his boyhood experiences, Junior Davis is vehemently opposed to fathering a child that would not live with both parents.").

338. Id.

339. See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (considering a baker's assertion of First Amendment rights that clashed with equality rights); see also Greene, supra note 26, at 120–24 (criticizing the Supreme Court's decision in *Masterpiece Cakeshop* and advocating a proportionality approach).

340. In re Neely, 390 P.3d 728, 732–33 (Wyo. 2017).

341. See id. at 735.

342. Id. at 742.

rights for all."[343] The state constitution's multiple overlapping equality provisions, the court observed, citing precedent, likewise confer greater protection than the federal Constitution.[344] Faced with conflicting rights, the court rejected the judge's position that the liberty right could "trump" the equality right.[345] But the court also rejected the Commission's recommendation of removal from office as excessive and instead adopted a narrower remedy: public censure and a choice for the judge between performing no marriages or refraining from discriminating in their performance.[346] Like the New Jersey and Tennessee courts, the Wyoming Supreme Court showcased the sorts of balancing and remedial tailoring embraced by democratic proportionality review yet foreclosed by familiar federal frameworks.

B. *New Directions*

Although components of democratic proportionality review have appeared prominently in cases involving conflicts between rightsholders, this state-centered approach to constitutional adjudication has yet to take hold more generally. In this section, we consider three burgeoning areas of state constitutional litigation—voting, occupational licensing, and abortion—and suggest that democratic proportionality review would yield sounder decisions, grounded in state constitutions and the distinctive balances they strike among individuals, community, and government. Our discussions are brief and positioned at a high level of generality; we seek to begin a conversation about the promise of democratic proportionality review rather than to resolve particular controversies.

1. *Voting*. — Democratic proportionality indicates several new directions for constitutional adjudication of voting rights. It situates the franchise within a broader context of democratic rights. It reveals that the federal test for reviewing voting regulations fails to properly appreciate and balance the state constitutional interests at stake. And it proposes that state governments may have the obligation to furnish appropriate infrastructure for the exercise of voting rights and not merely to desist from undue infringements.

The first step of democratic proportionality review is to discern the rights at issue. Superficially, this is an easy task when it comes to laws regulating voting: Every state constitution expressly and affirmatively guarantees the right to vote.[347] Consistent with existing judicial

343. Id. at 735, 744.
344. Id. at 744.
345. Id.
346. Id. at 753.
347. See supra note 62.

recognition of the right as "fundamental,"[348] "precious,"[349] and "bedrock,"[350] voting is readily classified a core self-determination right, a necessary precondition to democratic self-governance in the states.[351]

Even as the force of the right to vote is evident in isolation, the electoral context requires courts to read constitutional clauses together. All state constitutions include not only the right to vote but also additional protections to safeguard popular participation in and control over elections. For instance, they guarantee rights to free and fair elections, rights against interference in voting, and more.[352] Together these clauses undergird a powerful state constitutional commitment to democracy. Under this democracy principle,[353] courts should resolve cases "in relation to the fundamental purpose of the constitution as a whole, to wit: to create and define the institutions whereby a representative democratic form of government may effectively function."[354] Reading state constitutions' many election-related clauses together underscores the weight and expansive scope of state voting rights and suggests the range of cases that may implicate these rights.[355]

Although voting rights could hardly be weightier, courts evaluating laws that allegedly infringe these rights must also take seriously the government's interest in regulating elections. State constitutional provisions,[356] as well as "common sense,"[357] reveal a strong collective interest in accurate, well-run elections. Contrary to some legislatures' claims, constitutional clauses empowering legislatures to regulate elections do not insulate their laws from scrutiny,[358] but they do underlie the judicial obligation to engage with both the individual and collective interests at stake, consistent with the balances state constitutions strike among individuals, community, and government.

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348. E.g., Ferry v. City of Montpelier, 296 A.3d 749, 758 (Vt. 2023).

349. E.g., Chelsea Collaborative, Inc. v. Sec'y of Commonwealth, 100 N.E.3d 326, 331 (Mass. 2018) (citing Swift v. Registrars of Voters of Quincy, 183 N.E. 730, 732 (Mass. 1932)).

350. E.g., Socialist Workers Party v. Sec'y of State, 317 N.W.2d 1, 6 (Mich. 1982).

351. See supra section III.A.2.

352. See supra section I.D.

353. See Bulman-Pozen & Seifter, Democracy Principle, supra note 33.

354. State ex rel. Reynolds v. Zimmerman, 126 N.W.2d 551, 558 (Wis. 1964).

355. See Bulman-Pozen & Seifter, Democracy Principle, supra note 33, at 907–32 (addressing the democracy principle's application to cases involving gerrymandering, lame-duck legislative entrenchment, the regulation of popular initiatives, and more).

356. See, e.g., Ariz. Const. art. VII, § 12 ("There shall be enacted registration and other laws to secure the purity of elections and guard against abuses of the elective franchise.").

357. Burdick v. Takushi, 504 U.S. 428, 433 (1992).

358. See, e.g., Mont. Democratic Party v. Jacobsen, 518 P.3d 58, 65 (Mont. 2022); Driscoll v. Stapleton, 473 P.3d 386, 393 (Mont. 2020); League of Women Voters of Wis. Educ. Network, Inc. v. Walker, No. 11 CV 4669, 2012 WL 763586, at *4 (Wis. Cir. Ct. Mar. 12, 2012) ("The people's fundamental right of suffrage preceded and gave birth to our Constitution (the sole source of the legislature's so-called 'plenary authority'), not the other way around.").

As state courts are called on to evaluate laws regulating voting, litigants are pushing them to adopt the federal *Anderson–Burdick* test.[359] But adopting this test, which has come to function as a sort of rational basis review,[360] is inappropriate. Democratic proportionality requires state courts to take voting rights more seriously, to evaluate government regulation more meaningfully, and to weigh interests in the context of the concrete dispute. For example, while a federal court might accept the government's recitation of an abstract interest like combating voter fraud,[361] a court engaged in democratic proportionality review would require the government to establish concretely and specifically how that interest would be furthered by its regulation.[362] If the government successfully made such a showing, the court would ask whether there was a less rights-impairing way to achieve this result. And, if the law survived this stage of review, the court would proceed to engage in actual balancing, asking whether the established public benefits outweighed the intrusion on voting rights. At all stages of such an inquiry, state courts should be mindful of their ability to conduct context-specific analysis and to furnish tailored remedies.

As they review regulations of the franchise, moreover, courts applying democratic proportionality review should attend to government inaction as well as action. As election law scholars have observed, the distinction between negative and positive rights is flimsy when it comes to voting: Voting "is, inescapably, a positive right"[363] because it is only by creating a system of election administration that it can occur at all.[364] Balancing voting rights and the collective interest in well-run elections may require courts not only to invalidate problematic state regulation but also to demand an appropriate "infrastructure of provision."[365]

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359. The *Anderson–Burdick* test requires courts to weigh burdens a law imposes on electoral participation against the law's asserted benefits. See *Burdick*, 504 U.S. at 428, 441; Anderson v. Celebrezze, 460 U.S. 780, 788–89 (1983). For an example of litigants pushing the standard in state court, see *Mont. Democratic Party*, 518 P.3d at 74 (Rice, J., dissenting) ("[T]he Secretary [of State of Montana] and Amicus have asked the Court to adopt the balancing approach provided by the United States Supreme Court['s] . . . '*Anderson–Burdick* standard' . . . .").

360. See, e.g., Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 189–90 (2008); Pamela S. Karlan, Undue Burdens and Potential Opportunities in Voting Rights and Abortion Law, 93 Ind. L.J. 139, 149 (2018).

361. See Joshua A. Douglas, Undue Deference to States in the 2020 Election Litigation, 30 Wm. & Mary Bill Rts. J. 59, 62–63 (2021) (discussing recent federal cases involving a deferential form of *Anderson–Burdick*).

362. See, e.g., State v. Green Party of Alaska, 118 P.3d 1054, 1070 (Alaska 2005).

363. Joseph Fishkin, Voting as a Positive Right: A Reply to Flanders, 28 Alaska L. Rev. 29, 33 (2011).

364. See Joshua S. Sellers & Justin Weinstein-Tull, Constructing the Right to Vote, 96 N.Y.U. L. Rev. 1127, 1130 (2021).

365. Cary Franklin, *Griswold* and the Public Dimension of the Right to Privacy, 124 Yale L.J. Forum 332, 338 (2015), https://www.yalelawjournal.org/pdf/FranklinPDF_xotfi3j7.pdf [https://perma.cc/D2K7-U9QS].

During the COVID-19 pandemic, some state court decisions laid analytic groundwork for this approach. For example, the Alaska Supreme Court concluded that witness requirements deprived housebound voters of meaningful access to the ballot.[366] The court approved an injunction that not only eliminated the requirement but also required affirmative steps by the state to modify relevant election materials and to "educate the public about the change,"[367] including by amending its website, using social media, creating a public service announcement, and notifying "community get-out-vote organizations, tribal organization[s], Native corporations, and political parties."[368] Decisions from other states including New Mexico and Tennessee during this period similarly required states to affirmatively facilitate voting, including by mailing unsolicited absentee ballot applications to voters[369] and conducting public outreach regarding the availability of voting by mail.[370]

A commitment to democratic proportionality review suggests that this approach should be more routine in voting litigation—not simply a response to a once-in-a-century pandemic. As Professors Joshua Sellers and Justin Weinstein-Tull have proposed, for instance, state courts could review for electoral adequacy much as they already review for educational adequacy.[371] State constitutions both suggest that an infrastructure for elections is constitutionally required and provide resources to flesh out what it must entail in any given state.

2. *Occupational Licensing.* — Democratic proportionality review also offers a better approach to the economic rights claims that have burgeoned in recent years. In the past decade, in particular, litigants have brought numerous challenges to state occupational licensing schemes on grounds of economic freedom. From lactation consultants in Georgia to vacation property managers in Pennsylvania to eyebrow threaders in Texas, individuals have challenged laws demanding that they satisfy educational, testing, or financial requirements and obtain a state license before working.[372]

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366. State v. Arctic Vill. Council, 495 P.3d 313, 322 (Alaska 2021).

367. Id. at 317.

368. [Proposed] Preliminary Injunction Order paras. 5–7, 9(i)–(vii), 11, 12, Arctic Vill. Council v. Meyer, No. 3AN-20-07858 CI (Alaska Super. Ct. filed Oct. 13, 2020), https://www.acluak.org/sites/default/files/field_documents/3an-20-07858ci_003.pdf [https://perma.cc/ERQ8-7NH4].

369. See State ex rel. Riddle v. Oliver, 487 P.3d 815, 830 (N.M. 2021).

370. See Fisher v. Hargett, 604 S.W.3d 381 (Tenn. 2020) (modifying broader injunction but accepting state's concession that it would facilitate mail voting for medically sensitive populations).

371. See Sellers & Weinstein-Tull, supra note 364, at 1163–64.

372. See Raffensperger v. Jackson, 888 S.E.2d 483, 486 (Ga. 2023); Ladd v. Real Est. Comm'n, 230 A.3d 1096, 1101 (Pa. 2020); Patel v. Tex. Dep't of Licensing & Regul., 469 S.W.3d 69, 91 (Tex. 2015). These challenges have often been spearheaded by the Institute for Justice. See Occupational Licensing, Inst. for Just., https://ij.org/issues/economic-

The shadow of *Lochner* looms large over these cases. As some litigants and judges have insisted on strict scrutiny for economic rights,[373] many others have worried that this approach would invite a new era of "judicial overreach."[374] Democratic proportionality review offers a better approach, a principled way to invalidate arbitrary and unreasonable licensing schemes without casting economic rights as fundamental and "unleashing 'the *Lochner* monster.'"[375]

Begin, again, with the nature of the rights at stake. Litigants who argue that economic rights are at issue in occupational licensing cases find textual support in many state constitutions. For example, many of these constitutions expressly protect property rights or "the enjoyment of the gains of [one's] own industry" within their inalienable rights clauses.[376] State constitutions may also furnish support for such rights through due process and equal protection provisions.[377] But as is generally true of state constitutional rights, these individual-protecting provisions sit alongside community-regarding obligations. Even clauses recognizing economic rights as inalienable immediately temper such rights with the rights of other individuals to their own life, liberty, and happiness, consistent with relational understandings of property.[378] And state constitutions contain many potentially conflicting rights, including guarantees of equality, a clean environment, worker protections, and more.[379]

Consistent with—though not apparently motivated by—this range of relevant constitutional provisions, state courts rightly have been hesitant to describe the economic rights involved in occupational licensing cases as fundamental rights.[380] This poses a problem for judges tracking the federal

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liberty/occupational-licensing/ [https://perma.cc/4RRZ-7B69] (last visited Aug. 20, 2023).

373. See, e.g., Porter v. State, 913 N.W.2d 842, 853, 859 (Wis. 2018) (Bradley, J., dissenting) ("Article I, Section 1 of the Wisconsin Constitution includes economic liberty within its general guarantee of liberty as an inherent and fundamental right, [and] . . . [w]hen fundamental constitutional rights are implicated, we generally apply strict scrutiny review." (emphasis omitted)).

374. See *Ladd*, 230 A.3d at 1117 (Wecht, J., dissenting); see also Pizza di Joey, LLC v. Mayor of Balt., 235 A.3d 873, 896–97 & n.13 (Md. 2020) (reaffirming the state court's position that judicial restraint is required when reviewing most economic regulations).

375. *Patel*, 469 S.W.3d at 91.

376. E.g., Mo. Const. art. I, § 2; Okla. Const. art. II, § 2; see also N.C. Const. art. I, § 1 (guaranteeing individuals "the enjoyment of the fruits of their own labor").

377. See, e.g., Tex. Const. art. I, §§ 3–3a, 19.

378. See, e.g., Mo. Const. art. I, § 2 (guaranteeing "that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry").

379. See, e.g., Mont. Const. art. II, § 3 ("All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property . . . .").

380. See, e.g., Ladd v. Real Est. Comm'n, 230 A.3d 1096, 1108 (Pa. 2020) ("[U]nlike the rights to privacy, marry, or procreate, the right to choose a particular occupation,

tiers of scrutiny, however: If economic rights are not fundamental rights warranting strict scrutiny, they are mere interests that receive rational basis review, giving a free pass to state legislation no matter how arbitrary or unreasonable it may be.

Democratic proportionality review moves beyond this rigid binary. Even as it demands a careful inquiry into the rights at issue, it does not make the ultimate resolution of a dispute turn on whether a right is classified as fundamental. Rejecting tiers of scrutiny, it calls on courts to evaluate—for any rights infringement—whether the government has a legitimate objective, whether it is pursuing that objective through appropriate means, and whether it could have adopted a less rights-impairing approach.[381] A critical piece of this analysis in the states, where the people themselves are always distinguished constitutionally from their political representatives, is to ask whether the government has acted arbitrarily.[382]

When it comes to occupational licensing schemes, this means that courts should not settle for the government's empty recitation of a legitimate objective, such as protecting the people's health and welfare, but rather ask whether the licensing scheme actually serves that objective. This step is where several recently challenged occupational licensing schemes would fail. For instance, Texas required eyebrow threaders to undergo 750 hours of expensive training before being permitted to work.[383] Given that roughly half of those hours did not even ostensibly pertain to the health-and-safety justification the state provided, the regulation revealed itself to be irrational.[384] The problem was not that a fundamental right was infringed but rather that the state was acting in an arbitrary manner.

So too, the Georgia Lactation Consultant Practice Act required lactation care providers who wished to support mothers in breastfeeding

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although 'undeniably important,' is not fundamental. The right is not absolute and its exercise remains subject to the General Assembly's police powers, which it may exercise to preserve the public health, safety, and welfare." (citation omitted) (quoting Nixon v. Commonwealth, 839 A.2d 277, 287 (Pa. 2003))).

381. See supra note 212. Although state courts have not applied democratic proportionality as such, several have applied similarly intermediate standards of review. See, e.g., Raffensperger v. Jackson, 888 S.E.2d 483, 493 (Ga. 2023) (applying a "reasonable necessity" test to an occupational licensing law); *Ladd*, 230 A.3d at 1102 (requiring exercises of the police power to be not "unreasonable, unduly oppressive or patently beyond the necessities of the case" and to employ means that have "a real and substantial relation to the objects sought to be attained" (internal quotation marks omitted) (quoting Gambone v. Commonwealth, 101 A.2d 634, 637 (Pa. 1954))). Democratic proportionality review helps to make sense of this more intermediate approach and also suggests why the court's evaluation of government action, rather than the delineating of a right as fundamental or not, is the critical consideration in such cases.

382. See supra section III.B.1.

383. See Patel v. Tex. Dep't of Licensing & Regul., 469 S.W.3d 69, 90 (Tex. 2015).

384. See id.

to complete fourteen courses in health sciences, including eight college-level courses; complete ninety-five hours of lactation-specific education; complete at least 300 supervised clinical hours; and take an exam costing more than $500.[385] Other education and accreditation options, including a popular free course, did not suffice for licensure.[386] Although the Act's stated purpose "to protect the health, safety, and welfare of the public" was sound on its face, there was no evidence that lactation consultants would cause harm without the required training (or any evidence that such harm had ever occurred).[387] To the contrary, there was significant evidence of safe and beneficial services provided by non-licensed lactation consultants.[388] A court employing democratic proportionality review could readily conclude that the law was unreasonable and thus invalid, without recognizing the right to be a lactation consultant specifically, or to pursue a particular occupation more generally, as fundamental.

Although regulations like these would fail before a balancing stage of democratic proportionality review based on their arbitrary and excessive character, it is easy to imagine that many other state licensing schemes—such as those specifying educational and testing requirements for doctors and lawyers—would pass to the final stage of review if challenged. At the balancing stage, the vast majority of licensing schemes should survive, as a court would already have established that they serve legitimate public interests in a reasonable manner and do not infringe on individuals' rights to pursue their occupation more than necessary. In the rare case that a court finds such a scheme unduly burdensome in relation to its benefits, the court should engage in remedial tailoring in lieu of all-or-nothing dispositions.

3. *Abortion.* — We conclude where we began, with state constitutional adjudication of abortion. As with voting rights, a democratic proportionality frame helps to reveal reproductive rights as core self-determination rights that frequently emerge from layered provisions in state constitutions and may require the affirmative provision of government infrastructure. As with occupational licensing, a democratic proportionality frame suggests that a commitment to nonarbitrariness should doom many state statutes—in particular, those that operate as abortion bans—while leaving space for regulations that genuinely serve health, safety, and welfare. Finally, a democratic proportionality frame underscores that state citizens have the power and obligation to engage directly with constitutional rights, including by revisiting judicial decisions and revising state constitutions.

At the first stage of rights discernment, state courts should recognize reproductive rights as core self-determination rights that have been

385. *Jackson*, 888 S.E.2d at 486–87.

386. Id. at 488.

387. See id. at 488, 496.

388. See id. at 496–97.

refined and enhanced over time.[389] The right to abortion is rooted, first, in state constitutions' "universal" recognition of bodily autonomy.[390] As the Mississippi Supreme Court has put it, "Each of us has a right to the inviolability and integrity of our persons, a freedom to choose or a right of bodily self-determination . . . ."[391] In a range of contexts, including refusing and obtaining medical treatment, state courts have recognized that bodily autonomy is "the free citizen's first and greatest right, which underlies all others"[392]—or in Professor Pamela Karlan's words, a "rights-protecting right."[393] Bodily autonomy is vital in its own right and a prerequisite for exercising other rights recognized by state constitutions.

The practice of reading constitutional provisions together further illuminates the nature and force of reproductive rights. In most states, abortion rights have been strengthened and given more substantive content through the addition of rights to equality, privacy, health care, and more. For example, in Montana, which includes express protections for dignity, privacy, sex equality, and seeking health and happiness, as well as liberty rights and inalienable rights, the state supreme court has recognized that personal "procreative autonomy" is rooted in complementary provisions of the document.[394] Even as it focused on privacy rights, the court noted that abortion rights were supported by the "overlapping" rights to individual dignity, which "demands that people have for themselves the moral right and moral responsibility to confront the most fundamental questions about the meaning and value of their own lives"; to equal protection, which confers "an equal right to form and to follow [one's] own values in profoundly spiritual matters"; to "seek safety, health[,] and happiness," including by obtaining medical care and making bodily decisions without interference; to accept or reject religious doctrines and to express one's opinion; and to due process of law.[395]

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389. Already, most, though not all, state courts to consider the question have recognized abortion rights under their constitutions. See After *Roe* Fell: Abortion Laws by State, Ctr. for Reprod. Rts., https://reproductiverights.org/maps/abortion-laws-by-state/ [https://perma.cc/54AN-ZUYD] (last visited Aug. 20, 2023) (analyzing state laws, constitutions, and court decisions on abortion); Quinn Yeargain, What All State Constitutions Say About Abortion, and Why It Matters, Bolts (June 30, 2022), https://boltsmag.org/state-constitutions-and-abortion/ [https://perma.cc/B5D2-ZFZS] (summarizing state court interpretations of abortion rights).

390. See, e.g., Pratt v. Davis, 118 Ill. App. 161, 166 (1905) ("[U]nder a free government at least, the free citizen's first and greatest right, which underlies all others—the right to the inviolability of his person, in other words, his right to himself—is the subject of universal acquiescence . . . .").

391. In re Brown, 478 So. 2d 1033, 1039 (Miss. 1985); see also Hodes & Nauser, MDs, P.A. v. Schmidt, 440 P.3d 461, 482–83 (Kan. 2019) (collecting cases recognizing a constitutionally protected right to bodily autonomy).

392. *Pratt*, 118 Ill. App. at 166.

393. Karlan, supra note 360, at 142.

394. See Armstrong v. State, 989 P.2d 364, 377 (Mont. 1999).

395. See id. at 383–89.

Of course, reading provisions together will not look the same in all states. In part because of its relatively recent constitutional convention, Montana's layering of abortion-protecting rights is particularly substantial and various, but every state constitution includes multiple clauses that speak to the right. All states protect a right of bodily integrity and autonomy, and some states layer this with more libertarian privacy rights,[396] while others focus on equal protection, including through equal rights amendments expressly focused on sex equality.[397] This means that the abortion right does not look exactly the same in all states and, especially, that the justifications for regulation may be evaluated differently. Privacy-oriented states may be particularly concerned about government interference with personal decisions, for example, while equality-oriented states may be particularly concerned about the sex-stereotyping and misogyny that inform abortion regulation. The general point is that every state constitution contains not only a core right to bodily autonomy but also additional protections that bear on this right. Most recently, three state constitutions were amended in 2022 to secure and clarify existing reproductive rights by expressly protecting abortion as such for the first time.[398]

Even as it underscores the weight of the abortion right, democratic proportionality review allows for civil and serious dialogue regarding competing rights and interests, including religious beliefs. The especially weighty individual right requires especially weighty justifications for infringement, but the government has a chance to offer such justifications for its laws. As we have suggested with respect to understanding the right at issue, these government interests—and the constitutional recognition of them—will vary by case and by state.

In every state, however, constitutional insistence on nonarbitrariness may prove dispositive in some instances. After discerning the rights at stake, courts conducting democratic proportionality review ask whether the state has a legitimate purpose, is using appropriate means, and is minimally impairing rights. Abortion laws emerging around the country in the wake of *Dobbs* founder at these steps: State courts should readily

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396. See, e.g., Planned Parenthood S. Atl. v. State, 882 S.E.2d 770, 782 (S.C. 2023) (concluding that "few decisions in life are more private than the decision whether to terminate a pregnancy," and noting that Alaska, Florida, Minnesota, Montana, and Tennessee have also recognized abortion rights based on express privacy clauses). Some state constitutions also include libertarian health care rights that emerged out of opposition to the Affordable Care Act but speak more generally about individuals' rights with respect to health care decisions; these provisions are being invoked in support of abortion rights. See, e.g., Preterm-Cleveland v. Yost, No. A2203203, 2022 WL 16137799, at *15 (Ohio C.P. Hamilton Cnty. Sept. 2, 2022) (order granting preliminary injunction); Johnson v. Wyoming, No. 18732 (Wyo. Dist. Ct. July 25, 2022) (order granting preliminary injunction).

397. See, e.g., N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841, 851–52 (N.M. 1998) (holding that the New Mexico's Equal Rights Amendment requires judges to subject abortion restrictions to heightened scrutiny).

398. See Cal. Const. art. I, § 1.1; Mich. Const. art. I, § 28; Vt. Const. ch. I, art. 22.

conclude that abortion bans that fail to include exceptions, or that apply so early that many women are not even aware of a pregnancy, are invalid for their sheer arbitrariness. For example, the Idaho abortion ban, which requires the imprisonment of physicians rendering lifesaving care, does not clear this arbitrariness bar, contrary to the Idaho Supreme Court's holding.[399]

Moreover, as we have suggested with respect to voting litigation, democratic proportionality review may reveal problems not only of government action but also of government inaction. Although abortion is not generally understood as a positive right, reproductive rights do not meaningfully exist without a system that provides access to them. As Professor Cary Franklin has explained, "autonomy often depends . . . on an infrastructure of provision."[400] Unlike the U.S. Supreme Court,[401] a number of state courts have already determined that personal autonomy requires at least some public funding of abortion.[402] These cases have tended to focus more on nondiscrimination than on an affirmative requirement of government provision,[403] but some opinions have gone further in recognizing that "the distinction between prohibitions and benefits arbitrarily separates the existence of a right from the realization and enjoyment of that right."[404] Consistent with this observation, democratic proportionality review provides resources for conceptualizing abortion as a right requiring government support, especially when the rights provisions canvassed above are conjoined with provisions that more expressly impose affirmative obligations on state governments. In addition to positive welfare rights, for example, positive health care guarantees may require the government to furnish infrastructure for reproductive rights.[405]

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399. See supra notes 167–170 and accompanying text. For a frequently updated compendium of state abortion laws, see After *Roe* Fell, supra note 389.

400. Franklin, supra note 365, at 338.

401. See Harris v. McRae, 448 U.S. 297, 316–17 (1980) ("[I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of opportunities.").

402. See, e.g., Simat Corp. v. Ariz. Health Care Cost Containment Sys., 56 P.3d 28, 34 (Ariz. 2002); Comm. to Def. Reprod. Rts. v. Myers, 625 P.2d 779, 798–99 (Cal. 1981); Doe v. Maher, 515 A.2d 134, 162 (Conn. Super. Ct. 1986); Moe v. Sec'y of Admin. & Fin., 417 N.E.2d 387, 404 (Mass. 1981); Women of Minn. v. Gomez, 542 N.W.2d 17, 32 (Minn. 1995); Right to Choose v. Byrne, 450 A.2d 925, 937 (N.J. 1982); *N.M. Right to Choose/NARAL*, 975 P.2d at 850, 856; Women's Health Ctr. v. Panepinto, 446 S.E.2d 658, 667 (W. Va. 1993).

403. See, e.g., *Byrne*, 450 A.2d at 937 (holding that the state need not generally fund abortion but "may not jeopardize the health and privacy of poor women by excluding medically necessary abortions from a system providing all other medically necessary care for the indigent").

404. *Myers*, 625 P.2d at 805 (Bird, C.J., concurring).

405. See, e.g., Alaska Const. art. VII, § 4 ("The legislature shall provide for the promotion and protection of public health.").

Finally, the abortion context demonstrates particularly vividly how state constitutionalism is an ongoing, collective enterprise. Especially in states that provide for direct democracy, the people can decide, and have decided, to revisit judicial decisions concerning abortion rights. In Tennessee, for example, the people responded to a ruling protecting abortion rights with a constitutional amendment stating that the constitution does not secure a right to abortion and abortion may be regulated by statute.[406]

More recently, in the face of federal retrenchment, popular mobilization has strengthened state constitutional protection for abortion. In August 2022, Kansas voters rejected a proposed amendment that would have eliminated the state constitutional right to abortion, effectively ratifying the state supreme court's rights-protecting decision.[407] A few months later, Michigan voters got out in front of judicial decisionmaking by adding an express right to "reproductive freedom" to the state constitution.[408] Voters in California and Vermont similarly added express protections for abortion rights in November 2022, even without a threat of imminent rescission of existing constitutional protections.[409]

Such mobilization is not limited to reproductive rights. In recent years, often in response to unfavorable judicial decisions, voters have amended state constitutions to provide for same-day voter registration and

406. See Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1, 25 (Tenn. 2000), superseded by constitutional amendment, Tenn. Const. art. I, § 36 (enacted 2014).

407. See Dylan Lysen, Laura Ziegler & Blaise Mesa, Voters in Kansas Decide to Keep Abortion Legal in the State, Rejecting an Amendment, NPR (Aug. 3, 2022), https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment [https://perma.cc/3AHX-QQ6D] ("[S]upporters of the amendment argued that it was necessary to correct what they say was the Kansas Supreme Court's overreach in striking down some of the state's previous abortion restrictions in 2019.").

408. See Mich. Const. art. I, § 28 (enacted 2022) ("Every individual has a fundamental right to reproductive freedom, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including . . . abortion care . . . .").

409. See Cal. Const. art. I, § 1.1 (enacted 2022) ("The state shall not deny or interfere with an individual's reproductive freedom in their most intimate decisions . . . ."); Vt. Const. ch. I, art. 22 (enacted 2022) ("[A]n individual's right to personal reproductive autonomy . . . shall not be denied or infringed unless justified by a compelling State interest achieved by the least restrictive means.").

no-excuse absentee voting,[410] to raise the minimum wage,[411] to legalize marijuana,[412] to guarantee a right to bear arms,[413] to recognize a right to collectively bargain,[414] and more. These recent initiatives underscore that, although individual rights are never secure without popular support, we should not assume popular majorities will infringe or limit rights; democratic majority rule may enhance individual as well as collective self-determination.[415]

CONCLUSION

As state constitutional rights garner more attention, now is the time to focus on how state adjudication should proceed. This Article seeks to launch that conversation. We have argued that state constitutional adjudication must attend to the distinctive tradition of state constitutional rights. That is a tradition of rights abundance; of crosscutting obligations among the people; and of popular, majoritarian democracy. In full view, it is a rights tradition committed to both individual and collective self-determination.

Making sense of state constitutional rights claims requires an adjudicative framework focused on the states themselves. Methodological lockstepping with federal courts is understandable based on the limited study of and dialogue around state constitutions, but it leads state courts astray. A form of proportionality review tailored to the states better accounts for the state constitutional rights tradition. State courts should carefully discern the rights at issue, attending to the possibility of multiple relevant provisions. They should earnestly evaluate government

410. See 2018 Mich. Legis. Serv. Ref. Meas. 18-3 (Ballot Proposal 18-3) (West) (adopted Nov. 2018) (amending Mich. Const. art. II, § 4). In 2022, at the same time that the people of Michigan made protections for abortion rights more explicit, they also expressly recognized the right to vote as "fundamental" and limited incidental as well as intentional restrictions of the right. See 2022 Mich. Legis. Serv. Ref. Meas. 22-2 (Ballot Proposal 22-2) (West) (adopted Nov. 2022) (amending Mich. Const. art. II, §§ 4, 7); Derek Clinger, Democracy-Related Ballot Measures in 2022—and a Look Ahead, State Democracy Rsch. Initiative (Jan. 6, 2023), https://statedemocracy.law.wisc.edu/explainers/2023/democracy-related-ballot-measures-in-2022-and-a-look-ahead/ [https://perma.cc/CCR3-YUWV] (discussing recent Michigan ballot proposals).

411. See Fla. Const. art. X, § 24 (amended by Ballot Initiative 18-01) (approved Nov. 2020), https://initiativepetitions.elections.myflorida.com/InitiativeForms/Fulltext/Fulltext_1801_EN.pdf [https://perma.cc/B8VR-AEV9] (raising the minimum wage each year until it reaches fifteen dollars per hour in 2026).

412. See Mo. Const. art. XIV, § 2 (enacted by Ballot Proposal 2022-059) (approved Nov. 2022), https://www.sos.mo.gov/cmsimages/Elections/Petitions/2022-059.pdf [https://perma.cc/HH28-94A7] (legalizing recreational marijuana).

413. See S.J. Res. 7, 89th Gen. Assemb. (Iowa 2021) (proposing ballot amendment to state constitution creating a "[r]ight to keep and bear arms") (amendment approved Nov. 2022).

414. See Ill. Const. art. I, § 25 (enacted Nov. 2022 by ballot initiative) ("Employees shall have the fundamental right to organize and to bargain collectively . . . .").

415. See Bulman-Pozen & Seifter, Right to Amend, supra note 22 (manuscript at 14).

justifications and invalidate arbitrary decisions, without assuming that state legislatures represent the popular will and mindful that the people of a state remain sovereign. They should embrace their own participation in state democracy, without the pretense of a countermajoritarian difficulty, and offer public-facing explanations of the balances they strike. None of this requires wholesale departures from existing state case law; the seeds of democratic proportionality review are already planted. The new state constitutional adjudication that develops will have important consequences for contemporary debates on abortion, voting, and more.

ON ALGORITHMIC WAGE DISCRIMINATION

*Veena Dubal**

Recent technological developments related to the extraction and processing of data have given rise to concerns about a reduction of privacy in the workplace. For many low-income and subordinated racial minority workforces in the United States, however, on-the-job data collection and algorithmic decisionmaking systems are having a more profound yet overlooked impact: These technologies are fundamentally altering the experience of labor and undermining economic stability and job mobility. Drawing on a multi-year, first-of-its-kind ethnographic study of organizing on-demand workers, this Article examines the historical rupture in wage calculation, coordination, and distribution arising from the logic of informational capitalism: the use of granular data to produce unpredictable, variable, and personalized hourly pay.

The Article constructs a novel framework rooted in worker on-the-job experiences to understand the ascent of digitalized variable pay practices, or the importation of price discrimination from the consumer context to the labor context—what this Article identifies as algorithmic wage discrimination. Across firms, the opaque practices that constitute algorithmic wage discrimination raise fundamental questions about the changing nature of work and its regulation. What makes payment for labor in platform work fair? How does algorithmic wage discrimination affect the experience of work? And how should the law intervene in this moment of rupture? Algorithmic wage discrimination runs afoul of both longstanding precedent on fairness in wage setting and the spirit of equal pay for equal work laws. For workers, these practices produce unsettling moral expectations about work and remuneration. The Article proposes a nonwaivable restriction on these practices.

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INTRODUCTION

Over the past two decades, technological developments have ushered in extreme levels of workplace monitoring and surveillance across many sectors.[1] These automated systems record and quantify workers' movement or activities, their personal habits and attributes, and even sensitive biometric information about their stress and health levels.[2] Employers then feed amassed datasets on workers' lives into machine learning systems to make hiring determinations, to influence behavior, to increase worker productivity, to intuit potential workplace problems (including worker organizing), and, as this Article highlights, to determine worker pay.[3]

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1. See, e.g., Ifeoma Ajunwa, Kate Crawford & Jason Schultz, Limitless Worker Surveillance, 105 Calif. L. Rev. 735, 738–39 (2017) [hereinafter Ajunwa et al., Limitless Worker Surveillance]; Matthew T. Bodie, The Law of Employee Data: Privacy, Property, Governance, 97 Ind. L.J. 707, 712–17 (2022); Brishen Rogers, The Law and Political Economy of Workplace Technological Change, 55 Harv. C.R.-C.L. L. Rev. 531, 535–36 (2020).

2. See Ifeoma Ajunwa, Kate Crawford & Joel S. Ford, Health and Big Data: An Ethical Framework for Health Information Collection by Corporate Wellness Programs, 44 J.L. Med. & Ethics 474, 474–75, 477–78 (2016) (describing the comprehensive data collection practices and capacities of worker wellness programs).

3. See, e.g., Annette Bernhardt, Linda Kresge & Reem Suleiman, Berkeley Lab. Ctr., Data and Algorithms at Work: The Case for Workers' Technology Rights 6, 15–17 (2021),

To date, policy concerns about growing technological surveillance in the workplace have largely mirrored the apprehensions articulated by consumer advocates. Scholars and advocates have raised concerns about the growing limitations on worker privacy and autonomy, the potential for society-level discrimination to seep into machine learning systems, and a general lack of transparency on workplace rules.[4] For example, in October 2022, the White House Office of Science and Technology Policy released a non-legally-binding handbook identifying five principles that "should guide the design, use, and deployment of automated systems to protect the American public in the age of artificial intelligence."[5] These principles called for automated systems that (1) were safe and effective, (2) protect individuals from discrimination, (3) offer users control over how their data is used, (4) provide notice and explanation that an automated system is being used, and (5) allow users access to a person who can remedy any problems they encounter.[6] The *Blueprint for an AI Bill of Rights* (hereinafter

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https://laborcenter.berkeley.edu/wp-content/uploads/2021/11/Data-and-Algorithms-at-Work.pdf [https://perma.cc/TC3U-458E]. As employment law scholar Matthew Bodie has written in reference the role of data extraction at work under systems of informational capitalism:

> Workers find themselves on the wrong end of this data revolution. They are the producers of data, but the data flows seamlessly from their work and personal experience to corporate repositories. Employers can capture the data, aggregate it into meaningful pools, analyze it, and use it to further productivity. Individual employees cannot tap into that value, nor can independent contractors. They are trapped: the more data they provide, the more powerful their employers become.

Bodie, supra note 1, at 736.

4. See generally Bernhardt et al., supra note 3 (arguing that data-driven technologies harm workers through discrimination and work intensification at the expense of safety, depriving workers of their autonomy and dignity); Ajunwa et al., Limitless Worker Surveillance, supra note 1 ("[T]here has been a shift in focus from collecting personally identifying information, such as health records, to wholly acquiring unprotected and largely unregulated proxies and metadata, such as wellness information, search queries, social media activity, and outputs of predictive 'big data' analytics."); Bodie, supra note 1 ("As the data collected in this new environment has become increasingly individualized, the line between person as individual and person as employee has become significantly blurred."); Rogers, supra note 1 ("[L]abor and employment laws . . . and the broader political economy of work that they help sustain, also encourage employers to use new technologies to exert power over workers."). Labor law scholars Antonio Aloisi and Valerio De Stefano have argued convincingly in a comprehensive review of technology, law, and work that concerns about the supposed "disappearance of work" lost to algorithmic intelligence are less urgent than the myriad challenges raised by the incipient practices of algorithmic management at work. These nascent practices, they argue, have intensified any number of problems including the devaluation of work, the maldistribution of risks and privileges, the health and safety of workers, the assault on dignity, and of course, the destruction of individual and collective worker privacy. Antonio Aloisi & Valerio De Stefano, Your Boss Is an Algorithm: Artificial Intelligence, Platform Work and Labour 9, 23–24, 98–101, 104–05 (2022).

5. White House Off. of Sci. & Tech. Pol'y, Blueprint for an AI Bill of Rights 3 (2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf [https://perma.cc/A62C-TV47].

6. Id. at 5–7.

Blueprint) specified that these enumerated rights extended to "[e]mployment-related systems [such as] . . . workplace algorithms that inform all aspects of the terms and conditions of employment including, but not limited to, *pay or promotion*, hiring or termination algorithms, virtual or augmented reality workplace training programs, and electronic workplace surveillance and management systems."[7]

Under each principle, the *Blueprint* provides "illustrative examples" of the kinds of harms that the principle is meant to address. One such example, used to specify what defines unsafe and ineffective automation in the workplace, involves an unnamed company that has installed AI-powered cameras in their delivery vans to monitor workers' driving habits, ostensibly for "safety reasons." The *Blueprint* states that the system "*incorrectly* penalized drivers when other cars cut them off . . . . As a result, drivers were *incorrectly* ineligible to receive a bonus."[8] Thus, the specific harm identified is a mistaken calculation by an automated variable pay system developed by the company.

What the *Blueprint* does not specify, however, is that the company in question—Amazon—does not directly employ the delivery workers. Rather, the company contracts with Delivery Service Providers (DSPs), small businesses that Amazon helps to establish. In this putative nonemployment arrangement, Amazon does not provide to the DSP drivers workers' compensation, unemployment insurance, health insurance, or the protected right to organize. Nor does it guarantee individual DSPs or their workers minimum wage or overtime compensation.[9] Instead, DSPs receive a variable hourly rate based on fluctuations in demand and routes, along with "bonuses" based on a quantified digital evaluation of on-the-job behavior, including "service, safety, [and] client experience."[10]

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7. Id. at 53 (emphasis added).

8. Id. at 17 (emphasis added) (citing Lauren Kaori Gurley, Amazon's AI Cameras Are Punishing Drivers for Mistakes They Didn't Make, Vice (Sept. 20, 2021), https://www.vice.com/en/article/88npjv/amazons-ai-cameras-are-punishing-drivers-for-mistakes-they-didnt-make [https://perma.cc/HSF4-EG4M]).

9. As economist Brian Callaci explains, since the DSPs legally employ the delivery drivers, the DSPs, rather than Amazon, bear "liability for accidents or workplace safety," and DSP drivers, classified as Amazon's contractors, "do not fall under Amazon's $15 an hour minimum wage." Brian Callaci, Entrepreneurship, Amazon Style, Am. Prospect (Sept. 27, 2021), https://prospect.org/api/content/1923a910-1d7c-11ec-8dbf-1244d5f7c7c6/ [https://perma.cc/AV2H-59YA]. Meanwhile, Amazon's contracts with DSPs "[restrict] the wages the DSP can offer" drivers and mandate that drivers remain nonunion by stipulating that "they serve as at-will employees." Id. If the drivers unionize, "Amazon can terminate the contract and find a new DSP, which is much easier than fighting a union campaign itself." Id.

10. How Are Amazon DSPs Paid?, Route Consultant, https://www.routeconsultant.com/industry-insights/how-are-amazon-dsps-paid [https://perma.cc/684P-WLKB] (last visited Aug. 14, 2023). The scorecards that determine "bonuses" are calculated in constantly changing ways. The DSP scorecards I reviewed include four categories: safety and compliance, reliability, quality, and team. The "scores" for these categories—and for each driver employed by the DSP—are determined algorithmically. See also Peak Delivery Driver, Amazon DSP Scorecard Deep Dive, YouTube, at 1:04–1:58, 2:48–3:10 (Sept. 10, 2021),

DSPs, while completely reliant on Amazon for business, must hire a team of drivers as employees.[11] These Amazon-created and -controlled small businesses rely heavily on their automated "bonuses" to pay for support, repairs, and driver wages.[12] As one DSP owner–worker complained to an investigator, "Amazon uses these [AI surveillance] cameras allegedly to make sure they have a safer driving workforce, but they're actually using them not to pay [us] . . . . They just take our money and expect that to motivate us to figure it out."[13]

Presented with this additional information, we should ask again: What exactly is the harm of this automated system? Is it, as the *Blueprint* states, the algorithm's *mistake*, which prevented the worker from getting his bonus? Or is it the structure of Amazon's payment system, rooted in evasion of employment law, data extraction from labor, and digitalized control?

Amazon's automated control structure and payment mechanisms represent an emergent and undertheorized firm technique arising from the logic of informational capitalism: the use of *algorithmic wage discrimination* to maximize profits and to exert control over worker behavior.[14] "Algorithmic wage discrimination" refers to a practice in which

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https://www.youtube.com/watch?v=-mBOYfBZs9I (on file with the *Columbia Law Review*). The example in the *Blueprint*, for instance, lowered the score enough to undermine the DSP's ability to get a bonus. White House Off. of Sci. & Tech. Pol'y, supra note 5, at 17. By contrast, Amazon is guaranteed the data it wants from the DSPs (they cannot reject the use of cameras, for example)—not just while the DSP is servicing Amazon but also for three years afterward. In addition to using such data to calculate bonuses, Amazon can also use it to terminate contracts, terminate specific "underperforming" workers, and punish DSPs with fees. Josh Eidelson & Matt Day, Drivers Don't Work for Amazon but Company Has Lots of Rules for Them, Det. News (May 5, 2021), https://www.detroitnews.com/story/business/2021/05/05/drivers-dont-work-amazon-but-company-has-lots-rules-them/4955413001/ [https://perma.cc/7REA-NKRU].

11. When a DSP hires other drivers, it may appear more like a company that is legally separate from Amazon. This may protect Amazon from unionization efforts and downstream liability that it may otherwise incur based on allegations that the DSPs are its employees, not contractors. Callaci, supra note 9. It appears FedEx was the first delivery company to use this tactic after redrafting its contracts with drivers in response to Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981 (9th Cir. 2014), the Ninth Circuit decision that held that its drivers were employees, not independent contractors. Rather than changing the drivers' status in response to the decision, FedEx drafted its contracts to make the drivers appear more like independent contractors. V.B. Dubal, Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy, 2017 Wis. L. Rev. 739, 791–92. This included mandating that the drivers purchase more service areas, which in turn made drivers hire others to complete the deliveries. Id.

12. Lauren Kaori Gurley, Amazon's AI Cameras Are Punishing Drivers for Mistakes They Didn't Make, Vice (Sept. 20, 2021), https://www.vice.com/en/article/88npjv/amazons-ai-cameras-are-punishing-drivers-for-mistakes-they-didnt-make [https://perma.cc/HSF4-EG4M].

13. Id. (internal quotation marks omitted) (quoting the owner of a Washington-based Amazon delivery company).

14. "Informational capitalism" or "information capitalism" as a descriptor of the contemporary digital-age world system is generally attributed to sociologist Manuel Castells.

individual workers are paid different hourly wages—calculated with ever-changing formulas using granular data on location, individual behavior, demand, supply, or other factors—for broadly similar work. As a wage-pricing technique, algorithmic wage discrimination encompasses not only digitalized payment for completed work but, critically, digitalized decisions to allocate work, which are significant determinants of hourly wages and levers of firm control. These methods of wage discrimination have been made possible through dramatic changes in cloud computing and machine learning technologies in the last decade.[15]

Though firms have relied upon performance-based variable pay for some time (e.g., the use of bonuses and commission systems to influence worker behavior),[16] my research on the on-demand ride hail industry

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Castells first introduced the term in his three-volume study, *The Information Age*, published between 1996 and 1998. In describing a shift from industrial capitalism to information capitalism, Castells wrote in Volume I, "A technological revolution, centered around information technologies, is reshaping, at accelerated pace, the material basis of society. Economies throughout the world have become globally interdependent, introducing a new form of relationship between economy, state, and society, in a system of variable geometry." Manuel Castells, The Rise of Network Society 1 (2d ed. 2000). In legal scholarship, Julie Cohen uses the term "informational capitalism" to explore the relationships between political, legal, and economic institutions amidst the propertized expansion of data and information exchange. See generally Julie Cohen, Between Truth and Power: The Legal Constructions of Informational Capitalism (2019).

15. Zephyr Teachout has created a useful taxonomy of five different forms of "personalized wages" that have recently emerged in the labor market: (1) extreme Taylorism, in which "[h]igh degrees of surveillance [result in] . . . rewarding productivity"; (2) gamification, in which employers use psychological tools to incentivize task completion; (3) behavioral price discrimination, in which workers get paid more if they make certain lifestyle choices, like exercising, which can be tracked through fitness apps; (4) dynamic labor pricing, which, she argues, is based primarily on demand; and (5) experimentation, in which firms test "assumptions about what will lead to the firm gathering the highest output for the wages it pays." Zephyr Teachout, Algorithmic Personalized Wages, 51 Pol. & Soc'y 436, 437, 442–44 (2023) [hereinafter Teachout, Algorithmic Personalized Wages].

In all these instances, wages are rooted in data extracted from labor. My data indicate the potential to further simplify this taxonomy to two main ways of thinking about algorithmic wage discrimination: (1) wages based on productivity analysis alone (most evident in the employment context), and (2) wages based on productivity, supply, demand, and other personalized data used to minimize labor costs. This second form of algorithmic wage discrimination appears most commonly in on-demand work that treats workers like independent contractors.

16. Nonalgorithmic variable payment systems with transparent payment structures are more familiar to many people. See, e.g., United Farm Workers (@UFWupdates), Twitter (Oct. 15, 2022), https://twitter.com/UFWupdates/status/1577795973476220930 (on file with the *Columbia Law Review*) (showing how California companies use a variable bonus system for some farmers' pay). They are, nonetheless, controversial. Some critics in the human relations and management literature point to variable pay mechanisms as a contributor to income gaps by gender and race. See, e.g., Emilio J. Castilla, Gender, Race, and Meritocracy in Organizational Careers, 13 Am. J. Socio. 1479, 1502–17 (2008) (finding variable salary bias in salary increases and promotions on the basis of gender, race, and nationality). Others suggest variable pay has psychological costs for workers and other unforeseen consequences. See, e.g., Annette Cox, The Outcomes of Variable Pay Systems:

suggests that algorithmic wage discrimination raises a new and distinctive set of concerns. In contrast to more traditional forms of variable pay, algorithmic wage discrimination—whether practiced through Amazon's "bonuses" and scorecards or Uber's work allocation systems, dynamic pricing, and wage incentives—arises from (and may function akin to) the practice of "price discrimination," in which individual consumers are charged as much as a firm determines they may be willing to pay.[17] As a labor management practice, algorithmic wage discrimination allows firms to personalize and differentiate wages for workers in ways unknown to them, paying them to behave in ways that the firm desires, perhaps for as little as the system determines that the workers may be willing to accept.[18] Given the information asymmetry between workers and firms, companies can calculate the exact wage rates necessary to incentivize desired behaviors, while workers can only guess how firms determine their wages.[19]

Tales of Multiple Costs and Unforeseen Consequences, 16 Int'l J. Hum. Res. Mgmt. 1475, 1483–93 (2005) (discussing unexpected costs to both employers and employees resulting from variable salary systems).

17. To date, scholars and analysts who have written about what this Article terms "algorithmic wage discrimination" have predominantly adopted the language of pricing, though they describe wage and not product pricing. For example, in her 2021 Enlund Lecture at DePaul University School of Law, Professor Zephyr Teachout referenced some of these practices as "labor price discrimination." Zephyr Teachout, Professor, Fordham Univ. Sch. of L., Enlund Lecture at DePaul University School of Law (Apr. 15, 2021). Niels van Doorn, in an article analyzing the pay structures of on-demand Deliveroo riders in Berlin, describes "the algorithmic price-setting power of food delivery platforms," which he understands as a "monopsonistic power that is not only market-making but also potentially livelihood-taking." Niels van Doorn, At What Price? Labour Politics and Calculative Power Struggles in On-Demand Food Delivery, 14 Work Org. Lab. & Globalisation, no. 1, 2020, at 136, 138. But adopting the language of "pricing" for wage setting is politically and legally consequential. Since at least the rise of neoliberalism, price controls in the United States (and elsewhere) have been highly disfavored as economic interferences in the "free market," raising conservative critiques of socialism and "planned economies." See Benjamin C. Waterhouse, Lobbying America: The Politics of Business From Nixon to NAFTA 106–23, 132–39 (2013) (describing how American businesses rejected government price setting in the Nixon, Ford, and Carter administrations). Wage controls in the form of minimum-wage and overtime laws, on the other hand, have been contested but culturally naturalized as a necessary (or at least, accepted) part of economic regulation. See Amina Dunn, Most Americans Support a $15 Federal Minimum Wage, Pew Rsch. Ctr. (Apr. 22, 2021), https://www.pewresearch.org/short-reads/2021/04/22/most-americans-support-a-15-federal-minimum-wage/ [https://perma.cc/CX5Z-YX9Z] (surveying support for minimum-wage laws across the United States). In this sense, conceptualizing the digitalized wages received by workers not as firm price determinations but as firm wage determinations is a critical political—and legal—corrective.

18. See infra Part II.

19. See Aaron Shapiro, Dynamic Exploits: Calculative Asymmetries in the On-Demand Economy, 35 New Tech. Work & Emp. 162, 162–63 (2020) [hereinafter Shapiro, Dynamic Exploits: Calculative Asymmetries] (arguing that "independent service providers" for "on-demand service platforms" are workers and not independent contractors because the platforms set wages and "exhibit substantial information asymmetries"). Uber, for its part, has stated that "suggestions that Uber offers variable pricing based on user-profiling is completely unfounded and factually incorrect." Cansu Safak & James Farrar, Worker Info

The *Blueprint* example underscores how algorithmic wage discrimination can be "ineffective" and rife with calculated mistakes that are difficult to ascertain and correct. But algorithmic wage discrimination also creates a labor market in which people who are doing the same work, with the same skill, for the same company, at the same time may receive different hourly pay.[20] Digitally personalized wages are often determined through obscure, complex systems that make it nearly impossible for workers to predict or understand their constantly changing, and frequently declining, compensation.[21]

Drawing on anthropologist Karl Polanyi's notion of *embeddedness*—the idea that social relations are embedded in economic systems[22]—this Article excavate the norms around payment that constitute what one might consider a moral economy of work to help situate this contemporary

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Exch., Managed by Bots: Data-Driven Exploitation in the Gig Economy 26 (2021), https://5b88ae42-7f11-4060-85ff-4724bbfed648.usrfiles.com/ugd/5b88ae_8d720d54443543e2a928267d354acd90.pdf [https://perma.cc/TLV3-R2EE] (internal quotation marks omitted) (quoting Letter from Uber Data Protection and Cybersecurity Team to Cansu Safak (Dec. 3, 2021), https://5b88ae42-7f11-4060-85ff-4724bbfed648.usrfiles.com/ugd/5b88ae_f12953beac7e4fd9b6057375cce212b5.pdf [https://perma.cc/LL6M-KVGV]). We have no way to judge the accuracy of this statement.

Since a draft of this Article was posted online, Uber drivers have adopted the term "algorithmic wage discrimination," testified to how it reflects how they are paid, and documented how they are offered different base pay for the exact same ride when sitting next to each other. See, e.g., The RideShare Guy, The Age of Algorithmic Wage Discrimination for Uber & Lyft Drivers and More?!, YouTube, at 2:16 (Apr. 16, 2023), https://www.youtube.com/watch?v=MfFujB0IY6A (on file with the *Columbia Law Review*); The RideShare Guy, MORE Algorithmic Wage Discrimination?? Show Me The Money Club, YouTube, at 6:25, 1:01:03 (June 20, 2023), https://www.youtube.com/watch?v=8mwzsB41-f4 (on file with the *Columbia Law Review*).

20. See infra Part II.

21. See infra Part II.

22. In 1957, Karl Polanyi wrote,

> Instead of economy being embedded in social relations, social relations are embedded in the economic system. The vital importance of the economic factor to the existence of society precludes any other result. For once the economic system is organized in separate institutions, based on specific motives and conferring a special status, society must be shaped in such a manner as to allow that system to function according to its own laws.

Karl Polanyi, The Great Transformation: The Political and Economic Origins of Our Time 60 (Beacon Press 2001) (1944). One interpretation of this important excerpt, as used in this Article, is that Polanyi was referring to the ways in which society adapts to and reorganizes itself "by demanding new social institutions that can constrain market forces and compensate for market failures." Bob Jessop & Ngai-Ling Sum, Polanyi: Classical Moral Economist or Pioneer Cultural Political Economist?, 44 Östereichische Zeitschrift für Soziologie 153, 158 (2019). This, in essence, is what he calls the "embedded economy": that in order to prevent a "Hobbesian war of all against all," a market society must limit—through law, politics, and morality—the range of legitimate activities of economic actors motivated by material gain. Fred Block, Karl Polanyi and the Writing of *The Great Transformation*, 32 Theory & Soc'y 275, 297 (2003).

rupture in wages.[23] Although the United States–based system of work is largely regulated through contracts and strongly defers to the managerial prerogative,[24] two restrictions on wages have emerged from social and labor movements: minimum-wage laws and antidiscrimination laws. Respectively, these laws set a price floor for the purchase of labor relative to time and prohibit identity-based discrimination in the terms, conditions, and privileges of employment, requiring firms to provide equal pay for equal work.[25] Both sets of wage laws can be understood as forming a core moral foundation for most work regulation in the United States. In turn, certain ideals of fairness have become embedded in cultural and legal expectations about work. Part I examines how recently passed laws in California and Washington State, which specifically legalize algorithmic wage discrimination for certain firms, compare with and destabilize more than a century of legal and social norms around fair pay.

Part II draws on first-of-its-kind, long-term ethnographic research to understand the everyday, grounded experience of workers earning

23. Various disciplines, including political theory, anthropology, and sociology, have explored the notion of "moral economy" in relationship to labor and work as a way to think about and assess various systems of economic distribution and their impacts on everyday life. See, e.g., William Greider, The Soul of Capitalism 39 (2003) ("The logic of capitalism is ingeniously supple and complete, self-sustaining and forward-looking. Except for one large incapacity: As a matter of principle, it cannot take society's interests into account."); James Bernard Murphy, The Moral Economy of Labor 42 (1993) (applying moral reason to the social division of labor and technology); Sharon C. Bolton, Maeve Houlihan & Knut Laaser, Contingent Work and Its Contradictions: Towards a Moral Economy Framework, 111 J. Bus. Ethics 121, 123–124 (2012); Sharon C. Bolton & Knut Laaser, Work, Employment and Society Through the Lens of Moral Economy, 27 Work Emp. & Soc'y 508, 509 (2013) (using a moral economic approach in a sociological inquiry); Marion Fourcade, Philippe Steiner, Wolfgang Streeck & Cornelia Woll, Moral Categories in the Financial Crisis 2 (Max Planck Sciences Po Ctr. on Coping With Instability in Mkt. Societies (MaxPo) Discussion Paper, Working Paper No. 13/1, 2013), https://www.econstor.eu/bitstream/10419/104613/1/757489362.pdf [https://perma.cc/4ZJ4-QYC4] (analyzing the reconfiguration of the moral economy surrounding income inequality in France following the 2008 financial crisis).

24. See Gali Racabi, Abolish the Employer Prerogative, Unleash Work Law, 43 Berkeley J. Emp. & Lab. L. 79, 82 (2022) ("The employer [or managerial] prerogative is the default governance rule in the workplace . . . ."). This legal deference to the managerial prerogative is controversial in the scholarly literature. See, e.g., id. at 138 ("[P]erhaps the employer prerogative's most sinister effect is convincing work law movements, scholars, and activists that it is a state of nature, a necessary theoretical benchmark for both pragmatic and normative discussions of work law. It is not.").

25. At the federal level, the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2018), establishes a national floor for minimum-wage and overtime. Id. at §§ 203, 206, 207. The central federal laws that prohibit wage discrimination based on protected identities or classes are the Equal Pay Act, 29 U.S.C. § 206(d) (requiring that men and women in the same workplace be given equal pay for equal work); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2018) (prohibiting employment discrimination based on race, color, religion, sex, and national origin); the Age Discrimination in Employment Act, 29 U.S.C. §§ 623, 631 (prohibiting employment discrimination based on age for workers older than forty); and the Americans with Disabilities Act, 42 U.S.C. § 12112 (prohibiting employment discrimination based on disability).

through and experiencing algorithmic wage discrimination. Specifically, Part II analyzes the experiences of on-demand ride-hail drivers in California before and after the passage of an important industry-initiated law, Proposition 22, which legalized this form of variable pay. This Part illuminates workers' experiences under compensation systems that make it difficult for them to predict and ascertain their hourly wages. Then, Part II examines the practice of algorithmic wage discrimination in relationship to workers' on-the-job meaning making and their moral interpretations of their wage experiences.[26] Though many drivers are attracted to on-demand work because they long to be free from the rigid scheduling structures of the Fordist work model,[27] they still largely conceptualize their labor through the lens of that model's payment structure: the hourly wage.[28] Workers find that, in contrast to more standard wage dynamics, being directed by and paid through an app involves opacity, deception, and manipulation.[29] Those who are most

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26. The social construction of meaning is a central concern of sociologists and anthropologists who seek to account for the variability and diversity of human understandings and experiences. Compare Michèle Lamont, Meaning-Making in Cultural Sociology: Broadening Our Agenda, 29 Contemp. Socio. 602, 603–05 (2000) (offering a detailed taxonomy of sociological literature that takes up how people make sense of their worlds through their experiences of race, ethnicity, immigration, and inequality), with Richard A. Posner, Economic Analysis of Law 3–4 (9th ed. 2014) (describing rationality as grounded within self-interested economic maximization of scarce resources).

27. Philosopher Antonio Gramsci used the term "Fordism" to refer to an emergent system of material production—routine, intensified labor—under the regime of Ford. But due in large part to corresponding political and economic forces, namely the laws and policies passed in response to upheaval during the Great Depression, the Fordist work structure in much of the mid-twentieth century often corresponded to an hourly (living) wage and a forty-hour work week. See Antonio Gramsci, Americanism and Fordism, *in* Selections From the Prison Notebooks of Antonio Gramsci 561, 561–63 (Quentin Hoare & Geoffrey Nowell Smith eds. and trans., 1999). For more on the demise of Fordism, see generally Luc Boltanski & Ève Chiapello, The New Spirit of Capitalism (2007).

28. See Michael Dunn, Making Gigs Work: Digital Platforms, Job Quality and Worker Motivations, 35 New Tech. Work & Emp. 232, 238–39, 241–42 (2020) (discussing the motivations of gig workers, including flexible work hours, despite often needing to maintain the same work structures as traditional employment). It should be noted that nothing about employment status necessitates an inflexible work schedule. This is a business decision associated with, not mandated by, employment. For a discussion of the history of businesses contesting the legal rules defining employment status to avoid legal responsibility for basic employment safeguards, see Veena B. Dubal, Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities, 105 Calif. L. Rev. 65, 86–88 (2017) [hereinafter Dubal, Wage Slave or Entrepreneur?]. Notably, the passage of California's AB5 law made it much harder to misclassify workers in this way. See Hannah Johnston, Ozlem Ergun, Juliet Schor & Lidong Chen, Is Employment Status Compatible With the On-Demand Platform Economy? Evidence From a Natural Experiment 6 (2021) (unpublished report) (on file with the *Columbia Law Review*). When at least one labor platform company, called Bring Your Package, went on to hire their previously contracted workers in anticipation of AB5 restrictions, this transition did not precipitate any reduction in workers' desired scheduling flexibility nor in firm efficiency. See id. at 14, 24, 26–27.

29. These findings comport with research findings from across sociology, communications studies, and media studies literatures on algorithmic management. See,

economically dependent on income from on-demand work frequently describe their experience of algorithmic wage discrimination through the lens of gambling.[30] As a normative matter, this Article contends that workers laboring for firms (especially large, well-financed ones like Uber, Lyft, and Amazon) should not be subject to the kind of risk and uncertainty associated with gambling as a condition of their work. In addition to the salient constraints on autonomy and threats to privacy that accompany the rise of on-the-job data collection, algorithmic wage discrimination poses significant problems for worker mobility, worker security, and worker collectivity, both on the job and outside of it. Because the on-demand workforces that are remunerated through algorithmic wage discrimination are primarily made up of immigrants and racial minority workers, these harmful economic impacts are also necessarily racialized.[31]

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e.g., Antonio Aloisi, Platform Work in Europe: Lessons Learned, Legal Developments and Challenges Ahead, 13 Euro. Lab. L.J. 4, 10–11 (2022) (discussing how platform management tends to unfold in misleading, opaque ways); Rafael Grohmann, Gabriel Pereira, Abel Guerra, Ludmila Costhek Abilio, Bruno Moreschi & Amanda Jurno, Platform Scams: Brazilian Workers' Experiences of Dishonest and Uncertain Algorithmic Management, 24 New Media & Soc'y 1611, 1614 tbl.1 (2022) (presenting case studies of the types of dishonesty and deception that workers experience in platform work); Elke Schüßler, Will Attwood-Charles, Stefan Kirchner & Juliet B. Schor, Between Mutuality, Autonomy and Domination: Rethinking Digital Platforms as Contested Relational Structures, 19 Socio-Econ. Rev. 1217, 1224 (2021) (outlining common theories of the position of power that platforms hold over their workers); Steven Vallas & Juliet B. Schor, What Do Platforms Do? Understanding the Gig Economy, 46 Ann. Rev. Socio. 273, 279–81 (2020) (conducting a literature review of the predominant sociological views of platform work, which often conceptualize this work as an extension of existing neoliberal models of work without any of the worker protections); Daniel Susser, Beate Roessler & Helen Nissenbaum, Technology, Autonomy, and Manipulation, 8 Internet Pol'y Rev., no. 2, 2019, at 1, 8 (explaining how gig economy services covertly influence an individual's decision-making through "online manipulation").

30. See infra section II.B.

31. In the United States, such work is conducted primarily by immigrants and subordinated minorities. Lyft estimates that 73% of their U.S. workforce identify as racial minorities. Lyft, Economic Impact Report 5 (2022), https://s27.q4cdn.com/263799617/files/doc_downloads/esg/Lyft-Economic-Impact-Report-2022.pdf [https://perma.cc/8BUG-NGAV]. One study estimates that in the San Francisco Bay Area in 2019, immigrants and people of color composed 78% of Uber and Lyft drivers, most of whom relied on these jobs as their primary source of income. Chris Benner, Erin Johansson, Kung Feng & Hays Witt, UC Santa Cruz Inst. for Soc. Transformation, On-Demand and On-The-Edge: Ride-Hailing and Delivery Workers in San Francisco, Executive Summary 2 (2020), https://transform.ucsc.edu/wp-content/uploads/2020/05/OnDemandOntheEdge_ExecSum.pdf [https://perma.cc/DFH8-7VSY]. In addition to the nationwide Lyft data, we know that in New York City, 90% of ride-hail drivers are immigrants, and in Seattle, ride-hail drivers are 50% Black and "nearly three times more likely to be immigrants than all Kings County workers." James A. Parrott & Michael Reich, Ctr. on Wage & Emp. Dynamics & New Sch. Ctr. for N.Y.C. Affs., A Minimum Compensation Standard for Seattle TNC Drivers 23 (2020), https://irle.berkeley.edu/files/2020/07/Parrott-Reich-Seattle-Report_July-2020.pdf [https://perma.cc/QA9F-FV47] [hereinafter Parrott & Reich, Minimum Compensation Standard]; Ginia Bellafante, Uber and the False Hopes of the Sharing Economy, N.Y. Times

Finally, Part III explores how workers and worker advocates have used existing data privacy laws and cooperative frameworks to address or at least to minimize the harms of algorithmic wage discrimination. In addition to mobilizing against violations of minimum-wage, overtime, and vehicle reimbursement laws, workers in California—drawing on the knowledge and experience of their coworkers in the United Kingdom—have developed a sophisticated understanding of the laws governing data at work.[32] In the United Kingdom, a self-organized group of drivers, the App Drivers & Couriers Union, has not only successfully sued Uber to establish their worker status[33] but also used the General Data Protection Regulation (GDPR) to lay claim to a set of positive rights concerning the data and algorithms that determine their pay.[34] As a GDPR-like law went into effect in California in 2023, drivers there are positioned to do the same.[35] Other workers in both the United States and Europe have responded by creating "data cooperatives" to fashion some transparency around the data extracted from their labor, to attempt to understand their wages, and to assert ownership over the data they collect at work.[36] In addition to examining both approaches to addressing algorithmic wage discrimination, this Article argues that the constantly changing nature of machine learning technologies and the asymmetrical power dynamics of the digitalized workplace minimize the impact of these attempts at transparency and may not mitigate the objective or subjective harms of algorithmic wage discrimination. Considering the potential for this form of discrimination to spread into other sectors of work, this Article proposes instead an approach that addresses the harms directly: a narrowly structured, nonwaivable peremptory ban on the practice.

While this Article is focused on algorithmic wage discrimination as a labor management practice in "on-demand" or "gig work" sectors, where

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(Aug. 9, 2018), https://www.nytimes.com/2018/08/09/nyregion/uber-nyc-vote-drivers-ride-sharing.html (on file with the *Columbia Law Review*).

32. See infra Part III.

33. Kate Duffy & Theo Golden, Uber Just Lost a Major Legal Battle Over Whether Its UK Drivers Count as Workers and Are Entitled to Minimum Wage, Bus. Insider (Feb. 19, 2021), https://www.businessinsider.com/uber-driver-lost-uk-legal-battle-court-worker-rights-employment-2021-2 [https://perma.cc/CT27-K2ZP].

34. Jeffrey Brown, In New European Lawsuit, Uber Drivers Claim Company's Algorithm Fired Them, Geo. L. Tech. Rev. Legal Impressions (Nov. 2020), https://georgetownlawtechreview.org/in-new-european-lawsuit-uber-drivers-claim-companys-algorithm-fired-them/GLTR-11-2020/ [https://perma.cc/887P-RET4] ("The GDPR . . . imposes obligations on companies which collect personal information if that data is related to EU consumers, regardless of the consumer's physical location in the world. Under Article 22, individuals have 'the right not to be subject to a decision based solely on automated processing.'" (quoting Council Regulation 2016/679, art. 22, 2016 O.J. (L 119) 1 (EU))).

35. Cal. Civ. Code § 1798.100 (2023) (imposing limits on businesses' collection of consumer personal information and requiring notice of the purposes behind data collection).

36. See infra section III.B.

workers are commonly treated as "independent contractors" without protections, its significance is not limited to that domain. So long as this practice does not run afoul of minimum-wage or antidiscrimination laws, nothing in the laws of work makes this form of digitalized variable pay illegal.[37] As Professor Zephyr Teachout argues, "Uber drivers' experiences should be understood not as a unique feature of contract work, but as a preview of a new form of wage setting for large employers . . . ."[38] The core motivations of labor platform firms to adopt algorithmic wage discrimination—labor control and wage uncertainty—apply to many other forms of work. Indeed, extant evidence suggests that algorithmic wage discrimination has already seeped into the healthcare and engineering sectors, impacting how porters, nurses, and nurse practitioners are paid.[39] If left unaddressed, the practice will continue to be normalized in other employment sectors, including retail, restaurant, and computer science, producing new cultural norms around compensation for low-wage work.[40]

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37. See supra note 25. Antitrust laws, however, are a more promising way to address these practices when and if workers are classified as independent contractors. Part III discusses a California lawsuit filed in 2022 by Rideshare Drivers United workers against Uber alleging that the company's payment structures amount to price fixing and that it is violating state antifraud laws.

38. See Teachout, Algorithmic Personalized Wages, supra note 15, at 437.

39. For example, a company that brands itself "Uber for Hospitals" has developed AI staffing software for hospitals. This software uses "smart technology" to allocate work tasks and to judge the performance of porters, nurses, and nurse practitioners. See Nicky Godding, Oxford Tech Raises £9 Million for 'Uber for Hospitals' AI Platform, Bus. Mag. (May 21, 2020), https://thebusinessmagazine.co.uk/technology-innovation/oxford-tech-raises-9-million-for-uber-for-hospitals-ai-platform/ [https://perma.cc/8593-M9U7] ("Hospitals can use [this technology] to assign tasks to healthcare teams based on their location. . . . This helps to ensure . . . full visibility of vulnerable patient movement between departments, and connects porters directly with staff . . . ."). The technology company's "performance analysis" may then be used to determine the pay for these healthcare workers. Id.

IBM Japan is also using digital surveillance systems to help set wages for their workers. In 2019, the company introduced human relations software created by Watson to use as a "compensation advisor." The Japan Metal, Manufacturing, Information and Telecommunication Workers' Union (JMITU), which represents IBM Japan workers, requested disclosure of the data the Watson AI acquired and used, an explanation for how it was evaluating workers, and how these evaluations were involved in the wage-setting process. IBM Japan refused to disclose the information. JMITU subsequently lodged a complaint with the Tokyo Labor Relations Commission. The union argues that the software is being used to unfairly target union members. According to one report, "[i]n awarding summer bonuses in June 2019, the individual performance rate assessed by the company was only 63.6% on average for union members, compared to an average of 100% for all [other] employees. In addition, an exceptional 0% assessment was made for many union members." Hozumi Masashi (ほづみ まさし), AIによる賃金査定にどう向き合うか: 日本IBM事件(不当労働行為救済申立) の報告 [How to Face AI-Based Wage Assessments: Report on the IBM Japan Case (Unfair Labor Practice Relief Petition)], 338 季刊 労· 働者の権利 [Worker Rights Quarterly], no. 10, 2020, at 101, 102.

40. See, e.g., Min Kyung Lee, Daniel Kusbit, Evan Metsky & Laura Dabbish, Working With Machines: The Impact of Algorithmic and Data-Driven Management on Workers, *in* CHI 15: Proceedings of the 33rd Annual CHI Conference on Human Factors in Computing Systems 1603, 1603–04 (2015) (discussing how algorithms used across industries can

The on-demand sector thus serves as an important and portentous site of forthcoming conflict over longstanding moral and political ideas about work and wages.

I. WAGE LAWS IN RELATION TO MORAL ECONOMIES OF WORK

Under the regime of private sector at-will employment in the United States, contracts regulate a large, complex economy. When contracts are silent—particularly around scheduling and payment decisions—a general judicial deference to the managerial prerogative has reigned.[41] Wage-regulation laws are important exceptions. Both minimum-wage laws and antidiscrimination statutes reflect and have contributed to the legal consensus around what constitutes a moral economy of work regarding compensation for labor. "Moral economy," here, refers to an understanding of economic activities that "accounts for class-informed frameworks involving traditions, valuations and expectations."[42] Moral economy, as a theoretical and empirical focus, is a useful way to understand how class relations and resultant inequalities have been negotiated through law and to distinguish the values embodied in the prevailing legal frameworks. This Part argues that wage-related laws, passed in response to social and labor movements, have served to address and legitimize concerns about certain kinds of distributive injustices—concerns that the practice of algorithmic wage discrimination raises anew. In general, minimum-wage laws have created cultural and legal expectations that employers will compensate work at or above a particular wage floor, giving rise to agreement that payment for work should be both fair and predictable.[43] For their part, antidiscrimination laws have created

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produce new norms of allocation of, evaluation of, and compensation for work). Companies across the world use wage algorithms in both contracting and permanent employment settings to incentivize certain behaviors. Technology capitalists have foreshadowed its growth. See, e.g., Shawn Carolan, Opinion, What Proposition 22 Now Makes Possible, The Info. (Nov. 10, 2020), https://www.theinformation.com/articles/what-proposition-22-now-makes-possible (on file with the *Columbia Law Review*) (predicting increased venture capitalist investment in "all sorts of industries" after the passage of Proposition 22). As Tarleton Gillespie has warned regarding the power of algorithms, "[t]here is a case to be made that the working logics of these algorithms not only shape user practices, but also lead users to internalize their norms and priorities." Tarleton Gillespie, The Relevance of Algorithms, *in* Media Technologies: Essays on Communication, Materiality, and Society 167, 187 (Tarleton Gillespie, Pablo J. Boczkowski & Kirsten A. Foot eds., 2014).

41. See Racabi, supra note 24, at 82–83 (discussing employer prerogative as the "default governance rule in the workplace").

42. Jaime Palomera & Theodora Vetta, Moral Economy: Rethinking a Radical Concept, 16 Anthropological Theory 413, 415 (2016).

43. As an illustration, at jobs where employees customarily receive more than $30 in tips per month, federal law requires that an employer pay the tipped minimum wage of "$2.13 [per hour] in direct wages if that amount combined with the tips received at least equals the federal minimum wage. If the employee's tips combined with [those] direct wages . . . do not equal the federal minimum hourly wage, the employer must make up the difference." Tips, DOL, https://www.dol.gov/general/topic/wages/wagestips [https://

the expectation that individuals will not be paid differently because of their protected status—a cultural expectation of or aspiration toward equality of payment for equal work.[44]

Algorithmic wage discrimination—which personalizes wages to specific workers and moments—is not addressed by any such laws. This gap gives rise to two outcomes that conflict with existing legal and cultural wage norms. First, different workers can earn vastly different amounts for substantially similar work, making payment unequal. And second, the same worker can earn vastly different amounts in different moments, making wages highly unpredictable. In these instances, wages can be so low as to fall well below what legislatures have determined to be the lowest allowable minimum hourly compensation. How can we understand these earnings outcomes within and in relation to the moral economy of work that has developed through a century of wage regulations?

In Polanyi's terms, algorithmic wage discrimination is a "disembedding phenomenon"—a practice that eschews existing norms around social, economic, and political relations between firms and their workers.[45] It is, in essence, an economic practice—even an economic project—that is changing social imaginaries as to the kinds of compensation practices that are considered normal, acceptable, and fair. Because, to date, most people who endure the unpredictable, low, and variable pay associated with algorithmic wage discrimination are immigrants and subordinated racial minorities,[46] the practice may also exacerbate existing racialized economic inequalities and, for these populations, impede the possibility of economic security and mobility through work.

This Article's primary objection to this practice is normative—that is, there is good reason to reject the form of wage setting it imposes on workers—but the Article's critique is rooted in a historical analysis of labor practices and labor laws, particularly the values and customs that have guided wage regulation in the United States since industrialization. Before this Article turns to that analysis, however, this Part will first describe how two state laws—one passed through the initiative process and the other

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perma.cc/X6KU-NGBK] (last visited Aug. 14, 2023). Because employers often fail to comply with the law and make up the difference when tips are not sufficient to meet the minimum wage, seven states (Alaska, California, Minnesota, Montana, Nevada, Oregon, and Washington) require a full minimum wage for all workers. See Kate Bahn, Enacting a Minimum Wage Is on the Ballot in Two Cities. Here's What the Research Says, Wash. Ctr. for Equitable Growth (Nov. 4, 2022), https://equitablegrowth.org/enacting-a-minimum-wage-for-tipped-workers-is-on-the-ballot-in-two-u-s-cities-heres-what-the-research-says/ [https://perma.cc/LR2A-C4KH]; Minimum Wages for Tipped Employees, DOL, https://www.dol.gov/agencies/whd/state/minimum-wage/tipped [https://perma.cc/J7QX-E4N9] (last visited Aug. 14, 2023). Thus, while tipped workers' earnings are unpredictable, their wages are still subject by law to an hourly minimum-wage floor.

44. See infra section I.C.

45. See Polanyi, supra note 22, at 60.

46. See supra note 31.

through a state legislature—specifically legalized algorithmic wage discrimination.

A. *The Legalization of Algorithmic Wage Discrimination*

In 2020, amid the COVID-19 pandemic and presidential debates, a scholarly dispute about worker wages made its way to the *New York Times*. The newspaper's labor reporter, Noam Scheiber, wrote that the most contested question about the gig economy is not the employment status of its workers but exactly how much gig workers make.[47] In the lead-up to legislative battles in California and Washington State over the employment status of ride-hail drivers, Uber shared select data with historian Louis Hyman and several Cornell economists known for their association with Democratic administrations.[48] Hyman's research, paid for by Uber and later touted by Uber CEO Dara Khosrowshahi, found that a typical Uber driver in Seattle made about $23 an hour; 92% of workers earned above the local minimum wage, which, in 2020, was $16.39 for large employers.[49] But an alternative analysis using similar data conducted by labor economists James Parrott and Michael Reich and commissioned by the City of Seattle arrived at a very different number—$9.74 per hour—and found that the majority of drivers earned far less than the city's minimum wage.[50] The difference between the two figures turned largely on how the groups calculated overhead costs for workers.[51] In the Hyman-Uber

47. Noam Scheiber, When Scholars Collaborate With Tech Companies, How Reliable Are the Findings?, N.Y. Times (July 12, 2020), https://www.nytimes.com/2020/07/12/business/economy/uber-lyft-drivers-wages.html (on file with the *Columbia Law Review*) (last updated Nov. 4, 2021).

48. See id.

49. Louis Hyman, Erica L. Groshen, Adam Seth Litwin, Martin T. Wells, Kwelina P. Thompson & Kyrylo Chernyshov, Cornell Univ., Platform Driving in Seattle 10 (2020), https://ecommons.cornell.edu/bitstream/handle/1813/74305/Cornell_Seattle_Uber_Lyft_Project_Report____Final_Version__JDD_accessibility_edits__7_14_2020.pdf [https://perma.cc/6XCT-74FW]. Note that Uber and Lyft covered the costs of the $120,000 study. Id. at 20. Also, in late 2022, Uber whistleblower Mark MacGann testified before the European Parliament that, during his time at Uber, the company paid for studies providing skewed datasets. Gig Economy Project—Uber Whistleblower Mark MacGann's Full Statement to the European Parliament, Brave New Europe (Oct. 25, 2022), https://braveneweurope.com/uber-whistleblower-mark-macganns-full-statement-to-the-european-parliament [https://perma.cc/KCR3-U46U] ("While at Uber, we paid academics to use skewed data sets to produce numbers that favoured Uber's position. Data that would show high earnings because it wouldn't take account of wait times. Data that would show drivers wanted to be independent, but based on carefully designed driver surveys.").

50. See Parrott & Reich, Minimum Compensation Standard, supra note 31, at 55, 59 (noting "$9.73 as net pay" and finding that "only app-reported earnings from the survey at the 90th percentile rise above the Seattle minimum wage.").

51. See James Parrott & Michael Reich, Ctr. on Wage & Emp. Dynamics & Inst. for Rsch. on Lab. & Emp., Comparison of Two Seattle TNC Driver Studies 2–3 (2020), https://irle.berkeley.edu/files/2020/07/Comparison-of-two-Seattle-studies.pdf [https://perma.cc/N9RP-MCYX] [hereinafter Parrott & Reich, Two Seattle Studies] ("The Parrott- Reich study recognizes the full array of expenses borne by drivers seeking a living

analysis, Uber insisted that the investigators not include costs associated with the vehicle—which the firm claims are incidental to the work.[52] By contrast, economists Parrott and Reich asserted that, because workers often purchase cars (and are even induced to do so by the companies[53]) and must maintain their vehicles to labor (based on requirements set forth by Uber),[54] those costs should be included.[55]

Notably absent in the coverage of this debate, however, was that *both* studies found that *some* workers earned well under the minimum wage,[56] that workers who performed substantially similar work received dramatically different wages, and that the wages that an individual worker would receive were generally impossible to precisely ascertain or predict.[57] Even over the span of just a few days, individual workers made dramatically

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from driving, whereas the Uber-Lyft-Hyman excludes numerous expenses by taking a minimalist 'marginal' perspective . . . .").

52. See id. at 2.

53. In 2017, the FTC accused Uber of both exaggerating earnings claims and misleading workers with claims about the terms of the vehicle loans they provided or facilitated. See Press Release, FTC, Uber Agrees to Pay $20 Million to Settle FTC Charges that It Recruited Prospective Drivers With Exaggerated Earnings Claims (Jan. 19, 2017), https://www.ftc.gov/news-events/news/press-releases/2017/01/uber-agrees-pay-20-million-settle-ftc-charges-it-recruited-prospective-drivers-exaggerated-earnings [https://perma.cc/M77X-VM8C]; Rideshare Professor, Thank You Alissa Orlando Former Uber Employee. Whistleblower Exposing Disgusting Uber & Lyft Tactics, YouTube, at 0:21 (Sept. 22, 2020), https://www.youtube.com/watch?v=SfxUKvEa-os (on file with the *Columbia Law Review*) ("When I was at Uber, we encouraged drivers to take out three-year car loans, knowing we were going to cut prices by 35%. . . . [W]e knew we were encouraging drivers to take out debt they couldn't service without 70-plus-hour work weeks." (quoting tweet posted by Alissa Orlando (@AlissaOrlando))).

54. E.g., Vehicle Requirements: New York City, Uber, https://www.uber.com/us/en/drive/new-york/vehicle-requirements/ (on file with the *Columbia Law Review*) (last visited Aug. 14, 2023).

55. Parrott & Reich, Two Seattle Studies, supra note 51, at 2–3 ("By contrast, the Parrott-Reich study includes all costs associated with driving (fixed costs) . . . . Since most trips are completed by full-time drivers, whose primary use of the vehicle is for TNC purposes, it makes little sense to exclude the bulk of expenses associated with driving."); see also Gig Econ. Rschers. United, Open Letter and Principles for Ethical Research on the Gig Economy, Medium (July 30, 2020), https://medium.com/@gigeconomyresearchers united/open-letter-and-principles-for-ethical-research-on-the-gig-economy-3cd27924cc08 [https://perma.cc/C2G4-LG4M] (arguing that "[c]osts borne by workers include those directly related to driving and to health of workers").

56. Compare Hyman et al., supra note 49, at 1 (finding that "many drivers earn below the minimum wage"), with Parrott & Reich, Minimum Compensation Standard, supra note 31, at 55 (finding that "[o]nly app-reported earnings from the survey at the 90th percentile rise above the Seattle minimum wage").

57. Compare Hyman et al., supra note 49, at 5 ("In a normal service economy job, at Starbucks, Wal-Mart or McDonald's, the variation in worker earnings is very low. For platform drivers, the opposite is true."), with Parrott & Reich, Minimum Compensation Standard, supra note 31, at 37 (referring to the "considerable variation" in the individual driver earnings data).

different amounts of money for the same amount of work.[58] In my own long-term research among on-demand drivers, I found that, retrospectively, many workers are not sure how much money they made—or in some cases, lost.[59] For firms, this uncertainty is a way to obscure the harms of algorithmic wage discrimination. But, as discussed in Part II, for workers, this uncertainty is itself a harm.

On-demand labor platform companies adopted algorithmic wage discrimination, a highly personalized and variable form of compensation, to solve a particular problem that accompanies the (mis)classification of their workers as independent contractors. Since drivers are not treated as employees of the firm and the primary legal indicium of employment status is control the hiring entity exerts over the means and manner of work, firms often do not directly order workers as to where they must go and when they must go there, which would be the simplest way to calibrate supply and demand.[60] Instead, the firms use data extracted from workers' labor and fed into automated tools to incentivize temporal and spatial movement.[61] In other words, the companies use algorithmic wage discrimination to direct workers' behaviors without explicitly directing them—and to solve the problem of meeting demand.

Companies like Uber refer to some of the mechanisms by which they determine driver pay as "dynamic pricing," explicitly drawing a connection to the practice of price discrimination.[62] This latter practice

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58. See Parrott & Reich, Minimum Compensation Standard, supra note 31, at 36–40 & exh.25 (depicting a variation of over $20 between the fifth and ninety-fifth percentiles for hourly driver earnings reported during the week of December 2–8).

59. See, e.g., Research Assistant Justin Donner's Fieldnotes, San Francisco (Apr. 8, 2016) (on file with author).

60. See Dubal, Wage Slave or Entrepreneur?, supra note 28, at 90. See generally V.B. Dubal, The Drive to Precarity: A Political History of Work, Regulation, & Labor Advocacy in San Francisco's Taxi & Uber Economies, 38 Berkeley J. Emp. & Lab. L. 73 (2017) (discussing the growth of worker precarity in the United States resulting from differentiation between "employees" and "independent contractors" through the lens of the San Francisco chauffeur industry).

61. See Safak & Farrar, supra note 19, at 25 (discussing how Uber incentivizes employees to meet "performance goals").

62. See, e.g., Aaron Shapiro, Media, Inequality & Change Ctr., Dynamic Exploits: The Science of Worker Control in the On-Demand Economy 8 (2019), https://www.asc.upenn.edu/sites/default/files/2020-11/DynamicExploits_Final1.pdf [https://perma.cc/UH2G-R3QU] [hereinafter Shapiro, Dynamic Exploits: Worker Control] ("Dynamic pricing (also called 'surge,' 'demand,' or 'time-based pricing') is the most commonly used technique to influence worker decision-making. Dynamic pricing involves the manipulation of a product or service's commercial value based on perceived changes in market conditions."); Jessica Phillips, How Uber's Dynamic Pricing Model Works, Uber Blog (Jan. 21, 2019), https://www.uber.com/en-GB/blog/uber-dynamic-pricing/ [https://perma.cc/7J69-7LU4] (explaining how Uber's "dynamic pricing" works for consumers). In 2022, in a variety of jurisdictions, including California, Uber began to use "upfront pricing" to determine drivers' base pay. Rather than a rate card that showed workers how much they earned per mile, per minute, the company created an opaque system that offered workers a variable base payment for particular rides. For more on upfront pricing and the shift, see generally

typically involves segmenting consumers by their willingness to pay rather than charging a flat price. Coupons, student discounts, and bulk purchases are some of the most common forms of price discrimination. As these examples make clear, price discrimination long predates algorithmic computing.[63] But individualized data collection and machine learning makes the practice much more powerful and profitable for companies.[64] As Andrew Pole, a statistician for Target, explained to the *New York Times*, companies like Target use data algorithms to keep track of customer behavior and shopping habits in order to more efficiently market to them.[65] While price discrimination is illegal if it is intentionally based on race or gender,[66] sociologists have for many decades found that poor people and people of color often pay more for goods and services.[67] More recent research suggests that consumer price discrimination in hospital

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Yujie Zhou, Five Claims From Uber's Rosy 2022 Recap, Fact-Checked, Mission Local (Jan. 19, 2023), https://missionlocal.org/2023/01/five-claims-uber-2022-recap-fact-checked/ [https://perma.cc/HQV6-F7JR].

63. See, e.g., Alan Kaplan & Daniel O'Neill, NEJM Catalyst, Hospital Price Discrimination Is Deepening Racial Health Inequity 2–3 (2020), https://catalyst.nejm.org/doi/pdf/10.1056/CAT.20.0593 [https://perma.cc/EE5X-HF2G] (explaining that private health plans have covered increasingly higher prices since the 1990s, which contributes to the quality health services' inaccessibility to Medicaid recipients); How Invidious Discrimination Works and Hurts: An Examination of Lending Discrimination and Its Long-Term Economic Impacts on Borrowers of Color: Virtual Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs., 117th Cong. app. at 55 (2021) (prepared statement of Andre M. Perry, Senior Fellow, Metro. Pol'y Program, Brookings Inst.) ("Sociologists Junia Howell and Elizabeth Korver-Glenn found homes in metropolitan areas increased, on average, by $68,000 from 1980 to 2015 after adjusting for inflation. But homeowners in disproportionately Black and Latino or Hispanic neighborhoods are gaining wealth at around half the speed as homeowners in disproportionately white neighborhoods.").

64. See Shapiro, Dynamic Exploits: Worker Control, supra note 62, at 8 ("[Individualized data] can then be used to modulate prices according to statistical forecasts of supply and demand and to maximize profit.").

65. Charles Duhigg, How Companies Learn Your Secrets, N.Y. Times Mag. (Feb. 16, 2012), https://www.nytimes.com/2012/02/19/magazine/shopping-habits.html (on file with the *Columbia Law Review*) ("Almost every major retailer, from grocery chains to investment banks to the U.S. Postal Service, has a 'predictive analytics' department devoted to understanding not just consumers' shopping habits but also their personal habits, so as to more efficiently market to them."); see also Rishi Gummakonda, The Ugliness of Dynamic Pricing, MyPermissions: Blog (July 30, 2017), https://mypermissions.com/blog/2017/07/30/the-ugliness-of-dynamic-pricing/ [https://perma.cc/M8WA-CWPX] (quoting a CEO corroborating how companies can use data to change pricing based on a shopper's geography and shopping habits).

66. 42 U.S.C. § 2000a (2018).

67. See, e.g., Howard Kunreuther, Why the Poor May Pay More for Food: Theoretical and Empirical Evidence, 46 J. Bus. 368, 368 (1973) ("To the extent that poor people shop at these smaller stores, they pay higher prices for the same quality food than if they had purchased their groceries at a chain store."); Robert Tempest Masson, Costs of Search and Racial Price Discrimination, 11 W. Econ. J., 167, 167 (1973) ("There is some evidence that [B]lack[] [people] pay more for consumer durables than do white[] [people].").

services,[68] housing,[69] and ride-hail sectors exacerbates racial inequities, even absent intentional discriminatory profiling.[70]

In 2017, Uber pulled back the curtain somewhat on its use of price discrimination (what it calls "route-based pricing") to set fares for riders.[71] Previously, Uber had calculated fares using a combination of mileage, time, and surge multipliers based on geographic demand. In an interview with *Bloomberg*, Uber's head of product explained that:

> [T]he company applies machine-learning techniques to estimate how much groups of customers are willing to shell out for a ride. Uber calculates riders' propensities for paying higher prices for particular routes at certain times of day. For instance, someone traveling from a wealthy neighborhood to another tony spot might be asked to pay more than another person heading to a poorer part of town, even if demand, traffic, and distance are the same.[72]

Despite the implication in this hypothetical, extant empirical research suggests that surge pricing is more complicated and unpredictable, causing longer wait times for riders who start in nonwhite, low-income areas[73] and, in other instances, price gouging consumers who were fleeing disaster.[74]

While price discrimination is familiar within the consumer context, Uber and similar companies have broken new ground by using related

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68. See Kaplan & O'Neill, supra note 63, at 6.

69. See Perry, supra note 63, at 5.

70. See Jonathan A. Lanning, Evidence of Racial Discrimination in the $1.4 Trillion Auto Loan Market, ProfitWise News & Views, no. 1, 2023, at 1, 8, https://www.chicagofed.org/-/media/publications/profitwise-news-and-views/2023/pnv2023-1.pdf?sc_lang=en [https://perma.cc/J6TB-EUXV] ("Given that approximately 60% of Black households and around one-half of Hispanic households are [low or moderate income (LMI)], these findings [that non-White borrowers pay higher interest rates than their non-Hispanic White counterparts] imply a substantial risk that racial/ethnic prejudice may significantly limit the economic mobility of non-White LMI households.").

71. Alison Griswold, Uber Is Practicing Price Discrimination. Economists Say This Might Not Be a Bad Thing, Quartz (May 24, 2017), https://qz.com/990131/uber-is-practicing-price-discrimination-economists-say-that-might-not-be-a-bad-thing [https://perma.cc/6SW9-9LTW].

72. Id. (internal quotation marks omitted) (quoting Eric Newcomer, Uber Starts Charging What It Thinks You're Willing to Pay, Bloomberg (May 19, 2017), https://www.bloomberg.com/news/articles/2017-05-19/uber-s-future-may-rely-on-predicting-how-much-you-re-willing-to-pay (on file with the *Columbia Law Review*)).

73. Jennifer Stark & Nicholas Diakopoulos, Uber Seems to Offer Better Service in Areas With More White People. That Raises Some Tough Questions., Wash. Post (Mar. 10, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/03/10/uber-seems-to-offer-better-service-in-areas-with-more-white-people-that-raises-some-tough-questions/ (on file with the *Columbia Law Review*).

74. Sam Metz & Scott Sonner, Caldor Fire Evacuees Report Tahoe Ride-Hail Price Gouging of More Than $1,500, KQED (Sept. 3, 2021), https://www.kqed.org/news/11887558/caldor-fire-evacuees-report-tahoe-ride-hail-price-gouging-of-more-than-1500 [https://perma.cc/W6PF-XPKF].

methods to determine worker pay. As a 2017 exposé in the *New York Times* reported, Uber "is engaged in an extraordinary behind-the-scenes experiment in behavioral science to manipulate [drivers] in the service of its corporate growth."[75] Indeed, the journalist found that, by "[e]mploying hundreds of social scientists and data scientists, Uber has experimented with video game techniques, graphics and noncash rewards of little value that can prod drivers into working longer and harder—and sometimes at hours and locations that are less lucrative for them."[76] United States–based Uber drivers were previously paid a base fee based on mileage (amounts that varied per geographic location) and time.[77] But since the passage of Proposition 22 in California, which (among other things) legalized the practice of algorithmic wage discrimination, drivers have received a base fare rooted in what Uber calls "Upfront Pricing"—an amount based on a black-box algorithmic determination.[78]

In addition to this base fare, Uber drivers rely upon what this Article calls *wage manipulators*: any number of offers, bonuses, surges, and quests that can raise their base fare, which in most cases is untenably low by itself. Uber uses this practice across the world.[79] These *wage manipulators*—the additional financial incentives and dynamic pricing structures—are designed and deployed to influence individual worker behavior without directly telling a driver what to do. While Part II details some of these wage manipulators, the relevant point here is that these are not the same for every driver, nor are they the same across time. For example, the surge multiplier presented to Diego may differ from the multiplier presented to Marta, even if both workers are working in the same area at the same time. The bonus offer that Ahmed receives on any given week is not the same as the one Sanjeev receives. The reasons underlying these differences are opaque—the logic hidden inside black-box algorithms. But based on what is known about price discrimination in the consumer context, these wage manipulators appear to be personalized based on what Uber's machine learning systems know about the habits, practices, and income targets of individual workers. Despite Uber's pleadings to the contrary,[80] since drivers are best conceived of as workers whose labor provides a service,

75. Noam Scheiber, How Uber Uses Psychological Tricks to Push Its Drivers' Buttons, N.Y. Times (Apr. 2, 2017), https://www.nytimes.com/interactive/2017/04/02/technology/uber-drivers-psychological-tricks.html (on file with the *Columbia Law Review*) [hereinafter Scheiber, Uber's Psychological Tricks].

76. Id.

77. Amos Toh, Opinion, Gig Workers Think They Work for Themselves. They Don't, S.F. Chron. (Oct. 17, 2022), https://www.sfchronicle.com/opinion/openforum/article/gig-workers-17509777.php (on file with the *Columbia Law Review*).

78. See id.; infra note 86 and accompanying text.

79. Scheiber, Uber's Psychological Tricks, supra note 75.

80. For more discussion of how Uber has attempted to argue that it is merely a technology intermediary, see Julia Tomassetti, Does Uber Redefine the Firm? The Postindustrial Corporation and Advanced Information Technology, 34 Hofstra Lab. & Emp. L.J. 1, 13–16 (2016).

rather than consumers of Uber technology, "dynamic pricing" as it pertains to driver income is better understood as *algorithmic wage discrimination*.

One of the central levers Uber uses to manipulate worker behavior—and crucial to its practice of algorithmic price discrimination—is the rate at which it offers rides to various drivers. Uber and other on-demand companies do not pay workers for what they variably refer to as "non-engaged time," "non-passenger platform time," or "P1 time," the time workers spend awaiting a fare, which accounts for roughly (but unpredictably) 40% of overall time on the job.[81] Importantly, this waiting time is not purely a factor of demand or of driver quality or quantity. The company's goal is to keep as many drivers as possible on the road to quickly address fluctuations in rider demand; thus, they are motivated to elongate the time between sending fares to any one driver so long as that wait time does not lead the driver to end their shift. The company's machine learning technologies may even predict the amount of time a specific driver is willing to wait for a fare. In contrast to firms like Caviar, which uses disincentives to decrease the number of workers that log on at any specific time,[82] Uber primarily addresses the situation of the number of workers exceeding the number of customers by keeping workers waiting and unpaid while offering tantalizing bonuses and offers that keep them on the road with the possibility of receiving a larger fare in the near future. As discussed in the following sections, these practices run afoul of basic legal and cultural expectations around work and violate the prevailing moral economy norms reflected in most United States–based low-wage work over the past century.

And yet this is the default practice of many on-demand firms across the economy.[83] Indeed, in many states, legislatures have legally encased these wage practices in the ride-hail sector by passing statutes that classify workers laboring for "transportation network companies" like Uber and

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81. Memorandum from Melissa Balding, Teresa Whinery, Eleanor Leshner & Eric Womeldorff, Fehr & Peers, to Brian McGuigan, Lyft, & Chris Pangilnan, Uber, Estimated TNC Share of VMT in Six U.S. Metropolitan Regions (Revision 1) 9 (Aug. 6, 2019), https://issuu.com/fehrandpeers/docs/tnc_vmt_findings_memo_08.06.2019 (on file with the *Columbia Law Review*).

82. Shapiro, Dynamic Exploits: Worker Control, supra note 62, at 14–15.

83. The one exception to this norm in the United States is the New York City ride-hail sector, where local law mandates a time-based wage floor for all drivers. When the New York City Council passed this law, 85% of N.Y.C. drivers were making less than the minimum wage, according to former Taxi & Limousine Commission (TLC) director Meera Joshi. Author's Fieldnotes, New York (Sept. 30, 2022) (on file with author); see also Emma G. Fitzsimmons & Noam Scheiber, New York City Considers New Pay Rules for Uber Drivers, N.Y. Times (July 2, 2018), https://www.nytimes.com/2018/07/02/nyregion/uber-drivers-pay-nyc.html (on file with the *Columbia Law Review*) ("The [local law] would make New York the first major American city to establish pay rules to grapple with the upheaval caused by ride-hailing[ ] companies that has decimated the yellow cab industry and left many drivers in financial ruin.").

Lyft as independent contractors.[84] Terms of payment are settled entirely through contracts between the companies and the drivers—contracts that the companies frequently update and send to drivers through the app and that the drivers must accept in order to labor.[85] And in two states—California and Washington—nonpayment for nonengaged time has been explicitly legalized, leaving workers' hourly wages and their determination to the whim of the hiring entities.

In California, the passage of Proposition 22 sanctioned, among other things, this tool of algorithmic wage discrimination: the practice of not paying workers for time when they are laboring but have not been allocated work.[86] Instead, workers receive a guarantee of 120% of the minimum wage for the area in which they are working—but only for "engaged time," that is, after they have been dispatched a fare (or an order, in the case of food delivery platforms).[87] In Washington State, a similar piece of state-level legislation, negotiated by Uber and Teamsters Local 117, requires workers be paid $1.17 per mile and $0.34 per minute, including a minimum pay of $3.00 per trip, but legalizes the practice of not paying workers for nonengaged time.[88] This legislation, like Proposition 22, effectively sanctions one central aspect of algorithmic wage discrimination in app-deployed work: firms' power to provide digitalized

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84. Ruth Berins Collier, V.B. Dubal & Christopher L. Carter, Disrupting Regulation, Regulating Disruption: The Politics of Uber in the United States, 16 Persps. on Pol. 919, 921–28 (2018) ("The majority of these test cases involve the misclassification of Uber drivers as independent contractors, a status that denies them the labor and employment rights available only to employees.").

85. See, e.g., New Driver Agreements as of July 1, 2021 FAQ, Uber, https://help.uber.com/driving-and-delivering/article/new-driver-agreements-as-of-july-1-2021-faq?nodeId=3948cdfd-b5de-4781-991f-888f5c792403 [https://perma.cc/23YZ-F3SG] (last visited Sept. 7, 2023).

86. Veena Dubal, The New Racial Wage Code, 15 Harv. L. & Pol'y Rev. 511, 528 (2021) [hereinafter Dubal, New Racial Wage Code]. The Yes on Proposition 22 campaign, supported by Uber, Lyft, DoorDash, Postmates, and Instacart, invested $223 million to pass the initiative. Many of their tactics were widely believed to include voter deception. Brian Chen & Laura Padin, Prop 22 Was a Failure for California's App-Based Workers. Now, It's Also Unconstitutional., Nat'l Emp. L. Project: Blog (Sept. 16, 2021), https://www.nelp.org/blog/prop-22-unconstitutional/ [https://perma.cc/CN7S-MPXD].

87. See Dubal, New Racial Wage Code, supra note 86, at 533 ("On paper, [transportation] and [delivery] workers are entitled to 120% of the applicable minimum wage and 30 cents per mile reimbursement. But these wages and reimbursements are tied to 'engaged time' and 'engaged miles' . . . ." (footnote omitted)).

88. Brad Dress, Washington Passes First-Ever State Law Creating Minimum Pay for Ride-Hailing Companies, The Hill (Apr. 1, 2022), https://thehill.com/homenews/3256469-washington-passes-first-ever-state-law-creating-minimum-pay-for-ride-sharing-companies/ (on file with the *Columbia Law Review*). In an unusual break with the Teamsters local union that negotiated the bill with Uber, Teamsters International President Sean O'Brien opposed the law and urged the governor of Washington to veto it. Josh Eidelson, Teamsters Chief Seeks to End His Union's Uber Bill in Washington, Bloomberg Bus. (Mar. 31, 2021), https://www.bloomberg.com/news/articles/2022-03-31/teamsters-chief-seeks-to-end-his-union-s-uber-bill-in-washington (on file with the *Columbia Law Review*).

variable pay with no hourly floor guarantee. At the same time, it is silent on the other aspects of the practice—including the data collection that makes the algorithmic wage discrimination possible and the variable dispersal of wage manipulators that facilitates control over drivers.

With this background in place, the next section considers how the practice and legalization of algorithmic wage discrimination comport with longstanding U.S. wage laws and regulations as well as the moral and cultural norms they created.

B. *Calculative Fairness and Minimum-Wage Regulation*

Algorithmic wage discrimination represents a dramatic rupture in the moral economy of work. To illustrate this, this section considers the practice in relation to the history of the wage and work laws in the United States. More specifically, it examines it against the background of minimum-wage regulations that arose during the transition from craft-based work to the Fordist structures of work and the interpretations of distributive fairness—both in terms of the calculation of wages and their minimum sum—that were embedded in these laws.

The exchange of wages for time worked seems natural today. But in the transition to industrial capitalism, many workers contested waged labor, seeking instead to become or remain independent producers.[89] In the transition from artisanal production to industrialization in the late nineteenth century, craftsmen frequently demonstrated their independence from factory owners by refusing to work regular shifts—defying the capitalist's control over time, which workers viewed as a "degrading portent of proletarianization"[90] or, as was commonly called, "wage slavery."[91] Many labor reformers and worker collectives attempted to exert control over wages via campaigns for shorter days while reimagining workers as "merchants of time."[92] This conceptualization led to the fight for the eight-hour day and "a living wage"—both of which, reformers argued, would give workers the means to live and the time to engage in civic life and consumption.[93]

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89. See Lawrence B. Glickman, A Living Wage: American Workers and the Making of Consumer Society 11–12 (1999) (reviewing the history of wage labor in America, including the discourse around wage labor as a form of slavery).

90. Id. at 99.

91. Id. at 18.

92. Id. at 99.

93. Labor reformers debated whether minimum-wage laws would hurt or benefit the labor movement more broadly. Many, including leaders in both the more conservative American Federation of Labor (AFL) and the more radical Industrial Workers of the World (IWW), were skeptical of state intervention in negotiations between firms and collective groups—even in providing a basic wage floor from which to bargain. Melvyn Dubofsky, We Shall Be All: A History of the Industrial Workers of the World 90 (Joseph A. McCartin ed., 2000); see also Laura Murphy, An "Indestructible Right": John Ryan and the Catholic Origins of the U.S. Living Wage Movement, 1906–1938, Labor, Spring 2009, at 57, 77

As reformers gained legislative victories for minimum-wage and maximum-hour regulations, however, the Supreme Court ruled that such regulations violated the state's police power to govern commerce.[94] In these *Lochner*-era decisions, the Court endorsed the view that wages and hours should be decided through private contract, and generally determined by abstract market forces.[95] Yet careful review of these cases reveals a more nuanced approach to the regulation of payment for work. Even *Lochner*-era judges committed to an ideal of calculative fairness in the workplace: Wages should be predictable and reached in ways that are honest, clear, and fair. For example, the early twentieth-century Supreme Court case *Adkins v. Children's Hospital of D.C.* infamously struck down minimum-wage laws and upheld freedom of contract.[96] But in doing so, *Adkins* also highlighted the importance of wage calculability and predictability for workers. Citing to two previous Supreme Court cases, *McLean v. Arkansas*[97] and *Knoxville Iron Co. v. Harbison*,[98] *Adkins* outlined normative notions of fairness regarding wage calculation and distribution.[99]

(noting that most AFL leaders did not think legislation was the appropriate means). This skepticism has largely left the labor movement as minimum-wage laws have become the cultural norm. Howard D. Samuel, Troubled Passage: The Labor Movement and the Fair Labor Standards Act, Monthly Lab. Rev., Dec. 2000, at 32, 37 ("By 1944, . . . the AFL vowed to guard against 'any attempt to weaken [the FLSA] . . . .' Two years later, the AFL began its drive to raise the legal minimum wage to $1 an hour. By early 1955, . . . Labor's doubts about the creation of statutory wage and hour standards had disappeared." (quoting AFL Convention Proceedings 158 (1938))); see also Minimum Wage Tracker, Econ. Pol'y Inst. (July 1, 2023), https://www.epi.org/minimum-wage-tracker/ [https://perma.cc/86ET-RZEN] (explaining that forty-two states currently have minimum-wage laws).

94. See Lochner v. New York, 198 U.S. 45, 57–58 (1905), overruled in part by Ferguson v. Skrupa, 372 U.S. 726 (1963).

95. See, e.g., Adkins v. Child.'s Hosp. of D.C., 261 U.S. 525, 557 (1923) (condemning minimum-wage laws because "[t]o the extent that the sum fixed exceeds the fair value of the services rendered . . . [the law] amounts to a compulsory exaction from the employer"), overruled by West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Adair v. United States, 208 U.S. 161, 282 (1908) (invalidating federal law that prohibited contracts barring employees in the interstate railroad business from joining a union), abrogated by Lincoln Fed. Lab. Union No. 19129, AFL v. Nw. Iron & Metal Co., 335 U.S. 525, 536 (1949); Hammer v. Dagenhart, 247 U.S. 251, 276 (1918) (striking down a federal regulation on child labor), overruled in part by United States v. Darby, 312 U.S. 100 (1941).

96. See *Adkins*, 261 U.S. at 561 ("To sustain the individual freedom of action contemplated by the Constitution is not to strike down the common good . . . for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members.").

97. 211 U.S. 539 (1909).

98. 183 U.S. 13 (1901).

99. *Adkins*, 261 U.S. at 547. In *Adkins*, Chief Justice Taft wrote in dissent:

> [T]here are decisions by this court which have sustained legislative limitations in respect to the wage term in contracts of employment. In McLean v. Arkansas, 211 U.S. 539, . . . it was held within legislative power to make it unlawful to estimate the graduated pay of miners by weight after screening the coal. In Knoxville Iron Co. v. Harbison, 183 U.S. 13, . . . it was held that stores orders issued for wages must be redeemable in cash.

Writing on behalf of the Court, Justice George Sutherland in *Adkins* struck down an act that created a wage board to ascertain, for women living in the District of Columbia, "what wages are inadequate to supply the necessary cost of living . . . to maintain them in good health and to protect their morals."[100] While Justice Sutherland maintained that "[t]here is, of course, no such thing as absolute freedom of contract," he characterized the minimum-wage law as "a price-fixing law . . . [which has] no relation to the capacity or earning power of the employee."[101] And yet in focusing on the holding alone, legal scholars who study *Adkins* often overlook Justice Sutherland's articulation of a broader notion of fairness beyond a wage floor: "A statute," he wrote, "requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable."[102]

In other words, even a Court that cast the minimum wage as "a naked, arbitrary exercise of power"[103] that was unfair to business and broadly interfered in the workers' freedom to contract recognized the importance of fair payment in form and time. Indeed, citing to *McLean* and *Knoxville Iron*, the Court explained that it had upheld previous wage regulations because their "tendency and purpose w[ere] to prevent unfair . . . methods in the payment of wages."[104]

In *McLean*, the Court considered the regulation of a mining company that paid workers according to the quantity of the coal they mined. The law in question required that the contract between a mining company and a miner stipulate payment to the worker based not on "screened coal" but instead based on weights of coal "originally produced in the mine."[105] In this sense, the method of payment, the Court concluded, must be fair as to "honest weights and measures."[106] More specifically, the weight of the coal mined could not be measured by using technology that would result in lower payment than was fair. The Court upheld the law as a reasonable legislative restriction on contract and held that the company had violated it not only by "introduc[ing] . . . screens as a basis of paying the miners for screened coal only" but also because "after the screens had been introduced, differences had arisen . . . thereby preventing a correct measurement of the coal as the basis of paying the miner's wages."[107] In *Knoxville Iron*, the Court also upheld on fairness grounds a law that

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261 U.S. at 565 (Taft, C.J., dissenting).

100. Id. at 540 (majority opinion) (internal quotation marks omitted) (quoting Act of Sept. 19, 1918, ch. 174, § 9, 40 Stat. 960, 962).

101. Id. at 554–55.

102. Id. at 559.

103. Id.

104. Id. at 547.

105. McLean v. Arkansas, 211 U.S. 539, 548 (1909).

106. Id. at 550.

107. Id.

required a coal mining company to pay their workers in money or goods—but only if those goods were the same value as the money.[108]

In both cases, the "technology" through which wages were calculated—instruments to measure coal weight and the calculated worth of a nonmonetary good—had to be fair in form and method. That is, the company could not deduct value from the workers' labor by introducing a new, obscuring instrument for payment. In the *McLean* Court's words, the wage practices outlawed by the state legislature had a "reasonable relation to the protection of a large class of laborers in the receipt of their *just* dues."[109] Thus, the law's regulation of contract not only passed the muster of the Court's police powers analysis, but also—per the Court's logic—did so because it addressed the problem of calculative fairness in employers' wage-setting practices.

This value of calculative fairness, embedded even in *Lochner*–era Supreme Court decisions, is worth contrasting with the practice of algorithmic wage discrimination, in which employers calculate wages—again through the introduction of new technologies—through an entirely unpredictable and opaque means. The worker cannot know what the firm has algorithmically decided their labor is worth, and the technological form of calculation makes each person's wages different. In contrast to the wage regulations that the *Adkins* Court considered common sense, algorithmic wage discrimination obscures the possibility of discerning whether workers are paid "the value of the services rendered" or "even . . . with fair relation to the extent of the benefit obtained from the service."[110] These cases make clear that wage unpredictability is a matter of fairness, distinct from the fact that some workers earn below the minimum wage. Algorithmic wage discrimination thus raises the problem not just of wage value but also of the wage-setting process.

Adkins was overturned by *West Coast Hotel Co. v. Parrish*, marking a sharp shift in the Court's stance toward minimum-wage regulations.[111] Laws guaranteeing a time-based wage floor that were once derided as "a form of theft" were subsequently "required for bringing about distributional justness."[112] Importantly, "many minimum wage advocates . . . asserted" that wages themselves were a social construction and should thus be allocated justly, not only to "secure existence" but also, in the words of reporter Walter Lippmann, to "make life a rich and

108. Knoxville Iron Co. v. Harbison, 183 U.S. 13, 19–20 (1901).

109. *McLean*, 211 U.S. at 550 (emphasis added).

110. Adkins v. Child.'s Hosp. of D.C., 261 U.S. 525, 559 (1923).

111. 300 U.S. 379, 400 (1937). As historian Lawrence Glickman points out, this change in the Court's recognition of the importance of distributional justice finds its origins in the advocacy of late nineteenth-century U.S. workers who invented the language of the "living wage" and from whom the New Dealers adopted and modified the language. Glickman, supra note 89, at 155.

112. Edward James McKenna & Diane Catherine Zannoni, Economics and the Supreme Court: The Case of the Minimum Wage, 69 Rev. Soc. Econ., 189, 190 (2011).

welcome experience."[113] Vital to the Court's interpretation in *West Coast Hotel*, then, was earlier minimum-wage advocates' conception of "distributional justice": that an hourly wage was based not on an abstract or "'true' value of [the work]" but on an "*adequate* measure [of basic] needs."[114] This transformation—and the norms about labor compensation embedded in it—led to growing minimum-wage movements in states and cities across the nation and ultimately resulted in the passage of the Fair Labor Standards Act (FLSA) in 1938, which—with notable exceptions in the agricultural and domestic sectors, made up primarily of women and subordinated racial minority workers[115]—created a wage floor for workers.[116]

Thus, minimum-wage laws, as intrinsic to "moral capitalism" and a "need-centered pay system" and coupled with more conservative ideas about worker consumption and "purchasing power," have come to reflect standard economic practice and expectations about fair (and lawful) work.[117] Despite a staggeringly low federal minimum wage, "fair" payment demands predictability, calculative fairness, and, minus a few exceptions, a correlation to time labored.[118] Proposition 22, in fact, directly refers to the minimum wage,[119] reflecting the profound contemporary association between these ideas of fairness, the minimum wage, and "blue collar" work. And yet the actual effect of Proposition 22, as discussed below, is to obfuscate the minimum wage—and the notion of a living wage. The only worker-led study on worker wages in an on-demand sector (discussed in Part III), for example, found a variable average hourly wage for on-

113. Glickman, supra note 89, at 151–52 (internal quotation marks omitted) (quoting Walter Lippmann, Campaign Against Sweating, New Republic, Mar. 27, 1915, reprinted in Selected Articles on Minimum Wage 42–55 (Mary K. Reely ed., 1917)).

114. See id. at 153 (emphasis added) (describing the position of pre–*West Coast Hotel* minimum-wage advocates).

115. See Marc Linder, Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal, 65 Tex. L. Rev. 1335, 1372–75 (1987) (arguing that racial animus in FLSA's legislative history explains the inclusion of exemptions for domestic and agricultural workers).

116. See Fair Labor Standards Act of 1938, ch. 676, § 6, 52 Stat. 1060, 1062–63 (1938).

117. Glickman, supra note 89, at 155 (internal quotation marks omitted) (first quoting Lizabeth Cohen, Making a New Deal: Industrial Workers in Chicago, 1919–1939, at 209, 286 (1990); then quoting Nelson Lichtenstein, The Most Dangerous Man in Detroit: Walter Reuther and the Fate of American Labor 221 (1995)).

118. The exceptions are narrow, but under FLSA, some workers may not be remunerated for "on-call time." See Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA), DOL, https://www.dol.gov/agencies/whd/fact-sheets/22-flsa-hours-worked [https://perma.cc/6KHR-BUR2] (last modified July 2008) (explaining that "on-call time" may need to be compensated if there are "constraints on the employee's freedom").

119. See Legis. Analyst's Off., Proposition 22: Analysis of Measure 2 (2020), https://lao.ca.gov/ballot/2020/Prop22-110320.pdf [https://perma.cc/V5YQ-2872] (referring to "120 percent of the minimum wage" for driving hours, not including wait time, as a way to address concerns about driver minimum-wage protections); Chen & Padin, supra note 86.

demand ride-hail drivers in California that fell well below half (and sometimes a third) of the minimum wage in urban areas.

Minimum-wage laws—and the laws that came before them—embedded cultural norms and expectations about calculative fairness, wage predictability, and fair pay that prevail today in our conceptualization of what constitutes a moral economy of work. This conceptualization becomes particularly important as we see, in Part II, how workers make sense of their encounters with algorithmic wage discrimination.

C. *"Equal Pay for Equal Work": Antidiscrimination Laws*

Despite a persistent pay gap across social groups (between men and women[120] and between racial minorities and the white majority),[121] U.S. antidiscrimination laws (including Title VII of the U.S. Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Equal Pay Act, and the Americans with Disabilities Act) formally prohibit differential pay "because of" or on the basis of race, color, religion, sex, national origin, age, or disability.[122] These laws, which were adopted in response to social and labor movement demands, have also embedded values and expectations around "fair work" in relationship to identity. Regarding Title VII, the underlying normative dictate is that workers within a firm should not be treated differently as to the terms, conditions, and privileges of employment if that treatment is related to a protected identity.[123] The Equal Pay Act, by contrast, which emerged out of the "equal pay for equal work"

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120. See, e.g., Press Release, DOL, Equal Pay Day 2023 (Mar. 14, 2023), https://www.dol.gov/newsroom/releases/osec/osec20230314 [https://perma.cc/G3BB-MS4V] ("In the U.S., women who work full-time, year-round, are paid an average of 83.7 percent as much as men, which amounts to a difference of $10,000 per year. The gaps are even larger for many women of color and women with disabilities.").

121. See Valerie Wilson & William Darity Jr., Econ. Pol'y Inst., Understanding Black–White Disparities in Labor Market Outcomes Require Models that Account for Persistent Discrimination and Unequal Bargaining Power 10 (2022), https://files.epi.org/uploads/215219.pdf [https://perma.cc/E4ZN-TN6J] ("In 2019, the typical (median) [B]lack worker earned 24.4% less per hour than the typical white worker. This is an even larger wage gap than in 1979, when it was 16.4%.").

122. See supra note 25 and accompanying text.

123. Section 703 of Title VII of the Civil Rights Act of 1964 reads, in part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, § 703, 78 Stat. 253, 255 (codified at 42 U.S.C. § 2000e-2(a) (2018)).

movement, emphasized something slightly different but with the same effect.[124] Rather than legislating against differential pay based on a protected status or identity, the Equal Pay Act legislated affirmatively for sameness: within firms, the same pay for the same work, regardless of gender.[125] In doing so, the Act attempted to remedy that women had long been paid less than men even when doing substantially similar work.[126]

Though the "equal pay for equal work" movement garnered some recognition in the wake of World War I, it was not until World War II that the campaign gained significant traction.[127] Both the American Federation of Labor and the Congress of Industrial Organizations urged the inclusion of equal pay clauses in labor contracts,[128] and women's groups brought the issue before the War Labor Board in 1942, resulting in a rule establishing "the principle of equal pay for equal work."[129] In one important War Board opinion involving General Motors, the Board wrote that it "accepted the general principle of equal pay for equal work. *There should be no*

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124. In her 1910 manifesto Equal Pay for Equal Work, Grace Charlotte Strachan wrote powerfully on the problematics of unequal pay within a workforce:

> Who will deny that a railroad track with one of its rails depressed three feet below the other is dangerous to all who travel on it? I hold that all who are connected with the enforcement and the operation of our unjust salary schedules are in danger of moral degeneration. Therefore, I hold that the entire community should fight the unjust salary schedules . . . as immoral and as a menace to the welfare of the State.

Grace C. Strachan, Equal Pay for Equal Work 10 (1910). Strachan led the Interborough Association of Women Teachers in New York City, and a year after the publication of this book, the New York legislature passed a law mandating equal pay for equal work in teaching. See Act of Oct. 30, 1911, ch. 902, 1911 N.Y. Laws 2749–50 (amending the Greater New York City Charter to require that "[i]n the schedules of [teacher] salaries hereafter adopted there shall be no discrimination based on the sex of the [teacher]"); Robert E. Doherty, Tempest on the Hudson: The Struggle for "Equal Pay for Equal Work" in the New York City Public Schools, 1907–1911, 19 Hist. Educ. Q. 413, 428 (1979) ("Chapter 902 of the 1911 Laws of New York . . . outlawed any form of sex discrimination [in teacher salaries] . . . .").

125. A useful anecdote used during the fight for the Equal Pay Act early in the industrial revolution involved a widow who took over her husband's job after his death. John Jones, the husband, had earned wages braiding military tunics in a factory. When he fell ill, the factory allowed him to work from home. John's illness worsened, so he taught his wife Jane how to do the work. Jane would take the tunics to the factory, and in turn, the factory would disburse to her John's normal wages. When John died, Jane continued the work. But after the factory bosses discovered that he had passed and that they were paying for Jane and not John's work, they docked her pay by two thirds. See Millicent G. Fawcett, Equal Pay for Equal Work, 28 Econ. J. 1, 1 (1918).

126. H.R. Rep. No. 88-309, at 2–3 (1963), as reprinted in 1963 U.S.C.C.A.N. 687, 688; see also S. Rep. No. 88-176, at 1 (1963) (noting that the Equal Pay Act of 1963 aimed to counter the historical practice of American industry, which paid men more for the same work due to outdated beliefs about a man's role in society).

127. See Donald Elisburg, Equal Pay in the United States: The Development and Implementation of the Equal Pay Act of 1963, 29 Lab. L.J. 195, 195–97 (1973).

128. James C. Nix, Equal Pay for Equal Work, 74 Monthly Lab. Rev. 41, 42 (1952).

129. Marguerite J. Fisher, Equal Pay for Equal Work Legislation, 2 Indus. & Lab. Rels. Rev. 50, 51 (1948).

discrimination between employees [within a firm] whose production is substantially the same on comparable jobs."[130] In the same decade, nine states passed equal pay laws modeled after an equal pay bill written by the United States Women's Bureau and supported by the union movement and the League of Women Voters.[131] But the movement achieved its most significant victory in 1963 with the passage of the Federal Equal Pay Act, an amendment to FLSA that banned difference in pay between the two sexes when the employees are performing work that requires "equal skill, effort, and responsibility" and is "performed under similar working conditions."[132]

In practice, demonstrating that women are performing work "with the same quality and quantity of productivity" as their male counterparts has been a major impediment to achieving equal pay across the genders.[133] Yet the Act, however difficult to enforce, contains a relatively straightforward normative principle of fairness: Workers within a firm *should* receive equal pay for equal work. While the Act itself focuses on the idea that women, as a class, should earn similar pay to men for similar work, this focus is explained by the fact that men were, at the time, largely being paid comparable amounts for comparable work relative to other men.

Algorithmic wage discrimination upends this assumption. Some—including Uber Chief Economist Jonathan Hall—have suggested that "the gig economy" can help to narrow the persistent wage gap between men and women in the economy (which the Equal Pay Act did not adequately remedy) by lowering "the job-flexibility penalty."[134] And yet Hall and his coauthors in a 2020 study show that even though "neither the pay formula nor the dispatch algorithm for assigning riders to drivers depend on a driver's gender," women working for Uber make roughly seven percent less than men.[135]

On its own terms, the publication of this finding signals a troubling moral shift in how firms understand the problem of gender discrimination and their legal responsibility to avoid it. Since at least the Supreme Court's 1971 decision in *Griggs v. Duke Power Co.*, firms have been reticent to reveal pay differentials as they pertain to protected categories of workers for fear

130. Id. (emphasis added).

131. Id. at 52.

132. Equal Pay for Equal Work, DOL, https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/internal/policies/equal-pay-for-equal-work [https://perma.cc/FZ6C-BSSQ] (last visited Aug. 14, 2023).

133. For an overview of reasons the Equal Pay Act has failed—and potential solutions, see generally Kimberly J. Houghton, The Equal Pay Act of 1963: Where Did We Go Wrong?, 15 Lab. Law. 155 (1999).

134. Cody Cook, Rebecca Diamond, Jonathan Hall, John List & Paul Oyer, The Gender Earnings Gap in the Gig Economy: Evidence From Over a Million Rideshare Drivers, 88 Rev. Econ. Stud. 2210, 2211 (2021). For more on the moral stigma associated with job flexibility, see generally Joan Williams, Mary Blair-Loy & Jennifer Berdahl, Cultural Schemas, Social Class, and the Flexibility Stigma, 69 J. Soc. Issues 209 (2013).

135. Cook et al., supra note 134, at 2211.

of incurring liability.[136] Even absent intentional discrimination, such widespread wage differences between genders could trigger disparate impact liability under Title VII of the Civil Rights Act of 1964. In publicizing and interpreting the gendered wage difference in the Uber work force, the article coauthored by Hall reflects Uber's position that antidiscrimination laws do not apply to them, or at least, that they do not fear liability under the laws. By ignoring (or diverting attention from) the role of the firm's wage-setting process in creating the gendered wage gap, the article also does the cultural work of alleging that the gendered wage gap arises organically from individual worker—not firm—choices.

Hall and his coauthors, Cody Cook, Rebecca Diamond, John List, and Paul Oyer, attribute this gendered wage difference to three factors: (1) "the logic of compensating differentials (and the mechanisms of surge pricing and variation in driver idle time)"; (2) "rideshare-specific human capital"; and (3) "average driving speed."[137] In essence, they argue that men earn more because of the techniques they use to drive, their greater experience in working for Uber, and the fact that they drive faster. Somewhat counterintuitively, "hour-within-week differences are a small part of the gender gap."[138] While women might work around child-rearing or family responsibilities, they do not appear to "pay a large financial price for this."[139]

The authors of the study describe the factors to which they attribute the gender pay gap as worker "preferences or constraints," casting them as the result of individual driver decisions.[140] They analogize the gender pay gap found among ride-hail drivers to that found among J.D. and M.B.A. graduates, which studies have determined are due largely to individual preferences that correlate with gender, such as a preference to work fewer hours or to work at lower paying jobs.[141] Unlike in the case of lawyers or M.B.A.s, however, the pay differential between Uber drivers cannot be explained by women workers choosing to work fewer hours or even certain hours. Rather, the determinants that result in lower pay for women drivers are driven largely by the structure of wage setting—by algorithmic wage discrimination.[142] This, according to Uber's own research, results in gender pay discrimination.[143] But it also means that

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136. In *Griggs v. Duke Power Co.*, the Supreme Court unanimously ruled that employment policies that produce a disparate impact on protected classes of people may violate Title VII, even absent a showing of discriminatory intent. 401 U.S. 424, 435–36 (1971).

137. Cook et al., supra note 134, at 2211–12.

138. Id. at 2222.

139. Id.

140. Id.

141. Id. at 2237.

142. Id. at 2236–37.

143. While neither the EEOC nor private plaintiffs have attempted to hold Uber liable for this wage differential (under Title VII, this would only be possible as a disparate impact

there are individualized or personalized pay differences that run afoul of the norm undergirding the Equal Pay Act: that people should earn substantially similar amounts for similar work. Thus, algorithmic wage discrimination belies decades of legal norms—and compromises—around wages for work. It creates a structure in which wages are unpredictable and variable from person to person and hour to hour.

Part I examined the introduction of "algorithmic wage discrimination" by on-demand platform labor companies, the explicit legalization of parts of this practice in state law, and the tension between this practice and the norms embedded in the wage laws that have long shaped our contemporary moral expectations around work and wage regulation. Part II draws on original ethnographic research to examine the operationalization of algorithmic wage discrimination as a system of labor control and to understand how the practice is subjectively experienced and understood by workers.

II. THE OPERATION AND EXPERIENCE OF ALGORITHMIC WAGE DISCRIMINATION

"Modern production seems like a dream of cyborg colonization work, a dream that makes the nightmare of Taylorism seem idyllic."

— Donna Haraway.[144]

The findings in this Part reflect over eight years of first-of-its-kind, embedded ethnographic research among self-organizing Uber and Lyft drivers concentrated in the San Francisco Bay Area, beginning in 2014 after the first protest in front of Uber headquarters. This research included thousands of hours of participant observation and my own action at drivers' meetings and protests, in meetings with regulators, on group phone calls and texts, in government hearings, on social media, and

lawsuit because disparate treatment lawsuits would require a showing of intentional discrimination), this is largely because the threshold question in such a lawsuit would be whether the drivers are employees. See 42 U.S.C. § 2000e-2 (2018) (describing unlawful employment practices under Title VII); Noah Zatz, Beyond Misclassification: Gig Economy Discrimination Outside Employment Law (Jan. 19, 2016), https://onlabor.org/beyond-misclassification-gig-economy-discrimination-outside-employment-law/ [https://perma.cc/MXF9-KWTD]. If not, they are not covered by the Equal Pay Act or Title VII. See 42 U.S.C. § 2000e(a) (defining "employer" under Title VII); id. § 2000e-2(a) (defining "unlawful employment practices" to extend only to the activities of "employer[s]"); id. § 2000e-2(k)(1)(A)(i) (providing the burden-shifting framework for establishing disparate impact liability under Title VII); see also Dubal, Wage Slave or Entrepreneur?, supra note 28, at 90 & n.77 ("Control over the means and manner of production as required under the common law definition of the employee was, arguably, limited in transportation work. . . . Over and over again, courts found that taxi drivers who leased their cabs were 'independent contractors' under the common law." (footnote omitted)).

144. Donna J. Haraway, A Cyborg Manifesto: Science, Technology, and Socialist-Feminism in the Late Twentieth Century, *in* Simians, Cyborgs and Women: The Reinvention of Nature 149, 150 (1991).

through one-on-one conversations. With some drivers, the research continued into social spaces. All the workers in the drivers' groups studied were Uber or Lyft drivers, and many worked for other labor platforms as well, including Doordash, Instacart, Uber Eats, and Postmates (which Uber purchased during the research period). The findings here also reflect participant observation and everyday conversations with workers.[145] This Article analyzes interviews and fieldnotes for how workers described and experienced the digitalized variable pay structures through which they earn.

Drivers described the wage-setting practices of Uber and Lyft—described in section I.A as algorithmic wage discrimination—in relation to and as a disjuncture from long-held wage practices and cultures. Following economic sociologist Viviana Zelizer, this Article maintains that algorithmic wage discrimination—as a nascent economic and legal phenomenon—is thus laden with new and old meanings, institutions, and structures of social relations.[146] Many workers experienced algorithmic wage discrimination as fundamentally in conflict with what they understand as the purpose of work: economic stability and security. A focus on moral economy, then, is a useful analytic to understand not just how this practice objectively departs from existing legal norms but also how workers make sense of this form of labor control and remuneration.

Section II.A analyzes algorithmic wage discrimination—as practiced by on-demand firms like Uber—within the broader history of scientific management theory. It shows how, by obscuring the rules of the workplace, algorithmic wage discrimination departs from the foundations of Taylorism—the management practice of increasing workplace efficiency by breaking production into repetitive tasks and rules—thus creating an environment in which drivers must guess the logic of the algorithms to earn. Building on this, section II.B examines how workers subjectively experience and make sense of this practice. Though both management science scholars and critical science and technology scholars have examined algorithmic management as a technical or structural matter,[147]

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145. Alongside and at the behest of drivers, I also attended protests, spoke at townhalls and in legislative hearings, wrote public essays, and spoke to journalists, unions, lawyers, and (at their requests) lawmakers and regulators about app-deployed work. To protect the identity of most workers in my research, this Article uses first-name pseudonyms. For workers who assume a public role by speaking publicly or writing opinion pieces, this Article uses their real names.

146. See Viviana A. Zelizer, The Purchase of Intimacy 41 (2000) (noting that the book will sketch changes in the legal treatment of intimacy issues but "never reconstruct in detail the legal process that produced the changes or deal systematically with their implications"); see also, e.g., Lee et al., supra note 40, at 1610 ("[M]any complications . . . can occur when one relies too heavily on quantified metrics without deeper consideration of their meanings and nuances.").

147. See, e.g., Shapiro, Dynamic Exploits: Worker Control, supra note 62, at 14–16 (suggesting that management science literature enables a lack of ethical accountability in the platform economy); Kafui Attoh, Katie Wells & Declan Cullen, "We're Building Their

we know little about how workers understand or experience algorithmic management with respect to wage setting. To the extent that scholarship has focused on workers, it has tended to look instead at their attempts to countermanage the management: how they "gamify" or try to resist the algorithm rather than how they make sense of their compensation.[148] Foregrounding workers' subjective understandings and experiences is important in order to identify this new technology of pay and control's everyday impact on workers and to begin to formulate the appropriate regulatory interventions.

The values and norms embedded in both antidiscrimination laws and minimum-wage laws discussed in Part I have become schemas through which workers frame their work experiences as harmful. In defining algorithmic payment structures as unfair and unjust, workers frequently complained of their low hourly wages, even though they were not paid hourly. In describing the harms they suffered, they drew on the language of antidiscrimination law, condemning the variability of their income not just over time but more specifically compared to other drivers. The fact that different workers made different amounts for largely the same work was a source of grievance defined through inequities that often pitted

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Data": Labor, Alienation, and Idiocy in the Smart City, 37 Env't & Plan. D: Soc'y & Space 1007, 1011–18 (2019) (using interviews with Uber drivers to understand their working conditions); Siddhartha Bannerjee, Ramesh Johari & Carlos Riquelme, Dynamic Pricing in Ridesharing Platforms, 15 ACM SIGecom Exchs. 65, 70 (2016) (studying "equilibrium effects of pricing policies in a two-sided marketplace" in revenue management); Kelle Howson, Fabian Ferrari, Funda Ustek-Spilda, Nancy Salem, Hannah Johnston, Srujana Katta, Richard Heeks & Mark Graham, Driving the Digital Value Network: Economic Geographies of Global Platform Capitalism, 22 Glob. Networks 631, 640–41 (2022) ("These complex, algorithmically managed ratings systems form the cornerstone of Upwork's digital governance."); Lee et al., supra note 40, at 1608–09 (finding that the "numeric [algorithmic] systems that made drivers accountable for all interactions . . . created negative psychological feelings in drivers"); Alex Rosenblat & Luke Stark, Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers, 10 Int'l J. Commc'n 3758, 3765–67 (2016) (describing workers' experiences with surge pricing); van Doorn, supra note 17, at 136 (highlighting the "central role of dynamic pricing" in the algorithmic management of on-demand labor); M. Keith Chen & Michael Sheldon, Dynamic Pricing in a Labor Market: Surge Pricing and Flexible Work on the Uber Platform 2 (Dec. 11, 2015), https://www.anderson.ucla.edu/faculty/keith.chen/papers/SurgeAndFlexibleWork_WorkingPaper.pdf [https://perma.cc/H2XS-NLX2] (unpublished manuscript) (seeking to measure how the dynamic pricing of tasks on online "sharing" and "gig" economy platforms influence the supply of labor on the intensive margin").

148. See Martin Krzywdzinski & Christine Gerber, Between Automation and Gamification: Forms of Labour Control on Crowdwork Platforms, 1 Work Glob. Econ. 161, 167 (2021) (noting that studies suggest that "platform workers may also use these digital infrastructures to build networks of solidarity and resistance"); Krishnan Vasudevan & Ngai Keung Chan, Gamification and Work Games: Examining Consent and Resistance Among Uber Drivers, 24 New Media & Soc'y 866, 874 (2022) (finding that oppositional play is a mode of work in which Uber drivers "actively resist Uber's gamification"); see also Juho Hamari, Jonna Koivisto & Harri Sarsa, Does Gamification Work?—A Literature Review of Empirical Studies on Gamification, *in* 47th Hawaii International Conference on System Science 3025, 3029 (2014) (finding that "gamification does work").

workers against one another, leaving them to wonder what they were doing wrong or what others had figured out.[149] This feature of algorithmic wage discrimination—because of its divisive effects—may also undermine workers' ability to organize collectively to raise their wages and improve their working conditions.

In addition to complaints about the unfairness of low, variable, and unpredictable hourly pay, workers made two other moral judgements about the techniques through which they were paid. First, as the techniques of algorithmic wage discrimination deployed by on-demand firms both lowered pay and became increasingly obscure, drivers described the process of attempting to earn not through the lens of gaming but through the lens of gambling. Second, they portrayed the algorithmic changes or interventions that prevented them from earning as they had hoped or expected as trickery or manipulation enacted by the firm. Vacillating between feeling possibility and impossibility, freedom and control, workers experienced algorithmic wage discrimination as a practice in which the machine boss's structures and functions were designed to take advantage of them by providing the illusion of agency. As Dietrich, a part-time driver in Los Angeles said, "[It's] constant cognitive dissonance. You're free, but the app controls you. You've got it figured out, and then it all changes."[150]

Drawing on these insights, this Part argues that algorithmic wage discrimination is a deeply predatory and extractive labor management practice—a practice that preys on vulnerable workers' feelings of hope while limiting any real possibility of economic certainty and stability.

A. *Labor Management Through Algorithmic Wage Discrimination*

How can we position algorithmic wage discrimination in the history of scientific management and technology? Is it a departure from or merely a continuation of the general quest for optimization and efficiency? The purpose of traditional industrial forms of scientific management has been "to find ways to incorporate ever-smaller quantities of labor time into ever-greater quantities of product."[151] In early-twentieth-century scientific management, firms broke down factory workers' motions into "elementary components" and defined each component into a fraction of a second in order to discover how best to divide the labor process and to determine how long worker movements should or could take.[152] Through observation and synthesis of workflows, scientific management attempted to optimize the processes through which work was completed in order to

149. See infra section II.B.

150. Author's Fieldnotes, Los Angeles (Mar. 29, 2019) (on file with author).

151. Harry Braverman, Labor and Monopoly Capital: The Degradation of Work in the Twentieth Century 118 (1998).

152. See id. at 120–22 (noting that management scientists made efforts to "find a means of gaining a continuous, uninterrupted view of human motion" by using, for example, photoelectric waves, magnetic fields, and motion pictures).

increase productivity. But scientific management was never merely about efficiency. Early theorists also understood it through the lens of fairness and even through workplace democracy. For example, Frederick Taylor, the author of *Principles of Scientific Management*, was characterized as observing that scientific management substituted "exact knowledge for guesswork, . . . seek[ing] to establish a code of natural laws equally binding upon employers and workmen."[153] He went so far as to argue, "No such democracy has ever existed in industry before."[154] Taylor's primary contention was that through the effort to maximize efficient production, rules became knowable—to both workers and their bosses. Workers would know what was expected of them and could, in theory, use a "code of law" developed through scientific management to justify complaints to management.[155] Scholars have shown that other features of Taylorism—such as the fact that it deskilled workforces and made exacting demands of workers' bodies, essentially treating them as a standardized part of the machine—significantly undermine its conduciveness to workplace democracy.[156] While Taylor's analysis lacked a realistic assessment of the power dynamic of most workplaces and the impacts of his systems of control, his emphasis on the importance of clear expectations and transparency is useful for thinking about what has constituted normative notions of fairness in the workplace. At the very least, knowable rules and expectations for work behavior and pay have long been agreed upon as customary in the workplace.

Taylor's system of scientific management relied on an assumption that no longer remains true under informational capitalism: that labor overhead is directly proportional to time spent laboring. Today, facilitated by independent contractor status, algorithmic wage discrimination turns the basic logic of scientific management on its head. Instead of using data and automation technologies to increase productivity by enabling workers to work more efficiently in a shorter period (to decrease labor overhead), on-demand companies like Uber and Amazon use data extracted from labor, along with insights from behavioral science, to engineer systems in which workers are *less productive* (they perform the same amount of work over longer hours) and receive lower wages, thereby maintaining a large labor supply while simultaneously keeping labor overhead low. These systems generally operate through complex incentive structures (variably called "surges," "promotions," and "bonuses" in the UberX context and

153. See Herbert Marcuse, Some Social Implications of Modern Technology, *in* 9 Studies in Philosophy and Social Science 414, 422 (1941) (internal quotation marks omitted) (quoting Robert F. Hoxie, Appendix II: The Labor Claims of Scientific Management According to Mr. Frederick W. Taylor, *in* Scientific Management and Labor 140, 140 (1916)).

154. Robert F. Hoxie, Appendix II: The Labor Claims of Scientific Management According to Mr. Frederick W. Taylor, *in* Scientific Management and Labor 140, 140 (1916).

155. Id. (arguing that the code of laws would settle any of the workmen's complaints).

156. See, e.g., Braverman, supra note 151, at 119.

"scorecards" in the Amazon DSP context), which are intentionally opaque and highly adaptive to both general demand and worker behaviors.

As in earlier iterations of the application of scientific management to labor, subjective human decisionmaking is replaced by what is understood as objective calculations. But because this is achieved through a combination of data science, machine learning, and social psychology—rather than through direct command—algorithmic control is much less legible to the worker. Firms like Uber and Amazon influence worker behavior by learning not just how workers move but also how they think: using data and machine learning to reinforce behavior that they want using financial rewards and to punish behavior that they do not want by withholding work (and therefore wages).[157] In communications researcher Tarleton Gillespie's terms, the relationship between algorithms and people is "a recursive loop between the calculations of the algorithm and the 'calculations' of people."[158] As Professor Aaron Shapiro has shown, the management science literature examining the on-demand labor platform economy focuses on solving labor control problems for workers who cannot be directly controlled because of their independent contractor status. Accordingly, it offers some useful insights into the logic behind the operation of algorithmic wage discrimination.[159] Management scholars, per Shapiro's analysis, have argued that algorithmic levers of control can produce "optimal solutions" to the logistical challenges that firms face when they do not want to exert clear control as bosses (so as to avoid the risk of being legally considered employers).[160] They do so primarily by influencing work time (e.g., through incentives) and work location (e.g., through fare multiplier or surges).[161] These two variables, alongside individualized information about worker wage goals and habits, play a critical role in determining individual worker wages on any given day. Indeed, Shapiro's analysis of the literature suggests that firms use and monitor "dynamic pricing" (an example and component of algorithmic wage discrimination for firms like Uber) to determine the exact pay rates necessary to attract a sufficient volume of workers to specific areas.[162] Algorithmic wage discrimination thus helps ensure that workers labor

157. Gillespie, supra note 40, at 183.

158. Id.

159. See Shapiro, Dynamic Exploits: Calculative Asymmetries, supra note 19, at 168 (observing that management science models are created within the regulatory constraints of workers' independent-contractor classification).

160. See id. at 163 (arguing that surge pricing is an exemplary calculative asymmetry that allows firms to exert control over workers at the aggregate level while still classifying them as independent contractors).

161. See id. at 169, 171 (observing that when labor supply is positively elastic, workers respond in predictable ways to wage adjustment as an incentive and also that the platforms depend on spatial incentives).

162. See id. at 168 (noting that managers can produce the most desirable outcomes from management's perspective by calculating the exact wage rates needed in a given situation).

during busy hours, for long periods of time, and in the firm's preferred zones.

To serve this purpose, however, the wage manipulators—in the case of Uber, surges, offers, localized incentives, quests, boosts, bonuses, and guarantees—must be personalized to each driver (thus differing between drivers) and adapt from week to week and day to day. Let us consider in slightly more detail three levers that Uber uses to influence driver behavior: base fares, geographic surges, and quests. Until 2022, California drivers were paid a base fare rooted in what appeared to be an objective calculation: time and mileage. Although drivers claim that the amounts that Uber paid them for time and mileage dropped precipitously over time between 2014 and 2022,[163] they understood the calculation of the base wage per fare, even if they could not predict the number of fares that they were allocated or the distance per fare. In the fall of 2022, however, Uber replaced the time and mileage calculation with a system called "Upfront Fares."[164] Drivers are presented with a base fare—or the upfront pricing—but do not know how it is calculated.[165] California drivers have argued that upfront pricing has lowered their overall earnings.[166] One driver explained, "The new algorithm [that determines upfront pricing] is lowering driver base pay . . . and it's not adjusting the fares for extended trips by riders . . . . [I]t's a pay cut in disguise."[167]

Because base fares are generally quite low, drivers rely heavily on surges and quests (alongside other wage manipulators, which, inside the app, are called "offers") to increase their earnings. But as drivers explained, the surge rate is highly variable between drivers, even within a particular locale. According to Ben, an active driver and organizer with Rideshare Drivers United, "[e]veryone has different levels of surge at any given time. If the median surge is 10, someone else might have 8. We don't know what this is based on. It's not transparent."[168] Many drivers also rely on bonuses from "quests," in which, for instance, a driver is told that if he completes one hundred rides per week, he will receive a bonus of $50 to

163. Author's Fieldnotes (July 27, 2022) (on file with author).

164. See Toh, supra note 77. Lyft also transitioned to this model and called it "Upfront Pay." See id. For more on upfront pricing, see generally Alison Griswold, The Devilish Change Uber and Lyft Made to Surge Pricing, Slate (Aug. 23, 2023), https://slate.com/technology/2023/08/lyft-uber-surge-prime-time-upfront-pricing.html [https://perma.cc/53YP-6VYA].

165. See Toh, supra note 77 (reporting that with the Upfront Fares initiative, Uber "will be switching to an algorithm to calculate fares that is more opaque than before").

166. See Dara Kerr, Secretive Algorithm Will Now Determine Uber Driver Pay in Many Cities, The Markup (Mar. 1, 2022), https://themarkup.org/working-for-an-algorithm/2022/03/01/secretive-algorithm-will-now-determine-uber-driver-pay-in-many-cities [https://perma.cc/9DLL-MZZ6] ("Some drivers say . . . that they've mostly seen lower earnings overall since the change [to Upfront Fares] . . . [and] it seems like Uber is taking a bigger cut of fares.").

167. Telephone Interview with Ben, Driver, Uber (Sept. 26, 2022).

168. Id.

$200.[169] But "quests are not offered every week, not everyone receives a quest when they are offered, and not everyone who is offered a quest is offered the same bonus amount."[170] Moreover, drivers claim that as they approach the required number of rides to reach their quest, Uber slows down the rate at which it sends them rides.[171]

TABLE 1. LEVERS OF WAGE CONTROL OF PLATFORM WORKERS

	Example of Levers of Wage Control †	**Influences**
Base Fare	Upfront Pricing	Decision to Accept Ride
Fare Multiplier	Surge Set by Uber	Location of Driver & Amount of Time Worked
Wage Manipulators	Quests, Pay Guarantees, Pro Status	Location of Driver, Amount of Time Worked, and Timeframe Worked

As a result of the opacity, variability, and unpredictability with which wages are determined, drivers often earn much less than they expect to or plan for. While California's Proposition 22 guarantees drivers 120% of the minimum wage of the area in which they are driving, as mentioned above, this applies only to P1 or "engaged time."[172] Theoretically, workers could labor for an entire shift and legally earn nothing if they are not allocated a fare during that time.

After the passage of Proposition 22, Rideshare Drivers United (RDU)—a group of independent, self-organizing drivers in California—joined with the National Equity Atlas to conduct a study based on their membership. They found that drivers earned, on average, $6.20 per hour

169. For more on how Uber describes how "Quests" work, see How Does Quest Work?, Uber Help, https://help.uber.com/riders/article/how-does-quest-work?nodeId=3a43fa72-4fc2-42d0-bc1d-63c4c0bddb9d [https://perma.cc/7D22-ANMG] (last visited Aug. 14, 2023).

170. Interview with Nicole Moore, Rideshare Driver's United (Sept. 21, 2021); Author's Fieldnotes (Sept. 21, 2021) (on file with author).

171. Drivers who had driven for more than six months repeatedly raised this concern. This came up in interviews and fieldnotes twenty-eight times between 2020 and 2022.

† As described herein, each of these levers varies overtime and across drivers.

172. See California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative (2020), Ballotpedia, https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020) [https://perma.cc/Q67K-5DSF] (last visited Aug. 14, 2023) (explaining that the labor and wage policies enacted by Proposition 22 included an earnings floor based on the minimum wage and a driver's "engaged time").

(after accounting for expenses and lost benefits).[173] Revealingly, many drivers simply did not believe the findings, given the high variability of their individual incomes and the difficulty in calculating their net pay.[174] As Nicole Moore, a part-time driver and RDU leader, said:

> After we released the study, we met with sixty-five drivers from across the state. No one believed they were making so little. I didn't believe it. But we worked through the numbers with them, and they went from, 'I don't believe it,' to 'Tell me something I don't know,' to drivers saying, 'How are we going to fight for wages we can live on?'[175]

In striking contrast to Taylor's description of scientific management as bringing democracy to work because everyone—workers and bosses—knows the workflows and the rules governing them, algorithmic scientific management deployed by on-demand firms is opaque—and purposefully so. Because of this opacity, workers cannot trust the firm's or their own market forecasts, nor can they rely on the firm-created incentive structures (or wage manipulators). The time that they must labor to meet their income targets—the primary way in which workers in my research structured their work—is ever changing. Through this process, hard work and long hours become disconnected from any certainty of economic security. Thus, algorithmic wage discrimination, by keeping workers in a state of deep uncertainty, creates profoundly precarious working conditions and wages that belie long-held norms of a moral economy of work.

B. *A Bundle of Harms: Calculative Unfairness, Trickery, and Gamblification*

As the RDU study referenced above makes clear, one significant problem with algorithmic wage discrimination is that it allows companies to pay workers subminimum wages.[176] But the harms of algorithmic wage discrimination extend well beyond low wages. It also upends workers' expectations, grounded in longstanding work law and culture, that they will receive predictable wages that are comparable to other drivers'. Drivers often described the fact that they are paid differing amounts at different times and compared to other workers as fundamentally "unfair." Emphasizing the ubiquity of this problem, Carlos, a driver organizer, told me and a group of his fellow organizing drivers:

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173. See Eliza McCullough, Brian Dolber, Justin Scoggins, Edward-Michael Muña & Sarah Treuhaft, Prop 22 Depresses Wages and Deepens Inequities for California Workers, Nat'l Equity Atlas (Sept. 21, 2022), https://nationalequityatlas.org/prop22-paystudy [https://perma.cc/6BA7-V835] ("[T]he National Equity Atlas partnered with Rideshare Drivers United and 55 rideshare drivers working across the state's major rideshare markets to collect and analyze driver data from November 1, 2021, to December 12, 2021 . . . .").

174. Telephone Interview with Nicole Moore, Rideshare Drivers United (Sept. 23, 2021).

175. Id.

176. See supra note 173 and accompanying text.

> I need a real living wage. Not some fake minimum wage. I'm from Cuba and I'm not a socialist; I'm a social democrat. When I'm in the car, I think this is worse than socialism. It is the violence of unbalanced capitalism. There everyone has the same shoes. Here, we don't have money to buy shoes. I am not asking for a revolution. I am asking for fairness. I am asking to make enough to live. *To know how much I am going to make from one day to the next. To have some predictability.*[177]

The following sections examine how workers talk about the lack of predictability that Carlos describes. Drivers like Carlos object not just to the low pay but also to feeling constantly tricked and manipulated by the automation technologies. As wages for on-demand ride-hail drivers in California dropped over the course of my research, I increasingly heard drivers complain about the "casino culture" generated by on-demand work. These pervasive experiences and feelings run counter to the widespread moral expectation that work should, as discussed in Part I, provide a stable means of survival and even consumption.

1. *Calculative Unfairness.* — Algorithmic wage discrimination leads to different forms of perceived calculative unfairness among drivers, rooted in both in the variability of their pay and the differences in their pay. Experienced drivers generally report having to work longer hours to earn the amount that they earned early in their career. This is both because the collective wages for Uber drivers have been reduced dramatically since the firm was founded and because drivers generally believe that the firms offer new drivers better fares and bonuses to entice them to work for the company and become financially reliant on the work. As Moore, who started driving for Lyft because of a bad mortgage, told me:

> I was promised 80% of the fares [when I started], and within two months there was no relationship between what the passenger was paying and what I was earning. So, I had started making about $200 a day and within two months it was $150. And after a while, I was having a hard time even making a $100! So, I had to add on an extra day to pay for my mortgage. I've never had a job like this before. It felt fundamentally unfair.[178]

In addition to decreasing wages over time—due both to systemwide "pay cuts" and to the personalized nature of algorithmic wage discrimination—workers who labored for longer hours complained that they earned less per hour than workers who worked shorter hours. Hall and his coauthors confirmed this in their study on gendered wage disparities, noting a "decreasing return [for drivers] to within-week work intensity."[179] Thus, a worker who labors for thirty hours a week tends to

177. Author's Fieldnotes, New York (Sept. 29, 2022) (on file with author) (emphasis added).

178. Telephone Interview with Nicole Moore, Rideshare Drivers United (Aug. 6, 2019).

179. See Cook et al., supra note 134, at 2229 ("This [analysis] shows that, at least for Uber drivers, there is significant financial value in accumulated experience and a mildly decreasing return to within-week work intensity.").

earn less per hour than a worker who labors for twenty hours a week. Again, this phenomenon runs counter to moral expectations about work: Those who work long hours will earn the same for those hours, or even more per hour after laboring for a certain number of hours (due to overtime laws).

Drivers also notice that even among those who drive roughly similar routes and hours, some make more than others. Adil, a Syrian refugee who supports five kids and his wife, began driving for Uber after arriving in the Bay Area via Dubai. Many of his friends drove for Uber and showed him screenshots of how much they could earn. Hoping to follow in their footsteps, he got a loan, bought a car, and started driving. He lived two hours outside of the city and drove to San Francisco, where he labored for three days in a row—sleeping in his car when he felt tired. Adil would spend one day each week at home with his family. But at the time of our conversation, Adil was not earning enough to make his rent or pay for his car, which was on the verge of being repossessed. The perception that others were able to make more money than him was a nagging data point that kept Adil driving:

> My friends they make it, so I keep going, maybe I can figure it out. It's unsecure, and I don't know how people they do it. I don't know how I am doing it, but I have to. I mean, I don't find another option. In a minute, they find something else, oh man, I will be out immediately . . . . I am a very patient person, that's why I can continue . . . . Now for the past two days I was like, I am stupid. I should not be dragged like this [by this company]. I started praying recently. Maybe God can help me. I am working hard, why can't I make it?[180]

In contrast to Adil, who experienced his poor fortunes compared to other drivers as largely mysterious, some drivers had clear explanations for their experiences. Diego told me, "Anytime there's some big shot getting high payouts, they always shame everyone else and say you don't know how to use the app. I think there's secret PR campaigns going on that gives targeted payouts to select workers, and they just think it's all them."[181] For many drivers like Adil, Nicole, and Diego, their inability to make as much as they once did, or as others claim that they can, becomes a source of inner conflict—producing feelings not only of unfairness but also of personal failure and hopelessness. These experiences contradict the understanding of what contract-based work provides under industrial capitalism: the security of labor in exchange for a stable wage. But it also

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180. Interview with Adil, Driver, Uber, S.F., Cal. (Mar. 4, 2016).

181. Interview with Diego, Driver, Uber, S.F., Cal. (May 5, 2017). Diego's interpretation of how on-demand wages work is not dissimilar from how multilevel marketing schemes work. See Jon M. Taylor, Consumer Awareness Inst., The Case (for and) Against Multi-Level Marketing ch. 2, at 24 (2011) ("There is seldom any functional justification for five or more levels in [a multilevel marketing] hierarchy of participants[,] other than to encourage recruiting and the illusion of very large potential incomes—which only a few enjoy.").

creates a divisiveness within the workforce that makes it harder for workers to collectivize and address the harms of this form of compensation and control.

2. *Trickery and Gamblification.* — In response to algorithmic prodding enacted through wage manipulators discussed above, workers must make decisions—asserting calculative agency.[182] They do this by drawing on both their acquired knowledge of the algorithmic systems and their knowledge of urban spaces. This agency is circumscribed, however, by the opaque and constantly changing algorithmic systems and wage manipulators that firms offer them. As a result, drivers, especially those who have figured out a technique that helps them earn or who have come to rely on weekly quests, often feel manipulated or tricked as the system changes. Given the information asymmetry between the worker and the firm, this variability generates a great deal of suspicion about the algorithms that determine their pay.

Tobias, a longtime Uber driver, shared how he and his driver friends experience the information asymmetries:

> For us drivers, a lot of it is just suspicion. They [Uber] operate in very opaque ways, they are collecting your information and, they know everything about you. They know what route you're taking, your personal information, where you are going, but when it comes to the output of the algorithm, that is all obscured. There is no way to know why the app is making these decisions for me.[183]

Such obscurity generates many concerns about wage manipulation. For example, Domingo felt over time like he was being tricked into working longer and longer for less and less. He gave me an example:

> It feels like the algorithm is turned against you. There was a night at the end of one of the weeks, it felt like the algorithm was punishing me. I had ninety-five out of ninety-six rides for a $100 bonus . . . . It was ten o'clock at night in a popular area. It took me forty-five minutes in a popular area to get that last ride. The algorithm was moving past me to get to people who weren't closer to their bonus. No way to verify that, but that's what it felt like. I was putting the work in the way I was supposed to, but the app was punishing me because it was cheaper to give it to someone else. So I got forty-five minutes of dead time, hoping that I would go home and give up. Really feels like you are being

182. The work of Michel Callon and Fabian Muniesa influenced this characterization. In an influential organizational study paper, they theorize the calculative character of markets by defining their three constitutive elements: economic goods, economic agents, and economic exchanges. Michel Callon & Fabian Muniesa, Peripheral Vision: Economic Markets as Calculative Collective Devices, 26 Org. Stud. 1229, 1245 (2005) ("Economic calculation . . . is not a purely human mechanical and mental competence; it is distributed among human actors and material devices. . . . These three elements (goods, agents, and exchanges) constitute three possible starting-points for exploring markets as complex calculative devices.").

183. Interview with Tobias, Driver, S.F., Cal. (Sept. 21, 2021).

> manipulated—not random chance but literally feels like you're being punished by some unknown spiteful god.[184]

Domingo believed that Uber was not keeping its side of the bargain. He had worked hard to reach his quest and attain his $100 bonus, which he had budgeted to buy groceries that week, but he found that the algorithm was using that fact against him. Many drivers articulated similar suspicions. Melissa told me quite succinctly, "When you get close to the bonus, the rides start trickling in more slowly . . . . And it makes sense. It's really the type of sh—t that they can do when it's okay to have a surplus labor force that is just sitting there that they don't have to pay for."[185]

Perhaps no wage manipulator received more suspicion from drivers than surges—which are a major portion of overall driver income. Drivers overwhelmingly believed that surges are a form of trickery Uber enacts upon them, and they reported either not responding to surges or using another app to judge whether a surge was real or not. In other words, they independently determined whether there was actual demand in a given area or whether Uber was instead simply trying to trick them into changing their location. The first time I heard about surge trickery was in 2016, from Derrick, a middle-aged African American driver who frequently picked up passengers from the San Francisco International Airport. He told me how he dealt with surges:

> Derrick: Uber will make the airport surge bright red like it's 3.0 [three times the base fare] . . . . You get a 3.0 trip from the airport downtown, that might be like $60 a trip, you know. Uber will make it surge on there even though no flights coming in, so everybody can look at the app and [think], 'Man, it's surging at the airport, let me go back to the airport.' [But] you go to the airport, once the lot get kind of full, then the surge go away. They cut if off. So they just want you back.
>
> Dubal: So, wait, when you see the surge you don't respond?
>
> Derrick: No. I don't even go to it. [(laughs)] . . . It took me a minute to figure that out. It took me maybe, I won't say a year, but it took me a minute. Actually, there was this lady who worked at the Uber office in Sacramento, and she called me and pulled me to the side . . . . She said 'Don't be chasing that surge or nothing like that.' She said, 'Look, when you figure out how they play their game,' she said, 'You will be all right.' She said, 'Just watch. Think about how they play their game; you will be all right.' She worked for Uber. And I figured it out. I said, okay, I see what they do.[186]

After hearing about this strategy from Derrick, I started asking drivers about it. Many explained that they were on group texts with other drivers who would "call out" fake surges. After being added to one of these text

184. Author's Fieldnotes, San Francisco (May 20, 2020) (on file with author).

185. Telephone Interview with Melissa, Driver (Feb. 2020).

186. Interview with Derrick, Driver, Burlingame, Cal. (Mar. 9, 2017).

threads, I received text messages that alerted drivers to avoid certain areas (e.g., "I'm in the Marina. It's dead. Fake surge.").[187] The expectation not only that firms withhold information from workers but also that some information firms provide is "fake" has become a well-known phenomenon among those who study the field. Management scientists Harish Guda and Upender Subramanian have even proposed that on-demand firms "misreport" demand information to control worker behavior.[188] As Shapiro explains, Guda and Subramanian encourage firms to "mislead[]" workers by exaggerating surges more and more as workers "become suspicious of platform information."[189]

This sense that algorithmic wage discrimination techniques are used to manipulate drivers through trickery and misinformation has led many workers to feel angry and alienated. It has also motivated several to become involved in driver activism for better working conditions and wages. Inmer, who owned a small construction company and worked for Uber on the side to help pay his disabled child's medical expenses, explained why he decided to join a group of workers fighting against the on-demand system:

> It's like being gaslit every day, being told you are independent and being manipulated in all these different ways. Every single day they are figuring out how to exploit you in different ways. It drives me to anger that bubbles up inside me because I'm being taken advantage of . . . . The state of work is going to deteriorate in this country in a way such that it's not recognizable anymore. It already is.[190]

Inmer and Adil both expressed remorse and even guilt about not finding other, more secure jobs because they, like many others in my research, viewed ride-hailing work as a form of gambling. The trickery and opacity involved in setting wages made the work feel not just like a game, in which the labor was to drive, accept fares, and navigate the firm's incentives, but also like a gamble, in which the financial outcome of those incentives was always unpredictable.

The "gaming" of on-demand work has been described by media theorists as a process that "scaffolds tedious work tasks [through] 'puzzles' and 'challenges' that offer workers the potential to earn 'points,' 'badges,'" and other rewards in exchange for labor consent.[191] But these

187. Author's Fieldnotes, San Francisco (Apr. 10, 2017) (on file with author).

188. Harish Guda & Upender Subramanian, Your Uber Is Arriving: Managing On-Demand Workers Through Surge Pricing, Forecast Communication, and Worker Incentives, 65 Mgmt. Sci. 1995, 2000 (2019).

189. Shapiro, Dynamic Exploits: Worker Control, supra note 62, at 16. Shapiro cites a previous version of Guda & Subramanian's article, supra note 188, that was posted online prior to its final publication.

190. Author's Fieldnotes (Mar. 15, 2022) (on file with author).

191. Vasudevan & Chan, supra note 148, at 869 (quoting Tae Wan Kim & Kevin Werbach, More Than Just a Game: Ethical Issues in Gamification, 18 Ethics Info. Tech. 157, 157 (2016)). Scholars Krishnan Vasudevan and Ngai Keung Chan also note that gamification of labor "becomes predatory" when it is "designed to cultivate 'obsessive

"games"—in the form of surges or quests—may better be conceived as *gambles*, or in sociologist Ulrich Beck's terms, "manufactured uncertainties,"[192] which predicate earnings on worker consent to the risk. By design, they are work activities connected to earnings that limit choice and present high financial risk.[193]

Workers describe how the very structure of the system—seemingly random patterning of incentive allocation—produces subjective shifts in which they feel possibility and impossibility, freedom and unfreedom.[194] The occasional good fare or high surge allocation keeps many workers going. As they begin to feel hopeless and think about looking for other work, they might get another good fare—effectively keeping them in the labor force for longer. Moore explained:

> The system is designed to make sure people never earn a certain amount . . . . Who knows what the magic number is for Uber when they start sending us less desirable rides, but that calculation is happening. If someone is making forty dollars above expenses, and that's a good ride, . . . you are only getting that once a week. They will give that to someone to incentivize them to keep going. It keeps people in the loop a little longer. It's the *casino mechanics* . . . . You need to have that good ride to know that they come every now and again.[195]

In another one of my conversations with Ben, he affirmed this logic, right before he had to go back to work:

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behavior,' while limiting 'rational self–reflection.'" Id. (quoting Tae Wan Kim & Kevin Werbach, More Than Just a Game: Ethical Issues in Gamification, 18 Ethics Info. Tech. 157, 164 (2016)). While gamification may indeed incite obsessive behavior, the larger point I make is that even workers who are not "addicted" to the work find that the uncertain rules and payouts of the game are gambling-like.

192. See Ulrich Beck, World Risk Society and Manufactured Uncertainties, 1 Iris 291 (2009) ("[Manufactured uncertainties] are distinguished by the fact that they are . . . created by society itself, immanent to society and thus externalizable, collectively imposed and thus individually unavoidable . . . .").

193. Economic sociology scholar Vili Lehdonvirta notes that this is also true of online (as opposed to in-person) on-demand workers who labor under a different model of algorithmic wage discrimination. For example, Lehdonvirta finds that Mechanical Turk workers "effectively gamble with their time, forgoing modest but certain rewards for a chance to earn bigger rewards." Vili Lehdonvirta, Flexibility in the Gig Economy: Managing Time on Three Online Piecework Platforms, 33 New Tech. Work & Emp. 13, 22 (2018). For more on this model, see generally Alex J. Wood, Mark Graham, Vili Lehdonvirta & Isis Hjorth, Good Gig, Bad Gig: Autonomy and Algorithmic Control in the Global Gig Economy, 33 Work Emp. & Soc'y 56 (2019) (finding that although remote gig workers experienced "high levels of autonomy . . . [and] potential spatial and temporal flexibility" these same qualities produced by "algorithmic control" also resulted in "overwork, sleep deprivation, and exhaustion" since they often "[had] little real choice" in how, where, or for how long they worked).

194. See Rosenblat & Stark, supra note 147, at 3777 (discussing how Uber drivers do not experience the freedom and flexibility that Uber advertises).

195. Telephone Interview with Nicole Moore, Rideshare Drivers United (Mar. 29, 2019) (emphasis added).

> It's like gambling—the house always wins . . . . This is why they give tools and remove tools—so you accept every ride, even if it is costing you money . . . . You always think you are going to hit the jackpot. If you get two to three of these good rides, those are the screenshots that people share in the months ahead. Those are the receipts they will show. Hey, [(laughing, as he gets off the phone)] it's almost time to roll the dice . . . . I gotta go![196]

In dynamic interactions between a worker and the app, the machine—like a supervisor—is a powerful, personalized conduit of firm interests and control. But unlike a human boss, the machine's one-sided opacity, inconsistencies, and cryptic designs create shared worker experiences of risk and limited agency.[197] Perhaps most insidiously, however, the manufactured uncertainties of algorithmic wage discrimination also generate hope (that a fare will offer a big payout or that next week's quest guarantee will be higher than this week's) that temporarily defers or suspends the recognition that the "house always wins."[198] The cruelty of those temporary moments of optimism becomes clear when workers get their payout and subtract their costs.[199]

Even if on-demand companies are *not* using algorithmic wage discrimination to offer vulnerable workers lower wages based on their willingness to accept work at lower prices, the possibility remains that they *can* do so, as can other employers. Together with low wages, the unfairness, gamblification, and trickery create an untenable bundle of harms that run afoul of moral ideals of formal labor embedded in longstanding social and legal norms around work.[200]

III. REORIENTING GOVERNANCE OF DIGITALIZED PAY: TOWARD A NONWAIVABLE PEREMPTORY BAN ON ALGORITHMIC WAGE DISCRIMINATION

> *"Humans Aren't Computers! End AI Oppression!"*
>
> — Sign held by a protesting Uber driver.

Writing of the food riots precipitated by rising wheat prices and poor harvests in eighteenth-century England, historian E.P. Thompson observed:

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196. Telephone Interview with Ben, Driver, Uber (Aug. 22, 2022) [hereinafter August 2022 Interview with Ben].

197. See, e.g., Rosenblat & Stark, supra note 147, at 3764 (discussing how Uber hides its pay structure from drivers).

198. See August 2022 Interview with Ben, supra note 196.

199. This Article draws conceptually on Lauren Berlant's idea of "cruel optimism." Lauren Berlant, Cruel Optimism 1 (2011) ("A relation of cruel optimism exists when something you desire is actually an obstacle to your flourishing.").

200. See Bolton & Laaser, supra note 23, at 512 (discussing a morality-driven theory of labor that emphasizes the humanity of the labor force).

> [R]iots were triggered off by soaring prices, by malpractices among dealers, or by hunger. But these grievances operated within a popular consensus as to *what were legitimate and what were illegitimate practices* in marketing, milling, baking, etc. This in its turn was *grounded upon a consistent traditional view of social norms and obligations, of the proper economic functions of several parties within the community* . . . . An outrage to these moral assumptions, quite as much as actual deprivation, was the usual occasion for direct action.[201]

But Thompson's description of the famous riots should not be read as a form of nostalgia for a more "traditional" system on the part of the protestors.[202] During a historic era of industrial upheaval, protestors' actions were future looking.[203] As anthropologists Jaime Palomera and Theodora Vetta have written, "[T]hey [protested] to define entitlements and rights, forms of social responsibility and obligation, tolerable levels of exploitation and inequality, meanings of dignity and justice."[204] Their protests were intended to demarcate the boundaries of what they believed a moral economy should look like in the coming century.[205]

In this contemporary moment of rupture in the legal and social relationship between firms and workers under informational capitalism, there is a great deal of popular mobilization on the basis of beliefs about illegitimate wage calculation and digital compensation systems.[206] Through direct actions, strikes, protests, and lawsuits, on-demand workers all over the world have asserted discontent and outrage over the practices

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201. E.P. Thompson, The Moral Economy of the English Crowd in the Eighteenth Century, 50 Past & Present 76, 78–79 (1971) [hereinafter Thompson, Moral Economy] (emphasis added). In this foundational text on moral economy, Thompson discusses the shift from the subsistence economy to the wage economy. Id. Thompson revisited this article in 1991 and made clear that industrial capitalism was not an amoral economy. E.P. Thompson, Customs in Common 270–71 (1991) [hereinafter Thompson, Customs]. In doing so, he clarified that his essay was about a shift from a particular moral economy to a new moral economy. Id. Thompson argued that free market theories that attempted to divest moral imperatives from market relations created new kinds of moral problems. Id.

202. Thompson, Moral Economy, supra note 201, at 79.

203. See Thompson, Customs, supra note 200, at 340–41 (praising a forward-looking definition of moral economy when discussing the protests); Palomera & Vetta, supra note 42, at 424 (arguing that the riots described by Thompson were "future-oriented").

204. Palomera & Vetta, supra note 42, at 424.

205. Thompson, Moral Economy, supra note 201, at 79 ("[The protestors' convictions were] grounded upon a consistent traditional view of social norms and obligations, of the proper economic functions of several parties within the community, which, taken together, can be said to constitute the moral economy of the poor.").

206. See, e.g., Faiz Siddiqui, Uber and Lyft Drivers Strike for Pay Transparency—After Algorithms Made It Harder to Understand, Wash. Post (May 8, 2019), https://www.washingtonpost.com/technology/2019/05/08/uber-lyft-drivers-strike-pay-transparency-after-algorithms-made-it-harder-understand/ (on file with the *Columbia Law Review*) (discussing numerous demonstrations by Uber and Lyft drivers to lobby for improved pay and increased transparency).

of control and compensation that this Article theorizes as algorithmic wage discrimination.[207]

In these acts of resistance, workers have frequently demanded the traditional wage floor associated with employment status.[208] But, recognizing that this would not solve all the harms that arise from digitalized variable pay (after all, gamblification and trickery could still exist alongside a minimum-wage floor), many organized worker groups and labor advocates have turned their attention to the data and algorithms that are invisible to them.[209] In this sense, they are not just calling for a return to the Fordist employment system but rather attempting to redefine the terms of work in relation to informational capitalism and its indeterminate future(s).[210]

As a first step, these workers have sought to make transparent both the data and the algorithms that determine their pay (including those that determine work allocation).[211] This Part examines two important, worker-engaged forms of resistance that attempt to deal with the interrelated problems of pay and data in the on-demand economy and discusses their promises and limitations. Some workers have sought to leverage the European General Data Protection Regulation (GDPR) and analogous U.S. state laws, including the California Privacy Protection Act (CPPA), to learn what data are extracted from their labor and how the algorithms govern their pay.[212] Others have creatively used business association laws to maximize workers' financial gain and control through parallel data collection, collective data ownership, and sale of datasets.[213]

Sections III.A and III.B argue that both data transparency approaches and data collectives are critical forms of resistance but also that they cannot by themselves address the social and economic harms produced by

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207. See Ioulia Bessa, Simon Joyce, Denis Neumann, Mark Stuart, Vera Trappmann & Charles Umney, A Global Analysis of Worker Protest in Digital Labour Platforms 8–10 (Int'l Lab. Org., Working Paper No. 70, 2022), https://www.ilo.org/wcmsp5/groups/public/—dgreports/—inst/documents/publication/wcms_849215.pdf [https://perma.cc/5F4E-ZZVQ] (outlining various forms of protest by on-demand workers in opposition to issues like algorithmic management).

208. Id. at 8 (discussing on-demand digital platform workers' campaigns for minimum-wage legislation).

209. Id. (discussing worker unrest regarding algorithmic management).

210. See Rana Foroohar, How the Gig Economy Could Save Capitalism, Time (June 15, 2016), https://time.com/4370834/sharing-economy-gig-capitalism/ [https://perma.cc/7QZG-T2C7] ("[T]he platform technologies of the 'sharing economy' might offer the possibility of empowering labor in a new way, creating a more inclusive and sustainable capitalism.").

211. See, e.g., Siddiqui, supra note 206; see also infra section III.A.

212. See, e.g., Natasha Lomas, Drivers in Europe Net Big Data Rights Win Against Uber and Ola, TechCrunch (Apr. 5, 2023), https://techcrunch.com/2023/04/05/uber-ola-gdpr-worker-data-access-rights-appeal/ [https://perma.cc/3TSU-JE59] (discussing drivers' actions against Uber and Ola under the GDPR).

213. See infra section III.B.

algorithmic wage discrimination and its associated practices. Section III.C proposes that addressing the harms caused by the algorithmic wage discrimination detailed throughout this Article requires not merely shifting control over the data—for example, by democratizing workplace data relations—but rather envisaging a peremptory restriction on the practice altogether. This, in turn, may disincentivize or even eliminate certain forms of data collection and digital surveillance that have long troubled privacy and work law scholars (and, of course, workers themselves).

This Article thus invites scholars studying about data governance to think more expansively not just about the legal parameters of what happens to the data after it is collected but also about the legal abolition of digital data extraction: what I have called the "data abolition" objective.[214] Data extraction at work is neither an inevitable nor necessary instrument of labor management—especially when analyzed through the lens of moral economy.

A. *The Limits of Data Transparency and Algorithmic Legibility*

One of the most frequently proposed policy reforms for platform labor in the global fight to recognize the employment status of many on-demand workers (including Uber drivers) concerns algorithmic transparency and legibility. Workers, scholars, and regulators alike have argued that a first step to labor regulation in on-demand work sectors is to make the "black box" of algorithmic wage setting and labor controls more comprehensible and transparent to workers, consumers, and governing bodies.[215] Those who have tried or are trying to use data privacy laws such

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214. The term "data abolition" invites scholars and advocates to think about how ending digital data extraction can be a movement's aspiration, accomplished via statute or bargained for by contract. Using the term "abolition" draws upon W.E.B. Du Bois's articulation of "abolition democracy." W.E.B. Du Bois, Black Reconstruction in America: Toward a History of the Part Which Black Folk Played in the Attempt to Reconstruct Democracy in America, 1860–1880, at 163 (Routledge 2017) (1935) ("[One theory of the future of America] was abolition-democracy based on freedom, intelligence and power for all men; the other was industry for private profit directed by an autocracy determined at any price to amass wealth and power."). In Du Bois's making, employers' extraordinary power to subordinate workers—both Black and white—undermined the promise of Reconstruction for Black labor. What was left, Du Bois wrote, was "an oligarchy similar to the colonial imperialism of today, erected on cheap colored labor and raising raw material for manufacture." Id. at 211. Data abolition at work, as I conceive of it, is a means of intervening in these oligarchic, neocolonial formations. It is an objective that would prevent the ubiquitous extraction of digital data on workers—whether that data is extracted to control labor individually or collectively. Data abolition is of course just one instrument in the struggle toward coordinating more racially just and equitable workplaces and economies. But under informational capitalism, it is an essential one.

215. See, e.g., S.B. 23-098, 74th Gen. Assemb., Reg. Sess. (Colo. 2023); Sara Wilson, Colorado Bill Aims to Increase Transparency for Uber, Lyft Driver Pay, Colo. Newsline (Jan. 31, 2023), https://coloradonewsline.com/2023/01/31/colorado-transparency-uber-lyft-driver-pay/ [https://perma.cc/Q483-58YF] ("It's about transparency. Companies would

as GDPR and analogous U.S. laws to shed light on labor conditions and pay in on-demand sectors maintain that such knowledge can help equalize the playing field between workers and platforms by helping workers understand their pay calculations, the grounds for their dismissal or suspension, and the ways in which their working conditions are otherwise influenced or controlled by automated systems.

James Farrar, a former Uber driver and current organizer in the United Kingdom, discovered the importance of knowledge and control over data in the context of his legal disputes with Uber over his employment status. Along with his coworker, Yaseen Aslam, Farrar founded a union of on-demand workers called the App Drivers & Couriers Union (ADCU), and in 2015, they sued Uber for basic workers' rights, including the national minimum wage.[216] Farrar and Aslam (and their twenty-five coplaintiffs) won their case after six years of litigation, receiving a historic positive judgement from the U.K. Supreme Court in February 2021.[217] The Court found (among other things) that the drivers were entitled to minimum-wage protections for all the time they spent logged

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have to disclose the take rates to the drivers and customers before it happens. Sometimes that is not disclosed to a driver before we accept a ride." (internal quotation marks omitted) (quoting Brian Winkler, Organizer, Colo. Indep. Drivers United)); Press Release, Council of the EU, Rights for Platform Workers: Council Agrees Its Position (June 12, 2023), https://www.consilium.europa.eu/en/press/press-releases/2023/06/12/rights-for-platform-workers-council-agrees-its-position/ (on file with the *Columbia Law Review*) ("Digital labour platforms regularly use algorithms for human resources management. As a result, platform workers are often faced with a lack of transparency . . . . The Council wants to ensure that workers are informed about the use of automated monitoring and decision-making systems." (emphasis omitted)). For examples in the academic literature, see, e.g., Dan Calacci & Alex Pentland, Bargaining With the Black-Box: Designing and Deploying Worker-Centric Tools to Audit Algorithmic Management, 6 Proc. ACM Hum-Comput. Interaction (CSCW2), art. 428, 2022, at 1, 20 (noting that "data access for platform workers is also a larger project than just 'bargaining with the black box' for higher wages" because that data itself has other value to the workers); Toby Jia-Jun Li, Yuwen Lu, Jaylexia Clark, Meng Chen, Victor Cox, Meng Jiang, Yang Yang, Tamara Kay, Danielle Wood & Jay Brockman, A Bottom-Up End-User Intelligent Assistant Approach to Empower Gig Workers Against AI Inequality 1, 2 (CHIWORK Symposium on Human-Computer Interaction for Work 2022), https://arxiv.org/pdf/2204.13842.pdf [https://perma.cc/FPM9-WN7M] (noting that the use of AI in the gig economy disadvantages workers that have neither access to their data nor the tools to analyze it); Antonio Aloisi, Valerio De Stefano & Six Silberman, A Manifesto to Reform the Gig Economy, Wolters Kluwer: Glob. Workplace L. & Pol'y (May 1, 2019), https://global-workplace-law-and-policy.kluwerlawonline.com/2019/05/01/a-manifesto-to-reform-the-gig-economy/ [https://perma.cc/6K4D-RS72] (advising the development of standards and regulations to "temper the impulse to technological novelty . . . with sustained and serious action to safeguard workers' rights and build worker power in digital labour platforms").

216. About Us, App Drivers & Couriers Union, https://www.adcu.org.uk/about-us [https://perma.cc/CEF4-P928] (last visited Aug. 14, 2023).

217. Mary-Ann Russon, Uber Drivers Are Workers Not Self-Employed, Supreme Court Rules, BBC News (Feb. 19, 2021), https://www.bbc.com/news/business-56123668 [https://perma.cc/EXD7-E3V].

onto the app, including P1 or nonengaged time.[218] Still, to date, Uber has refused to guarantee a minimum-wage floor or pay workers for all the time that they labor, claiming the holding no longer applies to their operations because the on-the-ground facts have changed since the case was adjudicated.[219] Through this litigation, Farrar came to understand the role of data extracted from his labor in maintaining his subjugation and that of his on-demand worker colleagues. Reflecting on the case, he noted:

> Uber challenged me with my own data, and they came to the tribunal with sheaves of paper that detailed every hour I worked, every job I did, how much I earned, whether I accepted or rejected jobs. And they tried to use all this against me. And I said we cannot survive and cannot sustain worker rights in a gig economy *without some way to control our own data.*[220]

Prompted by this realization, Farrar founded Worker Info Exchange—a United Kingdom–based nonprofit dedicated to using GDPR to help workers across on-demand sectors understand what data is being collected by labor platform companies and how it is being processed to manage and compensate them. Farrar and Worker Info Exchange have since sued several on-demand companies for not sharing basic information on what data they collect from their workers' labor. But as Farrar states, "[W]hat we really want are *inference data*. What decisions has [the

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218. See Uber BV v. Aslam [2021] UKSC 5 [138] (Eng.).

219. In 2021, soon after the High Court ruling finding that Uber drivers are workers and deserve minimum-wage protections, the company reached a private agreement with the United Kingdom's largest union—the GMB, which funded the ADCU litigation. The GMB, like the Machinists Union in New York City that formed the Independent Drivers Guild (IDG) (an unelected worker association that receives funding from Uber and Lyft), gets to organize drivers at hubs and contest driver termination. See Natasha Bernal, Uber's Union Deal Doesn't Mean the Battle Is Over, Wired (May 27, 2021), https://www.wired.co.uk/article/uber-gmb-recognition-deal/ [https://perma.cc/QZ4V-KU4G]. But the GMB, unlike the IDG, does not insist that the company pay workers for all the time that workers spend laboring and appears to completely forgo collective bargaining on pay. Id. Instead, under the GMB–Uber agreement, Uber continues to pay workers a minimum wage only for "engaged time." UK Business Model Change, Uber (Feb. 24, 2022), https://www.uber.com/en-GB/blog/driver-terms-faq/ [https://perma.cc/SSR2-P654] ("It's important to note that these changes do not affect the worker protections that we provide to drivers on the Uber app . . . . You are still guaranteed to earn at least the National Living Wage for the engaged time you spend on the app . . . ."). One critique of this agreement is that it neutralizes the worker-led fight for an hourly wage and for employment status more generally. In practice, it also sanctions algorithmic wage discrimination as a form of insecure pay and labor control and leaves the issues raised by data extraction untouched. Months after the GMB agreed to these terms, the United Food and Commercial Workers International (UFCW) in Canada signed a similar agreement with Uber. David Doorey, The Surprising Agreement Between Uber and UFCW in Canada in Legal Context, OnLabor (Jan. 31, 2022), https://onlabor.org/the-surprising-agreement-between-uber-and-ufcw-in-canada-in-legal-context/ [https://perma.cc/6KGT-5YU5].

220. Bama Athreya, With One Huge Victory Down, UK Uber Driver Moves On to the Next Gig Worker Battlefront, Inequality.org (Apr. 5, 2021), https://inequality.org/research/uk-uber-drivers/ [https://perma.cc/ZMC6-97VR] (emphasis added) (internal quotation marks omitted) (quoting interview with James Farrar).

app] made about me? How has it profiled me? How does that affect my earnings? This is what Uber has not given us."[221]

CPPA went into effect for workers in January 2023. Drivers organizing with RDU, drawing on Farrar's work, are positioned to pursue similar legal inquiries. Both RDU and Worker Info Exchange base their actions and understanding of the data extraction and algorithmic processes that determine their pay in three aspirational rights: (1) the right to access the data extracted from their labor and the algorithms that pay and direct them, (2) the right to contest the validity of the data that is collected through their labor, and (3) the right to "explainability" of the algorithms that pay and direct them.[222] Workers' "rights to know" how they are governed and remunerated by automation technologies largely reflect what scholars of informational capitalism, including those who authored the White House *Blueprint*, have argued the public needs: technological governance built on consent and transparency.

Although these efforts should be understood as powerful attempts to leverage GDPR and draw attention to the use of data and opaque algorithms to control workers and their wages,[223] efforts by Farrar and others to gain transparency over—and even to "reverse engineer"—the labor management structures that produce algorithmic wage discrimination have yet to change firm practices.[224] In theory, Article 22 of the GDPR should protect workers from some algorithmic wage discrimination practices, as it provides them with a right to know how they have been subjected to automated decisionmaking and to challenge these decisions if they "produce legal effects."[225] Article 15 of the GDPR grants data subjects the right to receive a copy of their personal data and to attain information about how that data is processed and shared.[226] To date, some

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221. Id.

222. Author's Fieldnotes (Apr. 30, 2022) (on file with author).

223. Media studies scholar Niels van Doorn, for example, discusses how a "calculative experiment" among Deliveroo riders in Berlin—an experiment to understand dynamic pricing—created a web-based tracker app. See van Doorn, supra note 17, at 146. He notes that it was a "minor calculative power shift," but that it could be used to grow union power and to politicize workers around the problems of pricing. Id.

224. Id. at 148 (declaring a need for labor organizers and workers to continue working against the "unchecked power" of gig platforms).

225. Article 22 of the GDPR states, in part, "The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her." Council Regulation 2016/679, 2016 O.J. (L 119) 46 (EU).

226. Article 15 of GDPR states:

> 1. The data subject shall have the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data and the following information:
>
> (a) the purposes of the processing;
>
> (b) the categories of personal data concerned;

on-demand companies have made data downloads available to workers who request them.[227] Other firms have fought off attempts by workers to achieve some level of work rule transparency and accountability under GDPR. Companies like Uber and Ola have argued that "the safety and security of their platform may be compromised if the logic of such data processing is disclosed to their workers."[228]

Even in cases where the companies have released the data, they have released little information about the algorithms informing their wage systems. In one suit, Worker Info Exchange challenged Uber's refusal to provide information under GDPR on data processed in Upfront Pricing.[229] A lower court ruling found that "the drivers did not substantiate that they wanted to be able to verify the *correctness* and lawfulness of the data processing"—only that they had "a wish to gain insight" into how Uber

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> (c) the recipients or categories of recipient to whom the personal data have been or will be disclosed, in particular recipients in third countries or international organisations;
>
> (d) where possible, the envisaged period for which the personal data will be stored, or, if not possible, the criteria used to determine that period;
>
> (e) the existence of the right to request from the controller rectification or erasure of personal data or restriction of processing of personal data concerning the data subject or to object to such processing;
>
> (f) the right to lodge a complaint with a supervisory authority;
>
> (g) where the personal data are not collected from the data subject, any available information as to their source;
>
> (h) the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.
>
> 2. Where personal data are transferred to a third country or to an international organisation, the data subject shall have the right to be informed of the appropriate safeguards pursuant to Article 46 relating to the transfer.
>
> 3. The controller shall provide a copy of the personal data undergoing processing. For any further copies requested by the data subject, the controller may charge a reasonable fee based on administrative costs. Where the data subject makes the request by electronic means, and unless otherwise requested by the data subject, the information shall be provided in a commonly used electronic form.
>
> 4. The right to obtain a copy referred to in paragraph 3 shall not adversely affect the rights and freedoms of others.

2016 O.J. (L 119) 43.

227. Safak & Farrar, supra note 19, at 43.

228. Id. at 44.

229. WIE and ADCU Challenge Uber and Ola on Data Access and Automated Decision-Making, Worker Info Exch. (May 18, 2022), https://www.workerinfoexchange.org/post/worker-info-exchange-and-adcu-challenge-uber-and-ola-on-data-access-and-automated-decision-making [https://perma.cc/4FK8-CR8J] ("ADCU and Worker Info Exchange challenge Uber and Ola Cabs on behalf of 11 UK and Portugal based drivers for data access and algorithmic transparency at the Amsterdam Court of Appeal.").

uses the data in its algorithms.[230] In April 2023, however, the Amsterdam appellate court overturned the decision, finding that Uber "must explain how driver personal data and profiling is used in Uber's upfront, dynamic pay and pricing system."[231] But like in the *Blueprint* published by the White House, the primary focus of courts interpreting GDPR has been on transparency specifically related to potential mistakes or violations of the law.[232]

Drawing on Professor Frank Pasquale's analysis, this Article argues that workers and worker groups who succeed in obtaining some degree of transparency about the data extracted and deployed through algorithms to remunerate them face a formidable task in asserting any power or control over automated decisionmaking management structures. Absent a ban on algorithmic wage discrimination under Article 22 of the GDPR or through collective bargaining agreements, transparency requests are by themselves ineffectual.[233] Knowledge alone will not end or mitigate the precarities of digitalized pay.

In other words, firm transparency, or a worker right to algorithmic explainability—while crucial to understanding the logic of existing practices—does not by itself shift the power dynamics that enable algorithmic wage discrimination. Nor does it do much to mitigate the culture of labor gamblification described in Part II that is becoming endemic to the on-demand economy—and to more conventional workplaces. While knowing generally how the algorithm works might diminish the feeling of being manipulated, given the rapid rate at which machine learning systems change compared to the temporal tendencies of legal requests and subsequent adjudication, this knowledge will have little impact on drivers' ability to exert control on the job or on wage standardization in a fair and predictable way.

This is not to say that workplace transparency and these forms of resistance by workers are not crucial to building worker power and drawing public attention to the wage and control practices of on-demand companies. They are essential steps to those ends and the only tools that

230. Safak & Farrar, supra note 19, at 71 (emphasis added); see also RBAMS Amsterdam 24 februari 2021, RvdW 2021, C/13/696010 / HA ZA 21-81 m.nt (Uber B.V.) (Neth.) (ordering reinstatement of plaintiff drivers and payment of monetary damages); Jenny Gasley, Netherlands: Amsterdam District Court Classifies Uber Drivers as Employees, Libr. Cong. (Sept. 29, 2021), https://www.loc.gov/item/global-legal-monitor/2021-09-29/netherlands-amsterdam-district-court-classifies-uber-drivers-as-employees/ [https://perma.cc/52X8-J38E].

231. Historic Digital Rights Win for WIE and the ADCU Over Uber and Ola at Amsterdam Court of Appeal, Worker Info Exch. (Apr. 4, 2023), https://www.workerinfoexchange.org/post/historic-digital-rights-win-for-wie-and-the-adcu-over-uber-and-ola-at-amsterdam-court-of-appeal [https://perma.cc/2YE5-3EQ5].

232. See, e.g., White House Off. of Sci. & Tech. Pol'y, supra note 5, at 7.

233. See Frank Pasquale, The Black Box Society: The Secret Algorithms that Control Money and Information 8 (2015) ("Transparency is not just an end in itself, but an interim step on the road to intelligibility.").

workers have under existing laws. But transparency and legibility *alone* do not address the harms caused by algorithmic wage discrimination because they seek to understand, not directly impede, the source of these social harms. Put differently, it is not, primarily, the secrecy or lack of consent behind digitalized workflows that results in low and unpredictable wages; rather, it is the extractive logics of well-financed firms in these digitalized practices and workers' comparatively small institutional power that cause both individual and workforce harms.[234]

B. *Experiments With Data Cooperatives*

In addition to pressing for greater transparency and algorithmic legibility in the on-demand economy using privacy laws, some scholars and labor advocates have argued that data cooperatives would give platform workers power over their labor by allowing them to "compare their respective incomes across similar routes, areas, and distances" and, accordingly, to know whether they are being paid equitably.[235] With this in mind, advocates have launched at least two novel data cooperative projects: Driver's Seat Cooperative (in the United States) and WeClock (in Europe).[236] These cooperative efforts, which countercollect data collected by on-demand firms using separate apps, reflect the belief that if workers can collectively pool and exert ownership and control over their data, then they will be able to better understand their work experiences and "control their destiny at work."[237]

To be sure, such cooperatively organized collections of personal data have been useful for workers who have been able to contest unfair suspensions or terminations based on errors in facial recognition or in geolocation checks conducted by the companies.[238] But most U.S. workers do not have the option to make such contestations. Indeed, a common complaint of workers in my research is the lack of a formal appeals mechanisms for termination or suspension decisions (often made algorithmically).[239] A worker may go to a physical Uber or Lyft "hub" to complain or may attempt to engage with the firm via their app, but getting

234. Jathan Sadowski, Too Smart: How Digital Capitalism Is Extracting Data, Controlling Our Lives, and Taking Over the World 104 (2020) ("Even if we had access to all the data collected about us, 'what individuals can do with their data in isolation differs strikingly from what various data collectors can do with this same data in the broader context of everyone else's data' . . . ." (quoting Mark Andrejevic, The Big Data Divide, 8 Int'l J. Commc'n 1673, 1674 (2014))).

235. Thomas Hardjono & Alex Pentland, Data Cooperatives: Towards a Foundation for Decentralized Personal Data Management 3 (May 15, 2019) (on file with the *Columbia Law Review*) (unpublished manuscript).

236. See Driver's Seat, https://driversseat.co/ [https://perma.cc/925C-P6WU] (last visited Aug. 15, 2023); WeClock, https://weclock.it/ [https://perma.cc/UG5H-2PP6] (last visited Aug. 15, 2023).

237. Safak & Farrar, supra note 19, at 82.

238. See, e.g., id. at 17–25.

239. Author's Fieldnotes (Feb. 21, 2019) (on file with author).

reinstated or correcting a wrong is difficult, if not impossible, regardless of whether the automated suspension or termination is based on incorrect data.[240] This, then, is primarily a structural problem, not necessarily one that is rooted in control over and legibility of data.

Collective data ownership through data cooperatives does not address the most significant harms posed by algorithmic wage discrimination because—by itself—it does not fundamentally intervene in the economic relationship between hiring entities and workers. Having some knowledge of the data extracted from one's labor does not give rise to the power to negotiate over the use of that data or to restrict or even ban its future collection. Worse, like other proposals that claim that "data production is labor,"[241] these approaches may reify widespread data collection as a social good, thus ignoring individual and social harms that result from broad surveillance, categorization, and data derivative processing.[242] While scholars Jaron Lanier, Eric Posner, and Glen Wyle's basic presumptions about how workers and consumers are not compensated for the data that they provide to firms is correct, their solution—to pay them for it—raises more problems than it solves.[243]

The underlying assumption of data cooperatives—that data extraction is an inevitable form of labor for which workers should be remunerated—risks reifying the extraction itself. The on-the-job surveillance that gives rise to the data is not an inescapable practice. And in the bargain between workers and firms over data control, workers—even those in data cooperatives—are badly positioned both because of their relative lack of power and because of the vast expense and general inaccessibility of digital architectures to store, clean, understand, and leverage data.[244] For one, the value (and quality) of such workplace-derived datasets to the firm itself and to downstream buyers is unknown

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240. Id.

241. See, e.g., Eric A. Posner & E. Glen Weyl, Radical Markets: Uprooting Capitalism and Democracy for a Just Society 230 (2018).

242. See Salomé Viljoen, A Relational Theory of Data Governance, 131 Yale L.J. 573, 643 (2021) ("[B]y forming and then acting on population-level similarities in oppressive and dominating ways, datafication may materialize classificatory acts of oppressive-category formation that are themselves unjust.").

243. Posner and Weyl's book *Radical Markets*, supra note 241, draws on Jaron Lanier's work and suggests that the solution to the problems raised by informational capitalism is to "pay people from whom the data is gathered." See Jaron Lanier, Stop the Stealing, Pac. Standard (Sept. 15, 2015), https://psmag.com/economics/the-future-of-work-stop-the-stealing-and-pay-us-for-our-online-data (on file with the *Columbia Law Review*) (last updated June 14, 2017) (suggesting that under an "information economy . . . if you're not paid for your tweets, then you're being ripped off"). This obfuscates the first order question: Should the data be gathered at all?

244. See Beatriz Botero Arcila, The System Is Rigged Against Users: Another Reason Why Getting Compensated for Data Is Not a Good Idea, Medium (Feb. 23, 2020), https://medium.com/berkman-klein-center/the-system-is-rigged-against-users-another-reason-why-getting-compensated-for-data-is-not-a-good-ebb2192a3209 (on file with the *Columbia Law Review*) (critiquing Lanier, Posner, and Weyl's contentions).

and fluctuating. As Professor Salomé Viljoen argues, paying data subjects—workers, in this case—for their data may also further degrade worker privacy because workers may decide that the downstream risk of privacy loss is worth the payment provided, even when the actual value of that data is indeterminate.[245] To date, "data extraction [from workers] . . . [has provided] a stream of capital that is infinitely speculatable . . . with minimal . . . downward redistribution."[246]

This is not to say that these worker data cooperatives have no role in the current regulatory environment. To the contrary, data cooperatives have been important for regulators in several cities and states to understand the erratic and low wages of workers laboring for on-demand firms and to write policy accordingly. The RDU wage study, released in 2022 and referenced in Part II, was made possible through collaboration with the Driver's Seat Cooperative. The Driver's Seat Cooperative, run by longtime labor organizer Hays Witt, is a cooperative of ride-hail and delivery workers who share in profits from their data collection.[247] The cooperative has sold the pooled data to cities and transportation agencies, who, in turn, desire to use the data to address governance issues.[248] Drivers can also use the data to make analytical assessments about their work.[249] For example, Driver's Seat Cooperative helps workers to deduce their "true hourly earnings," to figure out what time it might be most lucrative to work, and to identify which platform is giving the workers the better hourly wage.[250]

In light of the critiques of data as labor and property more generally, this Article argues that this approach's limitations are threefold. As an initial matter, the assessments made through this model are constantly changing as algorithmic control practices continue to change. This may limit the cooperative's ability to give workers the stability and predictability they seek. For example, in my research, I found that drivers who "figured out" a way to hit their income target (and came to rely on these techniques) would often be devastated when their knowledge about the system was inevitably upended by changes in the system.[251] In other words, while data cooperatives might give workers some derivative knowledge

245. See Viljoen, supra note 242, at 618–22.

246. Sam Adler-Bell & Michelle Miller, Century Found., The Datafication of Employment: How Surveillance and Capitalism Are Shaping Workers' Futures Without Their Knowledge 2–3 (2018), https://production-tcf.imgix.net/app/uploads/2018/12/03160631/the-datafication-of-employment.pdf [https://perma.cc/9REN-4JM9].

247. See People: Hays Witt, Platform Coop. Consortium, https://platform.coop/people/hays-witt/ [https://perma.cc/V9WV-RYEZ] (last visited Aug. 14, 2023).

248. See Data Customers, Driver's Seat, https://driversseat.co/data_customers/1689706532362x298241080674223940 [https://perma.cc/JJ9S-9L7E] (last visited Oct. 20, 2023).

249. See Index, Driver's Seat, https://driversseat.co/index/1689706532362x298241080674223940 [https://perma.cc/Y3SK-CHSR] (last visited Oct. 20, 2023).

250. Id.

251. See supra Part II.

over the kinds of data that are collected about them, they cannot exert sustained control over the (constantly changing) automation processes that control them and determine their pay. Second, selling cooperatively collected data might be a small income source for workers and that data might be useful to regulators—especially since on-demand firms often deny access to data on privacy or intellectual property grounds—but it also assumes that these kinds of collection and sale carry no social risks when used to make private or public decisions in other contexts.[252] As Viljoen has argued elsewhere, workers cannot know whether the data collected will, at the population level, violate the civil rights of others or amplify their own social oppression.[253]

Finally, perhaps the most troubling problem with worker data cooperatives is the complicated (and expensive) nature of automated digital data collection and cooperatives' subsequent reliance on third-party data brokers. Workers who sign up to be members of the Driver's Seat Cooperative, for example, have two options. They can manually generate their data, which relies on the driver "to record their activity by swiping trip start/end buttons and filling out daily earnings logs"—an unrealistic series of steps for most workers.[254] Alternatively, drivers can opt for automatic tracking, a "hassle-free way of tracking their gig work."[255] Extracting data from the variety of different apps that its members use is extremely complicated, so the Driver's Seat Cooperative relies on a third-party service called Argyle to connect to the on-demand labor platforms and import their earnings data and activities.[256] But Argyle is itself a data broker that watchdog organizations such as Co-worker.org have flagged for potentially fraudulent practices, like phishing workers to extract their employment data.[257] The company claims to have a "longitudinal" dataset of "quality information willingly generated by gig workers," which it sells

252. See Shoshanna Zuboff, The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power 90 (2019) ("Decision rights confer the power to choose whether to keep something secret or to share it. . . . Surveillance capitalism lays claim to these decision rights. . . . In the larger societal pattern, privacy is not eroded but redistributed, as decision rights over privacy are claimed for surveillance capital.").

253. See Viljoen, supra note 242, at 622–23, 651 (arguing that downstream uses of collected data can lead to infringements of civil rights).

254. Frequently Asked Questions, Driver's Seat, https://driversseat.co/faq/1694143366421x418725978104454800 [https://perma.cc/P93Q-7SAK] (last visited Sept. 8, 2023).

255. Id.

256. Id.

257. Wilneida Negrón, Little Tech Is Coming for Workers: A Framework for Reclaiming and Building Worker Power 31 (2021), https://home.coworker.org/wp-content/uploads/2021/11/Little-Tech-Is-Coming-for-Workers.pdf [https://perma.cc/E68P-VM4C]. Negrón makes the related point that the firm practices that give rise to algorithmic wage discrimination are then used to produce other data extraction products to supposedly help workers. These products include payday loan firms and management software, which not only leverage existing datasets with worker information but create new datasets that have potential downstream impacts on workers. Id. at 24–27.

as its primary source of profits.[258] This arrangement calls into question the long-term efficacy of workers "owning" their own data, since well-capitalized data brokerage firms have the same datasets. For example, Argyle, through a partnership with Digisure, which claims to give "mobility and sharing platforms [the power] to own their data and customer experience," uses these datasets to sell and deny hybrid car insurance to gig workers.[259] This then raises a host of other concerns about downstream harm: Can companies use this data collected through the Driver's Seat Cooperative to create and sell data derivatives that trap workers into certain wage brackets based on their income history? Can they (and do they) use this data to target workers for predatory payday loans or to deny other kinds of credit?

As workers formulate and reformulate paths toward redefining "tolerable levels of exploitation and inequality, meanings of dignity and justice" in the context of labor management practices emerging from informational capitalism,[260] this Article's analysis of possibilities and limitations of existing business and data laws suggest that other legal interventions are necessary. Such interventions—including a potential legislative ban on digitalized variable pay—better reflect the harms emerging from these digitalized remuneration practices.

C. *A Nonwaivable Ban on Algorithmic Wage Discrimination*

Given the limitations of both worker cooperative ownership of data and attempts at data transparency and legibility under existing laws, this Article proposes a more direct solution: a statutory or regulatory nonwaivable ban on algorithmic wage discrimination, including, but not limited to, a ban on compensation through digitalized piece pay.[261] This would effectively not only put an end to the gamblification of work and the uncertainty of hourly wages but also disincentivize certain forms of data extraction and retention that may harm low-wage workers down the road, addressing the urgent privacy concerns that others have raised.

Similar to proposed bans on targeted advertising, which attempt to limit the use of "deep stores of personal information to make money from

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258. See Data Customers, supra note 248.

259. Press Release, Argyle Sys., Argyle and DigiSure Partner to Supercharge Screening and Risk Assessment for Gig Drivers, Globe Newswire (July 13, 2022), https://www.globenewswire.com/en/news-release/2022/07/13/2479144/0/en/Argyle-and-DigiSure-Partner-to-Supercharge-Screening-and-Risk-Assessments-for-Gig-Drivers.html [https://perma.cc/J6K3-47SK].

260. See Palomera & Vetta, supra note 42, at 424.

261. This could take several different forms. In the on-demand ride-hail and food-delivery sectors, it could mean allowing firms to collect data only on distance, driving time, location, and time of day to determine pay, on top of a uniform wage floor that all workers receive for all hours that they labor.

targeted ads,"[262] a peremptory ban on algorithmic wage discrimination might also disincentivize the growth of fissured work under informational capitalism.[263] If firms cannot use gambling mechanisms to control worker behavior through variable pay systems, they will have to find ways to maintain flexible workforces while paying their workforce predictable wages under an employment model.[264] If a firm cannot manage wages through digitally determined variable pay systems, then it is less likely to employ algorithmic management in certain circumstances.

This kind of ban is not without precedent. Reflecting the moral and legal norms embedded in wage laws, the spirit of a ban on algorithmic wage discrimination underpins both federal and state antitrust laws. Indeed, Professor Teachout has argued that consumer price discrimination "from the 1870s through the 1970s was [also] understood through a political, moral, and economic lens."[265] At the federal level, the Robinson–Patman Act bans sellers from charging competing buyers different prices for the same "commodity" or discriminating in the provision of "allowances"—like compensation for advertising and other services.[266] The FTC currently maintains that this kind of price discrimination "may give favored customers an edge in the market that has nothing to do with their superior efficiency."[267] Though price discrimination is generally lawful, and the Supreme Court's interpretation of the Robinson–Patman Act suggests it may not apply to services like those provided by many on-demand companies, the idea that there is a "competitive injury" endemic to the practice of charging different buyers a different amount for the same product clearly parallels the legally enshrined moral expectations about work and wages discussed in Part I.[268] Workers—like buyers—understand "moral economies of work" as reflecting systems in which they get predictable "equal pay for equal work"

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262. Taylor Hatmaker, New Privacy Bill Would Put Major Limits on Targeted Advertising, TechCrunch (Jan. 18, 2022), https://techcrunch.com/2022/01/18/banning-surveillance-advertising-act/ (on file with the *Columbia Law Review*).

263. "The fissured workplace," a term developed by economist David Weil, describes the firm trend of focusing on core business competencies and outsourcing or subcontracting other work (including, for example, accounting, payroll, and human resources). This typically lowers labor costs and liabilities for the core firm. David Weil, The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It 3–4 (2014).

264. Notably, there is precedent for this kind of agreement in some union contracts.

265. Teachout, Algorithmic Personalized Wages, supra note 15, at 451.

266. Robinson–Patman Price Discrimination Act of 1936, 15 U.S.C. § 13 (2018).

267. Price Discrimination: Robinson–Patman Violations, FTC, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/price-discrimination-robinson-patman-violations [https://perma.cc/Vs6L-E3RH] (last visited Aug. 15, 2023).

268. Keyawna Griffith argues that Congress should consider amending the Robinson–Patman Act to include "services" and not just "commodities" so as to address the problem of "surge pricing" by Uber and similar firms. Surge pricing, Griffith argues, hurts consumers and is anticompetitive in effect. Keyawna Griffith, Note, The Uber Loophole that Protects Surge Pricing, 26 Va. J. Soc. Pol'y & L. 34, 36, 60 (2019).

and in which wages rise above a certain level or value (at least the minimum wage). If, as on-demand companies assume, workers are consumers of their technology and not employees, we may understand digitalized variable pay in the on-demand economy as violating the spirit of the Robinson–Patman Act.

Plaintiffs from Rideshare Drivers United, represented by Towards Justice, a Colorado-based nonprofit legal organization, have filed a complaint based on state antitrust law in California court, alleging something very similar. They seek to use California antitrust law to permanently enjoin Uber and Lyft "from fixing prices for rideshare services, *withholding fare and destination data from drivers when presenting them with rides*, imposing other non-price restraints on drivers, such as minimum acceptance rates, and *utilizing non-linear compensation systems based on hidden algorithms* rather than transparent per-mile, per-minute, or per-trip pay."[269] If successful, the lawsuit, alleging violations of the Cartwright Act and California Business and Professions Codes that prevent secret commissions and other fraudulent practices, would stop the use of algorithmic price discrimination by these specific on-demand companies. But it would not necessarily prohibit variations on the practice altogether, especially for firms who classify their workers as employees. In those contexts, gamblification could continue as long as it did not fall below the minimum wage of the geographic area where a worker is laboring or create disparate incomes for workers based on their protected identities.[270] This makes considering an affirmative legal prohibition against the practice of algorithmic wage discrimination an imperative.

The precise limits of a proposed nonwaivable ban need to be explored. This Article seeks to identify and theorize the practice of algorithmic wage discrimination in relationship to longstanding ideas of what constitutes a moral economy and to invite scholars and regulators concerned with labor management practices in on-demand sectors of work to think about it as a distinct problem that has troubling implications for work and remuneration. This Article is also designed to shine a light on a possible legal path forward. But many questions remain in the statutory construction of such a ban and in its coverage. For example, would such a prohibition, as Teachout has suggested, comport with monopoly principles and affect only firms with a controlling market share?[271] Or

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269. Class Action Complaint at 4, Gill v. Uber Techs., Inc., No. CGC-22-600284 (Cal. Super. Ct. filed June 21, 2022) (emphasis added); see also Class and Collective Action Complaint at 28–29, Gill v. Uber Techs., Inc., No. 3:23-cv-00518 (N.D. Cal. filed Feb. 3, 2023). This is ongoing litigation in federal and state court.

270. Healthcare is one sector in which firms use algorithmic wage discrimination (or what firms call "incentive payment systems") to control employee work assignment and pay for nurses and janitorial staff. See supra note 39 and accompanying text.

271. See Teachout, Algorithmic Personalized Wages, supra note 15, at 452 (outlining "different ways in which new labor monopsony provisions could interact with personalized labor pricing").

would it rule out digitalized variable pay between workers such that it would allow a firm to pay all workers some declining or increasing rate based on an algorithmic assessment? Would it prevent the use of digital bonuses entirely, or would it allow such bonuses if offered consistently to all workers? Alternatively, and more expansively, would such a law cover all digitalized variable pay practices across industries, espousing the ethos of data abolition?

CONCLUSION

Algorithmic wage discrimination—in contrast to other forms of offline pay variability systems—is made possible through the ubiquitous, invisible collection of data extracted from labor and the creation of massive datasets on workers. These datasets, combined with machine learning science and insights from behavioral psychology, have come to form what are, as this Article suggests, morally objectionable techniques of work control and compensation. They circumscribe autonomy and economic mobility for highly racialized workforces, and they are seeping into other sectors' labor practices.

In some instances, algorithmic wage discrimination practices produce pay that falls well below what is guaranteed to employees by law. For example, in 2020, California's Labor Commission sued Uber and Lyft, claiming the companies had failed to pay drivers over $1.3 billion for all hours worked, including unpaid overtime, paid sick leave violations, and reimbursement of business expenses.[272] But wage and hour law violations are not the only harms caused by algorithmic wage discrimination. Low pay is accompanied by extractive labor processes that go against the moral norms embedded in over a century of U.S. statutes and case law, creating jobs akin to gambling and using personalized data to generate feelings of possibility that firms in turn crush to create value for themselves.

As a predatory practice enabled by informational capitalism, algorithmic wage discrimination profits from the cruelty of hope: appealing to the desire to be free from both poverty and employer control (and the scheduling norms of the Fordist economy) while simultaneously ensnaring workers in structures of work that offer neither security nor stability. These practices, even alongside employment status and the guarantees of a wage floor, contradict longstanding fairness norms as they pertain to wage practices and wage regulations. To address these problems, this Article invites scholars, lawmakers, and regulators to direct their attention not just to the transparency and accuracy problems of automation technologies at work but also to an evaluation of the social harms embedded in the logic of the algorithmic wage-setting systems themselves.

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272. Labor Commissioner's Wage Theft Lawsuits Against Uber and Lyft, Cal. Dep't of Indus. Rels. (Oct. 2020), https://www.dir.ca.gov/dlse/Lawsuits-Uber-Lyft.html [https://perma.cc/FWC4-L3NF].

NOTES

THE NEURODIVERSITY PARADIGM AND ABOLITION OF PSYCHIATRIC INCARCERATION

*Kiera Lyons**

Against rising calls to expand carceral psychiatry and increasingly pervasive mischaracterizations of neurodivergence in law, this Note accurately introduces the neurodiversity paradigm to call for the abolition of psychiatric incarceration. This Note challenges empirical narratives that render Neurodivergent people incapable of producing knowledge and holding expertise on their own embodied experiences by rejecting dominant conceptions of "mental illness" as an incompetence-inducing pathology that impairs an underlying "normal cognitive function." Rather, by positioning neurodivergence as integral to and indistinguishable from the self, this Note corrects the longstanding removal of expertise on neurodivergence from Neurodivergent people and misplacement of that expertise within the intersection of medical and legal professions. By severing the assumed causal connection between "mental illness" and legal competence, this Note argues that all people, as the experts on their own self-concept, retain the final and unilateral legal authority to define the support they need in crisis and beyond.

* J.D. Candidate 2024, Columbia Law School. I would like to profoundly thank Professor Maeve Glass for her patient guidance and unwavering support. Special thanks to the entire staff of the *Columbia Law Review* for their meticulous work and rigorous feedback. Finally, thank you to my adventure partner, Patrick Jones, for walking with me through the madness.

INTRODUCTION

All fifty states authorize psychiatric incarceration,[1] justifying the use of preventive detention based on the presumption of a causal relationship between "mental illness" and legal incompetence.[2] Statutes linking observably different cognition to irrationality, disease, and contamination pre-date the Founding of the United States.[3] Though there are ample critiques of psychiatric incarceration, within these critiques, the story of "mental illness" masquerades as biological fact.[4] Thus, the idea that observably different cognition is the result of an infection or an impairment to an underlying normal cognitive function has been widely and uncritically accepted in both medicine and law as nature-imposed reality rather than critiqued as a malleable normative framework.[5] Consequently, even psychiatric incarceration's most vocal critics have not been able to successfully advocate for its abolition.

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1. See infra section II.A. This Note does not refer to psychiatric incarceration as "civil commitment" because the accurate word for the exercise of state power to deprive someone of freedom of movement in its most basic form is "incarceration." This Note will not rely on euphemistic language to hide the reality of the legal mechanisms at work. Practically, there is little difference between being handcuffed, placed in the back of a police car, and then held involuntarily by threat of force at a hospital and being handcuffed, placed in the back of a police car, and then held involuntarily by threat of force at a jail.

2. For example, in November 2022, New York City Mayor Eric Adams "directed the police . . . to hospitalize people they deemed too mentally ill to care for themselves, even if they posed no threat to others." Andy Newman & Emma G. Fitzsimmons, New York City to Involuntarily Remove Mentally Ill People From Streets, N.Y. Times (Nov. 29, 2022), https://www.nytimes.com/2022/11/29/nyregion/nyc-mentally-ill-involuntary-custody.html (on file with the *Columbia Law Review*).

3. See Laura I. Appleman, Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and Mass Incarceration, 68 Duke L.J. 417, 423 (2018) ("As 1676 legislation from Massachusetts addressing mental illness made very clear, the fear was that the mentally ill might contaminate other members of the community, sending them to damnation . . . ."); see also id. at 421 ("From the very beginning, European society has aimed to confine and isolate those suffering from various poorly understood disabilities. Anglo-Europeans began segregating and confining the mentally ill and cognitively disabled from approximately the twelfth century.").

4. See Liat Ben-Moshe, Decarcerating Disability: Deinstitutionalization and Prison Abolition 39 (2020) ("Psychiatrization . . . is not natural or God given; it is a specific discourse arising in a particular historical moment that [has] come to be seen as ahistorical and inevitable.").

5. See infra sections I.B, II.A.

When lawyers, legislators, psychiatrists, and mental health professionals rely on this pathological framing, debates surrounding treatment imposed by the force of law devolve into a cyclical battle between preferences for protecting the liberty interests of those who are competent and preserving the state's power to mandate treatment for people who are incompetent.[6] Generally, supporters of psychiatric incarceration argue that protecting the liberty interests of the "mentally ill" is no better than letting people die preventable deaths.[7] Critics typically respond that the error rate in the determination of "mental-illness"-induced incompetence is too high to justify the harms imposed by the erroneous deprivation of liberty.[8] But the cyclical battle between liberty and paternalism obscures the relevant—and not yet addressed—legal question of who is granted the expertise on divergent cognition and thus authority to decide when a person is legally incompetent.

This Note proposes a resolution to this debate found not in the balance between liberty and paternalism but in rejecting the dominant normative framework of divergent cognition as "mental illness." Rooted in a combination of Critical Autism Studies,[9] Mad studies,[10] and disability justice, this Note introduces the neurodiversity paradigm to reject the construction of "normal" cognition within law governing psychiatric incarceration.[11] Within the language of the neurodiversity paradigm,

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6. See infra text accompanying notes 119–124.

7. See infra text accompanying notes 125–130; see also infra text accompanying note 143.

8. See infra text accompanying notes 137–142.

9. Critical Autism Studies is a decentralized, cross-disciplinary body of scholarship that not only challenges deficit-based descriptions of autism but also critiques dominant cultural assumptions regarding interpersonal relationships and communication dynamics, thus disrupting traditional conceptions of intent, rhetoric, agency, and empathy.

10. Regarding the identity term Mad: Starting in the nineteenth century, "intellectual disabilities" and "mental illnesses" were conceptually distinguished as discrete kinds of categories. Ben-Moshe, supra note 4, at 41. Consequently, "Mad has been reclaimed as a socio-political identity for people who experience emotional distress and/or who have been labeled as 'mentally ill' . . . ." Definitions, Mad Network News, https://madnessnetworknews.com/definitions/ [https://perma.cc/X5FP-NB3V] (last visited Aug. 16, 2023). Because some psychiatric survivors are neurotypical, not all Mad people are Neurodivergent. Conversely, not all Neurodivergent people are Mad. See Derrick Quevedo (@drrckqvdo), Instagram (July 7, 2023), https://www.instagram.com/p/CuZaJxhAGnX/ (on file with the *Columbia Law Review*) ("One of the biggest misconceptions about Mad Pride is the belief that the Mad community is united by 'mental illness,' when we're more accurately united by the harm we've experienced from the mental health industrial complex.").

11. See Nick Walker, Throw Away the Master's Tools: Liberating Ourselves From the Pathology Paradigm [hereinafter Walker, Liberating Ourselves], *in* Neuroqueer Heresies: Notes on the Neurodiversity Paradigm, Autistic Empowerment, and Postnormal Possibilities 16, 19 (2021) [hereinafter Neuroqueer Heresies] ("Neurodiversity—the diversity among minds—is a natural, healthy, and valuable form of human diversity. . . . There is no 'normal' or 'right' style of human mind, any more than there is one 'normal' or 'right' ethnicity, gender, or culture.").

"Neurodivergent" is the identity term coined by activist Kassiane Asasumasu for a person who experiences any form of divergent cognition,[12] similar to how "Queer" is an umbrella term for a spectrum of different sexual and gender identities.[13] By contrast, "neurotypical" refers to people who conform with the construction of "normal" cognition.[14]

The neurodiversity paradigm positions neurodivergence as an integral component of the self rather than as a corrosive, autonomy-depriving, or incompetence-inducing agent to an underlying "normal." The paradigm thus severs the illusion of the causal relationship between divergent cognition and the determination of legal incompetence. In preserving the competence of Neurodivergent people, the neurodiversity paradigm permits all people to retain the final and unilateral legal authority to define the support they need in crisis and beyond. Thus, reframing the story told about divergent cognition allows policy discussions to step beyond the notion that the only effective interventions for people experiencing crisis are ones rooted in coercive applications of force that override potentially deadly exercises of autonomy. In reclaiming the expertise on neurodivergence for Neurodivergent people, this Note calls for the abolition of psychiatric incarceration in favor of an

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12. Nick Walker, Neurodivergence & Disability, *in* Neuroqueer Heresies, supra note 11, at 60, 69 [hereinafter Walker, Neurodivergence & Disability]. For example, at least autism, bipolar, schizophrenia, attention deficit hyperactivity "disorder" (ADHD), dyslexia, post-traumatic stress "disorder" (PTSD), dissociative identity "disorder" (DID), narcissistic personality "disorder" (NPD), borderline personality "disorder" (BPD), and complex post-traumatic stress "disorder" (cPTSD) are neurodivergences. Id. This Note, in advocating for the depathologization of neurodivergence and distress, avoids the use of the word "disorder" wherever possible. When such avoidance is not possible, the Note places "disorder" in quotes. This is a short-term fix and may change with time as the community works through the process of depathologizing neurodivergence. The word "Neurodistinct" has also been proposed as an alternative identity term. See Tim Goldstein, Neuro Cloud & Neurodistinct, Neurodiversity Refined, Neurodistinct (June 16, 2020), https://www.timgoldstein.com/blog/neurodiversityrefined [https://perma.cc/6RGH-U8N8] ("Instead of the negative, separating, divisive term [Neurodivergent], I coined Neurodistinct."). This Note, however, elects to use the word "Neurodivergent" to preserve the recognition that cognition can and does diverge from neuronormativity.

13. See Sonny Jane Wise (@livedexperienceeducator), Instagram (Nov. 22, 2022), https://www.instagram.com/livedexperienceeducator (on file with the *Columbia Law Review*) ("[N]eurodivergent and queer are similar terms because they are both identities . . . about diverging; one is about diverging from neuronormativity while the other is about diverging from cisnormativity and heteronormativity."). It is more than a superficial comparison; Critical Autism Studies and Queer Theory are deeply intertwined. See Nick Walker, A Horizon of Possibility: Some Notes on Neuroqueer Theory, *in* Neuroqueer Heresies, supra note 11, at 168, 170–72 ("The more I reflected on the process by which I was pushed into the ill-fitting confines of heteronormative gender performance and the process by which I was pushed into the ill-fitting confines of neuronormative performance, the more it became clear that the two processes weren't merely similar or parallel . . . but [were] a single multifaceted process.").

14. Walker, Liberating Ourselves, supra note 11, at 27 ("In the pathology paradigm, the neurotypical mind is enthroned as the 'normal' ideal against which all other types of minds are measured.").

understanding of care designed by Indigenous, Black, Mad, Neurodivergent, and Disabled survivors of carceral psychiatry.[15]

Part I introduces the pathology paradigm. It explains how an outdated conceptualization of statistics within psychiatry permitted the construction of the false dichotomy between normal and abnormal cognition. It then details how disability studies absorbed the construction of abnormal cognition within biological impairment. Part II maps the pervasive and uncritical acceptance of the pathology paradigm into statutes authorizing psychiatric incarceration and policy debates regarding the practice's normative and ethical dimensions. Part III introduces the neurodiversity paradigm as developed in Critical Autism Studies and aligned with modern statistics. It then calls for the abolition of psychiatric incarceration in favor of an understanding of care and support currently being implemented by grassroots organizations that aim to catch society's most marginalized without resorting to handcuffs, body slams, or bullets.[16]

I. DEFINING THE PATHOLOGY PARADIGM

To understand how "mental illness" is a normative framework masquerading as empirical fact, section I.A first explains how normative reasoning and empirical inquiry are not distinct processes but rather are intrinsically intertwined. Section II.B then demonstrates how the normative commitment to biological essentialism in the concurrent development of statistics and psychiatry permitted the construction of "normal" and "abnormal" categories masquerading as empirically

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15. This Note uses identity-first language. If a nondisabled person needs a reminder that a Disabled person is a person, then the nondisabled person already sees the Disabled person as something less. This will be the only comment on identity-first language use in this Note.

Carceral psychiatry names spaces where psychiatrically labeled people are incarcerated as an extension of the carceral state. See Ben-Moshe, supra note 4, at 16; Rafik Wahbi & Leo Beletsky, Involuntary Commitment as "Carceral-Health Service": From Healthcare-to-Prison Pipeline to a Public Health Abolition Praxis, 50 J.L. Med. & Ethics 23, 26 (2022). For a more extensive background on the similarities between psychiatric hospitals and prisons, see generally Erving Goffman, Asylums: Essays on the Social Situation of Mental Patients and Other Inmates (1961) (defining "total institutions," including both prisons and mental hospitals, and the socialization process inmates in total institutions undergo).

16. See Judith Prieve, Family, Friends Call for Police Reform on Anniversary of East Bay Man's Shooting Death, E. Bay Times (June 3, 2020), https://www.eastbaytimes.com/2020/06/03/family-friends-call-for-police-reform-on-anniversary-of-east-bay-mans-shooting-death/ (on file with the *Columbia Law Review*) ("Miles Hall suffered a breakdown, and so did the system, [Hall's mother] said. 'We called them, they came with guns, they didn't come with compassion—and now our son is dead, dead at the hands of law enforcement because it is a broken system.'"); Special Books by Special Kids, Visiting My Schizoaffective Friend After His Forced Psychiatric Stay, YouTube, at 20:45 (Oct. 26, 2020), https://www.youtube.com/watch?v=xc1tbETJpX4 (on file with the *Columbia Law Review*) ("I was falling over [a bridge] and then it was body-slam time where [police officers] slammed me onto the ground and handcuffed me . . . . There have got to be better ways . . . . I didn't call for help . . . [because] I was afraid of exactly what would happen.").

cognizable classes.[17] Finally, section I.C demonstrates how the pathology paradigm was absorbed into disability studies under the concept of "impairment," which obscures the historical co-construction of and thus intersection between ableism and anti-Black racism.

A. *The Necessary Subjectivity of Empiricism*

Critiques of psychiatry often characterize the discipline as the consequence of bad or biased science.[18] Science, however, is characterized by subjective, value-laden choices made at every step of the process, from data collection to experimental design and result interpretation.[19] Thus, it

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17. This Note defines "biological essentialism" similarly to how Angela Harris defines "gender essentialism" as "the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience" and "racial essentialism" as "the belief that there is a monolithic 'Black Experience.'" Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581, 585–88 (1990). Specifically, this Note understands biological essentialism as the notion that there is essential human bodymind that can be isolated and described under a value-neutral empirical analysis. "[B]odymind refers to the inextricable nature of body and mind, insisting that one impacts the other and that they cannot be understood or theorized as separate." Sami Schalk, Black Disability Politics 15 (2022). The term "bodymind" was first coined by Margaret Price and expanded upon by Sami Schalk. Id. This Note uses "bodymind" because "the separation of the body and the mind, also referred to as the *Cartesian dualism*, has been used against people of color and women to claim that we are primarily or exclusively controlled (and therefore limited) by our bodies." Id. Bodymind is conceptually integral not only to disability justice broadly speaking but also to critical autism studies. See Nick Walker, Defining Neurodiversity, *in* Neuroqueer Heresies, supra note 11, at 53, 55 ("But *neuro-* doesn't mean *brain*, it means *nerve*. . . . [Thus] the *neuro-* in *neurodiversity* is . . . referring . . . to the entire nervous system—and, by extension, to the full complexity of human cognition and the central role the nervous system plays in the embodied dance of consciousness.").

18. See generally Thomas Szaz, The Myth of Mental Illness (1961) (arguing by relying upon a strict separation of mind and body that mental illnesses are not comparable to physical illness); Robert Whitaker, Mad in America: Bad Science, Bad Medicine, and the Enduring Mistreatment of the Mentally Ill (2002) (describing the history and pseudoscience of the treatment of the mentally ill in the United States). For more such critiques of psychiatry, see Nick Walker & Dora M. Raymaker, Toward a Neuroqueer Future: An Interview With Nick Walker, 3 Autism in Adulthood 5, 7 (2021) ("First, [we] need to be absolutely clear—in our own minds and in our written and spoken discourse—that [the pathological conception of Autism] is nothing more than institutionalized bigotry masquerading as science . . . ."); Benedict Cary, Dr. Thomas Szasz, Psychiatrist Who Led Movement Against His Field, Dies at 92, N.Y. Times (Sept. 11, 2012), https://www.nytimes.com/2012/09/12/health/dr-thomas-szasz-psychiatrist-who-led-movement-against-his-field-dies-at-92.html (on file with the *Columbia Law Review*) ("Dr. Szasz saw psychiatry's medical foundation as shaky at best, and his book hammered away, placing the discipline 'in the company of alchemy and astrology.'").

19. See Heather Douglas, Inductive Risk and Values in Science, 67 Phil. Sci. 559, 563–64 (2000) ("First, values (both epistemic and non-epistemic) play important roles in the selection of problems to pursue. Second, the direct use to which scientific knowledge is put in society requires the consideration of non-epistemic values. . . . Third, non-epistemic values place limitations on methodological options . . . ."); see also Michael Strevens, The Knowledge Machine: How Irrationality Created Modern Science 79 (2020) ("Science is

is not that a researcher's normative commitments can influence the research process but rather that a researcher cannot engage in the scientific method without relying on their normative commitments.[20] It is often the clarity of hindsight that allows the retrospective acknowledgement of how normative commitments informed the creation of dehumanizing hypotheses.[21] Once disproved, the sanctity of empirical objectivity is preserved by dismissing these hypotheses as pseudoscientific. This weaponization of pseudoscience thus allows for the continued conceptualization of science as an objective method of inquiry that must be protected from the erroneous and avoidable importation of bias.[22]

In other words, medical racism was not pseudoscience. Medical racism was the predictable consequence of letting people in positions of power tell stories about marginalized experiences under the veneer of scientific objectivity. Subjective hypotheses made by powerful groups about the legally subordinated, politically excluded, and socially ostracized other predictably lead to horrific abuses of power obscured behind notions of objectivity and perpetuated under the guise of evidence-based medicine, policy, and care. Psychiatry is not pseudoscience, but the stories told about Neurodivergent people are dehumanizing nonetheless.

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driven onward by arguments between people who have made up their minds and want to convert or at least to confute their rivals. Opinion that runs hot-blooded ahead of established fact is the life force of scientific inquiry.").

20. See Sandra Harding, Whose Science? Whose Knowledge? 81 (1991) ("[M]odern science has been constructed by and within power relations in society, not apart from them. . . . Even though there are no complete, whole humans visible as overt objects of study in astronomy, physics, and chemistry, one cannot assume that no social values, no human hopes and aspirations, are present in human thought about nature."); see also id. at 83–86 (refuting the conception of scientific fact and method as consisting only of formal statements and symbols that therefore do not absorb social values); Strevens, supra note 19, at 68 ("Scientists seeking to make sense of the evidence cannot be neutral. They must take a stand on whether the instrument is relaying the truth, on whether the theoretical assumptions hold. . . . They must resort to educated guesswork, and that makes scientific reasoning irreducibly, unavoidably . . . subjective."); Chris Wiggins & Matthew L. Jones, How Data Happened: A History from the Age of Reason to the Age of Algorithms 21 (2023) ("The critics of numerical statistics at the end of the Enlightenment well understood that data is profoundly artificial. . . . '[R]aw data is an oxymoron,' as all data collection comes through human choice about what to collect, how to classify, who to include and to exclude . . . ."); see also Stephen John, Why Science Isn't Objective, IAI News (July 26, 2021), https://iai.tv/articles/why-science-isnt-objective-auid-1846 [https://perma.cc/9UND-HM4C] ("There is no way at all of doing science which doesn't somehow prejudge or assume some ethical or political or economic viewpoint.").

21. See Medical Racism, Harv. Libr., https://library.harvard.edu/confronting-anti-black-racism/scientific-racism [https://perma.cc/Z63L-HAGE] (last visited Aug. 15, 2023) ("[P]romoters of anti-Black racism and white supremacy have co-opted the authority of science to justify racial inequality. A history of pseudoscientific methods 'proving' white biological superiority and flawed social studies used to show 'inherent' racial characteristics still influence society today.").

22. See Jonathan Metzl, The Protest Psychosis: How Schizophrenia Became a Black Disease, at xi–xvii (2010) (critiquing the influence of racial bias in the psychiatric definition schizophrenia while reinforcing its pathological conceptualization).

Though these theories may be refuted, how many people will we sacrifice between now and then when we continue to let the powerful dictate the "objective" narrative about those who they have made powerless?

B. *The Pathology Paradigm in Psychiatry*

Psychiatry relies on clinical observation of distress to statistically generate classes of cognitive impairments, thereby defining by negation the bounds of normal cognition.[23] This process, however, relies on a confounding normative commitment to biological essentialism, which provides a referential comparison group against which abnormal cognitive processes can be measured. To construct biological abnormality, psychiatry first asserts a meaningful distinction between rational and irrational distress[24] and second assumes that irrational distress can define the bounds of biologically abnormal cognitive processes.[25]

In other words, psychiatry assumes that society does not cause distress in biologically normal people, who are considered biologically normal at least in part because they are economically productive.[26] This assumption

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23. The DSM-V (that is, the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM)) does not define "normality." Rather, it defines a mental disorder as:

> [A] syndrome characterized by clinically significant disturbance in an individual's cognition, emotional regulation, or behavior that reflects a dysfunction in the psychological, biological, or development processes underlying mental functioning. An expectable or culturally approved response to a common stressor or loss, such as the death of a loved one, is not a mental disorder. Socially deviant behavior (e.g. political, religious, or sexual) and conflicts that are primarily between the individual and society are not mental disorders unless the deviance or conflict results from a dysfunction in the individual as described above.

Dan J. Stein, Andrea C. Palk & Kenneth S. Kendler, What Is a Mental Disorder? An Exemplar-Focused Approach, 51 Psych. Med. 894, 895 tbl.3 (2021) (internal quotation marks omitted) (quoting Diagnostic and Statistical Manual of Mental Disorders 20 (5th ed. 2013))).

24. See id. (articulating that culturally approved distress is not a mental disorder).

25. See Stein et al., supra note 23, at 895 (defining "mental disorder" as a disturbance in cognition that reflects dysfunctional biological processes).

26. See Bruce M.Z. Cohen, Psychiatric Hegemony 80 (2016) ("[T]he [DSM-V] . . . states that '[t]he symptoms are associated with clinically significant distress or interference with work, school, or social activities, or relationships with others (e.g., avoidance of social activities; *decreased productivity and efficiency* at work, school, or home).'" (alteration in original) (quoting Diagnostic and Statistical Manual of Mental Disorders 172 (5th ed. 2013)). Thus, according to Cohen, "the prevailing ideological values of our time—for instance, to be productive and efficient in all aspects of our lives—[are] conceived through psychiatric discourse as a common sense mental health message." Id. See also Micha Frazer-Carroll, Mad World 86–87 (2023) ("Under Capitalism, being able to sell our labour is the *definition* of mental health, with 'work' being referenced almost 400 times in the DSM-5. . . . [T]he common denominator between almost all experiences categorized as Mental Illness is that they . . . diminish our productivity in work."). Though conceptions of "mental illness" are often associated with self-shame and suffering, journalist Micha Frazer-Carroll notes that "[w]hile suffering is often a *component* of Madness/Mental Illness, it is not a precursor. Even

permits the conclusion that if a person is distressed to the point of unproductivity, it is because that person—not society—is abnormal.[27] Thus, psychiatry's commitment to biological essentialism not only masks the role of the constructed sociopolitical environment in creating distress but depoliticizes it by characterizing that allegedly irrational distress as induced by biological abnormality.[28]

Biological normality, however, is a nebulous concept in the face of the chaotic uniqueness of biological organisms.[29] Regardless of its fiction, medicine routinely applies statistical analysis to observations of distress to construct its "objective" bounds.[30] Yet the words "normal," "normality," and "normalcy" only entered the English language in the 1840s,[31] coinciding with Adolphe Quetelet's 1844 importation of astronomical error law to the study of human characteristics at a population level.[32] Thus, normality is not as inevitable as many believe it to be.

In astronomy, error law was a mathematical technique applied to a series of biased measurements to establish the underlying true value of what was being measured.[33] Thus, when Quetelet applied error law to human physical characteristics, he similarly understood the normal value

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when people with particular mental experiences are not actually in distress – for example, someone who hears voices and sees it as a spiritual experience – their bodymind may still be categorized as 'ill', because these experiences often limit a person's ability to labour under capitalism." Id. at 86–87.

27. See Jennifer Helfand, Childhood Gaslighting: When Difference Receives a Diagnosis, Mad in Am. (Oct. 29, 2021), https://www.madinamerica.com/2021/10/childhood-gaslighting-when-difference-receives-diagnosis/ [https://perma.cc/8UL3-A4YW] ("At age twenty-five, therapy officially began with a psychiatrist who told me outright: 'Society is fine. You're the one with the problems.'").

28. Cohen, supra note 26, at 87 ("[T]he psychiatric discourse seeks to both depoliticize the fundamental inequalities and structural failings of capitalism as individual coping problems . . . .").

29. See Ernst Mayr, The Growth of Biological Thought 46 (1982) ("This uniqueness is true not only for individuals but even for stages in the life cycle of any individual, and for aggregations of individuals whether they be demes, species, or plant and animal associations.").

30. See Darrel A. Regier, Emily A. Kuhl & David J. Kupfer, The DSM-5: Classification and Criteria Changes, 12 World Psychiatry 92, 94 (2013) ("Throughout general medicine, conditions are frequently conceptualized on a continuum from 'normal' to pathological . . . .").

31. Lennard J. Davis, Enforcing Normalcy: Disability, Deafness, and the Body 24 (1995) ("The word 'normal' as 'constituting, conforming to, not deviating or differing from, the common type or standard, regular, usual' only enters the English language around 1840. (Previously, the word had meant 'perpendicular'; the carpenter's square, called a 'norm,' provided the root meaning.)"); see also Jenifer L. Barclay, The Mark of Slavery: Disability, Race, and Gender in Antebellum America 9 (2021) ("'[N]ormality,' 'norm,' and 'normalcy' entered the English language []in 1840, 1849, and 1857, respectively[].").

32. See Theodore M. Porter, The Rise of Statistical Thinking, 1820–1900, at 100 (1986) ("Quetelet announced in 1844 that the astronomer's error law applied also to the distribution of human features such as height and girth . . . .").

33. Id. at 95–96 (explaining the development of the normal distribution between 1755 and 1837).

to reveal the essential human type, the unmarred human form, or *l'homme moyen*.[34] Both Quetelet's early application of error law to human populations and his imported concept of *l'homme moyen* were widely influential. This influence extended to Francis Galton,[35] the founder of eugenics,[36] who applied error law concepts to cognition.[37]

Galton's logic followed a specific pattern. First, he identified a human characteristic that presumptively can be measured linearly.[38] Second, he measured a subset of the individuals within the population and used error law to generate the distribution of the relevant characteristic over the population, thus identifying the normal value in the distribution.[39] Third, he labeled the statistical average as the true *l'homme moyen* value for that characteristic, understood to represent the underlying essential type.[40] Fourth, deviance from the *l'homme moyen* value was seen as error: literally a flawed expression of the essential type.[41] The logical jump made in Galtonian reasoning is that deviation from normal represents error from the underlying essential type. This permits abnormality to be understood as disordered or dysfunctional rather than a less probable expression of the measured characteristic. The derivation of normality and abnormality from statistical analysis thus rests upon the essentialist conceptualization of *l'homme moyen*.[42]

Yet modern statistical thinking rejects this essentialist understanding of normality. For example, in statistical thermodynamics, normal values do not correspond to a real or true underlying quantity but instead represent

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34. Id. at 108 ("Quetelet's identification of live individuals with copies of statutes conveys . . . the way he viewed human diversity. . . . [The] conformity [of the soldiers' measurements] to the error curve was interpreted as implying that the distribution was a genuine product of error. The soldiers had been designed according to a uniform pattern, that of the average man.").

35. Id. at 139.

36. Id. at 129.

37. Id. at 141 ("[I]f the error curve expresses the distribution of [physical] stature, 'then it will be true as regards to every other physical feature—as circumference of head, size of brain, weight of grey matter, number of brain fibres, and [thus] . . . mental capacity.'" (quoting Francis Galton, Hereditary Genius: An Inquiry Into Its Laws and Consequences 31–32 (London, MacMillan & Co. 1869))).

38. Id. at 287 ("Given Galton's experience as a meteorologist and his readiness to perceive linear relationships, it is unsurprising that he should have begun by trying a linear formula.").

39. Id. at 144 ("The presumptive applicability of the error law implied that only two pieces of information need be known in order to characterize the distribution.").

40. Id. at 139 ("Despite his enthusiasm for the exceptional, Galton often used the error curve precisely in the fashion developed by Quetelet . . . , as a definition of type.").

41. Id. at 130 ("[Galton] firmly believed that men are not 'of equal value, as social units, equally capable of voting, and the rest.'" (quoting Francis Galton, Hereditary Improvement, Fraser's Mag., Jan. 1873, at 116, 127)).

42. Language indicating that there is no "hard cut off" between normality and abnormality similarly reflects Galton's line of reasoning, in which distribution of a characteristic is continuous, not discontinuous.

the most probable state of the measured characteristic.[43] Thus, the use of statistics to define ranges of "normal biological function" is logically consistent only within the Galtonian regime. Under modern statistical thinking, the statistically calculated normal cannot define abnormality, disorder, or dysfunction.[44] Just because a certain cognitive function *is* common in a population does not mean that all human cognition *ought* to function that way. Further, the statistical construction of normality is empirically inconsistent with modern biology.[45] For example, the key conceptual advance in evolution was the rejection of biological essentialism,[46] including essential type in species, in favor of acknowledging the complete uniqueness of biological organisms.[47]

The psychiatric designation of "classes" of symptomatology that designate distinct disordered pathologies characterizes the statistically generated type as a real psychopathology rather than a manmade abstraction.[48] Only in accepting Galtonian reasoning can a psychiatrist name a statistically generated abnormality as a pathology subject to diagnosis and cure.[49]

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43. Porter, supra note 32, at 128 ("The second law of thermodynamics was equivalent to a tendency for a system of molecular velocities to approach its most probable state, the Maxwell-Boltzmann distribution . . . .").

44. Id.

45. Mayr, supra note 29, at 47 ("For instance, [a person] who does not understand the uniqueness of individuals is unable to understand the working of natural selection."). However, not only is the notion that there is a human type that is "fit" and thus closer to the human ideal blatantly racist, sexist, and ableist—it also requires the inaccurate presumption that the environment is static, constant, or unchanging.

46. Id. Regardless, even today essentialism remains a dominant, widespread, confounding framework. See id. at 38 (noting how historians of ideas have yet to appreciate the full extent to which essentialism dominated Western thinking "with its emphasis on discontinuity, constancy, and typical values"); see also Harris, supra note 17, at 589 ("Why, in the face of challenges from 'different' women . . . is feminist essentialism so persistent and pervasive?").

47. Mayr, supra note 29, at 46.

48. Id. at 47 ("[D]ifferences between biological individuals are real, while the mean values which we may calculate in the comparison of groups of individuals . . . are manmade inferences.").

49. DSM is fundamentally a statistical project with origins in data collected from the federal census. Gerald N. Grob, Origins of DSM-I: A Study in Appearance and Reality, 148 Am. J. Psychiatry 421, 424 (1991). It is more than just data aggregation, however; these statistical analyses influenced the development of distinct identifiable mental illnesses:

> Toward the close of the [nineteenth] century . . . interest in psychiatric nosology reawakened. . . . Emil Kraepelin in particular singled out groups of signs as evidencing specific disease entities . . . . Studying thousands of patients at his clinic in Heidelberg, Kraepelin identified the disease entity in terms of its eventual outcome. Dealing with a large mass of data, he sorted out everything that individuals had in common, omitting what he regarded as purely personal data. In this respect he diverted attention away from the unique circumstances of individuals toward more general and presumably universal disease entities. In so doing, he was simply emulating a distinct trend in medical thinking in general.

Regardless, psychiatry relies on statistical distributions in conjunction with economic-functioning expectations to establish the bounds of what constitutes abnormality.[50] When observable difference in cognitive function conflicts with economic-functioning expectations, that difference is conceptualized by way of metaphor to pathology, nosology, or disease such that it is understood as a pathological abnormality that corrupts or infects the underlying "normal" cognitive function, or the *l'homme moyen* of thinking.[51] The conceptualization of difference as disorder and of divergent cognition as psychopathology is the conceptual framework of the pathology paradigm.[52]

Empirical reasoning within the pathology paradigm leads to a positive feedback loop due to the effect of pathological framing. Specifically, external observers begin research expecting to find abnormality, then measure differences in structure or function, which they then presumptively interpret as abnormal or pathological.[53] However, observation of difference neither implies nor necessitates the orientation of differences into states of normality and abnormality.

C. *The Pathology Paradigm in Disability Law*

Traditionally, disability is conceptualized under different models, including the medical model of disability and the social model of disability.[54] A simple way to understand the need for a model of disability

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Id. at 423 (footnote omitted).

50. Id. at 422 ("Nineteenth-century American psychiatrists were deeply committed to the collection and analysis of such [quantitative] data. In their eyes, statistical inquiry could shed light on recovery rates, uncover the laws governing health and disease, . . . and enhance the legitimacy of both their specialty and their hospitals . . . .").

51. See Regier et al., supra note 30, at 97 ("By continuing collaboration with the [World Health Organization] in future editions of the DSM, we can assure a more comparable international statistical classification of mental disorders and move closer to a truly unified nosology and approach to diagnosis.").

52. The term "pathology paradigm" was first coined by psychology professor Nick Walker. See Walker, Liberating Ourselves, supra note 11, at 16. Walker defined the pathology paradigm as including two fundamental assumptions:

> There is one "right," "normal," or "healthy" way for human brains and human minds to be configured and to function . . . , [and second that if] your neurological configuration and functioning (and, as a result, your ways of thinking and behaving) diverge substantially from the dominant standard of "normal," then there is Something Wrong With You.

Id. at 18.

53. See Stein et al., supra note 23, at 898 ("In the case of Gender Dysphoria, there is some preliminary evidence of neuroanatomical differences between transgender and cisgender persons which may arguably indicate underlying dysfunction.").

54. See generally Routledge Handbook of Disability Law and Human Rights (Peter Blanck & Eilionóir Flynn eds., 1st ed. 2016) (detailing different models of disability and their conceptual development).

is to reframe discussions on disability using the active voice.[55] "I am disabled" becomes "something disables me," in which the model of disability identifies the disabling agent.[56] For example, the medical model identifies abnormal biology as the disabling agent,[57] whereas the social model identifies exclusionary design of physical, economic, and social landscapes as the disabling agents.[58] Thus, the medical model characterizes disability as individual and biologically inevitable, whereas the social model characterizes disability as socially constructed and malleable.

Because many Neurodivergent people are Disabled,[59] it may appear that the pathology paradigm is rooted within the medical model of disability. Within this reasoning, rejecting the medical model of disability in favor of the social model would appear to effectively reject the pathologization of bodymind nonnormativity.[60] But even though the social model places the cause of exclusion within the landscape rather than within the bodymind, it does not reject the statistical construction of a biological "normal."[61] Without rejecting the statistical construction of the Galtonian normal, the social model of disability is of little use to Neurodivergent people,[62] including in the context of psychiatric

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55. Marta Rose (@divergent_design_studios), Instagram (June 23, 2020), https://www.instagram.com/p/CBx0W5sBJtN/?img_index=1 (on file with the *Columbia Law Review*) ("We can re-diagram the sentence [we are disabled] to include implied actors i.e. those doing the disabling. Of course, that raises the complicated question of who [is] responsible for our disability.").

56. Id.

57. See Jamelia N. Morgan, Policing Under Disability Law, 73 Stan. L. Rev. 1401, 1406 (2021) ("The medical model of disability frames disability as an 'individual medical problem'—a succinct description I adopt from Elizabeth Emens. Michael Ashley Stein writes that the medical model 'views a disabled person's limitations as naturally (and thus, properly) excluding [them] from the mainstream.'" (footnotes omitted) (first quoting Elizabeth F. Emens, Framing Disability, 2012 U. Ill. L. Rev. 1383, 1401; then quoting Michael Ashley Stein, Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination, 153 U. Pa. L. Rev. 579, 599 (2004))).

58. See Elizabeth F. Emens, Framing Disability, 2012 U. Ill. L. Rev. 1383, 1401 ("[T]he social model understands disability to inhere in the interaction between an individual's impairment and the surrounding social context.").

59. However, not all Neurodivergent people are Disabled, such as synesthetes. Walker, Neurodivergence & Disability, supra note 12, at 70.

60. See Morgan, supra note 57, at 1401 ("Rather, I maintain that rejecting the medical model requires rejecting a view of disability focused on curing, controlling, or containing individuals in mental crisis—those with minds labeled as non-normative, deviant, disordered, or pathological.").

61. See Emens, supra note 58, at 1401 ("The social model does not necessarily reject the idea of biological impairment—in the sense of variations from a value-neutral idea of . . . normal functioning . . . . Even if one accepts some impairments as inherently undesirable, the social model shifts the focus . . . to the ways that the environment renders that variation disabling.").

62. Therí Alyce Pickens articulates the ineffectiveness of the social model without reverting to or reaffirming bioessentialist medical models:

incarceration.[63] Critiquing the social model of disability, however, does not require abandoning the social construction of both disability and impairment.[64]

Absent the full rejection of biological essentialism, both medical and social models of disability prevent full recognition of the historical co-construction of disability and race.[65] In the dichotomous construction of

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> The social model privileges a particular kind of mental agility and cognitive processing to combat the stigma and material consequences that arise as a result of ableism. In turn, the model dismisses madness as a viable subject position, ensuring that those counted as such—either by communal consensus or psy-disciplines—remain excluded from conversations about disability because they cannot logically engage.

Therí Alyce Pickens, Black Madness :: Mad Blackness 32 (2019).

63. See Essya M. Nabbali, A "Mad" Critique of the Social Model of Disability, 9 Int'l J. Diversity Orgs. Cmtys. & Nations, no. 4, 2009, at 1, 7 ("[The social model] is pallid, even empty, when addressing the convoluted systems of risk management which culminate in the forced deprivation of liberty occasioned by civil commitment and mandatory outpatient treatment[,] . . . [and] it fails to offer a well-founded stance against the said need[]of psychiatric intervention.").

64. Harding, supra note 20, at 134 (articulating that "the world as an object of knowledge is and will always remain socially constructed," where the socially constructed world includes the bodymind and conceptions of impairment and disorder applied to the bodymind). Further, conceptualizing disability as socially constructed does not mean that a person cannot be limited by their bodymind. It merely reflects the observation that there is no correct way to be, exist, or function. A person can be limited by their bodymind without saying that their bodymind is wrong for working in a way it does not currently work. Further, the constructed nature of disability does not mean that disability, suffering, or limitation is "not real" or that under the correct circumstances suffering, limitation, or difference would be eliminated.

65. Pickens grapples with the interstices of disability and race in the following illustrative quote:

> Historically speaking, the creating of disability, race, and gender occurs at the same time. The strands of what would become modern medicine worked to differentiate bodies from each other, specifically normal bodies from abnormal ones, where abnormal was constituted in gendered, raced and abled terms. These fantasies of identification found their justification in what [Ellen] Samuels terms 'biocertification," a process that further links the construction of abnormality (and with it the construction of Blackness and disability) to objective science, aspiring to some semblance of truth. What becomes clear is not just that one cannot read race without disability nor disability without race, but that their entanglement requires a robust critical armature that grapples with them both.

Pickens, supra note 62, at 25 (footnote omitted) (quoting Ellen Samuels, Fantasies of Identification: Disability, Gender, Race 9 (2014)); see also Ben-Moshe, supra note 4, at 25 ("Race is coded in disability, and vice versa. It's impossible to untangle antiblack racism from processes of pathologization, ableism, and sanism. . . . [W]omen of color are already understood as mentally unstable."); id. at 28 ("[A]ntiblack racism is composed of pathologization and dangerousness, which lead to processes of criminalization and disablement, for instance, constructing people as Other or as deranged, crazy illogical, unfathomable, or scary."). Pickens further complicates a linear or comparative construction, rejecting conceptualizations where Blackness is characterized as analogous to or indistinguishable from Madness. Id. at 3 ("I theorize that [M]adness (broadly defined) and

race, "Whiteness exists not only as the opposite of non-Whiteness, but as the superior opposite . . . [such that] [f]or each negative characteristic ascribed to people of color, an equal but opposite and positive characteristic is attributed to Whites."[66] However, the orientation of difference into states of superiority and inferiority is accomplished by invoking stigmatizing disability imagery,[67] in which "[B]lackness [is tethered] to disability, defectiveness, and dependency and whiteness to normality, wholeness, vitality, and rationality."[68] Failure to recognize the constructed nature of the Galtonian normal can hide the Disabled social identity behind the illusion of factually immutable biological impairment, obscuring the role of ableism in perpetuating anti-Black racism and of racism in perpetuating ableism.[69]

By contrast, in recognizing disability as entirely socially constructed, lawyer Talila Lewis captures the intertwined nature of ableism and racism:

> [Ableism is] [a] system that places value on people's bodies and minds based on societally constructed ideas of normality, intelligence, excellence, desirability, and productivity. These constructed ideas are deeply rooted in anti-Blackness, eugenics, misogyny, colonialism, imperialism and capitalism.
>
> This form of systemic oppression leads to people and society determining who is valuable and worthy based on a person's language, appearance, religion and/or their ability to satisfactorily [re]produce, excel and "behave."
>
> You do not have to be disabled to experience ableism.[70]

Failure to reject the pathology paradigm obscures knowledge held in Black disabled voices like Lewis's.[71] Further, anything less than the rejection of normality and the associated metaphor of psychopathology

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Blackness have a complex constellation of relationships. These relationships between Blackness and [M]adness (and race and disability more generally) are constituted within the fissures, breaks, and gaps . . . .").

66. Ian F. Haney López, White by Law: The Legal Construction of Race 28 (1996) (emphasis omitted).

67. Barclay, supra note 31, at 9 ("Disability's power to stigmatize [is] derived from its . . . ability to rationalize inequality based on one's real or imagined proximity to [biologically "objective" abnormality].").

68. Id. at 1.

69. See id. at 8 ("[M]any of the most deeply offensive racial stereotypes and caricatures involve obvious associations with physical or mental disabilities[.]"); Imani Barbarin (@crutches_and_spice), Instagram (Nov. 17, 2022), https://www.instagram.com/p/ClEklZmDmjc/ (on file with the *Columbia Law Review*) ("A lot of you let your ableism fly free, because it allows you the chance to be racist with no consequences.").

70. Talila A. Lewis, January 2021 Working Definition of Ableism, TL's Blog (Jan. 1, 2021), https://www.talilalewis.com/blog/january-2021-working-definition-of-ableism [https://perma.cc/2HH9-RWBV] (last alteration in original).

71. See Lauren Melissa Ellzey (@autienelle), Instagram (Sept. 13, 2021), https://www.instagram.com/p/CTw_OiAAtju/?hl= (on file with the *Columbia Law Review*) ("The ableism present in BIPOC spaces and the racism that pervades autistic spaces rests upon the false separation of disability and race. The intersection of race and disability must be named and incorporated in order for there to be disability and/or racial justice.").

permits the perpetuation of at least systemic racism, ableism, sexism, antisemitism, and cisheteronormativity. These systems of oppression are not discrete but instead weave together to create an interlocking web of power dynamics.[72] Within this web, failing to recognize any form of oppression or power, including the socially constructed nature of disability, confounds meaningful progress in totality.

II. THE PATHOLOGY PARADIGM IN LAW GOVERNING PSYCHIATRIC INCARCERATION

To demonstrate the pervasive legal acceptance of the pathology paradigm, section II.A first defines the causal relationship between the pathology paradigm and legal competence and then maps this causal relationship in statutes authorizing psychiatric incarceration. Section II.B then explores the human costs of statutory reliance on the pathology paradigm at different intersecting oppressions in carceral psychiatry. Finally, section II.C demonstrates how the pathology paradigm acts as a restrictive framework in legal and policy discussions surrounding the scope of psychiatric incarceration and its associated ethical and normative dimensions.

A. *Statutory Reliance on the Pathology Paradigm*

> *"I also know I am not free. I have a note on my medical records that makes me less free. If freedom is a real thing, I am less free because I cannot get angry, sad, or frustrated. I cannot call out anyone with power over me or be myself for fear of retribution in the form of incarceration in a psychiatric institution."*
>
> — Karin Jervert.[73]

All fifty states and the District of Columbia have statutes authorizing psychiatric incarceration that pervasively, uncritically, and unquestionably

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72. Harris, supra note 17, at 587 ("Feminists have adopted the notion of multiple consciousness as appropriate to describe a world in which people are not oppressed only or primarily on the basis of gender, but on the bases of race, class, sexual orientation, and other categories in inextricable webs."); see also Tiffany Hammond (@fidgets.and.fries), Instagram (Jan. 8, 2023), https://www.instagram.com/p/CnKHE_6uLNI/?utm_source=ig_web_copy_link&igshid=MzRlODBiNWFlZA== (on file with the *Columbia Law Review*) ("White advocates will often treat Intersectionality as if it were the hoarding of oppressed identities and not the exploration of how these experiences are interconnected . . . . It is about asking . . . questions . . . that will lead to the revealing of how discrimination operates within the experience that overlapping identities create.").

73. Karin Jervert & Marnie Wedlake, Loss, Grief, and Betrayal: Psychiatric Survivors Reflect on the Impact of New Serotonin Study, Mad in Am. (Aug. 9, 2022), https://www.madinamerica.com/2022/08/psychiatric-survivors-reflect-serotonin-study/ [https://perma.cc/C7KX-WNSU].

absorb the pathology paradigm.[74] Each statute falls into one of three categories. Thirty-one states justify carceral treatment and psychiatric incarceration based on mental-illness-impaired judgment, reason, or perception of reality and on dangerousness to the self or others.[75] Six states justify only outpatient carceral treatment based on mental-illness-impaired judgment, reason, or perception of reality and on dangerousness.[76] These six states justify inpatient psychiatric incarceration based on dangerousness alone.[77] The remaining thirteen states and the District of Columbia do not explicitly reference mental-illness-impaired judgment, reason, or perception of reality, justifying psychiatric incarceration and outpatient carceral treatment based only on dangerousness.[78]

Statutes that justify carceral treatment or psychiatric incarceration based on mental-illness-induced irrationality proceed in the following

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74. See Treatment Advoc. Ctr., State Standards for Civil Commitment (2020), https://www.treatmentadvocacycenter.org/storage/documents/state-standards/state-standards-for-civil-commitment.pdf [https://perma.cc/94KD-2ZLP].

75. Alabama, Alaska, Arkansas, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, Texas, Utah, Vermont, and Wisconsin. See Ala. Code §§ 22-52-10.1 to -10.2 (2022); Alaska Stat. § 47.30.915(17) (2022); Ark. Code Ann. § 20-47-207(c) (2009); Colo. Rev. Stat. § 27-65-101 (2022); Del. Code tit. 16, § 5011(a) (2014); Fla. Stat. Ann. § 394.4655(2) (West 2016); Idaho Code § 66-317(11)–(12) (2023); 405 Ill. Comp. Stat. Ann. 5/1-119(3)(ii), -119.1 (West 2023); Ind. Code Ann. §§ 12-26-7-5(a), -7-2-96(2) (West 2023); Iowa Code §§ 229.1(21), .13(1) (2023); Kan. Stat. Ann. § 59-2946(f)(1)–(2) (West 2023); La. Stat. Ann. § 28:2(13) (2023); Mich. Comp. Laws Ann. § 330.1401(1)(a)–(c) (West 2023); Minn. Stat. § 253B.02(17)(a) (2022); Miss. Code Ann. § 41-21-61(f) (2023); Mo. Ann. Stat. § 632.005(10)(a)-(b) (West 2023); Mont. Code Ann. § 53-21-102(9)(a) (West 2021); Neb. Rev. Stat. §§ 71-907, -925 (2023); Nev. Rev. Stat. Ann. § 433A.0175(1)(b) (West 2023); N.H. Rev. Stat. Ann. § 135-C:2(X) (2023); N.J. Stat. Ann. § 30:4-27.2(r) (West 2023); N.C. Gen. Stat. § 122C-3(11)(a)(1)(I)–(II) (2023); N.D. Cent. Code § 25-03.1-02(12) (2023); Ohio Rev. Code Ann. §§ 5122.01(A), .10(A)(1) (2023); Okla. Stat. tit. 43A, § 1-103(13)(a) (2023); 40.1 R.I. Gen. Laws § 40.1-5-2(7) (2023); S.C. Code Ann. §§ 44-17-580(A)(1), -23-10(7) (2023); Tex. Health & Safety Code Ann. §§ 574.034(a)(2)(C)(iii), .0345(a)(2)(D)(ii) (West 2023); Utah Code §§ 26B-5-332(16)(a)(iii), -351(14)(c)(i) (2023); Vt. Stat. Ann. tit. 18, § 7101(17) (2023); Wis. Stat. & Ann. § 51.20(2)(c) (2023).

76. Georgia, Hawaii, Kentucky, Oregon, Virginia, and Wyoming. See Ga. Code Ann. § 37-3-1(12.1) (2022); Haw. Rev. Stat. Ann. § 334-121(2) (West 2023); Ky Rev. Stat. Ann. § 202A.0815(3)(b) (West 2023); Or. Rev. Stat. § 426.133(2) (West 2023); Va. Code Ann. § 37.2-817.01(B) (2023); Wyo. Stat. Ann. § 25-10-110.1(b)(2023).

77. Ga. Code Ann. § 37-3-1(9.1); Haw. Rev. Stat. Ann. § 334-60.2; Ky. Rev. Stat. Ann. § 202A.026; Or. Rev. Stat. §§ 426.005(1)(f), .130(1); Va. Code Ann. § 37.2-817(C); Wyo. Stat. Ann. § 25-10-101(a).

78. California, District of Columbia, Georgia, Maine, Maryland, Massachusetts, New Mexico, New York, Ohio, Pennsylvania, South Dakota, Tennessee, Washington, and West Virginia. See Cal. Welf. & Inst. Code § 5250 (2023); D.C. Code § 21-545(b)(2) (2023); Me. Rev. Stat. Ann. tit. 34-B, § 3864(6)(A)(1) (West 2023); Md. Code Ann., Health–Gen. § 10-632(e)(2) (West 2023); Mass. Gen. Laws Ann. ch. 123, § 8(a) (West 2023); N.M. Stat. Ann. §§ 43-1-11(E), 43-1B-3 (2023); N.Y. Mental Hyg. Law §§ 9.37, .60 (McKinney 2023); 50 Pa. Stat. & Cons. Stat. Ann. § 7304(a)(1) (West 2023); S.D. Codified Laws § 27A-1-2 (2023); Tenn. Code Ann. § 33-6-502 (2023); Wash. Rev. Code Ann. § 71.05.153(1) (West 2023).

manner. First, these statutes establish a state of abnormality—mental illness. Second, they attach the abnormality to an undesirable outcome—suicide, homicide, or grave poverty—such that the way to resolve the poor outcome is to return the abnormal to a state of normality. Third, they create a causal link between the abnormality and rationality so as to attribute any rejection of offered treatment to the abnormality rather than to the expression of reasoned preference. Through this structure, these statutes justify a coercive override of autonomy under the guise of rational care.

In Alabama, for example, the statute permitting psychiatric incarceration establishes the state of abnormality by requiring that "the respondent has a mental illness."[79] The statute then attributes suicide, homicide, or grave poverty to the abnormality: "[*A*]*s a result of* the mental illness, the respondent poses a real and present threat of substantial harm to self or others."[80] Additionally, it asks whether "the respondent . . . [will] continue to experience deterioration of the ability to function independently."[81] Finally, it causally links the presence of abnormality to irrationality: "The respondent *is unable to make a rational and informed decision* as to whether or not treatment for mental illness would be desirable."[82]

Statutes that authorize either inpatient psychiatric incarceration or outpatient carceral treatment rely on a variety of phrasings to link abnormality to irrationality. Many states focus on impaired capacity to reason, such that "mental illness" causes an individual to be "incapable of making informed decisions,"[83] "unable to engage in a rational decision-making process,"[84] or "unable to make a rational and informed decision."[85] Other statutes link abnormality to the individual's cognitive capacity, dictating that an individual may be subject to psychiatric incarceration if the individual "lacks sufficient insight or capacity to make responsible decisions,"[86] if there is an "obvious deterioration of that individual's judgment, reasoning, or behavior,"[87] or if the individual "is unable to determine for himself or herself whether services are necessary."[88] Similarly, the abnormality may be conceptualized as limiting or negating a person's "capacity to exercise self-control, judgment and

79. Ala. Code § 22-52-10.4(a)(1).
80. Id. § 22-52-10.4(a)(2) (emphasis added).
81. Id. § 22-52-10.4(a)(3).
82. Id. § 22-52-10.4(a)(4) (emphasis added).
83. Colo. Rev. Stat. § 27-65-102(17) (2023).
84. Kan. Stat. Ann. § 59-2946(f)(2) (West 2023).
85. Tex. Health & Safety Code Ann. § 574.034(a)(2)(C)(iii) (West 2023).
86. S.C. Code Ann. § 44-17-580(A)(1) (2023).
87. Ind. Code Ann. § 12-7-2-96(2) (West 2023).
88. Fla. Stat. Ann. § 394.4655(2)(f) (West 2023).

discretion"[89] or impeding a "mentally ill" person's "capacity to knowingly and voluntarily consent."[90]

In other states, the reference to rationality is more brazen, where statutes connect "mental illness" directly to the recognition and perception of reality. For example, a person may be subject to psychiatric incarceration when mental illness "grossly impairs judgment, behavior, or capacity to recognize and adapt to reality,"[91] "grossly impairs judgment, behavior, capacity to recognize reality, or to reason or understand,"[92] or "significantly impairs judgment, capacity to control behavior, or capacity to recognize reality."[93] Other states permit psychiatric incarceration when mental illnesses cause "grossly disturbed behavior or faulty perceptions"[94] or confound "the ability to perceive reality or to reason . . . [and cause] extremely abnormal behavior or extremely faulty perceptions."[95]

In Arizona, the consequence of the connection between abnormality and irrationality becomes apparent. The relevant statute dictates that "a person who has a mental disorder" may be subject to psychiatric incarceration when "the[ir] judgment . . . is so impaired that the person is unable to understand the person's need for treatment."[96] The decision about the individual's need for treatment has already been made, and abnormality will be found regardless in order to justify psychiatric incarceration.[97] To reject handcuffed "care" is to be irrational, and once labeled abnormal, the only path to restore autonomy is near-total compliance.[98] Thus, under these state statutes, the illusion of voluntary treatment hides the reality that there was never a choice at all. In practice, however, the illusion of choice is laced with the threat of violence, in which "many so-called 'voluntary' patients will consent to things only because

89. Nev. Rev. Stat. Ann. §433A-0175.1(b) (West 2023).

90. Del Code tit. 16, § 5011(a)(4) (2023).

91. Idaho Code § 66-317(11) (2023).

92. Minn. Stat. § 253B.02.17(1) (2023); see also Miss. Code Ann. § 41-21-61(f) (2023) (using the same definition of mental illness as Minnesota).

93. N.J. Stat. Ann. § 30:4-27.2.r (West 2023).

94. Miss. Code Ann. § 41-21-61(f).

95. N.H. Rev. Stat. Ann. § 135-C:2(X) (2023).

96. Ariz. Rev. Stat. Ann. § 36-501.8 (2023).

97. William M. Brooks, The Tail Still Wags the Dog: The Pervasive and Inappropriate Influence by the Psychiatric Profession on the Civil Commitment Process, 86 N.D. L. Rev. 259, 278–79 (2010) ("The psychiatrist who wishes to pay lip service to the law . . . can always assert enough symptoms of mental illness or factors relating to harm-causing behavior . . . knowing the court system will rarely second guess [their] determination.").

98. See Palter v. City of Garden Grove, 237 F. App'x 170, 172 (9th Cir. 2007) (demonstrating how once abnormality is presumed, there is nothing a person can do to effectively counter that accusation without submitting to a coercive psychiatric examination).

they know that if they don't, they could be labeled 'noncompliant' and face even worse abuse."[99]

In states with outpatient carceral treatment or inpatient psychiatric incarceration statutes that do not reference rationality, judgment, or reason, coercive care is justified solely on dangerousness to the self or others. However, no matter how many times a person injures themselves downhill mountain biking, they may continue to ride at the detriment to their health without state intervention. Thus, even in the states that do not justify psychiatric incarceration on "mental-illness"-induced irrationality, the pathology paradigm's causal link between abnormality, irrationality, and dangerousness remains quite damning.

As soon as a person receives a psychiatric label, their freedom to reject treatment, direct treatment course, and change treatment providers all vanish. By comparison, absent a psychiatric label, the presence of an illness or injury does not result in surveillance or restriction of freedom of movement regardless of consequence.[100] For example, if a person has cancer, they remain free to completely reject treatment, even if doing so directly results in death. Thus, even if the black letter of the statute does not explicitly articulate that "mental illness" confounds a person's capacity to reason, there remains a strong implicit presumption of irrationality that justifies an autonomy-overriding paternalistic intervention.

B. *The Human Costs of Legal Reliance on the Pathology Paradigm*

There is perhaps not a place more evident of the presumption of irrationality and thus discrepancy between care received under a psychiatric label and care for other diseases, illnesses, or injuries than in Leah Ashe's story, which she documents in *From Iatrogenic Harm to Iatrogenic Violence: Corruption and the End of Medicine*. Published posthumously, Ashe's article documents the events that occurred upon the transmutation of a Crohn's disease diagnosis to that of an eating disorder.[101] After being admitted to a hospital for a chronic illness, a single medical note made by nurses who confused "explosions of diarrhea for an episode of bulimic vomiting" transformed the course of Ashe's treatment.[102] Despite Ashe's begging for real food, doctors declared she

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99. Maggie (@thebooksmartbimbo), Instagram (June 23, 2022), https://www.instagram.com/p/CfKsS8cM_2A/?utm_source=ig_web_copy_link&igshid=MzRlODBiNWFlZA== (on file with the *Columbia Law Review*); see also Eric Garcia, We're Not Broken: Changing the Autism Conversation 85 (2021) ("They stood behind me with guns and said, 'We can do this the easy way or the hard way.' And I cheerfully signed myself in voluntarily.").

100. Developments in the Law, Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190, 1194 (1974) ("Equally important, . . . a physically ill individual is ordinarily permitted to choose whether to seek medical attention and is protected in this right by common law tort doctrines . . . .").

101. Leah M. Ashe, From Iatrogenic Harm to Iatrogenic Violence: Corruption and the End of Medicine, 28 Anthro. & Med. 255, 258 (2021).

102. Id. at 260.

be force fed, all while denying her treatment for her chronic illness.[103] While psychiatrically incarcerated, Ashe experienced sepsis, hospital-acquired pneumonia, and cardiac arrest.[104] Once psychiatrically labeled, her care transformed from treatment to punishment, cooperative to combative, and healing to harming. Here, the bifurcation of carceral and noncarceral care demonstrates how, in psychiatry, "care" is merely punishment rebranded.

Medical professionals, however, are not the only people whose testimony overrides the credibility of a psychiatrically labeled person. As writer, mental health advocate, and Depressed While Black founder Imadé Nibokun describes, when Cards Against Humanity writer Nicholas Carter questioned his white coworkers' inclusion of the n-word in the card game, they interpreted his antiracist advocacy as mental instability.[105] Carter was subject to psychiatric incarceration on the basis that his "co-workers' account of his mental state was considered 'more reliable collateral' than Carter's own perspective as a Black man."[106]

Racialized people, queer people, transgender people, Autistic people, and people who hold multiple marginalized identities are particularly susceptible to erroneous psychiatric labeling. For example, attorney Gabriel Arkles describes the experience of a Black transgender client subject to psychiatric incarceration in which "his gender identity was treated like a delusion and his fear and distrust of police was treated like

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103. Id. at 263.

104. Id. at 261.

105. Imadé Nibokun, "Cards Against Humanity" Writer Says He Was Forced Into a Psych Ward After Speaking Up About Racism, The Mighty (July 8, 2020), https://themighty.com/topic/mental-health/cards-against-humanity-writer-psych-ward [https://perma.cc/8XJF-CBRS]; see also Nicholas Carter, How to Know You Are Not Insane (And How a Cards Against Humanity Staff Writer Was Fired), Medium (June 25, 2020), https://medium.com/@nicolas.j.carter/how-to-know-youre-not-insane-and-how-a-cards-against-humanity-staff-writer-was-fired-40fe07fbbfe4 [https://perma.cc/MX4P-JL9R]. There is a "deeply troubling history of pitting the categories of disability and race against one another." Barclay, supra note 31, at 8. This Note does not follow in that tradition. Rather, the Note invites all nondisabled people to reflect on how their privileged nondisabled identity interoperates with their other privileged and marginalized identities.

106. Naming how psychiatric incarceration of Black people mimics historical patterns of racism, Nibokun articulates:

> He should not have been told that living freely as a Black man is a mental illness over a hundred years after white southern physicians did the same. We need a mental health system where Carter can be treated as the expert of his own experiences. If we look beyond psychiatric jails and policing, we'll discover that what heals Black people is within Black people.

Nibokun, supra note 105. Further, the weaponization of psychiatric labels to silence, incarcerate, and debilitate Black men is no new occurrence. Black men are four times more likely to receive a schizophrenia diagnosis than their white counterparts; the backlash to the Civil Rights Movement transformed the conceptualization of the diagnosis. See Metzl, supra note 22, at xv. Before the Civil Rights Movement, schizophrenia was associated not with violence but rather with docile white femininity. Id.

paranoia."[107] Here, the institution of psychiatry relied on the veneer of a "biologically objective" disability status to perpetuate racism and transphobia. Gloria Oladipo, breaking news writer for the *Guardian*,[108] describes her experience as a Black woman seeking mental health care as "betrayal."[109] Despite knowing she was struggling with OCD and an eating disorder, mental health professionals construed her eating disorder as bipolar "disorder" and construed her distress due to changing circumstances as paranoid personality "disorder."[110] Oladipo, the expert on her own experiences, identified what professionals did not, in large part because "[m]ental health professionals don't know how to diagnose Black people."[111] The institution of psychiatry, marred by a long and still-present history of racism, remains ill equipped to stand in as an authority on the experiences of Black people.

Built on the bedrock of ableism and sanism,[112] psychiatry is similarly ill equipped to stand in as an authority on the experiences of Neurodivergent people. For example, Autistic people also receive a litany of misdiagnoses because of a pervasive misunderstanding of how masked autism presents in adults, especially in psychiatric settings.[113] Carrie Beckwith-Fellows remained unsupported within various mental health

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107. Gabriel Arkles, Gun Control, Mental Illness, and Black Trans and Lesbian Survival, 42 Sw. L. Rev. 855, 893 (2013) ("The police perceived him as an emotionally disturbed Black butch lesbian, cuffed him, and took him to a psychiatric emergency room. Once committed, he experienced pathologization, in that his gender identity was treated like a delusion and his fear and distrust of police was treated like paranoia.").

108. Gloria Olapido, The Guardian, https://www.theguardian.com/profile/gloria-oladipo [https://perma.cc/E3DW-BKF2] (last visited Aug. 17, 2023).

109. Gloria Olapido, Black People Like Me Are Being Failed by the Mental Health System. Here's How, Healthline (July 2, 2019), https://www.healthline.com/health/racism-mental-health-diagnoses [https://perma.cc/8YX6-766K].

110. Recounting her own experiences, Olapido articulates:

> My eating disorder was diagnosed as adjustment disorder. My moodiness, a direct result of malnutrition, was mistaken for a serious chemical imbalance—bipolar disorder—and a reaction to a stressful life change.
>
> My OCD . . . became paranoid personality disorder.
>
> I'd opened up about some of the greatest secrets in my life only to be called "paranoid" and "maladjusted."

Id.

111. Id.

112. This Note defines "sanism" as the subordination, exclusion, and dismissal of people and knowledge deemed irrational, unreasonable, or unquantifiable. For example, epistemic violence and psychiatric incarceration are both forms of sanism. See Ben-Moshe, supra note 4, at 16–17 ("[S]anism is oppression faced due to the imperative to be sane, rational, and non-mad/crazy/mentally ill/psychiatrically disabled.").

113. Devon Price, Unmasking Autism 110 (2022) ("Even many mental health professionals are unaware that these 'disorders' and self-destructive behaviors are highly comorbid with Autism. The stereotype that Autistic people are withdrawn 'losers' who just sit at home on the computer all day runs very deep . . . .").

settings for ten years, erroneously labeled with a litany of "disorders."[114] Only after Beckwith-Fellows voluntarily withdrew from treatment did she identify her own autism.[115]

Ableism and sanism also impact survivors of childhood abuse and intimate partner violence. Specifically, survivors can be coercively and erroneously bestowed with psychiatric labels that fail to address a history of trauma.[116] As ex-patient and now-psychotherapist Marnie Wedlake has described, "[I]t felt as though no one genuinely wanted to know . . . about why I was so distressed. References to trauma and adversity were stuffed behind the diagnoses. . . . [S]o, like many, I internalized the belief that . . . *I was the problem*."[117] But coercively imposing psychiatric labels—such as personality "disorders"—on a person experiencing discrimination and ostracization due to one or more marginalized identities does not just

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114. While presenting a TEDx talk, Beckworth-Fellows recounted her own experiences:

> As I grew up into my teens, my early twenties, my [a]utism fought back. It was tired of hiding, and it was tired of being masked, and so it showed itself in the only way it could: I developed an eating disorder, I began to self-harm and I tried to end my life repeatedly. My Autistic self was screaming to be heard, but the louder it shouted, the more incorrect labels I was given: bipolar disorder, borderline personality disorder, depression, mixed anxiety disorder. . . . I spent ten years in the mental health system bouncing from one inpatient stay to another until finally I was left blind for two whole years because of psychiatric drugs I should not have been on.

TEDx Talks, Invisible Diversity: A Story of Undiagnosed Autism, Carrie Beckwith-Fellows, YouTube, at 13:40 (July 6, 2017), https://www.youtube.com/watch?v=cF2dhWWUyQ4 (on file with the *Columbia Law Review*).

115. Id. at 14:49 ("Enough was enough: I withdrew from the mental health system. . . . I referred myself to an autistic-diagnostic team and they confirmed my suspicion: I was Autistic.").

116. As Rebecca Donaldson explains her own experiences in the mental health industrial complex as a trauma survivor:

> [C]linicians are trained to label feelings like suicidality, restricting food, self-injury, crying, and feeling sad as 'problem behaviors' and are taught to engage in irreverent responses to clients who exhibit them. Talking about trauma is often shunned, and any of the aforementioned 'behaviors' are commonly viewed as attention-seeking. Despite [a majority] of individuals diagnosed with 'borderline personality disorder' reporting histories of childhood trauma, these individuals are merely viewed through the [Dialectical Behavioral Therapy] lens as people with problems that need to change.

Rebecca Donaldson, Trauma Survivors Speak Out Against Dialectical Behavioral Therapy (DBT), Mad in Am. (Aug. 12, 2022), https://www.madinamerica.com/2022/08/trauma-survivors-speak-out-against-dialectical-behavioral-therapy-dbt/ [https://perma.cc/J2YM-UYX4].

117. Jervert & Wedlake, supra note 73; see also Donaldson, supra note 116 ("DBT infuriated [me] because it was basically telling me, 'learn to be passively okay with outrageous unhappiness at what's been done to you.' . . . [Y]ou're basically treating us like car alarms you want to . . . smash . . . with a hammer, so you don't have to pay attention to it." (first alteration in original) (internal quotation marks omitted) (quoting an anonymous comment)).

refuse to address a history of trauma—it actively depoliticizes distress stemming from systemic oppression.[118]

In these stories, the human cost of the legal reliance on the pathology paradigm begins to emerge: The political presumption that some people are broken and must be fixed is itself what traps many people in their sociopolitical distress. This is not to say that input from a medical professional is not valuable. Having an external perspective is a powerful way to help make meaning of an internal experience.[119] Erroneous psychiatric labeling, however, is not a consequence of a biologically inevitable error rate of an imprecise science. Rather, the error that disproportionately burdens othered bodyminds arises only when, based on the normative presumption of abnormality-induced irrationality, expertise on an internal experience is removed from the only person who has access to it.

C. *The Restrictive Effect of Pathological Framing in Legal and Policy Debates*

Though statutes rely on a presumption of irrationality arising from acceptance of the pathology paradigm, legal and policy discussions surrounding psychiatric incarceration are typically more nuanced. Many scholars recognize that the presence of "mental illness" does not necessarily imply that a person is legally incompetent.[120] Thus, scholars discussing psychiatric incarceration rely on a variety of normative frameworks to decide when, if at all, paternalistic intervention is justified. But despite the relative nuance, these debates remain constrained by acceptance of the pathology paradigm as biological fact and the limits this framework imposes.

Specifically, the pathology paradigm forces the normative balancing of two types of error associated with the coercive psychiatric labeling

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118. See Devin S. Turk, Mad Thought: "Personality Disorders", Medium (Sept. 23, 2022), https://medium.com/@devinsturk/mad-thoughts-personality-disorders-9213e786be87 [https://perma.cc/WKB5-HM5V] ("As someone who was misdiagnosed with a 'disordered personality,' and someone who is also Autistic and trans, being told to Cognitive Behavioral Therapy my way out of 'mental illness' that was born out of a response to an ableist and transphobic society . . . does nothing but perpetuate cycles of harm.").

119. Without realizing there is an alternative, many people accept the pathological understanding of neurodivergence and distress. This Note does not argue that we should dismiss the internal experiences of those who self-pathologize. Rather, the Note argues that psychiatry and the pathology paradigm should not be the legally mandated default understanding of suffering and difference. People should remain free to consume psychiatric services autonomously rather than being mandated to do so under the force of law.

120. See Candice T. Player, Involuntary Outpatient Commitment: The Limits of Prevention, 26 Stan. L. & Pol'y Rev. 159, 212 (2015) ("[N]ot all people with mental illnesses are incompetent to make treatment decisions."); Elyn R. Saks, Competency to Refuse Medication: Revisiting the Role of Denial of Mental Illness in Capacity Determinations, 22 S. Cal. Rev. L. & Soc. Just. 167, 169–70 (2013) (detailing the current standards for assessing capacity to refuse treatment).

process.[121] If law protects against harms inflicted by coercive restrictions on liberty, that law must tolerate false negatives and thus fail to incarcerate people who would experience harm due to a nonidentified pathology-induced incompetence.[122] Conversely, if a law protects against harms inflicted by untreated psychopathology, that law must tolerate false positives and thus subject people without incapacitating pathology to unnecessary, coercive, and traumatic treatment.[123] Further, because these two types of error are inversely related and thus cannot be reduced simultaneously, their balance is neither empirical nor value neutral.[124] Literature tackling psychiatric incarceration thus remains stuck within a cyclical battle between preferences for either liberty or paternalism. Within this literature, there is a spectrum of arguments about the correct balance between these two kinds of error.[125]

Effectively, these debates may be distilled to a particular pattern of reasoning. Arguments in favor of preserving or expanding psychiatric incarceration first observe that a person is different and struggling such that the observed difference is presumed to be the cause of the observed suffering.[126] This leads to the conclusion that relief of difference is relief of suffering. Never once is suffering conceptualized as an expected response to an economic, social, and political landscape that marginalizes difference at every turn. By contrast, arguments in favor of abolishing or severely limiting psychiatric incarceration follow the same logic but take issue with what is characterized as an unacceptable rate of error in distinguishing between people who do not need "treatment" and people who could be correctly subjected to involuntary "treatment."[127] Yet critics

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121. Player, supra note 120, at 220–21 ("[S]ettling on an appropriate competence standard is not simply a matter of settling on the correct test, but rather a process of balancing competing values and guarding against two kinds of error [i.e., false negatives and false positives].").

122. See id. at 220 ("The first error (Type I or false positive) results from choosing a standard of competence that is too low and failing to protect the person from the harmful consequences of his or her decisions when those decisions stem from serious defects in the capacity to decide.").

123. See id. at 220–21 ("The second error (Type II or false negative) results when we choose a threshold for competence that is too high and fail to allow a person to make her own choices when she is able to do so.").

124. See Douglas, supra note 19, at 566 ("For any given experimental test, one cannot lower both [false positive error and false negative error]; one can only make trade-offs from one to the other.").

125. Compare Stephen J. Morse, A Preference for Liberty: The Case Against Involuntary Commitments of the Mentally Disordered, 70 Calif. L. Rev. 54, 57 (1982) (accepting the harms that flow from false negatives in defense of a policy argument that would not tolerate false positives), with Dora W. Klein, When Coercion Lacks Care: Competency to Make Medical Treatment Decisions and Parens Patriae Civil Commitment, 45 U. Mich. J.L. Reform 561, 565 (2012) (accepting the perpetuation of harms that flow from false positives to guard against the harms that flow from false negatives).

126. See infra notes 129–132 and accompanying text.

127. See infra notes 141–145 and accompanying text.

and supporters alike fail to realize the false dichotomy within which they are stranded. This leads to the appearance of an unresolvable disagreement about which of two poor solutions is marginally preferable. Supporters of psychiatric incarceration argue that mandating carceral care to change the person to fit the landscape is better than the position of critics, who argue that if a person rejects carceral care, it is acceptable to leave that person without any support at all.[128] Not once do critics or supporters recognize that care need not be carceral or consider that perhaps it is not the person who needs fixing.

Scholars that argue in favor of maintaining or increasing the reach of psychiatric incarceration justify tolerance of false positive error by positioning the consequences of the untreated pathology as worse than the consequences of erroneous deprivation of liberty.[129] For example, some commentators connect untreated pathology to the disproportionate representation of "mentally ill" people in jails, prisons, and within unhoused populations.[130] Based on this connection, the solution to the disproportionate criminalization or impoverishment of the "mentally ill" appears obvious: Coercively treat the abnormal pathology. This permits the characterization of carceral treatment as the lesser of two evils when compared to the dangers of poverty or a criminal legal system that is unprepared to accommodate Disabled people.[131]

When neurodivergence is understood as "mental illness," poor outcomes are associated with and blamed on the state of abnormality, effectively internalizing—within individual biology—systemic drivers of inequity. Thus, the framework of "mental illness" masks the structural issues that leave multiply marginalized people most vulnerable to interpersonal and state-sanctioned violence that results in social, political, and economic exclusion. But the sanist idea that external expressions of neurodivergence should be understood as an eradicable illness is exactly what demands this framing.

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128. See infra notes 133–139 and accompanying text.

129. See Player, supra note 120, at 218 ("[T]he good associated with outpatient commitment outweighs the harms associated with infringing personal autonomy and the right to refuse treatment. . . . The harms to be avoided are grave—chronic homelessness, violent crime, violent victimization, incarceration, and suicide.").

130. See Sara Gordon, The Danger Zone: How the Dangerousness Standard in Civil Commitment Proceedings Harms People With Serious Mental Illnesses, 66 Case W. Rsrv. L. Rev. 657, 698 (2016) ("In many cases, this heightened [commitment] standard has resulted in the marginalization of people with serious mental illness into poverty and homelessness."); Collin Mickle, Safety of Freedom: Permissiveness vs. Paternalism in Involuntary Commitment Law, 36 Law & Psych. Rev. 297, 301 (2012) ("Thousands of other mentally ill individuals are homeless[,] . . . [facing] increased risks of illness, violence, and substance abuse, and consequently have much lower life expectancies than those with reliable shelter.").

131. See Mickle, supra note 130, at 301 ("The presence of large numbers of mentally ill inmates in ill-equipped and ill-prepared corrections facilities increases the risk of conflict in those facilities.").

In a related but alternative line of reasoning, advocates for paternalistic intervention also dispute the characterization of carceral treatment as deprivation of autonomy. Here, the pathology is characterized as the autonomy-depriving agent, such that return to "normal" cognitive function by way of carceral treatment is presented as restoring autonomy.[132] However, loss of autonomy based on the presence of pathology is again coherent only if neurodivergence is conceptualized as a destructive agent that corrodes an underlying "normal" cognitive process.[133]

In *Involuntary Outpatient Commitment: The Limits of Prevention*, Candice Player combines these two approaches when she suggests a soft paternalist theory of intervention regarding outpatient psychiatric "care."[134] For Player, "interventions into self-regarding harm are justified when, and only when, the actions or choices of the person concerned are substantially

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132. See M. Carmela Epright, Coercing Future Freedom: Consent and Capacities for Autonomous Choice, 38 J.L. Med. & Ethics 799, 804 (2010) ("Thus, if our purpose is to uphold patient autonomy, then coercing treatment in the short term might well be the best means of providing protection for the patient's capacities for rational choice, and thus promoting genuine autonomy for that patient."); Klein, supra note 125, at 566 ("Requiring that people who have been civilly committed because of dangerousness to self have a rational understanding of the consequences of refusing treatment furthers the ultimate goal of promoting autonomous decisions . . . ."); Player, supra note 120, at 203 ("If one's thoughts and behavior are driven by a disease process of the brain over which one has no control, is this truly liberty? . . . 'Medication can free victims from their illnesses . . . and restore their dignity, their free will, and the meaningful exercise of their liberties.'" (internal quotation marks omitted) (quoting E. Fuller Torrey & Mary Zdanowicz, Outpatient Commitment: What, Why, and for Whom, 52 Psychiatric Servs. 337, 340 (2001))).

133. Further, pathological framing that assumes an underlying essential "normal" often biases the interpretation of observed differences:

> Do psychotic diseases negatively impact these areas of the brain [necessary for exercise of autonomy and rational thought]? The general consensus is yes. Although the data is limited and preliminary, multiple neuroimaging studies have documented structural abnormalities in the prefrontal and dorsal lateral cortexes of persons with untreated bipolar and other mood disorders, including cortical thinning, the reduction of gray matter in these regions, and the various cell pathologies including alterations in neuronal and glial density. Neuroimaging studies of untreated [Schizophrenic people] show similar defects . . . .

Epright, supra note 132, at 804 (footnotes omitted). All the while, differences in structure and function can go unnoticed altogether when they do not conflict with economic functioning expectations:

> In an article entitled 'Is Your Brain Really Necessary?' Roger Lewin describes a university student . . . who has an IQ measured at 126, a normal social life, and 'virtually no brain.' . . . The student was functionally indistinguishable from his colleagues, but had no more than 10% of the average person's brain tissue.

See Ron Amundson, Against Normal Function, 31 Stud. Hist. Phil. Biological & Biomedical Sci. 33, 40 (2000).

134. Player, supra note 120, at 211.

nonvoluntary."[135] Thus, even though Player may be fairly characterized as protective of liberty interests of the psychiatrically labeled,[136] she argues that those liberty interests are permissibly curtailed when exercise of a pathology-influenced autonomy leads to sufficiently adverse outcomes.[137] Here, the pathological story of neurodivergence strips the psychiatrically labeled of their credibility by classifying certain embodied expressions of neurodivergence as "biological motions" rather than "symbolic actions," thereby degrading the rhetorical intentionality behind them.[138]

By contrast, critics who prefer tolerance of false negative error rely on a myriad of arguments that center on the legal inability to create substantive and procedural mechanisms that guard against unwarranted psychiatric incarceration. Some critics argue that if the state relies on poor outcomes to justify forced treatment, then this paternalistic override of autonomy should apply to all medical interventions, not just treatment of "mental illness."[139] Other critics argue that it is the imprecision of psychiatry or the lack of scientific character of psychiatric labels that guarantees an intolerable number of false positives.[140] Some critics argue that absent this scientific character, psychiatric incarceration is used predominantly as a mechanism to control noncriminal social deviance.[141]

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135. Id.

136. See id. at 221 ("I argue that an emphasis on appreciation or insight as a measure of competence is misplaced. Indeed 'appreciation,' the legal correlate of insight, should have no role to play in our thinking about competence." (footnote omitted)).

137. Id. at 228 ("Exposure to extreme weather conditions, untreated medical illnesses, infection, and insufficient nutrition . . . increase the risk of death. . . . [W]here the risks are sufficiently grave—and a person's capacity to make rational choices is sufficiently in question—a reasonable court might risk a [false negative] error . . . .").

138. Melanie Yergeau, Authoring Autism: On Rhetoric and Neurological Queerness 10 (2018).

139. See Samantha Godwin, Bad Science Makes Bad Law: How the Deference Afforded to Psychiatry Undermines Civil Liberties, 10 Seattle J. for Soc. Just. 647, 686 (2012) ("The argument that mentally ill people would benefit from needed medical treatment, and that this benefit outweighs their right to refuse and therefore justifies commitment, would apply equally to *anyone* who refuses needed medical treatment."); Morse, supra note 125, at 66 ("There would thus seem to be little support for an involuntary commitment system that is imposed only on the mentally disordered.").

140. See Godwin, supra note 139, at 648 ("I challenge the assumption that psychiatry provides reliable and scientific facts by demonstrating that the evidence available to psychiatrists is typically insufficient to support many of the claims they make about mental illness."); Morse, supra note 125, at 68 ("Another factor that increases the likelihood of improper overcommitment is the difficulty attending proper conceptualization and diagnosis of mental disorder.").

141. See Morse, supra 125, at 67 ("One factor that is likely to lead to the overuse of civil commitment is the use of commitment as a mechanism for the control of 'overflow' deviance. As a social control system, involuntary commitment provides a solution to the problems caused by troublesome, annoying, scary, and weird persons."); William Hoffman Pincus, Note, Civil Commitment and the "Great Confinement" Revisited: Straightjacketing Individual Rights, Stifling Culture, 36 Wm. & Mary L. Rev. 1769, 1814 (1995) ("The State has committed a woman for exercising independent religious thought and a man for practicing vegetarianism. It was not until 1972 that homosexuality ceased to be classified as

Other critics focus on the practical realities of the legal processes surrounding psychiatric incarceration, arguing that an intolerable number of false positives is at least in part a result of the opportunity for pretext during the psychiatric designation of dangerousness[142] or the performative nature of judicial procedures.[143] In effect, critics favoring tolerance of false negatives focus in some way on the rate of error inherent to an external observer's process in determining the presence or absence of a competence-impairing pathology.[144]

These critiques often fall flat because they fail to effectively respond to the paternalistic criticism that protecting liberty interests of the psychiatrically labeled is no different than letting people die preventable deaths.[145] Within these debates, however, there is no discussion of who is claiming expertise and authority on neurodivergence. The focus on the correct balance between preferences for liberty or paternalism obscures the fact that an entire industry of neurotypical people claim expertise on an embodied way of being they have never and may never experience.

III. THE NEURODIVERSITY PARADIGM AND NONCARCERAL CARE

As a solution to the restrictive and carceral influence of the pathology paradigm, section III.A introduces the neurodiversity paradigm as an alternative normative framework to understand divergent cognition. Section III.B then introduces relational autonomy to bridge a neurodiversity-informed vision of noncarceral care and legal discussions surrounding provision of support to people in crisis. Part III concludes with a call to shift from the pathology paradigm to the neurodiversity paradigm not only in law but also in broader discussions surrounding mental health, abolition, and social justice.

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mental illness and, hence, potential grounds for commitment . . . . On what primitive grounds do we justify commitment today?" (footnotes omitted)).

142. See Brooks, supra note 97, at 278–79 ("The psychiatrist who wishes to pay lip service to the law . . . can always assert enough symptoms of mental illness or other factors relating to harm-causing behaviors, . . . knowing [that] the court system will rarely second guess [their] determination.").

143. See Michael L. Perlin, "Who Will Judge the Many When the Game Is Through?": Considering the Profound Differences Between Mental Health Courts and "Traditional" Involuntary Civil Commitment Courts, 41 Seattle U. L. Rev. 937, 937 (2018) ("[T]he Supreme Court noted, in *Parham v. J.R.*, that the average length of a civil commitment hearing ranged from 3.8 to 9.2 minutes . . . .").

144. See Morse, supra note 125, at 74 ("[The] number of wrongly committed 'false positives' is completely unjustified in a society that values liberty.").

145. See Paul S. Appelbaum & Thomas G. Gutheil, "Rotting With Their Rights On": Constitutional Theory and Clinical Reality in Drug Refusal by Psychiatric Patients, 7 Bull. Am. Acad. Psychiatry L. 306, 311–15 (1979) (describing a "small study" in which the majority of legal arguments in support of the right to refuse medication were found not to fit the clinical reality).

A. *The Neurodiversity Paradigm*

"Mental illness" is not the only normative framework that can be used to understand divergent cognition. Beginning in tandem with both the Disability Rights movement and the rise of early versions of the internet in the 1990s, Autistic adults started questioning pathological descriptions of autism.[146] This Autistic-led critical approach gave way to the concept of neurodiversity, in which autism, dyslexia, and ADHD were characterized as natural and necessary forms of neurocognitive variation rather than abnormalities in need of eradication or cure.[147] In 2012, Critical Autism Studies scholar Nick Walker named and defined the neurodiversity paradigm.[148] Under the neurodiversity paradigm, Walker both explicitly broadened the concept of neurodiversity to all nonnormative neurocognitive variation and rejected the broad normative commitment to "normal" cognitive function.[149]

However, when Walker rejected the Galtonian normal to acknowledge that "differences between biological individuals are real" and "the mean values which we may calculate in the comparison of groups . . . are man-made inferences," she aligned the neurodiversity paradigm, perhaps inadvertently, with the modern, nonessentialist conceptualization of statistics.[150] Thus, where the social model of disability distinguishes between "value-neutral" biological impairment and socially constructed disability,[151] the neurodiversity paradigm rejects the notion that Neurodivergent people are impaired. The neurodiversity paradigm is thus aligned with disability justice, which rejects impairment broadly when arguing that there is no right or wrong way to have a bodymind.[152] While

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146. As sociologist Judy Singer recounts:

> By the 1990s, the idea of autism as a spectrum . . . was gathering momentum . . . . The new paradigm was spreading fast thanks to the advent of the internet, which I described in my thesis as "the prosthetic device that binds isolated . . . autistics into a collective social organism capable of having a public 'voice.'"

Judy Singer, NeuroDiversity 11 (2016).

147. Walker, Liberating Ourselves, supra note 11, at 38.

148. Awais Aftab, The Neurodiversity Paradigm in Psychiatry: Robert Chapman, PhD, Psychiatric Times (Sept. 24, 2021), https://www.psychiatrictimes.com/view/neurodiversity-paradigm-psychiatry [https://perma.cc/Y2R8-XP6Z] ("The term *neurodiversity paradigm* was proposed a bit later, in 2012, by [A]utistic scholar Nick Walker, PhD (she/her) . . . .").

149. Walker, Liberating Ourselves, supra note 11, at 19. Walker coined the term so that she could explore "the philosophical implications of this broader application of [neurodiversity] . . . and how it challenged theoretical assumptions and cultural and scientific practices." Aftab, supra note 148.

150. Mayr, supra note 29, at 47 ("[D]ifferences between biological individuals are real, while the mean values which we may calculate in the comparison of groups of individuals . . . are man-made inferences.").

151. See Emens, supra note 58, at 1401.

152. See Leah Lakshmi Piepzna-Samarasinha, Harm Reduction Is Disability Justice: It's Not Out There, It's in Here, *in* Saving Our Own Lives: A Liberatory Practice of Harm Reduction 182, 184 (Shira Hassan ed., 2022) ("One of the primary offerings of Disability

it rejects normality, the neurodiversity paradigm does not reject all data collected under the pathology paradigm.[153] Rather, it argues that when neurotypical researchers rely—often implicitly—on a pathological framing, they analyze that data through a dehumanizing lens, thereby generating limited and often outright inaccurate theories about a politically, socially, and economically subordinated group of people.[154]

Rejection of the Galtonian normal allows difference to be understood as a natural, even if less common, way of being, not as disease to be eradicated or disorder to be cured. Consequently, difference is not presumptively alien to or corrosive to the neurocognitive *l'homme moyen*—instead, neurodivergence may be experienced as integral to and indistinguishable from the self. As schizophrenia and psychosis advocate Rose Parker explains:

> Schizophrenia is so much more than hearing Voices. Schizophrenia affects every aspect of how we perceive[], interact with, experience, and are received by the world. I do not view my Schizophrenia as a 'Disorder' or 'Illness' . . . because even though it is Disabling, it is so fundamental to my life and to my Neurology that I would not be who I am without it – literally, it dictates how I experience my sense of Self. I am Schizophrenic and I do not believe there is anything wrong with that.[155]

Similarly, Autistic people describe their neurotype as an entirely different way of being, with cognition dominated by monotropic, grid-like thinking in contrast with the associative, spiral-like, curvilinear thinking characteristic of ADHD.[156] The neurodiversity paradigm frames borderline

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Justice is that there is no right or wrong way to have a body or mind."). As both a critical and a rhetorical question: Who gains power when a bodymind can be declared right or wrong?

153. Walker, Liberating Ourselves, supra note 11, at 28 ("A paradigm shift . . . requires that all data be *reinterpreted* through the lens of the new paradigm."); see also Frazer-Carroll, supra note 26, at 51 ("Questioning the way that we 'know' mental health doesn't involve rejecting all current knowledge, or resisting the pursuit of knowledge in the first place. Rather, it is about finding new ways to orient ourselves toward knowledge.").

154. See supra note 58 and accompanying text; supra note 119.

155. Rose Parker, Embodiment, The Self, and Schizophrenia, Medium (Apr. 12, 2022), https://medium.com/@psychosispsositivity/embodiment-the-self-schizophrenia-6e2b6932e360 [https://perma.cc/PM4A-ZBCZ].

156. Photograph of Tweet by Barisan Hantu (@barisanhantu), *in* Devon Price (@drdevonprice), Instagram (Aug. 14, 2021), https://www.instagram.com/p/CSj1NjnLd65 (on file with the *Columbia Law Review*) [hereinafter Price, Instagram Post] ("ADHD is associative and curvilinear in thinking [while] [a]utism is monotropic and tends to have repetitive patterns . . . ."); Photograph of Tweet by Lydian (@Marvin_humanoid), *in* Price, Instagram Post, supra (When you are both, it[']s really hard if not impossible to give a clear distinction between [autism and ADHD]. It[']s almost like you are in a [third] group . . . [a]n outsider amongst the outsiders."). Like Rose Parker understands being Schizophrenic, Nick Walker describes Autistic cognition as inextricably linked to conceptions of the self:

> It isn't a disease, like a tumor or a virus. You can't cut an autism out of a person and preserve it in a bottle. You can't isolate autism in a laboratory and have a little test tube or petri dish full of autism. Being autistic informs

personality "disorder" (BPD) and dissociative identity "disorder" (DID) as incredible adaptations to unacceptable circumstances rather than states of biological brokenness or moral failure.[157] However, in line with the rejection of biological essentialism, there is also no essential, monolithic, or universal experience of any given neurotype.

When Neurodivergent people are the authority on neurodivergence, they identify nuances between neurodivergences that are not readily made based on external expressions alone. Specifically, Neurodivergent people readily distinguish between neurodivergence and distress. For example, under the neurodiversity paradigm, anxiety and depression are often expressions of distress that arise predictably in response to the society we have constructed.[158] Further, eating disorders, substance use, self-harm,

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> every facet of a person's development, embodiment, cognition, and experience, in ways that are pervasive and inseparable from the person's overall being.

Nick Walker, Person-First Language Is the Language of Autistiphobic Bigots, *in* Neuroqueer Heresies, supra note 11, at 91, 95.

157. See Candice Alaska (@understandingbpd), Instagram (Jan. 13, 2023), https://www.instagram.com/p/CnXt1snvuxI (on file with the *Columbia Law Review*) ("What if we saw people with BPD as incredible instead of 'broken'? What if we admired people with BPD for the ways that they have survived often unbearable things?"); Gianu System (@gianusystem), Instagram, at 00:30 (Oct. 10, 2022), https://www.instagram.com/gianusystem (on file with the *Columbia Law Review*) ("[W]hat I wished people knew is that . . . the experiencing of a fragmented consciousness is not what is . . . distressing about DID. It's the dissociation and the PTSD symptoms."). Even though some Neurodivergent people reclaim and depathologize BPD, it is important to note how psychiatry weaponizes BPD against those gendered as female, survivors of childhood sexual abuse, and Autistic people. BPD is a heavily stigmatized psychiatric label. Cohen, supra note 26, at 163 ("[T]here is no other diagnosis currently in use that has the intense pejorative connotations that have been attached to the [BPD] diagnosis." (internal quotation marks omitted) (quoting Dana Becker, Through the Looking Glass: Women and Borderline Personality Disorder, at xv (1997))). It is also heavily gendered. See id. at 162 ("[BPD is] a label which has been increasingly applied to women, with around 75 per cent of all cases estimated to be female . . . ."). Many of those labelled with BPD are survivors of childhood sexual abuse. Id. at 163. Autistic people gendered as female by others are frequently misdiagnosed with BPD. See, e.g., Lisa Rayner, Abused by Psychiatrists After a BPD Misdiagnosis, Mad in Am. (Apr. 7, 2023), https://www.madinamerica.com/2023/04/abused-psychiatrists-bpd-misdiagnosis/ [https://perma.cc/GY8S-YUFJ] ("Like most older female-bodied autists, I was soon misdiagnosed with borderline personality disorder, which has significant overlapping symptoms with autism, like self-injury, meltdowns misinterpreted as tantrums, and an inability to form solid, emotionally healthy relationships with allistic and neuronormative people."). BPD is thus the label psychiatry uses most flexibly to depoliticize trauma derivative of and dismiss dissent against systemic marginalization.

158. See Sonny Jane Wise (@livedexperienceeducator), Instagram (Sept. 25, 2022), https://www.instagram.com/p/Ci8_jqPP94Q (on file with the *Columbia Law Review*) ("[P]erhaps depression and anxiety are human responses rather than disordered responses."). How people experience neurodivergence, however, is complicated, such that some people may see fit to reclaim anxiety and depression as neurodivergences. See Frazer-Carroll, supra note 26, at 52 ("To argue that Madness/Mental Illness is only caused by social factors also discounts the embodied experiences of many people. Sometimes suffering may

and other compulsive or impulsive behaviors are understood as coping mechanisms that help regulate distress.[159] Psychiatry—limited to observation of external expressions of behavior filtered through the neurotypical lens of the clinician—fails to capture these meaningful differences. Thus, removing credibility from Neurodivergent people not only obscures recognition of violence imposed by ableism and sanism on Neurodivergent bodyminds but also confounds development of effective support for all people. By contrast, under the pathology paradigm, distress created in response to the marginalization of neurodivergence is uncritically characterized as yet another expression of pathological abnormality.[160]

Though the neurodiversity paradigm rejects the pathological understanding of difference, it is not antimedicine. Rather, medicine, therapy, and other "treatments" are understood as forms of accommodation. When understood as accommodations, the authority to define the supports needed remains within the bodyminds that need them. Further, because unsupported neurodivergence itself is often traumatizing, medication can be an empowering tool to navigate the intersection of neurodivergence and trauma.[161]

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feel more 'bodily', internal, random, messy, spontaneous, or unknowable – in ways that we cannot always neatly trace to social triggers.").

159. Jenara Nerenberg, Divergent Mind: Thriving in a World that Wasn't Designed For You 137 (2020) ("[A]wareness of trauma and how it affects people's lives [is] fundamental and important, but . . . attribut[ing] *everything* to trauma, as though some kind of 'normal' exists that everyone would return to if they just resolved all their trauma . . . [risks] replicating the simplicity of past theoretical frameworks.").

160. Under the pathology paradigm, high rates of suicidal ideation and attempts in Autistic people are attributed to Autistic "deficits" or "comorbid" psychiatric conditions such as depression rather than the repeated trauma of being othered—bullying, exclusion, and ostracization—based on neurotype. See M. South, J.S. Beck, R. Lundwall, M. Christensen, E.A. Cutrer, T.P. Gabrielsen, J.C. Cox & R.A. Lundwall, Unrelenting Depression and Suicidality in Women With Autistic Traits, 50 J. Autism & Developmental Disorders 3606, 3613 (2020) ("[T]he construct of *flexibility* . . . added unique additional explanation for variance in S[uicidal] T[houghts and] B[ehaviors]. . . . [T]he flexibility [scores] . . . capture a desire for concrete, rather than abstract experience . . . and an associated preference for predictable environments and behavior."). The pathology paradigm thus depoliticizes the role of at least ableism in elevated suicide rates in Autistic people.

161. Karin Jervert explains how a person can rely on psychiatric medication without ascribing to the pathology paradigm:

> In another world, another culture, another life, I may have gotten the language, the stories, and the support I needed to deal with [hearing voices] and altered states before I collapsed into the isolation, chaos, and confusion that led me to psychiatry. Perhaps I could have lived without psychiatric medication. But as I write this today, it seems not in this life, not in this culture, not in this world. Although, that may change as I further build the architecture of support and wisdom in my life.

Karin Jervert, The Song of Psychiatry: The Impact of Language, Mad in Am. (Apr. 20, 2022), https://www.madinamerica.com/2022/04/song-psychiatry-language/ [https://perma.cc/3JM8-C9PL].

In other words, in conceptualizing neurodivergence as indistinguishable from the self and distress as a predictable response to both interpersonal and sociopolitical trauma, the neurodiversity paradigm preserves the credibility of Neurodivergent people and allows them to tell their own story. The Mad who experience altered states or multiple consciousness are not broken or irrational but are our story tellers, our creative thinkers, and our meaning makers. The Autistic are not wrong in how they take up space or connect but are our innovators, our social-construct critics, and our niche-theory historians. Those who experience extreme emotional states are not wrong for their intensity of feeling but are our connectors, our beauty holders, and our emotive translators. Under the neurodiversity paradigm, society respects how Neurodivergent people contribute to their communities without needing to dull the part of them that colors everything they touch.

The introduction of the neurodiversity paradigm to law governing psychiatric incarceration reclaims the authority on neurodivergence for Neurodivergent people, correcting the longstanding removal of that authority and its misplacement within medical and legal professions. Under the neurodiversity paradigm, people who experience altered states are best situated to detail, define, and explore the kinds of support provided to people who experience altered states. Similarly, chronically suicidal people are the best situated to detail, define, and explore the support provided to suicidal people. To quote Mad and Disabled writer Devin Turk:

> My history [as a survivor of psychiatric coercion] is an unfortunate kind of qualification: I do not have a degree in medicine or in treating "psychopathology" but I know viscerally what this system can do to those it consumes.
>
> Psychiatry . . . has done and continues to do irrevocable harm to generations of marginalized populations.
>
> I've been waiting for this knowledge . . . [that] so many people with stories like mine have embodied for hundreds of years[]to finally take up its proper space in modern discussions of so-called mental health. . . . I'm still waiting.[162]

Under a neurodiversity-informed conception of law, Mad people are the experts on madness, Neurodivergent people are the experts on neurodivergence, Disabled people are the experts on disability, and psychiatric survivors are the experts on the institution of psychiatry.[163] Ultimately, the neurodiversity paradigm champions the idea that any

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162. Devin S. Turk (@devinisautistic), Instagram (Oct. 10, 2022), https://www.instagram.com/p/Cji0OgPPeeh/ (on file with the *Columbia Law Review*) (emphasis added).

163. Similarly, formerly incarcerated people are the experts on the criminal legal system, and survivors of the family regulation system are the experts on that system.

individual person is the expert on their own internal narrative.[164] Yet this lifesaving expertise is so often dismissed, obscured, and discarded because of the power whole industries can claim when they pretend to speak on behalf of the very people they have rendered voiceless. So who dies when we continue to strip credibility from those with the knowledge we need to create lifesaving systems of noncarceral support?

B. *Relational Autonomy and Neurodiversity-Informed Noncarceral Care*

"The autonomy over my own identity was stolen from me within the fleeting moments of receiving my first diagnostic label."

— Rose Yesha.[165]

Definitions of "autonomy" as self-governance, self-determination, independence, and control confound the capacity of people who have not survived carceral psychiatry to understand the harms that arise from the deprivation of autonomy by way of legal force. Specifically, autonomy as self-governance leaves no space for the idea that a person needs support, but not carceral support. There are no words that a person can use to effectively communicate a need for support that does not start from the presumption that, because they are in distress, who they are is wrong, abnormal, disordered, or irrational. Rejection of the pathological story told about neurodivergence is often interpreted as rejecting observable distress, which is then used to support a determination of legal incompetence.[166] In other words, for a person to accept support under the pathology paradigm, they must accept that it is them—not society—who is wrong.

For example, in *The Limits of Prevention*, Player incorporates legal philosopher Joel Feinberg's understanding of autonomy in her analysis,[167] which defines autonomy as "the capacity for self-government and the

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164. The abolition of psychiatric incarceration based on the neurodiversity paradigm calls into question the validity of the insanity defense in the criminal context. Because the neurodiversity paradigm argues that Neurodivergent people are competent, there exists an argument that this Note does not explore that determinations of competence—including insanity—based on the haphazard construction of divergent cognition filtered through the lens of neurotypicality in the criminal context, are dehumanizing, if not outright discriminatory. This Note, however, takes an abolitionist position in totality, where harm is better reconciled through noncarceral processes, not through the criminal legal system.

165. Rose Yesha, Breaking With Disorder: The Invisible Flames of Mental Illness Labels, Mad in Am. (Sept. 10, 2021), https://www.madinamerica.com/2021/09/invisible-flames-mental-illness-labels/ [https://perma.cc/9XB2-A2RK].

166. See Saks, supra note 120, at 174–75 ("[T]here is more consensus around, and acceptance of, mental illness as a medical illness . . . . [S]ome mental illnesses are now being characterized as 'brain disorders' . . . . Therefore, today denial of mental illness is not as easily dismissed as a basis for incompetency [to make treatment decisions].").

167. Player, supra note 120, at 203–10 ("I argue that Joel Feinberg's theory of autonomy has sufficient room to accommodate people with mental illnesses.").

actual condition of self-government."[168] Here, Player and Feinberg explicitly connect dependence to a lack of full exercise of autonomy even if an individual would otherwise be capable of acting autonomously. Thus, they implicitly conceptualize independence as an integral component of autonomy's full exercise. Further, Player articulates that "Feinberg's account privileges authenticity as an element of autonomy. 'To the degree to which a person is autonomous he is not merely the mouthpiece of other persons or forces' . . . . [A]uthenticity arises through a process of self-creation and 'self-*re*-creation.'"[169] Thus, for Player, autonomy is individual self-governance that involves self-creation and re-creation. Yet Player's understanding of autonomy masks the underlying choice a distressed person seeking mental health support must make: seek support and thus reject one's autonomy to define and re-define one's own internal experiences, or retain the capacity to define and redefine one's own internal experiences and be left without support.

Thus, the combination of autonomy as authentic self-governance and the pathology paradigm obscures the current trade-off between support and autonomy, missing a viable solution held in their decoupling. We can have our cake and eat it too, but only by rejecting the pathology paradigm and reconceptualizing what it means to be autonomous.

In *Law's Relations: A Relational Theory of Self, Autonomy, and Law*, Professor Jennifer Nedelsky rejects self-governance, self-determination, independence, and control as defining features of autonomy.[170] Nedelsky instead defines autonomy as "the core of a capacity to engage in the ongoing, interactive creation of . . . our relational selves . . . that are constituted, yet not determined, by the web of nested relations within which we live[,] . . . to reshape, re-create, both the relationships and ourselves."[171] In focusing on the inherent interdependence of the human condition, "[a] relational conception of autonomy turns our attention to the kinds of relations that undermine or enhance autonomy."[172] Thus, for

168. Id. at 204 ("In Feinberg's view, a person might possess the capacity for self-government—insofar as he has the capacity to make rational choices—but be less than fully autonomous because he does not actually govern himself[including because of poverty-induced dependence]." (discussing 3 Joel Feinberg, The Moral Limits of Criminal Law 27–51 (1986))).

169. Id. at 205–06 (quoting 3 Joel Feinberg, The Moral Limits of Criminal Law 32, 35 (1986)).

170. Jennifer Nedelsky, Law's Relations: A Relational Theory of Self, Autonomy, and Law 118 (2011) ("My central argument here is that autonomy is not to be equated with independence."); id. at 46 ("I also reject another commonplace synonym for autonomy: control . . . ."); id. at 167 ("[I]t is more helpful to refer to an ongoing capacity for interactive 'self-creation' than to 'self-determination.'").

171. Id. at 45. Relational autonomy does not necessarily contradict the understanding of autonomy furthered by Player. Rather, each has different views on how autonomy is engaged. For Player, a person must elect into the act of exercising autonomy, whereas for Nedelsky, to be human is to be relationally autonomous.

172. Id. at 119.

Nedelsky, exercise of autonomy is a core function of what it means to be human,[173] which can be supported or corroded based on the relationships within which the person is positioned.[174]

Under a relational conceptualization, the interplay between autonomy and liberty in the context of psychiatric incarceration takes on a new valence. When we seek to help someone in crisis, we need not conceptualize the only effective crisis intervention as one rooted in surveillance that overrides a potentially deadly exercise of autonomy. Rather, through a relational lens, we can provide care through a relationship that supports a person's capacity to navigate their own inner world, even in a state of immense distress or existential exhaustion. This sits in stark contrast with our current system of support that is not only physically violent and even outright deadly for Neurodivergent Black men[175] but that also requires traumatic abandonment of the authority to create and re-create one's own internal narrative. Further, in the context of psychiatric incarceration, deprivation of relational autonomy is not merely deprivation of the authority to self-govern but is itself deprivation of the core human capacity to understand oneself, such that psychiatric incarceration violates a person's humanity. Thus, relational autonomy explains why trauma incurred during psychiatric incarceration is often so profound.

Suicide also takes on a new valence when viewed through the lens of relational autonomy. When a person experiences discrete or continuous trauma in which they are denied the autonomy necessary to alleviate or make meaning of that trauma, suicide can be a final reclamation of the autonomy they were long denied.[176] Placement in yet another autonomy-degrading relationship, however, only reinforces a sense of powerlessness. This is why, especially in the context of suicidal ideation, the preservation of autonomy must be so staunchly protected. Care that helps a person in

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173. Id. at 159 ("[A]utonomy is . . . a key component of a core human value: the capacity for creative interaction.").

174. Id. at 169 ("[T]he context of creative interaction highlights both the genuinely creative and inevitably interactive dimensions of all our exercises of autonomy. It thus directs our attention to the constraining as well as enabling dimensions of circumstance without underplaying the core capacity for creation.").

175. See e.g., Prieve, supra note 16.

176. As Leah Lakshmi Piepzna-Samarasinha explains:

> When I've wanted to kill myself—when it's hit strong and knocked me to my knees familiar—there's this thing. It's felt like, in that moment, I can feel all the ways I really have been without agency in my life. And in that moment of feeling the deep grief and sadness over the impact of oppression, killing myself has felt like one clear way I can have agency. I can have total control.

Leah Lakshmi Piepzna-Samarasinha, Suicidal Ideation 2.0: Queer Community Leadership, and Staying Alive Anyway, *in* Care Work: Dreaming Disability Justice 173, 177–78 (2018).

crisis reclaim autonomy is itself lifesaving, while treatment that further restricts autonomy can cause the suicide it intended to prevent.[177]

The imposition of medical jargon on an individual's internal understanding of themselves in exchange for access to health care, however, is no new occurrence. As Professor Dean Spade articulated in 2003, the pathologization of gender dysphoria made seeking gender-affirming care "dehumanizing, traumatic, or impossible to complete" for many transgender people.[178] The trauma of abandoning nonpathologizing language within autonomy-degrading relationships helps explain why many reject carceral support.

Absent a relational understanding of autonomy, rejection of support—especially by unhoused people—is used as evidence for the legal need of carceral "treatment." This dynamic is particularly apparent in Oakland Mayor Libby Shaaf's comment in support of California's Community Assistance, Recovery and Empowerment (CARE) Act:[179]

> [Shaaf] lost her composure as she shooed a rat off of a sleeping woman, she said. She later learned that the woman had spent three years living in that same spot, feeding rats because they were her "chosen company" and refusing services. "She had been offered care, shelter, housing countless times but had been left to freeze on the pavement of our city."[180]

Here, Shaaf degrades the rhetorical intentionality behind the rejection of carceral care by characterizing it as the consequence of impaired biology. By degrading this person's rhetorical intentionality, Shaaf both justifies legislation that disappears nonnormative bodyminds under the guise of benevolent compassion that mitigates her own discomfort and avoids the idea that cold sidewalks indeed offer more comfort than the cold dismissal of autonomy-corroding relationships she offers as care.[181] No person who wields political power asks why this woman decides to turn down services. Thus, the autonomy-corroding and

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177. See Alberto Forte, Andrea Buscajoni, Andrea Fiorillo, Maurizio Pompili & Ross J. Baldessarini, Suicidal Risk Following Hospital Discharge: A Review, 27 Harv. Rev. Psychiatry 209 (2019) ("The present findings support the proposal that patients recently discharged from psychiatric hospitalization have rates of suicide deaths and attempts that are many times higher than that in the general population . . . [and] in unselected clinical samples of similar patients.").

178. Dean Spade, Resisting Medicine, Re/modeling Gender, 18 Berkeley Women's L.J. 15, 28–29 (2003).

179. See generally Janie Har & Adam Beam, California Governor OKs Mental Health Courts for Homeless, AP News (Sept. 14, 2022), https://apnews.com/article/health-california-san-francisco-gavin-newsom-mental-0e68288d97959f9ceeb5c5683afa092b [https://perma.cc/WMS8-FG44] ("Gov. Gavin Newsom signed a first-of-its kind law . . . that could force [unhoused people] into treatment.").

180. Jocelyn Wiener, Newsom's 'New Strategy' Would Force Some Homeless, Mentally Ill Californians Into Treatment, CalMatters (March 3, 2022), https://calmatters.org/health/2022/03/newsom-california-mental-illness-treatment/ [https://perma.cc/9EV6-EFSH].

181. Id.

dehumanizing nature of the services offered remains unexamined. Instead, the imagery of physical squalor masks the reality that society treats unhoused people with so much disdain that rats may genuinely provide more compassionate, life-sustaining, and autonomy-supporting relationships than people, all the while denying the rhetorical act of asserting the veracity of such reality. Further, conditioning support on acceptance of the medical narrative of irrational distress and near-total compliance with treatment built on the assumption that it is the individual who is wrong can mimic and thus recreate the trauma that brought them to psychiatry in the first place.[182] Perhaps even worse, this carceral treatment fails to strike at the systems that both create the initial trauma and render people disempowered within their own distress.

Though this Note names the harm perpetuated by psychiatric incarceration, it recognizes that harm does not imply that psychiatry has not saved anyone. For many, violent intervention in crisis was the ghost-thin line between life and death. This Note, however, does not universalize the experiences of those who psychiatry saved. Rather, the Note argues that to build an infrastructure of care that does not perpetuate the harm it seeks to remedy, we must start by heeding the expertise of those who have been most violently harmed by the system as it stands. In reclaiming the authority to detail and define the support needed by the person who needs it, the neurodiversity paradigm displaces the need for psychiatric incarceration altogether. But abolishing psychiatric incarceration is not a call to leave Neurodivergent people unsupported. Rather, the call to abolish psychiatric incarceration is a call to reimage the contours of care that center the knowledge held by the most marginalized bodyminds.

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182. Indigo Daya describes how, in her experiences, psychiatric abuse is indistinguishable from other forms of abuse she has experienced in the following powerful quote:

> My abuser said no-one would believe me. Psychiatry . . . said I was lacking insight and capacity, so I couldn't be believed.
>
> My abuser controlled me with substances[.] Psychiatry controlled me with sedating drugs and shock treatment[.] My abuser put painful, unwanted things into my body. Psychiatry put painful, unwanted things into my body.
>
> My abuser told me to submit. Consent was impossible and irrelevant in the face of his total control. Psychiatry . . . said I must be compliant with what they wanted to do to my body and mind. They said if I didn't agree they could force me. Then they did.
>
> My abuser watched me. Told me others were watching too, I had to be careful. Psychiatry security guards watched me. Nurses did constant observations. . . .
>
> My abuser took off my clothes[.] Psychiatry strip searched me[.]
>
> Again and again, mental health services recreated the very experiences that led me to that state of extreme distress and altered states. To me, psychiatry became just one more perpetrator.

Indigo Daya (@indigo.mad.art), Instagram (Jan. 5, 2023), https://www.instagram.com/p/CnD0LEapU7s/ (on file with the *Columbia Law Review*) (emphasis omitted).

Indigenous, Black, Mad, Neurodivergent, Queer, and Disabled people have already begun the work of constructing networks of noncarceral care that could replace the violent and carceral medical–legal institution in place today.[183] From these people fighting for a world that leaves no one behind, we learn at least two critical ideas. First, focusing on preventing behavior labeled "dangerous" or "high risk" obscures how we force people to survive systems of immense violence.[184] Second, the presumption of singularity built into the pathology paradigm prevents recognition of the kaleidoscopic nature of crisis.[185] Thus, a call for psychiatric abolition recognizes that self-harm is a kind of quiet survival against all odds and the way out of crisis is a path only the person in crisis is capable of discerning.[186] Preserving the credibility of even those in their most distressed state so that they may determine what tools are necessary for their own survival is critical for crafting ecosystems where relational autonomy, dignity, and interdependence are universal.[187]

CONCLUSION

Abolishing psychiatric incarceration in favor of a noncarceral, neurodiversity-informed infrastructure of care is not about letting people die. Rather, rejecting the pathology paradigm is about removing carceral

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183. See generally Cara Page & Erica Woodland, Healing Justice Lineages: Dreaming at the Crossroads of Liberation, Collective Care, and Safety (2023) (formulating a political framework that embraces community- and survivor-led care networks, practices, and strategies that center the knowledge generated within disability, reproductive, environmental, and transformative justice movements).

184. Shira Hassan, Understanding Harm Reduction, *in* Saving Our Own Lives, supra note 152, at 114, 123 ("'High-risk behavior' is a stigmatized way of talking about the gorgeous and varied coping strategies we reach for when we are trying to heal from or just survive day to day.").

185. Stefanie Lyn Kaufman-Mthimkhulu describes the different forms of care needs they have seen in their time providing anticarceral care:

> Sometimes when someone reaches out in crisis they need $100 to fill their medication prescription before they go into withdrawal. . . . Or they need alternative housing for the night or the week. Sometimes, they need to be on the phone with someone for 3 hours to share their story. Sometimes intervention is needed in the form of de-escalating a crisis or mediating a conversation or offering a group the ability to process something traumatic. Sometimes someone feels unsafe and wants a person to stay in their home with them until the feeling passes.

Stefanie Lyn Kaufman-Mthimkhulu, Visions for a Liberated Anti-Carceral Crisis Response: From a Mad Crip Care Worker and Psychiatric Survivor, Medium (Sept. 3, 2022), https://medium.com/@stefkaufman/visions-for-a-liberated-anti-carceral-crisis-response-c81791459a99 [https://perma.cc/7U5U-9KT6].

186. Id. ("There is no one program that will solve the problem of distress. We are forced to endure a society that is deeply out of balance with our needs as humans. This will manifest inside of our individual bodies, but it doesn't mean the problem is individual.").

187. Hassan, supra note 184, at 212 ("Liberatory Harm Reduction gives us the rare opportunity to feel accepted, witnessed, and not judged for what the world sees as morally wrong behaviors, and we can learn to care for ourselves in complex and beautiful ways.").

logic from "care" and reframing who is the final authority on the internal experiences of those who are distressed, Neurodivergent, or both. Rejecting the pathology paradigm is about dismantling systems that corrode mental health rather than convincing those deemed other that it is them who are wrong. Neurodiversity-informed, noncarceral care is about liberatory harm reduction, including creating therapies that help all bodyminds move through trauma, acknowledging pain without pathologizing it, celebrating rather than shaming survival, and helping people identify the support they need without depriving them of full informed consent.

This paradigm shift demands that the best noncarceral care gets to the communities who need it most based on what those communities themselves have decided is necessary for their own healing and wellness and that we dismantle the systems that disproportionately burden othered bodyminds to envision a world where healthcare is more than merely biomedical. The abolition of psychiatric incarceration is about demanding we focus on the community relations that sustain us rather than strengthening a myopic focus on fixing what we perceive is broken only after we think we see it break.

REGULATING BUY NOW, PAY LATER: CONSUMER FINANCIAL PROTECTION IN THE ERA OF FINTECH

*Sahil Soni**

Recent years have seen the dramatic growth of Buy Now, Pay Later (BNPL), a class of unregulated fintech products that permit consumers to finance purchases by dividing payments into several interest-free installments. BNPL presents novel regulatory challenges because it is primarily marketed to consumers as an interest-free alternative to credit, and its distinctive market structure is characterized by lender–merchant agreements that promote financing at the point of sale. In the American context, the Consumer Financial Protection Bureau (CFPB) has announced plans to analogize treatment of BNPL to existing credit card regulations, which generally emphasize disclosure requirements.

Though undoubtedly an improvement over the unregulated status quo, this regulatory response is hardly a panacea to the industry's risks, as it would not account for the crucial role that merchants play in driving the industry or the fact that consumers often do not even view BNPL as credit in the first place. This Note proposes a novel framework for the regulation of BNPL under the CFPB's rulemaking authority to regulate actions undertaken by both lenders and merchants in promoting BNPL financing to consumers. This approach would provide the CFPB with the flexibility to ensure that regulations continue to stay abreast of developments in the market and the necessary tools to calibrate consumer financial protection to a landscape that is increasingly shaped by fintech.

* J.D. Candidate 2024, Columbia Law School. I am grateful to Professor Talia Gillis for her invaluable guidance and insight. Many thanks also to Eileen Li and Benjamin Smith for their support and to the entire staff of the *Columbia Law Review* for their thoughtful editorial input. All errors are my own.

INTRODUCTION

On June 6, 2022, Apple unveiled plans to introduce "Apple Pay Later" in its latest iteration of iOS,[1] joining a growing number of companies hoping to capitalize on the tide of Buy Now, Pay Later (BNPL) taking the consumer finance industry by storm.[2] The announcement is emblematic

1. Press Release, Apple, Apple Unveils an All-New Lock Screen Experience and New Ways to Share and Communicate in iOS 16 (June 6, 2022), https://www.apple.com/newsroom/2022/06/apple-unveils-new-ways-to-share-and-communicate-in-ios-16/ [https://perma.cc/S5CV-WBGW].

2. Companies that announced BNPL offerings in 2021 include Amazon, Microsoft, and Target. See Tara Siegel Bernard, Amazon Strikes a Deal With Affirm, the Buy-Now Pay-Later Provider, N.Y. Times (Aug. 27, 2021), https://www.nytimes.com/2021/08/27/business/amazon-affirm.html (on file with the *Columbia Law Review*) (last updated Aug. 30, 2021); Caitlin Mullen, Microsoft Shoppers Get Another BNPL Option, Payments Dive (Dec. 10, 2021), https://www.paymentsdive.com/news/microsoft-shoppers-get-another-bnpl-

of the dramatic growth of BNPL, a class of largely unregulated fintech[3] installment loans enabling consumers to finance purchases by dividing payments into a series of interest-free installments.[4] While BNPL has been available in the United States since at least 2012,[5] the industry underwent an exponential increase in popularity in the aftermath of the COVID-19 pandemic:[6] The number of BNPL users in the United States doubled to 50.6 million from 2020 to 2021,[7] and global BNPL spending is estimated to increase nearly 300% from 2022 to 2027.[8]

BNPL's unprecedented growth has forced regulators across the globe to grapple with the industry's evasive legal structure and the risks it poses

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option/611269/ [https://perma.cc/A4QV-ZAQ6]; Target Teams With Affirm, Sezzle for BNPL, Pymnts (Oct. 6, 2021), https://www.pymnts.com/buy-now-pay-later/2021/target-affirm-sezzle-bnpl/ [https://perma.cc/KE3J-FTL3]. The "big five" BNPL lenders operating in the United States are Affirm, Afterpay, Klarna, PayPal, and Zip. Peter Coy, Opinion, Buy Now, Regret Later?, N.Y. Times (Dec. 19, 2022), https://www.nytimes.com/2022/12/19/opinion/buy-now-pay-later.html (on file with the *Columbia Law Review*).

3. For a comprehensive definition of "fintech," see Saule T. Omarova, New Tech v. New Deal: Fintech as a Systemic Phenomenon, 36 Yale J. on Reg. 735, 743–45 (2019) (defining "fintech" as an "umbrella term that refers to a variety of digital technologies applied to the provision of financial services" that share an "explicit[] promise to 'revolutionize' the provision of financial services . . . [b]y making financial transactions . . . faster, easier, and cheaper").

4. See, e.g., Julian Alcazar & Terri Bradford, Fed. Rsrv. Bank of Kan. City, The Appeal and Proliferation of Buy Now, Pay Later: Consumer and Merchant Perspectives 2 (2021), https://www.kansascityfed.org/Payments%20Systems%20Research%20Briefings/documents/8504/psrb21alcazarbradford1110.pdf [https://perma.cc/CU82-CHUA] (comparing BNPL to traditional installment loans); see also infra section I.A.1.

5. See Julia Gray, The Evolution of Buy Now, Pay Later, Retail Brew (Dec. 27, 2021), https://www.retailbrew.com/stories/2021/12/27/the-evolution-of-buy-now-pay-later [https://perma.cc/33HA-393J] (explaining that Affirm began offering BNPL in 2012, with Sweden-based Klarna launching services in the United States in 2015).

6. See Peter Rudegeair, Covid-19 Economy Boosts 'Buy Now, Pay Later' Installment Services, Wall St. J. (Dec. 30, 2020), https://www.wsj.com/articles/covid-19-economy-boosts-buy-now-pay-later-installment-services-11609340400 (on file with the *Columbia Law Review*) (attributing the increase in BNPL usage during the pandemic in part to "[c]onsumers' reluctance to take on new revolving debt during economic uncertainty").

7. See Grace Broadbent, US Buy Now, Pay Later Forecast 2022, Insider Intel. (Oct. 4, 2022), https://www.insiderintelligence.com/content/spotlight-us-buy-now-pay-later-forecast-2022 [https://perma.cc/L3QN-8LBJ].

8. See Hanneh Bareham, Has the Buy Now, Pay Later Model Changed American Spending Habits for Good?, Bankrate (Apr. 3, 2023), https://www.bankrate.com/loans/personal-loans/buy-now-pay-later-impact-on-spending/ [https://perma.cc/U8X3-GVNN] (estimating that BNPL "will reach $437 billion in 2027, driven by 'escalating financial pressures from the rising cost of living'" (quoting Press Release, Juniper Research, Buy Now Pay Later Spend to Accelerate, Reaching Over $437 Billion Globally by 2027; Fuelled by Deteriorating Macro-Economic Factors (Oct. 25, 2022), https://www.juniperresearch.com/press/press-releases/buy-now-pay-later-spend-to-accelerate-reaching (on file with the *Columbia Law Review*))).

to consumers.[9] While installment loans are hardly new,[10] BNPL presents novel risks because it is primarily marketed to consumers as an interest-free alternative to traditional credit offerings like credit cards.[11] This interest-free structure is reflected in BNPL's distinctive profit model: Rather than relying on interest payments from consumers, BNPL lenders generate revenue by charging merchants fees on BNPL-financed transactions.[12] BNPL lenders advertise this arrangement to merchants as a way to increase sales and conversions, and consequently, lenders' revenue streams depend on forming partnerships with merchants.[13] Thus, in addition to being a form of consumer credit, BNPL plays a secondary role as a marketing tool that merchants use to drive sales.[14] This unique market

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9. The first country to formally announce plans to regulate BNPL was the United Kingdom, which announced its intention to bring BNPL products within the regulatory purview of the country's Consumer Credit Act in June 2022. See HM Treasury, Regulation of Buy-Now-Pay-Later Set to Protect Millions of People, Gov.UK (June 20, 2022), https://www.gov.uk/government/news/regulation-of-buy-now-pay-later-set-to-protect-millions-of-people [https://perma.cc/GWS2-UST2] ("The government's approach to regulatory controls . . . will tailor the application of the Consumer Credit Act . . . to these products[] and the elements of lending practice most linked to potential consumer detriment."). Regulators in Australia and New Zealand have recently announced plans to follow suit, citing concerns that "BNPL looks like credit, . . . acts like credit, [and] carries the risks of credit." Stephen Jones, Assistant Treasurer & Minister for Fin. Servs., Austl., Address to the Responsible Lending & Borrowing Summit (May 22, 2023), https://ministers.treasury.gov.au/ministers/stephen-jones-2022/speeches/address-responsible-lending-borrowing-summit [https://perma.cc/8XFD-U7PQ]; see also Duncan Webb, Minister of Com. & Consumer Affs., N.Z., Government Acts on Consumer Credit Protection, Beehive.govt.nz (Aug. 8, 2023), https://www.beehive.govt.nz/release/government-acts-consumer-credit-protection [https://perma.cc/S2LS-6CLU] (announcing plans to regulate BNPL products under New Zealand's Credit Contracts and Consumer Finance Act). Discussions regarding the regulation of BNPL remain ongoing in several other countries. See, e.g., Akihiro Matsuyama & Tony Wood, Buy Now Pay Later: The Regulatory Landscape in the Asia Pacific Region, Deloitte: Asia Pac. Ctr. for Regul. Strategy (May 5, 2022), https://www2.deloitte.com/cn/en/blog/financial-advisory-financial-services-blog/2022/buy-now-pay-later-regulatory-landscape-asia-pacific-region.html [https://perma.cc/J3ZS-H6FS] (describing policy discussions in Hong Kong, Malaysia, and Singapore).

10. See Joseph P. Jordan & James H. Yagla, Retail Installment Sales: History and Development of Regulation, 45 Marq. L. Rev. 555, 555 (1962) (detailing the growth of installment credit from 1939 to 1961); Timothy Wolters, "Carry Your Credit in Your Pocket": The Early History of the Credit Card at Bank of America and Chase Manhattan, 1 Enter. & Soc'y 315, 318–24 (2000) (describing the development of installment-based consumer credit contracts in the first half of the twentieth century).

11. See infra section II.A.2.

12. See Gordon Kuo Siong Tan, Buy What You Want, Today! Platform Ecologies of 'Buy Now, Pay Later' Services in Singapore, 47 Transactions Inst. Brit. Geographers 912, 918 (2022) (contrasting BNPL lenders' focus on merchant fees with credit card providers' focus on revolving interest).

13. See infra section I.A.2.

14. See Ron Shevlin, Buy Now, Pay Later: The "New" Payments Trend Generating $100 Billion in Sales, Forbes (Sept. 7, 2021), https://www.forbes.com/sites/ronshevlin/2021/09/07/buy-now-pay-later-the-new-payments-trend-generating-100-billion-in-sales/ (on file with the *Columbia Law Review*) (explaining that BNPL is "an element of the

dynamic creates incentives for both BNPL lenders and their partnering merchants to encourage consumers to increase their spending with BNPL.[15] This has led to concerns that BNPL may impair consumers' financial health by promoting overspending and impulsive buying.[16] These risks are compounded by lenders' tendency to represent BNPL as a sensible budgeting tool rather than properly describing it as a form of credit.[17]

Although the consumer risks accompanying the failure to regulate BNPL have garnered significant academic attention internationally,[18]

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marketing mix" that merchants can use to influence consumers' likelihood of making purchases).

15. See generally Lauren Ah Fook & Lisa McNeill, Click to Buy: The Impact of Retail Credit on Over-Consumption in the Online Environment, Sustainability, Sept. 7, 2020, at 1, 10, https://www.mdpi.com/2071-1050/12/18/7322 [https://perma.cc/HV96-4M64] (characterizing the BNPL paradigm as a reconceptualization of consumer credit that severs the traditional association between credit and debt to promote spending).

16. See infra section II.A.1.

17. See Rachel Aalders, Buy Now, Pay Later: Redefining Indebted Users as Responsible Consumers, 26 Info. Commc'n & Soc'y 941, 945 (2023) (arguing that BNPL lenders market their products as "morally superior to credit cards, which they position as . . . either predatory . . . [or] exclusionary"); Tan, supra note 12, at 913 ("[T]he positioning of BNPL as a lifestyle and a fashionable way to pay is deployed to obscure the underlying debt–credit relations forged between the BNPL firm and the user.").

18. The proliferation of BNPL has garnered particular attention in Australia. See, e.g., Julia Cook, Kate Davies, David Farrugia, Steven Threadgold, Julia Coffey, Kate Senior, Adriana Haro & Barrie Shannon, Buy Now Pay Later Services as a Way to Pay: Credit Consumption and the Depoliticization of Debt, 26 Consumption Mkts. & Culture 245, 246 (2023) (drawing on "an analysis of BNPL websites and apps, a walking ethnography of a large shopping centre in Newcastle, Australia, and interviews with BNPL customers"); Paul Gerrans, Dirk G. Baur & Shane Lavagna-Slater, FinTech and Responsibility: Buy-Now-Pay-Later Arrangements, 47 Austl. J. Mgmt. 474, 475 (2022) (relaying the ongoing debate as to whether BNPL products should be considered "credit" under Australia's National Credit Act); Jacob Rizk, Use Now, Regulate Later? The Competing Regulatory Approaches of the Buy-Now, Pay-Later Sector and Consumer Protection in Australia, 10 Victoria Univ. L. & Just. J. 77, 79–80 (2021) ("This explosive growth [of BNPL] has posed an issue to Australia's financial regulators: how to best balance assertive regulatory action to protect consumers and ensure market stability without stifling innovation."); Di Johnson, John Rodwell & Thomas Hendry, Analyzing the Impacts of Financial Services Regulation to Make the Case that Buy-Now-Pay-Later Regulation Is Failing, Sustainability, Feb. 12, 2021, at 1, 3–4, https://doi.org/10.3390/su13041992 [https://perma.cc/5ALQ-TJSJ] (discussing regulatory considerations in Australia); Elizabeth Boshoff, David Grafton, Andrew Grant & John Watkins, Buy Now Pay Later: Multiple Accounts and the Credit System in Australia 2–3 (Oct. 15, 2022), https://ssrn.com/abstract=4216008 [https://perma.cc/YN2D-9BXJ] (unpublished manuscript) (describing Australian consumers' use of BNPL). Outside of Australia, BNPL has also been subject to extensive academic treatment in Asia and Europe. See, e.g., Della Ayu Zonna Lia & Salsabilla Lu'ay Natswa, Buy-Now-Pay-Later (BNPL): Generation Z's Dilemma on Impulsive Buying and Overconsumption Intention, 193 Advances Econ. Bus. & Mgmt. Rsch. 130, 133 (2021) (Indonesia); Lachlan Schomburgk & Arvid Hoffman, How Mindfulness Reduces BNPL Usage and How That Relates to Overall Well-Being, 57 Eur. J. Mktg. 325, 326 (2023) (European Union); Benedict Guttman-Kenney, Chris Firth & John Gathergood, Buy Now, Pay Later (BNPL) . . . On Your Credit Card, 37 J. Behav. & Experimental Fin., no. 100788, 2023, at 1, 1 (United Kingdom); Allen Sng Kiat

there is currently a gap in the literature regarding regulatory considerations in the American context. This gap is important in light of the unique features of the American regulatory scheme, which has been largely constructed through intermittent, politically polarized responses to regulatory crises[19] and has only recently consolidated consumer financial protection into a single federal agency.[20] Moreover, the outsized role of nonfinancial partnering merchants in promoting BNPL to consumers calls into question the efficacy of extending existing financial regulations—which have historically focused on financial and depository entities[21]—solely to BNPL lenders.

Against this backdrop, on September 15, 2022, the CFPB issued its long-anticipated report on the industry,[22] announcing that it was looking into extending existing credit card regulations to BNPL lenders.[23] While this development certainly signals an improvement over not regulating lenders at all, this Note argues that the analogy to credit cards is fundamentally flawed because existing credit card regulations—which largely rely on disclosure requirements[24]—would fail to account for the crucial

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Peng & Christy Tan Muki, Buy Now Pay Later in Singapore: Regulatory Gaps and Reform 2 (Apr. 1, 2022), https://ssrn.com/abstract=3819058 [https://perma.cc/B3HZ-BB4Y] (unpublished working paper) (Singapore).

19. See Lisa Kastner, Tracing Policy Influence of Diffuse Interests: The Post-Crisis Consumer Finance Protection Politics in the US, 13 J. Civ. Soc'y 130, 134–38 (2017) (describing theories regarding the influence of diffuse interest groups in formulating regulatory responses to crises); Kathryn C. Lavelle, Constructing the Governance of American Finance: Timing and the Creation of the SEC, OTS, and CFPB, 29 J. Pol'y Hist. 321, 322 (2017) (arguing that financial crises have historically given rise to a two-stage regulatory response in which the federal government first exercises its emergency powers to temporarily prevent widespread insolvency and then restructures the regulatory system); see also Saule T. Omarova & Margaret E. Tahyar, That Which We Call a Bank: Revisiting the History of Bank Holding Company Regulations in the United States, 31 Rev. Banking & Fin. L. 113, 193–98 (2011) (describing the complexities of enacting regulatory reform in the context of American financial markets).

20. See infra section I.B.2.

21. See infra section I.B.1.

22. Martin Kleinbard, Jack Sollows & Laura Udis, CFPB, Buy Now, Pay Later: Market Trends and Consumer Impacts 1, 3–5 (2022), https://files.consumerfinance.gov/f/documents/cfpb_buy-now-pay-later-market-trends-consumer-impacts_report_2022-09.pdf [https://perma.cc/22SU-EDTA] [hereinafter September Report].

23. Rohit Chopra, Dir., CFPB, Prepared Remarks on the Release of the CFPB's Buy Now, Pay Later Report (Sept. 15, 2022), https://www.consumerfinance.gov/about-us/newsroom/director-chopras-prepared-remarks-on-the-release-of-the-cfpbs-buy-now-pay-later-report/ [https://perma.cc/YT4R-3NGU] [hereinafter Chopra, September Remarks] (explaining that the CFPB will "identify potential interpretive guidance or rules to issue with the goal of ensuring that Buy Now, Pay Later firms adhere to many of the baseline protections that Congress has already established for credit cards"); see also infra section II.B.

24. See, e.g., Ronald J. Mann, Charging Ahead: The Growth and Regulation of Payment Card Markets 159–65 (2006) (explaining the role of disclosure in credit regulation). For a critique of the assumptions underlying the present preference for disclosure, see Hosea H. Harvey, Opening Schumer's Box: The Empirical Foundations of

role that merchants play in driving the industry[25] and the fact that many consumers do not even view BNPL as credit.[26] Moreover, by focusing on the similarities between BNPL and traditional credit products, this approach risks failing to keep up with the industry's rapidly evolving landscape, characterized by market activities that frequently elude traditional legal classifications.[27]

This Note contributes to the literature of consumer finance law by describing the deficiencies in existing regulatory approaches and proposing a novel framework for the regulation of nonfinancial market participants. Part I provides an overview of the BNPL industry and contextualizes regulatory considerations by tracing the historical evolution of federal consumer protection law through the creation of the CFPB. Part II describes the risks that unregulated BNPL products pose to consumers and argues that the CFPB's proposal to extend existing credit card regulations to BNPL lenders is unlikely to sufficiently respond to these risks. Part III explains the important function that regulating merchants can have in creating a comprehensive regulatory scheme for BNPL and addresses some challenges in constructing such a framework. The Note concludes by proposing a framework for regulating representations and activities undertaken by merchants offering BNPL to customers under the CFPB's statutory authority to proscribe unfair, deceptive, or abusive acts or practices (UDAAPs) under the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank).[28]

I. SITUATING BUY NOW, PAY LATER IN THE FEDERAL REGULATORY LANDSCAPE

This Part situates BNPL within the broader context of the consumer finance market to provide an overview of the major actors and laws involved. Section I.A begins by describing the general mechanics of BNPL, with particular attention to the roles of lenders and merchants in offering BNPL financing to consumers. It then explains some of the substantive differences between BNPL and other credit products that are currently subject to some degree of federal regulation. Section I.B describes the historical evolution of federal consumer financial protection law through the creation of the CFPB. It concludes with an overview of the CFPB and its authority to protect consumers by prohibiting UDAAPs.

Modern Consumer Finance Disclosure Law, 48 U. Mich. J.L. Reform 59, 105–09 (2014) (arguing for a shift toward evidence-based policymaking).

25. See infra section II.C.2.

26. See infra section II.C.1.

27. See infra section II.C.3.

28. 12 U.S.C. § 5531 (2018).

A. *Overview of the Buy Now, Pay Later Industry*

1. *How Buy Now, Pay Later Works.* — While BNPL lenders offer a variety of financial products,[29] the most common iteration of BNPL is the four-payment plan, a type of installment loan.[30] Consumers typically use four-payment plans to finance small-ticket purchases, and as a result, BNPL lenders direct their customer acquisition efforts to partnering merchants' point of sale.[31] Once a merchant has entered into an agreement with a BNPL lender, the merchant's customers are presented with the option to finance their purchase through four interest-free installments. Acquisition thus occurs directly within the payment flow at checkout, where BNPL is displayed alongside traditional payment options such as credit cards and debit cards.[32]

For first-time users, clicking on the option to divide payment into interest-free installments will direct them to the lender's application, where consumers are prompted to supply basic information such as their name, contact information, and payment information.[33] If the consumer's application is approved and they proceed with the purchase, the lender will pay the full purchase price, adjusted for fees, to the merchant.[34] The consumer pays 25% of the price upfront to the lender and proceeds to pay the remainder in three equivalent payments every two weeks for a total of

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29. See Puneet Dikshit, Diana Goldshtein, Blazej Karwowski, Udai Kaura & Felicia Tan, Buy Now, Pay Later: Five Business Models to Compete, McKinsey & Co. (July 29, 2021), https://www.mckinsey.com/industries/financial-services/our-insights/buy-now-pay-later-five-business-models-to-compete [https://perma.cc/A869-LY8F] (describing offerings including four-payment plans, integrated shopping apps, off-card financing, virtual rent-to-own, and card-linked installments).

30. See Alcazar & Bradford, supra note 4, at 2; see also Marshall Lux & Bryan Epps, Grow Now, Regulate Later? Regulation Urgently Needed to Support Transparency and Sustainable Growth for Buy-Now, Pay-Later 6 (Harv. Kennedy Sch., M-RCBG Assoc. Working Paper No. 182, 2022), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/182_AWP_final.pdf [https://perma.cc/NYX7-FRP5].

31. See, e.g., Dikshit et al., supra note 29 (discussing targeted lending at point of sale and the focus on financing purchases less than $250); see also Anna Omarini, Shifting Paradigms in Banking: How New Service Concepts and Formats Enhance the Value of Financial Services, *in* The Fintech Disruption: How Financial Innovation Is Transforming the Banking Industry 75, 103 (Thomas Walker, Elaheh Nikbakht & Maher Kooli eds., 2023) ("BNPL providers are proposing merchants with a viable tool to increase online sales conversions and order values, reducing user acquisition costs.").

32. Why You Should Use Buy Now, Pay Later (BNPL) Payment Methods for Your Business, Stripe, https://stripe.com/guides/buy-now-pay-later [https://perma.cc/3ZPV-W2UW] (last visited Aug. 17, 2023).

33. See, e.g., Financing Application Process & Affirm Overview, Osim Int'l, https://us.osim.com/pages/financing-application-process-affirm-overview [https://perma.cc/KEQ2-VVAM] (last visited Aug. 17, 2023) (requiring users to enter their name, email, phone number, date of birth, and last four digits of their social security number).

34. Why You Should Use Buy Now, Pay Later (BNPL) Payment Methods for Your Business, supra note 32.

six weeks.[35] These payments are typically made in the form of automatic bank withdrawals or credit card charges.[36] If the consumer misses a payment, some lenders will assess a late fee,[37] and many lenders will also limit access to future extensions of credit.[38] Lenders may also employ a debt collection agency to collect missing payments or report defaults to credit bureaus.[39]

2. *How Buy Now, Pay Later Compares to Credit Cards.* — Along with verifying the prospective user's identity, consumer information collected in the application is usually used to perform soft credit checks and data-driven predictions, typically generating a credit decision immediately.[40] This represents a stark departure from credit cards, which typically require a more involved inquiry into an applicant's income and financial history[41] and are subject to statutory requirements under the Fair Credit Reporting Act (FCRA).[42] BNPL lenders often emphasize this distinction to target young consumers[43] and consumers who lack a formal credit history or are

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35. Id.

36. Ed deHaan, Jungbae Kim, Ben Lourie & Chenqi Zhu, Buy Now Pay (Pain?) Later 4 (Oct. 26, 2022), https://ssrn.com/abstract=4230633 [https://perma.cc/9KAR-APAG] (unpublished working paper).

37. Id. at 8. Not all BNPL lenders assess late fees. Compare Klarna Pay Later in 4 Agreement, Klarna (Aug. 11, 2023), https://cdn.klarna.com/1.0/shared/content/legal/terms/0/en_us/sliceitinx [https://perma.cc/7MJC-5N9M] (up to seven-dollar late fee), with Affirm Terms of Service, Affirm, https://www.affirm.com/terms [https://perma.cc/8PUM-M2KR] (last updated June 21, 2023) ("You will never be charged any late fees when you buy with Affirm.").

38. See, e.g., Klarna Pay Later in 4 Agreement, supra note 37 ("If you are in Default Klarna may prevent you from future use of any Klarna service.").

39. See, e.g., id. ("If you are in Default Klarna may: (i) employ a debt collection agency to collect payment; and (ii) report default information to credit bureaus.").

40. See Tan, supra note 12, at 917 (observing that "BNPL firms emphasise the absence of [hard] credit checks"); deHaan et al., supra note 36, at 8 ("Approval and credit limit decisions are made within seconds.").

41. See Terri Bradford, Fed. Rsrv. Bank of Kan. City, "Give Me Some Credit!": Using Alternative Data to Expand Credit Access 1 (2023), https://www.kansascityfed.org/Payments%20Systems%20Research%20Briefings/documents/9638/PaymentsSystemResearchBriefing23Bradford0628.pdf [https://perma.cc/46A7-85FD] (explaining that conventional credit checks have "strict requirements" and consider "the types of credit accounts a consumer holds, the age of those accounts, the amounts owed, and the consumer's payment history").

42. 15 U.S.C. § 1681 (2018).

43. See David Farrugia, Julia Cook, Kate Senior, Steven Threadgold, Julia Coffey, Kate Davies, Adriana Haro & Barrie Shannon, Youth and the Consumption of Credit, Current Socio., Aug. 5, 2022, at 1, 5, https://journals.sagepub.com/doi/full/10.1177/00113921221114925 [https://perma.cc/P5FJ-7WZG] ("Marketing themselves as suited to the consumption and financial practices of 'generation Z', BNPL services are a key example of the shift to credit as a consumer good in itself positioned within an overall consumer lifestyle."); see also Gerrans et al., supra note 18, at 496 (noting that BNPL lenders position themselves as a "budgeting tool").

otherwise skeptical of traditional financial institutions.[44] While lenders outwardly explain their reliance on alternative data as a means of democratizing access to credit,[45] a more plausible explanation lies in the market advantages that technology-driven lending models confer over traditional credit checks.[46] Unfortunately, these market dynamics may decrease uniformity among lenders' lending models and decrease the predictability of lending decisions from the consumer perspective, as the highly competitive market provides little incentive for lenders to share proprietary decisionmaking information with one another.[47]

Apart from its reliance on technology-enabled decisionmaking, BNPL's profit model is fundamentally different from that of credit cards.[48] Unlike credit card providers, which derive revenue primarily by charging interest to consumers,[49] BNPL lenders rely on partnerships with

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44. See Cook et al., supra note 18, at 255 ("[T]he distancing of BNPL services from other forms of credit [is] not achieved simply through their efforts to skirt credit regulations . . . . It is facilitated by the affective appeal that they make to consumers."); Tan, supra note 12, at 917 (noting that BNPL targets the "credit invisible").

45. For example, Max Levchin, CEO of Affirm, has described the firm's mission as "inclusive credit." Affirm: Q4 2022 Earnings Transcript, Mkt. Screener (Aug. 30, 2022), https://www.marketscreener.com/quote/stock/AFFIRM-HOLDINGS-INC-117540803/news/Affirm-Q4-2022-Earnings-Transcript-41654897/ [https://perma.cc/W666-LYEB] (claiming that Affirm has "worked relentlessly over the last several years to evolve [its] approach to identifying and underwriting creditworthy applicants left outside the traditional credit reporting infrastructure").

46. See Tobias Berg, Andreas Fuster & Manju Puri, FinTech Lending, 14 Ann. Rev. Fin. Econ. 187, 193–94 (2022) (explaining that companies use data-driven lending algorithms to facilitate faster processing times while simultaneously leveraging nontraditional data sources to improve screening and monitoring). For a discussion of the risks associated with algorithmic credit pricing, see Talia B. Gillis, The Input Fallacy, 106 Minn. L. Rev. 1175, 1217 (2022) ("The added variables and the increased flexibility that follow from the use of machine learning can increase . . . credit pricing disparities.").

47. See Tom Akana, Buy Now, Pay Later: Survey Evidence of Consumer Adoption and Attitudes 2 (Fed. Rsrv. Bank of Phila., Consumer Fin. Inst., Discussion Paper DP 22-02, 2022), https://www.philadelphiafed.org/-/media/frbp/assets/consumer-finance/discussion-papers/dp22-02.pdf [https://perma.cc/AC42-AHGY] (noting that this competitive environment disincentivizes the sharing of proprietary information). Compare José Liberti, Jason Sturgess & Andrew Sutherland, How Voluntary Information Sharing Systems Form: Evidence From a U.S. Commercial Credit Bureau, 145 J. Fin. Econ. 827, 828 (2022) (explaining that information sharing in new markets is disincentivized when doing so weakens a lender's informational advantage), with Boshoff et al., supra note 18, at 4 (noting that the opposite is true for incumbent financial institutions).

48. Amit Garg, Diana Goldshtein, Udai Kaura & Roshan Varadarajan, Reinventing Credit Cards: Responses to New Lending Models in the US, McKinsey & Co. (June 23, 2022), https://www.mckinsey.com/industries/financial-services/our-insights/reinventing-credit-cards-responses-to-new-lending-models-in-the-us [https://perma.cc/GLM5-9N2Z] (describing the primacy of revolving credit in the profit models of most credit card providers).

49. See Robert Adams, Vitaly M. Bord & Bradley Katcher, Credit Card Profitability, Bd. of Governors of the Fed. Rsrv. Sys. (Sept. 9, 2022), https://www.federalreserve.gov/econres/notes/feds-notes/credit-card-profitability-20220909.html [https://perma.cc/R95L-SPM6] (last updated Apr. 20, 2023) (finding that the "credit function" of credit

merchants for the majority of their revenues.[50] And while late fees represent a portion of some BNPL lenders' revenues, they are not ordinarily a lender's primary source of income.[51] Instead, most BNPL lenders derive their revenues primarily through merchant fees,[52] which are relatively high commissions charged to partnering merchants on BNPL-financed transactions.[53] Lenders justify these comparatively high costs to merchants by advertising the BNPL arrangement as a means of increasing sales and conversions.[54] And lenders have plenty to boast about—BNPL has been estimated to increase conversion rates by 20% to 30% and average ticket sales by 30% to 50%.[55]

3. *How Buy Now, Pay Later Compares to Other Installment Loans.* — Dating back to the Great Depression,[56] layaway plans also allow consumers

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cards—for which "interest income is the main source of revenue"—accounts for 80% of credit card profitability).

50. See Chay Fisher, Cara Holland & Tim West, Rsrv. Bank of Austl., Developments in the Buy Now, Pay Later Market 63 (2021), https://www.rba.gov.au/publications/bulletin/2021/mar/pdf/developments-in-the-buy-now-pay-later-market.pdf [https://perma.cc/6J27-Y6FF] ("The most common BNPL business model involves the BNPL provider facilitating transactions by entering into direct agreements with both participating consumers and merchants . . . ."); Colleen E. Mandell & Morgan J. Lawrence, Expanding Access for the Credit Invisible With Just Four Easy Payments? The Unregulated Rise of Buy Now, Pay Later, 35 Loy. Consumer L. Rev. 275, 281 (2023) (noting that the interest-free BNPL model "relies heavily on merchants who then foot the bill in the form of high service fees"). For a discussion of how BNPL lenders facilitate strategic partnerships to penetrate the consumer finance market, see Nathalie Martin & David Lynn, The Afterpay Hangover, 34 Loy. Consumer L. Rev. 529, 537 (2022) (discussing BNPL lenders' partnerships with Amazon, Target, and Walmart).

51. See Alcazar & Bradford, supra note 4, at 2 (characterizing late fees as a supplemental revenue stream); deHaan et al., supra note 36, at 9 (noting that late fees only accounted for 9.5% of net revenue for one major lender).

52. Guttman-Kenney et al., supra note 18, at 2.

53. See Marco Di Maggio, Emily Williams & Justin Katz, Buy Now, Pay Later Credit: User Characteristics and Effects on Spending Patterns 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30508, 2022), https://www.nber.org/system/files/working_papers/w30508/w30508.pdf [https://perma.cc/GW6B-876T] (reporting that BNPL lenders charge merchants fees ranging from 5% to 8%, which are "substantially higher than the [2% to 3%] charged by credit card companies").

54. See Cook et al., supra note 18, at 247 ("BNPL services are marketed to prospective merchant partners on the basis that their use reduces 'cart abandonment' . . . ."). For an example of lender representations to merchants, see Tom Musbach, Why Buy Now, Pay Later Increases Website Conversions, Affirm (Feb. 1, 2022), https://www.affirm.com/business/blog/affirm-bnpl-increase-ecommerce-conversion [https://perma.cc/T593-7PNQ] (claiming that BNPL helps to ease "sticker shock" at checkout by "reliev[ing] [the] pressure of having to pay the total price immediately" and that offering BNPL increases customers' sense of goodwill toward the merchant).

55. Dan Perlin, 2021 Outlook: Payments, Processing, and IT Services, RBC Cap. Mkts. (Apr. 9, 2021), https://www.rbccm.com/en/insights/tech-and-innovation/episode/2021-outlook-massive-shift-in-e-commerce-spend [https://perma.cc/53H9-AU8Q].

56. Rob Walker, Delayed Gratification, N.Y. Times Mag. (Nov. 28, 2008), https://www.nytimes.com/2008/11/30/magazine/30wwln-consumed-t.html (on file with the *Columbia Law Review*).

to divide payments into a series of installments and—like BNPL—are typically marketed to budget-constrained consumers. Both plans have the purpose of expanding a merchant's available market and facilitating purchases that consumers might not otherwise make.[57] But because layaway plans only allow consumers to receive purchased goods after payments have been made in full,[58] consumers tend to view BNPL and layaway plans differently.[59] While layaway plans are typically used to finance large, infrequent purchases, consumers tend to use BNPL for smaller, more frequent purchases.[60] On the merchant side, BNPL is easier to offer than layaway because BNPL does not require that the merchant store the item on site while installment payments are made.[61] And crucially, unlike BNPL, layaway plans are generally subject to the regulatory ambit of federal laws such as the Truth in Lending Act (TILA),[62] which only applies to plans comprising more than four payments.[63]

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57. See Daao Wang, Stanko Dimitrov & Lirong Jian, Optimal Inventory Decisions for a Risk-Averse Retailer When Offering Layaway, 284 Eur. J. Operational Rsch. 108, 109 (2020) (explaining that retailers can capture a larger segment of consumers with less capital risk by offering layaway plans instead of traditional credit options).

58. Id. at 108. For this reason, layaway plans have historically been less popular with consumers than other forms of financing. For a dramatic illustration of this phenomenon in the context of early automobile sales, see Kevin M. McDonald, From the Assembly Line to the Credit Line: A Brief History of Automobile Financing, 62 Automotive Hist. Rev. 62, 65 (2021) ("Henry Ford . . . insist[ed] that Ford . . . stick to the traditional layaway plan. . . . [This] plan . . . failed 'miserably' because 'Americans wanted fancy cars[] [that] they could buy on credit.' . . . By 1925 three of every four new cars . . . were . . . financed on the installment plan. Ford eventually reversed course and embraced installment lending." (footnote omitted) (quoting Stephen Smith, The American Dream and Consumer Credit, Am. Pub. Media (2018), http://americanradioworks.publicradio.org/features/americandream/b1.html [https://perma.cc/S8NL-ERT6])).

59. See Mac Schwerin, The 'Buy Now, Pay Later' Bubble Is About to Burst, The Atlantic (Jan. 10, 2023), https://www.theatlantic.com/culture/archive/2023/01/buy-now-pay-later-affirm-afterpay-credit-card-debt/672686/ (on file with the *Columbia Law Review*) ("[T]hough Americans have used layaway programs since the Great Depression, today's pay-later plans flip the order of operations: Rather than claiming an item and taking it home only after you've paid in full, consumers using these modern payment plans can acquire an item for just a small deposit . . . ."); see also Alcazar & Bradford, supra note 4, at 2 (noting that the increase in popularity of BNPL has escalated the decline in layaway offerings).

60. Sarah Papich, Effects of Buy Now, Pay Later on Financial Well-Being 7 (Feb. 7, 2023), https://ssrn.com/abstract=4247360 [https://perma.cc/BB2U-Y2FC] (unpublished manuscript).

61. See id. at 7–8 (noting that BNPL, unlike layaway, allows the consumer to receive the item before paying in full).

62. 15 U.S.C. §§ 1601–1667 (2018); see also Offering Layaways, FTC (Mar. 1986), https://www.ftc.gov/business-guidance/resources/offering-layaways [perma.cc/UL4K-6DZ6] (noting that while no federal law specifically governs layaway plans, they can be subjected to regulation under TILA or the Federal Trade Commission Act).

63. 12 C.F.R. § 1026.2(a)(17) (2023) (defining a "creditor" as a "person who regularly extends consumer credit that is . . . payable by written agreement in more than four installments").

A more recent development than layaway financing,[64] payday loans are short-term, single-payment loans that require consumers to repay the full amount of the loan plus a fixed fee, typically ranging from $15 to $20 per $100 borrowed.[65] Payday loans and BNPL also share several similarities—both products are typically used to finance small purchases, are offered to consumers with limited access to other credit options,[66] and do not require hard credit checks.[67] The central difference between the two is that BNPL four-payment plans do not charge interest as long as payments are made on time, which BNPL lenders have argued makes them a better choice.[68] This claim is necessarily complicated by the fact that many BNPL users report falling behind in payments.[69] Moreover, due to low barriers to access, BNPL users are more likely on average to take out payday loans.[70] The regulation of payday loans represents one arena in which the CFPB has exercised its rulemaking authority under Dodd–Frank: After clarifying that TILA disclosure requirements apply with full

64. See Roman V. Galperin & Andrew Weaver, Payday Lending Regulation and the Demand for Alternative Financial Services 6 (Fed. Rsrv. Bank of Bos., Cmty. Dev. Discussion Paper No. 2014-01, 2014), https://www.bostonfed.org/-/media/Documents/cddp/cddp1401.pdf [https://perma.cc/H7BC-88TU] (noting rapid growth in the payday loans industry from 1999 to 2004).

65. See Ronald J. Mann & Jim Hawkins, Just Until Payday, 54 UCLA L. Rev. 855, 861–62 (2007) (explaining that payday loans developed from the check-cashing business as an arrangement in which the cashier advanced a lower amount in exchange for deferred check presentment).

66. See Jerry Buckland, Building Financial Resilience: Do Credit and Finance Schemes Serve or Impoverish Vulnerable People? 195 (2018) (explaining that payday loans are part of a larger category of "small-loan products that target low-income people"); Papich, supra note 60, at 7 ("BNPL is typically used for small purchases, with the average transaction costing $200. . . . Many consumers who would not qualify for a low-interest credit card can qualify for BNPL." (citation omitted)); see also Lindsay Sain Jones & Goldburn P. Maynard, Jr., Unfulfilled Promises of the Fintech Revolution, 111 Calif. L. Rev. 801, 840 (2023) ("Many of the unbanked rely on check-cashing services and payday lenders who charge higher interest than any chartered bank can legally impose.").

67. See Michael A. Stegman, Payday Lending, 21 J. Econ. Persps. 169, 169 (2007) (explaining that because qualifying for a payday loan does not require a credit check, "the entire transaction can take less than an hour"); deHaan et al., supra note 36, at 8 (describing BNPL lenders' use of soft credit checks).

68. See Ayesha de Kretser, Payday Lenders Give Buy Now, Pay Later a Bad Reputation: AFIA, Fin. Rev. (Mar. 18, 2022), https://www.afr.com/companies/financial-services/payday-lenders-give-bnpl-a-bad-reputation-afia-20220318-p5a5rz (on file with the *Columbia Law Review*) (summarizing statements by BNPL spokespeople differentiating their businesses from online payday lenders).

69. See James Ledbetter, Are "Buy Now Pay Later" Startups the New Payday Lenders?, Bus. of Bus. (Feb. 17, 2021), https://www.businessofbusiness.com/articles/buy-now-pay-later-bnpl-credit-score-damage-late-payments-klarna-affirm/ [https://perma.cc/474D-KH52] (reporting that 38% of users reported falling behind on payments at least once).

70. See Cortnie Shupe, Greta Li & Scott Fulford, CFPB Off. of Rsch., No. 2023-1, Consumer Use of Buy Now, Pay Later: Insights From the CFPB Making Ends Meet Survey 20 tbl.2 (2023), https://files.consumerfinance.gov/f/documents/cfpb_consumer-use-of-buy-now-pay-later_2023-03.pdf [https://perma.cc/2K5Y-KW88] (finding that 11.5% of BNPL users reported taking out payday loans, compared to 2.9% of nonusers).

force to payday lenders,[71] the CFPB issued a final rule in 2017 classifying repeated withdrawal attempts of consumers' checking accounts as a prohibited UDAAP under certain conditions.[72]

B. *Overview of Federal Consumer Financial Regulations*

1. *Statutory Development of Financial Regulations.* — At the turn of the twentieth century, consumer financial protection was considered to fall under the exclusive police powers of the states,[73] which sought to regulate state-chartered financial institutions by passing usury laws[74] and restrictions on the types of financial products that these institutions could offer.[75] While these statutes had the subsidiary effect of providing consumers with some protections, they primarily served to protect financial institutions,[76]

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71. See CFPB, Examination Procedures: Short-Term, Small-Dollar Lending 3 (2013) ("Regardless of the channel used by lenders to conduct business[,] . . . [TILA] and . . . Regulation Z[] require lenders to disclose loan terms and Annual Percentage Rates. Regulation Z also requires lenders to provide advertising disclosures, credit payments properly, process credit balances in accordance with its requirements, and provide periodic disclosures.").

72. See Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472, 54,472–74 (Nov. 17, 2017) (codified at 12 C.F.R. § 1041 (2020)). For a discussion of challenges to the 2017 Payday Lending Rule, see John Villa & Ryan Scarborough, The Law of Unintended Consequences: How the CFPB's Unprecedented Legislative Authority and Enforcement Approach Has Invited Increasing Challenges, Banking & Fin. Servs. Pol'y Rep., July 2016, at 22, 26–28 (describing how the CFPB's approach has been perceived as regulation by enforcement); see also infra note 211.

73. See Seth Frotman, Reimagining State Banking Regulators: How the Principles Underlying the Consumer Financial Protection Bureau Can Serve as a Blueprint for a New Regulatory Federalism, 72 Me. L. Rev. 241, 258 (2020) ("Every state's police power is founded on the need to protect the general well-being of its citizens, including the power to oversee the companies responsible for the financial futures of those citizens." (footnote omitted)); Adam J. Levitin, Hydraulic Regulation: Regulating Credit Markets Upstream, 26 Yale J. on Reg. 143, 145 (2009) [hereinafter Levitin, Hydraulic Regulation] ("Consumer protection is an essential part of states' police power."). The subsequent concurrent development of state and federal consumer protection laws gave rise to substantial issues implicating preemption and state–federal cooperation. See Robert M. O'Neil, State Consumer Protection in a Federal System, 1975 Ariz. St. L.J. 715, 715–19 (explaining that the rapid expansion in state and federal consumer protection laws generated "risks of confusion, overlap, and competition between regulatory sectors").

74. For an overview of the development of state usury laws, see James M. Ackerman, Interest Rates and the Law: A History of Usury, 1981 Ariz. St. L.J. 61, 62–63, 85–109 (proclaiming that "American usury law represents a venerable body of legal, ethical, religious, and (sometimes) economic thought, reaching back through the Middle Ages to the foundations of western civilization").

75. Adam J. Levitin, The Consumer Financial Protection Bureau: An Introduction, 32 Rev. Banking & Fin. L. 321, 323 (2013) [hereinafter Levitin, The Consumer Financial Protection Bureau].

76. See id. ("While these restrictions often had consumer protection benefits, they were designed first and foremost to protect the solvency of financial institutions by limiting the types of risks they could assume. Enforcement of consumer finance regulation was primarily a private affair, although usury was sometimes a criminal matter.").

a feature that would largely persist in the federal regulatory scheme until the passage of Dodd–Frank.[77]

On a national level, the development of a regulatory framework for consumer protection originated in the unfair competition context[78] with the passage of the Federal Trade Commission Act (FTC Act) in 1914.[79] The FTC Act was novel in that it featured a broad statutory standard for enforcement: In light of market participants' frequent deployment of strategies to evade regulation, Congress decided against drawing up an itemized list of proscribed practices,[80] instead granting the newly created FTC the authority to enforce a broad prohibition on "unfair methods of competition" under section 5 of the Act.[81] Congress later expanded the FTC's authority to section 5's current language proscribing "unfair or deceptive acts or practices" in 1938.[82] Although the FTC was created with

77. See Jean Braucher & Angela Littwin, Examination as a Method of Consumer Protection, 58 Ariz. L. Rev. 33, 56 (2016) (explaining that federal regulatory agencies prioritized "prudential concerns, almost to the exclusion of consumer protection"); Helen A. Garten, The Consumerization of Financial Regulation, 77 Wash. U. L.Q. 287, 288 (1999) ("Historically, safety and soundness rather than consumer protection were the principal articulated goals of most financial regulation . . . . Although, in theory, safety and soundness and consumer protection are not inconsistent, bank regulation was characterized by many examples of safety and soundness rules that, deliberately or accidently, were anticonsumer in effect." (footnote omitted)); see also Mehrsa Baradaran, Banking and the Social Contract, 89 Notre Dame L. Rev. 1283, 1308 (2014) (explaining that during the S&L Crisis of the 1980s and 1990s, federal agencies "announced comprehensive preemption to protect all national banks and thrifts from state consumer protection laws," reasoning that "these public-protecting laws rendered banks less efficient and profitable").

78. See Marc Winerman, The Origins of the FTC: Concentration, Cooperation, Control, and Competition, 71 Antitrust L.J. 1, 6–7 (2003) (noting that the early twentieth century gave rise to a highly publicized string of mergers that consolidated control of several key industries in a small group of businesses, with state common law remedies proving to be mostly ineffectual for preventing consolidation).

79. Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–58 (2018)).

80. See S. Rep. No. 63-597, at 13 (1914) (explaining that the committee considered "attempt[ing] to define the[se] many and variable unfair practices" but decided to "leave it to the commission to determine what practices were unfair" because "there were too many unfair practices to define"); see also E.I. Du Pont De Nemours & Co. v. Fed. Trade Comm'n, 729 F.2d 128, 136 (2d Cir. 1984) ("Congress . . . gave up efforts to define specifically which methods of competition and practices are competitively harmful and abandoned a proposed laundry list of prohibited practices . . . [because] there were too many practices to define, and many more unforeseeable ones were yet to be created by ingenious business minds.").

81. 38 Stat. at 719 (current version at 15 U.S.C. § 45).

82. Federal Trade Commission Act Amendments of 1938, ch. 49, 52 Stat. 111 (codified as amended at 15 U.S.C. § 45).

the express purpose of addressing unfair competition,[83] it would later assume authority over some matters concerning consumer protection.[84]

Half a century later, the consumer movement of the 1960s[85] culminated in the passage of the landmark Consumer Credit Protection Act of 1968 (CCPA),[86] Title I of which codified TILA.[87] The CCPA provided for broad federal regulation of financial institutions and was the first federal regulatory framework of its kind.[88] Passage of the CCPA was politically polarizing,[89] with detractors vigorously opposing the extension of federal power into a domain that had traditionally been considered the exclusive province of the states.[90] TILA in particular underwent substantial changes in the years of legislative debate following its first introduction in the Senate in 1960.[91] Ultimately, Congress settled on disclosure requirements

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83. See, e.g., S. Rep. No. 63-597, at 13 ("One of the most important provisions of the bill is that which declares unfair competition in commerce to be unlawful[] and empowers the commission to prevent corporations from using unfair methods of competition in commerce . . . ."); see also Earl W. Kintner & Christopher Smith, The Emergence of the Federal Trade Commission as a Formidable Consumer Protection Agency, 26 Mercer L. Rev. 651, 651 (1975) ("The consuming public benefited from the actions of the Federal Trade Commission . . . because in the long run the consumer benefited from honest competition, but the Commission's mandate was not consumer protection.").

84. An early example of the FTC's invocation of its rulemaking authority relating to consumer financial protection is its 1951 rule requiring disclosure of certain terms relating to motor vehicle installment sales. See 1971 FTC Ann. Rep. 71 ("The Commission has no authority to regulate finance charges as to amounts. But it was apparent that the overcharges were being imposed by means of an unfair and deceptive practice within the Commission's jurisdiction.").

85. For an overview of the consumer movement, see generally Kathleen Browne Ittig, The Consumer Movement in the United States, Bridgewater Rev., Oct. 1983, at 7, 9–10 (describing the proliferation of consumer advocacy groups during the 1960s).

86. Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601–1691).

87. 82 Stat. at 146–58 (codified as amended at 15 U.S.C. §§ 1601–1665).

88. See Mark E. Budnitz, The Development of Consumer Protection Law, the Institutionalization of Consumerism, and Future Prospects and Perils, 26 Ga. St. U. L. Rev. 1147, 1149 (2010) ("Before passage of [TILA] . . . there were no federal laws regulating the consumer financial services industry that provided consumers with a private right of action. State laws were inadequate. There were few . . . lawyers whose practice was primarily protecting consumers. Law schools offered few, if any, courses devoted to consumer law.").

89. Id. at 1165–66 (chronicling the political backlash to the expansion of consumer protection during the Carter and Reagan Administrations); see also Carl Felsenfeld, Competing State and Federal Roles in Consumer Credit Law, 45 N.Y.U. L. Rev. 487, 499 (1970) (noting that TILA's requirements were "anathema to many traditional lenders").

90. See Felsenfeld, supra note 89, at 499 ("The traditions of state dominance . . . were deep-seated, and opposition existed almost as much to the specter of federal presence as to the substantive provisions of any law that might be enacted.").

91. Senator Paul Douglas of Illinois first introduced his "Consumer Credit Labeling Bill" in 1960. See 109 Cong. Rec. 2911 (1963). The Bill only vaguely hinted at consumer welfare, focusing instead on the threat to "economic stabilization . . . when credit is used excessively for the acquisition of property and services." S. 2755, 86th Cong. (1960). Following the Act's failure in the Senate, Douglas rechristened it as the "Truth in Lending Act." See S. 1740, 87th Cong. (1961).

as a compromise measure[92] to address the problem of the "uninformed use of credit."[93]

Aware that creditors would attempt to evade TILA requirements by structuring their transactions to fall outside of regulatory guidelines, Congress gave the Federal Reserve Board rulemaking authority to regulate consumer disclosures.[94] Regulations implementing TILA's disclosure requirements are compiled under Regulation Z.[95] Despite TILA's broad purpose to reduce consumer confusion and promote financial literacy, the Act's purview was largely constrained to disclosure requirements for political and practical reasons,[96] and in the immediate years following its passage, consumers and creditors alike expressed dissatisfaction with what they regarded as overly complex disclosure terms.[97] This led to amendments in 1980 that simplified TILA's disclosure terms,[98] purportedly to improve consumer understanding.[99] Despite lingering questions as to

92. See Edward L. Rubin, Legislative Methodology: Some Lessons From the Truth-in-Lending Act, 80 Geo. L.J. 233, 234–35 (1991) ("Our penchant for disclosure laws is in part a political compromise and in part a collective neurosis, but it is also an artifact of the current methodology of statutory design."). For an argument that the primacy of disclosure in consumer financial protection has its origins in Congress's preference for rational consumer choice theory, see Dee Pridgen, Sea Changes in Consumer Financial Protection: Stronger Agency and Stronger Laws, 13 Wyo. L. Rev. 405, 416–18 (2013) (explaining that federal consumer protections were premised on the theory that standardized access to information would promote fairness).

93. 15 U.S.C. § 1601(a) (2018).

94. The Supreme Court recognized as much in Mourning v. Fam. Publ'ns Serv., Inc., 411 U.S. 356, 365–66 (1973), in which the Court explained that Congress empowered the Federal Reserve Board to make classifications and exceptions in light of its awareness that merchants could evade disclosure requirements by "burying" the cost of credit in the price of goods sold.

95. 12 C.F.R. § 1026 (2023).

96. See Dee Pridgen, Putting Some Teeth in TILA: From Disclosure to Substantive Regulation in the Mortgage Reform and Anti-Predatory Lending Act of 2010, 24 Loy. Consumer L. Rev. 615, 616 (2012) [hereinafter Pridgen, Putting Some Teeth in TILA] (arguing that disclosure appealed to Congress because it was the "least costly and most politically acceptable method of regulation"); see also Andrea Ryan, Gunnar Trumbull & Peter Tufano, A Brief Postwar History of U.S. Consumer Finance, 85 Bus. Hist. Rev. 461, 489 (2011) (describing the shift in the regulatory landscape from "restrictions on product offerings and caps on interest rates for deposits and loans" to "a regime of enhanced disclosure").

97. See Jonathan M. Landers & Ralph J. Rohner, A Functional Analysis of Truth in Lending, 26 UCLA L. Rev. 711, 712 (1979) (detailing how TILA's disclosure requirements had become so complex that creditors were able to successfully lobby proconsumer legislators to permit the Federal Reserve Board to issue case-by-case exceptions).

98. Truth in Lending Simplification and Reform Act, Pub. L. No. 96-221, 94 Stat. 168 (1980) (codified in scattered sections of 15 U.S.C. ch. 41).

99. See Pridgen, Putting Some Teeth in TILA, supra note 96, at 619 ("These reforms were supposed to eliminate the problems of information overload and the obscuration of key terms that consumers needed for comparison shopping.").

these amendments' efficacy,[100] it would take Congress nearly another three decades before it significantly revised TILA. This was accomplished with the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act), which strengthened disclosure requirements for significant changes in terms, interest fees, and repayment conditions.[101]

2. *The Consumer Financial Protection Bureau.* — The creation of the CFPB under Dodd–Frank was largely a response to the 2007–2008 financial crisis.[102] The crisis had laid bare the inefficacy of the prior delegation of consumer financial protection to various disparate agencies—including, among others, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the National Credit Union Administration, and the Federal Reserve Board—each with limited enforcement and rulemaking authority.[103] As a result of this fragmentation, no federal agency was primarily concerned with consumer protection as a statutory mandate.[104] Title X of Dodd–Frank, the Consumer Financial Protection Act (CFPA),[105] created the CFPB and finally consolidated rulemaking authority over consumer protection into a single federal agency.[106]

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100. See id. at 621 (explaining that the 1990s and 2000s spawned "a new wave of scholarship focusing on behavioral economics [that] pointed out the limits of consumer disclosures for the type of complex credit transactions . . . [and] argued that even a rational consumer faces almost insurmountable cognitive obstacles in seeking to understand TILA disclosures"); Rubin, supra note 92, at 239 (noting that there is "little evidence" that the TILA amendments have "been any more effective in communicating information to consumers or in encouraging them to shop effectively for credit").

101. Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (codified in scattered sections of 15 U.S.C.).

102. See Jolina C. Cuaresma, Commissioning the Consumer Financial Protection Bureau, 31 Loy. Consumer L. Rev. 426, 440–43 (2019) (describing the creation of the CFPB as responsive to public opinion in the wake of the 2007–2008 financial crisis); Arthur E. Wilmarth, Jr., The Dodd–Frank Act's Expansion of State Authority to Protect Consumers of Financial Services, 36 J. Corp. L. 893, 951 (2011) ("Congress designed [the] CFPB to be especially resistant to capture by the financial services industry, because members of Congress and analysts agreed that the industry had exercised excessive influence over bank regulators during the period leading up to the financial crisis.").

103. See Levitin, Hydraulic Regulation, supra note 73, at 149–55 ("The plethora of agencies, each given a small piece of the consumer-protection field to police . . . , has the effect of making consumer protection an orphan in the banking regulation system. Because consumer protection is everybody's responsibility, but each agency is responsible for a very limited piece . . . , it becomes nobody's responsibility.").

104. While the impetus for Dodd–Frank may have been the 2007–2008 financial crisis, criticism of the preexisting fragmented regulatory scheme, which "produced frictions, tensions and uncertainties as to compliance requirements, and claims of anticonsumerism," was hardly new. See Ralph J. Rohner, "For Lack of a National Policy on Consumer Credit . . . "; Preliminary Thoughts on the Need for Unified Federal Agency Rulemaking, 35 Bus. Law. 135, 135 (1979) (deeming it "regrettable" that these "problems should continue and increase through the 1970s and into the 1980s").

105. 12 U.S.C. §§ 5463–5481 (2018).

106. Id. §§ 5491–5492; S. Rep. No. 111-176, at 11 (2010) ("The legislation ends the fragmentation of the current system by combining the authority of the seven federal agencies involved in consumer financial protection in the CFPB, thereby ensuring

Notably, as with TILA, the CFPA was largely the brainchild of a single legislator[107] and was subject to harsh criticism from opponents in Congress.[108]

Under the CFPA, the CFPB is vested with rulemaking, supervisory, and enforcement authority.[109] While the Bureau's supervisory and enforcement authorities are constrained by several significant limitations,[110] the CFPB enjoys broad rulemaking authority. The Bureau has a general rulemaking authority to "prescribe rules . . . as may be necessary" to enforce eighteen federal laws that were previously housed in other federal agencies.[111] Among these "enumerated consumer laws" are TILA, the FCRA, the Equal Credit Opportunity Act, and the Fair Credit Billing Act.[112]

The CFPB is also authorized to promulgate specific rules,[113] including implementing the prohibition of UDAAPs.[114] Notably, Congress expanded the CFPB's regulatory ambit beyond the FTC's section 5 authority[115] with

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accountability."). The consolidation of rulemaking authority over consumer protection into a single regulatory agency was recommended by the National Commission on Consumer Finance, created under the CCPA, in 1972. See Nat'l Comm'n on Consumer Fin., Consumer Credit in the United States 58 (1972) (recommending that "Congress create within the proposed Consumer Protection Agency a unit to be known as the Bureau of Consumer Credit . . . with full statutory authority to issue rules and regulations and supervise all examination and enforcement functions under the Consumer Credit Protection Act, including TIL[A]").

107. See Agostino S. Filippone, Newly Established Consumer Financial Protection Bureau Nets First Enforcement Action, 25 Loy. Consumer L. Rev. 175, 176–77 (2012) (explaining the outsized role of Senator Elizabeth Warren in the genesis of the CFPB). Senator Warren had previously argued for the consolidation of regulatory authority in a single agency in arguing that the current regulatory framework was failing. See Oren Bar-Gill & Elizabeth Warren, Making Credit Safer, 157 U. Pa. L. Rev. 1, 98 (2008) ("We propose the creation of a single federal regulator—a new Financial Product Safety Commission or a new consumer credit division within an existing agency (most likely the [Federal Reserve Board] or FTC)—that will be put in charge of consumer credit products.").

108. See, e.g., 156 Cong. Rec. 13145 (2010) (statement of Sen. Kay Hutchinson) ("I am concerned that a newly formed Consumer Financial Protection Bureau will take the lead rather than our banking regulators, and this is one of the biggest concerns I have with the bill."); 156 Cong. Rec. 13002 (2010) (statement of Sen. Christopher Bond) (characterizing the CFPB as a "new superbureaucracy with unprecedented power," which will make decisions "driven by the administration's political will and agenda").

109. See 12 U.S.C. § 5511(c)(3)–(5).

110. The CFPB's supervisory authority over nondepository institutions is limited to certain "covered persons," including, among others, "larger participant[s] of . . . market[s] for other consumer financial products or services." Id. § 5514(a)(1)(B). The CFPB's litigation enforcement authority is limited to bringing civil suits for violations of "[f]ederal consumer financial law." Id. § 5564(a).

111. Id. § 5512(b)(1).

112. Id. § 5481(12).

113. Id. §§ 5531–5538.

114. Id. § 5531.

115. See supra notes 79–82 and accompanying text.

the insertion of an abusiveness standard.[116] The Bureau's authority to prohibit UDAAPs is bounded by the limitation[117] that its rules be directed to "covered persons," which offer or provide financial services or products to consumers,[118] or to "service providers," which provide a "material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service."[119]

II. BUY NOW, PAY LATER REQUIRES A NOVEL REGULATORY APPROACH

This Part argues that a comprehensive regulatory response to the proliferation of BNPL must go beyond simply copy-and-pasting credit card regulations to BNPL lenders. Section II.A explains how the marketing of BNPL to consumers poses unique risks to consumer financial health by encouraging overspending and providing confusing, potentially misleading representations. Section II.B describes the CFPB's proposal to extend credit card regulations to BNPL lenders, as articulated in the September Report and Director Rohit Chopra's accompanying remarks (the "September Remarks"). Section II.C argues that this plan to treat BNPL products like credit cards—with the accompanying emphasis on mandating disclosure of credit terms—fails to address BNPL's novel risks. This Note contends that the efficacy of extending credit card regulations to BNPL may be impaired by (1) consumers' tendency to view BNPL as fundamentally different from traditional credit, (2) the specialized role played by merchants in marketing financing plans to consumers, and (3) the rapidly evolving landscape of fintech. More broadly, it argues that this approach risks perpetuating the historical pattern of developing consumer protection regulations in response to—rather than in anticipation of—harms in the market.[120]

A. *Buy Now, Pay Later Poses Unique Risks to Consumers*

1. *Excessive Spending.* — By weakening both consumers' personal safeguards against overspending and external procedural safeguards

116. Under this standard, "abusive[ness]" is defined as an act or practice that either "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service" or "takes unreasonable advantage" of a consumer's "lack of understanding . . . of the material risks, costs, or conditions," "inability . . . to protect [their own] interests . . . in selecting or using a consumer financial product or service," or "reasonable reliance . . . on a covered person to act in the [consumer's] interests." 12 U.S.C. § 5531(d).

117. See id. § 5531(a).

118. Id. § 5481(6)(A).

119. Id. § 5481(26)(A).

120. See Lavelle, supra note 19, at 343 (describing the development of financial regulations as driven "by public attention to the government's initial response . . . and the perceived need to change the institutions to achieve real success").

relating to the extension of credit,[121] BNPL may jeopardize consumers' financial health by encouraging unsustainable spending.[122] By dividing payments into a series of comparatively smaller installments, BNPL distorts consumers' perception of their spending power, thereby reducing their uncertainty before making purchases that they may otherwise ultimately forgo.[123] These risks are compounded when consumers are unable to access safer credit options, as is often the case with BNPL users.[124]

Moreover, because BNPL lenders are generally not subject to uniform reporting requirements under the FCRA,[125] users can quickly find themselves overcommitted with multiple accounts.[126] Because the use of multiple BNPL products is typically not visible to lenders when processing applications,[127] they are less likely to deny credit to consumers who already have multiple BNPL payment plans, regardless of their ability to pay on

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121. See Madiha Khan & Shejuti Haque, Impact of Buy Now–Pay Later Mechanism Through Installment Payment Facility and Credit Card Usage on the Impulsive Purchase Decision of Consumers: Evidence From Dhaka City, Se. U. J. Arts & Soc. Scis., June 2020, at 40, 55 (concluding that BNPL encourages impulsive spending that "may have a negative impact on . . . future spending on necessities due to excess current spending on . . . unnecessary goods"); Di Maggio et al., supra note 53, at 2 (finding that "BNPL increases the likelihood that consumers face negative outcomes resulting from low liquidity"); see also deHaan et al., supra note 36, at 2 (hypothesizing that one reason that BNPL lenders may be willing to extend riskier credit is because they "also earn substantial commission and advertising revenues from retailers").

122. See, e.g., Claire Williams, "Buy Now, Pay Later" Users Significantly More Likely to Overdraft Than Nonusers, Morning Consult (Mar. 2, 2022), https://morningconsult.com/2022/03/02/buy-now-pay-later-bnpl-overdraft-data/ [https://perma.cc/WJJ4-M5YA] (finding that in January 2022, 33% of BNPL users overdrafted, compared to 15% of all adults).

123. See Rizk, supra note 18, at 86 (explaining that the structure of BNPL transactions can lead to overconsumption because "consumers' perceptions of the cost of a transaction can decouple from the benefit as time passes"); deHaan et al., supra note 36, at 7 (finding that "BNPL users' total spending increases after BNPL adoption, consistent with BNPL motivating consumers to spend more"); see also Hannah Gdalman, Meghan Greene & Necati Celik, Fin. Health Network, Buy Now, Pay Later: Implications for Financial Health 7–8 (2022), https://finhealthnetwork.org/wp-content/uploads/2022/03/Buy-Now-Pay-Later-Brief-2022.pdf [https://perma.cc/GRF8-5XCD] (reporting that 47% of survey respondents claim that the availability of BNPL led them to either make a purchase they otherwise would not have made or to spend more than they would have without BNPL).

124. See Aaron Gilbert & Ayesha Scott, Auckland Ctr. for Fin. Rsch., Problem Debt, Buy Now Pay Later (BNPL) & Young Adults in Aotearoa New Zealand: Report 34 (2023), https://acfr.aut.ac.nz/__data/assets/pdf_file/0009/817803/FINAL-YA-Debt-Study-Industry-Report-v250823.pdf [https://perma.cc/6LCK-SVE7] (explaining that BNPL can "cause[] harm to low-income individuals or those unable to access safer credit").

125. 15 U.S.C. § 1681 (2018).

126. See Boshoff et al., supra note 18, at 2 (estimating that 40% of BNPL users have multiple accounts).

127. C.f. Gdalman et al., supra note 123, at 9 (noting that underwriting practices may help to prevent unaffordable usage).

them.[128] This is particularly troublesome given that, according to users, one of the primary reasons for using BNPL in the first place is poor credit history and credit card ineligibility.[129] Moreover, the use of multiple BNPL accounts may also increase the likelihood of consumers losing track of payments.[130] This problem is not readily solved by self-regulation tools—such as automated payment reminders—because unlike credit cards, BNPL payment periods are highly irregular.[131]

2. *Confusing and Potentially Misleading Representations.* — Lenders typically market BNPL ambiguously by presenting it as a smart payment option rather than a loan.[132] BNPL is thus portrayed as a convenient, financially responsible way to budget payments rather than a form of consumer credit entailing financial obligations. This may obfuscate the nature and terms of financing to consumers,[133] many of whom already

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128. See Boshoff et al., supra note 18, at 29 (explaining that the "inability to observe BNPL holdings increases adverse selection costs for lenders," and for consumers, "the availability of unregulated BNPL facilities may . . . encourage overborrowing"). A recent study estimates that roughly 13% of BNPL applicants are rejected. See Tobias Berg, Valentin Burg, Jan Keil & Manju Puri, The Economics of "Buy Now, Pay Later": A Merchant's Perspective 14 (June 2023), https://ssrn.com/abstract=4448715 [https://perma.cc/V3S4-KZ35] (unpublished manuscript).

129. See, e.g., Mike Brown, Study: Buy Now, Pay Later Is Surging but Many Consumers Overextend Their Credit, Breeze (Jan. 6, 2022), https://www.meetbreeze.com/blog/buy-now-pay-later-personal-finance-study/ [https://perma.cc/K9XM-2QLW] (finding that 57% of BNPL users stated that BNPL caused them to spend above their means and that 45% indicated that they had turned to BNPL due to poor credit history and inability to secure a credit card).

130. See Martin & Lynn, supra note 50, at 549 ("If a consumer has multiple purchases on multiple schedules with multiple companies, it may be hard to keep track of when payments are scheduled."); see also Nikita Aggarwal, D. Bondy Valdovinos Kaye & Christopher Odinet, #Fintok and Financial Regulation, 54 Ariz. St. L.J. 1035, 1049 (2022) (observing that the risk of losing track of payments can be exacerbated when consumers are still charged by BNPL lenders after returning a product).

131. See Tan, supra note 12, at 920 (arguing that "[u]nder BNPL, the topological spaces of debt become more diffused and stretched across different time periods compared to credit cards" and that "BNPL-induced debt relationships become fragmented, . . . are constructed between the consumer and the BNPL firm[,] and [are] further tied to individual purchases").

132. See Aalders, supra note 17, at 948 (arguing that "financing provided through the BNPL platform is presented as *money*, not credit or debt"); Cook et al., supra note 18, at 252 ("BNPL services . . . did not advertise themselves as providers of 'credit' nor acknowledge any association with 'debt'. Rather, every BNPL service website and app presented itself as an easy, accessible[,] and flexible *means of payment*."); Tan, supra note 12, at 920 (noting that "BNPL offerings are explicitly marketed as a non-credit-based service").

133. See, e.g., Good Shepherd Austl. N.Z., Safety Net for Sale: The Role of Buy Now Pay Later in Exploiting Financial Vulnerability 12 (2022), https://goodshep.org.au/wp-content/uploads/2022/11/Good-Shepherd-Report_The-Role-of-Buy-Now-Pay-Later-in-Exploiting-Financial-Vulnerability_November-2022-Full-Report.pdf [https://perma.cc/82EX-3RPD] (arguing that portraying BNPL to consumers as a financially responsible payment option leads to misconceptions about BNPL).

tend to misunderstand BNPL's key features.[134] BNPL lenders repeatedly emphasize this promise of interest-free credit, particularly toward low-income[135] and young[136] consumers, who tend to use BNPL at higher rates than the general population.[137]

The risk of consumer confusion is compounded by the divergence in structures for charging late fees employed by various BNPL lenders.[138] Consumers' tendency to view their finances both myopically and optimistically may worsen their ability to discern differences in fee structures, which can make it difficult to understand BNPL's true costs even if late fees are clearly disclosed.[139] This is particularly troublesome given that consumers who are already experiencing financial distress tend to use BNPL at higher rates.[140]

B. *The Consumer Financial Protection Bureau's Plan*

The CFPB outlined its concerns about BNPL in late 2022 with the release of the September Report, which offered a surprisingly mild[141] depiction of the industry: The Bureau's discussion of risks posed by BNPL

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134. See, e.g., Press Release, Zilch, Survey: BNPL Has Consumers Confused, 43% Believe BNPL Companies Make Money on the Interest They Collect (Mar. 29, 2022), https://www.businesswire.com/news/home/20220329005316/en/Survey-BNPL-Has-Consumers-Confused-43-Believe-BNPL-Companies-Make-Money-On-the-Interest-They-Collect [https://perma.cc/4D5F-QMLB] (noting a "widespread lack of understanding around how BNPL companies make money").

135. See Aggarwal et al., supra note 130, at 1044 ("BNPL has been touted as a cheaper, safer, and more convenient alternative to other forms of high-cost credit, particularly for low-income, low-FICO score consumers.").

136. See Martin & Lynn, supra note 50, at 550 (noting that "BNPL is marketed to and used primarily by millennials and Gen Zs").

137. See Good Shepherd Austl. N.Z., supra note 133, at 2 (noting highest rates of BNPL use among low-income and young consumers).

138. See Ctr. for Regul. Strategy Ams., Deloitte, The Now and Later: How Consumers' Use of Buy Now, Pay Later Fits Into the Evolving Regulatory Landscape 2 (2022), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/regulatory/us-regulatory-the-now-and-later-bnpl.pdf [https://perma.cc/HSG4-6BSE] (noting risks of customer confusion stemming from differing repayment structures across BNPL providers).

139. See Peng & Muki, supra note 18, at 17 (noting that "consumers often exclude certain pricing information, such as late payment fees, from their consideration entirely if they misperceive that such events would not materialise" and that "[s]uch complexities make it difficult for consumers to properly ascertain the cost of using consumer credit products and compare across products").

140. See Good Shepherd Austl. N.Z., supra note 133, at 3 (noting that "financial stress and hardship among clients using BNPL" is frequent and that "73% of [Financial Counselling and Capability] practitioners say that clients have missed essential payments, or cut back on or gone without essentials, in order to service BNPL debt").

141. See Yizhu Wang, CFPB Unlikely to Take Immediate Action on Buy-Now, Pay-Later Sector, S&P Glob.: Mkt. Intel. (Sept. 29, 2022), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/cfpb-unlikely-to-take-immediate-action-on-buy-now-pay-later-sector-72242601 [https://perma.cc/6M99-KLGS] (summarizing responses to the September Report).

largely mirrored risks associated with traditional credit products, namely the potential for debt overextension and certain "discrete harms" to consumer rights, such as the lack of standardized disclosures, uncertain dispute resolution rights, attempted reauthorization of failed payments, and the use of late fees.[142] Indeed, the CFPB's discussion of novel risks posed by BNPL and other fintech offerings was largely confined to the realm of data privacy.[143]

The September Report's discussion of both overextension and discrete harms to consumer rights appears to be primarily concerned with bringing BNPL lenders in line with existing regulations, without much discussion of modernizing the regulations or adapting them to developments in the fintech industry. The September Report articulates the risk of overextension primarily in terms of the industry's lack of reporting requirements or uniform underwriting procedures.[144] Similarly, it frames discrete harms to consumer rights in terms of lenders not being subject to Regulation Z rules requiring standardized disclosures[145] and dispute resolution rights.[146]

While the CFPB's general plans are mainly found in the September Remarks, the September Report's language also makes clear the Bureau's position that the primary issue facing consumers is the underapplication of current credit card regulations to BNPL lenders. This is reflected in its characterization of BNPL itself, which the September Report repeatedly describes as an "alternative" to credit cards,[147] rather than as a separate class of consumer credit products entirely. This framing naturally gives rise to the inference that these two products should be subject to analogous regulations, without consideration of the different functions they play in the consumer finance market. The September Report also details various similarities between BNPL and credit cards, including the use of merchant fees.[148] But this is an oversimplification; merchant fees associated with credit cards and BNPL are fundamentally different. Transaction fees

142. See September Report, supra note 22, at 64–66 (describing the risk that consumers take out multiple BNPL loans and subsequently are unable to meet their non-BNPL financial obligations); see also id. at 72–74 (describing discrete harms).

143. See id. at 75 ("The BNPL industry provides an example of the data harvesting that is occurring at the intersections of digital commerce, content, and lending.").

144. See id. at 77 (explaining that "BNPL lenders do not currently furnish repayment histories to the consumer reporting companies, which may compound overextension risks by masking borrowers' BNPL usage and loan performance from other lenders").

145. See id. at 72 ("For both open-end and closed-end credit, disclosures provide a standardized, meaningful visual aid about the terms of credit and allow consumers to make informed decisions across a variety of credit products. However, most BNPL lenders do not currently provide the standard cost-of-credit disclosures required by Regulation Z . . . .").

146. See id. at 73 ("Most BNPL lenders surveyed are currently not following Regulation Z's credit dispute resolution provisions and consumers sometimes are required to pay loan installment amounts in dispute pending dispute resolution.").

147. Id. at 2–3, 46.

148. Id. at 6.

associated with BNPL products are typically more than double those of credit cards and account for a significantly larger share of BNPL lenders' revenue.[149] More importantly, the role of the transaction fee in each business model is different.[150] Transaction fees are shared across various actors in the credit model,[151] whereas in the BNPL model, they are charged to a single actor: the merchant. The discussion of merchant fees reflects a broader tendency of the September Report to gloss over fundamental differences between the two industries—indeed, the Report largely confines discussion of any differences between industries to divergent regulatory treatment, rather than intrinsic differences between BNPL lenders and credit card providers.[152]

The proposed steps outlined in the September Remarks reflect this understanding of BNPL's risks being largely solvable by extending existing credit card regulations to lenders. The Remarks indicate that the Bureau will tailor its regulatory response to BNPL by issuing interpretive guidance to "ensur[e] that [BNPL lenders] adhere to many of the baseline protections Congress established for credit cards."[153] While noting that the overextension risk is compounded by issues particular to BNPL, the CFPB nevertheless announced plans to bring reporting in line only with requirements already imposed on credit card providers.[154] While stopping short of articulating concrete rules, the CFPB echoed this language in its semiannual report to Congress on December 14, 2022, stating that it is "working to ensure that Buy Now, Pay Later lenders adhere to the same protocols and protections as other similar financial products to avoid regulatory arbitrage and to ensure a consistent level of consumer protection."[155] Outside of the sphere of data protection,[156] the overall

149. See Di Maggio et al., supra note 53, at 1; see also Tan, supra note 12, at 917.

150. Compare Adams et al., supra note 49, with Austl. Sec. Invs. Comm'n, Rep. No. 672, Buy Now Pay Later: An Industry Update 9 (2020), https://download.asic.gov.au/media/5852803/rep672-published-16-november-2020-2.pdf [https://perma.cc/2G4F-VF79] (finding that merchant fees can account for up to 96% of BNPL lenders' revenue); see also infra section II.C.2.

151. See Scott Schuh, Oz Shy & Joanna Stavins, Who Gains and Who Loses From Credit Card Payments? Theory and Calibrations 1 (Fed. Rsrv. Bank of Bos., Pub. Pol'y Discussion Paper No. 10-03, 2010) https://www.bostonfed.org/-/media/Documents/Workingpapers/PDF/ppdp1003.pdf [https://perma.cc/CCR7-GTVC] ("[M]erchants pay banks a fee . . . proportional to the dollar value of the sale. The merchant's bank then pays a proportional interchange fee to the consumer's credit card bank. . . . [M]erchants mark up their retail prices for all consumers by enough to recoup the merchant fees from credit card sales.").

152. See, e.g., September Report, supra note 22, at 72–74.

153. Chopra, September Remarks, supra note 23.

154. Id.

155. Consumers First: Semi-Annual Report of the Consumer Financial Protection Bureau: Hybrid Hearing Before the H. Comm. on Fin. Servs., 117th Cong. 65 (2022) (prepared statement of Rohit Chopra, Dir., CFPB).

156. See September Report, supra note 22, at 75.

tenor of the CFPB has largely reflected a strategy of extending existing regulations to BNPL lenders.

C. *Extending Credit Card Regulations to Buy Now, Pay Later Is Inadequate*

1. *Divergent Consumer Perceptions.* — By portraying BNPL as a responsible budgeting tool,[157] BNPL lenders have asserted a role for BNPL that is entirely different from that of traditional credit offerings.[158] Alarmingly, this depiction—which deemphasizes the fact that BNPL is a loan that entails substantive financial obligations[159]—has led to many consumers not identifying BNPL as credit at all.[160] Many consumers' understanding of BNPL has been further obfuscated by the lenders' and merchants' exploitation of informational asymmetries at the point of sale.[161] At checkout, consumers are provided only the information that is voluntarily disclosed to them by lenders and merchants,[162] while lenders and merchants are both already aware of the precise terms and conditions antecedent to the extension of credit. As a result, supplementing this three-sided transaction only with a prolix array of legalistic disclosures imported from the credit card context will be insufficient to meaningfully

157. See supra notes 132–137 and accompanying text.

158. See, e.g., Cook et al., supra note 18, at 254 (arguing that lenders "distinguish[] BNPL services from other, more 'serious' sources of credit"); Deniz Okat, Mikael Paaso & Vesa Pursiainen, Trust in Finance and Consumer Fintech Adoption 7 (Apr. 2023), https://ssrn.com/abstract=3947888 [https://perma.cc/HWP5-SWKQ] (unpublished manuscript) (finding that "consumers [do] not view[] common fintech products as being financial products").

159. See Ida Helene Grøtan & Mari Anette Hjorthol, Consumers' Willingness to Incur Debt With "Buy Now Pay Later" Payment Options 59–60 (July 1, 2021) (M.S. thesis, BI Norwegian Business School), https://biopen.bi.no/bi-xmlui/bitstream/handle/11250/2824333/2942473.pdf?sequence=1 [https://perma.cc/T9DZ-U5R8] ("Many BNPL providers invest heavily in marketing . . . their payment solutions . . . as 'smart' and 'smooth', when in reality [they are] an encouragement to take up unsecured debt. This image is upheld . . . [because] BNPL providers are not required to provide information about what their services actually entail[] in terms of financial obligations.").

160. See Fin. Counselling Austl., It's Credit, It's Causing Harm and It Needs Better Safeguards 5 (2021), https://apo.org.au/sites/default/files/resource-files/2021-12/apo-nid315440.pdf [https://perma.cc/J8HR-2W89] (finding that many consumers "do not view BNPL as debt and may not report [BNPL] to financial counsellors"); Good Shepherd Austl. N.Z., supra note 133, at 3 (noting that many BNPL users "have been led to believe it is something other than credit/debt . . . [and] do not realise BNPL debts may affect their ability to get an affordable loan").

161. See UK Fin. & Oliver Wyman, Same Activity, Same Risk, Same Regulation 12–13 (2021), https://www.ukfinance.org.uk/system/files/Same%20activity%2C%20same%20risk%2C%20same%20regulation%20-%20FINAL.pdf [https://perma.cc/8YDX-TERT] (arguing that regulators must take note of information asymmetries, "where the same activity is occurring but the customer has a different understanding or information about it[] [and thus] . . . may not realise the extent to which they are exposed or vulnerable").

162. See id. at 13.

inform consumers of the consequences of using BNPL financing.[163] Disclosure may be especially ill suited for BNPL products, as disclosure requirements are generally premised on the idea that apprising consumers of interest terms will cause them to pay off larger percentages of their balances and decrease the size of their overall interest payments.[164] Because BNPL products typically do not charge interest at all, this goal is of limited utility in the BNPL context.

The divergent way that consumers perceive BNPL, coupled with widespread misunderstanding as to some of its key features, strongly suggests that conventional disclosure guidelines modeled after the regulations enforcing TILA and the CARD Act are not enough. Although TILA's disclosure requirements are intended to reduce consumer confusion by standardizing credit terms,[165] it is unclear whether they would be effective when applied to a product that many consumers do not even view as credit in the first place. Moreover, the neutral, informational thrust of the CARD Act's disclosure requirements[166] is likely insufficient to lead to any actual behavioral changes among consumers with a limited understanding of how BNPL works. Perhaps most significantly, consumers' interface with the BNPL application process is drastically different from that with credit cards. Applying for BNPL financing for small purchases is less formal than applying for a credit card, and consumers apply for BNPL in the context of already having a basket of goods ready for purchase. Disclosures are particularly ill equipped to modify behavioral biases at the point of checkout, when consumers have the least incentive and time to thoroughly parse lengthy financing terms.[167]

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163. See, e.g., Karin Braunsberger, Laurie A. Lucas & Dave Roach, The Effectiveness of Credit-Card Regulations for Vulnerable Consumers, 18 J. Servs. Mktg. 358, 367 (2004) (concluding that even in the credit card context, disclosure of "variable APR information, whether it is highlighted or not, actually distracts the consumer from considering other important cost information").

164. See Sumit Agarwal, Souphala Chomsisengphet, Neale Mahoney & Johannes Stroebel, Regulating Consumer Financial Products, 130 Q.J. Econ. 111, 112 (2015) (noting concerns that this reduced revenue stream would lead to credit card providers offsetting costs in other contexts).

165. See Mary Curtin, Cleaning House: Achieving Effective Consumer Protection Through TILA Reform, 45 Ariz. St. L.J. 1685, 1690–91 (2013) (explaining that Congress intended for the standardization of credit terms to "'teach' the consumer how to shop for credit"); Landers & Rohner, supra note 97, at 713 n.7 ("The need for standardization was caused by widespread consumer confusion and misinformation and the disparities in methods of stating interest rates in consumer credit transactions, e.g., add on, discount, monthly, and fees.").

166. See Paul Adams, Benedict Guttman-Kenney, Lucy Hayes, Stefan Hunt, David Laibson & Neil Stewart, Do Nudges Reduce Borrowing and Consumer Confusion in the Credit Market?, 89 Economica S178, S181 (2022) (contrasting proposed "valenced language recommending that cardholders 'clear [their] balance faster' or identify 'a quicker way to repay [their] balance'" with "the CARD Act's neutral 'informational' language").

167. See Ronald J. Mann, "Contracting" for Credit, 104 Mich. L. Rev. 899, 903 (2006) ("[Standardized disclosures are] likely to be functionally unreadable, especially when [they

With many consumers already unaware of the details of BNPL financing, complicated credit card disclosure regulations may themselves risk increasing consumer confusion[168] by failing to provide information that is meaningful to the decisionmaking process.[169] This is because the responsible use of BNPL becomes less likely when disclosure is insufficient and the cost of acquiring pertinent information is too high.[170] The extension of credit card regulations to BNPL also does little to address commonly employed industry practices that are unique to the BNPL context. For example, an analysis of the strategies employed by some BNPL lenders in formatting their interfaces has suggested that they may be deliberately exploiting lack of consumer understanding to maximize consumption,[171] meaning that investments in increasing consumers' financial literacy through disclosure alone may not be enough to rein in the excessive spending encouraged by lenders and merchants at the point of sale.[172]

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are] presented for the first time at the counter . . . ."); Jonathan Slowik, Credit Card Act II: Expanding Credit Card Reform by Targeting Behavioral Biases, 59 UCLA L. Rev. 1292, 1306 (2012) ("For a disclosure to help a consumer make a better decision, the consumer must take the time to read and understand the information and then use that information to estimate accurately the expected utility of available alternatives.").

168. See, e.g., Elizabeth Renuart & Diane E. Thompson, The Truth, the Whole Truth, and Nothing but the Truth: Fulfilling the Promise of Truth in Lending, 25 Yale J. on Reg. 181, 196 (2008) (explaining that in the context of mortgage loans, "lender-created complexity" renders most disclosures practically incomprehensible to most consumers).

169. See Rubin, supra note 92, at 236 (suggesting that "[TILA] succeeded in making consumers increasingly aware, but it has not managed to explain to them what it is they have been made aware of").

170. See Gerrans et al., supra note 18, at 479 (noting that the utility of a "policy approach based on disclosure will be reduced if there is 'consumer disengagement, complexity of documents and products, behavioural biases, misaligned interests and low financial literacy'" (quoting Explanatory Memorandum, Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018 (Cth) 5 (Austl.), https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6184_ems_45d91dd5-0e85-4166-8753-006baf09524c/upload_pdf/685004.pdf [https://perma.cc/V67Z-VU4F])).

171. See Isabella Johannesson, Dark Patterns in Digital Buy Now Pay Later Services 8 (Aug. 30, 2021) (M.S. thesis, KTH Royal Institute of Technology), https://kth.diva-portal.org/smash/get/diva2:1588606/FULLTEXT01.pdf%20 [https://perma.cc/N7D6-REQK] (finding that the interface of several BNPL lenders deployed four false hierarchies, including a pop-up notification prompting the user to save the installment plan as their "favorite" for future purchases, bypassing Swedish law prohibiting designers from preselecting installment plans and marking the installment plan as "recommended" upon checkout).

172. See, e.g., Morris Altman, Implications of Behavioural Economics for Financial Literacy and Public Policy, 41 J. Socio-Econ. 677, 687 (2012) (concluding that while improvements in financial literacy may promote better informed decisionmaking, this promotion "requires much more than just improvements to financial education," so "organizations marketing financial products[] . . . should be obliged to clearly specify the risks and prospective returns involved in purchasing particular financial products").

2. *Unique Lender–Merchant Dynamic.* — The comparatively high merchant fees associated with BNPL create unique market incentives for lenders and merchants that result in greater attention on users' spending than in the credit card industry.[173] By focusing on extending credit regulations to BNPL lenders alone, the CFPB would effectively confine regulation to only one of the two parties promoting BNPL financing—and not even the primary party responsible for driving customer acquisition at that. Merchants should be a key target for regulation because for many lenders, the primary means of attracting users is through representations by *merchants* to introduce customers to BNPL financing.[174] In fact, at least one prominent lender directs its advertisements almost exclusively to merchants, relying on the payment flow to acquire consumers.[175]

The coordinated relationship between lenders and merchants transforms BNPL from a pure financial product to a subsidiary market channeling device that is designed to increase consumer spending relative to traditional credit.[176] Because the success of this relationship depends on the merchant being able to recoup the cost of merchant fees, it is mutually beneficial for both the lender and the merchant to structure the transaction to maximize consumer spending.[177] Crucially, a merchant's decision to offer BNPL financing is fundamentally different from the decision to accept legacy credit card networks, which are accepted nearly ubiquitously throughout the United States.[178] Instead, the decision to partner with a BNPL lender involves a specific calculation of BNPL's probable effect on the spending behavior of a given consumer demographic—usually young

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173. See Garg et al., supra note 48 (explaining that BNPL lenders are "acting as an entry product for younger consumers who are new to credit . . . [and] also starting to shape the wider retail ecosystem by developing shopping apps that drive consumer traffic and stickiness").

174. Rohit Sharma, To Market to Market: How Do BNPL Players Go-to-Market?, Monetary Musings (Oct. 31, 2020), https://blog.thesharmas.org/2020/10/31/bnpl-affirm-klarna-afterpay-gtm/ [https://perma.cc/9TUZ-GW6P] (explaining that "[t]he core revenue source for [BNPL] is merchant revenue and hence merchants are the core customer" and that "merchants are also the core acquisition engine to get consumers").

175. Id. (observing that Affirm almost exclusively directs its marketing efforts toward merchants).

176. See Ainsley Harris, Buy Now, Pay Later Services Are Retailers' Next Great Hope, Fast Co. (May 5, 2022), https://www.fastcompany.com/90739769/buy-now-pay-later-services-are-retailers-next-great-hope (on file with the *Columbia Law Review*) ("BNPL is not only an additional payment option for consumers but also an increasingly essential marketing tool for retailers.").

177. See, e.g., Tan, supra note 12, at 918 ("BNPL is also tightly coupled with mainstream finance institutions for its debt collection system, where a bank-issued credit or debit card is needed to settle the BNPL debt.").

178. See Madison Blancafor, Amex and Discover Accepted in as Many Places as Visa, Mastercard in the US, Points Guy (Sept. 19, 2021), https://thepointsguy.com/credit-cards/american-express/amex-now-accepted-in-as-many-places-as-visa-mastercard [https://perma.cc/XJ3P-ASKP] (reporting "virtual parity" among acceptance rates of major credit card issuers).

customers lacking other credit options[179]—compared to the predicted effects of traditional advertising or marketing.[180] Once a merchant decides to partner with a BNPL lender, they have an incentive to market the spending plan *itself* to the customer,[181] with the explicit purpose of encouraging consumers to spend more than they otherwise would.[182]

Each party to the transaction has a vested interest in increasing consumer spending in a manner that diverges from incentives in the credit card market. On the one hand, lenders must contend with the fact that their per-transaction fees are much higher than merchant fees charged by credit card providers,[183] which forces many of them to offer secondary nonpayment services just to compete in the consumer finance market.[184] On the other hand, merchants are incentivized to increase consumer spending to recoup the cost, and they do so by promoting BNPL directly to customers. And—unlike previous options such as layaway plans—merchants do not themselves bear the risk of offering loans when encouraging consumers to use BNPL because this risk is assumed by lenders.[185]

3. *Developments in Fintech.* — Another challenge posed by BNPL is the industry's rapidly changing ecosystem,[186] which defies regulatory oversight by constantly contorting and eluding precise legal categorization.[187] This

179. See supra notes 135–137 and accompanying text.

180. See Harris, supra note 176 (describing incentives for merchants to provide BNPL despite high fees).

181. See, e.g., Add Extra Convenience to Holiday Shopping With These 'Buy Now, Pay Later' Options at Target, Target (Oct. 6, 2021), https://corporate.target.com/article/2021/10/buy-now-pay-later [https://perma.cc/GGX4-D9BW] ("With the help of two new partners—Sezzle and Affirm—we've added new payment solutions that let you buy what you need now, take advantage of our best deals, and pay at a pace that works well for you.").

182. See Harris, supra note 176 ("That core promise—that consumers will spend more—is still at the heart of the product's appeal to retailers.").

183. See Di Maggio et al., supra note 53, at 1.

184. See Fisher et al., supra note 50, at 63 (noting that some BNPL lenders have begun offering additional nonfinancial features such as "marketing, customer referrals and data analytics"); Tomio Geron, Invest Now, Win Later: Inside the 'Buy Now, Pay Later' Gold Rush, Protocol (Oct. 4, 2021), https://www.protocol.com/manuals/buy-now-pay-later/bnpl-affirm-klarna-afterpay [https://perma.cc/XE8S-3CB4] (noting that "[a]s competition for merchant placement tightens, the 'buy now, pay later' companies . . . [are] catering to merchants with more and more features").

185. See supra notes 57–61 and accompanying text.

186. See Valerio Lemma, FinTech Regulation: Exploring New Challenges of the Capital Markets Union 20 (2020) (arguing that the highly variegated market for fintech offerings calls for a "juridical order of this new market," while "keeping in mind that demand and supply will look for the elements required to develop an integrated process able to perform activities related to investments, credits/debits and risks").

187. For an argument that the proliferation of fintech companies demands the concomitant development of a similarly technologically sophisticated regime of "RegTech," see Douglas W. Arner, Jànos Barberis & Ross P. Buckley, FinTech, RegTech, and the Reconceptualization of Financial Regulation, 37 Nw. J. Int'l L. & Bus. 371, 373 (2017) (explaining that RegTech, "a contraction of the terms *regulatory* and *technology*[,] . . . comprises the use of technology . . . in the context of regulatory monitoring, reporting, and

changing landscape naturally results in a delayed regulatory response as the law struggles to maintain pace with technological progress.[188] Fintech firms are able to evade regulation by taking advantage of regulatory gaps to engage in regulated activities while formally structuring themselves as nonregulated technology entities. Consequently, BNPL lenders often characterize themselves as technology service providers rather than lending facilities.[189]

A regulatory approach that primarily focuses on the similarities between BNPL products and credit cards may incentivize lenders and prospective fintech companies to simply modify their financing structures to further distinguish themselves from traditional credit options, which could have the unintended effect of further confusing consumers. In contrast to traditional credit offerings, the business model of many fintech products (including BNPL) does not even necessarily rely primarily on the extension of credit, but rather on aiming to attract consumers by cutting costs and streamlining access to financing.[190] Indeed, fintech products are often designed to pull consumers *away* from traditional financial institutions, underscoring the issue with treating the two as equivalent.

III. THE CASE FOR REGULATING PARTNERING MERCHANTS

This Part argues for the tailoring of regulations to the unique lender–merchant relationship at the heart of the BNPL industry. Section III.A explains how regulating merchants would provide the CFPB with a flexible framework for addressing emerging challenges in the BNPL industry and argues that this is preferable to relying solely on extending credit card regulations to BNPL lenders. Section III.B analyzes some of the political and institutional challenges facing such a framework and how said concerns affect regulatory considerations. Section III.C proposes a

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compliance[,] . . . allow[ing] for better and more efficient risk identification and regulatory compliance than that which currently exists"); Gillis, supra note 46, at 1255–56 ("In the machine learning pricing context, regulators themselves can analyze pricing rules before they are applied to real borrowers, . . . creating the potential for ex ante testing.").

188. See Jillian Grennan, FinTech Regulation in the United States: Past, Present, and Future 1–2 (Aug. 31, 2022), https://ssrn.com/abstract=4045057 [https://perma.cc/CL7G-BXJQ] (unpublished manuscript) (arguing that the failure of existing statutes and financial regulations to keep pace with innovation in the fintech sector contributes to regulatory uncertainty and that regulations should be modernized to address evolving characteristics of the financial industry).

189. Tan, supra note 12, at 917 (arguing that in doing so, BNPL lenders fall "outside of consumer credit regulations" and then "insert themselves as intermediaries within the existing space that is dominated by financial incumbents such as banks and established payments providers").

190. See Roberto Moro-Visconti, Salvador Cruz Rambaud & Joaquín López Pascual, Sustainability in FinTechs: An Explanation Through Business Model Scalability and Market Valuation, Sustainability, Dec. 10, 2020, at 1, 2–4 (describing the fintech business model in terms of the strategic deployment of technology-driven enhancements to existing financial business models).

regulatory framework that balances the need to regulate the financial activities of nonfinancial merchants with the political and legal constraints within which the CFPB operates, describing how it can exercise its statutory rulemaking authority to proscribe UDAAPs to regulate both the direct and indirect encouragement of BNPL by merchants to consumers.

A. *The Rationale for Regulating Merchants Offering Buy Now, Pay Later*

1. *Targeting Consumers' Primary Point of Contact With Buy Now, Pay Later.* — Promulgating regulations on merchants' activities and representations in offering BNPL financing to consumers would address many of the challenges accompanying the extension of credit card regulations to BNPL lenders.[191] This is because such an approach would directly target most consumers' first introduction to BNPL: the point of sale.[192] By focusing on consumers' first point of contact with BNPL financing, regulations would effectively address consumers' interface with BNPL at two crucial stages—first, when consumers are introduced to BNPL by merchants and second, when consumers apply for financing from lenders. This two-pronged framework would provide the needed flexibility to ensure that regulations continue to keep up with developments in the fintech space, while simultaneously ensuring that regulations do not overly burden emerging actors[193] or stifle any benefits that innovations in consumer finance may confer to consumers.[194]

Regulating both lenders and merchants would also ensure that each party with a vested interest in encouraging consumer spending[195] is accountable to consumers for its activities and representations. Moreover, focusing on representations by merchants would effectively address their

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191. See supra section II.C.

192. See, e.g., Diana Milanesi, Buy Now, Pay Later ("BNPL") Under Regulatory Scrutiny—The Evolving Regulatory Landscape for BNPL in the United States, the United Kingdom, and Europe 1, 48 (Stan.–Vienna Transatlantic Tech. L.F., Working Paper No. 89, 2022), https://law.stanford.edu/wp-content/uploads/2022/06/TTLF-WP-89-Milanesi.pdf [https://perma.cc/98MC-G4SA] (explaining that BNPL is typically introduced to consumers at the point of sale, whether that be in-store or online).

193. See, e.g., Lisa Quest, Four Ways Regulators Must Keep Up With the Global Digital Economy, Oliver Wyman F. (Aug. 2, 2021), https://www.oliverwymanforum.com/future-of-data/2021/aug/four-ways-regulators-must-keep-up-with-the-global-digital-economy.html [https://perma.cc/ZK48-XG62] (arguing that "[t]ruly protecting consumers, while encouraging more technological advances, will require a more modern, holistic, regulatory architecture from governments").

194. It is particularly important that regulators keep in mind that, in the American context, the status quo itself is shaped by systemic inequities that create profound racial, ethnic, and class disparities in the percentage of income spent on interest and finance-related fees. See, e.g., Meghan Greene, Elaine Golden, Hannah Gdalman & Necati Celik, Fin. Health Network, FinHealth Spend Report 2022, at 11–13 (2022), https://finhealthnetwork.org/wp-content/uploads/2022/05/FinHealth_Spend_Report_2022_Final.pdf [https://perma.cc/TMS9-8YZJ] (describing the ways in which several populations have been traditionally underserved by the financial sector).

195. See supra notes 174–182 and accompanying text.

increasing tendency to push BNPL financing on reluctant customers.[196] This is especially important in light of the significant regulatory gap left by relying on disclosures made by lenders, which ignores merchants' increasingly active role in furnishing BNPL financing to consumers. Merchants have begun using AI-driven recommendations to target their communications to consumers with abandoned carts or who have previously used BNPL; they have also started pairing BNPL financing with price discounts to further lower consumers' psychological spending thresholds.[197] Additionally, focusing on market activities of both lenders and merchants would provide the CFPB with flexibility in targeting merchant industries that may be particularly prone to encouraging over-extension by young consumers or those with poor credit.[198]

2. *Clarifying the Nature of Buy Now, Pay Later.* — Regulating both lenders and merchants can provide an important check on lenders' ability to circumvent regulations by relying on representations made by merchants, which are often integrated into lenders' theory of customer acquisition.[199] Lenders often instruct partnering merchants to aggressively promote BNPL directly to their customers, with suggestions ranging from prominently displaying the lender's name on the merchant's website and social media accounts to sending targeted emails to customers encouraging them to use BNPL.[200] In fact, some lenders now advise partnering merchants to encourage consumers to consider BNPL financing *before*

196. For example, BNPL lenders encourage partnering merchants to target prospective users who have already elected not to make a purchase. See, e.g., Monica Deretich, 3 Smart Ways to Increase Buy Now, Pay Later Revenue, Retail Touch Points (June 14, 2021), https://www.retailtouchpoints.com/blog/3-smart-ways-to-increase-buy-now-pay-later-revenue [https://perma.cc/C5FG-WE8K] (advising merchants to "add cross-sell or upsell personalized product recommendations with BNPL marketing to abandoned cart emails").

197. Id.

198. See, e.g., Taanya Garg, The (Debt)rimental Surge in Buy Now, Pay Later, Shift London (Jan. 20, 2022), https://www.shiftlondon.org/features/the-surge-in-buy-now-pay-later-and-how-its-debtrimental-to-your-credit-score/ [https://perma.cc/84D8-K94X] (detailing young consumers' experience with BNPL in retail and explaining how they may be particularly prone to incurring debt through BNPL services).

199. Many BNPL lenders already encourage partnering merchants to incorporate their messaging in their representations to customers. See, e.g., Boost Your DTC Strategy to Get More Customers NOW, Afterpay, https://www.afterpay.com/en-US/for-retailers/access/marketing/boost-your-dtc-strategy-to-get-more-customers-now [https://perma.cc/VF55-6MTA] (last visited Aug. 18, 2023).

200. See, e.g., 5 Ways to Promote Your Afterpay Partnership, Afterpay, https://www.afterpay.com/en-US/for-retailers/access/marketing/5-ways-to-promote-your-afterpay-partnership [https://perma.cc/AG74-YDWV] (last visited Aug. 18, 2023) (suggesting that merchants advertise BNPL in "every place [their] customer could be shopping or discovering products"); see also Buy Now, Pay Later for Merchants: The 2023 Guide, PayPal (Jan. 30, 2023), https://www.paypal.com/us/brc/article/buy-now-pay-later-merchant-guide-2023 [https://perma.cc/NH9Q-5GBB] ("In 2023, buy now, pay later for merchants doesn't end with simply offering BNPL at checkout. You can use promotional messaging to let customers know earlier in the buying journey that you offer a certain BNPL option.").

checkout.[201] Clarifying that these consumer-facing representations are also subject to regulatory oversight would be instrumental in ensuring the efficacy of guidelines for lenders. Consequently, guidelines for merchants would provide an additional regulatory mechanism for preventing consumer confusion as to the nature of BNPL financing and help to ensure customers understand that—despite its differences from traditional modes of credit—BNPL represents a financial obligation that requires careful decisionmaking.[202]

Requiring merchants' representations to effectively communicate to consumers that BNPL financing entails taking on an installment loan would also strengthen the CFPB's proposed application of credit card regulations to lenders by contextualizing the information provided in these disclosures as it relates to BNPL.[203] Merchant regulation would also be responsive to the increasingly creative ways in which BNPL lenders may obfuscate the underlying nature of their products[204] because such a regulation would require merchants to initially identify these products accurately. Risks of consumer confusion engendered by BNPL lenders portraying their products as budgeting tools rather than installment loans would be substantially mitigated if, at checkout, merchants' representations to consumers provided an objective overview of what BNPL financing entails.

B. *Challenges to Regulating Merchants*

The primarily challenge in regulating the activities of partnering merchants offering BNPL to consumers is that this is a more complex undertaking than the CFPB's current proposal to extend existing credit card regulations to BNPL lenders. Such a regulatory approach raises issues as to the scope of the CFPB's authority to regulate nonfinancial actors[205]

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201. See, e.g., Tom Musbach, 5 Ways to Reduce Shopping Cart Abandonment, Affirm (Feb. 17, 2022), https://www.affirm.com/business/blog/affirm-reduce-shopping-cart-abandonment [https://perma.cc/96PU-CFBJ] ("[M]ak[e] sure shoppers are aware of the BNPL option well before checkout. One easy way to do this is to display the option as part of the product display page (PDP), showing what the fractional amount would be if buyers choose to make biweekly or monthly payments.").

202. See supra notes 173–185 and accompanying text.

203. For a comparison of the efficacy of TILA and non–TILA disclosures, see Enrique Seira, Alan Elizondo & Eduardo Laguna-Müggenburg, Are Information Disclosures Effective? Evidence From the Credit Card Market, 9 Am. Econ. J. 277, 305 (2017) (concluding that "currently mandated disclosures are likely to have zero effect" and that "alternative messages . . . are probably more effective").

204. See Aalders, supra note 17, at 951 (noting that lenders "present[] BNPL loans not as credit, but as the user's own (future) money"); see also supra section II.A.2.

205. The CFPB has nonetheless regularly exercised regulatory authority over certain activities of nonfinancial actors since its inception. See, e.g., Erin F. Fonté, Mobile Payments in the United States: How Disintermediation May Affect Delivery of Payment Functions, Financial Inclusion and Anti-Money Laundering Issues, 8 Wash. J.L. Tech. & Arts 419, 432 (2013) (explaining that nonfinancial institutions "are also subject to CFPB rulemaking and

and would likely be met with political backlash.[206] Formulating a regulatory response to BNPL must be contextualized within the broader trajectory of regulation in the United States, which has focused primarily on regulating representations made to consumers by credit providers.[207] And given that the CFPB was created primarily to ensure that consumers are protected in their interactions with financial actors,[208] any regulations that the CFPB promulgates over nonfinancial merchants offering BNPL to consumers should reflect a narrow interpretation of the Bureau's statutory authority and should be clearly limited to market activities undertaken pursuant to lender–merchant agreements.

Such a balanced approach is also important in light of current trends in the legal landscape, which have exemplified the federal courts' increasing willingness to scrutinize the power of federal agencies.[209] The

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interpretive authority . . . depend[ing] on [the nonfinancial institution's] role," and that with more independent nonfinancial institutions, "financial services laws, rules, and regulations may be more likely to apply"). For an argument that this trend may lead to a jurisdictional clash with the FTC, see Rory Van Loo, Technology Regulation by Default: Platforms, Privacy, and the CFPB, 2 Geo. L. Tech. Rev. 531, 544 (2018) ("Given the FTC's role in privacy, the CFPB would be faced with a potential jurisdiction clash along the lines of what some scholars predict will become increasingly common in a world in which software infuses most everything.").

206. In fact, House Republicans have indicated their opposition to regulating BNPL in any form. See Letter from U.S. Reps. Patrick McHenry, Ann Wagner, Frank D. Lucas, Pete Sessions, Bill Posey, Blaine Luetkemeyer, Bill Huizenga, Andy Barr, Roger Williams, French Hill, Tom Emmer, Lee M. Zeldin, Barry Loudermilk, Alexander X. Mooney, Warren Davidson, Ted Budd, Trey Hollingsworth, Anthony Gonzalez, John Rose, Bryan Steil, Lance Gooden, William Timmons, Van Taylor & Ralph Norman to Rohit Chopra, Dir., CFPB 2 (Dec. 14, 2022) ("Neither the CFPB nor any government entity should be dictating how consumers spend their money."), https://financialservices.house.gov/uploadedfiles/2022-12-14_hfsc_cfpb_hearing_december_letter_final__final.pdf [https://perma.cc/2L2H-AE9Z].

207. See supra notes 91–101 and accompanying text.

208. See Julie R. Caggiano, Jennifer L. Dozier, Richard P. Hackett & Arthur B. Axelson, Mortgage Lending Developments: A New Federal Regulator and Mortgage Reform Under the Dodd–Frank Act, 66 Bus. Law. 457, 461–62 (2011) (explaining that the primary purpose of the CFPB's creation was to ensure fair and equal access to consumer financial products through the "promulgation of rules and regulations, compliance supervision, and oversight of the entities under its jurisdiction . . . as well as . . . market analysis, assessment of market risks, and enforcement"); see also supra section I.B.2.

209. See, e.g., West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2608 (2022) (noting cases in which "'history and the breadth of the authority that [the agency] has asserted' . . . provide a 'reason to hesitate before concluding that Congress' meant to confer such authority" (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000))); see also Craig Green, Deconstructing the Administrative State: *Chevron* Debates and the Transformation of Constitutional Politics, 101 B.U. L. Rev. 619, 626 (2021) ("In recent years, *Chevron*'s status has dramatically changed, shifting from a bedrock judicial precedent to a contested doctrine that is sometimes toxic even to mention."). For a discussion of the substantial disparity as to the extent of deferring to determinations of federal agencies among the lower courts, see Michael Coenen & Seth Davis, Minor Courts, Major Questions, 70 Vand. L. Rev. 777, 841–42 (2017) (explaining that "not all lower courts may be alike for purposes of implementing a 'major dysfunctions' exception to the *Chevron* test").

scope of the CFPB's regulatory authority over even traditional financial institutions has been challenged by its detractors since its inception,[210] and in recent years, the number of companies that have elected to challenge the Bureau's authority rather than comply with enforcement actions has increased.[211] Accordingly, it is crucial that any regulation of merchants' activities be clearly limited to the offering of BNPL financing to consumers.[212]

Making it clear that regulations are limited to the BNPL interaction will also be critical in minimizing enforcement obstacles stemming from political polarization, which has increasingly threatened the efficacy of agency action.[213] Given the historical backdrop of consumer finance in the

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210. Challenges to the creation of the CFPB have been framed under a variety of theories, most often alleging that the agency's independence violates separation-of-powers principles and the Appointments Clause. See Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2191–92 (2020) (holding the CFPB Director's removal protections unconstitutional as violative of the separation of powers); C. Boyden Gray, Congressional Abdication: Delegation Without Detail and Without Waiver, 36 Harv. J.L. & Pub. Pol'y 41, 42–47 (2013) (arguing that the CFPB is subject to constitutional challenges under the Appointment Clause, the Appropriations Clause, and the nondelegation principle); Arielle Rabinovitch, Constitutional Challenges to Dodd–Frank, 58 Antitrust Bull. 635, 635–38 (2013) ("Arguments concerning the separation of powers contend that Dodd–Frank is problematic from the perspective of the nondelegation doctrine, the Appointments Clause, and Article III. Arguments concerning the Takings Clause are based on substantive challenges to constitutionality. [Another] argument . . . examines a First Amendment challenge to section 1502 . . . .").

211. For example, the Fifth Circuit recently sustained a challenge to the CFPB's 2017 Payday Lending Rule, not on the grounds that the agency acted arbitrarily and capriciously or without substantial evidence, but because "Congress's decision to abdicate its appropriations power under the Constitution, i.e., to cede its power of the purse to the Bureau, violates the Constitution's structural separation of powers." Cmty. Fin. Servs. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau, 51 F.4th 616, 623 (5th Cir. 2022), cert. granted, 143 S. Ct. 978 (2023). The Second Circuit expressly declined to follow this approach. See Consumer Fin. Prot. Bureau v. Law Offs. of Crystal Moroney, P.C., 63 F.4th 174, 182–83 (2d Cir. 2023) (finding no support for the Fifth Circuit's holding in Supreme Court precedent, constitutional text, or the history of the Appropriations Clause). The Supreme Court granted certiorari in *Community Financial Services* on February 27, 2023, and heard oral argument in its October 2023 sitting. See *Consumer Financial Protection Bureau v. Community Financial Services Association of America, Limited*, SCOTUSblog, https://www.scotusblog.com/case-files/cases/consumer-financial-protection-bureau-v-community-financial-services-association-of-america-limited/ [https://perma.cc/79KU-Y57V] (last visited Oct. 26, 2023).

212. See Kristin E. Hickman, Symbolism and Separation of Powers in Agency Design, 93 Notre Dame L. Rev. 1475, 1499 (2018) (arguing that "[g]iven the unrepresentativeness of the fourth branch, public perceptions of agency fairness and legitimacy are crucial if we want people to have faith in government agencies and the rule of law and, correspondingly, to comply with regulatory mandates").

213. See Gillian Metzger, The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege, 131 Harv. L. Rev. 1, 4 (2017) (arguing that "rhetorical anti-administrativism forms a notable link between the contemporary political and judicial attacks on national administrative government," connected by the "political flavor of many of the lawsuits underlying the current judicial attacks[] . . . [and] a shared network of conservative lawyers, organizations, academics, and funders involved in both").

United States,[214] it is perhaps unsurprising that actions taken by the CFPB[215]—along with the existence of the Bureau itself[216]—have been subject to particularly vigorous opposition in the political process,[217] and this represents a substantial hurdle in ensuring the stability of a regulatory scheme for nonfinancial actors. The call to regulate BNPL in any form has been fractured along ideological lines, with Democrats raising concerns of regulatory evasion by lenders[218] and Republicans vigorously denying the Bureau's statutory authority to regulate BNPL lenders at all.[219]

In light of these concerns, regulations on merchants should be directed toward the lender–merchant relationship and should be confined to activities flowing from the convergence of interests between lenders and merchants. While regulating the activities of nonfinancial actors is certainly a departure from the traditional model developed during the twentieth century,[220] such an approach is needed to address the emergence of fintech offerings such as BNPL, which operate in a fundamentally different manner from traditional credit providers and occupy a separate place in many consumers' perceptions.[221] The development of a framework that is responsive to current developments in

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214. See supra section I.B.

215. Backlash to the CFPB's activities has itself often been in the form of accusing the Bureau of partisanship. A letter by Republican Senate leadership expressing opposition to changes in CFPB's rules of adjudication accused the Bureau of "pursuing a radical and highly-politicized agenda unbounded by statutory limits." Letter from Pat Toomey, Richard Shelby, Mike Crapo, Tim Scott, M. Michael Rounds, Thom Tillis, John Kennedy, Bill Haggerty, Cynthia Lummis, Jerry Moran, Kevin Cramer & Steve Daines, U.S. S. Comm. on Banking, Hous. & Urb. Affs., to Rohit Chopra, Dir., CFPB (Sept. 12, 2022), https://www.banking.senate.gov/imo/media/doc/banking_republicans_letter_to_cfpb.pdf [https://perma.cc/ZDA6-A95H].

216. See Deepak Gupta, Reactions to *Noel Canning v. NLRB*: The Consumer Protection Bureau and the Constitution, 65 Admin. L. Rev. 945, 953–55 (2013) (noting that the institutional structure of the CFPB was hotly debated throughout the legislative history of Dodd–Frank and that, after the Act's passage, Congressional Republicans have remained steadfast in attempts to negotiate substantial reforms to the Bureau).

217. See, e.g., Repeal CFPB Act, S. 1363, 117th Cong. (2023); Repeal CFPB Act, S. 1090, 117th Cong. (2021); Repeal CFPB Act, S. 1335, 116th Cong. (2019); Repeal CFPB Act, S. 370, 115th Cong. (2017); Repeal CFPB Act, S. 1804, 114th Cong. (2015).

218. See, e.g., Letter from U.S. Sens. Jack Reed, Sherrod Brown, Chris Van Hollen, Elizabeth Warren, Tina Smith & Jon Ossoff to Rohit Chopra, Dir., CFPB (Dec. 15, 2021), https://www.reed.senate.gov/imo/media/doc/letter_to_cfpb_to_take_action_to_ensure_transparency__oversight_of_buy_now_pay_later_products__providers.pdf [https://perma.cc/VEX3-C4RT] ("Many BNPL providers structure these products in an effort to avoid certain consumer protection obligations under the Truth in Lending Act or the Military Lending Act, which generally apply to loans that are repayable in more than four installments or are subject to a finance charge.").

219. See, e.g., McHenry et al., supra note 206, at 1 (arguing that "the CFPB's recent actions with respect to nonbank entities exceed its statutory authority and harm the very consumers the CFPB was established to protect").

220. See supra section I.B.1.

221. See supra section II.C.1.

consumer finance also accords with the Bureau's statutory authority, which is flexible by design.[222]

C. *Regulating Merchants Under the Prohibition on Unfair, Deceptive, or Abusive Acts or Practices*

1. *Clarifying that Merchants Partnering With Buy Now, Pay Later Lenders Are Statutorily Covered Service Providers.* — The authority to prohibit UDAAPs conferred on the CFPB by Dodd–Frank[223] provides the Bureau with the flexibility needed to effectively regulate merchants' BNPL promotion activities while providing clear, uniform expectations for lenders and merchants alike. The CFPB has expressed a willingness in the past to apply its UDAAP regulatory authority to keep pace with developments in the consumer finance industry. For example, in 2016, the Bureau asserted its authority to regulate data security practices for the first time when it brought an enforcement action against an Iowa-based fintech firm for deceptive data security statements.[224] The CFPB should invoke its statutory authority to regulate certain merchant activities by clarifying that merchants that provide consumers with the option to use BNPL at the point of sale pursuant to lender–merchant agreements fall under the statutory definition of service providers.[225]

The CFPB could model regulations for merchants' BNPL promotion activities on its recent treatment of digital marketing providers that offer services to financial firms.[226] It has issued interpretive guidance characterizing these digital marketing providers' extended involvement with financial companies—including the provision of sophisticated behavioral analytics—as a service provider relationship within the meaning of the CFPA.[227] The CFPB explained that a "'material' service is a service that is significant or important" and includes activities by partnering nonfinancial entities to "identify or select prospective customers and/or select or place content to affect consumer engagement,

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222. See Leonard J. Kennedy, Patricia A. McCoy & Ethan Bernstein, The Consumer Financial Protection Bureau: Financial Regulation for the Twenty-First Century, 97 Cornell L. Rev. 1141, 1152 (2012) (describing the Bureau's regulatory approach).

223. See 12 U.S.C. § 5531(b) (2018).

224. See Dwolla, Inc., CFPB No. 2016-CFPB-0007, 5–7 (Mar. 2, 2016). The CFPB has also construed UDAAPs to extend to a company's failure to monitor its relationships with third parties. See Laura Hobson Brown & Dustin C. Alonzo, Online Advertising and Marketing Developments, 73 Bus. Law. 517, 524 (2018) (describing the CFPB's position that a company's "failure to monitor its third-party relationships, both its buy-side vendors and sell-side purchasers, constituted a UDAAP violation").

225. 12 U.S.C. §§ 5481(26)(A), 5536.

226. See Limited Applicability of Consumer Financial Protection Act's "Time or Space" Exception With Respect to Digital Marketing Providers, 87 Fed. Reg. 50,556, 50,557–60 (Aug. 17, 2022) (to be codified at 12 C.F.R. ch. X).

227. Id. at 50,557–60 ("[D]igital marketers that, for example, determine or suggest which users are the appropriate audience for advertisements are materially involved in the development of content strategy[] . . . and are typically service providers under the CFPA.").

including purchasing or adoption behavior."[228] It distinguished this sophisticated marketing function from certain statutorily exempted advertising activities[229] because the activities undertaken by digital marketing providers are "materially involved" with customer acquisition.[230] It further explained that "identifying prospective customers and then attempting to acquire those customers is a significant component of the 'offering' of a consumer financial product or service, which is part of the legally relevant test for determining that a firm is a 'covered person.'"[231]

The Bureau could develop an analogous framework for merchants by characterizing their incorporation of BNPL financing at checkout as providing a material service to BNPL lenders. This would be analogous to the CFPB's regulation of digital marketing providers because lenders rely on merchants' activities and representations to drive customer acquisition.[232] Moreover, many merchants encourage consumers to select BNPL financing with targeted communications,[233] which the CFPB specifically identified in its conclusion that digital marketing providers are covered service providers.[234] The CFPB should exercise its rulemaking authority to extend the definition of UDAAPs to include certain activities undertaken by merchants to influence consumers to finance purchases with BNPL. These activities can either be direct, as in the case of advertising or marketing BNPL to consumers, or indirect, as in the case of omitting specifically enumerated safeguards.

2. Prohibiting Abusive Representations and Activities by Merchants. — Merchants' BNPL promotion activities fall squarely within the Bureau's

228. Id. at 50,558.

229. See 12 U.S.C. § 5481(26)(B)(ii) (explaining that offering or providing "time or space for an advertisement for a consumer financial product or service through print, newspaper, or electronic media" to a covered person alone is insufficient to qualify a person as a service provider).

230. Limited Applicability of Consumer Financial Protection Act's "Time or Space" Exception With Respect to Digital Marketing Providers, 87 Fed. Reg. at 50,558.

231. Id.

232. See Dikshit et al., supra note 29 ("The most prevalent misconception . . . is that shopping apps offering 'buy now, pay later' (BNPL) solutions are pure financing offerings. . . . [T]he leading Pay in 4 providers are building integrated shopping platforms that engage consumers through the entire purchase journey, from prepurchase to postpurchase.").

233. See Deretich, supra note 196 (discussing the use of BNPL to create long-term customer relationships); see also Nian Wang, Joseph Pancras, Hongju Liu & Malcolm Houtz, "Buy Now, Pay Later" (BNPL): Optimizing Customer Targeting Decisions Using Payment Default and Product Return Option Values 2–4 (Univ. of Conn. Sch. of Bus., Working Paper No. 22-13, 2021), https://ssrn.com/abstract=4066695 [https://perma.cc/XUZ9-QPJL] (describing the use of BNPL for targeted marketing).

234. See Limited Applicability of Consumer Financial Protection Act's "Time or Space" Exception With Respect to Digital Marketing Providers, 87 Fed. Reg. at 50,558 ("When digital marketers target and deliver advertisements to users with certain characteristics, the digital marketer is materially involved in the development of content strategy and is not covered by the 'time or space' exception.").

broad statutory mandate[235] to proscribe abusive practices.[236] Given the informational asymmetry between merchants and consumers, along with consumers' tendency to view BNPL differently from traditional credit,[237] regulation of certain BNPL promotion activities would be analogous to the CFPB's prior interpretation that creating a "sense of urgency" in consumers constitutes an abusive practice in the payday lending context.[238] The CFPB should clarify that merchants' targeting of consumers and urging them to finance purchases with BNPL is a UDAAP in the same way as "creat[ing] and leverag[ing] an artificial sense of urgency to induce delinquent borrowers with a demonstrated inability to repay their existing loan to take out a new . . . loan with accompanying fees."[239]

Prohibiting merchants from encouraging the uninformed use of credit in this manner strikes the best balance between the interests of consumers, lenders, and merchants: Consumers are provided with the information necessary to understand the costs and benefits of BNPL financing, and lenders and merchants are apprised of uniform guidelines that are clear and minimally burdensome. The CFPB can also supplement these guidelines as needed by exercising its supervisory authority to detect and assess risks to consumers.[240] While formulating the precise contours of regulations directed toward merchants requires a fact-intensive inquiry, at a minimum these regulations can address several risks to consumers that have already been identified.[241]

First, regulations could mandate that merchants provide certain safeguards against overspending by limiting the availability of BNPL financing. To address the tendency among consumers to take on multiple BNPL loans,[242] the CFPB could issue a rule defining as a UDAAP merchants' sales that are financed with BNPL loans from multiple lenders. This would have the effect of limiting access to BNPL credit and requiring consumers to pay off existing balances before making purchases, which would in turn discourage impulsive buying and provide consumers with a more realistic appraisal of their financial constraints.

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235. See Levitin, The Consumer Financial Protection Bureau, supra note 75, at 343 (characterizing the CFPB's authority in this area as "extremely broad").

236. See supra note 116.

237. See supra text accompanying notes 157–161.

238. See ACE Cash Express, Inc., CFPB No. 2014-CFPB-0008, 10–11 (July 10, 2014).

239. Id. (explaining that such practices take "unreasonable advantage of the inability of consumers to protect their own interests in selecting or using a consumer financial product or service").

240. 12 U.S.C. § 5512(c)(4) (2018).

241. See supra section II.A.

242. See Mandell & Lawrence, supra note 50, at 292 (explaining that risks associated with BNPL "are more pronounced for users who juggle multiple BNPL loans[] and . . . are left to their own financial devices without any TILA protections"); Boshoff et al., supra note 18, at 10 ("Of the consumers experiencing adverse outcomes from BNPL[,] . . . 52% had used at least two BNPL facilities over . . . the past six months.").

Second, regulations could prevent misrepresentations by requiring that merchants provide affirmative notice as to the nature of the loan obligation of BNPL financing at the point of sale. The CFPB's proposed plan to extend credit card regulations to BNPL lenders would otherwise effectively enable lenders to circumvent disclosure requirements by relying on merchants—which are not subject to disclosure requirements under TILA[243]—to convince consumers to choose BNPL financing before they come across any required representations by lenders. Clarifying that a merchant's failure to provide minimum notice to consumers at the point of sale constitutes a UDAAP would ensure that both parties with an interest in the consumer's financing decision are accountable for their representations.[244] This could involve the disclosure of financing terms or else at a minimum require that merchants hosting an option to use BNPL financing direct consumers to lenders' disclosure statements to minimize the risk of circumvention. Merchants could also be required to provide information as to the terms of use for BNPL products in their FAQ section, a practice that some have already employed.[245] Regulations could be further tailored to ameliorate consumer confusion[246] by requiring that merchants provide consumers with notice that BNPL is a form of credit.

Third, regulations could prevent merchants from directly encouraging BNPL financing by prohibiting as a UDAAP the use of BNPL-related pop-up notices at checkout, as well as by placing restrictions on the ability of merchants to advertise partnering lenders' BNPL offerings.[247] This

243. See 12 C.F.R. § 1026.2(a)(17)(i) (2023) (defining "creditor" as a person who, among other things, "regularly extends consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments").

244. The CFPB has analogously extended UDAAP liability to other activities that are not reached by the enumerated consumer laws. See Press Release, CFPB, CFPB Targets Unfair Discrimination in Consumer Finance (Mar. 16, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-targets-unfair-discrimination-in-consumer-finance/ [https://perma.cc/3ECT-D969] (explaining that "discrimination may meet the criteria for 'unfairness' by causing substantial harm to consumers that they cannot reasonably avoid, where that harm is not outweighed by countervailing benefits to consumers or competition"). A federal district court in the Eastern District of Texas recently held that this regulation exceeded the CFPB's statutory authority under the Major Questions Doctrine. See Chamber of Com. of the U.S. v. Consumer Fin. Prot. Bureau, No. 6:22-cv-00381, 2023 WL 5835951, at *8 (E.D. Tex. Sept. 8, 2023) (determining that "the CFPB faces a high burden in arguing that Congress conferred a sweeping antidiscrimination authority without defining protected classes or defenses, without using the words 'discrimination' or 'disparate impact,' and while separately giving the agency authority to police 'discrimination' only in specific areas").

245. Many merchants who offer BNPL financing through Affirm, for example, provide consumers with information as to their rights and responsibilities directly on their website. See, e.g., Shop Pay Installments/ AFFIRM ABOUT, FAQ's & Terms of Service, Mi Raíz Jewelry, https://www.miraizjewelry.com/pages/shop-pay-installments-affirm-about-faqs-terms-of-service [https://perma.cc/QT79-57W6] (last visited Aug. 18, 2023).

246. See supra section II.C.1.

247. Many BNPL firms provide partnering merchants with advice on how to encourage BNPL use by customers. See, e.g., How to Encourage Customers to Use Buy Now Pay Later

would ensure that the option to finance purchases with BNPL is not portrayed to consumers as preferable to other forms of payment at checkout. Ultimately, regulations should seek to enable consumers to make financing decisions independently, without encouragement by merchants to choose BNPL over any other payment method.

CONCLUSION

The emergence of BNPL represents a critical juncture in the development of consumer financial protection regulations for the modern era and demands an innovative regulatory approach that is responsive to the industry's unique characteristics. Despite its broad popular appeal, BNPL poses several significant risks to consumers that merit close consideration. As the definition of consumer credit continues to expand, regulations must stay abreast of this rapidly developing industry to ensure that offerings are fairly represented to consumers and to encourage the responsible use of credit. This Note makes an important contribution to the literature by presenting a novel regulatory framework for fintech products such as BNPL that recognizes the important role played by nonfinancial market actors such as merchants partnering with BNPL lenders. By harnessing its broad mandate to regulate UDAAPs, the CFPB can tailor regulations to be responsive to current developments in consumer finance and empower consumers to make informed decisions about their finances.

(BNPL) in Your Store, ChargeAfter (Feb. 26, 2021), https://chargeafter.com/how-to-encourage-customers-to-use-buy-now-pay-later-in-your-store/ [https://perma.cc/U3HX-3H6R] (encouraging merchants to send mailers to their subscribers advertising the availability of BNPL financing, to use "catchy banners, icons, or logos to advertise" BNPL services, and to make announcements on social media).

ESSAY

THE FALSE PROMISE OF JURISDICTION STRIPPING

Daniel Epps & Alan M. Trammell***

Jurisdiction stripping is seen as a nuclear option. Its logic is simple: By depriving federal courts of jurisdiction over some set of cases, Congress ensures those courts cannot render bad decisions. To its proponents, it offers the ultimate check on unelected and unaccountable judges. To its critics, it poses a grave threat to the separation of powers. Both sides agree, though, that jurisdiction stripping is a powerful weapon. On this understanding, politicians, activists, and scholars throughout American history have proposed jurisdiction-stripping measures as a way for Congress to reclaim policymaking authority from the courts.

The conventional understanding is wrong. Whatever the scope of Congress's Article III power to limit the jurisdiction of the Supreme Court and other federal courts, jurisdiction stripping is unlikely to succeed as a practical strategy. At least beyond the very short term, Congress cannot use it to effectuate policy in the face of judicial opposition. Its consequences are chaotic and unpredictable, courts have tools they can use to push back on jurisdiction strips, and the judiciary's active participation is ultimately necessary for Congress to achieve many of its goals. Jurisdiction stripping will often accomplish nothing and sometimes will even exacerbate the problems it purports to solve.

Jurisdiction stripping can still prove beneficial, but only in subtle and indirect ways. Congress can regulate jurisdiction to tweak the timing of judicial review, even if it cannot prevent review entirely. Jurisdiction stripping also provides Congress a way to signal to the public and the judiciary the importance of an issue—and, possibly, to pressure courts to change course. But these effects are contingent, indeterminate, and unreliable. As a tool to influence policy directly, jurisdiction stripping simply is not the power that its proponents hope or its critics fear.

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INTRODUCTION

If Congress seeks to check the judiciary, jurisdiction stripping is supposedly one of the most potent weapons in its legislative arsenal.[1] The underlying logic is simple enough: Depriving a court of power to hear a case entirely prevents the court from producing a bad decision. Jurisdiction stripping would seemingly let Congress legislate and the President act without fear of judicial second-guessing and would prevent federal courts from intruding on states' prerogatives. To its proponents,

1. See, e.g., Stephen B. Burbank, The Architecture of Judicial Independence, 72 S. Cal. L. Rev. 315, 333–34 (1999) (describing jurisdiction stripping as a "powerful method[] of control" of judicial decisions); Barry Friedman, Reconstruction's Political Court: The History of the Countermajoritarian Difficulty (pt. 2), 91 Geo. L.J. 1, 16 (2002) (describing jurisdiction stripping as one of the "weapons in Congress's arsenal . . . to control the Court"); Christopher J. Sprigman, A Constitutional Weapon for Biden to Vanquish Trump's Army of Judges, New Republic (Aug. 20, 2020), https://newrepublic.com/article/158992/biden-trump-supreme-court-2020-jurisdiction-stripping [https://perma.cc/3URM-NG8G] [hereinafter Sprigman, A Constitutional Weapon] (describing jurisdiction stripping as "a power that can be employed to rein in politicized courts and even to override judicial decisions").

jurisdiction stripping offers the ultimate democratic check on unelected and unaccountable judges.[2] To its critics, it poses a grave threat to the separation of powers—even "the moral equivalent of nuclear war."[3] Both sides agree, though, that jurisdiction stripping is a powerful armament.

Working on this assumption, members of Congress have, at various points in American history, proposed bills to deprive federal courts of jurisdiction over hot-button issues such as school desegregation, abortion, school prayer, and same-sex marriage.[4] Activists and pundits, too, see jurisdiction stripping as a useful policy tool.[5] Most recently, progressives have embraced it as a way to rein in an aggressively conservative Supreme Court.[6] And while scholars have extensively debated jurisdiction stripping,

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2. See, e.g., Joseph Fishkin & William E. Forbath, The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy 431 (2022) (calling jurisdiction stripping a "tactical move[]" Congress might deploy against a hostile Supreme Court); Charles L. Black, Jr., The Presidency and Congress, 32 Wash. & Lee L. Rev. 841, 846 (1975) (arguing that congressional control of federal court jurisdiction is "the rock on which rests the legitimacy of the judicial work in a democracy"); Ryan D. Doerfler & Samuel Moyn, Democratizing the Supreme Court, 109 Calif. L. Rev. 1703, 1744 (2021) ("If properly calibrated, jurisdiction stripping statutes . . . could insulate precisely the attempted expansion of legislative rights from judicial limitation . . . while leaving judges power to protect other rights from unsuspected majoritarian excess."); Christopher Jon Sprigman, Congress's Article III Power and the Process of Constitutional Change, 95 N.Y.U. L. Rev. 1778, 1799–800 (2020) [hereinafter Sprigman, Congress's Article III Power] (describing jurisdiction stripping as "a means by which substantial, durable democratic majorities can push back against constitutional entrenchment and the counter-majoritarian force of judicial supremacy").

3. Laura N. Fellow, Note, Congressional Striptease: How the Failures of the 108th Congress's Jurisdiction-Stripping Bills Were Used for Political Success, 14 Wm. & Mary Bill Rts. J. 1121, 1141 (2006) (internal quotation marks omitted) (quoting Limiting Federal Court Jurisdiction to Protect Marriage for the States: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary, 108th Cong. 21 (2004) (statement of Martin H. Redish, Louis and Harriet Ancel Professor of Law and Public Policy, Northwestern Law School)); see also Janet Cooper Alexander, Jurisdiction-Stripping in a Time of Terror, 95 Calif. L. Rev. 1193, 1198 (2007) (describing jurisdiction stripping as "the nuclear option"); Paul Stancil, Congressional Silence and the Statutory Interpretation Game, 54 Wm. & Mary L. Rev. 1251, 1271 (2013) (describing jurisdiction stripping as one of "the political branches' few nuclear options").

4. See infra section I.D (describing jurisdiction-stripping measures proposed throughout American history).

5. See, e.g., Adam Freedman, Congress Can and Should Return Jurisdiction Over Marriage to the States, Nat'l Rev. (July 17, 2015), https://www.nationalreview.com/2015/07/obergefell-congress-same-sex-marriage-states/ [https://perma.cc/99Q2-H283] (arguing that Congress should abolish federal courts' jurisdiction over state laws concerning marriage); Phyllis Schlafly, Can Congress Limit Federal Court Jurisdiction?, Eagle F. (Jan. 25, 2006), https://eagleforum.org/column/2006/jan06/06-01-25.html [https://perma.cc/5Z7B-GRPG] (describing jurisdiction stripping as effective and calling for Congress to use it to protect conservative priorities).

6. See Kia Rahnama, The Other Tool Democrats Have to Rein in the Supreme Court, Politico (Oct. 26, 2020), https://www.politico.com/news/magazine/2020/10/26/amy-coney-barrett-confirmation-court-packing-jursidiction-stripping-432566 [https://perma.cc/QG4A-NKQP] (advocating jurisdiction stripping as a way to prevent the

that conversation has focused almost exclusively on questions about its constitutionality and taken for granted that jurisdiction stripping, if permissible, is a mighty power.[7]

Yet these debates almost entirely gloss over a fundamental question: Would jurisdiction stripping actually work? That is, even if the Constitution gives Congress broad power over federal courts' jurisdiction, could Congress successfully wield that power to compel its desired policy outcomes?[8] This Essay argues that—contrary to what nearly everyone has assumed[9]—the short answer is "no." As a strategy for directly circumventing hostile courts, jurisdiction stripping will in practice often prove pointless or even backfire. To the extent that jurisdiction stripping can

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Supreme Court from ruling on abortion-related issues); Caroline Vakil, Ocasio-Cortez, Progressives Call on Schumer, Pelosi to Strip SCOTUS of Abortion Jurisdiction, The Hill (July 15, 2022), https://thehill.com/homenews/house/3561533-ocasio-cortez-progressives-call-on-schumer-pelosi-to-strip-scotus-of-abortion-jurisdiction/ [https://perma.cc/S5QK-Z5L4] ("As we Democrats plan for further legislative action to protect and enshrine abortion rights . . . we urge the exercise of Congress' constitutional powers under Article III to include language that removes the Supreme Court's appellate jurisdiction over such legislation." (internal quotation marks omitted) (quoting Letter from Jamaal Bowman, Cori Bush, Mondaire Jones, Kaialiʻi Kahele, Marie Newman, Alexandria Ocasio-Cortez, Ilhan Omar, Mark Takano, Rashida Tlaib & Bonnie Watson Coleman, U.S. Reps., to Nancy Pelosi, Speaker, U.S. House of Reps. & Chuck Schumer, Majority Leader, U.S. Sen. (July 13, 2022) (on file with the *Columbia Law Review*))); David Yaffe-Bellany, Liberals Weigh Jurisdiction Stripping to Rein in Supreme Court, Bloomberg (Oct. 6, 2020), https://www.bloomberg.com/news/articles/2020-10-06/to-rein-in-supreme-court-some-democrats-consider-jurisdiction-stripping (on file with the *Columbia Law Review*) (noting that "[a] handful of academics and liberal thinkers" are "advocating jurisdiction stripping or other reforms that would chip away at the court's power"); Joshua Zeitz, How the Founders Intended to Check the Supreme Court's Power, Politico (July 3, 2022), https://www.politico.com/news/magazine/2022/07/03/dont-expand-the-supreme-court-shrink-it-00043863 [https://perma.cc/85XU-HBFU] (arguing that jurisdiction stripping, while risky, might be necessary to tame the Supreme Court's assertion of "largely unchecked power").

7. See infra section I.D (describing jurisdiction-stripping measures proposed throughout American history).

8. Several scholars have alluded to some of the practical problems with jurisdiction stripping, but none have done so in a comprehensive or systematic way. See Gerald Gunther, Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate, 36 Stan. L. Rev. 895, 910–11 (1984) (arguing that "jurisdiction-stripping laws are not truly effective means for implementing congressional dissatisfaction with Court rulings"); Michael Stokes Paulsen, Checking the Court, 10 N.Y.U. J.L. & Liberty 18, 59–62 (2016) [hereinafter Paulsen, Checking the Court] (questioning the efficacy of jurisdiction stripping); Martin H. Redish, Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination, 27 Vill. L. Rev. 900, 925 (1982) (noting the problem that jurisdiction stripping would "lock[] in" objectionable precedents); Herbert Wechsler, The Courts and the Constitution, 65 Colum. L. Rev. 1001, 1006 (1965) (noting that jurisdiction stripping might "freeze the very doctrines that had prompted its enactment"). The most thorough treatment was recently laid out in the Final Report of President Biden's commission charged with studying Supreme Court reform. See Presidential Comm'n on the Sup. Ct. of the U.S., Final Report 159–69 (2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf [https://perma.cc/3DA4-CMBK] [hereinafter Final Report].

9. See infra section I.D.

prove beneficial in some contexts, it does so only in subtle, indirect, and unreliable ways. It is thus a far weaker tool for policy reform than conventional wisdom suggests.

To prove this thesis, we work through various scenarios in which Congress might try to circumvent or countermand judicial precedents. It might, for example, strip courts of jurisdiction over a particular set of legal issues in the wake of an objectionable decision. Alternatively, it might attempt a preemptive strike—trying to protect certain precedents by stripping the Supreme Court of jurisdiction before it has the chance to overrule them. We also explore differences between jurisdiction stripping over issues that primarily emerge with respect to state law versus those that pertain to federal statutes and programs. Across all these contexts, we show that *direct* attempts to combat undesirable precedents (or prevent courts from issuing unfavorable decisions in the first place) will fail in most circumstances—at least beyond the very short term. Sometimes, jurisdiction stripping might even exacerbate the problem that it purports to solve.[10]

In parsing these various scenarios, we largely ignore whether and to what extent Congress *should* possess unfettered power over jurisdiction.[11] Instead, we ask only whether—assuming Congress has some power to regulate jurisdiction—Congress *could* accomplish its goals. In asking that question, the Essay operates within current jurisprudence and mainstream scholarly views about Congress's power. Under this view, Article III itself imposes few (if any) limitations on Congress's power, although other constitutional provisions (such as the Due Process Clause) might curb that power.[12] Even under this fairly broad conception of Congress's authority, and regardless of the context or how Congress manipulates the levers at its disposal, jurisdiction stripping simply is not the power that its proponents hope or its critics fear.

This is true for various reasons that depend on the particular context in which Congress seeks to strip jurisdiction. Sometimes, jurisdiction stripping will prove pointless because it will simply empower other actors (such as state courts) who will not share Congress's policy preferences. Sometimes, jurisdiction stripping will prove ineffective because the Court itself will refuse to go along. Whatever the "right" answer about the meaning of Article III, the Court in practice has sufficient doctrinal tools at its disposal to overcome the strip if it sees Congress as subverting judicial authority. Indeed, case law stretching over more than a century strongly suggests that the Court would find a way around a jurisdiction strip that sought to eliminate any possibility of Supreme Court review. And in other situations, jurisdiction stripping will fail because Congress cannot

10. See infra section II.A.1.

11. These questions have dominated the immense literature in this area. See infra section I.B.

12. See infra sections I.B–.C.

accomplish its goals without the active participation of the judiciary—for example, in implementing a comprehensive regulatory program. We explore all these scenarios in detail below, but the overarching point is that myriad practical difficulties mean that Congress cannot achieve its goals by getting courts out of the way.

Nevertheless, jurisdiction stripping might have some value as a policy tool. But its potential is limited and contingent. While *direct* efforts to undo or prevent disfavored rulings (or to entrench favorable precedent) will mostly prove fruitless, jurisdiction stripping could sometimes help Congress achieve its goals *indirectly*. It can allow Congress to sequence decisions—tweaking when and where cases are heard—and, relatedly, to buy time for a new federal program to become entrenched. Extra time can make all the difference. It created space for Military Reconstruction to take hold in the South after the Civil War, for the government to combat inflation during World War II, and even for a nascent labor movement to gain traction in the 1930s.[13] Congress also can deploy jurisdiction stripping to make a powerful statement to the public about an issue's importance and thus raise its political salience.[14] And Congress can put the judiciary on notice that it may be overstepping its bounds.[15] We reinterpret several jurisdiction stripping success stories as resting on these subtle, indirect benefits rather than on any direct attempt to keep courts at bay forever. But even under specific and narrowly drawn circumstances, these indirect benefits are not inevitable, and Congress's efforts could easily backfire.

By exploring a policy question that scholars and legislators overwhelmingly have neglected, this project sheds light on several important conversations. Perhaps most obviously, it contributes to the growing debate about court reform.[16] Supreme Court confirmation battles

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13. See infra section III.A.

14. See infra section III.B.

15. See infra section III.B.

16. For a sampling of the recent literature on Supreme Court reform, see William Baude, Reflections of a Supreme Court Commissioner, 106 Minn. L. Rev. 2631, 2631 (2022) (analyzing suggested court reform proposals, including term limits, court packing, and jurisdiction stripping); Joshua Braver, Court-Packing: An American Tradition?, 61 B.C. L. Rev. 2747, 2750–52 (2020); Adam Chilton, Daniel Epps, Kyle Rozema & Maya Sen, Designing Supreme Court Term Limits, 95 S. Cal. L. Rev. 1, 4–5 (2021); Doerfler & Moyn, supra note 2, at 1706 (comparing different statutory reforms, including partisan balancing and jurisdiction stripping); Daniel Epps & Ganesh Sitaraman, The Future of Supreme Court Reform, 134 Harv. L. Rev. Forum 398, 398 (2021), https://harvardlawreview.org/wp-content/uploads/2021/05/134-Harv.-L.-Rev.-F.-398.pdf [https://perma.cc/6NCA-GP77] (arguing that court reform is possible despite current political realities); Daniel Epps & Ganesh Sitaraman, How to Save the Supreme Court, 129 Yale L.J. 148, 152 (2019) (proposing a "Balanced Bench" and "Supreme Court Lottery"); Daniel Epps, Nonpartisan Supreme Court Reform and the Biden Commission, 106 Minn. L. Rev. 2609, 2611 (2021); Daniel Epps & Ganesh Sitaraman, Supreme Court Reform and American Democracy, 130 Yale L.J. Forum 821, 824 (2021), https://www.yalelawjournal.org/pdf/EppsSitaramanEssay_uongtzmp.pdf [https://perma.cc/LL52-9H6V] [hereinafter Epps & Sitaraman, Supreme Court Reform and American Democracy] (identifying the Court's legitimacy challenges and

continue to grow more heated, and an increasingly conservative Supreme Court has begun to revisit wide swaths of legal questions that scholars, policymakers, and the general public have long considered settled.[17] The left has responded with a sudden surge of interest in reform proposals, and President Joseph Biden tasked a commission comprising a number of distinguished legal scholars with examining the various options.[18] Although major reform appears unlikely in the very near future, the reform debate will endure. Understanding what might work—and what would not—will be crucial if major reforms ever become a more tangible possibility.

This Essay also provides new perspective on longstanding debates about Congress's power to regulate jurisdiction. Though it does not advance a particular theory about Congress's power under the Constitution, its analysis has implications for those debates. Even among those who embrace a broad conception of Congress's Article III power, most worry that jurisdiction stripping is unwise.[19] Recognizing jurisdiction stripping's practical limitations shows that those concerns are overblown. Rather than a nuclear weapon capable of decimating the separation of powers, jurisdiction stripping is a more subtle tool that Congress can use to reclaim policymaking space in response to a power grab by the Court.

Finally, this project implicates enduring theoretical debates about the nature of precedent, the parity of state and federal courts, and the permissible scope of non–Article III adjudication. These debates also have gained new salience. They squarely address questions that scholars, judges, and

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proposing structural reform); Daniel Hemel, Can Structural Changes Fix the Supreme Court?, 35 J. Econ. Persps. 119, 120 (2021); Michael J. Klarman, The Supreme Court, 2019 Term—Foreword: The Degradation of American Democracy—and the Court, 134 Harv. L. Rev. 1, 8 (2020) (examining the Court's contribution to democratic decline); Stephen E. Sachs, Supreme Court as Superweapon: A Response to Epps & Sitaraman, 129 Yale L.J. Forum 93, 95–100 (2019), https://www.yalelawjournal.org/pdf/Sachs_SupremeCourtas Superweapon_gc7vgqfu.pdf [https://perma.cc/7ZE8-29CC] (assessing "Balanced Bench" and "Supreme Court Lottery" reform proposals); Eric J. Segall, Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court, 45 Pepp. L. Rev. 547, 550 (2018); Sprigman, Congress's Article III Power, supra note 2, at 1782–84 (arguing that Congress can strip courts of "most questions of federal law").

17. See, e.g., Tejas N. Narechania, Certiorari in the Roberts Court, 67 St. Louis U. L.J. 587, 604 (2023) (noting "the Roberts Court's historically unique proclivity to grant review in cases to consider whether to overrule precedent").

18. See Final Report, supra note 8, at 1–4. Those options included jurisdiction stripping, and the Commission's Final Report provides the most thorough treatment of the practical problems with jurisdiction stripping to date. See supra note 8.

19. See, e.g., Gunther, supra note 8, at 898 (noting that "in this area as in others, it is useful—and often difficult—to bear in mind the distinction between constitutionality and wisdom"); Redish, supra note 8, at 927 (arguing against "confus[ing] issues of constitutionality with questions of propriety and wisdom").

some Supreme Court Justices have raised about the constitutionality of certain agencies and even the administrative state writ large.[20]

The Essay proceeds in three parts. Part I offers a high-level overview of the voluminous scholarship on jurisdiction stripping as well as the current state of the jurisprudence. We also summarize arguments that tout jurisdiction stripping as a means for Congress to achieve policy outcomes. This all sets the stage for Part II, which begins by laying out the various ways that Congress might try to use jurisdiction stripping to effectuate substantive policy goals. It then considers the best-case scenario for when jurisdiction stripping might work as well as the situations in which it almost certainly will fail. Part III then synthesizes the findings to argue that jurisdiction stripping for the most part will fail as an attempt to *directly* prevent or countermand judicial decisions. It can work as a policy tool but only *indirectly*. Congress can use jurisdictional levers to sequence decisions and raise the salience of issues, but those benefits remain highly contingent. In other words, jurisdiction stripping is weak, imprecise, and unpredictable—hardly the silver bullet that nearly everyone assumes.

The Essay concludes by discussing the larger lessons of its analysis. Recognizing jurisdiction stripping's failures sheds new light on scholarly conversations by reframing jurisdiction stripping as a tool for dialogue between the branches instead of an assault on the constitutional order. Our conclusions also have practical implications for court reform debates, undermining arguments that reformers should prefer "disempowering" strategies over structural and institutional changes.[21] More broadly, our conclusions suggest that those who believe the Court has lost sight of fundamental constitutional values should not look for easy answers hidden in the constitutional text. Quite simply, there are no constitutional magic tricks.

I. RECEIVED WISDOM

A. *Jurisdiction Stripping Defined*

Jurisdiction stripping can be a slippery concept, so we begin by defining terms. Thus far, we have elided critical differences between the

20. See, e.g., Buffington v. McDonough, 143 S. Ct. 14, 18–22 (2022) (Gorsuch, J., dissenting from the denial of certiorari) (criticizing a "broad reconstruction" of *Chevron*); Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring in the judgment) (expressing willingness to reconsider the nondelegation doctrine); Jarkesy v. Sec. & Exch. Comm'n, 34 F.4th 446, 449 (5th Cir. 2022) (finding an unconstitutional delegation of legislative power), cert. granted, 143 S. Ct. 2688 (June 30, 2023) (mem.) (No. 22-859); Philip Hamburger, Is Administrative Law Unlawful? 12 (2014); Aditya Bamzai, The Origins of Judicial Deference to Executive Interpretation, 126 Yale L.J. 908, 919 (2017); Andrew S. Oldham, The Anti-Federalists: Past as Prologue, 12 N.Y.U. J.L. & Liberty 451, 456–57 (2019) (arguing that Anti-Federalist concerns about executive power foreshadowed modern debates about the administrative state).

21. See Doerfler & Moyn, supra note 2, at 1721.

Supreme Court, lower federal courts, non–Article III adjudicators created by Congress, and state courts. Most scholarly attention has trained on proposals to strip the Supreme Court of jurisdiction after it has handed down a controversial opinion.[22] Other scholars have usefully considered Congress's power to strip lower federal courts of jurisdiction as well.[23] And while the literature once had failed to include federal non–Article III tribunals in the conversation, several important contributions over the last generation have filled that gap.[24] As discussed in Part II, understanding these different possibilities is critical to assessing jurisdiction stripping as a policy tool, and so we analyze all of them.

The most capacious understanding of jurisdiction stripping would include any instance when Congress reallocates decisionmaking authority among various courts and tribunals.[25] But this Essay has a limited focus by looking to situations in which Congress shifts jurisdiction *away* from one or more Article III courts—whether it reallocates that jurisdiction to a different Article III court, a state court, an administrative agency, or nowhere at all.

What does our focus leave out? "Reverse" jurisdiction stripping, in which Congress moves jurisdiction *into* Article III courts, mainly by taking cases away from state courts. Diversity jurisdiction, by allowing parties to bring certain state-law claims into federal court, offers the clearest example.[26] Sometimes Congress goes further by conferring exclusive jurisdiction on federal courts as to particular federal statutes, such as those regulating federal securities, copyrights, and patents.[27] Moreover,

22. See, e.g., Leonard G. Ratner, Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction, 27 Vill. L. Rev. 929, 929 (1982) [hereinafter Ratner, Majoritarian Constraints on Judicial Review] (framing the question in terms of Congress's power to control the Supreme Court's jurisdiction); Wechsler, supra note 8, at 1005 (same).

23. See, e.g., Theodore Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L.J. 498, 499–501 (1974) (challenging the widespread consensus that Congress has carte blanche to abolish lower federal courts); Martin H. Redish & Curtis E. Woods, Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis, 124 U. Pa. L. Rev. 45, 47–49 (1975) (outlining several theories that justify limiting congressional power over lower federal courts' jurisdiction).

24. See, e.g., Richard H. Fallon, Jr., Jurisdiction-Stripping Reconsidered, 96 Va. L. Rev. 1043, 1115–33 (2010) (engaging with various constitutional questions about shifting jurisdiction from Article III courts to agencies); Henry P. Monaghan, Jurisdiction Stripping Circa 2020: What the Dialogue (Still) Has to Teach Us, 69 Duke L.J. 1, 57–66 (2019) (same).

25. A terminological point is in order. Congress always must allocate decisionmaking authority, including when it decided to create lower federal courts rather than always relying on state courts as courts of first instance. Although the term "jurisdiction stripping" has baked-in value judgments, we opt for the familiar nomenclature. See, e.g., Sprigman, Congress's Article III Power, supra note 2, at 1780 (describing Congress's power to allocate jurisdiction "by restricting (or, less neutrally, 'stripping') the jurisdiction of federal courts").

26. See U.S. Const. art. III, § 2; 28 U.S.C. § 1332(a) (2018).

27. See, e.g., 15 U.S.C. § 78aa (2018) (giving federal courts exclusive jurisdiction over federal securities law); 28 U.S.C. § 1338(a) (giving federal courts exclusive jurisdiction over copyright and patent law).

Congress on occasion has deployed reverse jurisdiction stripping in a successful attempt to pursue substantive policies. For example, the corporate interests that lobbied for the Class Action Fairness Act[28] sought to move many class actions from state courts to what they perceived as the more business-friendly federal courts.[29]

These examples of reverse jurisdiction stripping deserve more attention.[30] But we bracket them for several reasons. First, shifting jurisdiction from state courts to federal courts, as opposed to moving cases out of Article III courts, raises distinct structural concerns. Because federal courts have limited subject matter jurisdiction,[31] they simply cannot hear most cases that parties otherwise litigate in state court. Moreover, while the Constitution gives Congress power to create (and destroy) lower federal courts[32] and also to tweak the Supreme Court's appellate jurisdiction,[33] Congress possesses no such power over state courts. Finally, on a more pragmatic level, reverse jurisdiction stripping is of less interest at this political moment. To the extent that proponents of court reform view the Supreme Court or lower federal courts as the problem, shifting *more* cases into federal courts (and away from state courts) seems counterproductive and thus unlikely to receive attention.[34]

One last restriction on this project's scope: It focuses on Congress's use of jurisdiction stripping to accomplish substantive policy goals in the face of actual or anticipated judicial impediments. Think, for instance, about proposals that aim to permit voluntary school prayer (despite

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28. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. §§ 1332(d), 1453, 1711–1715).

29. See David Marcus, *Erie*, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction, 48 Wm. & Mary L. Rev. 1247, 1288 (2007) (noting that the Act "was the brainchild of a group of Fortune 100 corporate counsel" seeking to "address what its members believe[d] to be a civil justice system that [had] spiraled out of control").

30. Cf. Michael C. Dorf, Congressional Power to Strip State Courts of Jurisdiction, 97 Tex. L. Rev. 1, 2–4 (2018) (describing and analyzing four categories of cases in which Congress exercises affirmative power by stripping state courts of jurisdiction).

31. See U.S. Const. art. III, § 2.

32. Id. § 1 (permitting but not requiring "such inferior Courts as the Congress may from time to time ordain and establish").

33. Id. § 2 (describing the Supreme Court's appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make").

34. Consider one more variation on jurisdiction stripping. In Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021), the Court considered a challenge to Texas's S.B. 8, which effectively banned abortion in the state using an elaborate scheme of private civil actions designed to preclude pre-enforcement constitutional challenges to the bill. See Texas Heartbeat Act, S.B. 8, 87th Gen. Assemb., Reg. Sess. (Tex. 2021) (codified as amended at Tex. Health & Safety Code Ann. §§ 171.201–.212 (West 2022)). In essence, a *state* managed to strip *federal* courts of jurisdiction. The gambit succeeded: The Court largely accepted that the law deprived challengers of potential defendants to sue in seeking to obtain a pre-enforcement declaration of unconstitutionality. See *Whole Woman's Health*, 142 S. Ct. at 531–36. Though a fascinating (if troubling) variation on jurisdiction stripping, this example poses sufficiently difficult issues that it is outside this Essay's scope.

Supreme Court precedent to the contrary)[35] or to protect reproductive rights[36] (to deprive the Court of a chance to overrule *Roe v. Wade*[37] and *Planned Parenthood v. Casey*[38] before it did so in *Dobbs v. Jackson Women's Health Organization*[39]).

We largely ignore other uses of Congress's power to control federal courts' jurisdiction—that is, the use of jurisdiction stripping to accomplish nonsubstantive policy goals, such as judicial administration. To take just one example, in 1925 Congress abolished most of the Supreme Court's mandatory appellate jurisdiction, largely giving the Court power to choose its cases through certiorari jurisdiction.[40] Under conventional accounts, Congress was not attempting to skew the substantive outcome of any case or issue.[41] Instead, it was responding to concerns about the Court's caseload, the quality of its decisionmaking, and so on—as well as acquiescing to concerted lobbying by the Justices who sought to increase their own discretion.[42] One might also view Congress's jurisdictional reform as an attempt "to safeguard, not to undermine, the Court's constitutional

35. See infra section II.A.1.

36. See infra section II.A.2.

37. 410 U.S. 113 (1973).

38. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

39. 142 S. Ct. 2228 (2022).

40. See Tara Leigh Grove, The Exceptions Clause as a Structural Safeguard, 113 Colum. L. Rev. 929, 962–68 (2013) [hereinafter Grove, The Exceptions Clause] (explaining discretionary certiorari jurisdiction as a way to address the Court's caseload crisis and enhance the Court's role in resolving federal questions).

41. See Felix Frankfurter & James M. Landis, The Supreme Court Under the Judiciary Act of 1925, 42 Harv. L. Rev. 1, 1 (1928) (describing administrative reasons for the switch to discretionary jurisdiction).

42. See id. (noting that the Court's previously large caseload had "'taken away from other[] [cases] which present[ed] grave questions and need[ed] careful consideration'" and that therefore discretionary jurisdiction was "proposed by the Supreme Court" (quoting Jurisdiction of Circuit Courts of Appeals and of the Supreme Court of the United States: Hearing on H.R. 8206 Before the H. Comm. on the Judiciary, 68th Cong. 13 (1924) (statement of Justice Willis Van Devanter))); see also, e.g., Edward A. Hartnett, Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill, 100 Colum. L. Rev. 1643, 1704–05 (2000) ("In advocating their bill, the Justices frequently argued that they needed the discretionary power to refuse to decide cases in order to avoid frivolous appeals."); Benjamin B. Johnson, The Origins of Supreme Court Question Selection, 122 Colum. L. Rev. 793, 835–39 (2022) (describing Justices' lobbying for the Judges' Bill as a way to reduce their onerous caseload).

Some situations defy easy classification. For example, Congress sometimes shifts cases away from Article III courts and into non–Article III tribunals for non-result-oriented reasons. This was the situation with the Bankruptcy Act of 1978, when Congress created new bankruptcy courts to alleviate docket congestion and improve the quality of decisionmaking. See N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 116–17 (1982) (White, J., dissenting) (arguing that Congress sought to improve accuracy and efficiency rather than "aggrandize" power to itself). By contrast, some administrative agencies are known for reflecting the political priorities of the presidential administration of the day. See Cary Coglianese, Presidential Control of Administrative Agencies: A Debate Over Law or Politics?, 12 U. Pa. J. Const. L. 637, 637–38 (2010).

role" by "facilitat[ing] the Court's role in providing a definitive and uniform resolution of federal questions."[43] On this account, Congress might "strip" the Court's jurisdiction over some cases—but with the goal of giving the Court time to focus on resolving more important cases. Even if, on their face, these examples meet the definition of jurisdiction stripping, such exercises of congressional power fall outside the scope of this Essay's inquiry. The question we seek to answer is whether Congress can use jurisdiction stripping to deprive the Court, or other federal courts, of power in order to shape policy.

B. *The Academic Debate*

The question of whether, and to what extent, Congress may strip federal courts of jurisdiction has generated immense academic commentary. The scholarly search for potential fetters on this power seems to reflect, in part, an unspoken assumption that one day Congress might succeed in accomplishing what jurisdiction stripping proposals have threatened to do. The next Part explains the deep flaws of that assumption. In sketching the commentary and jurisprudence on the question of congressional power, we don't offer a comprehensive overview. Instead, we concentrate on the contributions and holdings that bear directly on our inquiry. Most importantly, we highlight the few limitations that courts have recognized in this area, as they help elucidate our core conclusions.

Most of the literature on Congress's power to strip federal courts of jurisdiction falls into three broad camps.

First, the traditional theory contends that Article III gives Congress plenary authority to create, destroy, and define the jurisdiction of lower federal courts.[44] This theory posits a similarly plenary power under the Exceptions Clause to control the Supreme Court's appellate jurisdiction.[45] Together, these principles suggest that Article III itself imposes no *internal* limits on Congress's power to strip federal courts of jurisdiction.[46] Nevertheless, to use the now-familiar terminology, the traditional theory holds that Congress still faces *external* constraints—that is, limitations imposed by parts of the Constitution *other than* Article III.[47] For example, even if Congress generally can limit lower federal courts' jurisdiction, Congress couldn't deprive a federal court of jurisdiction over suits brought by Black or female plaintiffs, as that would surely violate the external

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43. Grove, The Exceptions Clause, supra note 40, at 931.

44. See, e.g., Gunther, supra note 8, at 899; Redish, supra note 8, at 912; Wechsler, supra note 8, at 1005.

45. See, e.g., Gunther, supra note 8, at 908; Redish, supra note 8, at 902; Wechsler, supra note 8, at 1005. The Supreme Court's original jurisdiction, though, is not subject to the Exceptions Clause.

46. Note, however, the general view that the Supreme Court's *original* jurisdiction vests automatically, such that Congress may not add to or take from it. See infra note 263.

47. See Gunther, supra note 8, at 900; Redish, supra note 8, at 902–03.

constraint posed by the equal protection component of the Fifth Amendment's Due Process Clause.[48] But the traditional theory holds that Congress faces no internal Article III constraints.[49]

The second view, famously articulated by Henry Hart, has become known as the "essential functions" thesis.[50] Variations abound, but, in broad strokes, the scholars who subscribe to some version of this theory share the view that while Congress has wide latitude to control federal courts' jurisdiction, it may not exercise that power in a way that destroys the "essential role" of the Supreme Court, or of the federal courts more generally, in the constitutional order.[51] As some have articulated the point, "exceptions" to the Supreme Court's jurisdiction must remain just that—exceptions can't swallow the rule.[52] This may be more of a conceptual limitation than a practical one. It rests on a structural axiom about the judiciary's vital role in a tripartite system of government, but it offers no clear judicially administrable standard for discerning how much congressional meddling is too much.[53]

Third, a few scholars have advocated different versions of a mandatory vesting theory—the idea that Congress must confer some (or potentially all) of the jurisdiction delineated in Article III on at least one federal

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48. See William W. Van Alstyne, A Critical Guide to *Ex parte McCardle*, 15 Ariz. L. Rev. 229, 263 (1973) (arguing that an "exception" to the Court's jurisdiction based on race clearly would violate the Fifth Amendment).

49. One variant posits that Congress has plenary power but only to the extent that its restriction genuinely counts as an "exception" to the defaults in Article III. See Baude, supra note 16, at 2644. William Baude thus has suggested that Congress may strip the Court's jurisdiction so long as it removes "less than fifty percent of the Court's possible appellate jurisdiction." Id. at 2644–45.

50. See Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1365 (1953).

51. See, e.g., Fallon, supra note 24, at 1087–93 (arguing that Congress may not go too far in impairing the Supreme Court's supervisory powers over lower federal courts); Hart, supra note 50, at 1365 (contending that exceptions may not "destroy the essential role of the Supreme Court in the constitutional plan"); Monaghan, supra note 24, at 10–31 (interpreting Hart's "essential functions" thesis as rooted in a legal process theory and arguing that "Hart got it right"); Ratner, Majoritarian Constraints on Judicial Review, supra note 22, at 935 (identifying the essential functions of the Supreme Court as resolving conflicts between state and federal courts on federal questions and maintaining the supremacy of federal law); Lawrence Gene Sager, The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17, 55–57 (1981) (arguing for the Supreme Court's essential role in supervising state courts and ensuring compliance with the Constitution); see also Eisenberg, supra note 23, at 504 (arguing that lower federal courts now perform critical functions and thus may not be abolished by Congress).

52. E.g., Leonard G. Ratner, Congressional Power Over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 157, 170 (1960) (arguing that "in a legal context an exception cannot destroy the essential characteristics of the subject to which it applies").

53. See Hart, supra note 50, at 1365 (acknowledging through dialogue that the standard "seems pretty indeterminate"); see also Fallon, supra note 24, at 1089–90 (agreeing with Hart that these questions "would need to be answered on a case-by-case basis, without the aid of any sharply determinate test").

court.[54] These theories would impose the greatest restrictions on Congress's power to deprive federal courts of jurisdiction. But aside from dicta in an 1816 opinion by Justice Joseph Story,[55] the federal courts never have seriously entertained these readings.

Finally, in recent years some scholars have advocated a variation on the traditional theory—what we call an absolutist view that Congress has truly unfettered power to regulate jurisdiction. This theory goes further than the traditional notion that Congress faces no *internal* constraints (from Article III). It provocatively suggests that few, if any, *external* constraints limit Congress's power over federal jurisdiction. For example, Professor Michael Stokes Paulsen contends that when it comes to jurisdiction stripping, "Congress can pretty much do whatever it wants."[56] Professor Christopher Sprigman has advanced the most comprehensive version of this argument. Because "[n]either text, nor history, nor precedent tells us with any certainty whether Congress's Article III power is subject to external limitations," Sprigman argues, "Congress has room to act."[57] In his telling, "[i]f a determined Congress acts to fill that space, courts will have little power to resist."[58]

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54. Robert Clinton advocated the strongest form of the mandatory vesting view—that (at least presumptively) Article III "mandate[s] that Congress allocate to the federal judiciary as a whole each and every type of case or controversy defined as part of the judicial power of the United States." Robert N. Clinton, A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III, 132 U. Pa. L. Rev. 741, 749–50 (1984).

Akhil Amar developed an idea first espoused by Justice Joseph Story that Congress must confer the first three categories on the Article III menu—federal question jurisdiction, ambassador jurisdiction, and admiralty jurisdiction—on some federal court. Article III, Section 2 introduces each of those heads of jurisdiction with the phrase "*all* Cases," whereas the remaining heads of jurisdiction lack the modifier "all." See U.S. Const. art. III, § 2 (emphasis added). Thus, according to Amar's textual and historical analysis, the full extent of the first three heads of jurisdiction must be vested in some federal court, whereas Congress has discretion as to the extent of the other heads of jurisdiction that it vests in federal courts. See Akhil Reed Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. Rev. 205, 229–30, 240–46 (1985) [hereinafter Amar, A Neo-Federalist View]; Akhil Reed Amar, The Two-Tiered Structure of the Judiciary Act of 1789, 138 U. Pa. L. Rev. 1499, 1501–05 (1990) [hereinafter Amar, Judiciary Act of 1789]. For a sampling of criticism of Amar's argument, see John Harrison, The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III, 64 U. Chi. L. Rev. 203, 247–52 (1997) [hereinafter Harrison, The Power of Congress]; Daniel J. Meltzer, The History and Structure of Article III, 138 U. Pa. L. Rev. 1569, 1585 (1990) [hereinafter Meltzer, Article III].

55. See Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 328–29 (1816); cf. Harrison, The Power of Congress, supra note 54, at 206 n.12 (describing the relevant passage from *Martin* as "dictum"); Meltzer, Article III, supra note 54, at 1579 n.33 (same).

56. Paulsen, Checking the Court, supra note 8, at 48–49.

57. Sprigman, Congress's Article III Power, supra note 2, at 1836.

58. Id. at 1784; see also Doerfler & Moyn, supra note 2, at 1725 (noting that "sweeping" reform could entirely prohibit courts from reviewing the constitutionality of federal legislation).

* * *

In the analysis that follows, this Essay takes the traditional view—under which Article III imposes no internal constraints on jurisdiction stripping—as its starting point. We do so for several practical reasons, given our focus on discerning whether Congress can use jurisdiction stripping to push back against a hostile judiciary. First, as discussed below, the courts generally have endorsed the traditional view,[59] so it seems most predictive of how courts would respond to jurisdiction-stripping efforts in the future. (We are agnostic about whether courts over the years have adopted the best reading of Article III.)

More importantly, though, treating the traditional theory enables us to make our arguments most persuasively. That is because the leading alternatives (namely the "essential functions" and "mandatory vesting" views) offer *more* restrictive theories of Congress's power. If one of those theories were correct, Part II's arguments about the practical limitations of jurisdiction stripping would only become stronger, as Congress would have even less latitude to use jurisdiction strips to craft substantive policy. For that reason, we can make the best case by showing that jurisdiction stripping will not fulfill its promise *even if* Congress has the plenary power that the traditional theory presumes.

In proceeding from the traditional theory, however, we necessarily reject the absolutist theory that Congress is not bound even by external constitutional constraints when regulating jurisdiction. If the Court subscribed to that view, some (though not all) of our arguments about jurisdiction stripping's policy failures would lose force. But the absolutist view's idea that the Supreme Court would acquiesce in all possible jurisdiction strips, no matter how extreme, strains credulity. For example, if Congress ever defined a federal court's jurisdiction along racial lines, the Court surely would find grounds to invalidate such legislation. Taken to its logical extreme, the absolutist view also would become a way for Congress to circumvent any limitation on its powers—passing whatever legislation it wants (however constitutionally dubious) and forbidding courts from declaring it unconstitutional. This, too, seems unlikely.

The absolutist theory also remains an outlier, endorsed by only a few scholars and rejected by the overwhelming majority.[60] That is unsurprising, as the theory finds little support in the case law. The (concededly limited) precedent on jurisdiction stripping strongly supports the view that courts

59. See infra notes 69–72 and accompanying text.

60. See Sprigman, Congress's Article III Power, supra note 2, at 1791–92 (noting that while a "substantial number of commentators" acknowledge Congress's authority to jurisdiction strip, "many of the same commentators . . . argue at the same time that it is limited").

will continue to recognize external constraints limiting Congress's power.[61]

Finally, an absolutist theory—and the view that jurisdiction stripping can succeed as the ultimate democratic check on hostile courts—depends on several questionable predicates. Most critically, it assumes that the Supreme Court would remain committed to principled formalism—that while the Court might genuinely believe Congress has transgressed its substantive powers, the Court would faithfully respect a jurisdiction strip, no questions asked. If this were true, then Congress theoretically could outflank a hyperformalist Court—write a substantive law, append a jurisdiction strip, and trust the Court to abide by it.

Enthusiasts of jurisdiction stripping (and the absolutist theory) don't rely on or defend such assumptions. Quite the contrary. Sprigman, for example, contends that jurisdiction stripping is necessary because the Court's conservative majority is likely to "gin up conservative interpretations of the Constitution for the purpose of killing off as much of the Democratic reform agenda as possible."[62] In other words, the supposed need for jurisdiction stripping arises from the Court's *unprincipled* interpretation of the Constitution's substantive provisions. Sprigman then predicts that the judiciary would nonetheless submit to Congress's attempt to strip jurisdiction.[63] Yet if—as Sprigman acknowledges[64]—the outer limits of Congress's power over jurisdiction remain indeterminate, it is hard to see why a lawless, partisan Court would not be willing to "gin up" interpretations of Article III that would permit it to overcome a jurisdiction strip.

C. *Judicial Precedent*

For all the academic commentary that has sought to identify textual and structural bounds on Congress's power, federal courts overwhelmingly have adhered to the traditional theory that Congress has plenary authority subject only to external constitutional constraints. The Supreme Court in *Ex parte McCardle* famously endorsed this view.[65] As part of Reconstruction after the Civil War, Congress had expanded federal courts' habeas corpus jurisdiction, allowing persons detained by *state* authorities to challenge the lawfulness of their detention. The clear objective was to protect recently emancipated Black citizens from recalcitrant Southern states. But William McCardle, an unreconstructed Mississippi newspaperman who had

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61. See, e.g., Patchak v. Zinke, 138 S. Ct. 897, 906 (2018) (plurality opinion) ("So long as Congress does not violate other constitutional provisions, its 'control over the jurisdiction of the federal courts' is 'plenary.'" (quoting Bhd. of R.R. Trainmen, Enter. Lodge, No. 27 v. Toledo, Peoria & W.R.R., 321 U.S. 50, 63–64 (1944))).

62. Sprigman, A Constitutional Weapon, supra note 1.

63. See Sprigman, Congress's Article III Power, supra note 2, at 1784.

64. See id.

65. 74 U.S. (7 Wall.) 506 (1869).

inveighed against military occupation of the South, invoked this provision to challenge his detention and the government's plan to try him using a military commission.[66]

McCardle seemed poised to turn the new habeas statute on its head and use it to challenge the constitutionality of the entire Reconstruction project. So, Congress scrambled to repeal the new habeas statute. Its motive in trying to insulate Reconstruction from constitutional challenge couldn't have been clearer, especially considering that it acted after the Supreme Court had heard oral arguments in McCardle's case.[67] Nevertheless, the Court acceded to Congress's jurisdictional wishes.[68]

In the century and a half since *McCardle*, the Supreme Court has continued to espouse the view that Congress enjoys "plenary" authority to control federal courts' jurisdiction.[69] True, Congress may not do literally anything it wants by dressing up some unlawful action in the garb of jurisdiction stripping.[70] Moreover, the Supreme Court sometimes goes out of its way to avoid having to define the outer boundaries of Congress's power in this regard.[71] But the Court has invalidated only two jurisdiction-stripping statutes in the history of the republic,[72] suggesting relatively

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66. See Bernard Schwartz, A History of the Supreme Court 140 (1993).

67. See Van Alstyne, supra note 48, at 233–42 (describing this historical background).

68. See *McCardle*, 74 U.S. (7 Wall.) at 515 (holding that "this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal"); see also Eric Foner, Reconstruction: America's Unfinished Revolution, 1863–1877, at 336 (updated ed. 2014) (noting that "the Supreme Court acceded to a law rushed through Congress stripping it of jurisdiction in habeas corpus cases, thus rendering moot [a case] that might have raised the question of the constitutionality of Reconstruction").

69. Patchak v. Zinke, 138 S. Ct. 897, 906 (2018) (plurality opinion) (internal quotation marks omitted) (quoting Bhd. of R.R. Trainmen, Enter. Lodge No. 27 v. Toledo, Peoria & W.R.R., 321 U.S. 50, 63 (1944)); id. at 907 n.4 (arguing that "the core holding of *McCardle*—that Congress does not exercise the judicial power when it strips jurisdiction over a class of cases—has never been questioned[] [and] has been repeatedly reaffirmed"); see also Lockerty v. Phillips, 319 U.S. 182, 187–88 (1943) (citing numerous cases for the proposition that Congress has plenary authority to control the jurisdiction of lower federal courts).

70. See, e.g., United States v. Klein, 80 U.S. (13 Wall.) 128, 145–48 (1872) (holding that Congress cannot deny presidential pardons their constitutional effect).

71. See, e.g., Hamdan v. Rumsfeld, 548 U.S. 557, 572–84 (2006) (interpreting jurisdiction strip narrowly to avoid questions of whether Congress had unconstitutionally suspended habeas corpus); Felker v. Turpin, 518 U.S. 651, 660–62 (1996) (interpreting the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C. § 2253 (2018)), as not foreclosing all judicial review).

72. See Fallon, supra note 24, at 1053 ("*Boumediene v. Bush* is the first decision since *United States v. Klein*, in 1871, to hold unequivocally that a statute framed as a withdrawal of jurisdiction from the federal courts violates the Constitution." (citations omitted)); cf. Daniel J. Meltzer, Habeas Corpus, Suspension, and Guantánamo: The *Boumediene* Decision, 2008 Sup. Ct. Rev. 1, 1 & n.2 (noting the ambiguity of *Klein* as to this point and that perhaps *Boumediene* was the first true invalidation). Some scholars have argued that *McCardle* shouldn't be read for all that it seems to say. See Fallon, supra note 24, at 1081; Monaghan, supra note 24, at 18.

modest boundaries on Congress's power to control federal courts' jurisdiction. Those limits fall into two major categories, one of which is probably best understood as a subset of the other.

First, and conceptually most important, Congress itself may not violate a provision of the Constitution and then use a jurisdiction strip to insulate that violation against legal challenges. This limit largely tracks the distinction, noted above, between *internal* Article III constraints (of which there appear to be few to none[73]) and *external* constraints that Congress must respect. Chief among such external constraints are due process rights. Thus, Congress may not impinge on those rights and then strip courts of jurisdiction to hear any legal challenges to the due process violation.

The chief case on point—though not a Supreme Court case—is *Battaglia v. General Motors Corp.*[74] There, the Second Circuit took seriously a due process challenge to the Portal-to-Portal Act,[75] which altered federal law on overtime compensation for mine workers[76] and also deprived *all* courts of jurisdiction over claims seeking to hold employers liable under prior law.[77] The Second Circuit endorsed the notion of external constitutional constraints on jurisdiction stripping, reasoning that if one of the jurisdiction strip's "effects would be to deprive the appellants of property without due process or just compensation, it would be invalid."[78] The court ultimately found no such constitutional violation because it concluded that Congress had power to change the statutory right that it had created.[79]

Another external constraint comes from Article I's Suspension Clause.[80] So, Congress may not improperly suspend habeas corpus and then try to prevent judicial challenges.[81] In *Boumediene v. Bush*, the Court

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73. See, e.g., Gunther, supra note 8, at 908 (concluding based on constitutional text, historical practice, and Supreme Court pronouncements that "there are no substantial internal limits on Congress' article III power to limit the Court's appellate jurisdiction").

74. 169 F.2d 254 (2d Cir. 1948).

75. Portal to Portal Act of 1947, ch. 52, 61 Stat. 84 (codified as amended at 29 U.S.C. §§ 251–262 (2018)).

76. See Ray A. Brown, Vested Rights and the Portal-to-Portal Act, 46 Mich. L. Rev. 723, 731 (1948).

77. See 29 U.S.C. § 252(d) ("No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding . . . .").

78. *Battaglia*, 169 F.2d at 257; see also id. ("[W]hile Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not . . . exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation.").

79. See id. at 259–61.

80. U.S. Const. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

81. See Boumediene v. Bush, 553 U.S. 723, 795 (2008).

considered a challenge to the Military Commissions Act of 2006 (MCA), which stripped federal courts of jurisdiction over habeas corpus petitions filed by enemy combatants detained at the United States Naval Station at Guantanamo Bay.[82] The Court found the withdrawal of habeas jurisdiction unconstitutional after concluding that Congress had not created an adequate alternative forum for review of detainees' status.[83] The Court recognized that the MCA, on its face, deprived the Court itself of jurisdiction over the case. Nonetheless, it was willing to consider the constitutionality of the jurisdiction strip.[84]

Second, Congress may not encroach on the "judicial Power" that Article III confers on federal courts.[85] Although one might view every instance of jurisdiction stripping as such an incursion, the Court has made clear that simply *regulating* jurisdiction doesn't cross the line. After all, as the Court has noted, "Congress generally does not infringe the judicial power when it strips jurisdiction because, with limited exceptions, a congressional grant of jurisdiction is a *prerequisite* to the exercise of judicial power."[86] But Congress cannot use its power over jurisdiction to *usurp* the judicial power.

For example, Congress may not tell a court how to resolve a particular case, a venerable principle often associated with *United States v. Klein*.[87] Shortly after the Civil War, the Supreme Court had held that presidential pardons of former Confederate rebels constituted proof of the pardon recipients' loyalty to the United States, a condition for Southerners to seek compensation in the Court of Claims for property seized during the war.[88] Congress sought to countermand these efforts. It passed a statute that deemed a presidential pardon proof of *disloyalty* and required the Court

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82. Id. at 732–36. The year before, Congress had similarly created military commissions and attempted to strip federal courts of jurisdiction. But in *Hamdan*, the Court sidestepped "grave" constitutional questions and construed the jurisdiction strip not to apply to pending cases. See Hamdan v. Rumsfeld, 548 U.S. 557, 572–84 (2006). Congress responded with the MCA and thus teed up the questions that *Hamdan* had avoided. See *Boumediene*, 553 U.S. at 735.

83. *Boumediene*, 553 U.S. at 792.

84. See id. at 736–39 (noting that section 7 of the MCA purported to strip all federal courts of jurisdiction over habeas petitions by persons whom the United States detained as enemy combatants, but nonetheless proceeding to assess the statute's constitutionality).

85. Determining what counts as an exercise of the "judicial power" has occupied courts since the earliest days of the republic, see, e.g., Hayburn's Case, 2 U.S. (2 Dall.) 409, 411 (1792), and continues to inform modern debates about the propriety of administrative agencies and other types of non–Article III adjudication, see, e.g., Robert L. Glicksman & Richard E. Levy, The New Separation of Powers Formalism and Administrative Adjudication, 90 Geo. Wash. L. Rev. 1088, 1117–18 (2022) (noting current debates about the constitutionality of administrative agencies vested with some form of "judicial power").

86. Patchak v. Zinke, 138 S. Ct. 897, 907 (2018) (plurality opinion).

87. 80 U.S. (13 Wall.) 128, 146 (1872).

88. United States v. Padelford, 76 U.S. (9 Wall.) 531, 543 (1870) (holding that "the law makes the proof of pardon a complete substitute for proof that [the claimant] gave no aid or comfort to the rebellion").

of Claims to dismiss claims based on pardons for lack of jurisdiction.[89] *Klein* found the statute unconstitutional. Congress had no authority either to redefine the effect of a presidential pardon or to command a specific result in the Court of Claims.[90]

The *Klein* opinion remains enigmatic and contested, as this Essay explores later.[91] But the Court routinely understands it to mean at least that Congress had unconstitutionally encroached on the judicial power by trying to direct a specific result.[92] Or, as the Court has put the point more succinctly in recent years, Congress may not pass a statute that says: "In *Smith v. Jones*, Smith wins."[93]

This second set of limitations is really a variation on, or, as we've suggested, a subset of, the first. The cases in which the Court has found an invasion of the judicial power identify additional external constraints on jurisdiction stripping that Congress must respect.[94] The only difference is that these are general structural limitations rather than individual rights rooted in discrete constitutional provisions. But either way, Congress may not skirt those limitations by attempting to deprive courts of the power to call them what they are.

Given the relatively few cases on point, open questions remain about how broadly courts will understand external constraints and how robustly they will police them. Some of the uncertainty owes to the murky line between (permissibly) allocating jurisdiction and (impermissibly) manipulating jurisdiction to accomplish a forbidden end. But the traditional theory still gives Congress wide latitude. Perhaps ironically, the more sweeping a jurisdiction strip, the more likely it is to pass constitutional muster rather than seem geared toward engineering a particular result in a particular case.[95]

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89. *Klein*, 80 U.S. (13 Wall.) at 145–46.

90. See id. at 146–48.

91. See infra note 314 and accompanying text.

92. See Bank Markazi v. Peterson, 578 U.S. 212, 228 (2016) (interpreting *Klein* to hold that Congress had "infringed the judicial power . . . because it attempted to direct the result without altering the legal standards . . . [that] Congress was powerless to prescribe"); id. at 245 (Roberts, C.J., dissenting) (describing *Klein*'s "central holding" as the admonition that "Congress may not prescribe the result in pending cases"); see also Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 439 (1992) (suggesting that a statute would be unconstitutional if it "failed to supply new law, but directed results under old law").

93. Patchak v. Zinke, 138 S. Ct. 897, 905 (2018) (plurality opinion); see also *Bank Markazi*, 578 U.S. at 231 (same example); id. at 246 (Roberts, C.J., dissenting) (same example).

94. The restrictions in *Klein*, discussed above, are the classic examples. See also Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219 (1995) (holding that in "retroactively commanding the federal courts to reopen final judgments, Congress has violated th[e] fundamental principle" of judicial finality).

95. For example, most scholars agree that if Congress wanted to, it could return to Article III's original position by abolishing all lower federal courts and sending all federal-question cases (outside of the Supreme Court's original jurisdiction) to state courts. See

The case law, though limited, reveals a fairly consistent view of Congress's power to control federal courts' jurisdiction. That power is "plenary," subject only to external constitutional constraints that Congress may not evade through the fig leaf of jurisdiction stripping.[96] The Court has, at times, left some ambiguity about where the ultimate outer boundaries of Congress's power lie.[97] In that vein, some Justices have mused in dicta about whether wholesale deprivations of power might veer into the territory about which Hart and others warned—that is, situations in which Congress has impaired the judiciary's ability to discharge its "essential functions."[98] But aside from some minor uncertainty about the most extreme deprivations of jurisdiction, the Court appears to subscribe to the view that Article III itself imposes no limits.[99]

D. *Jurisdiction Stripping as Policy Reform*

Legislators and activists have proposed various jurisdiction-stripping measures over the course of American history. This section documents some of those efforts. In particular, consistent with the goals of the Essay, we look only to jurisdiction-stripping measures proposed as tools for influencing substantive policy in some way, rather than those introduced for reasons of judicial administration. We don't aim to provide a complete catalog of all such efforts since the Founding. But we strive to recount enough examples to show the different contexts in which advocates have conceived of jurisdiction stripping as an effective tool for congressional policymaking and the particular ways in which Congress might strip or regulate jurisdiction to achieve its goals.

Arguably the first example of jurisdiction stripping on policy grounds occurred early in American history. Shortly before leaving office following their defeat in the 1800 election, the Federalists passed the Judiciary Act of 1801, which created sixteen circuit court judgeships (filled by President John Adams just before leaving office), reorganized the district courts, gave federal courts jurisdiction over cases involving federal questions, and

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Eisenberg, supra note 23, at 500 ("The position taken most often in contemporary debate begins with the assumption that Congress has authority to abolish the lower federal courts. Since Congress has the power to abolish, this argument runs, Congress must have plenary control over inferior federal jurisdiction." (footnote omitted)). But see id. at 504–13 (arguing that today, lower federal courts perform critical functions and thus may not be abolished by Congress); Brian T. Fitzpatrick, The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure, 98 Va. L. Rev. 839, 882–93 (2012) (arguing that Congress may not rely entirely on state courts of first instance to adjudicate federal questions because state judges today enjoy less structural independence than they did at the Founding).

96. E.g., *Patchak*, 138 S. Ct. at 906 (2018) (plurality opinion).

97. See supra notes 71–72 and accompanying text.

98. See, e.g., Felker v. Turpin, 518 U.S. 651, 666–67 & n.2 (1996) (Souter, J., concurring) (hypothesizing such a situation and citing various scholars who have endorsed or explored the "essential functions" theory of Article III).

99. See supra notes 65–71 and accompanying text.

eliminated a seat on the Supreme Court.[100] Once the Jeffersonians took office, they encountered an entrenched judiciary firmly controlled by Federalists that seemed poised to rein in the new Republican administration.[101] In March 1802, the new Congress repealed the 1801 Act, controversially eliminating the new circuit judgeships.[102]

Recognizing that the repeal stood on shaky constitutional ground and thus "fearful of how the Court might rule on the act,"[103] Congress swiftly passed another bill canceling the Court's upcoming Term.[104] The Court had been scheduled to sit in June 1802, but the new statute prevented it from reconvening until February 1803.[105] Though Republicans asserted they were simply adjusting the Court's schedule to account for its low caseload, this contention "fooled few observers—least of all the justices."[106] Nonetheless, the gambit worked. The Court did not have the chance to rule on the repeal's constitutionality until 1803, when *Stuart v. Laird* upheld it because "there are no words in the constitution to prohibit or restrain the exercise of legislative power" over inferior federal courts.[107]

This episode is not typically seen as an instance of jurisdiction stripping, as it did not remove the Court's power to hear any particular class of cases. Nonetheless, in our view, it belongs under that heading because it represents a situation in which Congress restricted the Court's jurisdiction to head off a potentially unfavorable ruling—even if Congress did so for only a limited period of time. Typically, jurisdiction stripping means removing *some* of the Court's jurisdiction over a defined class of cases *permanently*; here, Congress effectively removed *all* of the Court's jurisdiction *temporarily*.

Shortly after the Civil War, Congress engaged in its most successful act of jurisdiction stripping when it blocked the Court from resolving *Ex parte McCardle* on the merits.[108] Congress again became interested in jurisdiction stripping not long after *McCardle*. In 1875, Republicans, in a lame-

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100. See Judiciary Act of 1801, ch. 4, §§ 3, 4–7, 11, 21–24, 2 Stat. 89, 89–92, 96–97 (repealed 1802); Erwin C. Surrency, The Judiciary Act of 1801, 2 Am. J. Legal Hist. 53, 62–63 (1958).

101. See Richard E. Ellis, The Jeffersonian Crisis: Courts and Politics in the Young Republic 14–15 (1971).

102. See Schwartz, supra note 66, at 30–31; Gordon S. Wood, Empire of Liberty: A History of the Early Republic, 1789–1815, at 420 (2009).

103. Barry Friedman, The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution 58 (2009) [hereinafter Friedman, Will of the People].

104. An Act to Amend the Judicial System of the United States, ch. 31, § 1, 2 Stat. 156, 156 (1802).

105. Jed Glickstein, Note, After Midnight: The Circuit Judges and the Repeal of the Judiciary Act of 1801, 24 Yale J.L. & Humans. 543, 551 (2012); see also Ellis, supra note 101, at 59.

106. Glickstein, supra note 105, at 551.

107. 5 U.S. (1 Cranch) 299, 309 (1803).

108. See supra notes 65–68 and accompanying text.

duck congressional session, passed a new Judiciary Act that significantly expanded federal courts' jurisdiction, with one goal being to help corporate defendants remove cases to more business-friendly federal courts.[109] Democratic members of Congress responded over several decades by putting forward legislation that would have restricted corporations' removal rights.[110] Though several of these bills passed the House, the Republican-controlled Senate blocked them.[111]

Another surge of enthusiasm about jurisdiction stripping occurred in the middle of the twentieth century. In response to various Warren Court rulings, members of Congress proposed stripping the Court's jurisdiction over numerous issues, including legislative reapportionment,[112] civil liberties for Communists,[113] the admissibility of criminal confessions,[114] and habeas corpus.[115] None passed, though some may have subtly pressured the Court to change course, as we discuss later.[116]

Jurisdiction stripping attracted renewed interest in the late twentieth century. Members of Congress proposed stripping the Court's jurisdiction over issues including busing in desegregation cases, school prayer, and abortion.[117] In 1981, John Roberts, then serving as a Special Assistant to Attorney General William French Smith, wrote an internal Department of Justice memorandum defending such proposals' constitutionality and disagreeing with a contrary opinion by the Office of Legal Counsel.[118] In 1996, Congress succeeded in jurisdiction stripping several times.[119] It

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109. See Tara Leigh Grove, The Structural Safeguards of Federal Jurisdiction, 124 Harv. L. Rev. 869, 891–93 (2011) (explaining how this law furthered corporate interests).

110. See id. at 893–94.

111. Id. at 895–96; see also Keith E. Whittington, Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History 98 (2007) ("In the late nineteenth century, the Republican-controlled Senate was the graveyard of Democratic proposals to retrench federal jurisdiction.").

112. See Max Baucus & Kenneth R. Kay, The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress, 27 Vill. L. Rev. 988, 991 (1982).

113. See Neal Devins, Should the Supreme Court Fear Congress?, 90 Minn. L. Rev. 1337, 1342–43 (2006) [hereinafter Devins, The Supreme Court].

114. See Baucus & Kay, supra note 112, at 991.

115. See Larry W. Yackle, The Habeas Hagioscope, 66 S. Cal. L. Rev. 2331, 2344 (1993).

116. See infra section III.B.

117. See Sager, supra note 51, at 18–19 & nn.3–5.

118. Memorandum from John Roberts, Special Assistant to the Att'y Gen., DOJ, to William French Smith, U.S. Att'y Gen., DOJ, Proposals to Divest the Supreme Court of Appellate Jurisdiction: An Analysis in Light of Recent Developments (n.d.), http://www.archives.gov/news/john-roberts/accession-60-89-0172/006-Box5-Folder1522.pdf [https://perma.cc/UFM2-LLUQ]; see also Mark Agrast, Judge Roberts and the Court-Stripping Movement, Ctr. for Am. Progress (Sept. 2, 2005), https://www.americanprogress.org/article/judge-roberts-and-the-court-stripping-movement/ [https://perma.cc/Q7GN-SXU6].

119. See Aziz Z. Huq, Partisanship, Remedies, and the Rule of Law, 132 Yale L.J. Forum 469, 502 (2022), https://www.yalelawjournal.org/pdf/F7.HuqFinalDraftWEB_3f9fcje5.pdf [https://perma.cc/Z7SA-SX2A].

curtailed federal courts' ability to grant habeas relief to state prisoners.[120] It limited courts' power to remedy certain constitutional claims brought by prisoners.[121] And it restricted judicial review of some discretionary immigration decisions.[122]

Interest in jurisdiction stripping picked up again in the early 2000s. One proposal sought to restrict jurisdiction over cases involving same-sex marriage.[123] Another example, worth considering in detail, focused on challenges to the Pledge of Allegiance. In 2002, in response to a Ninth Circuit ruling that the phrase "under God" in the Pledge violated the Establishment Clause,[124] U.S. Representative Todd Akin introduced legislation to strip all federal courts of jurisdiction over such challenges.[125] In promoting the bill, Akin described jurisdiction stripping as a powerful policy tool under which "Congress has the ability to rein in a renegade judiciary."[126] Soon after, the House actually passed by a wide margin a version of the bill that had been amended to make its jurisdiction-stripping language even more sweeping,[127] but the bill died in the Senate.[128]

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120. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, sec. 102, § 2253, 110 Stat. 1214, 1217 (codified as amended at 28 U.S.C. § 2253 (2018)).

121. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-066 (1996) (codified as amended in scattered sections of titles 11, 18, 28, and 42 U.S.C.).

122. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of titles 8 and 18 U.S.C.).

123. See Fellow, supra note 3, at 1122 n.4, 1146–51 (discussing the Marriage Protection Act of 2004, H.R. 3313, 108th Cong. (2003), which would have amended the U.S. Code to "eliminate all federal jurisdiction over questions arising under the Defense of Marriage Act" (citing Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at § 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2018)), invalidated by United States v. Windsor, 570 U.S. 744, 750–52 (2013))); see also Freedman, supra note 5 (discussing the possibility of using jurisdiction stripping to roll back marriage equality).

124. Newdow v. U.S. Congress, 292 F.3d 597, 612 (9th Cir. 2002), amended on denial of reh'g, 328 F.3d 466 (9th Cir. 2003), rev'd sub nom. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

125. Pledge Protection Act of 2002, H.R. 5064, 107th Cong. § 2(a). For a useful overview of Akin's jurisdiction-stripping proposals, see generally Alexander K. Hooper, Jurisdiction-Stripping: The Pledge Protection Act of 2004, 42 Harv. J. on Legis. 511 (2005) (discussing the implications of the passage of the Pledge Protection Act).

126. Press Release, Rep. Todd Akin, Akin Introduces Pledge Protection Act of 2002 (July 8, 2002), http://web.archive.org/web/20060221080317/http://www.house.gov/akin/release/20020708.html (on file with the *Columbia Law Review*).

127. See Pledge Protection Act of 2004, H.R. 2028, 108th Cong. § 2(a). This amended bill provided, "No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, the Pledge of Allegiance . . . or its recitation." Id.

128. Hooper, supra note 125, at 512 n.17. Akin reintroduced versions of his bill in 2005 and 2007. See Pledge Protection Act of 2007, H.R. 699, 110th Cong.; Pledge Protection Act of 2005, H.R. 2389, 109th Cong.

During the War on Terror, Congress successfully enacted jurisdiction-stripping legislation aimed at insulating from Article III review the detention of suspected terrorists at Guantanamo Bay. This effort ultimately failed, however, when in *Boumediene* (as recounted above) the Court held that the jurisdiction strip violated the Constitution's Suspension Clause.[129]

Most recently, jurisdiction stripping attracted renewed interest after hardball tactics by Republicans gave President Donald Trump three appointments to the Supreme Court and allowed him to push it in a much more conservative direction. Progressives started debating various reforms as a possible response, with jurisdiction stripping emerging as a leading contender[130] alongside term limits, court packing, and other structural reforms.[131] Leading scholars, including Professors Ryan Doerfler and Samuel Moyn,[132] Christopher Sprigman,[133] and Joseph Fishkin and William Forbath,[134] endorsed it as a promising strategy. And President Biden's commission, responding to this latest surge of enthusiasm, studied jurisdiction stripping in detail.[135]

While occasionally alluding to the indirect benefits discussed at greater length in Part III,[136] proponents of jurisdiction stripping overwhelmingly emphasize that it would permit Congress to wrest control of decisionmaking from courts and have a *direct* (perhaps even immediate) effect on substantive policies. Doerfler and Moyn endorse what they call "disempowering" reforms, such as jurisdiction stripping, over "personnel" reforms like court packing, on these grounds:

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129. See Boumediene v. Bush, 553 U.S. 723, 798 (2008); supra section I.C.

130. See, e.g., Ryan Doerfler, The Supreme Court Is Broken. How Do We Fix It?: Strip Its Power, The Nation (June 6, 2022), https://www.thenation.com/article/society/how-to-fix-supreme-court/ (on file with the *Columbia Law Review*) (arguing in favor of jurisdiction stripping); Michael Hiltzik, Column: How Congress Could Rein In the Rogue Supreme Court, L.A. Times (Oct. 20, 2022), https://www.latimes.com/business/story/2022-10-20/column-how-congress-could-rein-in-the-rogue-supreme-court (on file with the *Columbia Law Review*) (same); Rahnama, supra note 6 (same); Sprigman, A Constitutional Weapon, supra note 1 (same); Christopher Jon Sprigman, Stripping the Courts' Jurisdiction, Am. Prospect (May 5, 2021), https://prospect.org/api/content/89916e00-ad0e-11eb-8007-1244d5f7c7c6/ [https://perma.cc/5DUH-N6Q9] [hereinafter Sprigman, Stripping the Courts' Jurisdiction] (same); Yaffe-Bellany, supra note 6 (same); Zeitz, supra note 6 (same).

131. See Epps & Sitaraman, Supreme Court Reform and American Democracy, supra note 16, at 836–50.

132. See Doerfler & Moyn, supra note 2, at 1744 (arguing for "disempowering reforms" such as jurisdiction stripping).

133. See Sprigman, Congress's Article III Power, supra note 2, at 1799 (arguing that jurisdiction stripping is a tool to combat "judicial supremacy").

134. See Fishkin & Forbath, supra note 2, at 431 (arguing for jurisdiction stripping as a "tactical" challenge to the Supreme Court).

135. See Final Report, supra note 8, at 154–69. Consistent with this Essay's overarching thesis, the Commission expressed skepticism about jurisdiction stripping's efficacy. See id. at 155, 159–60.

136. See, e.g., Sprigman, Congress's Article III Power, supra note 2, at 1854 (suggesting that the political coalition supporting jurisdiction "may be quite durable").

> With jurisdiction stripping, . . . the fate of . . . controversial legislation would be determined by Congress and the President in September or April, and not by the Supreme Court in June. By removing the judiciary from the process, jurisdiction-stripping legislation would thus tie policy outcomes exclusively to the most recent congressional and presidential elections.[137]

A common thread runs through the many proposals considered above: a conception of jurisdiction stripping as an awesome power. The next Part confronts that common assumption. In nearly every context, that belief turns out to be wrong.

II. PREDICTABLE FAILURE

To evaluate jurisdiction stripping as a policy tool, this Part games out precisely how it would work under different scenarios. To that end, we explore the various ways that Congress might try to use jurisdiction stripping to compel a particular substantive policy result. In seeking to influence policy through jurisdictional regulation, Congress has a variety of options. It might attempt to strip some courts (or other tribunals) of jurisdiction and intentionally direct cases into others. Or, most controversially, it might try to strip all federal tribunals of jurisdiction. Congress's choice will affect which tribunal hears a case in the first instance and which (if any) reviews decisions on appeal. And the option Congress chooses will depend on what particular problem it hopes to solve.

The efficacy of jurisdiction stripping often depends on the source of law that has motivated Congress to act. Congress might strip jurisdiction with the goal of shaping outcomes in federal constitutional challenges to *state* laws. Alternatively, it might be concerned with federal courts' power to interpret, and to evaluate the constitutionality of, *federal* laws. We thus divide our analysis into these two categories.

Within each category, we tease out further possibilities. When state law is at issue, Congress might strip federal courts of jurisdiction to *circumvent* Supreme Court precedent or *protect* precedents against overruling. When it comes to federal law, there are again different possibilities depending on whether questions of *statutory* or *constitutional* interpretation are at stake and which particular courts Congress views as problematic.

These rough groupings may shade into one another in some instances. As ideal types, though, they help illustrate the complexities of trying to use jurisdiction stripping as a substantive policy tool. Across the range of possibilities we consider, we show that jurisdiction stripping turns out to be far less efficacious as a policy tool than almost everyone assumes. In nearly every instance, Congress is unlikely to succeed in directly achieving its desired substantive outcome of either circumventing an

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137. Doerfler & Moyn, supra note 2, at 1726 (footnote omitted).

existing precedent or preventing an adverse decision. In some situations, this conclusion becomes obvious as soon as one plays things out. In others, understanding jurisdiction stripping's failures requires a more careful parsing of the mechanics of precedent and the few fetters on Congress's power to strip jurisdiction. Either way, jurisdiction stripping is a far weaker weapon than common wisdom assumes.

A. *State Laws*

1. *Circumventing Precedent.* — The quintessential problem that invites talk of jurisdiction stripping is a constitutional ruling by the Supreme Court with which Congress disagrees. More specifically, the high-profile examples usually involve situations in which the Court has declared a *state* law or policy unconstitutional. Think about rulings that have invalidated on constitutional grounds state laws that permit voluntary school prayer,[138] prohibit flag burning,[139] or criminalize abortion.[140] Or consider rulings that require states to adopt affirmative school desegregation measures, such as busing.[141]

The most common jurisdiction-stripping proposals that emerge in the wake of such rulings would deprive all federal courts of jurisdiction and thus give each state the final word on these constitutional questions.[142] We leave aside the vibrant debate about whether the potential disuniformity would cause chaos[143] or undermine the structural purpose of having "one supreme Court."[144] Instead, we focus on whether such strips would prove

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138. See, e.g., Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 223 (1963) (invalidating a state law requiring schools to begin each day with Bible readings); Engel v. Vitale, 370 U.S. 421, 424 (1962) (invalidating a public school's policy that students begin each day with a prayer).

139. See Texas v. Johnson, 491 U.S. 397, 420 (1989) (holding that a criminal conviction for desecrating the American flag was inconsistent with the First Amendment).

140. See, e.g., Roe v. Wade, 410 U.S. 113, 164 (1973) (holding all criminal prohibitions against abortion before "viability" to be unconstitutional), overruled by Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

141. See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 29–31 (1971) (approving judicial remedies, including busing, to rectify unconstitutional public-school segregation).

142. See generally supra section I.D (providing a summary of recent jurisdiction-stripping debates and proposals).

143. See Eugene Gressman & Eric K. Gressman, Necessary and Proper Roots of Exceptions to Federal Jurisdiction, 51 Geo. Wash. L. Rev. 495, 496 (1983) (contending that giving each state the final word on certain constitutional questions could create such chaos); Ratner, Majoritarian Constraints on Judicial Review, supra note 22, at 935 (arguing that stripping the Supreme Court of appellate jurisdiction would create massive inconsistencies).

144. Compare Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 Stan. L. Rev. 817, 828 (1994) (arguing that lower federal courts must be "subordinate to" the Supreme Court), and James E. Pfander, Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals, 78 Tex. L. Rev. 1433, 1451–59 (2000) [hereinafter Pfander, Jurisdiction-Stripping] (arguing that constitutional text and history mandate that the Supreme Court exercise supervisory authority over inferior federal

efficacious. That is, by directing these constitutional questions to the states, could Congress subvert or undo an unfavorable Supreme Court ruling? Maybe, the same way that firing buckshot at a fly on a window could be effective. It might hit the target, but only occasionally and haphazardly and with plenty of collateral damage along the way.

Consider the school prayer example, which offers a best-case scenario for proponents of jurisdiction stripping's efficacy. In the 1960s, the Supreme Court's decisions in *Engel v. Vitale*[145] and *Abington School District v. Schempp*[146] held that teacher-led prayers and Bible readings in public schools violated the Establishment Clause. Over the ensuing decades, members of Congress—including, most prominently, Senator Jesse Helms—offered several proposals that would have stripped *all* federal courts of jurisdiction to hear cases challenging state laws that related to "voluntary prayer, Bible reading, or religious meetings in public schools."[147] Thus, jurisdiction stripping of this nature would force all litigation into state courts. Without the prospect of Supreme Court review, each state would have the final say on the constitutionality of state laws that authorize voluntary school prayer. So, could this gambit successfully evade the likes of *Engel* and *Schempp* and permit school prayer?[148]

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courts), with Amar, A Neo-Federalist View, supra note 54, at 254–59 (arguing that Congress may create lower Article III courts whose judgments are not subject to Supreme Court review), Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev 1153, 1160–61 (1992) (discussing the view that Congress has "arguably unlimited power" to strip the Supreme Court's appellate jurisdiction), and David E. Engdahl, What's in a Name? The Constitutionality of Multiple "Supreme" Courts, 66 Ind. L.J. 457, 503–04 (1991) (arguing that the Constitution does not require a hierarchical federal court system). Professor Amar later reconsidered his original view and concluded that "although Congress may make exceptions to the Supreme Court's appellate jurisdiction, it may not make exceptions to the Supreme Court's supremacy itself, vis-à-vis other courts, in federal question cases." Akhil Reed Amar, The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine, 114 Harv. L. Rev. 26, 80 n.183 (2000).

145. 370 U.S. 421, 423–24 (1962) (holding that a public school's daily prayer recitation was unconstitutional even though individual students could opt not to participate).

146. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 223–24 (1963) (holding that a state law that mandated teacher-led Bible readings in public school, even without commentary, was unconstitutional).

147. Gressman & Gressman, supra note 143, at 500–02 (internal quotation marks omitted) (quoting Voluntary School Prayer Act, S. 784, 98th Cong. (1983)); see also Baucus & Kay, supra note 112, at 991–92 & n.18 (listing bills introduced to limit federal court jurisdiction over school prayer questions).

148. We address only the mechanical problems here. Others have flagged further difficulties in accomplishing the goals of jurisdiction stripping. For example, other scholars have shown that most jurisdiction-stripping proposals suffer from ambiguity in describing the class of cases to which they refer. See, e.g., Gressman & Gressman, supra note 143, at 501 (noting that Senator Helms's 1983 proposal could be read to apply to "any and all cases 'arising out of' state action relating to voluntary prayer, Bible reading, or religious meetings" (quoting S. 784)).

Imagine how this would work in practice.[149] The first difficulty lies in figuring out how state courts would treat the precedents that Congress finds offensive. Scholars disagree as to the formal strength that precedents like *Engel* and *Schempp* would still have.[150] One approach contends that these Supreme Court decisions remain binding precedent, even if the Court has no power to police whether state courts have applied those precedents correctly.[151] If so, then jurisdiction stripping closes the stable door after the horse has already bolted. It freezes in place the objectionable decisions and, even worse, prevents the only court that can reconsider those precedents from doing so.[152] Other scholars contend that a precedent's binding force necessarily depends on whether the rendering court has revisory power over lower courts.[153] Thus, adherents of this view argue that if the Supreme Court no longer has jurisdiction to review state-court school-prayer decisions, precedents like *Engel* are no longer binding on state courts.[154]

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149. For purposes of the argument, we'll assume, perhaps contrary to fact, that the Court would adhere to its school prayer precedents.

150. See Final Report, supra note 8, at 160–61 (noting that "it is not clear whether state-court judges would be bound by preexisting Supreme Court precedents"). And, in fact, the two of us differ on the right answer to this question.

151. See, e.g., Paul M. Bator, Withdrawing Jurisdiction From Federal Courts, 7 Harv. J.L. & Pub. Pol'y 31, 33 (1984) (arguing that "the proper answer is that standing Supreme Court precedent would continue to be authoritative law"); Steven G. Calabresi & Gary Lawson, Equity and Hierarchy: Reflections on the Harris Execution, 102 Yale L.J. 255, 276 n.106 (1992) (arguing that "the Exceptions Clause does not permit Congress to free the inferior federal courts or the state courts from their obligation to follow Supreme Court precedent in *all* cases"); Redish, supra note 8, at 925 ("Removal of Supreme Court appellate jurisdiction over an area of substantive law has no legal effect whatsoever on the validity of pre-existing Supreme Court decisions."); see also Michael C. Dorf, Prediction and the Rule of Law, 42 UCLA L. Rev. 651, 673 (1995) (noting that lower court judges "must follow applicable Supreme Court precedent"); Wechsler, supra note 8, at 1006 ("The lower courts or the state courts would still be faced with the decisions of the Supreme Court as precedents—decisions which that Court would now be quite unable to reverse or modify or even to explain.").

152. See Redish, supra note 8, at 925 ("Ironically, such congressional action would have the effect of locking in those decisions, for the only court that has power to modify, limit or overrule those decisions is the Supreme Court itself."); Wechsler, supra note 8, at 1006 (arguing that "[t]he jurisdictional withdrawal thus might work to freeze the very doctrines that had prompted" jurisdiction stripping).

153. See, e.g., Amar, A Neo-Federalist View, supra note 54, at 258 n.170 (contending that binding precedent is "governed not by any inherent judicial hierarchy in the structure of the Constitution" and that "state courts are currently bound to follow Supreme Court precedent because . . . if they do not, they can be reversed"); Michael Stokes Paulsen, Accusing Justice: Some Variations on the Themes of Robert M. Cover's *Justice Accused*, 7 J.L. & Religion 33, 83–84 (1989) (endorsing Amar's view and arguing that a higher court precedent is "controlling" on a lower court only to the extent that that higher court may reverse the lower court's decisions); Paulsen, Checking the Court, supra note 8, at 59–61 & n.55 (similar); cf. Caminker, supra note 144, at 837–38 (arguing that neither the Supremacy Clause nor structural federalism dictates that Supreme Court precedents bind state courts).

154. The notion that a jurisdiction strip changes the formal bindingness of a precedent is problematic because binding precedent does not always track the chain of appellate

This theoretical dispute touches on the rich commentary about the nature of precedent and the provenance of its rules[155] as well as the long-running debate about judicial supremacy versus departmentalism.[156] We don't attempt to resolve those debates. Our point is that this all remains contested, including the specific question at issue here—how a conscientious state-court judge should treat precedents like *Engel* and *Schempp* after a jurisdiction strip.

Regardless of who gets the better of the argument as to the existing precedents' formal strength, what really matters is what would happen in practice. Proponents usually feel compelled to talk elliptically about what they hope jurisdiction stripping will accomplish. Sometimes this comes in the form of modest language about preventing federal courts—usually the Supreme Court—from "extending" supposedly errant holdings.[157] As a practical matter, though, if state courts have the final word on a constitutional question, they can distinguish, narrow,[158] ignore, or openly flout Supreme Court precedents with impunity.[159]

Therein lies the hope of jurisdiction stripping and the best argument for its efficacy. A state might take up Congress's implicit invitation. The state legislature might pass a bill authorizing school prayer, the governor

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review. For example, in California, lower state courts are bound by the decisions of *all* divisions of California Courts of Appeal, even those that lack revisory authority over the lower courts. See Auto Equity Sales, Inc. v. Superior Ct., 369 P.2d 937, 940 (Cal. 1962) (en banc); 9 Witkin, California Procedure § 504 (6th ed. 2023). Thus, neither the chain of appellate review nor geography is fully determinative of a precedent's bindingness. See Alan M. Trammell, Precedent and Preclusion, 93 Notre Dame L. Rev. 565, 581–82 (2017) (developing this argument).

155. See, e.g., John Harrison, The Power of Congress Over the Rules of Precedent, 50 Duke L.J. 503, 506–13 (2000); see also Michael Stokes Paulsen, Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effects of *Roe* and *Casey*?, 109 Yale L.J. 1535, 1537–42 (2000).

156. See Whittington, supra note 111, at xi (describing debate).

157. See, e.g., Carl A. Anderson, The Power of Congress to Limit the Appellate Jurisdiction of the Supreme Court, 1981 Det. Coll. L. Rev. 753, 768 (arguing that one version of a school-prayer-jurisdiction-stripping bill wouldn't seek to "overturn" any precedents but would prevent the Supreme Court "from extending its past holdings" to new situations); Charles E. Rice, Limiting Federal Court Jurisdiction: The Constitutional Basis for the Proposals in Congress Today, 65 Judicature 190, 197 (1981) (arguing that jurisdiction stripping "would not reverse the Supreme Court's rulings on school prayer" but "would ensure that the Court received no opportunity to further extend its errors").

158. See Richard M. Re, Narrowing Precedent in the Supreme Court, 114 Colum. L. Rev. 1861, 1862–63 (2014) (defining "distinguishing" to mean that "the precedent, when best understood, does not actually apply," whereas "narrowing" entails construing a precedent to be "more limited in scope than . . . the best available reading").

159. See, e.g., Charles E. Rice, Congress and the Supreme Court's Jurisdiction, 27 Vill. L. Rev. 959, 985 (1981) (arguing that "some state courts would openly disregard the Supreme Court precedents . . . once the prospect of reversal by the Supreme Court had been removed"); see also Gunther, supra note 8, at 910–11 (arguing that some "courts no doubt would feel freer to follow their own constitutional interpretations if the threat of appellate review and reversal were removed"); Sager, supra note 51, at 41 (arguing that Congress would be "casting a lewd wink in the state courts' direction").

might sign it into law, and the state courts might then act on their own understanding of the First Amendment to declare the state policies constitutional. To work, though, all of these dominoes would need to line up. And this leaves to one side the problem, from the perspective of the jurisdiction strip's proponents, that other states might interpret the First Amendment to impose more onerous restrictions on public religious expressions.

Of course, this all requires the Supreme Court to willingly go along with the jurisdiction strip. It's far from certain that the Justices would feel powerless to respond. As we've discussed, the mainstream view of jurisdiction stripping still contemplates that *external* constitutional constraints curb Congress's power.[160]

Could the Court interpret the external constraints to provide a toehold for reviewing a state court's constitutional ruling, notwithstanding the jurisdiction strip? Possibly, yes. Although the Court has acceded to jurisdiction strips that foreclosed its review of a constitutional question, in each case, some alternative avenue still allowed the question to reach the Court. In *McCardle*, the Court went along with Congress's removal of jurisdiction over the constitutionality of McCardle's detention—but only after suggesting that another route, a habeas petition filed under the Judiciary Act of 1789, remained viable.[161] (Later that year, the Court confirmed as much in *Ex parte Yerger*.[162]) In *Yakus v. United States*, the Court held that Congress acted within its powers when depriving a criminal defendant of the opportunity to challenge the validity of the price-control regulation he was charged with violating.[163] But in doing so, it stressed that the statutory scheme provided a mechanism for raising constitutional objections to the regulations using the process that provided for review by a special court, the Emergency Court of Appeals, and, ultimately, by the Supreme Court itself.[164] And though the Second Circuit in *Battaglia* upheld a jurisdiction strip that foreclosed Article III review of a constitutional question, it did so only after essentially reaching the merits of the plaintiffs' constitutional objections to determine that the jurisdiction strip itself was constitutional.[165]

There is thus no precedent upholding a jurisdiction strip that denied a person the opportunity to raise a constitutional objection before *any* Article III court when the constitutional argument was potentially meritorious. Certainly none in which the jurisdiction strip prevented Article III review of state conduct that contravened clearly established

160. See supra section I.C.

161. See Ex parte McCardle, 74 U.S. (7 Wall.) 506, 515 (1869); David P. Currie, The Constitution in the Supreme Court: The First Hundred Years, 1789–1888, at 306 (1992); see also infra notes 270–272 and accompanying text.

162. See 75 U.S. (8 Wall.) 85, 106 (1869).

163. 321 U.S. 414, 430–31 (1944).

164. See id. at 434.

165. See Battaglia v. Gen. Motors Corp., 169 F.2d 254, 257–61 (2d Cir. 1948).

Supreme Court precedent (let alone a jurisdiction strip *designed* to accomplish that result). So, while the Court might go along with this hypothetical jurisdiction strip regarding school prayer, that outcome is far from inevitable. A Court determined to thwart Congress could certainly find the jurisdiction strip an impermissible attempt to evade the Establishment Clause.

A jurisdiction strip that deprived lower federal courts, but not the Supreme Court, of jurisdiction over school prayer cases seems much more certain to pass constitutional muster. Such a law would thus require cases to be litigated in the state courts in the first instance while preserving the possibility of Supreme Court review. If state courts were unconcerned with reversal, the measure could give states some temporary breathing room before being reined in when a case finally ends up at the Supreme Court. In that way, jurisdiction stripping would have the indirect benefit of buying time, as we discuss later.[166] But it would not give states the free rein for which advocates of jurisdiction stripping hope.[167]

But back to the hypothetical statute that precluded Supreme Court review entirely: Perhaps state courts would embrace the opportunity to flout Supreme Court precedent, no matter what federal courts scholars might say about the precedent's formal status. And perhaps the Supreme Court would accept the withdrawal of jurisdiction. Such a scenario would offer the cleanest example of how jurisdiction stripping might successfully empower states to do something that the Supreme Court has found unconstitutional. Even so, this example may overstate jurisdiction stripping's value as a policy tool.

We chose the school-prayer example as our case study because it presents the best possible case for jurisdiction stripping to succeed. But the school-prayer context—while not truly sui generis—differs in important ways from many situations in which Congress might use a jurisdiction strip to insulate state law from second-guessing by federal courts. What makes school prayer different from many other scenarios is that in the archetypal school-prayer case, the person raising the constitutional objection as a plaintiff seeks to stop the state from engaging in some conduct not directed exclusively at the plaintiff.

166. See infra section III.B.

167. Another reason that Congress might favor a law precluding lower federal court review is that the Supreme Court has limited docket resources and thus might not be able to correct every state court decision flouting precedent. As the late Judge Stephen Reinhardt of the Ninth Circuit explained when asked why he wrote decisions that he knew the Supreme Court would want to overturn, "They can't catch 'em all." Linda Greenhouse, Opinion, Dissenting Against the Supreme Court's Rightward Shift, N.Y. Times (Apr. 12, 2018), https://www.nytimes.com/2018/04/12/opinion/supreme-court-right-shift.html (on file with the *Columbia Law Review*).

This differs from a situation in which the objector is an individual against whom the state is directing coercive force.[168] A recurring feature of Establishment Clause litigation is that plaintiffs have difficulty establishing that they are distinctly injured by the challenged government conduct and thus fail to establish standing.[169] By contrast, many cases involving constitutional challenges to state laws differ from the school-prayer context because they involve situations where the state seeks to *enforce* its laws against some person who will rely on the federal Constitution as a shield. And the case for overcoming a jurisdiction strip becomes more compelling when a state tries to deny someone the right to present a constitutional defense in an enforcement proceeding.

Consider criminal enforcement. If a jurisdiction-stripping measure sought to empower states to enact criminal prohibitions that the Supreme Court has found unconstitutional (say, laws criminalizing flag burning or handgun possession), the calculus becomes much more complicated. Imagine, for example, that a Congress hostile to the Court's Second Amendment jurisprudence strips federal courts of jurisdiction to hear any cases raising constitutional challenges to firearms prohibitions. Then imagine that a state proceeds to criminalize all handgun possession—a prohibition that would contravene the core holdings of *District of Columbia v. Heller*[170] and *McDonald v. City of Chicago*.[171]

How would things play out? The state would—assuming prosecutors were willing to flout Supreme Court precedent—prosecute someone for possessing a firearm in violation of state law. That defendant would raise a constitutional defense, invoking the Second Amendment rights recognized in *Heller* and *McDonald*. And the state courts, including the state's highest court, would (if all goes according to plan) reject that defense, contravening the Supreme Court's precedents. Has the jurisdiction strip worked? More practically, would the Supreme Court stand by as all of this happens?

Probably not. Over the centuries, the Court has left open multiple avenues to address questions that a jurisdiction strip purports to make unreviewable. Not coincidentally, the cases in which the Court artfully finds its way past a jurisdiction strip have tended to involve deprivations of

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168. Of course, a state that *required* a student to participate in prayers on fear of punishment would present a different case. See W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding unconstitutional a resolution requiring students to salute the flag on threat of expulsion).

169. See, e.g., Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 609–14 (2007) (rejecting taxpayer standing).

170. 554 U.S. 570, 595 (2008) (holding that the Second Amendment embraces an individual right to bear arms).

171. 561 U.S. 742, 750 (2010) (incorporating the individualized Second Amendment right against the states).

physical liberty.[172] So, even as the Court espouses the traditional view that Article III itself imposes no limits on Congress's power to regulate federal courts' jurisdiction, the Court construes jurisdiction strips narrowly[173] and, most relevant to this example, recognizes external constraints on Congress's power.[174]

In the handgun prosecution hypothetical, a Supreme Court that believed state courts had trampled on a criminal defendant's Second Amendment rights could easily find a way to intervene. How could the Court get involved? A criminal defendant could ask the Court to evade a jurisdiction strip on several rationales.

Most obviously, the defendant could argue that Congress's jurisdiction strip and the state's subsequent actions all conspired to violate the defendant's Second Amendment rights. This doesn't present the same exact scenario as *Klein*—where Congress attempted to redefine the President's pardon power contrary to Supreme Court precedent and then strip courts of jurisdiction[175]—but it seems analogous. Congress effectively has invited *states* to redefine what the Constitution means (contrary to Supreme Court precedent on the Second Amendment) and then stripped federal courts of jurisdiction. And, as in *Klein*, the Court could step in to prevent Congress, working in tandem with a compliant state, from using jurisdiction stripping to undermine a constitutional right.[176]

Alternatively, and perhaps more adventurously, defendants could argue that the various machinations by Congress, the state legislature, and the state judiciary, taken together, violate their due process rights. Under this conception, the jurisdiction strip would prevent them from having a

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172. *Ex parte Yerger* concerned a detention by the U.S. military during Reconstruction. 75 U.S. (8 Wall.) 85, 89 (1869). *Felker v. Turpin* involved a Georgia prisoner. 518 U.S. 651, 655 (1996). *Boumediene v. Bush* concerned the detention of enemy combatants in Guantanamo Bay, Cuba. 553 U.S. 723, 732 (2008). Relatedly, *Yakus v. United States* grappled with the propriety of a jurisdiction strip under the Due Process Clause, even as it affirmed a criminal conviction. 321 U.S. 414, 443 (1944).

173. See supra notes 71–72 and accompanying text (discussing narrow construction of jurisdiction strips).

174. See supra notes 74–94 and accompanying text (discussing external constraints).

175. See United States v. Klein, 80 U.S. (13 Wall.) 128, 141 (1872).

176. Moreover, a jurisdiction strip of this nature tests the outer boundaries of whether state and federal courts truly enjoy parity to interpret questions of federal law. Although the traditional view of Article III and the Supremacy Clause would allow the hypothetical jurisdiction strip—by giving state courts final interpretative authority over what the Second Amendment means—several scholars have raised powerful arguments against the assumption of parity on historical and normative grounds. See, e.g., Amar, A Neo-Federalist View, supra note 54, at 230 (arguing that state-court judges do not enjoy constitutional parity with federal judges); Amanda Frost, Inferiority Complex: Should State Courts Follow Lower Federal Court Precedent on the Meaning of Federal Law?, 68 Vand. L. Rev. 53, 96–98 (2015) (arguing that federal judges are better positioned than state judges to interpret federal laws for various reasons, including experience, resources, and life tenure); Burt Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105, 1105–06 (1977) (arguing that state courts do not have constitutional parity with federal courts).

genuine opportunity to raise their constitutional defense. In two well-known instances, federal courts have been willing to entertain such due process arguments, though without actually settling whether such a challenge remains available in the face of an ironclad jurisdiction strip.[177] Moreover, strong constitutional arguments suggest that courts should take particular care to ensure that criminal defendants have adequate opportunities to raise defenses.[178]

Finally, the defendant could urge the Supreme Court to intervene under the theory that the jurisdiction strip deprived the Court of its inherent authority to supervise inferior courts, including state courts. Professor James Pfander has advanced this argument, contending that while "Congress has broad power to fashion exceptions to the Court's as-of-right appellate jurisdiction," it "may not place the work of inferior tribunals entirely beyond the Court's supervisory authority."[179] This core logic seems to have animated much of the Court's decision in *Felker v. Turpin*, which upheld Congress's withdrawal of habeas jurisdiction in the Antiterrorism and Effective Death Penalty Act and simultaneously asserted the Court's power to continue to entertain original habeas petitions.[180]

Thus, the Court could find support in its precedent for various ways to overcome the literal language of a jurisdiction strip. While we cannot claim that any of these arguments are slam dunks, they each represent a possibility that a determined Court could exploit. Even though the Court continues to recite the principle that Article III gives Congress plenary power over federal courts' jurisdiction,[181] the doctrine remains attuned to external constraints.[182] This framework has particular force in the context of criminal prosecutions, but it would also be relevant if a state sought to enforce potentially unconstitutional laws civilly. And as noted above, it

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177. Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir. 1948), offers the clearest example. Despite language that purported to strip *all* courts of jurisdiction, the Second Circuit considered but ultimately rejected due process challenges. See id. at 257. Similarly, in *Yakus*, the defendant argued that the bifurcation of administrative challenges to price controls and subsequent criminal prosecutions violated due process. While rejecting the argument, the Court nonetheless was willing to entertain the meta–due process argument about the jurisdiction strip itself. See *Yakus*, 321 U.S. at 434–38, 444–46.

178. See Hart, supra note 50, at 1379–83 (observing that "no decision in 164 years of constitutional history" had ever sanctioned sending a man to jail "without his ever having had a chance to make his defenses"); see also Fallon, supra note 24, at 1126–27 (noting that "the special burdens and stigma of criminal punishment should require more extensive judicial process under the Due Process Clause, and possibly under Article III as well, than do impositions of civil liability").

179. Pfander, Jurisdiction-Stripping, supra note 144, at 1504.

180. See 518 U.S. 651, 658 (1996).

181. See, e.g., Patchak v. Zinke, 138 S. Ct. 897, 906, 909 (2018) (plurality opinion) (reaffirming this idea and cabining language from *Klein* suggesting that Congress's motive matters in the calculus); see also supra section I.C.

182. See, e.g., Boumediene v. Bush, 553 U.S. 723 (2008) (habeas corpus); *Yakus*, 321 U.S. 414 (due process).

might even provide a toehold for the Court to intervene in best-case-scenario cases like the school-prayer hypothetical.

Still, a skeptic of our overarching thesis about the inefficacy of jurisdiction stripping might contend that falling back on external constraints, at least as we've presented them, proves too much. Even among those who accept the notion of external constraints, disagreement persists about how far those restrictions reach. Unlike a more obviously unconstitutional hypothetical such as stripping jurisdiction only over claims brought by, say, Black plaintiffs, here the hypothetical jurisdiction strip does not distinguish between litigants. Nor does it prevent the defendant from raising a Second Amendment defense. It simply requires the defendant to litigate that matter in state court. Federal defenses are litigated in state court all the time, often out of necessity.[183]

And—the skeptic might press on—isn't it true that the Supreme Court lacked any jurisdiction over a large swath of constitutional issues litigated in state courts for much of its history? Moreover, isn't the gun-rights hypothetical far less problematic than the scheme the Supreme Court blessed in *Yakus*, in which the defendant was forbidden from challenging the validity of a regulation he was prosecuted for violating?[184]

On closer analysis, though, these arguments aren't persuasive. While the Supreme Court indeed lacked jurisdiction over many state cases for much of the history of the republic, the Judiciary Act of 1789 only denied the Court jurisdiction over state cases *upholding* claims of constitutional right.[185] There isn't a historical tradition of stripping the Court's jurisdiction over a wide swath of state court cases *rejecting* a constitutional defense.[186]

As for *Yakus*, Congress hadn't entirely deprived someone of the right to present a constitutional argument to the Supreme Court. It had simply

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183. Criminal prosecutions based on state law almost always happen in state courts, which the Constitution trusts to entertain federal-law defenses. Cf. Harrison, The Power of Congress, supra note 54, at 233 (noting the presumption that courts of one sovereign will not enforce another sovereign's penal laws but contending that Article III permits exceptions to this maxim). Moreover, under the well-pleaded complaint rule in the civil context, a federal defense does not confer federal statutory arising-under jurisdiction. See Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 153 (1908) (articulating the well-pleaded complaint rule for the statute currently codified at 28 U.S.C. § 1331 (2018)).

184. See *Yakus*, 321 U.S. at 430–31.

185. See Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 297 (7th ed. 2015); Amar, Judiciary Act of 1789, supra note 54, at 1529.

186. For an interesting argument that, contrary to received wisdom, the Judiciary Act of 1789 did not give the Court jurisdiction over state *criminal* appeals denying claims of federal right, see Kevin C. Walsh, In the Beginning There Was None: Supreme Court Review of State Criminal Prosecutions, 90 Notre Dame L. Rev. 1867 (2015). The Court, though, certainly believed it had such jurisdiction. See Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 415 (1821) ("The exercise of the appellate power over those judgments of the State tribunals which may contravene the constitution or laws of the United States, is, we believe, essential . . . .").

prescribed a procedural means for the defendant to do so.[187] The Emergency Price Control Act bifurcated the constitutional defense and the actual criminal prosecution.[188] It forced (potential) defendants to litigate the constitutional question in front of an administrative agency (on pain of forfeiture) before they knew whether they were in actual jeopardy of prosecution. That arrangement may seem unfair, but the person subject to the regulation had an opportunity to seek review of the administrative agency's determination in the Emergency Court of Appeals (an Article III court) and, ultimately, in the Supreme Court itself. The statute channeled the Court's jurisdiction over a set of constitutional issues but did not remove it entirely.

The most important point, though, isn't a doctrinal argument. We don't claim that the broad external-constraints theory sketched above is the best or right answer to the formal legal question at stake. We thus can't argue that in the case of such a jurisdiction-stripping measure, the Court certainly would intervene using an external-constraints theory—let alone that the Court would ultimately vindicate the defendant's asserted Second Amendment rights. But, in keeping with the Essay's goals here, our external-constraints argument is a practical one. Namely, there are *plausible* arguments that would let the Court overcome a jurisdiction strip if it were inclined to do so. And if Congress thought jurisdiction stripping necessary to rein in a rogue Supreme Court, there would be plenty of reason to worry that the Court would choose the plausible interpretation of the Constitution that would preserve its own power.

* * *

This has been a long walk through some intricate scenarios, so we will summarize our principal conclusions thus far: The best-case scenario for a successful jurisdiction strip involves a situation in which Congress deprives federal courts of jurisdiction to hear challenges to state activity that does not involve enforcement actions against any individual—such as school prayer—and in which the state courts could be expected to ignore Supreme Court precedent. Even there, the Supreme Court over the centuries has left open multiple ways to intervene, despite seemingly iron-clad jurisdiction-stripping language. The gambit seems even less likely to work when the challenged action involves enforcement actions—and, in particular, criminal prosecutions for conduct that the Supreme Court has found constitutionally protected. Jurisdiction stripping, then, seems to provide no surefire way to protect state laws from disfavored Supreme Court precedent.

2. *Protecting Precedent.* — Enthusiasm for jurisdiction stripping has also swelled at various points when the Supreme Court seemed poised to

187. See *Yakus*, 321 U.S. at 427–31.

188. See Emergency Price Control Act of 1942, ch. 26, § 203, 56 Stat. 23, 31; *Yakus*, 321 U.S. at 428–29, 444.

overrule popular precedents. This idea has had allure over the years,[189] but it's gained renewed attention since Democrats retook both Congress and the White House around the same time that conservatives solidified a 6-3 majority on the Supreme Court.[190] Progressives recently proposed jurisdiction stripping as a way to prevent the overruling of abortion precedents after Republicans locked in a conservative supermajority.[191] Democrats missed that opportunity once *Dobbs* was decided. But reacting to credible suggestions that *all* substantive due process rights might come under threat,[192] Congress moved to codify same-sex marriage rights.[193] Could Congress go further and preemptively try to thwart the overruling of key substantive due process rights by depriving the Court of jurisdiction?

The idea sounds superficially attractive. Jurisdiction stripping would seemingly freeze favorable precedent in place before the Supreme Court can wreak havoc on it. As we explain, though, jurisdiction stripping in this context would prove ineffective at best and, at worst, could have exactly the opposite effect that its proponents want and thus exacerbate the perceived problem.[194]

To see why, begin with the logistics. Precedent-protecting jurisdiction stripping involves a temporal variation on the precedent-circumventing scenarios considered immediately above. Rather than trying to circumvent a bad decision, Congress would be trying to prevent an adverse decision

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189. Discussion of the technique long predates the commentary of the last several years. See, e.g., Jason S. Greenwood, Note, Congressional Control of Federal Court Jurisdiction: The Case Study of Abortion, 54 S.C. L. Rev. 1069, 1071–72 (2003) (arguing that Congress may strip all federal courts of jurisdiction over abortion questions).

190. See, e.g., Doerfler & Moyn, supra note 2, at 1744 ("If properly calibrated, jurisdiction stripping statutes . . . could insulate precisely the attempted expansion of legislative rights from judicial limitation . . . while leaving judges power to protect other rights from unsuspected majoritarian excess."); Rahnama, supra note 6 (describing jurisdiction stripping as "a more palatable option to Americans for safeguarding precedent on issues like abortion"); Yaffe-Bellany, supra note 6 (describing Democrats' musings about jurisdiction stripping as a way to tame a conservative Supreme Court); Anthony Michael Kreis (@AnthonyMKreis), Twitter (Dec. 2, 2021), https://twitter.com/AnthonyMKreis/status/1466387768637071364 [https://perma.cc/6VTR-UHZD] (urging that "Congress should pass legislation stripping the Supreme Court of abortion jurisdiction until OT22[] [because] [i]t's time for 1801-level constitutional hardball").

191. See, e.g., Vakil, supra note 6 (reporting on an effort by progressive lawmakers to pursue jurisdiction stripping as a response to the Supreme Court's *Dobbs* decision).

192. See Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301–03 (2022) (Thomas, J., concurring) (arguing that the Supreme Court should "reconsider all of [its] substantive due process precedents").

193. See Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022); Michael D. Shear, Biden Signs Bill to Protect Same-Sex Marriage Rights, N.Y. Times (Dec. 13, 2022), https://www.nytimes.com/2022/12/13/us/politics/biden-same-sex-marriage-bill.html (on file with the *Columbia Law Review*).

194. For a brief sketch of this argument, which we laid out prior to *Dobbs*, see Daniel Epps & Alan M. Trammell, There's No Magic Trick that Can Save Abortion Rights, Wash. Monthly (May 24, 2022), https://washingtonmonthly.com/2022/05/24/theres-no-magic-trick-that-can-save-abortion-rights/ [https://perma.cc/5FSM-N2A2].

proactively. This variation matters for several reasons and demonstrates why jurisdiction stripping would backfire predictably and quickly.

Proposals of this nature would take primary aim at the Supreme Court—locking in a decision that Congress doesn't want the Court to revisit and forcing state courts (and potentially lower federal courts) to continue applying that precedent. But these proposals make a critical assumption about how lower courts will handle the precedent. In the context of the precedent-circumventing proposals discussed earlier, proponents assume that at least some courts will accept Congress's invitation to ignore Supreme Court precedent on, for example, school prayer or Second Amendment rights. That assumption seems defensible as a pragmatic matter, whatever the answer to the normative question about Supreme Court precedent's formal status. Here, though, Congress would be assuming that a precedent like *Obergefell v. Hodges*, which guarantees same-sex marriage rights,[195] would remain formally binding and that state courts—including those that disagree with its correctness[196]—will continue to apply it faithfully, even without the prospect of reversal.

The idea of proactively protecting certain precedents almost always trains on state laws. Most of the contemporary discussion considers the abortion rights cases specifically, but the idea encompasses other scenarios when Congress tries to prevent states from passing laws that do not pass muster under Supreme Court precedent. So, although Congress might still leave lower federal courts with jurisdiction—for example, to entertain pre-enforcement challenges[197]—the focus really trains on how state courts would apply Supreme Court precedents in evaluating state laws.

Look beyond the superficial allure and consider how a proposal of this nature would play out. In May 2022, the country was stunned when a draft Supreme Court opinion in *Dobbs v. Jackson Women's Health Organization*[198] was leaked to *Politico*.[199] The leak revealed that the Court was on the precipice of overruling *Roe v. Wade*[200] and *Planned Parenthood v.*

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195. 576 U.S. 644, 681 (2015).

196. See, e.g., Order of March 4, 2016, Ex parte State ex rel. Ala. Pol'y Inst., 200 So. 3d 495, 562–63 (Ala. 2016) (Moore, C.J., statement of non-recusal); id. at 600 (Bolin, J., concurring specially) ("I do not agree with the majority opinion in *Obergefell*; however, I do concede that its holding is binding authority on this Court."); Costanza v. Caldwell, 167 So. 3d 619, 622 (La. 2015) (Knoll, J., concurring) ("I concur because I am constrained to follow the rule of law set forth by a majority of the nine lawyers appointed to the United States Supreme Court in *Obergefell* . . . .").

197. Such challenges are typically brought under the familiar paradigms of 42 U.S.C. § 1983 (2018), and Ex parte Young, 209 U.S. 123, 155–56 (1908).

198. 142 S. Ct. 2228 (2022).

199. See Josh Gerstein & Alexander Ward, Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows, Politico (May 2, 2022), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473 [https://perma.cc/XR3T-T7AS].

200. 410 U.S. 113 (1973).

Casey.[201] What if Congress had rushed to try to protect a constitutional right to abortion by preventing the Supreme Court from hearing any cases presenting questions about whether the Constitution protects a right to reproductive freedom? That move would have looked a lot like what Congress did in *McCardle*,[202] in which Congress deprived the Court of jurisdiction during the pendency of a case. What would happen at the state level politically and judicially?

Begin with a state like Vermont, which already guarantees reproductive rights far beyond what the Supreme Court articulated as a constitutional minimum under the *Roe*–*Casey* regime.[203] There, nothing hinges on how and whether the Supreme Court protects abortion rights. So, jurisdiction stripping—from the perspective of someone who wants to protect reproductive rights—hasn't improved the situation in Vermont.

Now consider Texas, which prior to *Dobbs* prohibited nearly all abortions after the six-week mark of a pregnancy using a devious civil enforcement regime designed to avoid judicial review.[204] As the proponents of the Texas law recognized, this restriction was unconstitutional under Supreme Court jurisprudence at the time.[205] Would an attempt to freeze the law through jurisdiction stripping have helped protect abortion rights? Perhaps *Roe* and *Casey* would have formally remained binding precedents in Texas and the Supreme Court would have been denied the chance to revisit them in *Dobbs*. As noted earlier, those arguments are debatable as a matter of formalism.[206] So, Texas judges might genuinely believe that *Roe* and *Casey* would lose their binding force. But even if the precedents remained binding as a matter of first principles, nothing would stop Texas state courts from distinguishing or narrowing them. Or the

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201. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

202. Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869).

203. Vermont, for example, does not impose limits on elective abortions, even limits that the Supreme Court over the years has deemed consistent with *Casey*'s "undue burden" test. See Vt. Stat. Ann. tit. 18, § 9497 (2023) (codifying that a public entity shall not restrict access to abortion).

204. The Texas Heartbeat Act, or S.B. 8, gained notoriety because it tried to skirt judicial review by creating only civil liability and prohibiting state officials from enforcing it. See Texas Heartbeat Act, S.B. 8, 87th Gen. Assemb., Reg. Sess. (Tex. 2021) (codified as amended at Tex. Health & Safety Code Ann. §§ 171.201–.212 (West 2022)); Whole Woman's Health v. Jackson, 142 S. Ct. 522, 530 (2021); see also supra note 34 and accompanying text.

205. See, e.g., Michael S. Schmidt, Behind the Texas Abortion Law, a Persevering Conservative Lawyer, N.Y. Times (Sept. 12, 2021), https://www.nytimes.com/2021/09/12/us/politics/texas-abortion-lawyer-jonathan-mitchell.html (on file with the *Columbia Law Review*) (last updated Nov. 1, 2021) (describing Texas's efforts to push back on Supreme Court abortion precedents and evade judicial review); see also *Whole Woman's Health*, 142 S. Ct. at 543 (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("Texas has passed a law banning abortions after roughly six weeks of pregnancy. That law is contrary to this Court's decisions in [*Roe*] and [*Casey*]." (citations omitted)).

206. See supra notes 149–156 (contrasting different formal approaches to whether precedent would remain binding if the Supreme Court had no authority to police compliance with that precedent).

state courts, knowing that the Supreme Court had no jurisdiction to reverse, could simply ignore the Court's precedent entirely. In other words, state courts could—and, we suggest, likely would—rely on their practical power to interpret the Constitution free from Supreme Court interference. From the perspective of someone trying to protect reproductive freedom, the jurisdiction strip would have provided no benefits.

What if the Supreme Court found its way through this hypothetical, precedent-protecting jurisdiction strip and weighed in on the constitutionality of a state abortion law? Here, too, the jurisdiction strip proves useless. Imagine that, before *Dobbs*, a state legislature had gone even further than Texas and criminalized all abortions. Suppose further that state courts reject any constitutional defenses based on *Roe* and *Casey*. As in the hypothetical gun prosecution,[207] the Supreme Court might intercede using an external-constraints theory. Perhaps the Court would then adhere to its precedents. The proponents of the jurisdiction strip would have gotten the result they wanted—but jurisdiction stripping would have had nothing to do with it. Alternatively, the Court might overcome the jurisdiction strip and do what the proponents feared all along (and what ended up happening in *Dobbs*)—overrule *Roe* and *Casey*. In this scenario, the jurisdiction strip would again have accomplished nothing.

A final possibility shows how jurisdiction stripping might even make things worse. Imagine that some states enact laws going beyond what even the *Dobbs* majority might countenance—say, prohibiting someone from traveling out of state to seek an abortion.[208] A jurisdiction strip would mean that the Court couldn't police even the most extreme and unconstitutional restrictions. So, from the perspective of abortion-rights supporters, the jurisdiction strip would lead to a *worse* result.

Thus, when used as a preemptive weapon to protect precedent, jurisdiction stripping either provides no benefits or proves counterproductive. And compared to some of the more complex scenarios discussed in the context of *retroactive* jurisdiction stripping, such as the school prayer

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207. See supra notes 170–188 (imagining that Congress strips federal courts of jurisdiction to hear cases involving constitutional challenges to firearms prohibitions and then a state criminalizes handgun possession).

208. See Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring) (suggesting that if a state tried to "bar a resident of that State from traveling to another State to obtain an abortion," such a prohibition would be clearly unconstitutional); Caroline Kitchener & Devlin Barrett, Antiabortion Lawmakers Want to Block Patients From Crossing State Lines, Wash. Post (June 29, 2022), https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines/ (on file with the *Columbia Law Review*) (last updated June 30, 2022).

hypothetical,[209] the effort to withdraw jurisdiction *proactively* is even less likely to succeed. It can't improve the situation; it can only make it worse.[210]

3. *Uncharted Territory.* — Finally, with respect to jurisdiction stripping aimed at protecting state laws, we flag two other possibilities that have existed only in the realm of academic discussion. One seems even more counterproductive than the proactive jurisdiction strips that we have just discussed, to say nothing of its likely unconstitutionality. The second is more intriguing but rife with constitutional concerns.

First, nearly everyone who has written about jurisdiction stripping assumes—correctly, in our view—that Congress could not foreclose *all* judicial review of state laws.[211] Suppose that it tried to do so, though. If Congress stripped all state and federal courts of jurisdiction to hear cases concerning abortion or gun rights, then it effectively would authorize state legislative supremacy. All the unsettled questions about the nature of precedent and what constitutes binding law would descend into uncertainty and chaos as states could disregard any possibility of federal constitutional litigation and legislate with complete abandon. Those consequences seem sufficiently chaotic and unpredictable that it would be hard for Congress to feel confident that the jurisdiction strip would produce its desired results.

Second, Congress might engage in adventurous attempts to create some sort of federal court review but not in what Congress perceives to be a hostile Supreme Court. Perhaps Congress might try to vest final decisionmaking authority in an existing lower federal court. But imagine an even more blatant effort, such as creating a lower court whose sole purpose is protecting abortion rights. In passing, Professor Akhil Reed Amar hypothesized an "Abortion Court."[212]

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209. See supra notes 148–169 (imagining that Congress stripped federal courts of jurisdiction to hear Establishment Clause challenges to public-school prayer after the Supreme Court already held that such prayer violated the Establishment Clause).

210. Sometimes scholars do not differentiate between proactive jurisdiction stripping with respect to constitutional review of state law versus federal law. See, e.g., Doerfler & Moyn, supra note 2, at 1725–27 (discussing jurisdiction stripping without addressing state laws); Caprice L. Roberts, Jurisdiction Stripping in Three Acts: A Three String Serenade, 51 Vill. L. Rev. 593, 598 (2006) (discussing jurisdiction stripping with respect to all constitutional claims regardless of whether they involve state or federal law). This imprecision obscures important differences. Our argument here pertains only to review of state laws. As the following section explains, the analysis becomes more nuanced when only federal law is at issue.

211. See, e.g., Fallon, supra note 24, at 1093 ("[T]here should be no doubt that Congress has very broad power to limit the jurisdiction of the lower federal courts, as long as the Supreme Court retains appellate jurisdiction over constitutional claims initially litigated in state court."). A complete jurisdiction strip with respect to a federal statute presents a different question altogether, as mentioned with respect to the Portal-to-Portal Act, see supra notes 74–79, and as further discussed in the following section. See infra section II.B.1.

212. Amar, A Neo-Federalist View, supra note 54, at 258 (arguing that the power to structure which federal court reviews federal questions "comprehends the power to create

How would that work? The statute considered in *Yakus* as well as the Foreign Intelligence Surveillance Act (FISA) exemplify one possible model. Under these statutory frameworks, Congress creates a new lower court (whose purpose is clear) populated by existing Article III judges.[213] The advantage here is not requiring new appointments and confirmations. It prevents expanding the Article III judiciary and, critically, allows Congress to shut the court down without controversially eliminating any judgeships, because the court's members could just go back to their day jobs.

Those statutes gave the Chief Justice the power to appoint the judges.[214] That option would work only if the Chief Justice, but not the Court as a whole, were ideologically friendly to Congress and willing to use his appointment power to skew expected case outcomes by staffing the court with at least a majority of judges favorable to abortion rights.[215] Congress would have no guarantee that even an ideologically friendly Chief Justice would behave in this way. Moreover, depending on contingent events, the Chief Justice might eventually be replaced by a new Chief hostile to the rights Congress sought to protect.

Another approach would involve creating a new court with entirely new judges selected by the President and confirmed by the Senate. Assuming the political branches were on the same page, the President and Senate could choose judges who they expect to rule favorably on abortion rights. But political majorities are fleeting. Depending on future elections, the new court eventually could become populated with judges nominated and confirmed by the opposition. In other words, the new court quickly

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an unreviewable Article III Tax Court—or an Abortion Court" but conceding that such "power to choose *which* Article III judge shall have the last word can be abused by Congress"); see also Paulsen, Checking the Court, supra note 8, at 61 ("[O]ne could even create a new federal court specifically for resolution of a certain category of issues . . . and deny appellate jurisdiction over such cases to the U.S. Supreme Court. Thus: Congress could create a new, federal 'Abortion Cases Court' . . . .").

213. See 50 U.S.C. § 1803(a) (2018) (detailing the designation of federal district court judges to the FISA Court); James R. Conde & Michael S. Greve, *Yakus* and the Administrative State, 42 Harv. J.L. & Pub. Pol'y 807, 827 (2019) (discussing the formation of the Emergency Court of Appeals under the statute considered in *Yakus*).

214. In the case of the Emergency Court of Appeals under the Emergency Price Control Act, this meant that the court was "staffed with New Deal judges who practically never set a regulation aside." Conde & Greve, supra note 213, at 830. This seems unsurprising, given that Chief Justice Harlan Fiske Stone was widely regarded as a sympathetic New Dealer. See Alpheus Thomas Mason, Harlan Fiske Stone and FDR's Court Plan, 61 Yale L.J. 791, 793 (1952) ("In [Justice Stone's] opinions, as nowhere else, New Dealers, including the President himself, found authoritative support for their charges.").

215. There is reason to think that a Chief Justice would consider ideology in making appointments to a specialized court like this one. Chief Justice Roberts has been criticized for choosing almost exclusively Republican-appointed judges for the FISA Court. See Charlie Savage, Roberts's Picks Reshaping Secret Surveillance Court, N.Y. Times (July 25, 2013), https://www.nytimes.com/2013/07/26/us/politics/robertss-picks-reshaping-secret-surveillance-court.html (on file with the *Columbia Law Review*).

could become weaponized—in the same way that today's progressive critics argue the Supreme Court has been.

These machinations to create a new court might succeed in the short term. An Abortion Court, whether existing as a freestanding court or a temporary court staffed with Article III judges, could restore protections under *Roe* and *Casey* or even protect reproductive rights more rigorously than the Supreme Court ever did. The constitutionality of giving a lower federal court final authority remains unresolved,[216] but leave such legal questions aside. Even if the new court passed constitutional muster, its efficacy would be tethered to fleeting contingencies—who occupies the Chief Justice's seat and who controls the White House and Congress. If anything, the most creative approach to reallocating federal jurisdiction is consistent with our central thesis developed below—that, at best, a jurisdiction strip can buy time.

B. *Federal Laws*

Thus far this Essay has considered the ultimate futility of jurisdiction stripping with respect to federal constitutional questions that arise through adjudication of state law. We shift focus now to consider how jurisdiction stripping can play out in adjudicating federal statutes—questions of pure statutory interpretation as well as cases concerning the constitutionality of federal statutes. This section considers three basic scenarios and the ways that Congress can operate within each: first, jurisdiction stripping with respect to purely statutory questions; second, jurisdiction stripping of lower federal courts when they (rather than the Supreme Court) are the perceived problem that Congress seeks to solve; and, finally, jurisdiction stripping that tries to protect unique federal policies or regimes against constitutional challenges.

We bring together various examples and argue that they reveal remarkably consistent lessons. Congress can sometimes exercise its power over federal courts' jurisdiction to achieve substantive goals but not by paralyzing courts and directly compelling specific policy results. Rather, the common thread running through these examples is that Congress can at best delay, but not forever preclude, federal courts' involvement in a particular issue or set of questions. And even then, jurisdiction stripping doesn't always succeed as an indirect policy tool. Thus, congressional attempts to use jurisdiction stripping to protect federal statutes reveal some nuanced and qualified success stories. They also show the limits—and, sometimes, failures—of jurisdiction stripping as a strategy.

1. *Pure Statutory Interpretation.* — We begin with jurisdiction stripping as to statutory questions. Congress probably can evade *all* judicial review of federal-law questions that don't raise a constitutional issue—that is, pure statutory questions. Imagine that Congress, seeking to protect efforts

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216. See supra notes 212–215.

by the Environmental Protection Agency (EPA) to regulate carbon emissions, denies the Supreme Court jurisdiction over administrative challenges to EPA regulations concerning greenhouse gases. That move would have prevented *West Virginia v. EPA*, in which the Court invalidated the EPA's Clean Power Plan rule.[217] At first glance, that jurisdiction strip appears successful. But on closer analysis, jurisdiction stripping of this ilk doesn't achieve much, if anything, that Congress could not accomplish directly through substantive legislation.

Start with the logistics. Although Congress legislates against a background assumption that state and federal courts have concurrent jurisdiction over federal questions,[218] it can choose to vest federal courts with exclusive jurisdiction on federal statutory questions.[219] So, when enacting a federal statute, Congress may deprive state courts of jurisdiction.[220] And then the familiar architecture of Article III comes into play. Congress has plenary authority to strip lower federal courts of jurisdiction and, under the Exceptions Clause, to prevent the Supreme Court from hearing the matter.[221]

On rare occasions, Congress has taken full advantage of these jurisdictional levers. Most famously, the Portal-to-Portal Act, which the Second Circuit examined extensively in *Battaglia*,[222] changed the underlying labor laws, effectively overruling the Supreme Court's more worker-friendly interpretations of the Fair Labor Standards Act (FLSA).[223] Furthermore, Congress stripped all courts of jurisdiction to hear any claims based on the Supreme Court's earlier decisions.[224] These provisions, taken together, meant that workers who had sued for unpaid wages and overtime (relying on Supreme Court precedent) but who had not secured a final judgment by the time Congress passed the Portal-to-Portal Act were out of luck.

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217. See 142 S. Ct. 2587, 2615–16 (2022).

218. See, e.g., Claflin v. Houseman, 93 U.S. 130, 136–37 (1876) (articulating presumption of concurrent jurisdiction); see also Tafflin v. Levitt, 493 U.S. 455, 458–59 (1990) (noting the "deeply rooted presumption in favor of concurrent state court jurisdiction" to adjudicate federal questions and collecting authorities).

219. See, e.g., Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 378 (2012) ("The presumption of concurrent state court jurisdiction . . . can be overcome 'by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state court jurisdiction and federal interests.'" (quoting Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981))). Iconic examples include federal securities laws and patent laws. See supra note 27.

220. Note the contrast with respect to state-law questions, over which Congress may not deprive state courts of jurisdiction.

221. See supra section I.C.

222. Battaglia v. Gen. Motors Corp., 169 F.2d 254, 255 (2d Cir. 1948).

223. See id. at 259–62 (discussing Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946), which determined that previously uncompensated activities were entitled to compensation and overtime under the FLSA).

224. See id.

Congress's zeal to protect the titans of industry at workers' expense was striking in its comprehensiveness, but the jurisdiction strip didn't add anything. Congress always has authority to change the underlying substantive law.[225] Moreover, even though such changes normally apply prospectively only, Congress may apply them to past conduct without violating due process.[226] In the case of the Portal-to-Portal Act, the end result for the workers may seem unfair, but Congress had sufficient legislative power to impose those new substantive standards and even to make them retroactive.

Professor Richard Fallon has succinctly summarized what he terms the "*Battaglia* principle": "[W]hen Congress can validly extinguish a substantive right, it can also strip courts of jurisdiction to enforce the right that it has abolished."[227] Note what this meant as a practical matter in *Battaglia* itself. Once Congress had changed the substantive law to abolish certain rights that the Supreme Court had read into the FLSA, the jurisdiction strip—that is, Congress's withdrawal of jurisdiction from all state and federal courts to enforce the extinguished rights—added nothing.[228]

The same basic scenario played out in *Patchak v. Zinke*.[229] At the behest of a Native American tribe in Michigan, Congress changed the underlying

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225. See, e.g., Bank Markazi v. Peterson, 578 U.S. 212, 230–32 (2016) (holding that Congress does not impinge on the judicial power when it creates a "new legal standard" that courts must apply); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 431–32 (1856) (finding that a change in the underlying substantive law, when applied prospectively, did not impermissibly annul a final judgment); see also The Federalist No. 81, at 594–95 (Alexander Hamilton) (Floating Press 2011) ("A legislature, without exceeding its province, cannot reverse a determination once made in a particular case; though it may prescribe a new rule for future cases.").

226. See Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994), the modern case most on point. It noted that "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law." Id. at 269 (citing Republic Nat'l. Bank of Mia. v. United States, 506 U.S. 80, 100 (1992) (Thomas, J., concurring in part and concurring in judgment)). Moreover, *Landgraf* observed that Congress may overcome the presumption against retroactivity through a clear statement of its intent. See id. at 270 ("Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent.").

227. Fallon, supra note 24, at 1104.

228. See *Battaglia*, 169 F.2d at 259. In *Battaglia*, the Second Circuit did probe whether the jurisdiction strip had the effect of violating workers' due process rights under the Fifth Amendment. Id. So, the court did end up evaluating the constitutionality of the underlying substantive change in the law. The *Battaglia* principle undermines the widely shared intuition that a comprehensive jurisdiction strip of all federal and state courts "would undoubtedly have a major effect in allowing Congress and state legislatures to insulate their preferences and judgments of constitutional validity from judicial review." See Final Report, supra note 8, at 161.

229. See 138 S. Ct. 897, 906 (2018) (plurality opinion). Technically this applied only to federal courts. But because it relied on the federal government's waiver of sovereign immunity, the suit never could have proceeded in state court.

substantive law (albeit only as it applied to that tribe), allowing the Secretary of the Interior to take certain tribal land into trust.[230] That move, in turn, allowed the tribe to build a casino on the property.[231] In addition to changing the substantive law, Congress—according to the plurality—stripped federal courts of jurisdiction to hear any claims related to the land in question.[232] As with the Portal-to-Portal Act, though, the substantive part of the legislation already accomplished Congress's goal. As Justice Stephen Breyer aptly summarized, the jurisdiction strip just "gilds the lily."[233]

So too with our example from the beginning of this discussion. Congress could strip the Court of jurisdiction over EPA cases involving carbon emissions. But Congress just as easily could change the substantive law to make clear that EPA has authority to regulate carbon.[234] Jurisdiction stripping is just a more complex way to accomplish indirectly what Congress could do directly. If anything, jurisdiction stripping would be less effective. If judicial review of EPA decisions about carbon emissions were eliminated, a new administration could simply repeal any prior regulations limiting emissions. And even if the new administration's repeal were arbitrary and capricious or otherwise violated administrative-law principles, opponents of the repeal could not challenge the administration's decision in court.

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230. See Indian Reorganization Act, 25 U.S.C. § 5108 (2018).

231. *Patchak*, 138 S. Ct. at 903 & n.1.

232. The language of the supposed jurisdiction strip is frustratingly imprecise. It provides: "Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described [herein] shall not be filed or maintained in a Federal court and shall be promptly dismissed." Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, § 2(b), 128 Stat. 1913, 1913–14 (2014). The plurality found that it stripped federal courts of jurisdiction. *Patchak*, 138 S. Ct. at 904–06. The dissent disagreed. See id. at 918–20 (Roberts, C.J., dissenting). Justices Ruth Bader Ginsburg and Sonia Sotomayor would have avoided the hard jurisdictional question by finding that Congress had reasserted the federal government's sovereign immunity. See id. at 912 (Ginsburg, J., concurring in the judgment).

233. *Patchak*, 138 S. Ct. at 911 (Breyer, J., concurring); see also id. (noting that "the jurisdictional part . . . does no more than provide an alternative legal standard for courts to apply that seeks the same real-world result as does the [substantive] part").

234. In fact, Congress recently has attempted to do something along these lines with respect to the Mountain Valley Pipeline project. See generally MVP's 2023 Construction Progress, Mountain Valley Pipeline, https://www.mountainvalleypipeline.info [https://perma.cc/QU8V-9LT3] (last updated Aug. 31, 2023). Congress stripped all courts of jurisdiction to consider whether various departments and agencies had properly issued the necessary authorizations and permits. See Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 324(e)(1), 137 Stat. 10, 47–48. This seems strikingly similar to the statute at issue in *Patchak*. Congress appears well within its substantive powers to change the underlying environmental laws, even as applied just to the Mountain Valley Pipeline. And it seems to have done that in essence. See id. § 324(c). Using jurisdiction stripping to lock in the approved permits looks like another exercise in lily-gilding. We consider one other wrinkle within the jurisdiction strip in the discussion of sequencing. See infra section III.A.

Shortly we will discuss what happens if Congress does not have substantive legislative power to enact a substantive provision—the flip side of the "*Battaglia* principle." On a matter of pure statutory interpretation, though, a jurisdiction strip might, at most, clarify Congress's substantive intent. But a jurisdiction strip on its own accomplishes hardly anything.

2. *Constitutional Issues.* — What about when Congress seeks to use jurisdiction stripping to limit review in cases that involve constitutional, and not merely statutory, questions? Here, the analysis depends on Congress's goals: Is it merely trying to stop hostile lower courts from too eagerly issuing aggressive remedies, or is it concerned with protecting a federal law or program from the Supreme Court (or the Article III judiciary more generally)?

a. *Inferior Federal Courts and Aggressive Remedies.* — Start with situations in which Congress is pushing back on the overly aggressive use of federal remedies, particularly injunctions. This scenario illustrates the subtle way that Congress can use jurisdiction stripping in a targeted and surgical fashion to promote its goals. Congress can withdraw from lower courts the power to issue injunctions or other forms of relief. Though not a complete strip of jurisdiction over a category of cases, such a restriction of judicial power nonetheless is fairly characterized as a jurisdiction strip.[235]

In these scenarios, the Supreme Court itself doesn't present an actual or potential problem, so Congress isn't trying to stymie Supreme Court review and, in fact, usually leaves open the possibility that cases eventually could end up there. A couple of examples from the 1930s show how this works. In both examples, Congress faced constitutional constraints that prevented it from simply changing the underlying rights but nonetheless found a way to manipulate jurisdiction to stop meddling by the lower courts.

First, consider the Norris–LaGuardia Act. At the turn of the twentieth century, a nascent labor movement had trouble gaining traction, in large part because federal courts issued sweeping labor injunctions that applied to enormous swaths of people.[236] Moreover, the injunctions did not simply prevent picketing or strikes but often covered every aspect of a union's activities.[237] These sweeping injunctions defied core tenets of equity: They applied far beyond the specific harm that employers alleged, covered

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235. The Supreme Court itself analyzed the Norris–LaGuardia Act as a withdrawal of jurisdiction. See Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938) ("There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."); see also Fallon et al., supra note 185, at 312–14 (discussing the implications of *Lauf* on Congress's power to strip jurisdiction).

236. See Jon R. Kerian, Injunctions in Labor Disputes: The History of the Norris–LaGuardia Act, 37 N.D. L. Rev. 49, 49–50 (1961) (highlighting the increase in labor injunctions from 1895 onward).

237. See, e.g., id. at 51–52; Luke P. Norris, Labor and the Origins of Civil Procedure, 92 N.Y.U. L. Rev. 462, 485 (2017).

numerous people who were not parties to the lawsuits,[238] and were based on cookie-cutter complaints rather than specific allegations of harm.[239] Temporary restraining orders, which federal courts had begun to issue as a matter of course rather than as an exceptional remedy,[240] had especially devastating effects by snuffing out strikes. At that point, the harm to workers was done.[241] Getting to trial, to say nothing of seeking appellate review, was beside the point.[242] Lower federal courts, in Congress's estimation, had thus become the central problem.

But constitutional obstacles stood in the way of simply changing the law. In *Truax v. Corrigan*, the Court had held that changing state law to authorize union picketing, permit union promotion of a boycott, and deny a business owner the right to obtain injunctive relief against such conduct was unconstitutional.[243] Congress's solution was the Norris–LaGuardia Act (NLGA) in 1932.[244] Among other things, it created new substantive law, such as outlawing "yellow dog" contracts that prohibited workers from joining a union.[245] But it also stripped all lower federal courts of jurisdiction to issue injunctions except in narrowly defined circumstances.[246] Congress chose to "phrase the [NLGA] in jurisdictional terms to avoid an apparent conflict" with *Truax*.[247]

The NLGA's jurisdiction strip worked as its proponents hoped it would.[248] In large measure it prevented federal courts from granting labor

238. See Norris, supra note 237, at 485.

239. See Felix Frankfurter & Nathan Greene, The Labor Injunction 52 (1963) (contending that "the extraordinary remedy of injunction has become the ordinary legal remedy, almost the sole remedy"); see also id. at 62–65 (describing the complaints in these cases as being "perfunctorily dictated" and written in a manner that was "unsupported, one-sided [and] in general terms").

240. Kerian, supra note 236, at 50–51.

241. See id. ("The aim of employers basically was . . . to secure a temporary restraining order. A temporary order was the most [important] of all injunctive writs because strikes are usually won or lost within a few days and they were issued as a matter of course.").

242. See id. at 52 ("Appeals were rarely brought on injunction. Once the injunction was granted, the strikers' ferver [sic] was abated and the strike was lost.").

243. 257 U.S. 312, 330 (1921). Specifically, the Court held that changing the substantive law to completely deny any remedies for the challenged conduct would violate due process, while simply denying injunctive relief when it was otherwise available would violate equal protection. Id. at 330, 334–35.

244. See Norris–LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101–115 (2018)).

245. Id. § 3.

246. Id. § 7 (prohibiting a "court of the United States" from issuing such injunctions except under narrow circumstances); see also id. § 13(d) (defining "court of the United States" to mean inferior federal courts but not the Supreme Court).

247. Eisenberg, supra note 23, at 528–29.

248. See Michael Goldfield, Worker Insurgency, Radical Organization, and New Deal Labor Legislation, 83 Am. Pol. Sci. Rev. 1257, 1258 (1989) (noting that the Norris–LaGuardia Act "greatly limited the use of injunctions"); Herbert N. Monkemeyer, Five Years of the Norris–LaGuardia Act, 2 Mo. L. Rev. 1 (1937) (collecting cases demonstrating a marked shift in how frequently courts issued labor injunctions).

injunctions, which had had a devastating effect on union organizing. Time proved critical. It created an opportunity for workers and unions to build a movement. Effective social organizing, including widespread labor protests in the summer of 1934, ultimately spurred Congress to pass the transformative National Labor Relations Act in 1935.[249] Though the NLGA left open the possibility that the Supreme Court could hear a case, the breathing room it created was most essential. By 1938, when the Supreme Court addressed the constitutionality of the jurisdiction strip,[250] "*Truax* was already in peril," meaning that the NLGA "merely ha[d] the effect of accomplishing through jurisdiction what Congress could do through substantive rulemaking."[251]

In a similar vein, Congress passed the Tax Injunction Act of 1937 in response to overly hasty district court injunctions.[252] Here again, large corporations had turned to federal courts, which they perceived as sympathetic to their interests,[253] and often had persuaded those courts to enjoin certain taxes as unconstitutional.[254] Congress feared that these injunctions had created financial instability for states and localities.[255] Congress's jurisdictional and remedial response proved effective not by changing the substantive law or circumventing ultimate Supreme Court review but by buying time.

Consider several interlocking features of the Tax Injunction Act's jurisdiction strip. As with the labor injunctions that spurred Congress to pass the Norris–LaGuardia Act, federal courts had tipped the scales in

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249. See Goldfield, supra note 248, at 1273 ("The most reasonable hypothesis to account for the passage of the NLRA is that labor militancy, catapulted into national prominence by the 1934 strikes and the political response to this movement, paved the way for the passage of the act.").

250. See Lauf v. E.G. Shinner & Co., 303 U.S. 323 (1938).

251. Eisenberg, supra note 23, at 529.

252. Tax Injunction Act of 1937, ch. 726, 50 Stat. 738 (codified as amended at 28 U.S.C. § 1341 (2018)).

253. See, e.g., Fulton Mkt. Cold Storage Co. v. Cullerton, 582 F.2d 1071, 1074–75 (7th Cir. 1978) (citing S. Rep. No. 75-1035, at 1–2 (1937)) (observing that Congress, according to the Senate Report, feared that corporations could invoke diversity jurisdiction and persuade a federal court to enjoin the tax, whereas state residents had no such recourse).

254. See, e.g., Fair Assessment in Real Est. Ass'n, Inc. v. McNary, 454 U.S. 100, 109 (1981) (observing that before Congress passed the Act, many federal courts had found that "available state remedies did not adequately protect the federal rights"); Note, Federal Court Interference With the Assessment and Collection of State Taxes, 59 Harv. L. Rev. 780, 782–83 (1946) (noting that "prior to 1937, jurisdiction for injunctive relief was freely assumed by federal courts, readily amenable to persuasion that the state remedy was inadequate" and collecting cases).

255. See Perez v. Ledesma, 401 U.S. 82, 127 n.17 (1971) (Brennan, J., concurring in part and dissenting in part) (explaining this rationale with reference to legislative history of the Tax Injunction Act); see also Frederick C. Lowinger, Note, The Tax Injunction Act and Suits for Monetary Relief, 46 U. Chi. L. Rev. 736, 741–44 (1979) (detailing Congress's concern that federal court injunctions could disrupt and impede collection of state and local taxes).

favor of big businesses by ignoring well-settled principles of equity, which permit relief such as injunctions only when remedies at law are inadequate.[256] That is, federal courts were jumping the gun, especially when challengers hadn't demonstrated the inadequacy of legal remedies in state court. As a result, these injunctions had undermined state and local governments' financial stability.[257] By taking away district courts' power to enjoin the payment of taxes, the Tax Injunction Act effectively compelled entities to pay a tax and only then challenge it as unconstitutional (in a refund suit or a damages action under § 1983).[258] So, Congress sought to foster financial stability for states and localities by buying time—taking away federal courts' injunctive power, except in rare cases.

Both of these examples show how Congress used its jurisdiction-stripping power to prevent lower federal courts from undermining important federal policies through overly aggressive injunctions. In the labor context, prohibiting those injunctions essentially stymied employers' capacity to thwart labor organizing.[259] The precise mechanics of the Tax Injunction Act are different. Congress remained attuned to ensuring that taxpayers could challenge the constitutionality of taxes, but it tweaked the sequencing, largely ensuring a pay-before-you-litigate policy to protect state and local financial stability.[260] Moreover, it left the Supreme Court with the final word on the taxes' constitutionality.

b. *Protecting Federal Laws and Programs.* — Finally, Congress might use jurisdiction stripping to try to protect federal laws or regimes against constitutional challenges. Here, Congress sees the danger as coming from the Supreme Court, or the Article III judiciary as a whole, and not merely the lower federal courts. This particular form of jurisdiction stripping has captured the imagination of some scholars in recent years, who urge that

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256. See Lowinger, supra note 255, at 744 ("What may have prompted Congress to act, despite the limitations on federal equity jurisdiction already recognized by courts, was the narrow construction given by the federal courts to 'adequate' remedies at law and their resulting failure to cut back sufficiently on tax-injunction suits.").

257. See id. at 742 ("Both the Senate and House reports on the bill that became the Tax Injunction Act emphasized that suits brought in federal courts by foreign corporations for injunctive relief from state or local taxes disrupted the continuous flow of governmental revenues.").

258. The Tax Injunction Act provided, "[N]o district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State." Tax Injunction Act of 1937, ch. 726, 50 Stat. 738.

259. In theory, it could have shifted litigation to state courts. See S. Rep. No. 72-163, at 17 (1932) (criticizing federal courts for "prohibit[ing] laboring men from litigating in State courts, under the law of the State, to sustain what they claim to be their rights"). And, again in theory, Supreme Court review remained available.

260. See, e.g., Lowinger, supra note 255, at 743, 761 (noting pay-before-you-litigate sequencing of challenges).

it offers a uniquely effective way for progressives to pursue their priorities and circumvent a hostile Supreme Court.[261]

The jurisprudential building blocks, which we mentioned earlier,[262] turn on the idea that Congress may deprive state courts of jurisdiction to adjudicate federal statutes; that Congress has plenary authority to deprive inferior federal courts of jurisdiction; and that, through its plenary power under the Exceptions Clause, Congress may deprive the Supreme Court of appellate jurisdiction, too.[263] This sort of complete jurisdiction strip would constitute the most extreme exercise of Congress's power. Congress also has other options, including channeling cases into an administrative agency,[264] an existing lower court,[265] or a specially created lower court.[266] In other words, Congress can mix and match these options, creating a bespoke system (or none at all) for constitutional review of federal statutes.

We contend that whichever option Congress chooses, it is unlikely to succeed in forever insulating a federal law or program from constitutional scrutiny. We have two overarching points. First, we look to historical examples of jurisdiction stripping and find that even where Congress apparently succeeded in its goals by using jurisdiction stripping, it did not preclude Article III review entirely. Second, we argue that whatever the limits of Congress's constitutional authority, a jurisdiction strip is not a viable long-term strategy because most federal laws and programs ultimately need courts to cooperate for those laws to have any force.

Lessons from history. At first blush, history justifies enthusiasm for jurisdiction stripping. Congress used it to protect Military Reconstruction of the South after the Civil War and a massive federal takeover of the American economy during World War II. We agree that these experiments with jurisdiction stripping count as successes, but only in a limited and qualified way. Other scholars, we contend, have drawn the wrong lessons from these episodes, which don't reveal an unbridled authority to evade judicial scrutiny.

Consider three examples—two successful attempts at jurisdiction stripping and one failure. Together they suggest the subtle and indirect ways that jurisdiction stripping can work and begin to illustrate why the

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261. See supra section I.D.

262. See supra section I.C.

263. See California v. Arizona, 440 U.S. 59, 66 (1979) (noting that "it is extremely doubtful that [Congress's broad powers to control federal jurisdiction] include the power to limit in this manner the original jurisdiction conferred upon this Court by the Constitution"); Ex parte Yerger, 75 U.S. (8 Wall.) 85, 98 (1869) (noting Article III's conferral of original and appellate jurisdictions on the Supreme Court and Congress's power to create exceptions only as to the appellate jurisdiction); see also James E. Pfander, Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases, 82 Calif. L. Rev. 555, 558 n.12 (1994).

264. See infra notes 336–338 and accompanying text.

265. See supra note 25 and accompanying text.

266. See supra notes 273–276 and accompanying text.

robust version—forever wresting interpretive control from the courts—won't.

The first, and probably most famous, success story comes from *McCardle*. In laying out the Supreme Court's endorsement of the view that Congress has plenary power to control both lower courts' and the Supreme Court's jurisdiction, we recounted the twists and turns of *McCardle*.[267] For all of the complications—including the case's multiple trips to the Supreme Court and the irony that someone like McCardle would invoke the new 1867 habeas statute to attack the Reconstruction project—the jurisdiction strip was straightforward. Congress made clear that the Supreme Court's jurisdiction to hear appeals pursuant to the new 1867 statute was repealed.[268]

The Supreme Court famously acquiesced to that jurisdiction strip, which some members of Congress had openly described as an attempt to prevent the Court from opining on the constitutionality of Reconstruction.[269] Thus, Congress staved off McCardle's constitutional challenge. The ambitious Reconstruction project continued.

McCardle ranks among the most consequential Supreme Court decisions of all time. The Court broadly endorsed Congress's jurisdiction-stripping power under Article III, and it showed tremendous deference to the political branches during a precarious period when the future of the United States hung in the balance. From the perspective of whether Congress succeeded in achieving its policy goals through the jurisdiction strip, most people would agree that it did.

We do, too—but not for the reasons most assume. Congress's jurisdiction strip did not build an impenetrable jurisdictional fortress around the Reconstruction efforts. Instead, the Court in *McCardle* cryptically suggested that someone in McCardle's shoes could bring a habeas action pursuant to the original Judiciary Act of 1789 rather than the repealed 1867 statute.[270] The Court, in other words, took pains to emphasize that Congress had not closed off all avenues of review. It confirmed as much in late 1869 when it heard the case of Edward Yerger,

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267. See supra notes 65–68 and accompanying text.

268. Section 2 of the 1868 Repealer Act provided that to the extent the 1867 habeas statute "authorized an appeal from the judgment of the Circuit Court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court, on appeals which have been, or may hereafter be taken, be, and the same is hereby repealed." Ex parte McCardle, 74 U.S. (7. Wall.) 506, 508 (1869) (internal quotation marks omitted) (quoting Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44) (misquotation).

269. See Van Alstyne, supra note 48, at 239 (quoting Representative James Wilson of Iowa as expressing fear "that the McCardle case was to be made use of to enable a majority of that [Supreme] Court to determine the invalidity and unconstitutionality of the reconstruction laws of Congress" (internal quotation marks omitted) (quoting Cong. Globe, 40th Cong., 2d Sess. 2062 (1868) (statement of Rep. Wilson))); see also *McCardle*, 74 U.S. (7 Wall.) at 514 ("We are not at liberty to inquire into the motives of the legislature.").

270. See *McCardle*, 74 U.S. (7. Wall.) at 515 (noting that the Repealer Act of 1868 "does not affect the jurisdiction which was previously exercised").

another unreconstructed newspaper publisher from Vicksburg, Mississippi.[271]

The jurisdiction strip in *McCardle* thus did not take the Court out of the picture entirely. Instead, it succeeded as a way for Congress to buy time—about a year and a half—before the Supreme Court decided *Ex parte Yerger*. In Part III, we return to what *McCardle* made possible during the Reconstruction period. For now, though, the point is that for all that *McCardle* rightly stands for today, it's easy to overread the case as sustaining Congress's limitless power under the Exceptions Clause. No one can say with certainty what the Supreme Court would have done if Congress had truly closed off all avenues of review. But as Professors Richard Fallon and Henry Monaghan underscore, even in the most famous endorsement of the view that Congress has broad authority under the Exceptions Clause, the Court knew that constitutional review was still possible.[272] Moreover, in case after case since *McCardle*, the Court has bent over backward to conclude that Congress has left a sliver of judicial review available notwithstanding a jurisdiction strip.[273]

The second qualified success story stems from the Second World War. Congress successfully used its power over federal courts' jurisdiction to help entrench a price control regime. With the United States government infusing the economy with massive amounts of wartime spending (and deficits), the threat of inflation loomed large. To prevent inflation and related price speculation, which Congress feared could have destabilized the national economy in wartime, it enacted price control mechanisms. It also crafted a unique jurisdictional arrangement for any challenges to maximum prices. If the jurisdiction strip in *McCardle* was straightforward—repealing the 1867 habeas statute and stripping the Supreme Court of jurisdiction—Congress's jurisdictional innovation in the price control context looked more like a Rube Goldberg machine.

To those who view jurisdiction stripping as an effective way to protect a federal regime against judicial review, the Emergency Price Control

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271. See Ex parte Yerger, 75 U.S. (8 Wall.) 85, 103–06 (1869) (reviewing *McCardle* and stating that the Judiciary Act of 1867 did not repeal the Act of 1789, which provided for habeas corpus review of Yerger's case).

272. See Fallon, supra note 24, at 1081 (arguing against the "intractable insistence that a single sentence in *McCardle* definitively resolves a question that that case did not present—namely, whether Congress could strip all jurisdiction to entertain constitutional challenges"); Monaghan, supra note 24, at 18 (arguing that cases like *McCardle* "are simply unable to bear the weight put on them"); see also Hart, supra note 50, at 1364 ("You read the *McCardle* case for all it might be worth rather than the least it has to be worth, don't you?").

273. See Hamdan v. Rumsfeld, 548 U.S. 557, 575–76 (2006) (avoiding a "grave" constitutional question by interpreting the statute not to preclude all review); Felker v. Turpin, 518 U.S. 651, 660–62 (1996) (finding that Congress left open an avenue for review, thus avoiding a constitutional question about the outer boundaries of Congress's Article III powers); see also Final Report, supra note 8, at 167 (noting the historical constitutional importance of leaving some Supreme Court review available).

Act—which led to the Supreme Court's decision in *Yakus*—comes as close as one can imagine. Even still, it doesn't vindicate the idea that Congress can avoid judicial review altogether.

The Emergency Price Control Act created a bespoke method of judicial review that put a heavy thumb on the scale in favor of the government in any constitutional challenge. Someone subject to a maximum price could file an objection with the administrative agency tasked with setting those prices.[274] If dissatisfied with the result, the person could then appeal the administrative decision to a new Article III court that Congress created—the Emergency Court of Appeals.[275] Importantly, Congress prohibited the Emergency Court of Appeals from issuing temporary or interlocutory relief.[276] Moreover, permanent injunctions couldn't take effect for at least thirty days and (if the aggrieved party sought certiorari) not until final disposition by the Supreme Court.[277] The Emergency Court of Appeals shows Congress at its most innovative and aggressive. Congress created it "to avoid hostile courts imposing delays and jeopardizing the overall implementation of the emergency price control program."[278] In other words, as with the Norris–LaGuardia Act and the Tax Injunction Act, Congress intentionally steered cases away from the "problematic" courts.

Congress included another jurisdictional twist that created an enormous incentive for those subject to price controls to comply. Someone could face criminal prosecution in federal or state court for charging prices above those set by the Administrator.[279] But during those prosecutions, a defendant who had failed to challenge the constitutionality of the maximum prices through the novel administrative mechanism was barred from asserting a defense that the prices were unconstitutionally confiscatory.[280]

The Supreme Court upheld the constitutionality of the jurisdictional innovations—from the administrative exhaustion requirement to the specialized court of appeals to the bifurcation of federal defenses and

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274. Emergency Price Control Act of 1942, ch. 26, § 203, 56 Stat. 23, 31.

275. Congress did not create new judgeships. Instead, it directed the Chief Justice to appoint district and circuit judges to this new court. Id. § 204; see also Theodore W. Ruger, The Judicial Appointment Power of the Chief Justice, 7 U. Pa. J. Const. L. 341, 363 (2004).

276. Emergency Price Control Act of 1942 § 204.

277. Id.

278. James R. Elkins, The Temporary Emergency Court of Appeals: A Study in the Abdication of Judicial Responsibility, 1978 Duke L.J. 113, 118 n.17 (1978).

279. Emergency Price Control Act of 1942 §§ 4, 205.

280. See id. §§ 203, 204; see also Yakus v. United States, 321 U.S. 414, 467 (1944) (Rutledge, J., dissenting) ("The crux of this case comes . . . in the question whether Congress can confer jurisdiction upon federal and state courts in the enforcement proceedings, more particularly the criminal suit, and . . . [yet] deny them 'jurisdiction or power to consider the validity' of the regulations for which enforcement is thus sought." (quoting Emergency Price Control Act § 204)).

criminal prosecutions.[281] From a substantive policy perspective, economists have raised important questions about whether the price controls did long-term harm. They basically agree, though, that in the short run, the controls succeeded in keeping inflation down.[282] From a legal perspective, some commentators have offered unsparing criticism of what they contend was perfunctory judicial review that allowed the government to trample on individual rights.[283]

We don't necessarily endorse that perspective. But to the extent that this criticism has bite, it's because Congress's jurisdictional tweaking worked. One of the postmortems of this entire scheme found that the Emergency Court of Appeals set aside only thirty (of nearly 400) decisions by the Price Control Administrator.[284] Perhaps even more importantly, Congress succeeded in directing cases away from "hostile" courts—preventing those courts from delaying the price control scheme or granting provisional relief that could have hobbled the endeavor.

For all that Congress accomplished through these jurisdictional innovations, notice what it *didn't* try to do—eliminate Article III review altogether. The Emergency Price Control Act provided for review as a matter of right in the new Emergency Court of Appeals and authorized the Supreme Court to review these decisions by way of its usual certiorari jurisdiction.[285] Thus, any challenges to the validity of price control regulations had to be resolved up front rather than down the line after someone had violated the rules and was being prosecuted. That could have significant consequences for *how* those issues might be resolved, as we will discuss later. But this is a far cry from outright denying Article III review.[286] As in *McCardle*, scholars can grapple with counterfactual questions. Would the Supreme Court have acquiesced if Congress had vested final decisionmaking authority in a politically accountable agency? Or if the Emergency Court of Appeals had been the only Article III court with

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281. See *Yakus*, 321 U.S. at 444–47 (majority opinion); Lockerty v. Phillips, 319 U.S. 182, 187 (1943).

282. See, e.g., Paul Evans, The Effects of General Price Controls in the United States During World War II, 90 J. Pol. Econ. 944, 955 (1982) (arguing that "price controls were effective" insofar as "the inflation rate actually fell after 1943" despite the fact that "government purchases and the money supply were surging").

283. See Conde & Greve, supra note 213, at 861–63 (labeling *Yakus* a "fulsome judicial endorsement" of "a constitutionally unconstrained administrative state").

284. See Harvey C. Mansfield, Off. of Temp. Controls & Off. of Price Admin., Hist. Reps. on War Admin. Gen. Pub. No. 15, A Short History of OPA 279 (1946).

285. Emergency Price Control Act of 1942 § 203.

286. Some might argue that as a practical matter, Article III review didn't amount to much. The Emergency Court of Appeals was staffed with New Deal judges hand selected by Chief Justice Stone, as provided for by the Emergency Price Control Act. See supra note 214. Moreover, when Congress passed the Act in 1942, eight of the nine members of the Supreme Court had been appointed by President Roosevelt. Schwartz, supra note 66, at 241. But the fact remains that Congress did not attempt to oust all Article III courts of jurisdiction.

jurisdiction to review those agency decisions? Maybe the Supreme Court would have stood idly by, but history, including the myriad ways that courts have nimbly dodged complete jurisdiction strips over the centuries, strongly suggests otherwise.[287]

Reconstruction and the Emergency Price Control Act illustrate, to our mind, the best-case scenario when Congress actively tries to stack the jurisdictional deck by outright depriving the Supreme Court of jurisdiction or engineering a review mechanism designed to uphold the federal program. Though both instances helped Congress effectuate its goals, for reasons we will discuss in the next Part, neither supports the notion that Congress can evade Article III review indefinitely. Nor do these examples create a foolproof blueprint for how Congress can protect federal programs, even on a short-term basis.

By contrast, the clearest example of a failed jurisdiction strip arose during the Bush Administration's so-called War on Terror. Congress had established Combatant Status Review Tribunals (CSRTs), which gave suspected terrorists detained in Guantanamo Bay, Cuba, limited opportunities to challenge their detention.[288] Several detainees sought habeas relief instead. Congress quickly intervened to strip all federal courts of jurisdiction to hear detainees' habeas petitions, making the CSRTs the exclusive form of relief.[289]

The ensuing litigation demonstrated that jurisdiction stripping is not a trump card that Congress can play at will. For starters, during the first round of litigation, the Court, as it had in *McCardle* and *Yerger*, construed the jurisdiction strip narrowly—as applying only to future cases, not to those already pending—to avoid a "grave" constitutional question.[290] Congress tried again and made clear that the jurisdiction strip applied to pending cases as well.[291] The second round of litigation thus teed up the question that the Court initially had avoided—whether Congress had unconstitutionally suspended the writ of habeas corpus and then (à la *Klein*) attempted to insulate that unconstitutional action through a jurisdiction strip. *Boumediene* determined that Congress had done both.[292] And thus, for only the second time in the country's history, the Court

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287. Indeed, in the case most analogous to the *Yakus* counterfactual—permitting criminal prosecution for violation of an administrative order without *any* possibility of Article III review of the underlying order—the Court found the scheme impermissible. See United States v. Mendoza-Lopez, 481 U.S. 828, 837–39 (1987).

288. See Hamdan v. Rumsfeld, 548 U.S. 557, 572–74 (2006).

289. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2739, 2742–44.

290. See *Hamdan*, 548 U.S. at 575–84.

291. See Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635–36 (codified at 28 U.S.C. § 2241(e) (2012)); Boumediene v. Bush, 553 U.S. 723, 735–37 (2008).

292. See *Boumediene*, 553 U.S. at 771–72, 795.

found a jurisdiction strip invalid.[293] When the Court really wants to weigh in on the constitutionality of a federal program, it can find a way.

The need for courts. History, then, shows that jurisdiction stripping is not a foolproof method for precluding constitutional challenges to a federal program. But assume for purposes of argument that the courts would accede to a jurisdiction strip broader than those in *McCardle* and *Yakus* or even *Boumediene*—one that eliminated any possibility of Article III review. Even here, jurisdiction stripping simply won't provide a long-term guarantee of the success of a federal law or program.

To have any real-world significance, a federal law or program will ultimately need to rely on courts to enforce its guarantees. Jurisdiction stripping's proponents, we argue, have not recognized that taking courts out of the picture entirely simply won't work. Courts are ultimately essential.

Understanding this point requires working through some examples. Consider first a hypothetical federal law, suggested in passing by Sprigman, that guarantees a right to abortion and purports to preempt state laws forbidding abortion.[294] Imagine Congress fears that a conservative Court would strike the law down as exceeding Congress's enumerated powers.[295] So, Congress includes in the law a jurisdiction-stripping provision that forbids the Court from hearing any case contesting the law's constitutionality. Indeed, progressive members of Congress have urged this strategy to insulate potential rights-granting federal statutes against judicial interference.[296] Would this work?

Almost certainly not. How, exactly, is the federal law guaranteeing abortion rights supposed to be enforced? What if Texas courts simply refused to follow it (on the theory that it was unconstitutional) and upheld a criminal conviction of a woman who received an abortion? Requiring a state court to follow federal law is one of the Supreme Court's most important roles. But if the Court has been taken out of the picture, there is no *other* institution that could obviously stop Texas from enforcing its

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293. Interestingly, the *Boumediene* Court did not spend much time addressing the link between the unconstitutional suspension of habeas corpus and the invalidity of the jurisdiction strip. The Court seemed to assume that if Congress had violated the Suspension Clause, then the jurisdiction strip was necessarily impermissible. See id. at 739 (concluding that "the [Act] deprives the federal courts of jurisdiction to entertain the habeas corpus actions now before us" and then in the next sentence proceeding to take up the constitutional question of whether Congress had violated the Suspension Clause).

294. See Sprigman, Congress's Article III Power, supra note 2, at 1859.

295. For the related argument that Congress lacks power under the Commerce Clause to forbid "partial-birth abortion," see Allan Ides, The Partial-Birth Abortion Ban Act of 2003 and the Commerce Clause, 20 Const. Comment. 441, 461–62 (2003); David B. Kopel & Glenn H. Reynolds, Taking Federalism Seriously: *Lopez* and the Partial-Birth Abortion Ban Act, 30 Conn. L. Rev. 59, 104 (1997).

296. See Vakil, supra note 6.

criminal law.[297] Perhaps the President could call in the National Guard to liberate the defendant from state prison, but this seems far-fetched—to say the least.[298]

Nor could Congress craft the law to permit the Supreme Court to hear cases enforcing the statute yet deny it jurisdiction only over the *issue* of constitutionality. If Congress tried that move, the Court almost assuredly would strike it down on one of two grounds.[299]

First, and most likely, it could conclude that the jurisdiction strip represented an impermissible attempt by Congress, as in *Klein*, to dictate the outcome of a particular case—rather than simply to remove certain cases from its docket. The Court could then rule on the substantive federal law's constitutionality. Alternatively, the Court might accede to the jurisdiction strip but then rule that without jurisdiction to determine whether such an order would be constitutional, it was powerless to overturn a conviction. For the jurisdiction strip to succeed in making the statute effective, one would need to believe that the Court would take neither path and instead willingly overturn a state-court ruling based on a federal statute that the Court believed exceeded Congress's substantive powers.

What about a situation in which Congress is trying to insulate a federal program from judicial review? Imagine that when passing the Affordable Care Act (ACA), Congress paired it with a jurisdiction strip forbidding the Court from addressing any constitutional objections to it. And assume that,

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297. The progressive commentator Ian Millhiser is perhaps the only voice in the recent debate about Supreme Court reform to have emphasized this problem with jurisdiction stripping. See Ian Millhiser, 10 Ways to Fix a Broken Supreme Court, Vox (July 2, 2022), https://www.vox.com/23186373/supreme-court-packing-roe-wade-voting-rights-jurisdiction-stripping [https://perma.cc/X2FJ-GW4Z] ("Congress might be able to prevent the Supreme Court from striking down the Voting Rights Act, for example, by stripping the Court of jurisdiction to hear voting rights cases. But if voting rights plaintiffs cannot obtain a court order enforcing the Voting Rights Act, that law ceases to function.").

298. Several readers of early drafts have suggested that calling in the National Guard might not be far-fetched after all. Consider how this could play out. The President would need to be not just sympathetic to the federal law protecting abortion rights but also willing to expend maximal political capital to enforce it through violence against a state. Prison authorities might be caught between judgments and injunctions from state courts (commanding that the prisoner remain incarcerated) and armed federal authorities (demanding, at the President's behest, that the prisoner be released)—with no Supreme Court to mediate the constitutional conflict. Even if this "works," and even if calling in the National Guard is right and just, the entire gambit would hark back to the most precarious times in American history when the survival of the country hung in the balance. See, e.g., Proclamation No. 82 (Apr. 27, 1861), reprinted in 12 Stat. app. 1259 (1863) (deploying federal troops to Virginia and North Carolina to extend the Union blockade of Southern ports during the Civil War). At the very least, spinning out this hypothetical reinforces our thesis that jurisdiction stripping's effects are contingent and unpredictable.

299. See Final Report, supra note 8, at 168 (noting constitutional problems "if Congress sought to provide for coercive enforcement of a statute by the courts while purporting to withdraw judicial jurisdiction to entertain constitutional objections to the statute").

contrary to fact, five Justices were willing to declare the entire ACA unconstitutional but for the jurisdiction strip. So far, so good while Barack Obama was President. But what if the Trump Administration simply refused to follow and enforce any of the ACA's requirements?[300] The typical solution would be to go to court to get the Administration to follow the law. But if the Supreme Court thought that the law as a whole was unconstitutional, it again would either (1) declare itself powerless to consider whether to enforce the law given Congress's *Klein*-like attempt to dictate its decision in a case; or (2) overcome the jurisdiction strip by reviewing the constitutional question to determine whether it had power to order the Administration to follow the law. Yet again, the jurisdiction strip fails to accomplish its goals—at least in the long term.

The point here is that any federal program will ultimately require the active participation of the judiciary if it is to be durable as administrations change hands. When the Court is hostile to Congress's efforts, it is unrealistic to expect the Court to nonetheless be an active partner, which would be necessary to ensure the long-term success of the program. To summarize these last points: To accomplish almost any of its goals, Congress will eventually need the judiciary's help.[301]

C. *Mythology Reexamined*

Having worked through various permutations of how jurisdiction stripping likely would play out, let us revisit the mythology that has grown up around it. Amidst the robust scholarly debate about Congress's constitutional authority over jurisdiction, scholars continue to rely on an assumption about jurisdiction stripping's practical consequences that is descriptively wrong.[302] As our polarized country wrestles with profound questions about democratic legitimacy, understanding how these levers of power do (and don't) work is critical.

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300. Consider some of the ACA's most prominent features, including insurance subsidies to private company plans on the government-created insurance exchanges and payments to states as part of the Medicaid expansion. See King v. Burwell, 576 U.S. 473, 482–83 (2015) (describing exchanges); NFIB v. Sebelius, 567 U.S. 519, 575–76 (2012) (describing Medicaid expansion).

301. One also can imagine a hostile Court coming up with other ways to meddle with Congress's efforts. For example, consider a case like *Burwell*, 576 U.S. 473, which involved a question of statutory interpretation that was hugely consequential to the ACA's proper functioning. See Rachel Sachs, *King v. Burwell*: Appreciating the Stakes of the Case, Bill of Health (Mar. 15, 2015), https://blog.petrieflom.law.harvard.edu/2015/03/05/king-v-burwell-appreciating-the-stakes-of-the-case/ [https://perma.cc/4VU3-WJX2] (noting the possibility of an "insurance death spiral" if the government lost in *Burwell*). A Court firmly opposed to the ACA (and perhaps willing to operate in bad faith, or at least one engaged in motivated reasoning) could have chosen an interpretation that would have crippled the ACA. See Epps & Sitaraman, Supreme Court Reform and American Democracy, supra note 16, at 844–46 (suggesting this possibility).

302. See, e.g., supra notes 2–3.

In just the last few years, several scholars have pointed to jurisdiction stripping as a tool progressives can use to respond to the hyperconservative Court.[303] These scholars contend that Congress could foreclose *all* constitutional challenges to a federal regime. Doerfler and Moyn suggest, for example, that Congress could pair the Green New Deal with a jurisdiction strip that would insulate the program from constitutional challenge.[304] Going further, they contend that "[a] total or near-total strip over constitutional cases would . . . dramatically reallocate decision-making authority within our constitutional scheme."[305] Similarly, Sprigman argues that "[i]f it wishes to, Congress can seize interpretive authority with respect to particular cases or issues."[306] Or, to put it more bluntly, Congress could simply tell the courts to "stay out."[307] The check, these scholars all suggest, comes from the people's ability to vote out members of Congress—either because voters disagree with the substantive policy or because they believe Congress has transgressed the separation of powers.[308]

This rosy conception of jurisdiction stripping's efficacy doesn't withstand analysis.[309] In the long run, Congress is unlikely to succeed in impermeably insulating a regime against constitutional review. We have shown that courts have numerous tools at their disposal to engage in normal judicial review, even in the face of language that purports to deprive courts of jurisdiction categorically. The idea of external constraints looms largest in this regard. Although we have discussed external constraints previously, this section revisits them for a moment because they form an integral part of our descriptive claim that Congress can't really accomplish what most scholars assume it can.

One might counter that under our argument, external constraints become an exception that swallows the rule. On this view, if any allegedly

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303. See supra note 2 for a list of such scholarship.

304. Doerfler & Moyn, supra note 2, at 1735.

305. Id. at 1736.

306. Sprigman, Congress's Article III Power, supra note 2, at 1836.

307. Sprigman, A Constitutional Weapon, supra note 1; Sprigman, Stripping the Courts' Jurisdiction, supra note 130.

308. See Sprigman, Congress's Article III Power, supra note 2, at 1784 ("Correction, if it comes at all, will come from *voters*."); Sprigman, A Constitutional Weapon, supra note 1 (arguing that "Congress will face discipline from voters, not judges"); Sprigman, Stripping the Courts' Jurisdiction, supra note 130 ("If voters disagree [with a jurisdiction strip] they can discipline Congress in the next election."); see also Doerfler & Moyn, supra note 2, at 1735 (arguing that interpretive decisions "would be made by Congress and the President and, in turn, voters, who hold those officials accountable—however imperfectly").

309. Professor Sprigman makes a thoughtful normative claim about the power of jurisdiction stripping. See Sprigman, Congress's Article III Power, supra note 2, at 1836–43; Sprigman, A Constitutional Weapon, supra note 1; Sprigman, Stripping the Courts' Jurisdiction, supra note 130. So, too, Professors Doerfler and Moyn argue as a normative matter for the democratizing effect of such jurisdiction stripping. See Doerfler & Moyn, supra note 2, at 1735–36. We leave to one side these normative questions and focus here on their descriptive accounts.

unconstitutional law implicates an external constraint, then Congress's power to strip federal courts of jurisdiction becomes meaningless when constitutional claims are at issue.[310]

We have gamed out various scenarios based on the traditional theory of jurisdiction stripping (plenary power, subject to external constraints) not because we think it reflects the best reading of Article III but because the Supreme Court consistently has subscribed to it. That's what matters most when trying to figure out how a Court hostile to a substantive law will respond to jurisdictional hardball. One could argue that external constraints *should* be narrowly defined (as a normative matter). But the limited precedent from the Supreme Court and lower federal courts suggests a broad understanding of external constraints (as a descriptive matter). While Sprigman, for example, argues that the external constraints on Congress are vanishingly small,[311] the case law strongly suggests that courts would not agree with so bold a reading.[312] Going back as far as *McCardle*, federal courts often have construed jurisdiction strips narrowly and ensured that some avenue of constitutional review remains available.[313] Courts also have been willing to consider whether a jurisdiction strip attempts to shield an otherwise unconstitutional action (such as a potential due process violation) from review.[314]

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310. Of course, even the most expansive approach to external constraints doesn't categorically quash Congress's power to regulate federal courts' jurisdiction. See Patchak v. Zinke, 138 S. Ct. 897, 906–07 (2018) (plurality opinion) (describing congressional power over federal jurisdiction as an "essential" ingredient of separation of powers). As this Essay has explained, Congress might still strip courts of jurisdiction as to statutory questions that don't implicate the Constitution, even if such stripping constitutes lily-gilding. The power to regulate jurisdiction still has enormous utility when Congress acts to regulate docket congestion and promote uniformity of federal law. See N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 116–17 (1982) (White, J., dissenting) (arguing that Congress sought to improve accuracy and efficiency rather than "aggrandize" power to itself by setting up specialized bankruptcy courts). And the power to regulate jurisdiction remains integral to non–Article III adjudication, including agency adjudication. See Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 852–53 (1986) (emphasizing the extent of Article III supervision).

311. See Sprigman, Congress's Article III Power, supra note 2, at 1829–31 (cabining statements in *Patchak* about external constraints as not essential to the holding, confining *Boumediene* to its precise facts, and arguing for a narrow interpretation of *Klein*).

312. Doerfler and Moyn do not engage the descriptive problem beyond one footnote. They suggest (without fully endorsing) the notion that Congress has unfettered authority to foreclose constitutional review of federal laws, "excepting *textually grounded* external constraints such as the Suspension Clause," with a citation to *Boumediene*. Doerfler & Moyn, supra note 2, at 1725 n.109 (emphasis added). The long history of cases that consider a wide array of external constraints belies the implication that few such constraints exist and that they apply only in a few exceptional situations. See supra section I.C.

313. This was the situation in Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Felker v. Turpin, 518 U.S. 651 (1996); Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1869); and Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869).

314. This is precisely what the Second Circuit did in *Battaglia* (by inquiring whether a jurisdiction strip masked a deprivation of workers' due process rights), Battaglia v. Gen.

To crystallize the point: The Supreme Court has never acquiesced in a jurisdiction strip of the Court's power of constitutional review without *either* engaging in constitutional review in the case at hand *or* pointing to another readily available avenue for such review in a future case. And if Congress perceives the Court as so hostile that jurisdiction stripping is necessary, there is no particular reason to expect that the Court would embrace a sweeping understanding of jurisdiction stripping going well beyond precedent and the scholarly mainstream. In short, if the Court wants to decide a matter, particularly a constitutional question, it has numerous options at its disposal. Jurisdiction stripping might be a speed bump along the way; it isn't an insurmountable wall.

External constraints aren't the only reason jurisdiction stripping may fail. Even if the judiciary does not interpret external constraints broadly, Congress may not be able to effectuate its goals over the long term, at least if it is trying to enshrine federal rights. Much of what Congress wants to accomplish will ultimately require the judiciary's active participation. If the Court thinks Congress has exceeded its constitutional powers (say, by codifying a right to abortion in federal law), believing that that same Court will willingly *enforce* that law simply because Congress has stripped the Court of jurisdiction over constitutional challenges is naïve. Getting courts out of the way is—at best—a temporary solution.

III. LIMITED POTENTIAL

This Part returns to the ultimate question that overlays this entire project: Can jurisdiction stripping work? Our resounding answer has been "no." At least in the strong form that has animated so much of the scholarly and political conversation, jurisdiction stripping does not allow Congress to directly defy or prevent a constitutional ruling.

But jurisdiction stripping can have more subtle benefits. Throughout this discussion, the Essay has alluded to Congress's ability to sequence decisionmaking, creating time and space for policies to take hold and gain political support. This Part elaborates on that basic idea. It also suggests

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Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948), and what the Supreme Court did in *Yakus* (similarly analyzing whether Congress's allocation of jurisdiction deprived a criminal defendant of due process), Yakus v. United States, 321 U.S. 414, 418 (1944). And, as explained above, this is also how the Supreme Court in *Boumediene* analyzed whether a jurisdiction strip tried to cover up an otherwise unconstitutional suspension of habeas corpus. Boumediene v. Bush, 553 U.S. 723 (2008). Arguably the same is true of *Klein* and the presidential pardon power, but how much or how little *Klein* stands for is in the eye of the beholder. See Daniel J. Meltzer, Congress, Courts, and Constitutional Remedies, 86 Geo. L.J. 2537, 2549 (1998) (arguing that *Klein* means that "whatever the breadth of Congress's power to regulate federal court jurisdiction, it may not exercise that power in a way that requires a federal court to act unconstitutionally"); Amanda L. Tyler, The Story of *Klein*: The Scope of Congress's Authority to Shape the Jurisdiction of the Federal Courts, *in* Federal Courts Stories 103, 103–04 (Vicki C. Jackson & Judith Resnik eds., 2010) (noting that "*Klein* may be read to stand for a number of different propositions, many of which have not held up over time").

that Congress can use jurisdiction stripping to raise the salience of issues in an exhortative way and to impose political and reputational costs on the judiciary.

A. *Sequencing and Delay*

If Congress can't use jurisdiction stripping in the *direct* way that nearly all scholars and commentators have assumed, that doesn't mean jurisdiction stripping has no value as a policy tool. This section contends that Congress still can use jurisdiction stripping to exert *indirect* influence on how and when courts decide issues. Most significantly, it can sequence courts' decisionmaking, and sequencing can have a tremendous effect on Congress's extrajudicial efforts to implement policies. Most intriguingly, many of the following examples reveal that across varied contexts, time can be a commodity even more precious than a favorable judicial decision.

On some occasions Congress has homed in on the problem of time and crafted an effective jurisdictional response. Congress's 1802 cancellation of the Supreme Court's Term can be seen as the first example of instrumental jurisdiction stripping. Here, Congress necessarily had the goal of delay in mind, as the strip itself was temporal rather than subject-matter based. When the Court finally reconvened in 1803, it upheld the repeal of the 1801 Judiciary Act.[315]

Observers have attributed the Court's acquiescence to Chief Justice John Marshall's realization that declaring the repeal unconstitutional could provoke a crisis that would seriously damage the judiciary.[316] We cannot know whether the case would have come out differently absent the delay. Professor Bruce Ackerman argues, however, that by "disrupting the Court's deliberative processes," Congress's decision to cancel the Term "may have succeeded in its basic strategic objective. If the Justices had come together for their customary face-to-face deliberations in June, the dynamics may well have been different."[317] Moreover, Congress's gamesmanship delayed resolution of the constitutional question until after the Republicans' decisive victory in the 1802 election.[318] That result "immediately reshaped the debate" regarding the 1802 elimination of circuit judgeships, as it revealed that "the voters were not impressed by the

315. See supra notes 100–107 and accompanying text.

316. See Wood, supra note 102, at 440. Chief Justice Marshall's correspondence supports this interpretation. In the wake of Congress's cancellation of the Court's Term, the Justices privately discussed whether to refuse to carry out their circuit-riding duties that had been imposed by the legislation repealing the 1801 Judiciary Act. See Ellis, supra note 101, at 60–61. Chief Justice Marshall urged his colleagues to acquiesce and noted concern that "[t]he consequences of refusing to carry the law into effect may be very serious." See id. at 61.

317. Bruce Ackerman, The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy 170 (2007).

318. See Friedman, Will of the People, supra note 103, at 58–59.

Federalist defense of judicial independence."[319] Marshall and his Federalist colleagues must have recognized that they stood on shaky political ground.

With the Norris–LaGuardia Act, Congress recognized that labor injunctions had become one of the single greatest impediments to collective organizing by workers. Congress responded by stripping lower federal courts of jurisdiction to issue injunctions except in narrow circumstances. It technically left alone the jurisdiction of state courts as well as the Supreme Court, but that didn't really matter. From a policy perspective, putting a halt to the temporary restraining orders was the jurisdiction strip's focal point, creating time and space for an incipient labor movement to take root.[320]

The Tax Injunction Act evinced a similar concern with hasty injunctions that in Congress's view threatened the financial stability of state and local governments.[321] So, once again, time became valuable. Unlike in the context of labor injunctions, though, Congress sought to balance different policy concerns, and its solution reflects a sensitivity to this unique mix of problems. Congress largely put a halt to the injunctions by federal courts, yet it preserved multiple opportunities for taxpayers to litigate the constitutionality of a tax in either state or federal court and under different causes of action. And it left untouched the Supreme Court's ultimate authority to determine whether a tax passed constitutional muster.[322] So, here, sequencing—specifying the precise order in which taxes would be paid and then when and where litigation could take place—enabled Congress to respond precisely and creatively to myriad competing concerns.

Although Congress seems to have embraced a temporal strategy in the cases above, the success of the famous jurisdiction strip in *McCardle* might owe more to serendipity. Congress scrambled when it realized the profound irony that William McCardle, of all people, was trying to challenge Reconstruction using a habeas provision intended to protect Black citizens. The Court acquiesced in *McCardle*, but in *Yerger*, the Court explicitly recognized that another avenue existed for someone in McCardle's shoes to seek habeas relief (and thus also to challenge the Military Reconstruction project). So, to the extent that the jurisdiction strip worked, it did so by delaying the Court's intervention through an alternative habeas route.

A skeptic might contend that the jurisdiction strip in *McCardle* didn't give Congress that much extra time—a year and a half.[323] Historians can

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319. Ackerman, supra note 317, at 177.

320. See supra section II.B.2.a.

321. See supra notes 252–258 and accompanying text.

322. See supra note 258 and accompanying text.

323. The Supreme Court had concluded the *McCardle* oral arguments in March 1868. Later that same month, Congress enacted the Repealer Act over President Johnson's veto.

debate the difference that this time made, but it seems significant. McCardle challenged his detention—and the entirety of Military Reconstruction—mere months after the Reconstruction project had commenced.[324] Between the time that Congress repealed the habeas statute on which McCardle relied and when the Court decided *Yerger*, Reconstruction had a chance to take hold.[325]

This consequential period saw the ratification of the Fourteenth Amendment,[326] the election of Ulysses Grant as President (who, unlike his predecessor, was committed to the cause of civil rights),[327] the adoption of new constitutions in Southern states that guaranteed Black citizens greater rights,[328] the readmission of most former Confederate states to the Union on terms dictated by Congress,[329] and Congress's formal proposal of the Fifteenth Amendment to the states.[330] We don't suggest that a jurisdiction strip magically made this all possible. But forestalling a decision on Reconstruction's constitutionality did at least create more breathing room for a Republican Congress to remake the country in the wake of the Civil War.

A modern Congress should internalize the right lesson from *McCardle* and other successful examples of jurisdiction stripping. It can't expect to pass something like the Green New Deal and then append a jurisdiction strip with the belief that a court will never entertain a legal challenge to a massive new government program. But what about a more modest goal of giving the program time to blossom and become entrenched? On this score, jurisdiction stripping could perhaps succeed. Although the Affordable Care Act didn't include a jurisdiction strip, it offers an example of how Congress can de facto entrench a program through politics.[331] The

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This stopped the Supreme Court in its tracks. The ultimate decision did not come down for more than a year—in April 1869. See Van Alstyne, supra note 48, at 242. *Ex parte Yerger* was argued and decided in October 1869. 75 U.S. (8 Wall.) 85 (1869).

324. See Van Alstyne, supra note 48, at 241–42 (setting out the chronology).

325. Another example of jurisdiction stripping being used as a delay tactic is found in Texas's S.B. 8. Through its devious procedural strategy, Texas managed to effectively outlaw abortion in Texas, notwithstanding binding Supreme Court precedent to the contrary, for nearly a year before the Supreme Court actually overturned *Roe* in *Dobbs*. See supra note 34.

326. Cong. Globe, 40th Cong., 2d Sess. 4266, 4295 (1868), as reprinted in 2 The Reconstruction Amendments: The Essential Documents 422–24 (Kurt T. Lash ed., 2021).

327. Ron Chernow, Grant 613–23 (2017).

328. See Travis Crum, The Lawfulness of the Fifteenth Amendment, 97 Notre Dame L. Rev. 1543, 1559 (2022) (noting that new state constitutions guaranteed universal male suffrage).

329. See John Harrison, The Lawfulness of the Reconstruction Amendments, 68 U. Chi. L. Rev. 375, 405–08 (2001) ("Congress offered [the former Confederate states] a way out: form new governments that satisfied Congress's notions of validity and republican form, and ratify the Fourteenth Amendment.").

330. See Earl M. Maltz, Civil Rights, the Constitution, and Congress, 1863–1869, at 153–55 (1990).

331. See generally Daryl Levinson & Benjamin I. Sachs, Political Entrenchment and Public Law, 125 Yale L.J. 400 (2015) (conceptualizing de facto political entrenchment as

program, vilified in its early years, grew increasingly popular, so much so that even when Republicans controlled both Congress and the White House in 2017, they couldn't muster enough votes to repeal it.[332] Entrenchment, though, required time.

The Norris–LaGuardia Act's restriction on injunctive relief provides a model that Congress might use today. In recent years, the propriety of so-called universal injunctions has generated a robust debate.[333] A single court's power to enjoin particular governmental conduct in its entirety—and not just as it affects the plaintiffs to a lawsuit—offers a way for politically motivated litigants to quickly smother a controversial federal program in its infancy.[334] The potential to abuse these sweeping injunctions is exacerbated when litigants forum shop by filing suits before ideologically friendly judges.[335] Just as the Norris–LaGuardia Act limited injunctions directed at labor activity,[336] Congress might restrict district courts' ability to issue sweeping injunctions against the government. Such a reform might give federal programs breathing room without eliminating the possibility of later judicial review.

Perhaps most significantly, in terms of modern debates about jurisdiction stripping, Congress can sequence decisions by routing them through administrative agencies.[337] The example of the Emergency Price

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shifting the composition of political community or altering the structure of political decision).

332. See Carl Hulse, McCain Provides a Dramatic Finale on Health Care: Thumb Down, N.Y. Times (July 28, 2017), https://www.nytimes.com/2017/07/28/us/john-mccains-real-return.html (on file with the *Columbia Law Review*).

333. See, e.g., Samuel L. Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417, 419 (2017); Zachary D. Clopton, National Injunctions and Preclusion, 118 Mich. L. Rev. 1, 3 (2019); Amanda Frost, In Defense of Nationwide Injunctions, 93 N.Y.U. L. Rev. 1065, 1069 (2018); Mila Sohoni, The Lost History of the "Universal" Injunction, 133 Harv. L. Rev. 920, 929 (2019); Alan M. Trammell, The Constitutionality of Nationwide Injunctions, 91 U. Colo. L. Rev. 977, 978 (2020); Alan M. Trammell, Demystifying Nationwide Injunctions, 98 Tex. L. Rev. 67, 70–71 (2019).

334. See, e.g., Aaron Blake, The Rise of Solo Judges Halting Nationwide Policies, Wash. Post (Apr. 20, 2022), https://www.washingtonpost.com/politics/2022/04/20/nationwide-injunctions-trump-biden/ (on file with the *Columbia Law Review*).

335. See Ian Millhiser, Republicans Can Choose the Judge Who Hears Their Lawsuits. DOJ Wants to Stop That., Vox (Feb. 14, 2023), https://www.vox.com/policy-and-politics/2023/2/14/23597741/supreme-court-matthew-kascmaryk-judge-shopping-texas-utah-walsh-justice-department [https://perma.cc/YB4V-NNEG].

336. See supra notes 236–241 and accompanying text.

337. Another possibility, as discussed in conjunction with the Price Control Act, is rerouting judicial review through different Article III courts. Earlier we mentioned the Mountain Valley Pipeline jurisdiction strip, which seems to confirm that Congress has simply changed the underlying substantive law. See supra note 234. But Congress also foresaw challenges to this regime and directed them away from the Fourth Circuit, which would normally hear such challenges, and into the D.C. Circuit. See Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 324(e)(2), 137 Stat. 10, 48 (2023). Ultimately, though, the regime leaves in place ultimate Supreme Court appellate review as to the statute's constitutionality, even if Congress has tweaked the usual sequencing.

Control Act illustrates how Congress might do so to great effect. In some ways, the story of price controls during the Second World War offers another example of how Congress used its power over courts' jurisdiction to buy time and allow a novel federal regime to become entrenched. But the broader lessons from this episode stem from the use of a politically accountable administrative agency whose decisions predictably skewed in favor of upholding the government's price controls.[338] This structure provided a significant impetus for adjudication within the administrative state.[339]

Notice that the modern administrative state does not try to prevent constitutional review of federal policies or regimes. To the contrary, Congress almost always provides for the possibility of Article III review, including before the Supreme Court, and the Court routinely notes the importance of Article III supervision of non–Article III adjudicators.[340] Moreover, Congress does not try to direct a particular outcome in any given case.[341] In fact, this set of affairs leads to one of the central critiques of the modern administrative state: Democratically accountable institutions do not actually make consequential decisions but instead delegate them to agencies.[342] We hesitate to wade too deeply into the boisterous normative debates about the administrative state. Our point is that this kind of decisional sequencing offers one of the most powerful *indirect* methods by which Congress can shape policy outcomes through its power over jurisdiction.[343]

Sequencing isn't just about delay. Congress can also manipulate jurisdiction to have the opposite effect and speed things up. Return to

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338. See, e.g., Leanora Schwartz Gruber, Establishment and Maintenance of Price Regulations—A Study in Administration of a Statute, 96 U. Pa. L. Rev. 503, 535 (1948) (noting the remarkable infrequency with which Administrator decisions were reversed by the Emergency Court of Appeals during the price control program).

339. See, e.g., Conde & Greve, supra note 213, at 826–27.

340. See, e.g., Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1379 (2018) (noting that "the Patent Act provides for judicial review by the Federal Circuit"); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 852–53 (1986) (emphasizing extent of Article III supervision); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 592–93 (1985) (same).

341. See Bank Markazi v. Peterson, 578 U.S. 212, 228–30 (2016) (noting that Congress cannot invade the judicial power by dictating how courts rule in a particular case).

342. See Oldham, supra note 20, at 474 ("After all, agency heads don't stand for election. What's more, *independent* agencies are designed precisely to protect against influence by the one executive (the President) who does stand for election.").

343. For example, the Supreme Court recently reaffirmed its approach to determining whether a party must raise certain issues before an agency or may proceed directly to a district court. See Axon Enter., Inc. v. Fed. Trade Comm'n, 143 S. Ct. 890, 900 (2023). Either way, normal appellate review, including before the Supreme Court, is available. But as Justice Gorsuch noted in concurrence, the precise path that a case takes—its sequencing—can prove enormously consequential in terms of time, resources, and settlement incentives. See id. at 916–18 (Gorsuch, J., concurring in the judgment).

Yakus.[344] The statute required constitutional objections to price control regulations to occur early: If a person subject to the regulations challenged the regulation when issued, they could obtain possible Supreme Court review of any constitutional objection.[345] But if they failed to take advantage of that opportunity, they couldn't raise the issue when later prosecuted for violating the regulation.[346] In practice, this meant that if the Supreme Court were to consider a constitutional objection to price control regulations, it would do so sooner than if review were available after a prosecution. And that meant any Supreme Court review would occur when wartime exigencies were at their zenith, when one might expect the Court to exercise utmost deference to the political branches. Individuals subject to the regulations would know they couldn't violate the rules in the hope that, perhaps as the fog of war receded, the Supreme Court would find the scheme unlawful.

Thus, even if Congress cannot use jurisdiction stripping to preclude review of a particular constitutional question, it can use it to influence *when* that review occurs. And that power over sequencing can sometimes help Congress achieve its goals in the face of anticipated judicial opposition.

B. *Salience and Political Costs*

Beyond the power of sequencing, Congress can use jurisdiction stripping to influence policy in an even more indirect way. If Congress knows that it can't entirely prevent judicial review in the medium-to-long run, jurisdiction stripping still can serve an exhortative role. By invoking the threat of jurisdiction stripping, Congress raises the political salience of an issue. Drawing attention to an issue can have political benefits of its own but also can make the Supreme Court (or other courts) less willing to diverge from congressional preferences. And even when the Court proves unwilling to accede to the attempt to block judicial review, Congress will have forced the Court to expend valuable political capital by intervening.

Start with the value that Congress gets by using jurisdiction stripping to send a message to voters. Imagine that Congress enacts (or threatens to enact) legislation that strips federal courts of jurisdiction to hear cases involving an issue that arouses passion among the public—say, flag burning, abortion, or gun rights. By turning to the rare tool of jurisdiction stripping, Congress (or its members) shows that it deeply cares about the issue—and that Congress believes the Supreme Court has gone, or is about to go, far astray of its proper role. Precisely because jurisdiction stripping is seen as a nigh-nuclear option, supporters of the Court may feel

344. Yakus v. United States, 321 U.S. 414 (1944).
345. Id. at 427–29.
346. Id. at 430–31.

compelled to defend the Court from its attackers—further raising the salience of the issues that Congress seeks to highlight.

Jurisdiction stripping, then, could drive a national dialogue, potentially placing an issue in the country's political consciousness for far longer than even the most unpopular Supreme Court decision can. Indeed, the most famous successful jurisdiction strip in American history had the effect of drawing the nation's attention to an issue that Congress cared about. As Professor Barry Friedman has documented, "[t]he attention of the country was galvanized" after Congress initially passed the jurisdiction-stripping measure that ultimately led to *McCardle*.[347]

But to provide political benefits, a jurisdiction-stripping proposal need not succeed or even have a real prospect of becoming law. Threatening to dial back the Court's jurisdiction provides a way for politicians to signal their disapproval of the Court to co-partisans. For example, Professor Neal Devins has explained how Republicans in the early 2000s used jurisdiction-stripping proposals "to stake out a position on . . . socially divisive issues" in order to "solidify[] support among their base."[348] A similar dynamic may explain progressive Democrats' recent endorsement of jurisdiction stripping in response to disfavored Supreme Court decisions, given that such measures would seem doomed in the closely divided Senate.[349]

The political benefits of jurisdiction stripping, however, extend beyond posturing to voters. A potentially more important benefit is the potential to influence the *Court*. By using or threatening jurisdiction stripping, Congress sends an important signal to the Court: that the Justices are treading on thin ice and risking a collision with the political branches that could severely damage the Court's legitimacy. Although courts have doctrinal tools to overcome a jurisdiction strip, they may be "disinclined to play 'chicken' with the legislature on a large scale."[350]

Even if Congress does not succeed in stripping the Court of jurisdiction, the mere threat can encourage the Court to stay its hand.[351] Political science research has shown that threatened Court-curbing efforts by Congress are "followed by marked periods of judicial deference to legislative preferences."[352] According to one explanation for this finding,

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347. Friedman, Will of the People, supra note 103, at 131.

348. Neal Devins, Congress and Judicial Supremacy, *in* The Politics of Judicial Independence: Courts, Politics, and the Public 45, 63 (Bruce Peabody ed., 2011).

349. See Vakil, supra note 6.

350. Frank B. Cross & Blake J. Nelson, Strategic Institutional Effects on Supreme Court Decisionmaking, 95 Nw. U. L. Rev. 1437, 1464–65 (2001).

351. Id. at 1463 (noting that "actual jurisdiction stripping may prove unnecessary, as the mere threat may suffice to affect judicial decisions").

352. Tom S. Clark, The Separation of Powers, Court Curbing, and Judicial Legitimacy, 53 Am. J. Pol. Sci. 971, 972 (2009); see also, e.g., Shelden D. Elliott, Court-Curbing Proposals in Congress, 33 Notre Dame Law. 597, 607 (1958); Roger Handberg & Harold F. Hill, Jr., Court Curbing, Court Reversals, and Judicial Review: The Supreme Court Versus Congress,

the Court responds to these threats because they serve as "a credible signal about waning judicial legitimacy" given that "Congress is more directly connected to the public than the Court."[353]

Several historical episodes illustrate how jurisdiction-stripping measures can cause the Court to blink. Friedman has documented several examples where jurisdiction stripping, actual or threatened, put political pressure on the Court and may have caused it to change course; we rely extensively on his thorough historical excavation here.[354]

Return to Friedman's account of how the jurisdiction strip in *McCardle* attracted great public attention. Discourse in the popular press centered on whether the Court should respond to the assault on its power that the jurisdiction strip presented, with some pressing the Court to stand up for itself and others urging deference to Congress.[355] Given the attention to the case, there's plenty of reason to suspect that the Court's decision to back down owed partly to political, not exclusively legal, considerations.

Threats of jurisdiction stripping alone can force the Court to change course. In the late 1950s, the Supreme Court ruled against the government in a number of cases involving Communists.[356] Congress took up, and nearly passed, jurisdiction-stripping legislation in response.[357] Again, the proposed legislation ultimately failed after a close vote in the Senate, but the Justices seemed to get the message nonetheless. Facing the credible threat of jurisdiction stripping, the Court "relented, issuing decisions that limited the scope of earlier rulings and otherwise permitting the government to prosecute subversive cases."[358] The episode sent a strong signal to the Justices that "running afoul of public opinion . . . would mean harsh criticism and the very real possibility of reprisal."[359]

In another example of how the Justices have paid close attention to jurisdiction-stripping threats, the Supreme Court found itself in conflict with the states over its authority in the decades after the War of 1812. This led to debates on various proposals in Congress that would have restricted

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14 Law & Soc'y Rev. 309, 310 (1980); Gerald N. Rosenberg, Judicial Independence and the Reality of Political Power, 54 Rev. Pol. 369, 375 (1992).

353. Clark, supra note 352, at 972.

354. See generally Friedman, Will of the People, supra note 103.

355. See id. at 132.

356. See Devins, The Supreme Court, supra note 113, at 1342–43.

357. See id. at 1343 (noting that Chief Justice Earl Warren feared Congress would enact legislation stripping the Supreme Court of jurisdiction in five domestic security areas).

358. Id.; see also Friedman, Will of the People, supra note 103, at 255–58 (arguing that political pressure and criticism by legal elites played a role in the Court's switch).

359. Friedman, Will of the People, supra note 103, at 258. For an argument that the Justices did not surrender to Congress, see David P. Currie, The Constitution in the Supreme Court: The Second Century, 1888–1986, at 368 (1994) (noting how, despite congressional barriers, Chief Justice Fred Vinson supported broad executive authority in the landmark 1952 case Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)).

the Court's jurisdiction over decisions by state high courts.[360] These reforms never became law but still may have accomplished something.[361] One particularly heated debate over such a proposal occurred in 1825 and 1826; in its aftermath, Professor Dwight Wiley Jessup argues, the Marshall Court reined itself in "so as to more nearly accord with the economic and political life of the nation."[362] Nonetheless, reform proposals continued for several years, and the Court continued to pay attention. Friedman has documented how Chief Justice Marshall and Justice Story both expressed consternation about an 1830 jurisdiction-stripping bill in private correspondence.[363]

Of course, the Court sometimes holds firm even in the face of actual jurisdiction-stripping laws.[364] For the reasons we've explained, courts unquestionably have doctrinal tools to overcome a jurisdiction strip. If the Court remains determined to stand in Congress's way, it can do so. But even then, Congress could still benefit by instigating a high-stakes separation-of-powers battle. A jurisdiction strip can force courts to expend reputational and political capital if they do ultimately take up an issue that Congress supposedly has removed from their cognizance. If the Court effectively overrules Congress and the decision backfires, the Court will have to face the political consequences.

Boumediene, for example, arose in the years following the September 11 attacks. Volatile questions of national security and civil liberties infused much of the national discourse, including during the presidential election of 2004.[365] Congress had staked out a firm position on Guantanamo Bay and repeatedly attempted to keep courts at arm's length.[366] If the stakes weren't already clear enough, Justice Antonin Scalia, in dissent, put an especially fine point on the matter: "The game of bait-and-switch that today's opinion plays upon the Nation's Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed."[367] One must imagine that the Court did not relish finding itself in

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360. See Friedman, Will of the People, supra note 103, at 88.

361. See id. at 88–91 (discussing how the Justices considered public sentiment in their decisionmaking).

362. Dwight Wiley Jessup, Reaction and Accommodation: The United States Supreme Court and Political Conflict 1809–1835, at 320 (1987).

363. See Friedman, Will of the People, supra note 103, at 88.

364. See supra note 313 and accompanying text.

365. See, e.g., C. Dean McGrath, Jr., The Genius of the Constitution: The Preamble and the War on Terror, 3 Geo. J.L. & Pub. Pol'y 13, 14 (2005) ("The war on terror was a key issue in the 2004 Presidential and Congressional elections.").

366. See, e.g., Doran G. Arik, Note, The Tug of War: Combatant Status Review Tribunals and the Struggle to Balance National Security and Constitutional Values During the War on Terror, 16 J.L. & Pol'y 657, 659 (2008) ("[E]ach time the Supreme Court held that [habeas] extended to alien detainees held at Guantanamo, Congress responded with legislation to strip federal courts of their jurisdiction over detainees' habeas petitions." (footnotes omitted)).

367. Boumediene v. Bush, 553 U.S. 723, 827–28 (2008) (Scalia, J., dissenting).

a position of countering the political branches and exposing itself to such reputational jeopardy.

As it happened, the Court seemed to suffer no real blowback from *Boumediene*. But then, the decision came at the very end of the Bush Administration, when support for the War on Terror had waned.[368] One can imagine alternative scenarios in which the Court's willingness to assert its authority over Congress could produce backlash. If, say, the current conservative Supreme Court majority overcame a jurisdiction strip to declare a novel but popular progressive policy initiative unconstitutional, Democrats could make the case to voters that the Justices were out of control.

All that said, the indirect political upsides described in this section are anything but guaranteed. For each possible benefit, there is a countervailing potential cost. Stripping jurisdiction may increase the salience of an issue with voters—but it could cause a backlash given the popularity of judicial independence.[369] It might show the public that Congress cares deeply about an issue—or it might be seen as a concession by Congress that it has reached beyond its constitutional authority. It might pressure the Justices to back down—or it might make them feel compelled to protect the Court's prestige when they otherwise might have stayed their hand.[370] Here, as elsewhere, jurisdiction stripping's benefits are contingent and uncertain, making it an unreliable tool for reining in the judicial branch.

One further cautionary note. We've discussed various historical episodes when the Court seems to have blinked in response to political opposition and public opinion. But the Court won't inevitably respond to those forces and change course. One might wonder whether the situation on the Court today is profoundly different. Constitutional law has become more deeply polarized as Presidents have become better at ideologically screening potential nominees and as the Justices increasingly see

368. See, e.g., Jack M. Balkin, This Is What a Failed Revolution Looks Like, Balkinization (June 13, 2008), https://balkin.blogspot.com/2008/06/this-is-what-failed-revolution-looks.html [https://perma.cc/J9W5-Y9NP] ("By the time Boumediene was decided, support for Bush and his unilateral vision of the Presidency was very weak indeed.").

369. See Devins, The Supreme Court, supra note 113, at 1356 ("Americans have historically supported judicial independence . . . .").

370. See id. at 1347 (identifying the tension between legislative and judicial policy preferences, and the ways the Justices respond to that tension). As compared to jurisdiction-stripping proposals in the past, the Court today might also see such threats as toothless given extreme polarization in Congress and the ability of the minority party in the Senate to block legislation via the filibuster. For a discussion of the extent to which the Supreme Court might take into account such considerations when rendering decisions, see Richard H. Pildes, Institutional Formalism and Realism in Constitutional and Public Law, 2013 Sup. Ct. Rev. 1, 33–35.

themselves as speaking to audiences of co-partisans.[371] Today's conservative supermajority asserts its confidence in its chosen methodology—originalism—to dictate the one correct answer to every constitutional question[372] and thus might not respond to outside pressure. This is not to say that jurisdiction stripping could have no value today, but merely to underscore the uncertainty about its effects.

CONCLUSION

For all that academics have debated constitutional constraints on Congress's power over jurisdiction, they have paid far too little attention to the question of whether jurisdiction stripping could actually effectuate Congress's goals. Proponents and skeptics alike seem to assume that the strong form of jurisdiction stripping will work. This Essay has shown that it won't. Jurisdiction stripping can have indirect benefits as a policy tool. It might succeed in allowing Congress to sequence how and when issues are litigated and thus buy time for policies to become entrenched. And it can raise the salience of issues and put the Court on the defensive.

But as a straightforward strategy for wresting control of the Constitution from the Court, jurisdiction stripping almost assuredly will fail. Its effects are chaotic and unpredictable; the Court can find a way to overcome a jurisdiction strip if it so desires; and the judiciary is ultimately needed to enforce, and to make durable, federal guarantees. To overcome a hostile judiciary, Congress and the President cannot simply get the Court out of the way. They may have no choice but to *transform* the Court. In this way, understanding jurisdiction stripping's limitations offers a rejoinder to those who argue that Court reformers should seek to disempower courts rather than pursuing institutional change.[373]

Beyond this practical takeaway, clarifying how jurisdiction stripping will and won't work as a policy tool has implications for deeper normative questions. Even among those who subscribe to the plenary view of Congress's jurisdiction-stripping power, many argue that taking whole classes of cases away from the courts in pursuit of a political agenda is

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371. See Neal Devins & Lawrence Baum, The Company They Keep: How Partisan Divisions Came to the Supreme Court (2019) (arguing that judicial nominees' ideologies reflect the dominant ideology of both their appointing Presidents and their broader social networks).

372. See generally Jamal Greene, Selling Originalism, 97 Geo. L.J. 657, 689 (2009) (discussing originalism's tendency to reshape constitutional interpretation in its own image).

373. See, e.g., Doerfler & Moyn, supra note 2, at 1738–46 (advocating disempowering reforms). See generally Epps & Sitaraman, Supreme Court Reform, supra note 16 (arguing for transformation). Of course, some institutional reforms might themselves face obstacles from a hostile Court, but identifying the kinds of reforms most likely to overcome judicial opposition is a topic for future work.

fundamentally unwise and even dangerous.[374] Professor Charles Black offered one of the few normative defenses of jurisdiction stripping. He supported the plenary view of Congress's power for a "reason primarily of a political kind," arguing that, leaving to one side the Supreme Court's original jurisdiction, every federal court exercises jurisdiction only upon an explicit congressional directive.[375] And this, he contended, "is the rock on which rests the legitimacy of the judicial work in a democracy."[376]

If our arguments are right, then Black's normative defense takes on new relevance. Jurisdiction stripping can't subvert the constitutional order. But it can create space for a dialogue between the political and judicial branches. In its soft and subtle form, it can allow federal innovations—from Reconstruction to labor laws—to take root and even blossom rather than being prematurely cut down by the judiciary. Professor Black perhaps overstated the role that this congressional power plays in legitimizing the judiciary's work. But seen in its proper and humble light, jurisdiction stripping can be consistent with—rather than a grievous affront to—the separation of powers.

There is a broader lesson, though. In our nation, at any given point there have been, and will be, those who believe the Supreme Court has lost faith with true constitutional values. Today that describes progressives, but it could describe others yesterday or tomorrow. For those out of power, looking for easy answers is tempting. Jurisdiction stripping's allure lies in its supposed promise as a constitutional loophole that Congress can exploit to disable a hostile judiciary. But there are no constitutional cheat codes. The Supreme Court is, for all else, a political institution. Those who seek to tame and control it can do so only by building political coalitions, winning elections, and ultimately retaking control of the judiciary. That is a long and grueling path, and it is one for which the Constitution provides no shortcuts.

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374. See, e.g., Gunther, supra note 8, at 898 (noting that "in this area as in others, it is useful—and often difficult—to bear in mind the distinction between constitutionality and wisdom"); Redish, supra note 8, at 927 (arguing against "confus[ing] issues of constitutionality with questions of propriety and wisdom").

375. Black, supra note 2, at 846. Sprigman builds his thoughtful normative defense of "the desirability of a legislative check on judicial power" around this same basic insight about democratic legitimacy. See Sprigman, Congress's Article III Power, supra note 2, at 1800.

376. Black, supra note 2, at 846.

Columbia Law Review. ISSN 0010-1958.

Published by Columbia Law School students monthly except for February, July, August, and September. Printed in Hanover, Pennsylvania. Editorial Office, 435 West 116th Street, New York, New York 10027. For issues prior to volume 118 inquire of William S. Hein & Co., Inc., 1285 Main Street, Buffalo, New York 14209-1987, 1-800-828-7571, https://www.wshein.com. Back issues are also available in PDF format through Hein Online, https://www.heinonline.org. For current and recent printed issues, please send an email to business@columbialawreview.org.

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VOL. 123, NO. 7 COLUMBIA LAW REVIEW Pages 1855 to 2152 NOVEMBER 2023