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BOOK REVIEW

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BOOK REVIEW

METHODOLOGY AND INNOVATION
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In a series of recent cases, the Supreme Court has reconfigured the administrative state in line with a particular version of Article II. According to the Court’s scheme, known as the theory of the “unitary executive,” all of the government’s operations must be housed under one of three branches, with the head of the executive branch shouldering unique and personal responsibility for the administration of federal law.

Guiding the Court’s decisions is Myers v. United States, the famous 1926 case about the firing of a postman. Written by President-turned–Chief Justice William Howard Taft, Myers is used to bolster the Court’s jurisprudence as a supposed precedent for the unitary executive theory and an alleged originalist defense of strong executive administration.

This Article shows that Myers has been misread. It did not explicate a preexisting tradition of presidential power; it invented one. Claiming to describe the presidency as it had always been, Taft’s opinion broke with decades of jurisprudence to constitutionalize a new understanding of the office. This “Progressive Presidency,” which (President) Taft himself helped create, made the President the administrator-in-chief on developmental, not originalist, grounds as part of a broader Progressive remaking of government. And it differed from its modern-day unitary counterpart in many important particulars, including respect for administrative independence.

This Article reconstructs the Progressives’ transformation of the presidency and shows how Myers wrote it into law. This contextual reading of Myers undermines the Court’s recent decisions and highlights the co-constitutive roles of institutional and doctrinal developments in making the modern presidency.

In myriad areas of public life—from voting to professional licensure—the state collects, shares, and uses sex and gender data in complex algorithmic systems that mete out benefits, verify identity, and secure spaces. But in doing so, the state often erases transgender,
nonbinary, and gender-nonconforming individuals, subjecting them to the harms of exclusion. These harms are not simply features of technology design, as others have ably written. This erasure and discrimination are the products of law.

This Article demonstrates how the law, both on the books and on the ground, mandates, incentivizes, and fosters a particular kind of automated administrative state that binarizes gender data and harms gender-nonconforming individuals as a result. It traces the law's critical role in creating pathways for binary gender data, from legal mandates to official forms, through their sharing via intergovernmental agreements, and finally to their use in automated systems procured by agencies and legitimized by procedural privacy law compliance. At each point, the law mandates and fosters automated governance that prioritizes efficiency rather than inclusivity, thereby erasing gender-diverse populations and causing dignitary, expressive, and practical harms.

In making this argument, the Article challenges the conventional account in the legal literature of automated governance as devoid of discretion, as reliant on technical expertise, and as the result of law stepping out of the way. It concludes with principles for reforming the state’s approach to sex and gender data from the ground up, focusing on privacy law principles of necessity, inclusivity, and anti-subordination.

NOTES

FREE THEIR MINDS: LEGACIES OF ATTICA AND THE THREAT OF BOOKS TO THE CARCERAL STATE

Book bans and censorship battles have garnered considerable attention in recent years, but one of the most critical battlegrounds is kept out of the public eye. Prison officials can ban any book that threatens the security or operations of their facility. This means that the knowledge access rights of incarcerated people are subject to the judgments of the people detaining them. This Note focuses on books about Black people in America and books about the history of and conditions in prisons, which are often banned for their potential to be divisive or incite unrest. The result is that Black people, who are already disproportionately victimized by the criminal punishment system, cannot read their own history and the history of the institution imprisoning them.

This Note examines the legal backdrop enabling these book bans. As an example, it highlights the recent ban of Heather Ann Thompson’s Blood in the Water: The Attica Prison Uprising of 1971 and Its Legacy in the New York State prison system, including at the Attica Correctional Facility. This Note argues that prison book bans are coeval with attacks on Black history in American schools, and labels both practices as attempts to stifle the democratic engagement of Black people and other marginalized groups. As a guiding thesis, it draws inspiration from the organizers of the Attica prison uprising to assert
that this fight is best understood from the vantage point of those most impacted by prison book bans: incarcerated people who are denied the right to read.

**Ticket to Debt: City of Chicago v. Fulton and the Two-Track Consumer Bankruptcy System**  
Karen Lou 2371

In 2021, the Supreme Court decided City of Chicago v. Fulton, a landmark bankruptcy case that addressed the issue of whether passive retention of estate property violates § 362(a)(3) of the U.S. Bankruptcy Code, commonly known as the “automatic stay” provision. The automatic stay, as its name suggests, is a breathing spell that prevents creditors from taking certain collection actions against the debtor after a bankruptcy petition has been filed. The Court answered in the negative, significantly weakening the automatic stay’s protective power in cases involving creditor actions commenced pre-petition and maintained post-petition. This Note examines the aftermath of the Fulton decision. It considers Fulton’s impact on debtors, creditors, and bankruptcy courts. Specifically, this Note argues that Fulton sheds light on the shortcomings of the current bankruptcy system, and it discusses the ways in which debtors of color are disproportionally disadvantaged. In closing, this Note proposes that the Bankruptcy Code’s discharge provisions should be amended to provide debtors with a better chance at relief.

**Essay**

**Rolling Back Transparency in China’s Courts**  
Benjamin Liebman, Rachel Stern, Xiaohan Wu & Margaret Roberts 2407

Despite a burgeoning conversation about the centrality of information management to governments, scholars are only just beginning to address the role of legal information in sustaining authoritarian rule. This Essay presents a case study showing how legal information can be manipulated: through the deletion of previously published cases from China’s online public database of court decisions. Using our own dataset of all 42 million cases made public in China between January 1, 2014, and September 2, 2018, we examine the recent deletion of criminal cases from the China Judgements Online website. We find that the deletion of cases likely results from a range of overlapping, often ad hoc, concerns: the international and domestic images of Chinese courts, institutional relationships within the Chinese Party-State, worries about revealing negative social phenomena, and concerns about copycat crimes. Taken together, the decision(s) to remove hundreds of thousands of unconnected cases shape a narrative about the Chinese courts, Chinese society, and the Chinese Party-State. Our findings also provide insight into the interrelated mechanisms of censorship and transparency in an era in which data governance is increasingly central. We highlight how courts seek to curate a narrative that protects the courts from criticism and boosts their standing with the public and within the Party-State. Examining how Chinese courts
manage the removal of cases suggests that how courts curate and manage information disclosure may also be central to their legitimacy and influence.

**BOOK REVIEW**

**METHODOLOGY AND INNOVATION IN JURISPRUDENCE**

*Kevin Tobia* 2483

Jurisprudence aims to identify and explain important features of law. To accomplish this task, what method should one employ? Elucidating Law, a tour de force in “the philosophy of legal philosophy,” develops an instructive account of how philosophers “elucidate law,” which in turn elucidates jurisprudence’s own aims and methods. This Review introduces the book, with emphasis on its discussion of methodology.

Next, the Review proposes complementing methodological clarification with methodological innovation. Jurisprudence should ask some timeless questions, but its methods need not stagnate. Consider that jurisprudence has a long tradition of asserting claims about how “we” understand the law—in which “we” might refer to all people, citizens of a jurisdiction, ordinary people, legal experts, or legal officials. There are now rich empirical literatures that bear on these claims, and methods from “experimental jurisprudence” and related disciplines can assess untested assertions. Today’s jurisprudence can achieve greater rigor by complementing traditional methods with empirical ones.
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This Article reconstructs the Progressives’ transformation of the presidency and shows how Myers wrote it into law. This contextual reading of Myers undermines the Court’s recent decisions and highlights the co-constitutive roles of institutional and doctrinal developments in making the modern presidency.

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“Inherent power! . . . The partisans of the executive have discovered a [new] and more fruitful source of power.”
—Sen. Henry Clay, Senate Debate of 1835.¹

“We elect a king for four years, and give him absolute power within certain limits, which after all he can interpret for himself.”
—Secretary of State William Seward.²

“I have an Article [II], where I have the right to do whatever I want as president.”
—President Donald Trump.³

INTRODUCTION

Since at least 1935, when the Supreme Court countermanded President Franklin Roosevelt’s attempt to remove a Federal Trade Commissioner,⁴ administrative independence has enjoyed legal sanction.⁵ But the law of the executive is now in flux. The New Deal order is in retreat everywhere, and administrative law is no exception.⁶ In the last few years, the Supreme Court has pushed back against bureaucratic autonomy, cabined Congress’s ability to design federal agencies, and enforced

². Louis J. Jennings, Eighty Years of Republican Government in the United States 36 (London, John Murray 1868) (recounting that Seward once said this to the author in a conversation).
⁵. See Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2224 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (“[T]he Court has commonly allowed [Congress and the President] to create zones of administrative independence by limiting the President’s power to remove agency heads.”).
presidential control or supervision of administrative action. Two Justices have flatly suggested that the 1935 decision enshrining administrative independence is no longer good law. The New Deal settlement—which combined presidential policymaking with internal executive branch divisions, expertise, and insulation from political control—is eroding. Unitary presidential administration, once a legally questionable power grab, is rapidly becoming the law of the land.

This unfolding revolution is billed as a restoration. The modern Supreme Court disclaims any pretension of changing the law, professing merely to return it to what it has always been. On the Court’s account, our Constitution always conceived of the President as the administrator-in-chief. By separating powers, the text sets the President as the head of the executive branch with unique and particular responsibility for enforcing the law. Under this scheme, all nonjudicial and nonlegislative government actors must report to the President in an unbroken chain of command. Other arrangements are simply unconstitutional. This is the


9. See Noah A. Rosenblum, The Antifascist Roots of Presidential Administration, 122 Colum. L. Rev. 1, 66 (2022) (“In response to the threat of fascism, the architects of executive control over the administrative state embraced separation of powers, especially internal to the executive branch, as a way to make presidential administration antifascist.”).


11. See, e.g., Seila L., 140 S. Ct. at 2202 ("The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty. Their solution to governmental power and its perils was simple: divide it." (citation omitted) (quoting Bowsher v. Synar, 478 U.S. 714, 730 (1986))); see also Corey Robin, The Reactionary Mind: Conservatism From Edmund Burke to Donald Trump 56–57 (2d ed. 2018) (arguing that conservative counterrevolutions are often couched as "restoration[s]").


13. See Steven G. Calabresi & Christopher S. Yoo, The Unitary Executive 3–4 (2008) (explaining that the "unitary executive eliminates conflicts . . . by ensuring that all of the
theory of the unitary executive, whose major theoretical and doctrinal move is to infer from the fact of three separate branches a constitutional mandate of unimpeded presidential control over the administrative state.\textsuperscript{14}

Unitarians—proponents of the unitary executive theory—advance a specific view of political history to justify their doctrinal claim. They assert that for the better part of two centuries, American political institutions embodied unitary arrangements. Only in the mid-twentieth century did the government stray from the original, formalist separated-powers blueprint with the rise of the regulatory state and new forms of independent administration.\textsuperscript{15} Against the backdrop of this history, today’s Court presents itself as correcting the New Deal anomaly.\textsuperscript{16}

cabinet departments and agencies that make up the federal government will execute the law in a consistent manner and in accordance with the president’s wishes”).

14. For classic statements of the theory, see id. (“[T]he theory of the unitary executive holds that the Vesting Clause of Article II . . . is a grant to the president of all of the executive power, which includes the power to remove and direct all lower-level executive officials.” (citing U.S. Const. art. II, § 1, cl. 1)); Michael W. McConnell, The President Who Would Not Be King: Executive Power Under the Constitution 235–41, 341 (2020) (discussing variations on unitary executive theory and describing a “unitary executive” as one in which all executive power resides in the President and all executive officers and agencies serve to carry out the President’s will); Saikrishna Bangalore Prakash, Imperial From the Beginning: The Constitution of the Original Executive 33 (2015) [hereinafter Prakash, Imperial From the Beginning] (recounting how the federal government drew lessons from early state constitutions, in which “no adequate barriers separated the three powers” and legislatures often “usurped the executive power”); Calabresi & Rhodes, supra note 12, at 1165 (“Unitary executive theorists read [the Vesting Clause], together with the Take Care Clause, as creating a hierarchical, unified executive department under the direct control of the President.” (footnote omitted)). For a critical view of the same, see Jeffrey Crouch, Mitchell A. Sollenberger & Mark Rozell, The Unitary Executive Theory: A Danger to Constitutional Government 26 (2020) (noting critiques of the unitary executive theory “because of its origin, rationale, and use, and the danger it represents to governmental openness and transparency”); Peter M. Shane, Democracy’s Chief Executive 205–07 (2022) [hereinafter Shane, Democracy’s Chief Executive] (arguing for a “more democratic reading” of the executive power that emphasizes “the authorities granted to Congress and to the courts to check and balance the president, should they choose to do so”); Stephen Skowronek, John A. Dearborn & Desmond King, Phantoms of a Beleaguered Republic: The Deep State and the Unitary Executive 71–72 (2021) (contending that “a broadly based party coalition does not comport well with a unitary executive”). On the historical development of unitary executive theory and practice, see generally Ahmed et al., supra note 10.


16. See, e.g., Seila L., 140 S. Ct. at 2202 (noting that examples cited in support of agencies with single-director structures are “modern and contested” and “historical anomalies”); id. at 2198 (“Rightly or wrongly, the Court [in Humphrey’s Executor] viewed the FTC . . . as exercising ‘no part of the executive power.’” (quoting Humphrey’s Ex’r v. United States, 295 U.S. 602, 628 (1935))); id. at 2199 (stating that Morrison “back[ed] away from the reliance in Humphrey’s Executor on the concepts of ‘quasi-legislative’ and ‘quasi-
In carrying out this mission, the Court has been guided by one judicial lodestar: *Myers v. United States*. That 1926 case, in which the Supreme Court sided with President Woodrow Wilson in striking down a statute that purported to prevent him from firing a postman, pre-dates the New Deal settlement. Written by President-turned–Chief Justice William Howard Taft, the opinion reprimanded Congress for interfering with the President’s duty to “take care that the laws be faithfully executed” and set down a pro-presidential precedent on constitutional (as opposed to statutory) grounds. It claimed to encapsulate timeless principles and vindicate the law of the presidency as it had existed from the Founding. That *Myers* was penned by the only President to later become a Supreme Court Justice has only added to its authority and persuasive power, at least for some judges and commentators.

The current Court has relied on *Myers* to legitimate its supposed restoration in two specific ways. First, *Myers* stands out as an exception in a sparse terrain of twentieth-century separation-of-powers cases, seeming to provide authority for the Court’s current theory of presidentialism. Separation-of-powers cases not only were exceedingly rare but also, until recently, mostly rejected unitarism. (The Supreme Court’s first statement of modern unitary theory famously occurs in a solo dissent from just forty
years ago.\footnote{21} For the Court to maintain the appearance of restoring the Constitution from its New Deal perversion, the Court needs a pre–New Deal guide of what the law used to be. \textit{Myers} has served that purpose.

Second, the argumentation in \textit{Myers} appears well suited to the Court’s current originalist pretensions.\footnote{22} Like today’s originalists, Taft’s opinion speaks in essentialist terms about what Article II of the Constitution does and does not include.\footnote{23} Like the originalists, it relies on early-republic sources, seeming to read its conclusions back into the logic of the Constitution as understood by its drafters at or soon after the Founding.\footnote{24} This method lends unitary theory a higher democratic pedigree, rooting it not just in history but in the social contract itself.\footnote{25} And it further supports the Court’s claim to be doing nothing more than bringing the Constitution back to what it has always meant.

This Article argues that the current Court’s use of \textit{Myers} is unjustified in three ways. First, \textit{Myers} is not originalist. Unlike modern originalists, Taft was unwilling to rely solely on original meaning.\footnote{26} Taft struggled with the drafting process, calling it a “kind of nightmare”; he admitted that the final seventy-two-page opinion was “unmercifully long, but it [was] made so by the fact that the question has to be treated historically as well as from a purely legal constitutional standpoint.”\footnote{27}

Taft’s history of the removal power does look back to the actions of the first Congress, but not because he presumed that the meaning of the Constitution was decisively settled at the Founding or resolved with the so-

\footnote{21} See \textit{Morrison}, 487 U.S. at 705 (Scalia, J., dissenting) (arguing that “all of the executive power”—not just “some”—is vested in the President); see also infra notes 80–89 and accompanying text. As a historical matter, Justice Scalia’s \textit{Morrison} dissent lies at the root of the modern unitary theory. See Ahmed et al., supra note 10 (manuscript at 46–48) (explaining Scalia’s dissent as “a watershed in the development of unitary executive theory”).

\footnote{22} See supra note 19 and accompanying text.

\footnote{23} See \textit{Myers}, 272 U.S. at 126–27 (“[B]y the specific constitutional provision for appointment of executive officers with its necessary incident of removal, the . . . legislative power of Congress in respect to both [appointment and removal] is excluded . . . .”); see also id. at 127–29 (“Article II expressly and by implication withholds from Congress power to determine who shall appoint and who shall remove except as to inferior offices.”). For a detailed analysis of \textit{Myers’s} argumentation, see infra section II.B.

\footnote{24} See \textit{Myers}, 272 U.S. at 127 (appealing to original intent to discern constitutional meaning).


\footnote{27} Id. at 181 (internal quotation marks omitted) (first quoting Letter from William H. Taft to Robert A. Taft (Oct. 17, 1926) (on file with the \textit{Columbia Law Review}); then quoting Letter from William H. Taft to Helen Taft Manning (Oct. 24, 1926) (on file with the \textit{Columbia Law Review})).
called Decision of 1789. Rather, Myers’s bulk is explained by long stretches of the opinion devoted to showing that, from the start of the republic through the Civil War, “all branches of the Government,” led by the first Congress, “acquiesce[d]” in a certain understanding of presidentialism. According to Taft, during this “period of 74 years, there was no act of Congress, no executive act, and no decision of th[e] [Supreme] Court at variance” with this tradition.

That statement is at least tendentious as a historical matter. But regardless of its truth, it is an appeal to political practice or “historical gloss,” not original meaning. For Taft, the actions of the first Congress were just one entry of many in a historical sequence stretching over decades. And it was that history that created legal authority.

The Court’s second mistake concerns Myers’s substance. The presidency of Myers is strong, but it is not a unitary executive. Taft’s opinion went out of its way to defend the constitutionality of limits on presidential administrative power. It expressly affirmed Congress’s right to set conditions on removal for many government officials. It distinguished ordinary executive branch officers from Article I judges whose terms and tenures were defined by statute, and it disclaimed any pretension to rule on the latter’s status or privileges. And it protected the civil service, emphatically asserting that “[t]he independent power of removal by the President alone . . . works no practical interference with the merit

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29. See Myers, 272 U.S. at 148.

30. Id. at 163.

31. See id. at 252–61 (Brandeis, J., dissenting) (canvassing statutes showing the contrary).


33. Cf. Myers, 272 U.S. at 175 (observing that a reading of the Constitution that has been “acquiesced in for a long term of years[] fixes the construction to be given its provisions”).

34. Id. at 160–61.

35. Id. at 157–58.
system.”  

Myers envisioned a powerful presidency. But it also championed the role of independent expertise in policymaking, embraced internal divisions within the executive branch, and welcomed Congress’s power to impose conditions on the government it built out.

This points to the modern Court’s third mistreatment of Myers: By ignoring the case’s place in history, it obscures its radicalism. Contrary to what present-day expositors suggest, Myers did not merely summarize an existing tradition of presidentialism. The first Supreme Court opinion to invalidate a congressional statute because it violated the President’s inherent Article II power, Myers broke with decades of precedent to constitutionalize a new vision of the presidency.

To show how, this Article reconstructs the story of the premodern administrative state Myers helped to bury, which was characterized by two arrangements: (1) the primacy of Congress in defining the shape and personnel of the administrative state by statute and (2) the compliance of the President and the Court with these statutes. At the time of Myers, courts had over six decades of experience with explicit legislative restrictions on the President’s removal power. These laws tied the President’s hands and gave the legislature sway over executive branch officers.

Such arrangements sprang from and supported the late nineteenth-century party-based governance regime. In that world, the legislature was the nation’s most important governing institution and political parties were the constitutional system’s lifeblood. Parties selected state and national candidates, defined the policy agenda, and doled patronage—cushy federal jobs, that is—back to armies of (mostly unpaid) volunteers who had helped bring them to power. Indebted to party and in practice lacking hiring and firing power over the bureaucracy, the nineteenth-century President was a weak figure.

This arrangement shifted at the turn of the twentieth century. The Progressive Era led to a profound rethinking of the Constitution’s meaning and the President’s role within it. Many communities in an

36. Id. at 173.
37. On the way texts operate not only as documents to be interpreted but as works that do work in the world, see Dominick LaCapra, Rethinking Intellectual History and Reading Texts, 19 Hist. & Theory 245, 250 (1980).
38. Robert C. Post, 10 The Oliver Wendell Holmes Devise History of the Supreme Court of the United States—The Taft Court: Making Law for a Divided Nation, 1921–1930, at xxxv (2024) [hereinafter Post, History of the Supreme Court].
39. See infra sections III.B–.C.
40. See infra sections III.B–.C.
41. See infra section III.A.
42. See infra section III.A.
43. See infra Part III.
industrializing, urbanizing, diversifying America clamored for more help from the government.\textsuperscript{45} Under sustained pressure from reformers, the federal bureaucracy evolved from a prize to be captured by election winners to a professionalized body charged with realizing the will of the voters.\textsuperscript{46} New federal agencies arose to oversee and administer antitrust, labor, and regulatory policy.\textsuperscript{47} Along the way, the President transformed from a mere party servant into something different and bigger.


\textsuperscript{45} See Charles Noble, Welfare as We Knew It 36 (1997) (describing the circumstances that spurred the Progressive movement).


\textsuperscript{47} Id. at 361–63. For scholarship on the different regulatory areas, see generally Carpenter, supra note 44 (examining the Department of Agriculture, the Department of the Interior, and the Post Office); Samuel Haber, Efficiency and Uplift: Scientific Management in the Progressive Era, 1890–1920 (1964) (uncovering how “scientific management” affected the movement for Progressive reform); Gabriel Kolko, Railroads and Regulation: 1877–1916 (1965) (focusing on labor and regulatory policies related to railroads); Sanders, supra note 44 (focusing on labor policies related to agrarian workers); Sklar, supra note 44 (focusing on antitrust policies); John Fabian Witt, The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law (2004) (tracing the role of the American industrial-accident crisis in the development of Progressive regulatory schemes).
As popular tribune, the President channeled the will of the nation into a specific policy program. As chief administrator, the President supervised the bureaucracy in its implementation. The performance of Progressive Era Presidents refined and consolidated these two roles. And *Myers* wrote the new script into law. The opinion self-consciously endowed the President with expansive authority to control the implementation of federal law.

Progressives believed that the new presidency embodied a particular role for the officeholder as the people’s representative, chief policymaker, and main government administrator. But this was a new, functional theory of the office—one grounded in a new understanding of democracy, not an old, already established constitutional dogma. Taft’s opinion may have labored to emphasize the continuities between *Myers* and previous judicial glosses on executive power, but his masterwork only reflects how far-reaching the Progressives’ departures really were.

This Article recontextualizes *Myers* to recover this revolution. It resituates *Myers* as part of the Progressive Era transformation of democracy that marked the early decades of the twentieth century. And it relies on close readings of *Myers* and the line of removal cases from which it broke to advance a new, better interpretation of the opinion. In so doing, it builds on and contributes to a growing literature that seeks to understand how law, history, and political development work together to shape institutions of governance. Legal doctrine cannot be read in isolation from wider political change. Conversely, doctrine defines a key dimension of the institutional environment in which political contestation and change take place.

The Article proceeds in five parts. Part I sets up the legal puzzle and explains its stakes. It explicates the doctrinal moves that have rendered *Myers* so central to the current Court’s Article II jurisprudence. The Court’s recent embrace of the novel theory of the unitary executive has left it scrambling for persuasive precedent that would allow it to root its new theory in American law and history. *Myers* seems to serve the Court’s

48. See infra Part V.
49. See infra section V.B.
50. See infra Part IV.
51. See Post, Unitary Executive, supra note 26, at 182 (discussing Justice McReynolds’s “long and furious dissent” taking issue with the quintessential spirit of pragmatism underlying Taft’s opinion).
52. See infra Part V.
54. See infra Part I.
many purposes, which explains why it has been a mainstay of unitarist arguments.

The Article then turns to historical excavation. Part II explains where Myers came from. A removal case that shouldn’t have been, Myers arose out of the firing of a low-ranking Democratic official by President Wilson. The case is doubly ironic: Mr. Myers’s firing was not only trivial stuff for a constitutional controversy but also may have been based on an order Wilson never issued. When the case was first argued on December 5, 1923, its mysteries and contingencies were of little interest to Chief Justice Taft, who immediately grasped the opportunity the case presented to transform the law of the presidency. Taft was irritated when Justices Oliver Wendell Holmes, Louis Brandeis, and James Clark McReynolds dissented from the majority. As Chief Justice, he assigned himself the opinion and lavished over a year on drafting it, including crafting a vigorous response to the dissenters’ “very forcibly expressed” objections.

The three dissenters took issue with Taft’s constitutional theory, his account of the debates of the First Congress, and his treatment of decades of legislative and judicial precedent. They were gesturing toward the pre-Myers regime of the President’s place under the Constitution.

Part III moves backward in time to reconstruct that world and show how radical a departure Taft’s Myers decision constituted. Analyzing late nineteenth-century political history and jurisprudence, Part III uncovers the workings of the prior judicial–administrative settlement in practice. It shows how the President, then, had neither the political nor the constitutional authority to realize a policy agenda. Legally speaking, Congress could limit the President’s authority over the government, and the Court repeatedly deferred to Congress in opinions that resolved apparent constitutional puzzles by looking to the language of statutes. Abstract claims about presidential representation and the nature of

55. See infra section II.A.
56. See infra section II.A.
57. Myers v. United States, 272 U.S. 52, 52 (1926) (listing the argument, reargument, and decision dates).
58. See infra section II.B.
59. Post, Unitary Executive, supra note 26, at 176, 179.
60. Id. at 172, 179–81.
61. See Myers, 272 U.S. at 192–93 (McReynolds, J., dissenting) (critiquing the majority’s view of executive power).
62. See id. at 292–95 (Brandeis, J., dissenting) (providing an alternate reading of the Founding era).
63. See id. at 215 (McReynolds, J., dissenting) (“The claim advanced for the United States is supported by no opinion of this Court . . . .”); id. at 250–54 (Brandeis, J., dissenting) (pointing out the immense legislative precedent contravening the Court’s decision).
64. See infra section III.A.
65. See infra sections III.B–.C.
democratic government—hallmarks of the current Court’s jurisprudence—were conspicuously absent.

Part IV looks to how the Progressive Presidents—Theodore Roosevelt, William Howard Taft, and Woodrow Wilson—dramatically changed the presidency in practice and, through Taft’s writings, in theory too. The decisive pivot in the office’s development took place in the first two decades of the twentieth century as Roosevelt, Taft, and Wilson established a durable new understanding of the presidential role.66 As they worked the office, the American President became the people’s tribune and the government’s chief administrator. As the preeminent representative of the nation with a direct democratic tie to the people, the President claimed a special mandate to implement the people’s policy program.

Doctrine lagged behind, though. Part V returns to the Article’s anchor—Myers—to show how the opinion encoded this new “Progressive Presidency” in our Constitution. And it draws out the consequences of this rereading of Myers for contemporary law and scholarship.

Taft would spend several fruitful years in academia between his terms as President and Chief Justice elaborating his own understanding of the new Progressive Presidency.67 That theory would form the basis of his opinion in Myers, institutionalizing the President’s new political power as the people’s tribune through expanded legal authority as administrator-in-chief.68

This reconstruction of Myers changes our understanding of the Court’s current project. Properly read as the translation of the Progressive Era presidency into law, Myers is less a return to the Founding than an act of modern invention. Today, the Court is doing something similar. In championing the unitary theory of the executive, the Court purports to be rescuing Myers from “the dustbin of repudiated constitutional principles.”69 While there is a wide gulf between the presidency of Myers and that of the Roberts Court,70 the two Chief Justices’ gambits are the same. What is billed as a constitutional “restoration”71 is simply the Court imposing one new vision of the President in place of another.72

Reconstructing the democratic theory that underlies Myers’s Progressive Presidency also undermines the substance of the Court’s current arguments. Modern unitarism claims that structural pluralism and

66. See infra sections IV.A–.C.
67. See infra section V.A.
68. See infra section V.B.
70. See infra section V.C.
71. Robin, supra note 11, at 57.
72. See Nikolas Bowie & Daphna Renan, The Separation-of-Powers Counterrevolution, 131 Yale L.J. 2020, 2076–78 (2022) (arguing that Myers instituted a new version of the presidency that served the interests of reactionaries who were scarred by Reconstruction).
independent administration are incompatible with a strong, constitutional President and that the President is necessarily entitled to a privileged position vis-à-vis other political actors in the name of democracy. This Article’s re-reading of Myers shows this is not the case.

Finally, this Article contributes to the growing scholarly literature on Article II and the place of history in constitutional interpretation. The Article shows that the law of the presidency is part and parcel of the office of the executive. That office undergoes institutional development as a result of forces only dimly alluded to in the doctrine itself. To understand the presidency and develop a law adequate to it, courts cannot close their eyes to these changes or wish them away through the fantasy of an immutable, unchanging office. As Myers itself illustrates, such a project merely masks the inevitability of institutional intercurrence. Law and legal scholarship must attend to the dynamic interplay between doctrine and development or risk becoming a fable.

I. THE SUPREME COURT’S IMAGINARY PRESIDENCY

The Supreme Court’s operating theory of the presidency is remarkably new and rests on surprisingly thin doctrinal foundations. The cases creating the new unitary executive date mostly from the last few years, and they rely centrally on one case, Myers v. United States, for authority.

This Part canvasses the startling transformation in the Court’s Article II jurisprudence to show its doctrinal weakness and thus the importance of Myers. Section I.A briefly reconstructs the rise of unitary executive theory in case law. It shows how, starting thirteen years ago, the Roberts Court began to rehabilitate an argument Justice Antonin Scalia first articulated in a dissent in Morrison v. Olson. Section I.B then looks at the limited sources of textual and historical support for the Court’s project. Reliance on a particular reading of Myers, the section shows, has become an integral part of the Court’s current separation-of-powers jurisprudence.

As a whole, the Part shows how the Court’s recent opinions lack meaningful support in traditional sources of constitutional authority besides Myers. The centrality of Myers to the modern Court’s unitary turn

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73. See supra notes 7–17 and accompanying text.
76. 272 U.S. 52 (1926).
77. See 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (arguing that the Constitution provides for the President to have all of the executive power, not just some of it).
sets the stage for the rest of this Article, which reinterprets Myers in light of its historical context\(^{78}\) with important consequences for Article II jurisprudence today.\(^{79}\)

A. Finding an Unfetterable Presidential Removal Power

The roots of the Court’s current Article II jurisprudence lie in an unlikely solo dissent from 1988.\(^{80}\) A decade before, Congress had passed the Ethics in Government Act, which created the office of the independent counsel, a prosecutor appointed by a panel of the D.C. Circuit Court (upon request of the Attorney General) to investigate alleged wrongdoing in the executive branch.\(^{81}\) *Morrison v. Olson* arose out of the appointment of independent counsel Alexia Morrison to investigate a controversy involving the Reagan Justice Department’s alleged failure to comply with a subpoena.\(^{82}\) The Reagan Administration, represented by Solicitor General Charles Fried, argued that appointing the independent counsel was an unconstitutional delegation of executive power to an officer neither appointed nor removable by the President.\(^{83}\)

A 7-1 decision upholding the statute, *Morrison* was not a hard case for the Court. Pursuant to its legislative powers, the Court held, Congress had significant discretion in creating a special prosecutor to investigate presidential wrongdoing and structuring that investigatory office.\(^{84}\) The provisions of the Ethics in Government Act did not “impermissibly interfere with the President’s authority under Article II” and therefore suffered from no constitutional infirmity.\(^{85}\)

The lone dissenter was Justice Scalia, then just two years into his thirty-year tenure. For Scalia, the 1978 Act had one serious constitutional defect: It vested the appointment of an executive officer in a judicial body and made that prosecutor unremovable by the President.\(^{86}\) Because investigation was a part of prosecution, Scalia argued, and prosecution a part of the executive power, no federal prosecutor could operate outside

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\(^{78}\) See infra Parts II–IV.

\(^{79}\) See infra Part V.

\(^{80}\) *Morrison*, 487 U.S. at 697 (Scalia, J., dissenting).


\(^{82}\) The controversy centered around whether Assistant Attorney General for the Office of Legal Counsel Ted Olson had lied to Congress about the completeness of the EPA’s production of documents in response to a legislative subpoena. *Morrison*, 487 U.S. at 665–67.


\(^{84}\) See *Morrison*, 487 U.S. at 674–75 (noting that case law and constitutional history show no proscription of interbranch appointments by Congress).

\(^{85}\) Id. at 660.

\(^{86}\) Id. at 706 (Scalia, J., dissenting) (citing 28 U.S.C. § 594(a) (Supp. V 1982)).
of the President’s control. Article II vested the executive power in a single person, the President, Scalia wrote—not “some of the executive power, but all of the executive power.” Because the 1978 Act vested executive power outside the President’s reach, it was unconstitutional.

Although Scalia’s reasoning failed to attract even a single additional vote in 1988, his anxiety about a President hamstrung by an executive branch outside the President’s control would soon be elevated into a constitutional rule. The doctrinal upheaval began in 2010 with a 5-4 decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board.* In the wake of the Enron accounting scandal, Congress had created a federal accounting board to audit public companies. The Sarbanes–Oxley Act protected the Board’s five members from presidential removal, specifying that the SEC’s Commissioners could only dismiss them “for good cause shown.” The Court struck the provision down on separation-of-powers grounds.

Chief Justice John Roberts’s opinion was ambiguous. It claimed to be doing little more than faithfully applying *Morrison* (albeit with a different result). Congress could protect officers from presidential removal so long as these arrangements did not interfere with the President’s Article II responsibilities. But the Court felt that the structure of the new Board was unusual and troubling. Not only did the Board members enjoy for-cause removal protection but so did the SEC Commissioners who appointed and could remove them. If two layers of insulation from the President were permissible, why not more? “The officers of such an agency—safely encased within a Matryoshka doll of tenure protections—would be immune from Presidential oversight, even as they exercised power in the people’s name.” Under such a structure, wrote Roberts, the President could not “take Care that the Laws be faithfully executed” since “he [could not] oversee the faithfulness of the officers who execute them.”

87. See id. (arguing that the independent prosecutor was vested with a “quintessentially executive function”).
88. Id. at 705.
89. Id. at 705–06.
93. Id. at 484.
94. See id. at 494–98 (noting that the Court had previously upheld a single level of protected tenure separating the President and the officer but that the added layer in this case made a constitutional difference).
95. See id. at 487 (noting that SEC Commissioners are only removable by the President in cases of “inefficiency, neglect of duty, or malfeasance in office” (internal quotation marks omitted) (quoting Humphrey’s Ex’r v. United States, 295 U.S. 602, 620 (1935))).
96. Id. at 497.
97. Id. at 484 (quoting U.S. Const. art. II, § 3).
The Court insisted that its holding was limited to that Board and its two-layer structure.\textsuperscript{98} But its logic suggested otherwise: In recognizing that some removal protections interfered with the President’s constitutional responsibilities, the Court implied that any statute limiting the President’s ability to “oversee the faithfulness” of executive branch officers might run afoul of the commands of Article II. (And who might say? The Court, of course.)

Ten years later, in \textit{Seila Law LLC v. Consumer Financial Protection Bureau},\textsuperscript{99} the Court confirmed this implication. The Consumer Financial Protection Bureau, a relatively new agency created after the 2008 recession, was headed by a single director serving a five-year term and removable by the President only for “inefficiency, neglect of duty, or malfeasance in office.”\textsuperscript{100} The Court found the agency’s structure unconstitutional, again by a 5-4 vote.\textsuperscript{101} The four dissenters urged the Court to stick with \textit{Morrison}’s “interference” standard, as it had avowedly done in \textit{Free Enterprise}.\textsuperscript{102} But Roberts declined. His majority opinion took up the latest constitutional theory of \textit{Free Enterprise} and made it into a new legal rule. Because the “entire ‘executive Power’ belongs to the President alone,”\textsuperscript{103} Roberts wrote, the agency’s design “clash[ed] with constitutional structure.”\textsuperscript{104} The dissenters pointed out that American history counted many federal agencies led by officials with removal protections.\textsuperscript{105} But the majority insisted that everywhere executive officials wielded “significant” authority, that authority had to remain “subject to the ongoing supervision and control of the elected President.”\textsuperscript{106}

Since then, the \textit{Seila Law} holding has been extended to undermine the structure of other agencies.\textsuperscript{107} In at least one recent case, the new doctrine led the Supreme Court to redraw an agency’s internal reporting

\begin{itemize}
\item \textsuperscript{98} See id. at 501 (“The point is not to take issue with for-cause limitations in general; we do not do that.”).
\item \textsuperscript{99} 140 S. Ct. 2183 (2020).
\item \textsuperscript{100} 12 U.S.C. § 5491(c)(1)–(3) (2018).
\item \textsuperscript{101} \textit{Seila L.}, 140 S. Ct. at 2191–92.
\item \textsuperscript{102} Id. at 2235–36 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).
\item \textsuperscript{103} Id. at 2197 (majority opinion) (quoting U.S. Const. art. II, § 1, cl. 1).
\item \textsuperscript{104} Id. at 2192.
\item \textsuperscript{105} Id. at 2231–33 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).
\item \textsuperscript{106} Id. at 2203 (majority opinion).
\item \textsuperscript{107} See Collins v. Yellen, 141 S. Ct. 1761, 1770 (2021) (holding that the Federal Housing Finance Agency’s structure, whereby a single Director leads the Agency and can only be removed for cause, “violates the separation of powers”); Jarkesy v. Sec. & Exch. Comm’n, 34 F.4th 446, 449 (5th Cir. 2022) (holding that “statutory removal restrictions on SEC [administrative law judges] violate the Take Care Clause of Article II”); Constitutionality of the Comm’r of Soc. Sec.’s Tenure Prot., 2021 WL 2981542, at *4 (O.L.C. July 8, 2021) (concluding that the President has the authority to remove the SSA Commissioner at will).
\end{itemize}
lines in defiance of precedent, congressional statute, and agency regulations.108

This line of cases marks a new epoch in the constitutional theory of the presidency. With Seila Law, the Roberts Court decisively shed Morrison’s functionalism in favor of the formalist approach advanced by Scalia thirty-two years earlier, according to which the President’s presumed constitutional prerogatives supersede Congress’s statutory arrangements. There are more rulings to come; this Article arrives in the midst of a tectonic legal shift.

B. The Unitary Theory’s Missing Text and Scant History

This recent revolution in Article II jurisprudence rests on surprisingly flimsy foundations. The Roberts Court has justified its separation-of-powers formalism with an appeal to originalism, claiming to find, in text and history, a constitutional mandate for the unitary executive.109 But the textual evidence for this version of the presidency is thin at best. In any case, the formal theory of the unitary executive turns out to be so deeply ahistorical that it simply cannot be squared with the federal government’s early operations or the Framers’ designs.

Start with the constitutional text. Scalia’s Morrison opinion admitted what every scholar of the removal power has long known: The Constitution contains “no provision” stating who may remove executive officers.110 Text is thus a limited guide to the vexed question of removal. And in Morrison, seven Justices pointedly rejected Scalia’s attempt to read Article II’s Vesting Clause to mean “that every officer of the United States exercising any part of [the executive] power must serve at the pleasure of the President and be removable by him at will.”111 Conservative Chief Justice William Rehnquist, writing for the majority, called this an “extrapolation from general constitutional language which . . . is more than the text will bear.”112

To fill in the gaps in language, Scalia turned to history.113 So too, more recently, have the Roberts Court’s unitarian opinions. The opinions have relied on the same three episodes to legitimate the unitary theory: the

109. See supra note 7 (collecting cases).
111. Id. at 690 n.29 (majority opinion).
112. Id.
113. Id. at 723 (Scalia, J., dissenting) (“Before the present decision it was established . . . that the President’s power to remove principal officers who exercise purely executive powers could not be restricted . . . .” (citing Myers v. United States, 272 U.S. 52, 127 (1926))).
But these episodes, far from shoring up unitarism, expose it to further vulnerabilities.

The first two historical moments are simply not good authorities for the theory. Relying on the Decision of 1789 is notoriously fraught. A series of votes taken by the First Congress while designing the Departments of Foreign Affairs, War, and Treasury, the Decision of 1789 has sometimes been taken as evidence for an indefeasible constitutional power of presidential removal. But the meaning of these votes has been contested almost since they were taken. The most recent scholarly investigations of the Decision, which include the most thorough study of the speeches and positions of the members of the First Congress who participated in the debate, conclude that they did not articulate a clear position on the President’s power under Article II. If that scholarship is right, the

114. See, e.g., Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2191–92 (2020) (“The President’s power to remove . . . was settled by the First Congress, and was confirmed in the landmark decision Myers v. United States.” (citation omitted)).


117. See Gienapp, Removal, supra note 116 (manuscript at 7–12) (discussing the uncertainty, indecision, and division that permeated the First Congress’s removal debate);
Decision did not decide anything, really. If it is wrong, the question remains what kind of legal authority the Decision actually has.\footnote{Shugerman, Indecisions, supra note 115, at 757 (showing that members of the First Congress were indecisive on matters of presidentialism).}

Government practice at the time of the Founding offers no better support for the unitary theory. Recent scholarship has uncovered numerous instances in which Congress vested executive authority in independent officers and commissions, apparently in violation of the current Court's understanding of the separation of powers. From customs boards imposing health guidelines on cod fisheries to special administrative courts resolving widows' pension claims after the Revolutionary War, the early republic counted many nonunitary features that apparently aroused no constitutional concerns.\footnote{See Katz & Rosenblum, supra note 74, at 410–12 (arguing that the Decision of 1789 does not establish executive removal on originalist grounds).} And theoretical statements sometimes touted as strongly unitary have turned out, on closer examination, to be ambiguous or even outright opposed to unitarism.\footnote{Shugerman, Presidential Removal, supra note 17, at 2087–90 (advancing an "anti-unitary" argument on the question of removal power); Shugerman, Vesting, supra note 116, at 1483 (pointing out that unitary scholars’ “claims are often a series of textual assertions or etymological assumptions without concrete eighteenth-century evidence to support the intuition that ‘vesting’ connoted exclusivity or indefeasibility”). The Morrison dissent makes analogous use of James Madison’s statement in Federalist 47 that “[n]o political truth is certainly of greater intrinsic value [than the separation of powers]” to support a separation of powers that was rigid and impermeable. See Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (quoting The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961)). In fact, the majority of Federalist 47 is spent rejecting any literal understanding of this principle as desirable or attainable in structuring a government. See, e.g., The Federalist No. 47, at 241 (James Madison) (Lawrence Goldman ed., 2008) (“If we look into the constitutions of the several States we find that, notwithstanding the emphatic and, in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate . . . .”).}

This is not particularly surprising because the theory of the unitary executive was itself only developed two centuries later. The product of a post-Vietnam and post-Watergate presidency fallen into disrepute, the theory aimed to rehabilitate an office that conservatives saw as besieged by an overzealous Congress.\footnote{See Katz & Rosenblum, supra note 74, at 407–08, 410–14 (demonstrating deficiencies in the textual and historical arguments for unitary scholars’ claims); Shugerman, Presidential Removal, supra note 17, at 2087–90 (advancing an “anti-unitary” argument on the question of removal power); Shugerman, Vesting, supra note 116, at 1483 (pointing out that unitary scholars’ “claims are often a series of textual assertions or etymological assumptions without concrete eighteenth-century evidence to support the intuition that ‘vesting’ connoted exclusivity or indefeasibility”). The Morrison dissent makes analogous use of James Madison’s statement in Federalist 47 that “[n]o political truth is certainly of greater intrinsic value [than the separation of powers]” to support a separation of powers that was rigid and impermeable. See Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (quoting The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961)). In fact, the majority of Federalist 47 is spent rejecting any literal understanding of this principle as desirable or attainable in structuring a government. See, e.g., The Federalist No. 47, at 241 (James Madison) (Lawrence Goldman ed., 2008) (“If we look into the constitutions of the several States we find that, notwithstanding the emphatic and, in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate . . . .”).}

Unlike older generations of conservatives, this generation used text-based arguments not to “contain the power of the
presidency” but “as a vehicle for more aggressively asserting the President’s independence and freedom of action.”

Law schools, think tanks, and policy shops in the ’80s and ’90s began to translate these arguments into potential doctrine. Gradually, the theory made its way to the federal judiciary, and thence into law.

Many things about unitary executive theory betray its newness. Take the term “unitary,” for instance. Before the 1970s, it denoted only a single executive, as distinct from, say, a multimeember council of governors. Alexander Hamilton’s Federalist No. 70, a text unitarians commonly marshal in support of their position, warns that plurality in the executive tends to “conceal faults and destroy responsibility.” But Hamilton’s concern was not specialized administrative judges with job protection; it was “multiplication” of the chief executive, of which he supplied two concrete examples: (1) the two-headed Consulate of Rome and (2) a council of advisors whose approval the President was constitutionally required to obtain before taking action (an idea the Framers toyed with, then discarded). The present-day usage of the term, as a constitutional mandate that a single person must wield inalienable control of the administrative state, was unknown until roughly forty years ago.

The political theory on which unitarism relies is new too. As Scalia explained in Morrison, the President must have control over the executive branch because “[t]he President is directly dependent on the people, and since there is only one President, he is responsible.” The current Court has fully embraced this theory of personal responsibility and direct

122. Id. at 2077.

123. See Jeremy Bailey, The Idea of Presidential Representation 171–89 (2014) (detailing the political realities that solidified the theory of the unitary executive in the later parts of the twentieth century); Crouch et al., supra note 14, at 18–22 (“Many of the fathers of the unitary executive theory were presidential power advocates who worked in Reagan’s Department of Justice.”); Ahmed et al., supra note 10 (manuscript at 43–53) (describing the development of unitary executive theory through legal scholarship in the 1990s); Skowronek, Conservative Insurgency, supra note 121, at 2073, 2075, 2089 (asserting that the unitary executive theory was a marginal conservative idea in the 1970s and 1980s that became a full-fledged constitutional theory in the 1990s).

124. See Shane, Democracy’s Chief Executive, supra note 14, at 5–8 (detailing the progression of the unitary executive theory from the Federalist Society to Republican officials to the courts).


126. Id. at 345–48.


128. In fact, Scalia’s dissent elides the two senses by helping give the word a new meaning. Compare Morrison v. Olson, 487 U.S. 654, 698–99 (Scalia, J., dissenting) (“[T]he [F]ounders conspicuously and very consciously declined to sap the Executive’s strength in the same way they had weakened the Legislature: by dividing the executive power.”), with id. at 732 (“It is, in other words, an additional advantage of the unitary Executive that it can achieve a more uniform application of the law.”).

129. Id. at 729.
popular dependence. Because of how important this argument is to the Court’s current Article II jurisprudence, it is worth quoting at some length. The Seila Law majority put it as follows:

The Framers deemed an energetic executive essential to “the protection of the community against foreign attacks,” “the steady administration of the laws,” “the protection of property,” and “the security of liberty.” Accordingly, they chose not to bog the Executive down with the “habitual feebleness and dilatoriness” that comes with a “diversity of views and opinions.” Instead, they gave the Executive the “[d]ecision, activity, secrecy, and dispatch” that “characterise the proceedings of one man.”

To justify and check that authority—unique in our constitutional structure—the Framers made the President the most democratic and politically accountable official in Government. Only the President (along with the Vice President) is elected by the entire Nation. And the President’s political accountability is enhanced by the solitary nature of the Executive Branch, which provides “a single object for the jealousy and watchfulness of the people.”

In the recent Arthrex case, the Court further elaborated: “Today, thousands of officers wield executive power on behalf of the President in the name of the United States. That power acquires its legitimacy and accountability to the public through ‘a clear and effective chain of command’ down from the President, on whom all the people vote.”

The Court’s democratic theory cannot be found in the Constitution. The U.S. Constitution fails to guarantee any Americans the right to vote for the nation’s highest office. And, as unitary originalists all emphasize, the presidency is a constitutional—rather than political—creation. This point is usually made to distinguish originalism from left-wing constitutional theories, which supposedly supplement the President’s constitutional powers with political ones. Originalism, the argument

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133. See, e.g., Calabresi & Yoo, supra note 13, at 3–4 (explaining that the theory of the unitary executive is rooted in the Vesting Clause of Article II); Prakash, Imperial From the Beginning, supra note 14, at 3–11 (observing that the presidency’s powers are defined and limited by the Constitution). On the dualism of the office, see Bailey, supra note 123, at 3, 10 (“[E]ven as [unitarians] embraced executive power, they remained ambivalent about grounding executive power in appeals to the people and instead found in Hamilton’s argument a President whose power derived from the formal ‘unitary’ structure of the office.”); Skowronek, Conservative Insurgency, supra note 121, at 2072 (noting that the Framers “created the presidency in large part to check popular enthusiasms”).

134. See Saikrishna Bangalore Prakash, The Living Presidency: An Originalist Argument Against Its Ever-Expanding Powers 18 (2020) (“Liberals are essentially picking and choosing among constitutional theories to suit their current policy or constitutional
goes, properly cabins the President’s powers by relying on the Constitution alone. Popular legitimacy is legally irrelevant.

History provides equally little support for the idea that the Framers designed the President to be “directly dependent” on the people. The delegates at the Constitutional Convention in Philadelphia would often speak of the “people,” but not to evoke direct popular choice.\textsuperscript{135} Citizenship in the early republic did not include the right to vote, and many at Philadelphia looked dimly on the idea of giving suffrage to the unpropertied.\textsuperscript{136} The Constitution ultimately left the franchise in the hands of the states, most of which limited that privilege to property-holding white men. The Federalist Papers explained the necessity of the compromise: “[O]ne uniform rule[,] [of national suffrage] would probably have been as dissatisfaction to some of the States as it would have been difficult to the convention.”\textsuperscript{137} When it came to presidential selection, the Framers made the President electable by an Electoral College.\textsuperscript{138} A tiny minority of the Convention defended direct popular presidential election, but most believed the broader public too ignorant to familiarize itself with notables outside of their region.\textsuperscript{139} And if today the Electoral College is criticized for being insufficiently democratic,\textsuperscript{140} it was even wider off the mark in its early years. Estimates suggest that, of an American population of a mere 2.5 million people,\textsuperscript{141} very few were

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\textsuperscript{135} Robert W. Bennett, Taming the Electoral College 15–16 (2006).

\textsuperscript{136} Keyssar, The Right to Vote, supra note 132, at 18–19, 36–38, 49–50.

\textsuperscript{137} The Federalist No. 52, at 260 (James Madison or Alexander Hamilton) (Lawrence Goldman ed., 2008).

\textsuperscript{138} U.S. Const. art. II, § 1, cl. 2–4.

\textsuperscript{139} See Forrest McDonald, The American Presidency 166–67, 170–71 (1994) (“[Roger] Sherman objected [to the proposal that the President be elected by freeholders at large, arguing] that the voters would not be well enough informed to make an intelligent choice . . . .”).

\textsuperscript{140} See, e.g., George C. Edwards III, Why the Electoral College Is Bad for America 205 (3d ed. 2019) (arguing that the Electoral College “violates political equality”); Jesse Wegman, Let the People Pick the President 5 (2020) (criticizing the Electoral College on these grounds). On the history of the Electoral College and reform movements, see generally Alexander Keyssar, Why Do We Still Have the Electoral College? (2020).

eligible to vote.\textsuperscript{142} Many didn’t bother: Around 10% of eligible voters cast a ballot in the 1820 presidential election.\textsuperscript{143}

The Framers did not see the presidency as the nation’s “most democratic and politically accountable” body; that honor (if it was an honor, given the Framers’ ambivalent attitudes toward democracy\textsuperscript{144}) belonged to the House of Representatives.\textsuperscript{145} “The only national [body] for which the Constitution demanded a popular electoral process of any kind,” the House was built for representativeness, made up of politicians elected with the mission of channeling their districts’ preferences into government.\textsuperscript{146}

In the sense of having to carry out the public’s wishes, the President, by contrast, was not a “representative” of the people at all. The Framers saw the President as a counterweight to the popular impulse, a trustee utilizing his good judgment and sense to carry out the law, whether his constituents liked it or not.\textsuperscript{147} When “the interests of the people are at variance with their inclinations,” wrote Hamilton in Federalist No. 71, it was the President’s solemn duty “to withstand the temporary delusion in order to give [the people] time and opportunity for more cool and sedate reflection.”\textsuperscript{148} Indeed, Hamilton viewed a “servile pliancy of the Executive to a prevailing current, either in the community or in the legislature” as a sign of weakness.\textsuperscript{149}

This helps explain why neither Scalia in \textit{Morrison} nor the Roberts Court more recently has been able to rely on a thick account of the early republic and its institutions to support their arguments. Simply put, their

\begin{itemize}
\item \textsuperscript{142} See Robert J. Dinkin, Voting and Vote-Getting in American History 29–38 (2016) (discussing the expanding, but still limited, voting population in the early years of the nation).
\item \textsuperscript{144} See James W. Ceaser, Presidential Selection 48–49 (1979) (contrasting the President’s authority with the theory of “representative democracy” found in the states that based government power “on a claim to immediate representation of the popular will”); Bernard Manin, The Principles of Representative Government 94, 102–51 (1997) (describing the “principle of distinction”—“that representatives [ought to] be socially superior to those who elect them”—and its effect on debates over the franchise in the United States); Gordon Wood, The Creation of the American Republic, 1776–1787, at 163–73, 395–413, 430–38 (1998) (describing political conditions leading to skepticism about direct democracy in the early United States).
\item \textsuperscript{145} See Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2203 (2020).
\item \textsuperscript{146} Keyssar, The Right to Vote, supra note 132, at 18; see also U.S. Const. art. I, § 2, cl. 1 (specifying the composition and election requirements for the House).
\item \textsuperscript{147} See Ceaser, supra note 144, at 50–51 (noting that, in contrast to the House, “the executive would be more partial to, and itself embody, certain aristocratic or monarchic elements”).
\item \textsuperscript{148} The Federalist No. 71, at 352 (Alexander Hamilton) (Lawrence Goldman ed., 2008).
\item \textsuperscript{149} Id. at 351.
\end{itemize}
theory of the executive is not one that could be found in early America. Not even Hamilton, the great believer in a strong presidency and the Founding Father most frequently invoked by unitarians, shared their view.

The Court’s Article II jurisprudence therefore rests on Myers. As the rest of this Article shows, that reliance is misplaced.

II. Myers Visited

Lacking textual or historical support from the early republic for its Article II revolution, the Court has turned to Myers. This reliance is easy to understand. While neither the Constitution nor the Framers accepted the Court’s political theory, Myers seems to. The opinion used the language of presidential responsibility and democratic accountability, returning several times to the idea of the President as the privileged national representative charged with implementing a national policy program. And it defended its argument by reference to the Founding, the writings of the Framers, and the so-called “Decision of 1789.”

Myers has thus been pressed into service as a cornerstone of modern unitarism. It has provided the movement with a citation in case law and with apparent historical legitimacy.

But this reliance on Myers is misplaced. Read carefully and in context, it does not establish a unitary presidency. And it does not support the Court’s current originalist unitary project. To the contrary, it embodies the presidency of the Progressive Era, which it writes into law. To that extent, it is actually an example of living constitutionalism.

This Part begins the project of reading Myers in context. Section II.A recreates the immediate dispute that produced Myers to highlight its origins in the patronage politics of the post–Civil War republic. Section II.B reconstructs the Myers opinion to show how it used a mine-run removal dispute to reach an extraordinary result. Section II.C analyzes the decision in Myers to reveal how it fails to support unitary theory on originalist grounds. Parts III and IV take up the question section II.C sets up: If Myers did not advance unitary theory on originalist grounds, what did it do?

A. The Removal Case that Shouldn’t Have Been

In April 1913, President Wilson appointed Frank Myers to a four-year term as postmaster of the city of Portland, Oregon. The position—postmaster first class—was a standard patronage appointment. And Myers was a standard patronage appointee: He had helped manage an Oregon

150. See infra section V.B.
151. See infra section V.B.
152. See infra section V.B.
senator’s campaign and served as that Senator’s personal secretary before Wilson gave him a federal job.\textsuperscript{154} Myers spent four uneventful years coordinating Democratic Party patronage matters and overseeing the delivery of the mails from his plum federal perch before being successfully reappointed.\textsuperscript{155} In his second term, however, Myers caused problems. He broke with Oregon’s senior Democratic Senator, argued with a Portland-based Republican Congressman, and solicited a Department inspection of his own deputy.\textsuperscript{156}

The specific act that went too far has been lost to history.\textsuperscript{157} Whatever he finally did, Washington officials decided he had to go. On January 22, 1920, the First Assistant Postmaster General, John Koons, wrote to Myers asking for his resignation, “[i]n the interest of the Postal Service,” to restore “needed cooperation.”\textsuperscript{158}

Myers refused, setting in motion an unlikely constitutional showdown. Koons’s letter warned that if Myers refused to resign, “the records will show your separation from the service by removal.”\textsuperscript{159} Myers replied by telegram that he had no intention of resigning and that the law entitled him to his position.\textsuperscript{160} Myers also sent a longer letter, posted the same day, which argued that he had “never been presented with the copy of any so-called charges” and that any concerns were trumped up.\textsuperscript{161} Absent legitimate reasons for his removal, he argued, he had a “legal right to the office and its emoluments” under the laws of the United States.\textsuperscript{162}

\begin{itemize}
\item \textsuperscript{154} Id.
\item \textsuperscript{155} Id. at 1062.
\item \textsuperscript{156} Id. at 1062–63.
\item \textsuperscript{157} See id. at 1060 (observing that “it has never been very clear why Frank Myers was removed from his position” and reviewing possible explanations).
\item \textsuperscript{158} Letter from J.C. Koons, First Asst. Postmaster Gen., to Hon. F.S. Myers, Postmaster, Portland, Or. (Jan. 22, 1920), in Power of the President to Remove Federal Officers, S. Doc. No. 69-174, at 6, 7 (2d Sess. 1926). The letters are all part of the Transcript of Record in Myers’s Court of Claims case. Transcript of Record, Myers v. United States, 58 Ct. Cl. 199 (1923) (No. 92-A), in Power of the President to Remove Federal Officers, supra, at 5.
\item \textsuperscript{159} Letter from J.C. Koons to Hon. F.S. Myers, supra note 158, at 7.
\item \textsuperscript{160} Wire from F.S. Myers, Postmaster, Portland, Or., to John C. Koons, First Asst. Postmaster Gen. (Jan. 31, 1920), in Power of the President to Remove Federal Officers, supra note 158, at 7, 7.
\item \textsuperscript{161} Letter from F.S. Myers, Postmaster, Portland, Or., to J.C. Koons, First Asst. Postmaster Gen. (Jan. 31, 1920), in Power of the President to Remove Federal Officers, supra note 158, at 11, 11–12.
\item \textsuperscript{162} Id. at 12.
\end{itemize}
Washington was unpersuaded. Headquarters tried to supplant Myers with a post office inspector, but he refused to leave. He protested vehemently by telegram, reasserting that he had “not resigned and [had] not been removed according to the law.” This, Myers reminded Washington, was the necessary precondition for replacing an appointed postmaster with a postal inspector. Absent Myers’s resignation or legal removal from office, there was no vacancy for a postal inspector to fill.

Myers’s obstreperousness prompted the Postmaster General to follow through on Koons’s earlier threat. “Replying to your telegram,” the Postmaster General wired, “order has been issued by direction of President removing you from office . . . effective January 31st.” The post office inspector took control of the office, and Myers vacated the premises. Eventually, after writing to more people and sending more telegrams, Myers sued, demanding his unpaid salary.

In hindsight, the whole affair has the feel of an accident. As all parties knew, there was an easy way to remove Myers, which likely would have occasioned no controversy. President Wilson could simply have nominated Myers’s successor. The law at the time was clear that first-class postmasters like Myers could only be removed with the Senate’s concurrence. This was neither controversial nor contested. Presidents routinely complied.

163. See Letter from Robert H. Barclay, Inspector in Charge, Post Off., to Frank S. Myers, Postmaster, Portland, Or. (Jan. 31, 1920), in Power of the President to Remove Federal Officers, supra note 158, at 13, 13 (“[T]he Postmaster General has ordered . . . that you . . . deliver and surrender to me this post office and all Government property therein . . . .”).

164. Letter from Frank S. Myers, Postmaster, to Robert H. Barclay, Post Off. Inspector (Jan. 31, 1920), in Power of the President to Remove Federal Officers, supra note 158, at 13, 13 (“I am the duly appointed, qualified postmaster of Portland, Oregon, and . . . I have not resigned and do not intend to resign . . . .”).


166. Id.


168. See Transcript of Record, Myers v. United States, 58 Ct. Cl. 199 (1923) (No. 92-A), in Power of the President to Remove Federal Officers, supra note 158, at 5, 8 (describing the removal of Myers from office and the assumption of the role by Barclay).


170. See Act of July 12, 1876, ch. 179, § 6, 19 Stat. 78, 80 (“Postmasters of the first . . . class[,] shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law . . . .”).

171. See, e.g., Jonathan L. Entin, The Removal Power and the Federal Deficit: Form, Substance, and Administrative Independence, 75 Ky. L.J. 699, 736 n.166 (1987) (noting that the congressional records of 1909 and 1912 reflect that President Taft sought to remove at least 175 postmasters by submitting the names of replacements to the Senate, whereby “Senate confirmation of the replacement necessarily constituted advice and consent to the removal of the incumbent”).
in part because it was so easy for them to do so. The nomination and confirmation of the new postmaster was understood to constitute the Senate’s ratification of the removal of the previous occupant.172

Besides, Presidents were invested in giving the Senate a say in the appointment and removal of patronage positions like postmasters. This was the era of the spoilsmen, when party unity was central to effective government operation and government patronage was the cornerstone of party stability.173 Senators, who led local political machines, needed control over patronage appointments to keep their machines in line.174 And the Post Office was the richest store of patronage the federal government had to offer.175 Senate involvement in postmaster appointments and removals was a pragmatic, settled constitutional construction, which had helped make party-centered government work throughout the nineteenth century.

For this reason, the law concerning the appointment, removal, and tenure of postmasters had not aroused concern before. The Wilson Administration had followed it scrupulously for other postmasters.176 And it embodied the logic of officeholding that was widely shared at the time and had been traditional at common law. As Lev Menand and Jane Manners have shown, under this shared understanding, the occupant of an office defined for a term of years was entitled to hold the position through the length of the statutorily prescribed term, subject only to such “removal permissions” as Congress might detail.177 The postmaster law was not that different from many other public officer statutes of that time, which imposed a wide range of limitations on the President’s removal power.178

Neither Myers nor Congress expected the Administration to unsettle that balance. They seemed surprised that Washington did not follow its usual course and replace Myers by nominating a successor rather than
seeking to remove him. In the midst of his woes, Myers wrote to Senator Charles E. Townsend, chairman of the Committee on Post Offices and Post Roads, to protest that he had never been properly removed and to request an opportunity to present his side of the case. Townsend, a Republican, might have been expected to jump at the opportunity to embarrass his Democratic Party rivals for overstepping. But his reply was more perplexed than gleeful: “I have not written you to appear before the committee,” he explained to Myers, “because the President has not yet sent in the name of your successor,” and so “there is nothing pending before us of which we could take cognizance.” He promised that the Senate would address Myers’s worries when the President finally nominated a successor, which he assumed Wilson would soon do. Until then, as far as Townsend understood the law, Myers could be removed from his office for a statutory offense but nothing else. Implicitly, Townsend agreed with Myers: The office was his until he was removed or replaced according to the terms of the statute. This was how things had always been.

There is reason to believe that the executive may not have intended to upset that balance either. Why the Wilson Administration chose to ignore the postal law, settled practice, and its own precedent in replacing Myers has never been clear, but it may have related to an exceptional circumstance: President Wilson’s incapacity. In October 1919, Wilson suffered a massive stroke. For the next weeks, “he just lay helpless” and could do little more than be “lifted out of bed and placed in a comfortable chair for a short while each day.” Until well into the next year, his wife “act[ed] as a gatekeeper, restricting access to her husband.”

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181. Letter from Chas. E. Townsend to Frank S. Myers, supra note 179, at 15.

182. Id. at 16.

183. Id.

184. See Entin, The Curious Case, supra note 153, at 1065 (“President Wilson surely could have chosen that course to get rid of Myers, but, for whatever reason, he decided to defy the statute and risk a constitutional confrontation.”).

185. See id. at 1065 n.34 (“[T]he chief executive was recovering from a stroke at this time. Therefore, it is not entirely clear to what extent he was engaged in day-to-day decision-making during this period.”).


187. Id. at 535 (internal quotation marks omitted) (quoting Irwin Hood Hoover, The Facts About President Wilson’s Illness, in 63 The Papers of Woodrow Wilson 632, 635–36 (Arthur S. Link ed., 1990)).

188. Id. at 536–37.
The executive branch operated as a ship without a captain. Wilson’s cabinet met without him, and his advisors drafted important documents in his name without consulting him.189 Wilson suffered further health scares, including a “life-threatening prostate infection” and a urinary blockage, while his staff engaged in elaborate staged performances to hide the extent of his debilitation.190 Although Wilson recovered somewhat, the left half of his body remained paralyzed, and he suffered a grievous bout with the flu in the winter of 1920.191

According to Wilson’s biographer, in the period surrounding the Myers affair, Wilson was rarely lucid and was prone to impulsive action and erratic, unmoored thinking.192 When he did turn his thoughts to government, he remained fixated on the fight over the League of Nations.193

Given Wilson’s health, it is notable that the record in Myers does not include an actual order from Wilson’s hand directing Myers’s removal.194 Closest is the communication from the Postmaster General observing that an order “ha[d] been issued” at presidential direction.195 But not all acts claiming to be from the President at that time actually were. In other words, it is not clear from the Postmaster General’s telegram that Wilson actually authorized Myers’s removal. And, as Wilson’s wife was screening what the President saw, it seems unlikely that she would have allowed a matter as small as a local patronage dispute to reach him.

This would explain why Wilson did not seek to remove Myers by nominating a replacement: He was in no position to nominate one. Myers’s removal may have been the accidental improvisation of a group of presidential advisers acting without a plan. This would make the Myers case doubly ironic. Not only did it have no reason to occur but the central judicial fact at its heart—the President’s removal of an executive branch officer—may never have happened at all.196

189. Scholars now agree that Wilson’s veto of the Volstead Act, for example, was drafted without his knowledge. See id. at 537.
190. Id. Most dramatically, Wilson’s staff invited congressmen to meet the President in his bedroom, hiding the paralyzed left side of his body under blankets. Id. at 547.
191. Id. at 551–52.
192. Id. at 544.
193. See id. at 542–43 (recounting how, in the midst of recovering from his illness, Wilson threw himself back into treaty negotiations); see also Patrick Weil, The Madman in the White House 21–23 (2023) (describing the decline in Wilson’s health and effectiveness as he advocated for treaty ratification).
194. This contrasts with other presidential removals. See infra section III.C.
196. To spell out the (possible) irony more clearly: If Wilson had been in good health and nominated Myers’s successor in the regular course, then Myers would not have sued, or, if he had, the suit would never have reached the Supreme Court. The case, then, was the result of presidential weakness, born of a nonpresidential act. Yet in current jurisprudence, the case has come to stand for strong executive power. And the decision was rooted in the
B. The Opinion

Chief Justice Taft ignored these contingencies. He did not care about the opportunity to embarrass Wilson, expose the shenanigans of the Democratic administration, or undercut his political enemies out West. By December 5, 1923, when the case was first argued before the Court, Calvin Coolidge was in power, and Republicans were riding high.

As a legal matter, the case was unremarkable. It was not infrequent that federal officials who were dismissed from their positions then sued the government for backpay. The Supreme Court had dealt with many such cases in the previous decade. Myers had held his office under an 1876 law providing that postmasters like him would be appointed and removed “by the President by and with the advice and consent of the Senate” and would hold their offices for four years “unless sooner removed or suspended according to law.” His claim was identical to those of past plaintiffs: He alleged that he had not been removed according to law and demanded his unpaid salary.

It soon became clear, however, that the Supreme Court would not treat this case as business as usual. Myers had lost his suit in the Court of Claims in 1923 and died soon thereafter, but his estate pursued an appeal to the Supreme Court. Yet no decision followed the December argument. Instead, the Court set the case for reargument and appointed Senator George Wharton Pepper to argue Myers’s side as amicus. It would be another year and a half before the Court finally issued judgment.

Taft knew from the very beginning that this would be a major decision and devoted himself to its writing as he had for no other case. In his magisterial volume of the _Oliver Wendell Holmes Devise History_ on the Taft Court, Robert Post has reconstructed what was happening behind the scenes. The “unusual process of composition” included two full-dress meetings of the six-Justice majority at Taft’s home as well as months of editing and revisions. There was, Post concludes, “nothing analogous during the entire Taft Court era.”
Remarkably, when the opinion was finally issued, Taft feigned modesty. It had always been the “earnest desire” of the Court, Taft wrote, “to avoid a final settlement of the question” of the President’s constitutional removal power “until it should be inevitably presented, as it is here.”

The constitutional question was not “inevitably presented,” though. In fact, there existed at least three other paths for resolving the suit without having to consider whether the President enjoyed a removal power under the Constitution. The Court of Claims had relied on the doctrine of laches, finding that Myers had waited too long to sue. Taft could have said the same. Alternatively, Taft could have followed the logic of earlier removal cases that relied on statutory language and congressional intent. For instance, in 1897, the Court had found that a former U.S. Attorney was removable, despite statutory language to the contrary, by use of a variant of the whole code rule. The Court determined that when Congress repealed a form of tenure protection for the Postmaster General in 1887, it had intended that repeal to cover tenure protections applying elsewhere, including to U.S. Attorneys. The Court could have followed that same logic in Myers’s case. Or it could have held, as it did in another prior case, that just because the statute specified conditions under which postmasters “may” be removed, it did not require the President remove postmasters only in such a manner. Any of these three options would have allowed the Court to avoid the constitutional question.

Taft’s refusal to engage in minimalist argument points us toward the kind of break Myers effected. The writing swept large: It declared not only that the President enjoyed an inherent constitutional power to remove, which Congress could not abrogate, but that such a power had been

206. See *Myers* v. United States, 58 Ct. Cl. 199, 206 (1923).
207. The government did concede that “it can not sustain this judgment on th[at] ground,” though. *Myers*, 272 U.S. at 88 (quoting the clerk’s summary of oral argument by Solicitor General James M. Beck).
208. *Parsons* v. United States, 167 U.S. 324, 342–43 (1897); see also infra section III.B.
209. See *Shurtleff* v. United States, 189 U.S. 311, 316–18 (1903); see also infra Part III.
210. The Court could also have revived an earlier tactic from *United States ex rel. Goodrich* v. Guthrie, 58 U.S. (17 How.) 284 (1855), a case that involved the removal of a territorial judge who was to have held office for a term of years. The Court sidestepped the removal question, concluding that “[t]he only legitimate inquiry” was whether any court could “command the withdrawal of a sum or sums of money from the treasury of the United States” to pay out claims. Id. at 303. The answer was clearly not, for reasons legal and functional. See id. at 304–05 (noting that the Court’s mandamus power extends to “purely ministerial” tasks and that the law expressly provides that the Treasury Department makes these discretionary decisions). While this approach seems to have fallen out of fashion in the later nineteenth century, it offered the *Myers* Court a fourth way of avoiding the constitutional question of removal.
recognized by the very first Congress and was “accepted as a final decision of the question by all branches of the Government.”

This was a hard proposition to sustain. To do it, Taft had to weave a textual foundation for the President’s removal power out of the Constitution’s silences, show that it was recognized at the beginning of the republic, and narrate the subsequent century and a half of doctrinal development to bring out the continuity. The very size of the undertaking helps explain why it took Taft so long to draft the opinion and why the finished writing is so long.

Taft recognized that both the Constitution and the debates at the Constitutional Convention were silent on removal. To understand the meaning of the Constitution in practice, then, it was necessary to look to the First Congress, where the removal question presented itself “early in the first session.” Taft treated this debate, the notorious Decision of 1789, as speaking clearly in favor of presidential removal. But he did not find it authoritative simply because “a Congressional conclusion on a constitutional issue is conclusive.” He acknowledged that it was made two years after the Convention by a Congress that still counted among its leaders former delegates to Philadelphia, which gave the Decision some authority. But Taft gave as the first reason the Decision mattered that he “agree[d] with the reasons upon which it was avowedly based”—at least as he reconstructed them. And he claimed that “all branches of the Government” “soon accepted” the Decision as “a final decision of the question”—an “acquiescence” that was “promptly accorded it after a few years” and “universally recognized.”

What were the reasons for the Decision that the rest of the government came to accept? On Taft’s analysis, champions of a constitutional presidential removal authority in the First Congress advanced four principal arguments.

First, they argued from a pure and formal separation of powers. The Constitution had sought to establish three “branches [that] should be kept separate in all cases in which they were not expressly blended.” Executive power was lodged in the President and in general included the power of removal; it should thus be kept free from interference by the other two branches, including Congress.

211. Myers, 272 U.S. at 136.
212. See id. at 109–10. Presidential historian Forrest McDonald has speculated that this omission reflects the unvarnished reality that, by September, the Framers were “tired and irritable and anxious to go home.” McDonald, supra note 139, at 180.
214. Id. at 136.
215. See id.
216. Id.
217. Id.
218. Id. at 116.
219. Id. at 117–18.
recognition” of the President’s appointment power was an argument for presidential authority over removals “on the well-approved principle . . . that the power of removal of executive officers was incident to the power of appointment.” 220 Third, Congress’s enumerated powers did not include the power to control the removal of noninferior officers. 221 Fourth, “without express provision,” the drafters could not have intended to give Congress, “in case of political or other differences, the means of thwarting the executive in the exercise of his great powers and in the bearing of his great responsibility,” which would follow if Congress could interfere with the President’s ability to remove “subordinate executive officers.” 222

Taft saw these arguments accepted, or at least not rejected, by the whole subsequent course of American legal and political history. Hamilton had argued for a different conception of the executive in The Federalist Papers, Taft conceded. 223 But he “changed his view of this matter during his incumbency as Secretary of the Treasury.” 224 Chief Justice John Marshall, in Marbury v. Madison, had seemed to disagree with the Decision of 1789. 225 But he, too, apparently changed his mind, having expressed agreement with the Decision in his biography of George Washington. 226 Further, all court cases and acts of Congress from 1789 onward were at least compatible with the Decision, wrote Taft, notwithstanding some apparently contrary words of Senators Daniel Webster, Henry Clay, and John C. Calhoun and some stray remarks in various Supreme Court opinions. 227

220. Id. at 119.
221. Id. at 127; see also U.S. Const. art. I, § 8 (enumerating the powers vested in the legislative branch).
222. Myers, 272 U.S. at 131.
223. See id. at 136–37 (explaining that Hamilton advocated for requiring the Senate to consent to the President’s removals in Federalist No. 77 (citing The Federalist No. 77 (Alexander Hamilton)).
224. Id. at 137.
225. See id. at 139, 141 (explaining that Chief Justice Marshall wrote that because “the officer [had] a right to hold [office] for five years, independent of the executive, the appointment was not revocable” (internal quotation marks omitted) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162 (1803))). Insofar as it prevented President Thomas Jefferson from withdrawing a judicial commission already provided for by the exiting President and Congress, the famed opinion seemed to stand against unfettered presidential removal.
226. See id. at 143–44 (hypothesizing that Marshall “changed his mind” about Marbury’s congruence with the Decision of 1789, “for otherwise it [was] inconceivable that he should have written and printed [in his 1807 biography of George Washington] his full account of the [First Congress’s] discussion and decision . . . and his acquiescence in it” (citing 5 John Marshall, The Life of George Washington 196–200 (Philadelphia, C.P. Wayne 1807))).
227. See id. at 139–44, 158–63, 172–76 (discussing possible complications but ultimately “find[ing] that from 1789 until 1863 . . . there was no act of Congress, no executive act, and no decision of this Court at variance with the declaration of the First Congress, but there was . . . clear, affirmative recognition of it by each branch of the Government”).
There was one blatant exception that even Taft had to recognize: the Tenure of Office Act of 1867. Passed by the Reconstruction Congress, the Act prevented President Andrew Johnson from firing the Secretary of War, Edwin Stanton, a staunch reconstructionist. The Act was a close relative of the 1876 Act that guaranteed Myers’s own job security.  

Taft glossed the Act as an anomaly, the product of “a period in the history of the government when both houses of Congress attempted to reverse this constitutional construction [on presidential removal].” According to Taft, the Tenure of Office Act remained on the books as long as it did only out of lingering antipathy towards Johnson. It was a “radical innovation,” inflicting “injury” on the presidency, and so essentially “invalid[].” In any case, Taft went on, it had never really been accepted. Presidents continuously denied its validity. If they had signed bills into law that suggested otherwise, they did so only out of expediency. For its part, the Supreme Court had never signed off on the constitutionality of such arrangements but had studiously left the question open.

Ultimately, Taft wrote off the Tenure of Office Act—and the related legislation at issue in Myers—as a law passed “in the heat of political differences” that drove Congress to “extremes.” It was an unfortunate misadventure, creating no lasting precedent and entitled to little weight.

228. Compare Post Office Act of 1872, ch. 335, § 2, 17 Stat. 283, 284 (stating that the Postmaster General would serve “during the term of the President by whom he is appointed, and for one month thereafter”), with Tenure of Office Act of 1867, ch. 154, § 1, 14 Stat. 430, 430 (providing that the Postmaster General will serve “during the term of the President by whom they may have been appointed and for one month thereafter”), amended by Act of Apr. 5, 1869, ch. 10, sec. 1, 16 Stat. 6, 6 (repealing the cabinet-level provisions of the 1867 Tenure of Office Act). Congress also provided for congressional consent to presidential removals of certain classes of postmasters. See Act of July 12, 1876, ch. 179, sec. 6, 19 Stat. 78, 80 (specifying that first-, second-, and third-class postmasters “may be removed by the President by and with the advice and consent of the Senate”), amending Act of June 23, 1874, ch. 456, sec. 11, § 80, 18 Stat. 231, 233–34 (same), in turn amending Post Office Act of 1872 § 63 (same).

229. Myers, 272 U.S. at 164.
230. Id. at 168.
231. Id. at 167.
232. See id. at 172 (“Whenever there has been a real issue in respect of the question of Presidential removals, the attitude of the Executive in Congressional message has been clear and positive against the validity of such legislation.”).
233. See id. at 170 (noting that despite the “[i]nstances . . . cited of the signed approval by President Grant and other Presidents of legislation [limiting removal powers],” the Court “think[s] these are all to be explained, not by acquiescence therein, but by reason of the otherwise valuable effect of the legislation approved”).
234. See id. at 173 (“This Court has, since the Tenure of Office Act, manifested an earnest desire to avoid a final settlement of the question [of whether to depart from the Decision of 1789] until it should be inevitably presented, as it is here.”).
235. Id. at 175. Taft believed this was “now recognized by all who calmly review the history of that episode.” Id.
236. See id. at 176 (“[W]e are certainly justified in saying that [the Act] should not be given the weight affecting proper constitutional construction to be accorded to that reached
Taft declared the Tenure of Office Act of 1867 invalid, ruled the 1876 law protecting Myers’s tenure unconstitutional, and affirmed the President’s constitutional right to remove.\footnote{Id.}

\section*{C. The Puzzles of Myers}

In modern unitary executive theory, \emph{Myers} is treated as an originalist opinion offering an accurate account of the Constitution and of the history of the nineteenth-century republic. When Scalia gave his famous lecture on originalism the year after his dissent in \emph{Morrison}, he began his talk with a discussion of \emph{Myers}, calling it "a prime example of what . . . is known as the ‘originalist’ approach to constitutional interpretation."\footnote{Scalia, supra note 19, at 851–52.} Recent Roberts Court opinions have followed Scalia’s \emph{Morrison} dissent in citing to \emph{Myers} for the idea that presidential removal is constitutionally required, traces back to the Founding, and was widely recognized in the past.\footnote{See supra section I.A.}

Yet this misreads \emph{Myers}. As section II.B clarified, even by its own terms, \emph{Myers} was not grounded in originalist interpretations of the Constitution. It was based on a theory of constitutional acquiescence.\footnote{See supra note 217 and accompanying text.} Moreover, as the opinion recognized, that acquiescence was contested. Only by ignoring the Tenure of Office Act and the decades of history that followed could Taft reconstruct a history of congressional agreement to a presidential removal power.\footnote{See supra notes 227–234 and accompanying text.}

Nor does the opinion stand for the proposition that a constitutional removal power was widely recognized in the past. \emph{Myers} abandoned the logic and the tactics of the Supreme Court’s earlier removal cases, which had avoided the constitutional question, as Taft noted.\footnote{See supra notes 205–210 and accompanying text; see also infra Part III.} In finding a constitutional removal power, Taft turned to a new, open-ended textualism, purporting to divine what Article II’s “executive power” truly meant—\footnote{See \emph{Myers v. United States}, 272 U.S. 52, 134 (1926) (“The imperative reasons requiring an unrestricted power to remove the most important of his subordinates in their most important duties must, therefore, control the interpretation of the Constitution as to all appointed by him.”); see also infra section V.C.} an approach his dissenting colleagues found laughable.\footnote{See \emph{Myers}, 272 U.S. at 192 (McReynolds, J., dissenting) (“A discourse proceeding from that premise helps only because it indicates the inability of diligent counsel to discover a solid basis for his contention. The words of the Constitution are enough to show that the framers never supposed orderly government required the President . . . to appoint or to remove postmasters.”).}
Most consequentially, Taft’s constitutional analysis was grounded in a different understanding of the President than the one that had given rise to the case. As section II.A showed, Myers had its roots in a patronage dispute. Yet Taft’s analysis ignored this facet of the President’s office. Instead, as Taft explained, the “executive power” included the responsibility of “determining the national public interest” and “directing the action to be taken by his executive subordinates to protect it.”

This language suggests a particular kind of President: a leader of the people, making policy and directing administration. But that was neither the President of the Founding nor the President of the spoilsmen. Who was Myers’s President, then? And where did it come from?

III. PRESIDENTIAL REMOVAL BEFORE PROGRESSIVISM

Myers was an anomaly, acknowledged as such in its time. It self-consciously departed from a previous legal tradition to make something new. This Part reconstructs the law of removal before Myers to show the world Myers left behind and so the change it made.

The most striking feature of pre-Myers removal law is a basic difference in the posture of the President. The nineteenth-century President was nothing like today’s President or Taft’s President in Myers. While individual Presidents had made successful bids to represent the nation, the office did not enjoy the status or prestige it is now accorded. Nor, for that matter, did the federal government possess the institutions that would have enabled the President to exercise significant policymaking power even if desired. The presidency was weak.

Nineteenth-century law reflected this. The primacy of Congress and the logic of patronage are key to unlocking the pre-Myers law of presidential removal. In case after case, the Supreme Court reaffirmed that, when it came to structuring the government, Congress set the

245. Id. at 134 (majority opinion).

246. See William E. Leuchtenburg, The Supreme Court Reborn 65–67 (1996) [hereinafter Leuchtenburg, The Supreme Court Reborn] (describing the range of criticism against Taft’s opinion from both liberals and conservatives, including those who found his logic unconvincing and likened him to Benito Mussolini); Edward S. Corwin, Tenure of Office and the Removal Power Under the Constitution, 27 Colum. L. Rev. 353, 387 (1927) [hereinafter Corwin, Tenure of Office] (“[E]ven if [Taft’s] interpretation of the decision of 1789 were all that he claims . . . , still his argument would invite the serious criticism that in attempting to settle a constitutional problem of . . . 1926 by such exclusive reference to [1789] . . . he had ignored intervening material of greater pertinence and validity.”); George B. Galloway, The Consequences of the Myers Decision, 61 Am. L. Rev. 481, 485, 491–97 (1927) (analyzing several criticisms of Taft’s opinion, including its weak logic, incomplete historical treatment, and failure to distinguish between superior and inferior officers).


248. See infra section III.A.
The President had little independent constitutional authority to administer the execution of the laws. Indeed, the President’s power came from Congress. The Court resolved most cases without asking about the President’s constitutional powers at all.

This Part recovers the overlooked law of the weak presidency. It begins, in section III.A, with an analysis of the role of the pre-Progressive presidency to show how ineffectual, venal, and unimportant the office was. Only in rare and exceptional circumstances did the President act as the leader of the nation; most of the time, the President was simply a partisan hack, dispensing spoils pursuant to Senate instruction. Section III.B turns to cases to show how this conception of the “party President” was woven into separation-of-powers law. When an executive branch official other than the President sought to remove an administrative officer, federal courts routinely held that Congress’s intent and design controlled. As section III.C describes, this rule held even when the President sought to remove officers of the United States.

The Supreme Court routinely found that Congress’s intent and design limited the President’s power. In hindsight, these opinions are also striking for what they did not do: rely on or invoke the Constitution or the President’s putative role as national leader, administrative chief, or popular representative.

A. The Inconsequential Pre-Progressive President

To understand just how much of a change the Progressives wrought on the institutions and law of the executive, it helps to recall what the office they inherited looked like. The answer is not much. The late nineteenth-century presidency was awfully weak, at least from a policy-implementing perspective.

This was a matter of contingent institutional development. Abraham Lincoln was famously a strong President, but the impeachment of his successor, Andrew Johnson, confirmed that Congress held the reins of power. The next forty years were what Wilson, then a scholar of political science and not yet a politician, called an era of “congressional government,” by which he meant that the American state was firmly in the hands of the federal legislature. Congress set American policy and effectively controlled its implementation.

249. See infra section III.B.
252. See Woodrow Wilson, Congressional Government 52 (15th ed. 1913) (“[T]he President is . . . but a part of Congress . . . .”). Less seriously, but no less accurately, in 1993, The Simpsons caricatured this as the era of the “Mediocre Presidents.”
Modern historians have shared this assessment. In his recent book on the American presidency, the great political historian William Leuchtenburg concluded that the nineteenth-century executive was frankly pathetic: “Dwarfed by Congress, often denied respect, [postbellum] presidents found elevation to the highest office in the land deeply disappointing.” Presidents themselves agreed. Once former Congressman James Garfield made it to the Executive Mansion, he decried his fate: “My God! What is there in this place that a man should ever want to get into?”

A weak office attracted undistinguished men. In 1888, British legal scholar James Bryce devoted a chapter of his authoritative study of American democracy to the puzzle of the underwhelming American chief. Why, he wondered, were “great men . . . not chosen president”? Bryce identified several different reasons, but the dispositive factor was the President’s irrelevance. Great men would not want to do the job. “After all,” Bryce quipped, “a President need not be a man of brilliant intellectual gifts.” “Four-fifths of his work is the same in kind as that which devolves on the chairman of a commercial company or the manager of a railway . . . .” Bryce may have been exaggerating, but to the President’s benefit; in fact, at the turn of the twentieth century, the largest American corporations outstripped the government in sophistication. The titans of Gilded Age industry engaged in complex tasks of hierarchical management as they built continent-spanning enterprises.

Mediocre Presidents, YouTube (Feb. 20, 2011), https://www.youtube.com/watch?v=r8N7BSsU50o (on file with the Columbia Law Review) (excerpting The Simpsons: I Love Lucy (Fox television broadcast Feb. 11, 1993)).


255. Id. at 16 (internal quotation marks omitted) (quoting Gail Hamilton, Biography of James G. Blaine 514 (Norwich, Conn., The Henry Bill Publishing Co., 1895)).

256. 1 James Bryce, The American Commonwealth 100–10 (1888) [hereinafter 1 Bryce, The American Commonwealth, 1888 ed.].

257. Id. at 100–01. On the importance of Bryce’s book, see Noah A. Rosenblum, A Body Without a Head: Revisiting James Bryce’s American Commonwealth on the Place of the President in the 19th Century Federal Government 2 (July 13, 2023) (on file with the Columbia Law Review) [hereinafter Rosenblum, A Body Without a Head] (unpublished manuscript).

258. Some of the reasons included: (1) The United States had less available talent to draw from than Europe; (2) political life in the United States did not give very many “opportunities for personal distinction”; and (3) under the spoils system, parties were more interested in running men who would make good candidates than good Presidents. 1 Bryce, The American Commonwealth, 1888 ed., supra note 256, at 100–05, 109.

259. Id. at 104.

260. Id. at 104–05.

President’s work was, by contrast, less complicated and seemingly less important. “In quiet times,” Bryce observed, a great man is “not . . . absolutely needed.”262

Far from an elected monarch, the nineteenth-century President was a glorified human resources manager. The position’s main responsibility seems to have been filling offices. According to Bryce, the federal government of the time counted something like 120,000 positions.263 Of those, perhaps 14,000 were part of the then-new civil service and so less subject to direct presidential patronage.264 But this left more than 100,000 positions subject to political consideration in appointment.265 Would-be officeholders besieged Washington demanding jobs for themselves and their allies. Pacifying them constituted a major share of what nineteenth-century Presidents actually did.

It was an exhausting undertaking. Bryce relates a famous anecdote about how, in the middle of the Civil War, someone found President Lincoln looking troubled. “You look anxious, Mr. President; is there bad news from the front?” ‘No,’ answered the President, ‘it isn’t the war; it’s that post-mastership at Brownsville, Ohio.’”266 President Garfield spent essentially his whole time in office consumed with appointments matters, working on nominations from his inauguration until, in a tragic historical irony, he was shot by a disappointed office-seeker.267

Appointments took up so much presidential headspace because of their importance. It was not that every office mattered so much to the country; most, in fact, were forgettable positions like the postmastership that so bothered Lincoln. Offices mattered to the political parties, though, to reward their functionaries.268 And political parties were central to making the nineteenth-century state work.

264. Id. at 491.
266. 1 Bryce, The American Commonwealth, 1888 ed., supra note 256, at 82 n.1 (quoting President Lincoln).
267. Id. at 82; see also A Great Nation in Grief, N.Y. Times, July 3, 1881, at 1 (noting that the assassin, Charles J. Guiteau, “ha[d] been an unsuccessful applicant for office under the Government”).
Party organizations played several essential roles in post–Civil War American governance. They selected candidates for office, including of course for the presidency.\textsuperscript{269} They elected those candidates to office by mobilizing constituencies and turning out voters.\textsuperscript{270} More surprisingly to modern observers, they ran the actual election, down to the printing of ballots.\textsuperscript{271} And after the election was over, the parties helped coordinate the government’s actions.\textsuperscript{272} They were one of the only entities cutting across the horizontal and vertical divisions of the American state, bringing government officers together across branches and the state–federal gulf.

Parties were thus central to American democracy. And patronage was the glue that held the parties together.\textsuperscript{273} Financially, patronage kept parties solvent. Many campaign workers worked for free, rewarded for their efforts only later, if the party won.\textsuperscript{274} Patronage appointees would then kick a fraction of their salary back to party coffers.\textsuperscript{275} And parties charged would-be nominees fees on the front end to put their names forward for nomination.\textsuperscript{276}

But the tie of patronage was about more than money. Patronage created a functional and psychological link between the party and its functionaries. Men who owed their professional future to the party would work diligently on the party’s behalf.\textsuperscript{277} Patronage was thus an inducement to enter party service and a reward to ensure loyalty.

Patronage was so important to parties that they used several constitutional levers to prevent the President from handling it all alone. The Constitution made the President a part of many appointments by assigning the office explicit responsibility for nominating ambassadors, judges, and noninferior officers and by granting Congress the power to vest in the office, at its pleasure, the appointment of lower officers.\textsuperscript{278} But it ensured Senate involvement in the most high-profile appointments through the requirement of Senate confirmation.\textsuperscript{279} And it gave Congress other tools to shape staffing, including the power to create and define the

\textsuperscript{269} Id. at 73.
\textsuperscript{270} Id. at 74.
\textsuperscript{271} Id.
\textsuperscript{272} Id. at 77–78.
\textsuperscript{273} Rosenblum, A Body Without a Head, supra note 257, at 15–16.
\textsuperscript{275} See id. at 165 (describing how party bosses raised funds through “assessments levied on state patronage employees”).
\textsuperscript{276} Id. at 162–63.
\textsuperscript{277} See 2 Bryce, The American Commonwealth, 1888 ed., supra note 263, at 486 (“[Citizens] whose bread and butter depend on their party may be trusted to work for their party . . . .”).
\textsuperscript{278} U.S. Const. art. II, § 2.
\textsuperscript{279} Id.
government’s offices and control over the government’s finances.280 All this informed a tradition known as “courtesy of the Senate,”281 which kept the President beholden to party wishes. The practice prevented the President from making patronage appointments to any state without the approval of that state’s same-party senators. This left the President, in Bryce’s judgment, “practically enslaved [to the party] as regards appointments.”282

Parties used this power aggressively. The deals that party operatives cut to win elections often included promises of future appointments over which presidential candidates might have little say. Republican party boss Matt Quay, who helped arrange President Benjamin Harrison’s election, remarked that Harrison “would never know ‘how close a number of men were compelled to approach the gates of the penitentiary to make him president.’”283 To seal the election, Quay and the other operatives promised away the most important posts in Harrison’s government. Harrison was caught off guard: “When I came into power, I found that the party managers had taken it all to themselves. I could not name my own Cabinet. They had sold out every place.”284

Trapped in a small office and hemmed in by party and legislature, Presidents had little left to do after dealing with appointments. There was certainly not enough policy work to keep them busy. According to Leuchtenburg, Ulysses Grant only worked from ten to three, and that was on the days he was in Washington instead of at his Jersey Shore escape.285 Chester Alan Arthur worked from ten to four but was known to take Mondays off.286 Benjamin Harrison seems to have broken at midday to play with his grandkids.287 And Grover Cleveland refused to let the public know about his work habits; he did not think he owed them an account.288

There was nothing striking or unusual about this. Grant, Arthur, Harrison, and Cleveland were simply inhabiting the office according to the norms that then governed it. The post–Civil War, late nineteenth-century presidency was not thought to be a policymaking center of

280. Id. art. I, §§ 8–9.
281. See Betsy Palmer, Cong. Rsch. Serv., RL31948, Evolution of the Senate’s Role in the Nomination and Confirmation Process: A Brief History 4, 6–7 (2008) (noting that since Washington’s presidency, senators from a nominee’s home state and belonging to the President’s party “can block a nomination to a federal office within their state merely by objecting to it”).
283. Leuchtenburg, American President, supra note 254, at 11 (quoting 2 A.K. McClure, Old Time Notes of Pennsylvania 573 (1905)).
284. Id. (internal quotation marks omitted) (quoting a statement by President Harrison that was printed in 1 Herbert Adams Gibbons, John Wanamaker 269 (1926)).
285. Id. at 14.
286. Id.
287. Id.
288. Id. at 15.
government. It was hardly a center of government at all. The dominant theory of the executive at the time saw it as limited and tightly reined in by Congress, to whom it was ultimately beholden. The individual men who occupied the office in that time played the largely passive, forgettable role they were assigned.

B. Congress’s Authority: Perkins and the Rule of the Statute

Congressional primacy and presidential weakness were reflected in the law. Today, some argue that the government’s bureaucracy is supposed to be under the President: If the President can fire a government officer, the argument goes, then the President can control how that officer goes about their work by threatening them with removal.

Whatever the abstract merits of this argument today, it was historically a legal nonstarter. Nineteenth-century removal law did not allow the President to remove government officers at will. Rather, it embodied the constrained conception of the presidency elaborated in section III.A. The pre-Progressive government bureaucracy was not a tool for nonexistent presidential policymaking and implementation; it was a loose collection of political sinecures used to reward sympathizers, electioneers, friends, and relatives. The law of removal accepted and reinforced that reality. It clarified that power over removal—and so over the shape and operations of the government—lay not with the President but with Congress.

This, at any rate, is the clear rule of United States v. Perkins, one of the leading pre-Myers removal cases, and the decisions leading up to it. This line of cases emerged from the transformation of the Navy in the 1880s and was closely connected to Progressive statebuilding and America’s rise as a global power. Progressive reformers, sensitive to the development of new military technologies, pushed to modernize the U.S. fleet. By the end of the nineteenth century, they persuaded Congress to

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292. 116 U.S. 483 (1886).


authorize the construction of new, state-of-the-art steel steamer ships to replace the country’s aging sail-based force.\textsuperscript{295}

The new armada would require “a new type of sailor.”\textsuperscript{296} The service was dominated by officers with obsolete skills; meanwhile, advancement for new commissions with talent and ability could be painfully slow.\textsuperscript{297} A technology-driven, steamer-based steel fleet would need new seamen to guide it, trained in engineering and the tactics of open ocean, “blue-water” power.\textsuperscript{298}

To meet these staffing needs, the Navy made efforts to revamp its personnel structure.\textsuperscript{299} Before 1882, there were two different kinds of students at the Naval Academy: (1) cadet-midshipmen, who went on to serve as officers of the line and (2) cadet-engineers, who ran ships’ engine rooms.\textsuperscript{300} They had slightly different training. Both spent four years at the Naval Academy in Annapolis followed by two years of service at sea.\textsuperscript{301} But midshipmen had to return to the Academy for a final examination by an Academic Board before graduating,\textsuperscript{302} while engineers were eligible to be examined for promotion and warranted assistant engineers after their time at sea without returning.\textsuperscript{303}

The law then in force provided that “no officer in the . . . naval service shall in time of peace be dismissed from service except . . . [as a result of] a court-martial.”\textsuperscript{304} This contributed to bloat in the Navy’s ranks and slowed the advancement of new service members.\textsuperscript{305} With the Naval

\textsuperscript{295} Thiesen, supra note 294, at 43.

\textsuperscript{296} Id. at 34.

\textsuperscript{297} See Philip A. Crowl, Alfred Thayer Mahan: The Naval Historian, in Makers of Modern Strategy From Machiavelli to the Nuclear Age 444, 469 (Peter Paret ed., 1986) (observing that in 1889, the top graduates of the Naval Academy from twenty years before were still only lieutenants).

\textsuperscript{298} Thiesen, supra note 294, at 34–35. On the new naval strategy, see Crowl, supra note 297, at 469; see also A.T. Mahan, The Influence of Sea Power Upon History \textsuperscript{89} (London, Sampson Low, Marston & Co., Ltd. 1890) (describing the call for a crew of seamen capable of managing the new naval armada).

\textsuperscript{299} See Donald Chisholm, Waiting for Dead Men’s Shoes: Origins and Development of the U.S. Navy’s Officer Personnel System, 1793–1941, at 365–69 (2002) (discussing the Navy’s drive to modernize, including through changes to personnel structure).


\textsuperscript{301} Leopold, 18 Ct. Cl. at 555.

\textsuperscript{302} Redgrave, 116 U.S. at 479 (citing 15 Rev. Stat. §§ 1520–1521, 1556 (1874)).

\textsuperscript{303} Leopold, 18 Ct. Cl. at 557.

\textsuperscript{304} United States v. Perkins, 116 U.S. 483, 484 (1886) (internal quotation marks omitted) (quoting 14 Rev. Stat. § 1229 (1874)).

\textsuperscript{305} See Chisholm, supra note 299, at 369–70 (describing how the newly proposed personnel structure would “reduce crowding into the line, and, presumably improve the officer corps by commissioning only higher-ranked graduates”).
Appropriation Act of 1882, Congress sought to address this problem. The Act streamlined training by reclassifying all undergraduate cadet-engineers and cadet-midshipmen as “naval cadets” and prescribing a uniform six-year course of study. It also eliminated entry into the service for Naval Academy graduates as a matter of right and specified that, each year, appointments into the service could not exceed the number of vacancies. Surplus graduates would be honorably discharged with a year’s pay. The Act’s frank intention was to restructure the Navy’s officer corps.

The law created a conundrum as applied to some cadet-engineers, though. What was the status of cadet-engineers who had completed their studies at Annapolis before 1882 but had not yet been warranted assistant naval engineers? Had they been removed from the service? And if so, under what authority? The years after the 1882 Act saw a series of court cases, culminating in Perkins, in which the Court of Claims and the Supreme Court wrestled with this removal puzzle. In all of them, the courts approached the matter by looking carefully at the terms of the statute. The Constitution, the meaning of executive power, and fundamental questions of separation of powers never entered into the courts’ analyses.

The first issue concerned the matter of pay. In 1883, Harry G. Leopold brought a “test case” to regularize his classification under the new Act. He had entered the Naval Academy as a cadet-engineer in 1878 and received a diploma from the Academy in June 1882. Until December of that year, he had been paid as a cadet-engineer. But after the terms of the Act went into effect, the Navy and the Treasury Department reclassified him as a naval cadet and lowered his pay accordingly. Leopold sued, alleging that he had already graduated from the Naval Academy and so should not have been reclassified.

The Court of Claims agreed. To construe the law, the court used the traditional tools of statutory interpretation, looking to the text of the statute, other uses of the word “graduate,” and other laws passed by
Congress. The latter included the Naval Appropriation Act of 1883, which specifically allocated pay for cadet-engineers serving on steamers according to the older, pre-“naval cadet” pay scale. Cadet-engineers, it concluded, were graduates. Congress had the authority to specify their classification, which it had; the administration thus lacked authority to downgrade Leopold.

Two years later, another cadet-engineer brought a similar suit, and the Court of Claims adhered to its earlier decision. This time, the Government appealed, urging the Supreme Court to read the statute anew. But the Court followed the earlier opinion almost exactly, looking to the text of the law and the intent of Congress to determine the cadet-engineer’s entitlements under the relevant statutes. The opinion is notable, again, for its total silence on considerations of government order that would come to be so important in Myers and its belated progeny.

With the question of pay settled, the next problem with the law was tenure. This directly raised the removal issue. The Court of Claims had observed in dicta that the Act’s surplus graduate clause was prospective in character, so it should not apply to cadet-engineers no longer in residence at the Academy. Cadet-engineers already embarked on their two years of naval steamer service would, then, be entitled to a position in the Navy and should already enjoy tenure in office.

Whether that dicta was correct was the question in Perkins. Lyman Perkins had graduated from the Naval Academy in 1881 as a cadet-engineer; he then entered into his two-year service. In June 1883, at those two years’ conclusion, the Secretary of the Navy notified him that he was not needed to fill any vacancies and was therefore honorably discharged with one year’s pay under the terms of the 1882 Act. Perkins refused the pay and, invoking the Court of Claims’s dicta, argued that he was already in the Navy with tenure and so could not be discharged under the Act in this way.

The Government’s response complicated the legal issue and raised the constitutional question. Although the Secretary of the Navy had relied on the 1882 Act alone for authority to release Perkins, the Government’s lawyers developed a new argument for the legality of the Secretary’s
actions that implicated the separation of powers. First, they contended that “if the Secretary [of the Navy] otherwise had the right to discharge the claimant,” then “the order of discharge [was] not vitiated” even if the 1882 Act did not grant him the necessary power. The Government next argued that, regardless of the 1882 Act, the Secretary had an inherent right to discharge Perkins—an inferior officer—that Congress could not restrict without “infring[ing] upon the constitutional prerogative of the Executive.”

The Court of Claims was not persuaded. It acknowledged that the then-leading removal case stated as a rule that “the power of removal [w]as incident to the power of appointment”\textsuperscript{331} this would seem to give the Secretary the power to fire Perkins. But the Supreme Court had always said that such power might be abrogated by “constitutional provision or statutory regulation.”\textsuperscript{332} And, the Court of Claims went on, there was just such an abrogation in the case at bar: a “curtailment of [the Secretary’s] implied power of removal” by the law that provided tenure for officers of the naval service.\textsuperscript{333} The government’s attempt to avoid that restriction by appealing to the Constitution was perplexing and unpersuasive. There was simply “no doubt” that, for inferior officers appointed by the head of a department, Congress could “limit and restrict the power of removal as it deem[ed] best for the public interest.”\textsuperscript{334} Department heads acquired their authority to appoint inferior officers only from legislation passed by Congress; they had no independent constitutional authority to appoint or remove officers at all.\textsuperscript{335} If Congress wanted to limit the circumstances under which the Secretary of the Navy could remove an inferior officer, it had nearly limitless authority to do so. The question of presidential prerogative simply “d[id] not arise . . . and need[ed] not be considered.”\textsuperscript{336}

The Court of Claims therefore ruled for Perkins.\textsuperscript{337} His graduation had made him an officer.\textsuperscript{338} Congress’s laws had granted him removal protection.\textsuperscript{339} Those laws were valid.\textsuperscript{340} And the Secretary of the Navy was

\textsuperscript{328} Id. at 443. \\
\textsuperscript{329} Id. \\
\textsuperscript{330} Id. at 444. \\
\textsuperscript{331} Id. at 443 (internal quotation marks omitted) (quoting Ex parte Hennen, 38 U.S. (13 Pet.) 230, 259 (1839)). \\
\textsuperscript{332} Id. (internal quotation marks omitted) (quoting Ex parte Hennen, 38 U.S. (13 Pet.) at 259). \\
\textsuperscript{333} Id. at 444 (citing 14 Rev. Stat. § 1229 (1874)). \\
\textsuperscript{334} Id. \\
\textsuperscript{335} Id. at 444–45. \\
\textsuperscript{336} Id. at 444. \\
\textsuperscript{337} Id. at 445. \\
\textsuperscript{338} Id. at 444. \\
\textsuperscript{339} Id. at 445. \\
\textsuperscript{340} Id. at 444.
without statutory power to remove him at will. Perkins was thus entitled to remain in his position.\textsuperscript{341} The Government appealed the Court of Claims’s ruling, but the Supreme Court accepted the lower court’s reasoning, quoting the lower court’s opinion and “adopt[ing] [its] views” as the Court’s own.\textsuperscript{342}

This should not have surprised the government. The principles the Supreme Court and the Court of Claims applied were those the Supreme Court had stated in \emph{Ex parte Hennen}—the “leading case” the Court of Claims had identified from nearly fifty years before.\textsuperscript{343} That case, too, had treated inferior officer removal as a fundamentally statutory question. The Constitution hardly entered into it.\textsuperscript{344}

\emph{Hennen}, like the \emph{Myers} case to come,\textsuperscript{345} had involved a patronage problem. The dispute centered on the removal of a court clerk by a judge who wanted the position for a friend.\textsuperscript{346} The legal puzzle was that, while Congress had provided by law for the appointment of court clerks, it never specified the length of their term or the conditions governing their removal.\textsuperscript{347} The deposed clerk objected to his firing and sued to keep his job.\textsuperscript{348}

The lawyers in \emph{Hennen} waxed eloquent about the Constitution, republicanism, and the (by then already hoary) “Decision of 1789.”\textsuperscript{349} But the Supreme Court resolved the case through a simple syllogism that ignored most of the lawyers’ legal claims. The Court’s major premise—which it never justified—was that if neither the Constitution nor a law specified an office’s length of tenure, the incumbent held it either for life or at pleasure.\textsuperscript{350} The Court’s minor premise was that no one could have

\footnotesize{\textsuperscript{341} Id. at 445.  
\textsuperscript{342} United States v. Perkins, 116 U.S. 483, 485 (1886).  
\textsuperscript{343} Perkins, 20 Ct. Cl. at 443; accord Richard H. Pildes, Separation of Powers, Independent Agencies, and Financial Regulation: The Case of the Sarbanes–Oxley Act, 5 N.Y.U. J.L. & Bus. 485, 517 (2009) (“[F]or over a century the Supreme Court has made clear that Congress has the constitutional power to set the terms under which inferior officers of the United States hold their positions.”).  
\textsuperscript{344} Compare Perkins, 116 U.S. at 484–85 (observing that the Constitution here gave Congress the authority to “limit and restrict the power of removal as it deems best for the public interest” through legislation and declining to recognize other relevant constitutional limits (internal quotation marks omitted) (quoting Perkins, 20 Ct. Cl. at 444)), with \emph{Ex parte Hennen}, 38 U.S. (13 Pet.) 230, 260 (1839) (observing that who exercises the power of removal depends “upon the authority of law” and declining, in the instant case, to recognize other relevant constitutional limits).  
\textsuperscript{345} See supra Part II.  
\textsuperscript{346} \emph{Ex parte Hennen}, 38 U.S. (13 Pet.) at 256–57.  
\textsuperscript{347} Id. at 258–59.  
\textsuperscript{348} Id. at 256.  
\textsuperscript{349} Id. at 233, 247.  
\textsuperscript{350} Id. at 259.}
intended for court clerks to hold their positions for life.\footnote{351} It naturally followed, then, that they should be removable at will.\footnote{352}

The only question left, then, was who should have removal authority. The answer would turn, the Court believed, on “the nature of the power \textit{of removal}.”\footnote{353} “The execution of the power” to appoint and remove, the Court said, “depends upon the authority of law, and not upon the agent who is to administer it.”\footnote{354} In other words, whether a government actor had the power to remove an inferior officer had to do not with the actor’s identity or title but with \textit{the law that created the office} and empowered the actor.\footnote{355} Here, Congress had not specified who should have the removal power, so the Court proposed a sensible default rule: When it came to service at pleasure, “[i]n the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment.”\footnote{356}

Armed with that logic, the Court disposed of the puzzle of the clerk’s removal easily. Congress had vested the power to appoint the clerk “exclusively in the District Court.”\footnote{357} Since Congress had vested the appointment power in the judge and given that judge the power to appoint a successor, which “would, per se, be a removal of the prior incumbent,” it must have intended to give the judge removal power as well.\footnote{358} The default rule made sense here, so the Court applied it. The removal was thus acceptable, and the Supreme Court itself “c[ould] have no control over the appointment or removal, or entertain any inquiry into the grounds of removal” either.\footnote{359}

There was a constitutional logic undergirding this statutory ruling, but it actually cut against contemporary Article II sensibilities and the logic Taft would rely on in \textit{Myers}. Suppose, the Court explained, that the court clerk had \textit{not} been removable at pleasure by the judge who had appointed him. This would lead to a horrible reductio ad absurdum: The clerk would have been legally unremovable! Admittedly, this was “a most extraordinary construction of the law,” but it would “inevitably follow,” the Court believed, “unless the incumbent was removable at the discretion of the department.”\footnote{360} The implication was that only the department head would have the power to remove an inferior officer they had appointed. The
Court underscored its implication by ruling out the President as a possible firer-in-chief: “[T]he President has certainly no power to remove.”

This analysis brings into view the wholly different world of separation of powers that informed the Court’s pre-Myers removal cases involving agents other than the President. From 1839 (Hennen) to 1903 (Perkins)—from Jacksonian rotation in office to the turn-of-the-century civil service—the Court refused entreaties to turn questions of statutory construction into problems of constitutional law. To be sure, Hennen did surmise that “the power of removal [w]as incident to the power of appointment,” but it did so as a statutory matter, based on what it supposed was Congress’s intent, and only as a default rule. Inferior officers were products of Congress’s law. The authority to appoint them flowed from Congress’s acts, so the authority to remove them would have to come from Congress’s acts as well.

None of these nineteenth-century authorities found a free-floating presidential removal power to fire any government employee or inferior officer. The President’s removal power would need a legal foundation as solid as that of any other government agent claiming appointment and removal authority.

C. Presidential Acquiescence: The Tenure of Office Act and the Revised Statutes of 1874

According to Hennen, presidential involvement in the tenure of inferior officers should be treated no differently than nonpresidential removals: “The same rule, as to the power of removal, must be applied to offices where the appointment is vested in the President alone.” Later nineteenth-century courts agreed, looking to Congress’s intention to determine whether the President could remove particular appointed officers. When the Court did find reason to identify a specific presidential removal power, it analyzed it as a discrete legal (and usually statutory) entitlement.

Consider McAllister v. United States, an 1887 case concerning the removal of Ward McAllister, a district judge for the Alaska Territory. Judge McAllister had been appointed by the Republican President Chester A. Arthur in 1884, but, one year later, the new Democratic President, Cleveland, suspended the judge and replaced him. McAllister sued, arguing that Cleveland had no right to suspend him, and demanded his unpaid salary.
Despite the President’s involvement, the Supreme Court analyzed the case just as it had treated the prior cases involving clerks and naval cadets: It looked to the terms of the statutes at issue. The law establishing the judgeship for the District of Alaska specified that the officeholder would serve a term of four years “and until [a] successor[] w[as] appointed and qualified.”\footnote{368} The statute pointedly did not empower the President to remove or suspend the officeholder. President Cleveland thus sought his authority in—of all places—the Tenure of Office Act, which had a provision permitting the President to, under certain circumstances, suspend “any civil officer appointed by and with the advice and consent of the [S]enate, except judges of the courts of the United States.”\footnote{369} The question for the Court, then, was whether the District of Alaska territorial judge was a “civil officer” or a “judge” of the United States.\footnote{370} If the former, the President was within his rights to suspend McAllister; if the latter, McAllister’s “claim to salary, up to, at least, the confirmation by the [S]enate of [his successor] [wa]s well founded.”\footnote{371}

The Court divided. Six Justices held McAllister to be a civil officer, not a judge, on the grounds that because he served for a limited term, he did not meet the standards for an Article III judgeship, and so did not count as a judge of a court of the United States.\footnote{372} The dissenters disagreed, concluding that no judgeship could ever be held at the pleasure of an executive officer and that, in any case, a territorial judgeship surely counted as a United States court.\footnote{373} The details of the disagreement matter less than that all nine Justices fundamentally agreed on the nature of the legal question presented: If the President did have the power to suspend McAllister, it was because of the authority granted by the Tenure of Office Act. The legal question, again, was one of statutory interpretation.

The dissent did suggest that McAllister’s case might raise a constitutional problem. But, as in Hennen, it was not the one modern readers expect. The dissenters did not worry about whether Congress could restrict the President’s removal power; rather, they surmised that

\footnotesize{368. Id. at 178.}
\footnotesize{369. Id. at 177 (quoting 19 Rev. Stat. § 1768 (1875)). The statutory language at issue was enacted as part of the 1869 amendments to the Tenure of Office Act and was repealed in 1887. See Act of Apr. 5, 1869, ch. 10, sec. 2, 16 Stat. 6, 7 (amending Tenure of Office Act of 1867, ch. 154, 14 Stat. 430), repealed by Act of Mar. 3, 1887, ch. 353, 24 Stat. 500. On Cleveland’s reliance on the Tenure of Office Act to perform the suspension, see McAllister, 22 Ct. Cl. at 319 (reporters’ statement of the case).}
\footnotesize{370. McAllister, 141 U.S. at 179–80.}
\footnotesize{371. Id.}
\footnotesize{372. Id. at 184–87. The position also lacked the guarantee of compensation that could not be diminished. Id. at 187.}
\footnotesize{373. Id. at 193–94, 200–01 (Field, J., dissenting).}
Congress might not be allowed, constitutionally, to empower the President to suspend a territorial judge at all.\textsuperscript{374}

There was a further irony in play: The Government’s position, which echoed the Court’s statute-first view of the case, was briefed and argued at the Supreme Court by none other than Taft, serving at the time as Solicitor General. Strikingly, Taft did not argue that the Tenure of Office Act was void. Rather, he relied on it. “It is not proposed to enter into the question of the right of Congress to limit the power of appointment and removal,” Taft opened his brief.\textsuperscript{375} “The only point for discussion here is whether the language of [the Tenure of Office Act] applies to a judge of the district court of Alaska . . . .”\textsuperscript{376} Taft concluded that it did and that the President’s actions were therefore lawful.\textsuperscript{377}

After \textit{McAllister}, the Tenure of Office Act would create at least one new headache for the law of presidential removal. The Act specified that the President could suspend civil officers while the Senate was not in session and allowed the Senate to ratify the President’s choices by confirming new nominees.\textsuperscript{378} In 1887, the Act was repealed through a law that simply struck it from the books.\textsuperscript{379} In the interim, though, Congress had completely revised and consolidated the laws of the United States against the backdrop of the Tenure of Office Act.\textsuperscript{380} Over several years, a rotating cast of attorneys had combed through the seventeen volumes of the \textit{Statutes at Large} to prune away contradictions and eliminate obsolete provisions.\textsuperscript{381} Congress had enacted the new consolidation into law in 1874 as the \textit{Revised Statutes}.\textsuperscript{382} It was a heroic undertaking, the first of its kind in the United

\begin{itemize}
  \item \textsuperscript{374} See id. at 195 (“I cannot believe that under our constitution and system of government any judicial officer invested with these great responsibilities can hold his office subject to such arbitrary conditions. . . . [G]ood behavior during the term of his appointment is the only lawful and constitutional condition to the retention of his office.”).
  \item \textsuperscript{375} Brief of the United States at 3, \textit{McAllister}, 141 U.S. 174.
  \item \textsuperscript{376} Id. at 3–4.
  \item \textsuperscript{377} Id. at 18.
  \item \textsuperscript{379} 24 Stat. at 500.
  \item \textsuperscript{380} See Ralph H. Dwan & Ernest R. Feidler, The Federal Statutes—Their History and Use, 22 Minn. L. Rev. 1008, 1012 (1938) (describing how Congress enacted a “complete revision” of all permanent federal public law in 1874).
  \item \textsuperscript{381} See id. at 1012–14 (describing the lengthy process). Note that “[i]t was the opinion of the joint [congressional] committee [overseeing the consolidation] that the commissioners [in charge of doing the compiling] had so changed and amended the statutes that it would be impossible to secure the passage of their revision,” and so their first draft was sent to an attorney to “expunge all changes in the law made by the commission”—to imperfect effect. Id. at 1013–14.
  \item \textsuperscript{382} Id. at 1014.
\end{itemize}
States. And it had harmonized the existing laws with the no-longer-in-force Tenure of Office Act, stripping away provisions from other laws that the Act had abrogated.

This created confusion, as revealed in Parsons, probably the leading pre-Myers presidential removal case. Lewis E. Parsons Jr. was three years into his four-year term as U.S. Attorney for the Northern District of Alabama (and acting U.S. Attorney for the Middle District of Alabama) when President Cleveland—back for the second of his two nonconsecutive terms—sought to replace him. Parsons refused to step down and disputed the President’s authority to force him out; he eventually sued for his salary.

Had the Tenure of Office Act still been in force, the Supreme Court opined, Parsons would have had no case. His suspension by the President and the eventual confirmation of his successor by the Senate would have led to his being “legally removed ... in [just] the way it occurred.” But the repeal of the Act caused a complication. Congress created the office of U.S. Attorney in 1789 without specifying either term lengths or removal conditions. Congress corrected that oversight in 1820 by passing a new law setting the term for U.S. Attorneys at four years and specifying that they were to be “removable from office at pleasure.” But the Tenure of Office Act abrogated the removal-at-pleasure provision, so it was not included in the definition of the office when the laws were consolidated and reenacted as the Revised Statutes in 1874. Meanwhile, the repeal of the Act in 1887 did not include any new language on removal; it simply got rid of the Tenure of Office Act. What, then, of the removability of U.S. Attorneys?

Parsons claimed he was unremovable, relying on the text of the Revised Statutes. His attorney argued straightforwardly that the repeal of

384. See Dwan & Feidler, supra note 380, at 1014 (noting that sixty-nine errors were found in the Revised Statutes when it was first published and that 183 errors were found in the following few years).
385. Parsons v. United States, 30 Ct. Cl. 222, 223 (1895) (reporters’ statement of the case); id. at 237 (majority opinion).
386. Id. at 223–25 (reporters’ statement of the case).
388. Id.
389. See Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 73, 92–93 (describing the duties and compensation of the person appointed “to act as attorney for the United States” in each judicial district but not providing any term lengths or procedures for the removal of said official).
390. Act of May 15, 1820, ch. 102, § 1, 3 Stat. 582, 582.
391. Compare 13 Rev. Stat. § 769 (1874) (establishing U.S. Attorneys’ term length but not a process for their removal), with ch. 102, § 1, 3 Stat. at 582 (establishing U.S. Attorneys’ term length and specifying that they are “removable from office at pleasure”).
392. See supra note 379 and accompanying text.
the Tenure of Office Act did not revive the President’s 1820 removal authority because the repeal of the Act did not by itself reenact the earlier statute.393 “If the law is wrong,” they concluded their brief, “the remedy is with Congress.”394 The Government defended by arguing that the President enjoyed a constitutional power to remove executive branch officers, that the law specifying U.S. Attorneys’ four-year term was “a limitation . . . not a grant,” and that, in any case, the repeal of the Tenure of Office Act in 1887 “was not intended to restrict the powers of the President” to remove but rather “to remove restrictions thereon.”395

As in its previous cases, the Court was guided by its understanding of what the legislature wanted, despite the Government’s invitation to resolve the case on constitutional grounds. It “could never have been the intention of Congress,” the Court concluded, “to limit the power of the President more than it was limited before that statute was passed.”396 Before the Tenure of Office Act, under any theory of presidential removal, the President had the power to remove U.S. Attorneys, and the President and Senate acting together could certainly replace them. Repealing the Tenure of Office Act must have aimed to restore that status quo ante—“again to concede to the President the power of removal if taken from him by the original tenure of office act.”397

In dicta, both the Court of Claims and the Supreme Court recognized that there was a constitutional issue in the background. But it was, again, not quite the issue modern sensibilities expect. The two courts understood Congress’s construction of the Constitution as a determining factor to be considered in deciding whether the President had a constitutional power to remove at all.398

393. Appellant’s Brief at 14–16, Parsons, 167 U.S. 324 (No. 270).
394. Id. at 50.
395. Brief for Appellee at 3, 51, 57, Parsons, 167 U.S. 324 (No. 270). The government grounded this right, of course, in the Decision of 1789, which it rehearsed at length in its brief. Id. at 3–15, 51, 57.
396. Parsons, 167 U.S. at 342–43.
397. Id. at 343.
398. According to the Court of Claims, from 1789 to 1820 the President’s power to remove U.S. Attorneys had existed “by constitutional implication and construction.” Parsons v. United States, 30 Ct. Cl. 222, 242 (1895). Congress’s 1820 decision to recognize that power “is an additional argument in favor of th[at] construction.” Id. at 243. The Court frankly recognized that the passage of the Tenure of Office Act “establish[ed] a new theory of constitutional law and a new policy of political administration” connected to the “readjustment of our institutions incident to the great civil war.” Id. But neither that fact nor the Act’s repeal in 1887 made it any less “valuable as a legislative construction of the Constitution of the United States in conflict with that theory which had prevailed” before. Id. For its part, the Supreme Court curiously began its Parsons opinion with a long list of citations to authorities tending to establish the President’s inherent constitutional power to remove, Parsons, 167 U.S. at 328–34, but disclaimed any intention of deciding that question, id. at 334 (“The foregoing references to debates and opinions have not been made for the purpose of . . . arriving at a decision of the question of the constitutional power of the President . . . but simply for the purpose of seeing what the views of the various departments
This focus on Congress, as opposed to the President, persisted even in Shurtleff, perhaps the most strongly pro-executive of any of the pre-Myers removal cases. Ferdinand Shurtleff had been appointed to the Board of General Appraisers, a predecessor to the Court of International Trade responsible for adjudicating customs disputes. The Board was an unusual institution at the time: It had a strict partisan balance built into the statute because it was quasi-judicial and supposedly above politics. In that spirit, the statute did not specify a term of years for Board members, but instead granted them for-cause removal protection. Contemporary accounts suggest that appointments to the Board were understood to last "for life or during good behavior.

For reasons that are not entirely clear but may have been connected to a desire to change tariff policy, President William McKinley sought to remove Shurtleff and one of his fellow Board members nine years after

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403. See § 12, 26 Stat. at 136 (stating that Board members "may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office.").
404. Appraisers Asked to Resign, N.Y. Times, Jan. 24, 1899, at 12; see also Big Customs Fight Predicted, N.Y. Times, Jan. 25, 1899, at 9 ("The members of the board have always supposed that they held life positions. . . . [O]ne member some years ago refused an offer from a business concern [for a higher salary than he made as a board member] because he preferred a life position."); The Case of the General Appraisers, N.Y. Trib., Jan. 26, 1899, at 6 (“[T]he position of General Appraiser has been considered a life position, not to be taken away for political reasons.”).
their appointment. A minor scandal ensued. Shurtleff filed suit, demanding the remainder of his salary.

The courts did what they had done previously: looked to the terms of the statute to understand Congress’s intent. According to the Court of Claims, the law empowered the President to remove Board members like Shurtleff for certain causes and left it to “the President alone to determine whether one of the specified causes furnishe[d] a basis for his action.” The court presumed that McKinley had followed the law: Even though he did not tell anyone, he must have determined for himself that Shurtleff had been inefficient, neglected his duty, or engaged in malfeasance in office. This was fine. The removal was therefore legal.

The Supreme Court upheld the Court of Claims’s decision on different statutory grounds. As it saw things, any for-cause removal required a hearing. Because Shurtleff was not given a hearing, the Court argued, “[i]t must be presumed that the President did not make the removal for any cause assigned in the statute.” The Court of Claims was thus wrong to conclude that the President had removed Shurtleff for one of the causes specified in the law.

Nevertheless, the Supreme Court agreed with the Court of Claims that Shurtleff’s removal was proper. The key issue was, as ever, Congress’s intent. The Supreme Court conceded that the text of the statute would seem to limit the President to removal for cause only. But this would lead to absurd results. If the President could remove a General Appraiser only for cause, Board members would by default enjoy life tenure unless “found guilty of some act specified in the statute.” Yet “no civil officer,” excepting Article III judges “ha[d] ever held office by a life tenure since the foundation of the government.” The Court refused to conclude that Congress sought “to make such an extraordinary change in the usual rule governing the tenure of office” without more explicit language—especially not here, because the Court could find “no reason for such

405. On the possible reasons for Shurtleff’s removal, see Bamzai, supra note 402, at 720–21.
406. Id. at 722.
408. See id. at 42 (discussing the purpose of the Customs Administrative Act of 1890 § 12).
409. Id.
410. See id. (dismissing Shurtleff’s claim after finding that the President could remove General Appraisers from office).
412. Id. at 314.
413. Id. at 318–19.
414. See id. at 315–16 (evaluating whether Congress’s “use of language providing for removal for certain causes thereby provide[s] that the right could only be exercised in the specified causes”).
415. Id. at 316.
416. Id.
action by Congress with reference to this office.”417 Because the Court could not believe that Congress intended to create a life-tenured office, it concluded that the Board members must be removable by the President at will, at least for causes other than those enumerated.

This ruling did implicitly recognize something like a presidential removal power for officers the President appointed.418 But, in keeping with the default rule of Hennen, the Court observed that it could be “limited by constitution or statute.”419 Here it just had not been. And the Court’s discussion suggested some serious limits on whatever removal power the President did have: The President must act “under his oath of office” and so “for the general benefit and welfare.”420 “In making removals from office it must be assumed that the President acts with reference to his constitutional duty to take care that the laws are faithfully executed . . . .”421

The Court’s analysis of the President’s power is as notable for its silences as for what it stated. The Court did not consider a presidential power of removal necessary to make democracy work or to embody the President’s democratic authority. Nor did the Court seem to believe that the President should have the power to remove officials in order to realize a personal policy preference or national program. The notion that the President possessed a “mandate” to act independent of Congress’s wishes was also missing. Indeed, the Court closed its eyes to the particular political context, refusing to discuss either popular understanding that these offices were to be held during life or good behavior or how such a tenure might pose a barrier to McKinley’s tariff goals. Nor did the Court believe the question settled by the President’s place in an administrative hierarchy. It did note that the Board was “under the direct supervision of the President.”422 But it had “no doubt of the power of Congress” to create and organize the office pursuant to congressional goals, responsibilities, and structure.423

So committed was the law to congressional primacy that the Court would rather stretch its reading of a statute to reconcile presidential action with congressional intent than find an independent constitutional presidential removal power. According to one interpretation, the statute in Shurtleff sought to give the members of the Board of Appraisers tenure

417. Id. at 316–17.
418. See id. at 318 (“The right of removal, as we have already remarked, would exist as inherent in the power of appointment unless taken away in plain and unambiguous language.”).
419. Id. at 316.
420. Id. at 318.
421. Id. at 317.
422. Id. at 315.
423. Id. at 313.
during good behavior and render them unremovable except for cause. 424 (Indeed, Congress would later make them into Article III judges. 425) From this view, McKinley’s actions were just as much a violation of the law as Wilson’s were in *Myers.* 426 Looking back from *Myers,* the Court’s easiest resolution would have been to acknowledge a constitutional presidential removal power. Yet it demurred. Instead, the Justices offered a patently unconvincing interpretation of the statute and congressional intent that would make McKinley’s conduct licit. 427 In other words, the Court strained to uphold the President’s actions under a theory of legislative removal supremacy, revealing the power of this nineteenth-century way of thinking.

Even a strongly pro-executive case like *Shurtleff,* then, hewed to the same Congress-first pattern of the other removal cases. When the President sought to remove government officers, courts looked to the terms of Congress’s laws and gave those laws effect. Litigants regularly raised constitutional arguments, and the Supreme Court occasionally acknowledged constitutional considerations. But courts resolved these disputes on nonconstitutional grounds. If Congress had vested the President with appointment authority, the President might have a removal power under the rule of *Hennen.* 428 And courts might imply the existence of such a power when, in their judgment, Congress must have intended one to avoid an absurd result. But Congress’s power to create the government was undisputed. There was no discussion of the President’s special obligations (and so attendant) powers as representative, policymaker, or administrator. Why would there be when the President was engaged in removal to realize party patronage ends?

**IV. THE PROGRESSIVE PRESIDENCY**

At the dawn of the twentieth century, the presidential role seemed settled. The President was Congress’s errand boy. Presidents did not understand themselves as national leaders, elaborating or implementing a policy for the nation; that was the legislature’s job. The law reflected that reality. From the Jacksonian Era through the Spanish–American War, an uninterrupted string of Supreme Court decisions recognized Congress’s power to specify the structure of the government and the reach of the President’s administrative authority. 429

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424. See id. at 314–16 (rejecting the appellant’s contention that the statute reflects Congress’s intent to prohibit the President from removing Board members without cause).


426. See supra section II.B.

427. See supra notes 413–421 and accompanying text.

428. See supra notes 345–362 and accompanying text.

429. See supra section III.B.
Yet even as the Court handed down *Shurtleff*, the world was changing. In the first decades of the twentieth century, the presidency was developing into something new. A telling commentary could be found in the revisions Bryce made to his magnum opus, *The American Commonwealth*, which went through multiple editions between 1888 and 1914. The changes were subtle but all tended in the same direction: toward greater presidential power. The President went from having, in Bryce’s first edition, no “free hand” in foreign policy to, by the third edition, having one “rarely.”\(^{430}\)

During that same timeframe, Bryce recognized that Congress had begun to yield some of the “ground which the Constitution left debatable between the President and itself.”\(^{431}\) The presidential veto was changing too—from a constitutional check to a policy tool.\(^{432}\) In a 1914 update to his chapter assessing the weaknesses and disappointments of American chiefs past, Bryce added a telling footnote: “Of presidents since 1900 it is not yet time to speak.”\(^{433}\)

Several factors made the moment so open ended. Rising labor unrest and industrial consolidation led to the development of new federal agencies to oversee antitrust, labor, and regulatory policy.\(^{434}\) A passionate reform impulse called for new public champions against party machines and moneyed interests.\(^{435}\) A professionalized corps of journalists emerged,

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432. Compare 1 Bryce, *The American Commonwealth*, 1888 ed., supra note 256, at 55 (explaining that the President uses the veto “to keep Congress in order”), with 1 Bryce, *The American Commonwealth*, 1910 ed., supra note 430, at 59 (noting that the use of the veto had gone beyond what had been imagined at the Convention, as it had “now come to be used on grounds of general expediency, to defeat any measure which the Executive deems pernicious either in principle or in its probable results”).


434. See supra note 47 and accompanying text.

ready to expose unsavory conditions in cities and industry. Eager for access to the political class, they elevated the very politicians they covered, making them media stars. America’s rise as an industrial and imperial power spurred new diplomatic and nation-building efforts abroad (along with the already-discussed growth of a sprawling navy). The country was becoming great—a policy state—and politicians were discovering ways, as individuals, to tap into that greatness. The presidency became an institutional focal point for these developments.

With a new mandate came new roles and new tools. The nineteenth-century “partisan Presidents” had been bound by loyalty to their party, which constrained their direct communications to the public. In the mid-1890s, fixed institutional relationships began to change. The new Presidents spoke directly to the public, thereby setting the terms on which ideological competition and policymaking would take place. The concept of presidential representation came to the fore: As the sole officer elected by the nation as a whole, Presidents enjoyed a stronger claim to democratic representativeness than other elected officials; this afforded them independent policymaking authority separate from Congress. This shift in the conception of the presidency, coupled with decades of civil service reform that had produced a new cadre of professionals,


437. See Kaplan, supra note 436, at 193 (arguing that journalists often embraced and promoted politicians, resulting in greater access and elevation in journalists’ status); see also John Nerone, The Media and Public Life 141–42 (2015) (“The journalism of exposé posited a new and different relationship between the news media, the citizen, and the political process.”); Stephen Ponder, Managing the Press: Origins of the Media Presidency, 1897–1933, at xvi, 1–3 (1998) (arguing that Presidents from McKinley onward managed the press and increased the prestige of the presidency by granting unprecedented access).

438. See Moore, American Imperialism, supra note 293, at 1–5 (discussing bureaucrats and politicians’ “quest to transform the United States from a prosperous industrial republic into an imperial power” beginning around the turn of the twentieth century); see also Arthur M. Schlesinger, Jr., The Imperial Presidency 82 (1973) (discussing how these developments strengthened executive power); supra notes 292–310 and accompanying text.

439. See Arnold, Remaking, supra note 44, at 10–13 (discussing the great institutional changes that occurred under President Taft).

440. See, e.g., Skowronek, Politics, supra note 251, at 199–200 (examining this trend in the context of Lincoln’s presidency); Matthew J. Dickinson, The President and Congress, in The Presidency and the Political System 406, 419–21 (Michael Nelson ed., 10th ed. 2014) (discussing how parties developed “mass-based campaigns” that included Congress and the President); cf. Bailey, supra note 123, at 3–9 (canvassing the debate over presidential modernity). For a discussion of the pre-Progressive presidency, see supra section III.A.

441. See Ponder, supra note 437, at 1–3 (explaining how McKinley saw the “press [as] a tool that he could use to shape public opinion”).

442. See Bailey, supra note 123, at 3 (noting that modern Presidents claim a popular mandate and the unique right to speak on behalf of the American public).
transformed the bureaucracy into a streamlined apparatus ready to serve the presidential agenda.\footnote{See Skowronek, Politics, supra note 251, at 229–30 (noting that Roosevelt built “new kinds of governing institutions” that enabled him to “seize[] the role of party-builder itself”).}

This was a new, modern approach to the presidency. These twin roles in the new presidential script—public leadership and presidential administration—appeared to make Presidents more than mere “enforcers of the law”; they were becoming “lawmakers” themselves.\footnote{Bailey, supra note 123, at 3.}

This Part recounts the watershed transformation of the presidency in the Progressive Era. Section IV.A focuses on Teddy Roosevelt to emphasize his account of the President as the people’s representative. Section IV.B turns to Taft to show how he responded to Roosevelt by highlighting the President’s administrative authority. Section IV.C looks to Wilson to bring out his attempt to theorize the office beyond Taft as the nation’s lead policymaker: an American prime minister. And Section IV.D looks to the 1920s to show how the new presidential script survived the “return to normalcy.” Under nominally anti-Wilsonian President Warren Harding, the new Progressive Presidency endured, setting the stage for its constitutionalization in Myers.

A. \textit{Theodore Roosevelt: The Popular Tribune}

No one embodied this change better than the gallant, buoyant Teddy Roosevelt, who rose improbably to the presidency and then captivated the public’s attention for seven years. He redefined the national agenda with his leadership of his party and the federal agencies, including the Navy, the Forestry Service, and the Department of Justice.\footnote{See Lewis L. Gould, The Presidency of Theodore Roosevelt 5, 189–214 (1991) [hereinafter Gould, Roosevelt] (discussing Roosevelt’s leadership of the Navy during his time in the McKinley Administration and his leadership of other federal agencies as President).} After four years out of office, Roosevelt threw “his hat . . . in the ring” once more in 1912, mounting a frontal challenge against his old party from the back of a locomotive.\footnote{James Chace, 1912: Wilson, Roosevelt, Taft & Debs—The Election that Changed the Country 107, 200 (2004).} Roosevelt’s 1912 presidential campaign has gone down as a failure,\footnote{See id. at 238–40 (discussing Roosevelt’s defeat in the 1912 election).} but it left no doubt about the President’s status as celebrity, agenda-setter, and party leader. Roosevelt was “the most striking figure in American life,” per Thomas Edison;\footnote{Jon Knokey, Theodore Roosevelt and the Making of American Leadership 400 (2015) (internal quotation marks omitted) (quoting Corinne Roosevelt Robinson, My Brother Theodore Roosevelt 297 (1921)).} “a Superman if there ever was one,”
according to Arthur Conan Doyle.449 Influential Progressive editor William Allen White gushed: “Theodore Roosevelt bit me and I went mad.”450

When first taking office after McKinley’s assassination, Roosevelt dutifully reassured old-guard Republicans that he would continue his predecessor McKinley’s priorities.451 But in private, Roosevelt had long criticized McKinley’s leadership as weak and passive.452 He soon discovered, to his joy, that the constraints on the office “were as much norms internalized by presidents as they were institutional limitations imposed on those presidents.”453 Unbeholden to such norms himself, Roosevelt was free to rewrite the presidential script. He ended up developing the role of the President as popular tribune.

This required, first, reworking the relationship between the presidency and the party. During his first term, Roosevelt was careful not to break openly with Republican congressional leadership, instead setting his administration’s focus on issues of less concern for dedicated Republicans, including antitrust and naval policy.454

The freedom this afforded was striking. Roosevelt worked with Congress on new consumer protection laws and railroad regulations.455 But he did much alone too, bypassing Congress to orchestrate the response to financial panics in 1903 and 1907.456 Defying isolationists, he built a robust naval power and sent the American battle fleet on a cruise around the world.457 He also brokered peace in the Russo–Japanese War, defused a European crisis in Morocco, and expanded U.S. presence in Cuba, Panama, and the Philippines.458 Acting unilaterally, he resolved labor disputes.459 And, famously, he set aside approximately 230 million

449. Id. (internal quotation marks omitted) (quoting Doyle).


452. Knokey, supra note 448, at 203.

453. Arnold, Remaking, supra note 44, at 18, 196.

454. Id. at 202.


456. Id. at 112–14, 238–40.

457. Id. at 118–20, 131–32.

458. Id. at 167–88.

459. Id. at 63–68.
acres of land for conservation via legislation and executive order. By sidestepping his party’s central preoccupations, Roosevelt worked out from his own agenda rather than take direction from party bigwigs.

Roosevelt owed at least some of his success to his use of new presidential-leadership tools. Roosevelt was a master of what modern political analysts now call “spin.” Ahead of his famous (staged) ride up the San Juan Hill in Cuba during the Spanish–American War, Roosevelt made sure that reporters and photographers followed. As President, he dumped the stuffy, stately title of “Executive Mansion” in favor of the catchier “White House” and invited favored reporters to a daily “shaving hour” during which he would talk “a blue streak,” offering “presidential advice, leaks, story ideas, gossip, [and] instructions on how to write their stories.” It was no surprise that Roosevelt enjoyed largely favorable publicity.

For Roosevelt, this was less a means of directly influencing his Congress than one of maintaining public support. Roosevelt seems to have anticipated Richard Neustadt’s famous maxim that “[a]n image of the office” is “the dynamic factor in a President’s prestige.” By these lights, Roosevelt’s presidency proved that “the intentional construction of presidential image” could be a critical tool of leadership.

Publicity was the outward-facing side of Roosevelt’s presidency. The inward reverse was administrative policymaking. On Roosevelt’s “neo-Hamiltonian” model, the President’s position “as a nationally elected officer” combined with the role of bureaucrat to produce a strong state that legitimized and instantiated his cherished values of nationalism, imperialism, and industrialism. Decades of Progressive civil service reform, which freed agencies from partisan spoils, made such a regime possible.

Roosevelt had implemented administrative reform before his time as President. As Governor of New York, he reorganized the state’s canal


462. Ellis, supra note 450, at 112.

463. Id. at 112–13 (alteration in original) (internal quotation marks omitted) (quoting Ponder, supra note 437, at 18, 24).


466. Skowronek, American State, supra note 44, at 172.

467. See id. (explaining how Roosevelt’s civil service reforms complemented the development of a “strong bureaucratic state”).
system, reformed its correctional institutions, and updated its factory inspection procedures. As President, he followed the same course, locating strategic resources in the federal bureaucracy when possible and consolidating substantive powers in the new administrative machinery.

Roosevelt’s muscular use of the 1890 Sherman Anti-Trust Act to prosecute the “bad trusts” is a good illustration of the two faces of Roosevelt’s presidential leadership—outward popular publicity and inward administrative management. Seeking to transform antitrust policy and tame corporate power, Roosevelt might have requested new legislation expanding on the Sherman Act. Instead, he “clarified” the old legislation’s terms under his own prosecutorial powers and then provoked a public confrontation with powerful industrial interests as an opportunity for moral leadership. Early in 1902, Roosevelt directed his Department of Justice to initiate a lawsuit against Northern Securities, a railroad conglomerate formed in 1901 to a massive public outcry. Rebuffing banker J.P. Morgan’s efforts to settle the suit privately, Roosevelt turned to public channels to clarify his Administration’s antitrust policy and reassure the American people that he was responding to their anxieties about unchecked corporate power.

The choice to bring the lawsuit was as much about Roosevelt’s public image as the judicial process. He publicized the decision widely, relishing the opportunity to cast himself as the people’s tribune against conspiratorial financial-sector enemies. At the same time, because he was acting on his own, Roosevelt could stand apart from congressional Republicans and their business clientele, presenting to them a policy fait accompli. It was a typical Rooseveltian mix of public spectacle and bureaucratic unilateralism.

But while Roosevelt was attuned to the two sides of the Progressive Presidency—popular leadership and professionalized administration—he was not equally successful at institutionalizing them. To stylize slightly: He showed the public that the President could be a popular tribune, but he did not manage to make the executive the administrator-in-chief. Roosevelt’s most important effort at consolidating administrative power, his famed Keep Commission, was largely ineffectual: Congress ignored its recommendations and even stripped its funds. Roosevelt set in motion the transformation of the presidency, but he did not conclude it.

471. See Edmund Morris, Theodore Rex 91–95 (2001) (describing Roosevelt’s decision to bring the suit and his confrontations with financial sector leaders).
B. William Howard Taft: The Chief Administrator

Taft, Roosevelt’s handpicked successor, was an improbable innovator in the presidential role. He wrote to a friend in 1925, “I don’t remember that I ever was president.” Most historians agree and consider his time in office at best an uneventful lull between Roosevelt and Wilson and at worst a “disaster,” as historian Arthur Link summed it up. Taft was no charismatic leader of the people, nor was he a bold maverick on policy, but he advanced where Roosevelt failed by pioneering new dimensions of the President’s role as chief administrator, a role in which he found himself quite at home. Taft’s problem was not his political ineptitude so much as his inability to escape from the shadow of the larger-than-life Roosevelt. More than anything, Taft’s supposed shortcomings, discussed much at the time and still visible in the historiography, speak to a presidential office in transition. The public’s rebuke of Taft for his failures of leadership—especially his failure regarding the tariff—only makes sense in light of Roosevelt’s example of a President. Taft’s tenure


475. See Gould, Taft, supra note 473, at 72 (describing Taft as “lack[ing] the charisma that Roosevelt possessed”).

476. See Coletta, supra note 474, at 40–41 (noting that, upon assuming office, Taft endeavored to “assimilate the reforms undertaken by Roosevelt” and pursue incremental change).

477. See Gould, Taft, supra note 473, at 121–22 (arguing that Taft “was more of an innovator than Theodore Roosevelt and Woodrow Wilson” in exercising the President’s administrative capacities). And Taft appeared to embrace this work of administrative reform. Id.

478. See id. at 208–09 (describing commentators’ characterization of Taft’s presidency as unable to emulate Roosevelt’s); Arnold, Taft’s Legacy, supra note 474 (noting how Taft struggled in the face of Roosevelt’s legacy).

479. See Gould, Taft, supra note 473, at 208–09 (describing contemporary commentary); Id. at 213 (noting the “scholarly consensus about Taft as a lackluster chief executive”).

480. See infra notes 493–499 and accompanying text.

481. Arnold believes that Roosevelt, more than the other Progressive Presidents, had a “strong, personalist reform image” that “most closely resembles modern Presidents’ plebiscitary performance and ambivalent relationships with their party.” Arnold, Remaking, supra note 44, at 199.
proved, if nothing else, that there was no going backward from the presidency Roosevelt had built.

Taft never aspired to be President. He accepted his role as Roosevelt’s heir apparent with mixed feelings but resolved to do the job to the best of his abilities. A loyal Republican, Taft refused to deploy Roosevelt’s tools of leadership to advance beyond, much less defy, congressional leaders. The Ballinger–Pinchot Affair, a notorious scandal triggered by Taft’s firing of a Roosevelt loyalist in the Department of the Interior, reflected this fundamental difference: Taft may have agreed with Roosevelt on land conservation, but he refused to change policy by executive order, preferring instead to seek statutory authorization, which, at least on this matter, never came.

While Taft struggled to be the people’s tribune, he embraced the President’s bureaucratic powers, accepting that he should use the tools he deemed properly at his disposal to achieve the people’s aims. Under Taft’s watch, federal antitrust litigation more than doubled. Taft “placed 35,000 postmasters and 20,000 skilled workers in the Navy under civil service protection.” With his approval, the Department of Commerce and Labor was divided into two cabinet departments.

Most importantly, he convened a Commission on Economy and Efficiency, populated by well-known progressives like Frederick Cleveland, William Willoughby, and Frank Goodnow, to propose reforms to streamline administration, especially the federal budget process. And he managed it much better than Roosevelt had managed his Keep

482. Chace, supra note 446, at 23.
484. Arnold, Remaking, supra note 44, at 199.
487. Arnold, Domestic Affairs, supra note 486.
488. Id.
Commission: Taft kept legislators abreast of his Commission’s proposals, giving them somewhat greater purchase.490 While the Taft Commission’s most controversial recommendation—that the President, rather than various agencies of government, submit a unified budget to Congress—went unheeded, Taft asserted a right to review the budgets anyway, and his Commission’s effort ultimately spurred the creation of the executive budget in the Budget and Accounting Act of 1921.491

Taft was not passively aloof from the legislative process either. He worked closely with congressional Republicans to enact a postal banking bill, an income tax amendment, and a bill creating a specialized court to review claims before the Interstate Commerce Commission, whose powers to set rates he also advocated expanding.492 Tariff reform, the signature issue that would, for better or worse, define Taft’s presidency, was one Roosevelt had conspicuously avoided.493 Taft tackled it at great political risk.494 In one of his first acts in office, Taft called for a special session of Congress to take up the question.495 Here, he understood his legislative role not as requiring pure passivity but as guiding reform while remaining loyal to the various sectors of a sharply divided Republican party.

It was a noble but hopeless endeavor. While Congress hammered out the tariff, Taft eschewed public statements that might have clarified his position or exerted pressure for the lower rates he favored.496 He stood by quietly, too, when high-tariff Republicans spearheaded the addition of 847 amendments, dashing any hope for real reform.497 When the Payne–Aldrich tariff finally passed, Taft privately admitted that the legislation was

490. Mansfield, supra note 489, at 477, 487–89.
491. See Gould, Taft, supra note 473, at 124 (explaining how, inspired by the Commission, Taft created his own federal budget proposal, which Congress forcefully rejected); Mansfield, supra note 489, at 476 (“[The Commission’s] report entitled The Need for a National Budget later furnished material for the campaign that eventuated in the passage of the Budget and Accounting Act of 1921.”). For the act that created the executive budget, see Budget and Accounting Act of 1921, ch.18, 42 Stat. 20 (codified in scattered sections of 31 U.S.C. (2018)).
492. See Anderson, supra note 485, at 108–10, 114–15 (detailing Taft’s role in passing an income tax amendment); Coletta, supra note 474, at 125–26 (noting Taft’s role in the development of a postal savings banking system); Gould, Taft, supra note 473, at 95–101, 213–14 (describing Taft’s changes to the Interstate Commerce Commission and his creation of a specialized court).
493. See Gould, Taft, supra note 473, at 51 (characterizing tariff reform as “[t]he defining moment of William Howard Taft’s presidency”); see also Anderson, supra note 485, at 96–97 (describing how Roosevelt avoided the tariff issue while Taft embraced it).
495. Id. at 52, 104.
496. Id. at 104–05, 110–11, 115–16, 122.
497. See F.W. Taussig, The Tariff History of the United States 374–76 (5th ed. 1910) (noting that Senator Nelson Aldrich, a “protectionist of the most unflinching type,” influenced the addition of many of the 847 amendments to the tariff package); see also Anderson, supra note 485, at 204–05 (describing Taft’s failure to mobilize public opinion against the Senate’s version of the tariff package).
not what he had hoped for but still considered it to be the best Congress had ever delivered. As political scientist Peri Arnold puts it, Taft’s failure was due not to his lack of policy independence or initiative but to his inability to coordinate Congress’s process and understand his stake as President in the legislative outcome. It was a mistake his successors would seek to avoid.

But while the public Taft was a poor advocate for himself and his policies, the private Taft was a consequential figure for the continuing development of the Progressive Presidency. Though he failed to build on Roosevelt’s performance of the President as popular tribune, Taft helped lead his party’s legislative program and deployed his managerial talents and his commitment to governmental efficiency to strengthen the foundations of presidential leadership, most particularly the President’s claims over public administration. In these ways, he developed the role of the President as administrator-in-chief and pointed toward the possibility of the President as congressional policy leader, even though he did not succeed in that role himself. It was a kind of presidential leadership his successor would seize on.

C. Woodrow Wilson: The Presidential Prime Minister

Despite having only two years of experience in politics before his election, Wilson won the presidency in 1912, promising to use government to liberate Americans from predatory industry. Wilson may have differed from Roosevelt on race, foreign policy, and trust busting, but once in office, he governed in Roosevelt’s image, informed by lessons drawn from Taft’s presidency. In this way, Wilson further combined the two sides of the Progressive Presidency: policy leader and administrative head.

Critically, Wilson had a different relationship to his party and Congress than Roosevelt, one more in line with the parliamentarism of Taft’s term. Wilson’s commitment to “responsible party government” and the goal of broadening the Democratic Party coalition into a viable national party militated against Roosevelt’s executive-led strategy. So Wilson explored the promise of greater cooperation between the legislative and executive branches. “You cannot compound a successful government out of antagonisms,” he wrote in a famous 1908 critique of the separation of powers. A President who deftly read public opinion

498. Arnold, Remaking, supra note 44, at 199.
499. See id. at 199–203 (discussing how Taft’s more reserved approach compromised his ability to enact his desired policy initiatives).
503. Woodrow Wilson, Constitutional Government in the United States 60 (1908) [hereinafter Wilson, Constitutional Government].
and marshaled his party into a disciplined policymaking apparatus, he practiced parliamentarism in function, if not in form.\footnote{504. Id. ("[W]e have grown more and more inclined from generation to generation to look to the President as the unifying force in our complex system, the leader both of his party and of the nation."); see also Arnold, Remaking, supra note 44, at 200 ("[Wilson] was invested in the possibility of a prime ministerial stance within the American constitutional framework.").}


Not all of Wilson’s accomplishments should be celebrated. He resegregated the federal bureaucracy, created a wartime committee of propaganda and censorship, and endorsed the 1917 Espionage Act, which made public criticism of the government punishable by fine or up to twenty years in jail.\footnote{510. Id. at 52.} Bitter disappointments, they nevertheless illustrate Wilson’s muscular conception of his role.

Wilson was Rooseveltian, too, in his appreciation for the “bully pulpit,” though he understood his role somewhat differently. Roosevelt emphasized individual leadership, appealing directly to the people.\footnote{511. See supra notes 453–460 and accompanying text.}
Wilson, however, acted more as a prime minister, working through the intermediary institution of party. Tellingly, a month into his presidency, he appeared before Congress to speak about revising tariffs, the first President to address the legislature in person since John Adams in 1800. Wilson believed that, through the party, he had a lens on the public’s values and an electoral mandate to engage in interpretive discourse with public expectations.

Where he differed most significantly from Roosevelt was on the question of presidential administration. Spurning Roosevelt’s go-it-aloneism, Wilson forged a cooperative partnership with Congress. Under this model, administrative policy was closely tied to party development. Wilson worked through party channels to personally bridge the constitutional separation of powers and carry out the policy program on which he had run for office.

This enabled Wilson to push a legislative program, but it came at a significant cost. The southern Bourbons who “dominated” the party machinery had “a tremendous thirst for offices” but had little interest in Wilsonian Progressivism. Wilson was forced to beat a retreat from the progressive expansion of the merit-based civil service he favored. The New Freedom’s major legislation came stamped with explicit provisos against the merit classification of administrative personnel in the IRS, the FTC, the Tariff Commission, and the Agricultural Credits Administration. Ultimately, the price of Wilson’s legislative success was a galling resurgence of the spoils system under congressional control.

The sudden onset of World War I cast this tradeoff in the harshest of lights. Secretary of State William Jennings Bryan’s resignation in June 1915 symbolized the splintering of the Democratic–Progressive coalition over the war. To make matters worse, the Democrats’ assault on the merit system soon exposed a lack of professionalism in crucial wartime posts. Faced with the burden of preparedness, the national administrative machinery faltered. By 1916, it was obvious to Wilson that “the cooperative party strategy was a luxury America could no longer afford.” Wilson reversed course and attempted to regain control over the bureaucracy. He received emergency authority to reorganize the executive branch, but the grant was

512. See Terri Bimes & Stephen Skowronek, Woodrow Wilson’s Critique of Popular Leadership: Reassessing the Modern–Traditional Divide in Presidential History, 29 Polity 27, 43 (1996) (highlighting Wilson’s emphasis on working with other party leaders rather than appealing directly to the public); see also Arnold, Remaking, supra note 44, at 202 (discussing how Wilson considered party leadership essential to public leadership).

513. See Ellis, supra note 450, at 115.


515. Skowronek, American State, supra note 44, at 175.

516. Id. at 194–95.

517. Id. at 195.

518. Id. at 175.
temporary, and in any case, he no longer had sufficient political capital to push an alternative administrative course. For the U.S. government, it was a humiliating loss of face.

By the time the Democrats suffered a landslide defeat to Republican Warren G. Harding in 1920, Wilson’s presidency had come to seem an indictment of his own theory of government. For one so focused on rendering the party a disciplined machine, Wilson’s curiously rigid attitude when it came to ratification of the Versailles Treaty was a puzzling anticlimax. The war had exposed the weakened state of American bureaucracy under party government: What Wilson had presented as a cooperative partnership was ultimately exposed as a set of unprincipled bargains and tradeoffs culminating in administrative incoherence and amateurism.

D. The Republican Presidents: Consolidating the New Presidential Script

It is somewhat surprising, then, to find that critical aspects of Wilsonian presidentialism endured. The shift in the performance of the presidential office instantiated by Roosevelt, Taft, and Wilson proved durable.

In 1920, Harding handed Democrat James Cox the largest defeat in history, promising the electorate little more than a “return to...‘normalcy.” At his inauguration, President Harding laid out his vision: “Our most dangerous tendency,” he lectured, “is to expect too much of government, and at the same time do for it too little.” What pressing tasks lay on the presidential agenda? “[P]utting our public household in order,” the “efficient administration of our proven system,” and building “a rigid and yet sane economy, combined with fiscal justice.” Hardly gripping stuff—and as far from the rhetorical flights of Wilson or Roosevelt as imaginable.

Harding and his successor Calvin Coolidge, a fellow moderate Republican, would deliver a return to a traditional Republican platform of lower taxes, higher tariffs, administrative efficiency, and smaller

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519. Some have explained this episode as a result of Wilson’s debilitating stroke. See, e.g., John Milton Cooper, Jr., Breaking the Heart of the World: Woodrow Wilson and the Fight for the League of Nations 89–90 (2001); see also supra section IIA.


522. Id.
government. But if Americans expected “normalcy” to mean that the President would step back from the limelight and defer to the party and Congress, they were mistaken.

For one thing, the 1910s and ’20s had witnessed major advances in technologies of mass communication, and however modest a role Harding and Coolidge had embraced on the campaign trail, neither man seemed to believe in practice that proper behavior in office required cutting down on presidential publicity. After Harding died of a heart attack during a cross-country speaking tour in 1923, the man who earned the nickname “Silent Cal” became the first President to use the tools of mass communications to broadcast his image and message to the American people.

Coolidge was fluent on the radio. His 1925 inaugural address reached up to 25 million Americans, more than had ever “heard Wilson or [Roosevelt] speak on tour in eight years in office.” Coolidge appeared in “talkies” and in newsreels cavorting with celebrities; he was so accommodating of photo ops that the pose of photographers who followed him around joked that he “would don any attire or assume any pose that would produce an interesting picture.” Unlike Wilson, who abandoned presidential press conferences midway through his first term, Silent Cal stuck to a twice-a-week schedule, delivering 407 press conferences during his five and a half years in the White House, more than any other President then or since. Progressives who had celebrated the “bully pulpit” under Wilson and Roosevelt now fretted that Coolidge’s publicity machine would deceive and mislead the American people. In 1926, the *New Republic* pronounced Coolidge’s “government by publicity” a dangerous innovation: “No ruler in history,” its editors concluded, “ever had such a magnificent propaganda machine as Mr. Coolidge[.]”

Presidential administration also survived the “return to normalcy”; Progressive-era administrative innovations had consolidated into a new politics organized around administrative power and avid use of executive

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523. Arnold, Remaking, supra note 44, at 206.
525. See id. at 154–55 (stating that Coolidge was “prof[il]ed in major magazines” using “evocative photographs” that “exploited the new president’s style”).
526. Id. at 155.
528. See Greenberg, supra note 524, at 164–65 (internal quotation marks omitted) (quoting Jay Hayden of the *Detroit News*).
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530. See id. at 154–55 (stating that Coolidge was “prof[il]ed in major magazines” using “evocative photographs” that “exploited the new president’s style”).
prerogatives. Republicans’ traditional laissez-faireism did not entail a rejection of administration. Far from it: Party leaders grasped that new economic and social complexities required guidance from the top. Secretary of Commerce Herbert Hoover, for example, earned wide praise for spurring the formation of trade associations and encouraging standardization and efficiency throughout industry.

Republicans had another reason to favor executive solutions to national economic problems: The Party still harbored plenty of Progressives who were hostile to business-friendly legislation. Republicans helped to put civil service merit classification back on the agenda—less out of zeal for reform than because the spoils system had now come to be associated with corruption and the southern Democrats. It didn’t hurt that reclassification allowed Republicans to pack agencies, the courts, and regulatory commissions with conservative appointees. Despite a reduction in the scope of government, the Harding–Coolidge years were a boom time for the new professional-managerial ethos in Washington. Harding largely made good on his campaign promise to nominate the “best men in the nation” to run the federal agencies. That included the young Hoover, a brilliant engineer and rising star in the Republican Party; Andrew Mellon, a Pittsburgh titan of industry, as Secretary of the Treasury; and Charles Evan Hughes, the former presidential candidate and future Supreme Court Chief Justice, at State. All three stayed on into the Coolidge Administration; Mellon and Hoover would remain through the end of the decade.

Major pieces of legislation reflected the new professional-managerial ethos, too. Perhaps most importantly, the 1921 Budget and Accounting Act was directly patterned on the Taft Commission’s blueprint. In 1913, the Commission’s endorsement of presidential management of the federal budget had been viewed as an obnoxious intrusion upon the House’s prerogatives. But by 1921, Congress had no objection to vesting such power in the President, and the bill passed with little opposition in either house. Harding himself was a great supporter of the bill, and Coolidge,

532. See Skowronek, American State, supra note 44, at 175–76.
533. See Ellis W. Hawley, The Great War and the Search for the Modern Order 55–57 (2d ed. 1992) (listing Hoover’s successes while in office and tracking the impact of this success on other areas of government).
534. Leuchtenburg, Perils, supra note 520, at 97.
however much a “minimalist,” was no foe of bureaucratic initiative in policymaking. Coolidge once said, “The way I transact the cabinet business is to leave to the head of department the conduct of his own business.”539 That left energetic administrators like Hoover and Mellon plenty of room to maneuver.

The conservative interval of the 1920s was thus hardly a retreat from the presidency of the Progressive Era. Indeed, it saw the further institutionalization of the presidency’s powers.540 Conservatives found the new managerialism conducive to running the boom economy, and while they repudiated many of Progressivism’s aims, they did not abandon a presidential script of public persuasion, policy leadership, and presidential administration. It was a presidency amply predicted by the Progressive theory of presidential representation.541 From this new performance of the office, there was no going back.

V. Myers Revisited

Bryce’s first edition of The American Commonwealth in 1888 claimed that the presidency had not grown in “dignity and power” since Andrew Jackson.542 By the 1914 edition, the presidencies of Roosevelt, Taft, and Wilson had forced him to reconsider.543 Wilson had been right, it turned out, when he wrote in 1907 that nothing in the Constitution would stop a bold leader occupying the office from being “as big a man as he can.”544

Still, the new Progressive Presidency was not yet law. The Budget and Accounting Act of 1921 embodied aspects of the new vision but was not, on its own, a legal reconstruction of the office. When Wilson relinquished the presidential seat to Harding, he left him a position loaded with new expectations.545 The formal doctrine that bound the executive, however, reflected the pre-Progressive presidency.546

540. See Arnold, Remaking, supra note 44, at 205 (noting that it would “miss the most important implication” to see the Progressive Presidency “as a mere interlude of activism within the long period of Republican control, small presidents, and limited national government”).
541. See id. at 204 (“Of course, [Roosevelt, Taft, and Wilson] also fascinated the Progressive Era public and shaped its perception of the presidency . . . [t]hrough their language, initiatives, and shaping of press coverage . . . .”).
543. See 1 Bryce, The American Commonwealth, 1914 ed., supra note 431, at 66 (stating that the “dignity and power of the presidential office . . . did not greatly grow between the time of Andrew Jackson . . . and the death of President McKinley in 1901”).
544. Wilson, Constitutional Government, supra note 503, at 70.
545. See supra section IV.C.
546. See supra sections III.B–C.
This was the backdrop against which *Myers* transformed the law of the presidency. This Part returns to *Myers* to explain how it changed the law. It also reflects on what those changes mean for law and scholarship today.

The key actor was Taft. Once he left office, he continued to follow the development of the presidency and theorized it in a legalistic direction. Section V.A looks to Taft out of power to explore how he conceptualized the project of presidential transformation he had helped initiate.

Taft eventually returned to power as Chief Justice, which gave him the opportunity to write his new theory of the presidency into law. This, of course, was *Myers*. Section V.B shows how *Myers* translated the Progressive Presidency Taft had helped shape into a constitutional rule.

Section V.C explains how this Article’s contextualized rereading of *Myers* undercuts the Supreme Court’s current use of the case. To put it bluntly: *Myers* does not stand for the expansive vision of presidential power the Court claims it does.

This story has consequences for more than court watchers. The Court’s misunderstanding of *Myers* is emblematic of a broader ignorance about the growth of the American presidency—one Taft contributed to with his misleading opinion. Section V.D elaborates how this Article’s new account of *Myers* contributes to scholarly debates about law and the presidency. To understand the law of the executive, scholars must attend to institutional transformations and not merely changes in formal legal doctrine.

### A. The House that Taft Built

Conventional wisdom on Taft has emphasized how the cramped legalism of his thinking produced a cramped, legalistic presidency. Some of this is the result of contrast: Roosevelt’s outsized personality overshadowed Taft’s reticence and moderately conservative politics, while the astonishing productivity of the Wilson Administration made Taft’s output look inconsequential. Roosevelt also helped, rather cruelly, to popularize this view. While on the 1912 campaign trail, the Progressive Party candidate called his old friend a reactionary “fathead” who was “useless to the people.” In 1913, fresh off defeat, Roosevelt published a bestselling autobiography that skewed Taft’s leadership in scarcely veiled

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547. See Anderson, supra note 485, at 294–306 (“[S]till oblivious to the requirements of rhetoric, Taft was inclined to express his views in the technical language of the law, which emphasized the limitations rather than the opportunities of power.”); Gould, Taft, supra note 473, at 45–46 (“Unlike Theodore Roosevelt, who was convinced that the president should do anything that the Constitution did not explicitly forbid, Taft was sure that the chief executive had to remain within the boundaries of the Constitution itself.”).


terms. Presidential greatness, wrote Roosevelt, was hardly compatible with “the negative merit of keeping [one’s] talents undamaged in a napkin.”\footnote{550} Taft, who had taken a post as Kent Professor of Law and Legal History at Yale Law School, countered Roosevelt in his 1916 monograph *The President and His Powers*. The book is often remembered for its rejection of Roosevelt’s belief in an “undefined residuum of power [the President] can exercise because it seems to him to be in the public interest.”\footnote{551} This has contributed to the mistaken notion that Taft was not committed to strong presidential power and rejected Roosevelt’s approach to the presidency. Taft, the story goes, insisted that the President had no power except what the Constitution specifically granted. Roosevelt, by contrast, defended the opposite view: The President’s powers were limited only by “specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its constitutional powers.”\footnote{552}

In fact, the Taft–Roosevelt schism has obscured the many ways in which the two men’s views were quite similar.\footnote{553} While they would not reconcile until just before Roosevelt’s death in 1919, their views on presidential power were much closer than has usually been appreciated. Considering what Taft believed the Constitution empowered the President to do, his “legalistic” presidency was gargantuan, indeed even Rooseveltian. As political scientist Stephen Skowronek put it, Taft’s presidency may have “trimm[ed] the abrasive edges off [Roosevelt’s] stewardship theory, but it did not imply a return to the governmental order of the late nineteenth century.”\footnote{554} Taft insisted that the prerogatives of the Congress, the judiciary, and the presidency had to be respected, protected, and promoted within their proper sphere. But he never rejected executive prerogative or believed that Presidents should refrain from using administration to carry out the tasks the public expected of them.\footnote{555}

Ironically, one of the drivers of Taft’s expansive idea of the presidency was an obsession with the survival and independence of the judiciary. The macroeconomic changes industrialization wrought in the nineteenth

\footnote{550. Theodore Roosevelt, An Autobiography 389 (1913).}
\footnote{551. William Howard Taft, The President and His Powers, reprinted in 6 The Collected Works of William Howard Taft 11, 104 (David H. Burton, W. Carey McWilliams & Frank X. Gerrity eds., 2003) [hereinafter Taft, President and Powers].}
\footnote{552. Compare id. at 104 (“[T]he President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise.”), with Roosevelt, supra note 550, at 388–89 (arguing that the executive powers are limited only by the Constitution or additional Congress-imposed restrictions).}
\footnote{553. Accord Anderson, supra note 485, at 289, 291 (arguing that, because the two men were reacting to each other, the alleged differences between the theories “should be read skeptically,” and that “the similarities between the two conceptions are actually greater than the apparent differences”).}
\footnote{554. Skowronek, American State, supra note 44, at 173.}
\footnote{555. Id. at 173–76 (characterizing Roosevelt as a “neo-Hamiltonian” and Taft as a “neo-Madisonian”).}
The argumentative strategy Taft developed in these lectures and writings underscored his commitment to the Progressive Presidency. Taft argued that, under a proper understanding of the U.S. Constitution, the President must be responsive to the electorate so the judiciary could take the countermajoritarian positions required of it by law. During one March 1912 speech before the Ohio Bar Association, Taft admitted that, regrettably, courts had on occasion invalidated “useful statutes.” But it was a “complete misunderstanding of our form of government” to think that judges were bound to follow the will of the majority in deciding legal

556. See, e.g., Adair v. United States, 208 U.S. 161, 180 (1908) (holding that Congress could not criminalize the termination of an employee who joins a labor organization by an employer engaged in interstate commerce); Lochner v. New York, 198 U.S. 45, 64 (1905) (holding that state legislation restricting the number of hours that bakery employees could work violated the Constitution); Allgeyer v. Louisiana, 165 U.S. 578, 593 (1897) (holding that state legislation could not force people to insure their property with an insurer licensed in that state); United States v. E.C. Knight Co., 156 U.S. 1, 17–18 (1895) (holding that legislation could not prevent monopolies where the business had no direct relation to interstate commerce). For a classic treatment of this era of jurisprudence, see Morton J. Horwitz, The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy 65–168 (1992).

557. 198 U.S. at 58.


559. See, e.g., William H. Taft, U.S. President, Address in Toledo, Ohio: The Judiciary and Progress (Mar. 8, 1912), in S. Doc. No. 62-408, at 8 (1912) [hereinafter Taft, Judiciary and Progress] (arguing against reactionary measures to remove judges whose actions conflict with popular opinion); William Howard Taft, Liberty Under Law 28–29 (1922) (calling a more direct democracy in which judges could be easily removed “expensive” and unsuccessful); William Howard Taft, Popular Government 165 (1913) (arguing that the courts are necessary to keep Congress from infringing on the Constitution); see also William Howard Taft, Judge, 6th Cir., Address Delivered to the American Bar Association Meeting, Detroit, Michigan: Criticisms of the Federal Judiciary (Aug. 28, 1895), in 29 Am. L. Rev. 641, 644 (1895) (arguing that “hostility to the Federal courts” is “without foundation”).


561. Taft, Judiciary and Progress, supra note 559, at 5.
questions. The judge’s task was to protect rights (including, importantly, property rights), not to follow public opinion. If the public wanted accountability, they should look elsewhere. Where, exactly? Taft’s answer was clear: not Congress, but the President. The President was “elected by his constituents” to carry out “discretionary policy”; “[i]n that sense he represents the majority of the electorate.”

For one who viewed himself as a “strict constructionist” of the President’s powers, this was a striking position. For most of American history, critics of presidential power had made “arguments from law” against opponents’ “arguments from opinion” to emphasize textual limitations on that power. The nineteenth-century Whigs viewed themselves as defenders of the Constitution against the populist “King Andrew Jackson,” whose leadership they viewed as illegally supplementing the President’s constitutional powers with rhetorical—that is, political—powers. Whig hero General William Henry Harrison was elected President in 1840 on a promise to return the office to its narrower constitutional dimensions. Harrison rejected the idea that the President could exercise any independent will in the lawmaking process at all, calling it “preposterous” to imagine the President as somehow more representative of the people than “their own immediate representatives, who spend a part of every year among them, living with them, often laboring with them, and bound to them by the triple tie of interest, duty, and affection.”

562. Id. at 5.
563. Id. at 4.
564. See Taft, President and Powers, supra note 551, at 104–05 (describing his accord with strict constructions of the President’s implied powers).
565. Compare Bailey, supra note 123, at 9–10 (“[C]onstitutional democracy pits two foundational arguments into opposition, namely, arguments from law and arguments from opinion.”), with Skowronek, Conservative Insurgency, supra note 121, at 2077 (“Whereas the progressives revamped American government in general, and the presidency in particular, in a concerted ‘revolt against formalism,’ today’s conservatives insist on a close reading of constitutional stricture.” (footnote omitted) (citing Morton G. White, Social Thought in America: The Revolt Against Formalism (1949))).
566. This was a common slur the Whigs wielded against Jackson. See Daniel Walker Howe, What Hath God Wrought: The Transformation of America, 1815–1848, at 583 (2007) (mentioning the term’s presence in a famous political cartoon).
568. See William Henry Harrison, U.S. President, Inaugural Address (Mar. 4, 1841), https://avalon.law.yale.edu/19th_century/harrison.asp [https://perma.cc/FZ5B-6M3D] (last visited Aug. 22, 2023) (“I should take this occasion to repeat the assurances I have heretofore given of my determination to arrest the progress of [the] tendency [of the executive power to grow] if it really exists and restore the Government to its pristine health and vigor . . . .”).
569. Id. Another famous episode in the development of Whig theory is Senator Clay’s message to the Senate after Jackson’s infamous Bank Veto. Clay argued that the veto was
Needless to say, Taft stood at a great remove from this view of the Constitution. Taft consistently described the President as a leader stamped by supporters with a mandate to act independently of Congress. The Presidents’ authority to take discretionary action derived from their status as leaders of public opinion—not the opinion of Americans at large but that of their “constituents”: the followers of their political party.

This claim to leadership dovetailed with Taft’s commitment to presidential administration. Like the conservative presidential administrations of the 1920s, Taft mistrusted majorities clamoring for wealth redistribution and legislatures prone to pork-barrel spending, but he was a staunch believer in the President’s power to help achieve the goals of “economy and efficiency” by streamlining the federal administrative state. For the same reason, he proposed amending the Constitution to give the President the power to prepare a budget.

This idea reflected more than a concern with housekeeping. He grasped how, with such a power, the President could dictate the policy agenda. In one section of *The President and His Powers*, he compared the British Prime Minister with the American President, who seemingly lacked the power to propose, draft, and debate legislation. This was a disadvantage, he felt. Taft concluded on an optimistic note, however, arguing that once party ties united the political branches, American government had nothing to envy the British. After all, the President’s powers were “not rigidly limited” by the Constitution but ebbed and flowed according to practice and construction.

merely a tool for filtering out unconstitutional legislation; for a President to use it on partisan grounds of policy disagreement was “totally irreconcilable” with the genius of republican government. 8 Reg. Deb. 1265 (1832) (statement of Sen. Clay).

570. See Anderson, supra note 485, at 294–306 (describing Taft’s broad “notions of power and duty”).


572. This was not only the formal title of the committee Taft convened in 1910 to reform administration of the government; it was also the name of his final message to Congress in April 1912 calling for the legislature to grant the President enhanced power to recommend a federal budget. See Message of the President of the United States on Economy and Efficiency in the Government Service, H. Doc. 62-670, reprinted in 48 Cong. Rec. 4280, 4280–82 (1912). On the “managerial” impulse in the 1920s, see Leuchtenburg, American President, supra note 254, at 60–61.

573. On this proposal, Congress could accept the proposed budget or revise it downward, but not increase it! See Taft, President and Powers, supra note 551, at 16.

574. Id. at 18.
575. Id. at 8, 11–12.
576. Id. at 13.
Out of office, Taft became only more committed to presidential leadership, particularly as he reflected on legislators’ motives. As President, he had suffered frequent indignities at the hands of his Republican Congress. He had broken from party orthodoxy to advocate for a graduated federal income tax because the Republicans’ pending tariff bill threatened to leave irresponsibly large budget deficits. The political wounds Taft suffered from taking this stand help make sense of his self-serving observation in *The President and His Powers* that only the President possessed the perspective to save the nation from a Congress “unlimited in its extravagance, due to the selfishness of the different congressional constituencies.” Taft devoted several pages of the book to recounting congressional bad behavior.

B. *Myers* as the Statement of Taft’s Progressive Presidentialism

These sentiments would find expression in his famous opinion in *Myers*. The presidency he reconstructed there bore a greater intellectual debt to Progressive political thought than to the eighteenth-century science of politics or the Court’s actual nineteenth-century jurisprudence on the administrative state.

To begin: In *Myers*’s reconstruction of the arguments of the First Congress in favor of presidential removal, Taft rendered them as sustained by a core commitment to the idea of presidential responsibility. The Constitution’s division of the government into three branches with separate powers was important because it gave the President alone the duty to “take care that the laws be faithfully executed.” This in turn implied a removal power because the President would otherwise be forced to rely on “those for whom he [could] not continue to be responsible.” Besides, Taft reasoned, if Congress had the power to condition presidential removal, then it could interfere in “the operation of the great independent executive branch of government.” Congress would be able to “fasten[] upon [the President] . . . men who by their inefficient service under him, by their lack of loyalty to the service, or by their different views of policy might make his taking care that the laws be faithfully executed most difficult or impossible.”

Skeptics could argue that the Senate already had the power to control the approval of some executive officers and so control the President’s

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578. Taft, President and Powers, supra note 551, at 16.
579. Id. at 21, 25, 27–29.
581. Id. (citing 1 Annals of Cong. 474 (1789) (Joseph Gales ed., 1834) (statement of Rep. Ames)).
582. Id. at 127.
583. Id. at 131.
staff. But there was a difference between picking officers ex ante and retaining them ex post. The President, Taft wrote (echoing the bureaucratic managerialism of his age), would be much better informed than the Senate about an officer’s actual performance and ability to do the job. Presidential removal was a simple, functional necessity that allowed the President to fulfill their responsibilities.

There was something a little monarchical about all this, Taft recognized. “In the British system, the Crown, which was the executive, had the power of appointment and removal of executive officers . . . .” Taft believed that the Framers included such removal power in their conception of executive power. But this did not make the Framers, Taft, or the Myers Court into monarchists. The crucial difference was the President’s representativeness. “[I]n the discussions had before this Court,” Taft explained, there was a “fundamental misconception,” that the House and Senate were the people’s “only defender in the Government” and that the President was somehow their enemy, a would-be tyrant waiting to abuse the office’s powers.

Per Taft, this was wrong. The President was no less considerate of popular concerns than Congress: “The President is a representative of the people just as the members of the Senate and of the House are.” In fact, “at some times, on some subjects” the President was “rather more representative” of the people than the Congress, because “the President [was] elected by all the people” while “the Legislature[’s] . . . constituencies are local and not countrywide.”

As the national representative, the President was in charge of national issues. “The extent of the political responsibility thrust upon the President” was vast. His concerns ranged from dealing with foreign governments to overseeing the mail to protecting the public. Sometimes he was in charge of running the government wholesale, particularly in the

584. See id. at 121 (“It has been objected[,] that the Senate have too much of the executive power even, by having control over the President in the appointment to office.” (internal quotation marks omitted) (quoting 1 Annals of Cong. 380 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison))).

585. See id. at 121–22.

586. Id. at 122.

587. See id. at 132 (“Made responsible under the Constitution for the effective enforcement of the law, the President needs as an indispensable aid to meet it the disciplinary influence upon those who act under him of a reserve power of removal.”).

588. Id. at 118 (citing Ex parte Grossman, 267 U.S. 87, 110 (1925)).

589. Id.

590. See id. (noting that “the association of removal with appointment of executive officers is not incompatible with our republican form of Government”).

591. Id. at 123.

592. Id.

593. Id.

594. Id. at 133 (citing In re Neagle, 135 U.S. 1, 63 (1890)).

595. See id. at 133–34 (discussing the President’s responsibilities).
The age of the racialized American empire, as Taft knew from experience. The “possible extent of the field of the President’s political executive power may be judged by the fact that the quasi civil governments of Cuba, Porto Rico and the Philippines, in the silence of Congress, had to be carried on for several years solely under his direction as commander-in-chief.”596 “In all such cases,” Taft went on, “the discretion to be exercised is that of the President in determining the national public interest. . . .”597 The President was uniquely in charge of realizing the nation’s policy.

To do that, he needed control over government actors. Critics might object that the government’s staffers were “bound by the statutory law[] and are not [the President’s] servants to do his will.”598 But to Taft, these critics missed the point. Government servants engaged in all manner of actions. And sometimes, particularly when engaged in some of their “highest and most important duties”—what the Court had in the past called “political” duties—they were simply acting as stand-ins for the President. In those cases, the government’s staffers were “exercising not their own [discretion] but [the President’s]”; they were simply “act[ing] for him.”599 It was the President who was the representative of the people and had a unique charge in national affairs. It was the President who held the executive power and had the duty to take care that the laws be faithfully executed. The other actors in the executive branch were ultimately his assistants and subordinates, there to help the President realize the office’s duty and exercise its power.600 “Each head of a department is and must be the President’s alter ego” on the most important matters of law and policy.601

Taft then added a functional corollary. It was not enough for Presidents to have power in the abstract. They needed to be able to use it.602 If the President had no direct removal power over officers, Congress could frustrate the “unity and co-ordination in executive administration” that was “essential to effective action.”603 It was simply not possible to distinguish between those moments when executive branch actors were exercising the President’s discretion, wherein they should be absolutely accountable to the President, and those when they were discharging their

596. Id. at 134.
597. Id.
598. Id. at 132.
599. Id.
600. See id. at 117 (suggesting that the role of executive appointees is to act on behalf of the President in executing the nation’s laws).
601. Id. at 133 (emphasis added).
602. See id. at 134 (“The moment that he loses confidence in the intelligence, ability, judgment or loyalty of any one of them, he must have the power to remove him without delay.”).
603. Id.
ordinary duties. For pragmatic reasons alone, then, the President should have removal power over all executive officers all the time.

This, Taft believed, was in keeping with the President’s responsibility to run an efficient government. He asserted that the President enjoyed “general administrative control” by virtue of the vesting of executive power in the President alone. Pursuant to that administrative authority, the President could and should supervise the federal government’s staff to ensure that they did not act negligently or inefficiently. The President could also “supervise and guide their construction of the statutes under which they act” in the interest of ensuring the “unitary and uniform execution of the laws.” The President should judge subordinates’ judgment, evaluate their ability, and take account of their “energy” and capacity for motivating their workforce. To Taft’s eyes, the President was already the general manager of the federal government. To give the President removal authority over executive actors was a natural extension of already existing powers and responsibilities.

These were the explicit “merits” grounds of the Myers decision. The President enjoyed “general administrative control of those executing the laws,” which included the power of removal, pursuant to the Vesting Clause of Article II. That power enabled the President to realize “his obligation to take care that the laws be faithfully executed.” To that end, it would be better to keep Congress out of removal; otherwise it might interfere with the President’s constitutional responsibilities. According to that vision, the President was the great national spokesperson, uniquely charged with realizing the national interest. The President was the people’s representative, the state’s chief policymaker, and the government’s administrator—all rolled into one.

The full reach of the Progressive nature of this vision is evident in the limits and carveouts that Taft built into it. Detractors of presidential removal worried that a constitutional right to executive removal would “open the door to a reintroduction of the spoils system.” Taft recognized that the defeat of the spoils system and the creation of the civil service were some of the great accomplishments of modern government. He had no desire to reverse them (or be associated in any way with their recent

604. Id.
605. Id. at 135.
606. See id. (explaining that administrative control includes removing officers if the President “[f]ind[s] such officers to be negligent and inefficient”).
607. Id.
608. Id.
609. Id. at 163.
610. Id. at 164.
611. Id.
612. Id.
613. Id. at 173.
614. Taft, President and Powers, supra note 551, at 51.
reintroduction at Wilson’s hands). He thus explained that, as long as the civil service remained confined to inferior officers, “[t]he independent power of removal by the President alone . . . works no practical interference.”615 In fact, the merit system could even be extended.616 Under Perkins, which Myers claimed not to disturb, Congress could control the conditions of inferior officers’ appointment and removal by vesting the appointment in the heads of departments rather than the President.617

In the same spirit, a presidential removal power did not, for Taft, endanger adjudicative independence within administrative agencies. (Note, here, Taft’s twinned interest in presidential representation and judicial insulation.) Taft stated baldly that whether the President alone could remove administrative judges or members of executive tribunals “present[s] considerations different from those which apply in the removal of executive officers.”618 And while he sought to avoid addressing the question, he did suggest that such officers could enjoy greater protection without raising constitutional problems.619 In these cases, Taft thought the President might be able to remove them after the fact if they had not been “intelligent[] or wise[]” in the exercise of their discretion.620 But they should be free to act in the moment pursuant to law, without executive interference.

Taft’s vision of the executive was thus not unbounded. In the end, it was a quintessentially Progressive executive. As the people’s representative, the President would act to realize the nation’s interests. And as the leader of the people’s government, the President would run it efficiently and efficaciously. The removal power would be a tool to perform this presidential role. In Taft’s hands, it would not threaten the great accomplishments of Progressive state-building, including the civil service and the creation of Article I judges.621

More generally, Taft saw presidential removal as compatible with the emerging administrative state. Both served the same purpose: efficient and effective presidential government. Removal was a tool of administration,

615. Myers, 272 U.S. at 173.
616. Id.
617. See id. at 162 (“The condition upon which the power of Congress to provide for the removal of inferior officers rests is that it shall vest the appointment in some one other than the President with the consent of the Senate.”); see also supra notes 324–342 and accompanying text.
618. Myers, 272 U.S. at 158.
619. Officers who might properly enjoy protection included those who exercised “duties of a quasi-judicial character,” members of “executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control,” or those with duties “so peculiarly and specifically committed to the[ir] discretion . . . as to raise a question whether the President may overrule or revise the officer’s interpretation of his statutory duty in a particular instance.” Id. at 135.
620. Id.
621. See supra notes 615–620 and accompanying text.
which was the President’s constitutional duty. That this was the First Congress’s vision, as Taft claimed, is unlikely.\textsuperscript{622} It was certainly not the vision embodied in the removal jurisprudence before \textit{Myers}.\textsuperscript{623} It did, however, belong to Taft—and to the new Progressive conception of the office of the President, which he had helped create.

C. \textit{Assessing the Contemporary Court’s Use of Myers}

This is not how the current Supreme Court has read \textit{Myers}. In its recent opinions constructing the unitary executive relying on \textit{Myers}, today’s Court has relied on the case—implicitly and explicitly—for the following propositions:

1. The President’s Article II mandate to faithfully execute the law includes a removal power that is only narrowly constrained.\textsuperscript{624}  

2. Congress oversteps its constitutional powers insofar as it tries to insulate executive officers from presidential control by law, save under narrow circumstances.\textsuperscript{625}  

3. Dividing the executive power among officers who are not politically accountable threatens the President’s ability to carry out the duties of the office.\textsuperscript{626}  

4. The President has a unique “national” vantage point that makes them in some way “more representative” of the People than Congress and therefore justifies the removal power.\textsuperscript{627}  

5. The President is elected by the people to get things done, that is, to achieve a certain set of policies.\textsuperscript{628}

\textsuperscript{622} See supra section V.B.  

\textsuperscript{623} See supra Part III; see also supra note 117 and accompanying text.  

\textsuperscript{624} See \textit{Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.}, 561 U.S. 477, 483 (2010) (“Since 1789, the Constitution has been understood to empower the President to keep executive officers accountable—by removing them from office, if necessary.”). The opinion also cited \textit{Myers} for the proposition that the Constitution confers upon the President “the general administrative control of those executing the laws,” id. at 492–93 (internal quotation marks omitted) (quoting \textit{Myers}, 272 U.S. at 164), and that the “traditional default rule” is that “removal is incident to the power of appointment,” id. at 509 (citing \textit{Myers}, 272 U.S. at 119).  

\textsuperscript{625} See \textit{Collins v. Yellen}, 141 S. Ct. 1761, 1787 (2021) (“[A]s we explained last Term, the Constitution prohibits even ‘modest restrictions’ on the President’s power to remove the head of an agency with a single top officer.” (quoting \textit{Seila L. LLC v. Consumer Fin. Prot. Bureau}, 140 S. Ct. 2183, 2205 (2020))).  

\textsuperscript{626} \textit{Free Enter. Fund}, 561 U.S. at 495–98.  

\textsuperscript{627} \textit{Seila L.}, 140 S. Ct. at 2203 (claiming that the Founders counterbalanced unitary executive power by making the President “the most democratic and politically accountable official in Government”).  

\textsuperscript{628} \textit{Collins}, 141 S. Ct. at 1784 (noting that the removal power helps to ensure that executive branch subordinates “serve the people effectively and in accordance with the policies that the people presumably elected the President to promote” (citing \textit{Myers}, 272 U.S. at 131)).
6. The foregoing conclusions are a necessary inference from the Constitution, the Framers’ writings, the Decision of the First Congress of 1789, and the landmark opinion *Marbury v. Madison*.629

This Article’s recovery of *Myers* in context casts these propositions “into constitutional shadow.”630 *Myers* does not establish all six. And insofar as it stands for any of them, it does so as a judicial construction by a Supreme Court under the sway of a pro-presidentialist political philosophy rather than a logical inference from text and history.631

To begin with, however colorable as an interpretation of Article II, Claims 1 to 3 are quite weak empirically. As a veritable pile of scholarship has established, American government has never been without government actors insulated from direct presidential control; indeed, such actors were plentiful in the earliest American governments.632 And the Supreme Court tolerated countless such arrangements, even when those arrangements encoded explicit removal limits in statute.633

More to the point, *Myers* offers no support for Claims 1 to 3 either. Taft recognized that Congress could isolate government actors from presidential removal, particularly in the civil service.634 And he took it as obvious that Congress could prescribe the duties of executive branch officers in a way that deprives the President of meaningful control.635 Taft believed that Presidents could fire subordinates whose judgment they no longer trusted.636 Still, even then, the President could not legally control that subordinate if the statute vested discretion in the agency heads rather than in the President.637

This was not because *Myers* subscribed to the Congress-first vision of governance dominant in the nineteenth century though. Taft and the Progressive Presidents rejected the spoilsmen’s state and believed firmly in the notion of the President’s superior representation and leadership

629. Seila L., 140 S. Ct. at 2191–92, 2197 (explaining that the President’s removal power “follows from the text of Article II, was settled by the First Congress, and was confirmed” in *Myers* and then describing *Myers* as authoritative on “the First Congress’s determination in 1789, the views of the Framers . . . , historical practice, and our precedents” (citing *Myers*, 272 U.S. at 163–64)).


631. See supra section V.B.


633. See supra Part II.

634. See supra notes 615–617 and accompanying text.

635. See Myers v. United States, 272 U.S. 52, 135 (1926) (noting that officers may have duties “so peculiarly and specifically committed to the[ir] discretion . . . , the discharge of which the President can not . . . properly influence or control”).

636. Id. at 134–35.

637. See id. at 162.
(Claims 4 and 5). But precisely for this reason, Progressive presidentialists—like Taft himself—were committed to administrative independence (contrary to Claim 2). A President who was to get the people’s work done (Claim 5) would need a professional civil service, immune from the dangers of political interference.

The Court’s reliance on Myers for Claim 6—the originalist unitary President—is perhaps the crowning irony in a story full of them. As strong as the Progressives’ President was, that President fell short of the modern unitary executive’s audacious sweep and supposed textualism. The key discrepancies: Taft’s canny (if questionable) use of early republic sources did not make Myers an originalist opinion; at most Taft used them to make a point about constitutional acquiescence by the political branches.

More problematically for originalist unitarism, Myers relied on bad history. Most contemporary scholars agree that Taft’s account of the Decision of 1789 is tendentious and historically inaccurate, glossing over irreducible ambiguities. And from the moment Taft’s opinion appeared, scholars and jurists attacked its historical arguments. Constitutional
scholar Edward Corwin was particularly savage: “[W]hat a judge cannot prove he can still decide. Viewed purely as history, the Chief Justice’s interpretation of the decision of 1789 is without validity.”\textsuperscript{644}

Taft’s colleagues on the bench at the time understood his references to the Founding as a feint.\textsuperscript{645} Among other reasons Taft gave for his ruling, he emphasized that a presidential right of removal was supported by the executive branch’s greater familiarity with the job performance of executive officers.\textsuperscript{646} This made Justice McReynolds furious. Convenience did not a constitutional rule make. Between 1789 and 1836, the appointment of postmasters had been vested in the Postmaster General, not the President, he observed in dissent.\textsuperscript{647} Was it therefore correct to say that for forty-seven years the President had failed to meet the duty to “take care that the laws be faithfully executed”?\textsuperscript{648} McReynolds thought not.\textsuperscript{649}

The dissenters expressed the same skepticism for Taft’s freewheeling construction of the bare language of Article II. Brandeis declared: “[A]n uncontrollable power of removal in the Chief Executive ‘is a doctrine not to be learned in American governments.’”\textsuperscript{650} McReynolds concluded: “I think the supposed necessity and theory of government are only vapors.”\textsuperscript{651} Justice Holmes referred to the same readings of the text as “spiders’ webs inadequate to control the dominant facts.”\textsuperscript{652} The \textit{American Law Review} pointed out that “implications are quite commonly intellectual devices for making plugs fit holes.”\textsuperscript{653} Not even in its own time, then, did

\textsuperscript{644} Corwin, Tenure of Office, supra note 246, at 369. Corwin also questioned Taft’s treatment of past jurisprudence: “[T]he Chief Justice’s opinion in the case at bar finds surprisingly little support in anything that the Court itself has previously said with regard to the power of removal.” Id. at 380. He further deemed \textit{Myers}’s reliance on Chief Justice John Marshall’s \textit{Life of Washington} to overturn \textit{Marbury} only the oddest of Taft’s many strange moves. See id. at 372–73 (explaining that Marshall’s \textit{Life of Washington} doesn’t provide adequate proof that Marshall changed his mind).

\textsuperscript{645} Justice Louis Brandeis, in dissent, marshaled dozens of statutes and judgments upholding removal restrictions in defiance of Taft’s “settled” construction. \textit{Myers}, 272 U.S. at 242–44, 250–55 (Brandeis, J., dissenting). Brandeis also demonstrated that removal restrictions preceded Reconstruction by thirty years, despite Taft’s assertion that such restrictions stemmed from the clashes between President Johnson and Congress and represented a constitutional anomaly. Id. at 279.

\textsuperscript{646} Id. at 122 (majority opinion).

\textsuperscript{647} Id. at 192 (McReynolds, J., dissenting).

\textsuperscript{648} Id.

\textsuperscript{649} Id.

\textsuperscript{650} Id. at 292 (Brandeis, J., dissenting) (quoting 1 Annals of Cong. 513 (1789) (Joseph Gales ed., 1834) (statement of Rep. White)).

\textsuperscript{651} Id. at 192 (McReynolds, J., dissenting).

\textsuperscript{652} Id. at 177 (Holmes, J., dissenting).

\textsuperscript{653} Galloway, supra note 246, at 491.
others believe that Taft’s view of the presidency could be sustained as a creation of 1789.

There is evidence that Taft himself recognized his subterfuge. While still in the throes of crafting *Myers*, he wrote in a letter to a friend:

> I am very strongly convinced that the danger to this country is in the enlargement of the powers of Congress, rather than in the maintenance in full of the executive power. Congress is getting into the habit of forming boards who really exercise executive power, and attempting to make them independent of the president after they have been appointed and confirmed. This merely makes a hydra-headed Executive, and if the terms are lengthened so as to exceed the duration of a particular Executive, a new Executive will find himself stripped of control of important functions, for which as the head of the Government he becomes responsible, but whose action he can not influence in any way. It was exactly this which the two-thirds majority of the Republicans in the Congress after the War attempted to with the Tenure of Office Act [of 1867]. They attempted to provide that Cabinet officers who had been appointed by Lincoln, and who differed with Johnson as to the policy to be pursued in respect to dealing with reconstruction questions should be retained in office against his will.654

Taft here says explicitly what *Myers* does implicitly: The republic should shift power away from Congress and toward the President. What the Founders thought is beside the point.

The contemporaneity of *Myers* appears on its surface. Taft’s retelling of Reconstruction history fairly seethes with late nineteenth-century contempt for Congress. Siding with Andrew Johnson against the Radical Republicans, Taft accused the legislative bloc of seeking to paralyze “the executive arm and destroy the principle of executive responsibility and separation of the powers, sought for by the framers of our Government.”655

This was not good history. But it was a fairly accurate paraphrase of the then-dominant Dunning School of historiography, as Niko Bowie and Daphna Renan have powerfully shown.656

For the Dunning School, Reconstruction was not a moment of redemption for a slaveholding America, but a cautionary tale in which a fanatical Congress unconstitutionally “emasculate[d] [the executive’s] power just as it had

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654. Post, Unitary Executive, supra note 26, at 186–87 (internal quotation marks omitted) (quoting Letter from William Howard Taft, C.J., to Thomas W. Shelton (Nov. 9, 1926)); see also Brief of Appellant, *Myers*, 272 U.S. 52, reprinted in 272 U.S. 60, 65 (interpreting Taft’s transmission of the recommendations of the Commission of Economy and Efficiency, 48 Cong. Rec. 8500–01 (1912), to mean that “there must be checks on the usurpation of power by the executive departments”).


656. See Bowie & Renan, supra note 72, at 2062–63.
emasculated the power of the white South.”657 On this view, Taft’s invocation of an “original” constitutional model of three separated branches forbidden from intermingling is a smokescreen designed to prevent a repeat of the Johnson affair.658 His judicialization of a longstanding political question reflected not just naked judicial activism but also his political conservatism. Congress might act rashly and unwisely in support of extreme policy aims, but the President would be more circumspect.

To advance his project, Taft appealed to history. This, of course, is exactly what today’s Supreme Court does.659 Myers thus stands as a successful example of how to smuggle a contemporary conservative legal project into the language of historical analysis. But it is not, actually, a historical authority at all.

D. The Law of the President in Historical Time

So what? Despite formal doctrine that claims to rely ever more on history,660 the current Court has shown a remarkable disregard for historical accuracy661 (or even factual accuracy662). Someday, perhaps, judges will be interested in what Myers really said.663 When that day comes, this Article will have implications for doctrine.

Until then, the Article’s main contributions are scholarly. Getting the history right matters most for understanding the executive. This

657. Id. at 2063.
658. See Myers, 272 U.S. at 116 (discussing the Framers’ intention to keep the three branches separate).
660. Bruen, 142 S. Ct. at 2131 (asserting that the test to identify violations of the Second Amendment “requires courts to assess whether modern firearms regulations are consistent with [that Amendment’s] . . . historical understanding”).
661. See West Virginia v. Env’t Prot. Agency, 142 S. Ct. 2587, 2625 n.6 (2022) (Gorsuch, J., concurring) (“In the course of its argument, the dissent leans heavily on two recent academic articles. But if a battle of law reviews were the order of the day, it might be worth adding to the reading list.” (citation omitted)); Katz & Rosenblum, supra note 74, at 426 (criticizing Justice Gorsuch’s failure to seriously respond to the West Virginia v. EPA dissent’s historical arguments (citing West Virginia v. Env’t Prot. Agency, 142 S. Ct. at 2625 n.6)).
662. See Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2434 (2022) (Sotomayor, J., dissenting) (revealing that the majority inaccurately represented the facts of the case).
understanding in turn shapes thinking about the law of the presidency and potential reforms.

Studies of constitutional law in general, and the law of the executive in particular, have often remarked on the strange flip-flopping in the law between formalist and functionalist approaches.\textsuperscript{664} Myers is alive today as the main case law authority for a separation-of-powers formalism quick to strike down legislation for violating implied limits on Congress’s power to structure the executive branch.\textsuperscript{665} Such formalism tends to surface in the Supreme Court cyclically through the decades, coinciding with certain clear ideological postulates.

Explaining the rise of formalism on purely internal, doctrinal terms has never succeeded, though.\textsuperscript{666} This Article’s account offers another explanatory variable in the story of formalism’s ascendance: the evolution of the office of the presidency itself.

This attention to institutional development makes the unitary executive a constitutional paradox. Today, most unitarians are committed originalists.\textsuperscript{667} But far from endorsing presidential leadership, the Framers feared what contemporary political scientists call “issue arousal,”\textsuperscript{668} and they separated executive and legislative power in hopes that the President would provide a “counterweight to impulsive majorities” likely to channel their energies through Congress, the most popular branch.\textsuperscript{669}

Taft agreed with Hamilton that the executive could be a conservative counterweight to rash, ill-conceived policy by supplying the government with stability, unity, and competence. Taft believed, for instance, that the President should have a six- or seven-year term with no reelection to discharge duties with “greater courage and independence” and maintain “the efficiency of administration” free from the distractions of campaigning.\textsuperscript{670} Taft’s longstanding support for a presidential budget was similarly grounded in the notion that the President’s national “method of


\textsuperscript{665} Today’s Court adopts Taft’s version of the history of the removal power almost in total, including Taft’s treatment of the Reconstruction Republican Congress as an overzealous and meddlesome body that adopted a removal statute “without discussion’ during the heat of the Civil War.” See Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2201 (2020) (quoting Myers v. United States, 272 U.S. 52, 165 (1926)).

\textsuperscript{666} See Strauss, supra note 630, at 526 (attributing the rise of formalism to skepticism about the judiciary’s ability to perform functionalist analyses).


\textsuperscript{668} See Caesar, supra note 145, at 56 (defining issue arousal as “the effort of an aspiring leader to win power by putting himself at the head of a broad movement based on some deeply felt issue or cause which he may have played a role in creating or arousing”).

\textsuperscript{669} Skowronek, Conservative Insurgency, supra note 121, at 2072.

\textsuperscript{670} Taft, President and Powers, supra note 551, at 4.
choice and . . . range of duties” provided the vision and independence to resist irresponsible spending, unlike short-sighted legislators pillaging the Treasury for pork to benefit their constituencies.\footnote{671}{Id. at 14. See generally Dearborn, supra note 538, at 12–13 (discussing Taft’s preference for a presidential budget given executive power and independence).}

But Taft was a modern President living with a modern office. The Hamiltonian executive may have been unitary, but it was only an executive, not a lawmaker by virtue of some claim to superior representativity.\footnote{672}{See supra section I.B, especially notes 125–128 and accompanying text.} By contrast, Myers cast the President as the leader of the nation, elected to carry out a national policy agenda. In postulating that the faithful execution of the law entitles the President to “determin[e] the national public interest” and direct subordinates to carry it out, Myers fatefully transformed a duty imposed by the text into a power vested by virtue of popular opinion—a fact that dissenters, then and today, have not missed.\footnote{673}{Compare Myers v. United States, 272 U.S. 52, 134 (1926) (articulating the majority’s approach), with id. at 177 (Holmes, J., dissenting) (responding that the duty to see that the laws be executed does not create new presidential powers), id. at 184 (McReynolds, J., dissenting) (same), id. at 292 (Brandeis, J., dissenting) (same), and Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2228 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (noting that the Take Care Clause “speaks of duty, not power”).}

This transformation happened in practice before it happened in law. The law did not evolve according to its own logic. Rather, it was self-consciously pushed to accommodate intellectual and political developments in the office of the presidency.\footnote{674}{See supra section IV.D.} The law and the office were never fully independent, but they changed according to different imperatives and on different timelines. It is little surprise, then, that the modern presidency combines democratic legitimacy and textual authority in an often unwieldy admixture.\footnote{675}{See Bailey, supra note 123, at 3 (highlighting the challenging relationship between the President’s political authority and legal authority).}

Myers was not simply reactive. It was also productive. The law of the executive affects the continuing development of the office of the President. It makes some things easier and forecloses others. The developments Myers set in motion remain ongoing.

Consider, in closing, Myers’s discussion of the civil service. As discussed, Taft believed that the civil service was an essential component of the modern state and an ally to the Progressive Presidency; the holding in Myers was not supposed to threaten it.\footnote{676}{See supra section V.B.}

But judicial opinions have a power beyond their author’s control. If “effective enforcement of the law” is a value worthy of constitutional protection, and if effectiveness requires that the President have a
“disciplinary influence upon those who act under him,” then why tolerate a civil service (or Article I judges, or any independent officers at all)? In an internal memorandum to Taft during the Myers drafting process, a young Justice Harlan Fiske Stone underscored exactly this point. He insisted that the functional argument undergirding Myers’s formalism be taken to its logical conclusion. The President would then enjoy an unrestricted removal power over all executive subordinates, irrespective of their function or who had appointed them. Taft pragmatically refused to “intimate that the Civil Service was constitutionally infirm” in any way, and he became angry with his dissenting colleague, Justice McReynolds, for indicating that the opinion suggested the contrary.

But considering how strongly McReynolds pressed Taft on this point, Myers’s failure to specify the conditions under which Congress could lawfully trench on the President’s removal authority left the decisional rationale “curiously suspended and unsatisfying.” A few months after the decision came down, the Nation commented that it would make it “impossible for Congress” to give any fixed tenure to “quasi-judicial offices” and that “the fear of removal w[ould] henceforth operate to bow hitherto independent officials to the will of the President or of his party speaking through him.”

Nearly 100 years later, the constitutional rule adumbrated in Myers has taken on a life of its own. It has swallowed up Chief Justice Taft’s carefully traced-out exceptions, as Justice Stone (approvingly) and the Nation (critically) deduced it would. Writing in 2021 to dismantle tenure protections for the head of a regulatory agency, the Court concluded that the Constitution “prohibits even ‘modest restrictions’ on the President’s power to remove the head of an agency with a single top officer” regardless of the officer’s function or the manner of their appointment. For support, this sweeping conclusion reached back to its own holding a year prior in Seila Law and, of course, to Myers.

It is not a correct reading of Myers. But Myers left itself open to this interpretation. More, it constitutionalized a strong President that would,
predictably, continue to develop in strength. The law of the President set in motion institutional developments that have now come back to transform the law. Taft would have been scandalized at what the Court has done with his opinion. But modern unitarism has real roots in the Progressive Presidency nonetheless.

**CONCLUSION**

The theory of the unitary executive is the dominant theory guiding the separation-of-powers jurisprudence of the Roberts Court. This theory holds that a faithful reading of Article II of the U.S. Constitution requires an executive branch insulated from most forms of congressional interference and control. The theory has been put into practice in a series of recent cases invalidating statutes attempting to define administrative arrangements, insulate civil servants and technocratic expertise from presidential direction, and, indeed, check the President.

These recent cases have overwhelmingly relied on a single case for their originalist theory of the presidency: *Myers*, a 1926 opinion written by Taft, not coincidentally the only Chief Justice of the Supreme Court ever to have been President himself. *Myers* appears to contain the main ingredients of today’s unitarism: a formalist reading of Article II, the elevation of abstract principles of constitutional “structure” over statutes, and the invalidation of a congressional enactment mandating bureaucratic independence. Most usefully for the Court, *Myers* seems to root its presidentialism in the Founding.

Yet this reading is mistaken. *Myers* is not originalist. It does not explicate a long extant tradition of presidential administrative supremacy. In fact, just the opposite: It broke with decades of Supreme Court precedent that had firmly established the primacy of Congress’s statutes in setting the bounds of presidential control of the administrative state. Nor did the *Myers* opinion rely on originalist methodology. It defended its theory of the executive on functional grounds and arguments from acquiescence.

At the heart of *Myers* was a theory of presidentialism rejected at the Founding and unknown in nineteenth-century case law: the theory of presidential representation. The theory had various roots in American history but reached its flowering in the Progressive Era. Early in the twentieth century, the Progressive Presidents gave the theory expression as Roosevelt, Taft, and Wilson explored what the presidency could be. By the time they were done, the President was looked to as the people’s lead policymaker, head government administrator, and privileged champion. The change was durable enough that it survived into the 1920s, reflected in the period’s conservative administrations and Taft’s own post-presidential writings.

With *Myers*, Taft wrote this new theory into law. On its own terms, the opinion imagined a strong executive with far-reaching powers that would
have upset the Founders. But even Taft’s executive fell far short of the unitarian fantasy. *Myers* recognized the necessity of the civil service, the propriety of insulating executive branch officials from presidential control, and ultimately the power of Congress to structure the government.

Recovering this more contextually adequate reading of *Myers* has important consequences for doctrine and scholarship today. Doctrinally, it undercuts the Supreme Court’s current reliance on *Myers*. The case does not stand for the Founders’ view of the presidency. Nor does it support presidential control over all executive branch officials. Nor does it aggressively cabin congressional creativity in the design of the executive branch.

At the level of scholarship, this new reading of *Myers* highlights the necessary imbrication of law and institutional development, especially for the study of the presidency. *Myers* did not endorse the unitary executive. But by writing the strong Progressive Presidency into law, it helped legitimate the development of stronger executives down the line. Law reflects institutional realities. And law helps create new institutional relationships, as modern unitarists illustrate when they rely on *Myers* to champion their own new presidentialist projects.

Unitarians may think they are simply restoring the Constitution to its original state. But as our return to the case has shown, *Myers* was practically the opposite of the text-based, pre-political, ahistorical totem the Roberts Court now venerates. It was a period-specific manifestation of early twentieth-century political thought. In this way, the current conservative Supreme Court is doing just what *Myers* did: writing a new theory of the office of the President into law by reaching back to the Founding to construct continuity.

*Myers* is thus the correct progenitor for the Court’s unitary project, but not for the reason it thinks. The real story of how the President became the administrator-in-chief is one of institutional innovation and judge-led legal development. Today, with its unitary revolution, what the Court once made one way, it is trying to make anew. That is the kind of judicial revolution *Myers* itself engaged in. Taft would reject the presidency the current Court is creating. But the judicial project of the Roberts Court? That, he would understand. It was what he himself had done.
GENDER DATA IN THE AUTOMATED ADMINISTRATIVE STATE

Ari Ezra Waldman*

In myriad areas of public life—from voting to professional licensure—the state collects, shares, and uses sex and gender data in complex algorithmic systems that mete out benefits, verify identity, and secure spaces. But in doing so, the state often erases transgender, nonbinary, and gender-nonconforming individuals, subjecting them to the harms of exclusion. These harms are not simply features of technology design, as others have ably written. This erasure and discrimination are the products of law.

This Article demonstrates how the law, both on the books and on the ground, mandates, incentivizes, and fosters a particular kind of automated administrative state that binarizes gender data and harms gender-nonconforming individuals as a result. It traces the law’s critical role in creating pathways for binary gender data, from legal mandates to official forms, through their sharing via intergovernmental agreements, and finally to their use in automated systems procured by agencies and legitimized by procedural privacy law compliance. At each point, the law mandates and fosters automated governance that prioritizes efficiency rather than inclusivity, thereby erasing gender-diverse populations and causing dignitary, expressive, and practical harms.

In making this argument, the Article challenges the conventional account in the legal literature of automated governance as devoid of

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discretion, as reliant on technical expertise, and as the result of law stepping out of the way. It concludes with principles for reforming the state’s approach to sex and gender data from the ground up, focusing on privacy law principles of necessity, inclusivity, and antisubordination.

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INTRODUCTION

Sasha Costanza-Chock triggered the alarm when they walked through the full-body scanner at the Detroit Metro Airport. They knew it would happen because it happens to transgender, nonbinary, and gender-nonconforming people all the time. The machine deemed Sasha “risky” because their body, datafied into machine-readable code, differed from the pictures of bodies that trained the machine’s algorithm. Their breasts were too pronounced relative to data associated with “male,” and their groin area deviated from data associated with “female.” Pulled out of the line for a physical body search, Sasha found themself in an awkward, humiliating, and potentially dangerous situation.

Toby P., a transgender man living in Colorado, was singled out by a different kind of automated administrative technology. After Toby sustained a debilitating injury at work, his employer completed the required workers’ compensation First Report of Injury Form by checking the box next to “Female,” a designation that matched Toby’s assigned sex at birth and the information in his human resources file. The state’s

2. See, e.g., Deema B. Abini, Traveling Transgender: How Airport Screening Procedures Threaten the Right to Informational Privacy, 87 S. Cal. L. Rev. Postscript 120, 135 (2014); Paisley Currah & Tara Mulqueen, Securitizing Gender: Identity, Biometrics, and Transgender Bodies at the Airport, 78 Soc. Rsch. 557, 562–66 (2011); Dawn Ennis, Her Tweets Tell One Trans Woman’s TSA Horror Story, Advocate (Sept. 22, 2015), https://www.advocate.com/transgender/2015/9/22/one-trans-womans-tsa-horror-story [https://perma.cc/5FZS-6NKV]. For detailed definitions of “transgender,” “nonbinary,” “gender-nonconforming,” and related terms, please see Jessica A. Clarke, They, Them, and Theirs, 132 Harv. L. Rev. 894, 897–99 (2019); Glossary of Terms: LGBTQ, GLAAD, https://www.glaad.org/reference/terms [https://perma.cc/7BHP-6Y2T] (last visited Aug. 21, 2023). In brief, transgender individuals are those whose sense of self or expression of their gender differs from their assigned sex at birth. Nonbinary individuals are those whose identities cannot be restricted to just “male” or “female.” “Gender-nonconforming” is an umbrella term that can include nonbinary individuals, but it is used in this Article to refer to those who are genderqueer (those who challenge norms concerning sex, gender, and sexuality), genderfluid (those whose gender expressions or identities may change over time), or agender (those who do not adopt a traditional gender category and may describe their gender as the lack of one).
4. Id.
5. Toby’s name has been changed to protect his anonymity as he and his lawyers determine how to proceed with a potential claim against the state.
automated fraud-detection system, which compares this claim form with information pooled from state databases, denied Toby’s claim. The “system,” Toby told me, “saw ‘female’ here and ‘male’ [everywhere else] . . . and figured something didn’t match.”

Seven months, twenty-five phone calls, sixteen refiled forms, and two demand letters later, Toby is still hurt and still without the compensation to which he is entitled. He is “basically bankrupt.”

Sasha and Toby fell through the cracks of the automated administrative state. As government agencies turn to algorithms and artificial intelligence (AI) to administer benefits programs, detect fraud, and secure spaces, transgender, nonbinary, and gender-nonconforming individuals are put in situations where they can’t win. They become “anomalies” or “deviants” in systems designed for efficiency.

Technologies “have politics.” Just like race and gender hierarchies can be embedded into technological systems, in this case it is

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7. Telephone Interview with Toby P., supra note 6.
8. Id.
9. This Article uses the phrase “automated decisionmaking system” or “algorithmic decisionmaking system” to refer to the overall process in which a computational mechanism uses data inputs to make probabilistic, predictive conclusions or implements policy by software. See Ryan Calo, Artificial Intelligence Policy: A Primer and Roadmap, 51 U.C. Davis L. Rev. 399, 404–05 (2017) (noting that there is no one “consensus definition of artificial intelligence” but clarifying ways of understanding what scholars and industry mean by AI). This simplification is intentional: The Article focuses on the law’s responsibility for trends in automation rather than the technical distinctions between different types of automated technologies. See AI Now Inst., Confronting Black Boxes: A Shadow Report of the New York City Automated Decision System Task Force 7 (Rashida Richardson ed., 2019), https://ainowinstitute.org/publication/confronting-black-boxes-a-shadow-report-of-the-new-york-city-automated [https://perma.cc/2K5X-GB3A] (defining algorithmic or automated decisionmaking systems as “data-driven technologies used to automate human-centered procedures, practices, or policies for the purpose of predicting, identifying, surveilling, detecting, and targeting individuals or communities”).
11. Langdon Winner, Do Artifacts Have Politics?, Daedalus, Winter 1980, at 121, 121 (explaining that technology embodies forms of power and authority).
12. There is a vast literature in this space. See, e.g., Safiya Umoja Noble, Algorithms of Oppression: How Search Engines Reinforce Racism (2018) (explaining how digital decisions made through systemic algorithms reinforce oppressive social relationships); Sarah Myers West, Meredith Whittaker & Kate Crawford, Discriminating Systems: Gender, Race, and Power in AI 8–9 (2019), https://ainowinstitute.org/wp-content/uploads/2023/04/discriminatingsystems.pdf [https://perma.cc/A4YD-UPPG] (outlining research findings that the AI sector has a lack of diversity among its professionals, which has led to discriminatory outcomes); Solon Barocas & Andrew D. Selbst, Big Data’s Disparate Impact, 104 Calif. L. Rev. 671, 674–77 (2016) [hereinafter Barocas & Selbst, Big Data’s Disparate Impact] (outlining various reports that have suggested “big data” has unintended
cisnormativity—the assumption that everyone’s gender identity and presentation accord with their assigned sex at birth—that is designed into the automated systems that singled out Sasha and Toby. The underlying data that train machines to recognize males and females, the algorithms that identify anomalies in a person’s body relative to that database, the forms inconsistently designed to collect sex and gender data in the first place, and the systems’ restriction to only male/female options all reflect assumptions of gender as binary. Anyone who deviates from a normative, binary body is “risky” and singled out, potentially exposing them to harm. Those gender-nonconforming individuals who are also religious minorities, immigrants, people of color, or people with disabilities, and people who hold more than one minoritized identity, are multiply burdened.13

But this Article is not simply about the biases replicated and entrenched by AI and algorithmic technologies, a story deftly told by others and summarized in Part I. Nor is it just about gender as a tool of classification, a story as old as the nation.14 This is a story about law. Specifically, this Article argues that the law has mandated, influenced, and guided the state to automate in a way that binarizes gender data, thereby erasing and harming transgender, nonbinary, and gender-nonconforming individuals.

The law’s active role in the creation of this kind of automated state has been overlooked because the two dominant strands in legal scholarship on algorithmic technologies are focused elsewhere. One of discriminatory effects); Joy Buolamwini & Timnit Gebru, Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification, 81 Proc. Mach. Learning Rsch. 1, 10–11 (2018), https://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf [https://perma.cc/Q5VD-EF9F] (detailing how machine-learning technology can produce disastrous results in high-stakes circumstances, specifically when used in criminal matters); Pauline T. Kim, Data-Driven Discrimination at Work, 58 Wm. & Mary L. Rev. 857, 874–90 (2017) (describing how “training data,” or data used to inform machines running algorithms, are often unknowingly infected with bias, creating discriminatory results that are especially harmful in the workplace). In a recent article, Professor Sonia Katyal and healthcare industry lawyer Jessica Jung focus almost entirely on the gender and racial biases of algorithmic technologies used by private, for-profit companies. Katyal & Jung, supra note 10. This Article adds to this literature with a different narrative, focusing on government uses of automated technology and the mostly underappreciated laws that are responsible for collecting and entrenching binary gender in government systems.


those strands sees automation and its harms flourishing in a regulatory void. Scholarship in this vein rightly argues that automated systems used by private, for-profit technology companies cause harm because “the law has offered insufficient protection.” Other scholars suggest that algorithmic technologies are built amidst “lawlessness,” or the lack of regulation.

A second important strand of law and technology scholarship focuses on how law can address automation’s harms. This research explores how the technologies work, where they go wrong, and how we might use law to regulate them, fix them, and restore the status quo ex ante by holding technologies and those that use them accountable for discrimination, bias, and harm. Few scholars have focused on how the law creates the

15. See Katyal & Jung, supra note 10, at 704 (“[G]ender panopticism has been facilitated by absences within privacy law, in that the law has offered insufficient protection to gender self-determination and informational privacy.”); see also id. at 723, 760–61 (outlining forms of biometric surveillance technology that render nonbinary individuals outliers).


automated administrative state, and fewer still have focused on how the law constructs gender data in the automated state. This Article fills that gap: Sasha’s and Toby’s stories are actively and indelibly framed, constructed, and sustained by law every step of the way.

The process begins at the source, where statutes mandate the collection of sex and gender data. As Part II describes, the law of gender data collection relies on assumptions of static gender, taps into uninformed perceptions of the gender binary as “common sense,” and creates the conditions for civil servants to design forms with primarily binary gender questions. This creates binary gender data streams. Part III shows how interstate compacts and interagency contracts, all of which I collected from public records requests, require states to share datasets that include sex and gender. The law of gender data sharing looks outward and inward to privilege the gender binary: It has expressive effects that normalize the gender binary, conflationary effects that confuse the social aspects of gender with the biological aspects of sex, and interoperability effects that force the gender binary onto any agency that wants to realize the benefits of participating in shared data systems. Part IV demonstrates how automation mandates, agency policymaking by procurement, trade secrecy law, and privacy and data protection law actively encourage automation to improve efficiencies while preventing anyone from interrogating the underlying assumptions of the algorithms that use sex and gender data. This web of legal rules guides automation to exclude those outside the norm and erects barriers around automated tools that protect the gender binary from change. In other words, the law forces an oversimplified legibility on its subjects, leaving those most marginalized at risk.

18. But see Cohen, Between Truth and Power, supra note 16, at 48–74 (exploring the ways law, actively leveraged by interested economic actors, has created a “zone of legal privilege” around the activities of data-driven technologies); Alicia Solow-Niederman, YooJung Choi & Guy Van den Broeck, The Institutional Life of Algorithmic Risk Assessment, 34 Berkeley Tech. L.J. 705, 705–08 (2019) (arguing that risk assessment statutes create frameworks that constrain and empower policymakers and technical actors when it comes to the design and implementation of a particular instrument).

19. Of course, there has been scholarship on gender as a tool of administrative governance. See, e.g., Dean Spade, Normal Life: Administrative Violence, Critical Trans Politics, & The Limits of Law 73–95 (2015) [hereinafter Spade, Normal Life]. But this scholarship has not extended to consider the effects of algorithms and automation in the administrative state.


21. For how governments force this legibility on their subjects, see generally James C. Scott, Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed (1998) [hereinafter Scott, Seeing Like a State] (“[T]he legibility of a society provides the capacity for large-scale social engineering, high-modernist ideology provides the desire, the authoritarian state provides the determination to act on that desire, and an incapacitated civil society provides the leveled social terrain on which to build.”).
This rich account of how law collects, shares, and uses sex and gender data in state-run automated systems offers several insights about automation and the automated state in general that challenge or add nuance to the conventional wisdom in the legal literature. Part V discusses four of those lessons.

The automated state is discretionary. Scholars have argued that automation erodes traditional agency discretion, a pillar of the administrative state. But this Article shows that civil servants have discretion to guide automation in ways that binarize gender data. The discretion may be buried, but its fingerprints are everywhere—in the design of data-collection forms, in the terms of data-sharing agreements, in the procurement of technologies, and in the design and completion of privacy impact assessments (PIAs).

Relatedly, the automated state is also driven by stereotypes. Rather than merely shifting expertise from civil servants hired for their substantive knowledge to engineers with technological knowledge about how algorithms work, the automated state relies on both civil servants’ and engineers’ supposedly commonsense perceptions of sex and gender. Because most people have traditionally presumed that sex and gender are the same and static, automated systems designed by engineers and used by the government reflect those stereotypes.

The automated state is also managerial. Far from a product of the law stepping out of the way, the state’s use of algorithmic decisionmaking processes represents the synthesis of the logics (and pathologies) of data-driven governance, risk assessment, public–private partnerships, and procedural compliance, leveraging the power of law and the state to achieve efficiency goals. By orienting algorithmic tools toward the neoliberal goal of targeted governance through risk assessments that are supposed to cover most people most of the time, the law singles out those outside the norm for disproportionate harm. Finally, and again, relatedly, the automated state is structurally subordinating. Law infuses the

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22. See infra section V.A.
25. See infra section V.B.
26. See infra section V.B.
27. See infra section V.C.
28. See infra section V.D.
government’s data ecosystem with sex and gender information in a way that is both over- and underinclusive: It is overinclusive because it collects sex and gender data too often when not necessary; it is underinclusive because its reliance on the gender binary excludes transgender, nonbinary, and gender-nonconforming individuals from any of the benefits that could come from data’s capacity to create insight.

This kind of automated state harms gender-diverse populations. But the reification of the gender binary in the automated state is not a niche concern; it harms anyone constrained by strict gender expectations.29 Plus, those most dependent on government resources and thereby subject to the state’s informational demands will bear the greatest burdens of the state’s automated use of binary gender data streams.30 This poses a particular problem for members of the LGBTQ+ community, approximately one million of whom are on Medicaid.31 Nearly half of LGBT people of color live in low-income households.32 Transgender people are nearly two and a half times more likely than non-transgender people to face food insecurity.33 LGBT people have higher rates of unemployment than the general population.34

For some scholars and advocates, the solution to these problems is for the state to stop collecting sex and gender data.35 But as various scholars


35. See, e.g., Lila Braunschweig, Abolishing Gender Registration: A Feminist Defence, 1 Int’l J. Gender Sexuality & L. 76, 86 (2020); Davina Cooper & Flora Renz, If the State Decertified Gender, What Might Happen to Its Meaning and Value?, 43 J.L. & Soc’y 483, 484 (2016); Ido Katri, Transitions in Sex Reclassification Law, 70 UCLA L. Rev. 636, 641
have shown, legibility comes with benefits as well as risks.\textsuperscript{36} I don’t know whether there is a way to get it right, to find the “Goldilocks Zone” for gender, data, and power, especially given the state’s historic commitment to queer oppression and the historical aims of what James C. Scott might call top-down legibility.\textsuperscript{37} But I would like to try. This Article offers a way to navigate the legibility dilemmas triggered by state gender data collection.

The Article’s lessons about the automated state—its persistent reliance on civil servant discretion, its use of stereotypes and perceptions of common sense, its orientation toward efficiency, and its subordinating capacities—suggest that scholars and advocates ignore the liminal space between the law on the books and the law on the ground to our peril.\textsuperscript{38} For sure, we can pass new laws that guarantee an “X” gender marker option; we can also litigate in court when state gender designations discriminate against those outside the gender binary. But “new categories


38. This is known as “gap studies” in the sociolegal literature, and this Article is situated in that intellectual tradition. See Jon B. Gould & Scott Barclay, Mind the Gap: The Place of Gap Studies in Sociolegal Scholarship, 8 Ann. Rev. L. & Soc. Sci. 323, 324 (2012).}
are not enough.”\textsuperscript{39} Nor will a statute “deprogram” a gender binary so embedded in our culture and in the technologies of private and state surveillance.\textsuperscript{40} To protect transgender, nonbinary, and gender-nonconforming individuals from automation-based harms on a more systematic level, we can also develop the state’s “gender competence.”\textsuperscript{41} That is, in addition to changing the law on the books, scholars and advocates can also help change how civil servants understand gender data and its value, limits, and powers.

These are the goals of Part VI, which wrestles with the live and pressing questions of the proper role of the state: Should the state ever collect and use gender data? If not, why? If so, how can the state do so in a way that serves the interests of gender-diverse populations rather than its own disciplinary interests? Resolving these questions is beyond the scope of this Article, but in a world in which the state does collect and use gender data, its role should be particularly narrow. Part VI offers three principles, familiar to privacy scholars, for building a future in which government uses of gender data and algorithmic technology foster rather than erode antisubordination goals. A \textit{necessity} principle urges the state to ask whether it actually needs sex or gender data to achieve its goals and, if it does, to determine which one it needs. An \textit{antisubordination} principle would limit sex and gender data collection to only those uses that benefit and support greater inclusion of gender-diverse populations. And an \textit{inclusivity} principle would ensure that once the state decides to collect sex or gender data for emancipatory ends, it does so sensitively and in a contextually inclusive way.

Luckily, privacy law principles of data minimization—that one should only collect as much personal data as is necessary to achieve a stated purpose—and antisubordination—that law should disrupt traditional hierarchies of power enjoyed by data collectors—are capable of doing just that.\textsuperscript{42} Part VI concludes with this Article’s ultimate recommendation: The law on the books and the law on the ground should take gender diversity into account. The state should be able to collect, share, and use sex and gender data only when necessary to support a gender-inclusive


\textsuperscript{40} See Rena Bivens, The Gender Binary Will Not Be Deprogrammed: Ten Years of Coding Gender on Facebook, 19 New Media & Soc’y 880, 895 (2017).

\textsuperscript{41} Kevin Guyan, Queer Data: Using Gender, Sex and Sexuality Data for Action 155 (2022).

\textsuperscript{42} Scott Skinner-Thompson, Privacy at the Margins 6 (2021) (noting that an antisubordination agenda requires consciousness of classifications and using them to “level up” those disadvantaged by traditional hierarchies of power); Spiros Simitis, Reviewing Privacy in an Information Society, 135 U. Pa. L. Rev. 707, 740 (1987) (“Personal information should only be processed for unequivocally specified purposes. Both government and private institutions should abstain from collecting and retrieving data merely for possible future uses for still unknown purposes.”).
antisubordination agenda: to combat discrimination, to provide adequate healthcare, to guarantee benefits that have been traditionally denied, and to enable self-determination for gender-diverse populations.

To date, the law’s role in creating an automated state that binarizes gender data has been mostly hidden from view. It is a puzzle of statutes, rules, interstate compacts, intergovernmental cooperation, procurement, street-level bureaucracy, and managerial policymaking, all of which is summarized in Table 1. This Article pieces that puzzle together. It relies on a mix of primary source materials, including a computationally derived novel dataset of more than 12,000 government forms scraped from state agency websites, documents obtained through public record requests, and first-person interviews with lawyers and government officials.

TABLE 1. LAW AND THE BINARIZATION OF GENDER DATA, SUMMARY

<table>
<thead>
<tr>
<th>Law of Data Collection (examples)</th>
<th>Data binarized by . . .</th>
</tr>
</thead>
<tbody>
<tr>
<td>Statutes requiring sex/gender data collection (e.g., security, identity verification, distribution of benefits).</td>
<td>Mediation by the state, which creates the data.</td>
</tr>
<tr>
<td>Information primarily gathered through forms created by street-level bureaucrats.</td>
<td>Perceptions of “common sense” about sex/gender, which govern form design.</td>
</tr>
<tr>
<td>Path dependencies, which ensure that forms remain the same over time.</td>
<td>Assumption that gender is a static/secure identifier, which implies gender binary only.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Law of Data Sharing</th>
<th>Data binarized by . . .</th>
</tr>
</thead>
<tbody>
<tr>
<td>Data sharing required to realize security and efficiency benefits.</td>
<td>Normalization of the binary by dissemination.</td>
</tr>
<tr>
<td>Data sharing permitted at discretion of state agency leadership.</td>
<td>Conflation of sex and gender.</td>
</tr>
<tr>
<td>Interagency agreements.</td>
<td>Interoperability, which requires all data look to the same.</td>
</tr>
<tr>
<td>Interstate compacts.</td>
<td></td>
</tr>
</tbody>
</table>

43. See infra Part II.
44. See infra Part III.
### I. AUTOMATED ADMINISTRATIVE TECHNOLOGY AND ITS HARMS

In today’s automated administrative state, algorithmic technologies offer governments new opportunities for gender-based classifications. Professor Sonia Katyal and healthcare industry lawyer Jessica Jung argue in the context of private, for-profit uses of algorithms and AI, anti-transgender bias and erasure are designed into these tools. That is in line with the conventional account in much of the legal literature on algorithmic discrimination, which focuses primarily on technology’s capacity to entrench historical racial and gender biases. This Part briefly recounts that conventional account, focusing on how the design of algorithmic technologies used by the automated administrative state erases and causes harm to gender-diverse populations.

#### A. Technologies in the Automated State

Automated systems will sometimes use gender to apply rules in practice, like meting out benefits. Other technologies use gender as data points in data-matching systems and as training data for data-mining systems. Data-matching systems compare two sets of data—for example,

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<tr>
<th>Law of Data Use</th>
<th>Data binarized by . . .</th>
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<td>Automation mandates.</td>
<td>Efficiency mandates, which mean binary design.</td>
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<td>Efficiency mandates.</td>
<td>Managerialization via innovation offices, which ensures narrow cost–benefit analysis.</td>
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<td>Innovation, chief innovation offices.</td>
<td>No interrogation of design via procurement process.</td>
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<td>Procurement.</td>
<td>Symbolic compliance, which weaponizes PIAs to serve automation rather than privacy.</td>
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<tr>
<td>Trade secrecy.</td>
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45. See infra Part IV.
46. Katyal & Jung, supra note 10, at 700–01 (arguing that “invisibility” is the result of how AI and algorithmic technologies are built and function).
47. See supra note 17.
48. See Citron, Technological Due Process, supra note 17, at 1268.
demographic data provided on an application for unemployment benefits and a database with the applicant’s motor vehicle records, voter registration, and information from private brokers—to determine if both datasets represent the same person.\textsuperscript{49} If one or more data points do not match, the system flags the applicant as risky or fraudulent. This is what happened to nearly 50,000 people who applied for unemployment insurance in Michigan, which introduced an automated fraud-detection system in 2013.\textsuperscript{50} The problem was that few of them actually committed fraud.\textsuperscript{51} When the comparison data is incorrect or outdated, as was the case in Michigan, data-matching systems flag fraud where there is none.\textsuperscript{52} In Michigan, the error caused profound harm. The state garnished wages and withdrew money from people’s bank accounts, money that many victims are still trying to get back.\textsuperscript{53}

Toby was harmed by a data-matching system. Fraud-detection software compared data on the employer’s forms with data about Toby in state databases. Because those data did not match, Toby was accused of fraud. Sasha, on the other hand, was the victim of another cluster of algorithmic decisionmaking tools that use gender data—namely, data-mining systems.\textsuperscript{54}

Data mining uses gender information as training data to “teach” an algorithm to find patterns and correlations in large datasets.\textsuperscript{55} The algorithm then makes probabilistic predictions about the future.\textsuperscript{56} For example, in the private commercial space, Amazon’s recommendation algorithm mines our prior purchases, browser history, and latent characteristics to predict what we might buy next.\textsuperscript{57} Google’s search algorithm combines internet-wide data with information about our

\textsuperscript{49} Id. at 1260.
\textsuperscript{50} See Cahoo v. SAS Analytics Inc., 912 F.3d 887, 892 (6th Cir. 2019) (describing the faulty data-matching algorithm that caused the false determinations of fraud).
\textsuperscript{52} Charette, supra note 51.
\textsuperscript{53} Calo & Citron, supra note 23, at 828–29.
\textsuperscript{54} See Citron, Technological Due Process, supra note 17, at 1260.
\textsuperscript{55} Solow-Niederman, supra note 17, at 639.
interests and prior searches to autocomplete our queries and arrange search results.\(^5^8\)

Data mining enhances the state’s power to leverage gender data to make decisions about people’s lives.\(^5^9\) Sex and gender have become data points in complex algorithms that try to predict recidivism in sentencing: “Female” is associated with lower rates of recidivism; “male” with higher.\(^6^0\) The now-infamous Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) system, which assesses risk for use in parole decisions, also uses gender data in the same way.\(^6^1\) Public and private employers use algorithms to assess job applicants.\(^6^2\) An increasing number of jurisdictions use binary gender data to train complex algorithms meant to identify children who are at risk of committing future

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59. Although this section is exclusively about the state’s use of advanced technology to make policy decisions, there is a vast literature on how private companies use these kinds of automated systems to make decisions about credit, loan risks, housing, and much more. See, e.g., Frank Pasquale, Black Box Society: The Secret Algorithms that Control Money and Information 102 (2015) [hereinafter Pasquale, Black Box Society]; Citron & Pasquale, supra note 17, at 4 (describing algorithm use to score credit card applicants and rank job candidates’ talent, among other uses); Katyal, Private Accountability, supra note 17, at 56 (describing algorithmic housing and hiring discrimination); Joshua A. Kroll, Joanna Huey, Solon Barocas, Edward W. Felten, Joel R. Reidenberg, David G. Robinson & Harlan Yu, Accountable Algorithms, 165 U. Pa. L. Rev. 633, 636 (2017) (describing algorithmic decisionmaking for loan and credit card applications). There is also a related literature about how algorithms exacerbate inequality and should trigger equal protection concerns. See, e.g., Virginia Eubanks, Automating Inequality 180–88 (2018); Barocas & Selbst, Big Data’s Disparate Impact, supra note 12, at 673–74; Deborah Hellman, Sex, Causation, and Algorithms: Equal Protection in the Age of Machine Learning, 98 Wash. U. L. Rev. 481, 484 (2020) [hereinafter Hellman, Causation].


62. Kim, supra note 12, at 874–90 (emphasizing that employers’ use of data analytic tools to identify employees’ skills also disadvantages certain groups).
violence.\textsuperscript{63} And law enforcement uses binary gender data in facial recognition tools to help identify persons of interest in criminal investigations.\textsuperscript{64}

Data-matching and data-mining programs have several things in common that make them appear attractive for government agencies. Both automated systems use large datasets to identify patterns that might be illegible to humans but that are relevant to government agencies: fraud, eligibility, and risk assessment. Importantly, both systems are designed and marketed to reduce costs and increase efficiency.\textsuperscript{65} As a result, automation taps into persistent norms that efficient government is “good” government that can do more with less.\textsuperscript{66}

B. Effects on Gender-Diverse Populations

Data-matching systems pose unique problems for transgender and nonbinary people. Many have inconsistent identity documents because gender reclassification rules are labyrinthine and inconsistent.\textsuperscript{67} Individuals may lack the money or time to meet onerous medical or surgical standards for updating birth certificates or driver licenses in certain jurisdictions.\textsuperscript{68} Granted, transgender people could purposely answer questions to match their information on official documents. But

\begin{itemize}
\item \textsuperscript{64} See, e.g., Lynch v. State, 260 So. 3d 1166, 1169 (Fla. Dist. Ct. App. 2018) ("[T]he crime analyst testified [that] . . . [she] [t]urn[ed] to law-enforcement databases, . . . looked up those who had been previously arrested at the address . . . [and] then used a facial-recognition program that compared the photo officers took against photos in law-enforcement databases.").
\item \textsuperscript{65} See, e.g., Charette, supra note 51.
\item \textsuperscript{66} See Brooke D. Coleman, The Efficiency Norm, 56 B.C. L. Rev. 1777, 1786–95 (2015) (describing and critiquing the tendency to associate efficiency and cost cutting with good government).
\item \textsuperscript{67} See Paisley Currah, Sex Is as Sex Does: Governing Transgender Identity 76–98 (2022) ("Individuals whose gender identity differs from what is traditionally associated with the sex assigned to them at birth may be included or excluded from systems of sex classification."); Katri, supra note 35, at 656–95 (examining American sex reclassification law); Spade, Documenting Gender, supra note 36, at 733–34 (same).
\end{itemize}
lying on government forms is a crime.69 Identifying yourself as something you’re not resurrects gender dysphoria.70 Plus, intentional self-misidentification on one form fails to solve the problem created by data-matching and data-mining algorithms: The vast reach of data-matching databases and data inputs creates the risk that any inconsistency on any form completed at any time could trigger an accusation of fraud.71

Transgender, nonbinary, and gender-nonconforming individuals also face increased risk from automated systems designed to turn the body into code in the most efficient way possible.72 Machines designed for efficiency make conclusions that cover most people most of the time. They “stylize reality”;73 models make assumptions about the world to make data more legible and easier to manipulate.74 As a result, they have trouble correctly identifying people who do not meet social expectations associated with their assigned gender at birth.75 If training data is binary or based on cisnormative expectations of how males and females are supposed to look,76 as was the case with the full-body scanner that flagged Sasha as a security risk, those who exist outside the gender binary are treated as outliers.77 Similar harms can affect people of color, especially when AI is trained on mostly white faces and expected to make predictions about how Black or Asian individuals should look. That is how facial recognition

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70. “Gender dysphoria” refers to clinical distress associated with one’s sex assigned at birth. Am. Psychiatric Ass’n, Diagnostic and Statistical Manual of Mental Disorders 455–56 (5th ed. 2013).

71. Currah & Mulqueen, supra note 2, at 559 (stating that providing inconsistent information during the air travel process may create false security risk alerts).


75. See Scheuerman et al., supra note 56, at 144:14–144:15.

76. See id. at 144:17.

77. See Kendra Albert & Maggie Delano, Algorithmic Exclusion, in Handbook of Critical Studies of Artificial Intelligence 538, 540 (Simon Lindgren ed., 2023) (“[M]ethods [used] to remove outliers from particular datasets may result in indirect exclusion of particular groups of people . . . .”).
technology classifies the eyes of Asian faces as “closed” or misidentifies Black women at higher rates than white women.\textsuperscript{78}

Plus, data-mining systems need training data, all of which come from a time (even in the very recent past) when transgender, nonbinary, and gender-nonconforming people were barely recognized in the public consciousness.\textsuperscript{79} This “increase[s] the influence of the past”—one dominated by the gender binary (as well as white supremacy and homophobia, among other exclusionary ideologies)—on the future.\textsuperscript{80} The process is also iterative and self-reinforcing: Data inputs reflect the gender binary; algorithmic technologies output new data that reflect the gender binary; those data are then added back to better train the automated system, thereby amplifying and replicating the gender assumptions built into the algorithm itself.\textsuperscript{81}

The exclusion of gender diversity also stems from the social contexts in which algorithmic technologies are designed. The people who design automated decisionmaking systems and the corporate organizations in which they do their work are notoriously unrepresentative; they skew cisgender, heterosexual, and white.\textsuperscript{82} The lived experiences of that limited slice of the population are more likely than others to make their way into the political, distributional, and technical decisions in design.\textsuperscript{83}

C. Harms of Erasure

Automated decisionmaking systems harm marginalized populations in at least four related ways. The first two are practical. First, algorithmic tools create repeated moments of vulnerability for transgender and nonbinary individuals with inconsistent identity documents. Every airport or doctor’s visit, every job or benefits application, every background check, every vote, every interaction with the police, every plan to start a business, and every identity verification demand triggers a larger system of technological surveillance designed, from the ground up, to erase or  


\textsuperscript{79} Indeed, as the sociotechnical scholar Os Keyes found in a review of hundreds of published studies at the intersection of AI and gender, every single one reified the gender binary. Os Keyes, The Misgendering Machines: Trans/HCI Implications of Automatic Gender Recognition, 2 Proc. ACM on Hum.-Comput. Interaction, no. CSCW, art. 88, at 88:1, 88:2 (2018).

\textsuperscript{80} Hellman, Causation, supra note 59, at 487.

\textsuperscript{81} Katyal & Jung, supra note 10, at 710.


\textsuperscript{83} Id.
misgender anyone outside the norm. Second, and relatedly, the pervasive danger of vulnerability causes chilling effects. To avoid situations likely to include misgendering, many transgender individuals choose to avoid those situations entirely, opting themselves out of daily life, government benefits, and opportunity. Interviews with transgender individuals describe a “continuous assault upon our existence, well-being, opportunity, and potential” and a “process of cisgendering reality” whereby “only cisgender people may move freely without punishment, shock, and stigmatization coming from others,” among other similar expressions of harm. This may be one reason why transgender, nonbinary, and gender-nonconforming individuals report higher rates of depression, suicidal ideation, loneliness, and underemployment than the general population.

Third, exclusion comes with dignitary harms as well. Institutional erasure tells gender-nonconforming individuals that they do not count, that their identities do not matter, and that their humanity does not exist. This exclusion is then broadcast throughout the data ecosystem, affecting the views of everyone who encounters binary gender data.

Fourth, and finally, algorithms and automated systems more generally amplify these harms, creating powerful expressive effects. Because they rely on data inputs to make predictive policy decisions about the future, algorithms replicate and entrench old biases. Popular trust in computers as infallible make those predictions harder to challenge. Beyond merely amplifying old harms, automation privileges decisionmaking based exclusively on quantifiable variables, ignoring value-based, qualitative, and human rights considerations that defy neat clustering into numerical

84. Chan Tov McNamarah, Misgendering, 109 Calif. L. Rev. 2227, 2234–35 (2021) (arguing that misgendering and misrecognition are part of a pattern of subordination that denigrates the personhood of transgender and nonbinary people).
85. Currah & Mulqueen, supra note 2, at 560.
87. James et al., supra note 68, at 5–6.
89. E.g., Cathy O’Neil, Weapons of Math Destruction 3, 7–8 (2016); Pasquale, Black Box Society, supra note 59, at 14–15; Katyal, Private Accountability, supra note 17, at 69.
values. In other words, whereas inconsistencies in documents could have once been resolved through civil servant discretion, machines programmed to see only ones and zeros transform data input errors or inconsistencies into grounds for benefit denials, fraud accusations, and discrimination.

To most scholars, technology is the root cause of these harms; law seems absent from this story of automation and discrimination. Legal scholars who see law as a means of holding states and technology companies accountable for harms caused by automated decisionmaking systems tend to gloss over the things that created the conditions necessary for automation in the first place. Indeed, because it focuses on legal redress after algorithmic harm, much of the algorithmic accountability literature skips right to descriptions of legal responses to harm. Some scholars merely note that algorithmic policymaking is becoming “more common.” Others acknowledge that the rise of automation stems from austerity. Although tight budgets are undoubtedly the products of law, this legal narrative of the rise of the automated administrative state is thin.

Automated systems that apply rules, match identities, and mine for patterns need data to function; states need to find or purchase those data from somewhere. System designers also need instructions about what categories of data to include in the system. They need principles, values, directions, goals, and budgets with which to build automated tools for the state to use. In particular, the state must decide whether, when, and how to collect gender data; whether, when, and how to share it; and whether, when, and how to use it. At each stage—collection, sharing, and automated use—binary gender data’s pathway is laid, brick by brick, by law and, more specifically, by a legal regime designed primarily for efficiency. The next three Parts describe this pathway and how it erases gender-diverse populations and causes the above harms.

II. LAW AND THE COLLECTION OF BINARY GENDER DATA

Gender data’s path begins with laws that require states to collect gender data. It is difficult to estimate how many state laws require individuals to provide their sex or gender to engage in daily life; even targeted searches return thousands of hits. The examples discussed below

91. See supra note 17; see also Frank Pasquale, The Second Wave of Algorithmic Accountability, LPE Project (Nov. 25, 2019), https://lpeproject.org/blog/the-second-wave-of-algorithmic-accountability/[https://perma.cc/P68K-K87D] (referring to this scholarship as the “first wave,” following similar terminology used in the feminist movement).

92. Hellman, Causation, supra note 59, at 484.

93. E.g., Calo & Citron, supra note 23, at 800; Citron, Technological Due Process, supra note 17, at 1259; see also Robert Brauneis & Ellen P. Goodman, Algorithmic Transparency for the Smart City, 20 Yale J.L. & Tech. 103, 114 (2018) (discussing how tight budgets impel municipalities to use private technology companies for their automation needs).
are paradigmatic of the law’s role in triggering many gender data streams. After describing some of these laws, this Part then shows that even though the law rarely states how the information should be collected, the law’s underlying assumptions and practical implementation act as a filter that makes binary gender data streams most likely.

A. Statutory Gender Data-Collection Mandates

Almost all states use individuals’ sex and gender data in several administrative areas. Thirty-seven states require driver license or identification card applicants to provide their sex. Eight states ask for gender. Ten states have statutes requiring sex data on voter registration.
applications. All states require applicants to present a form of identification in order to register to vote, and all driver licenses and state identification cards must include sex designations under federal law. Statutes governing birth and death certificates all mandate the inclusion of sex data. And five states still require parties to disclose their sex on marriage license applications.

Sex and gender data are also statutorily required in more targeted areas of social and professional life. Firearm licenses require sex or gender. Prospective state employees, licensed professionals, and foster parents, among others, have to provide their sex for background checks. Licensure for for-hire and private carrier vehicle drivers, chiropractors, private detectives, medical cannabis caregivers, and


99. See Adair, supra note 36, at 587–88 (explaining how sex markers are universally mandated by the federal 2005 Real ID Act).


commercial fishers, any home solicitation salespersons, anyone “engaged in the business of collecting secondhand building materials for resale,” and precious metals dealers all require sex data in some states. Organ donors must be issued identification cards that list their sex. Anyone in Illinois and Missouri whose job requires them to work with explosives has to provide their sex to obtain a license. Collection agents in Arkansas and bail enforcement agents in Delaware can be licensed only if they provide their sex. If minors want to work in the District of Columbia or Puerto Rico, their permit or certificate must have, among other things, their sex. This section could go on and on.

**B. Mandating the Gender Binary at Data Collection**

Although these laws mandate sex and gender data collection, it is rare for a law to explicitly detail how to collect the data, what answer options to provide, how to phrase the question, or whether forms should explain why the information is required. Therefore, it is at least theoretically possible that these laws could catalyze gender data streams that respect diverse

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gender identities. To be sure, some laws do. But three features of statutory gender data mandates tend to binarize whatever data are collected: the source of the data, the assumption that gender data are a useful securitizing tool, and the law’s practical implementation. The first two concerns are discussed here; the third is detailed in the next section.

The first feature of state gender data-collection mandates that tilts the data toward the gender binary is that much of the data is created by the state in the first place. It is commonly presumed that sex and gender data are raw materials in what Professor Julie Cohen calls the “biopolitical public domain,” or a “source of raw materials about people framed as inputs into productive, informationalized activity.” These data are biopolitical because they are information about people used for classification and, therefore, have political and distributive consequences; they are also presumed to be in the public domain—namely, there for the taking within a legal construct of privilege, or “conduct as to which no one has a right to object.” The biopolitical public domain is a foundational premise of the information economy and the automated state. It asserts that certain data are raw, that no previous claims to those data exist, and that they can be collected, used, and mixed with labor and turned into something productive.

But gender designations are not raw. They are mediated by the state before and after birth: at Medicaid recipients’ prenatal appointments with healthcare providers, during which physicians designate the fetus’s sex; at birth, when physicians or bureaucrats complete birth certificates and Live Birth Worksheets; and at schools, where nurses designate sex or gender on immunization and health forms. By the time Sasha walked through the full-body scanner and Toby submitted his workers’ compensation claim, they had both been designated by the state as male or female. The presumed power of official documents to verify identity derives precisely from “the authority of the institution that issued it,” not from the


119. Id. at 49.

120. Id. at 50–52.

121. Spade, Normal Life, supra note 19, at 14.
documents’ inherent accuracy or the law’s respect for self-identification. In other words, state laws that require gender data collection are relying on the state’s determinations of a person’s gender, which historically have been binary.

In addition to assuming that sex and gender data are raw and accurate, a regime that uses sex and gender data to verify identity, assess risk, and maintain security also assumes that sex and gender are effective at achieving these goals. But the only way these data could be effective is if they were unchanging descriptions of individuals. If they weren’t, gender data would do a poor job at ensuring that the people applying for jobs or benefits or licenses are who they say they are. Security systems use retinal scans instead of, say, hair color for the same reason: The former relies on data that rarely, if ever, change; the latter can change on a whim. One is a more permanent marker of identity than the other. Of course, sex and gender designations can change. Therefore, the only people for whom gender data can help predict whether a given person is committing fraud are cisgender people. In this way, the state’s mere use of sex and gender data as securitizing, identification-verifying tools necessarily implies cisnormativity.

C. Entrenching the Gender Binary Through Form Design

This leads to the third feature of statutes’ capacity to binarize gender data—namely, their implementation in practice through official government forms. We fill out forms to obtain identification cards, purchase license plates, practice licensed professions, record vaccinations for schoolchildren, and obtain government-sponsored healthcare, among myriad other aspects of everyday life. Forms were supposed to give Toby access to compensation after being injured on the job. Forms’ ubiquity means that they have an outsized effect on how we perceive and understand the law.

Forms are also where the state collects data to classify people by race, gender, ethnicity, disability, and myriad other demographic characteristics. The design of those forms determines what the state’s gender data will

124. Not that we should rush to use retinal scans and other biometric data. See, e.g., Danielle Keats Citron, Reservoirs of Danger: The Evolution of Public and Private Law at the Dawn of the Information Age, 80 S. Cal. L. Rev. 241, 250–53, 255 (2007) (noting that “[t]he release of biometric information from a database will engender serious harm as criminals can use such data to impersonate individuals”).
look like. That is a type of power exercised by what political scientist Michael Lipsky called “street-level bureaucrats.”

Street-level bureaucrats are frontline civil servants with the least formal authority but the most discretion to determine how the law is implemented. For example, in Professor Lipsky’s canonical account, street-level bureaucrats decide how to achieve the best interests of children in foster care, flexibly apply rules to send lifesaving benefits to those in need, and evaluate patient medical needs to secure care.

Frontline workers also determine precisely how to begin the large, free-flowing system of gender data among government agencies at the local, state, and federal levels. The law of sex and gender “remains an abstraction” until these frontline workers carry it out and apply it in real life, communicating with the public through the gender questions and answer options they create. When they exercise this discretion to collect sex and gender information in certain ways, gender-box designers are effectively “making law” in the most practical sense.

Gender questions on most government forms are limited to male/female answer options. This is because form designers work in

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126. Michael Lipsky, Street-Level Bureaucracy 3 (2d ed. 2010). Granted, traditional street-level bureaucrats have often been defined by their face-to-face interactions with the public. Id. at 3–4. But their choices affect the practical implementation of the law. Mark Bovens & Stavros Zouridis, From Street-Level to System-Level Bureaucracies: How Information and Communication Technology Is Transforming Administrative Discretion and Constitutional Control, 62 Pub. Admin. Rev. 174, 181 (2002). Form designers have at least three characteristics in common with street-level bureaucrats: They exercise discretion, they shape policy through their discretionary acts, and they sit in social and organizational contexts that may affect their work. They exercise discretion because even when formal law requires an agency to collect sex or gender data, the law rarely says anything about how the agency should collect it. See Evelyn Z. Brodkin, Reflections on Street-Level Bureaucracy: Past, Present, and Future, 72 Pub. Admin. Rev. 940, 943 (2012) (reviewing Lipsky, supra) (noting that policy is “indeterminate”).

127. Steven Maynard-Moody & Michael Musheno, State Agent or Citizen Agent: Two Narratives of Discretion, 10 J. Pub. Admin. Rsch. & Theory 329, 333 (2000). Such discretion is inevitable because it is inherent to both street-level work specifically and “all acts of administration” generally. Id. at 338–39.

128. See Lipsky, supra note 126, at 3 (providing examples of roles street-level bureaucrats inhabit in public service agencies).

129. See Fahey, Data Federalism, supra note 16, at 1078–79 (documenting the ways mid-to line-level bureaucrats are part of a larger system of data exchange between agencies).

130. See Bernardo Zacka, When the State Meets the Street: Public Service and Moral Agency 16 (2017).


organizational contexts in which a combination of social forces incentivizes inertia. These include complex decisionmaking processes that make change difficult, social networks of colleagues that help civil servants “learn the ropes” and maintain the status quo, the perception that expertise is irrelevant to gender question design, and intergovernmental dependencies that constrain design options. These pressures, combined with norms against politicization of the bureaucracy, status quo biases and path dependencies, the urge to simplify information for superiors, and decades-long trends toward digitization and automation, all encourage form designers to restrict sex and gender questions to male/female answer options.

133. Ari Ezra Waldman, Opening the Gender Box: Legibility Dilemmas and Gender Data Collection on U.S. State Government Forms, 49 Law & Soc. Inquiry (forthcoming 2023) (manuscript at 14) (on file with the Columbia Law Review) [hereinafter Waldman, Opening].


138. This does not exclude the reality that transphobia pervades social and legal institutions. See Gayle S. Rubin, Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality, in Culture, Society and Sexuality, A Reader 150, 158 (Richard Parker & Peter
As a result, even if state laws simply require an agency to collect sex and gender data generally, the forms the agency uses to collect that data will most often reflect the gender binary. Consider, for example, how state boards of elections and secretaries of state implement voter registration laws. Of the seventeen states that explicitly require or request that citizens designate their sex or gender when registering to vote, fourteen use forms with only male/female options.\(^{139}\) And of the remaining thirty-four

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jurisdictions (including the District of Columbia) where the law is silent on whether sex or gender data are required to register to vote, five nevertheless have binary male/female options on their forms,\(^{140}\) three ask

registrants to select gendered salutations, and only five include the option to select “Unspecified/Other” in response to a question about gender. Civil servants made these forms, and the result of their work means that—as broad-based empirical studies have shown—the gender binary is for the most part entrenched at the implementation level.

Of course, governments do not collect all this information on their own. They also buy it from the private sector. Gender data purchased on the open market are also likely to reflect the gender binary. Despite high-profile examples of digital platforms adding multiple checkboxes to answer gender questions, those same platforms only allow advertisers to target users based on binary gender categories (male, female, or all).


143. Waldman, The Gender Box, supra note 132, at 5 (discussing how civil servants play a role in pre-determining the options on administrative forms).


They recode nonbinary individuals within the gender binary on the back end.\(^{147}\) The private sector also packages clusters of users into categories based on gender.\(^{148}\) We know little about the secretive data broker industry, so we can only surmise that it is likely that data brokers follow the gender binary as well.

Even if it were possible to systematically make gender data collection more inclusive (for many reasons discussed below, doing so is not the answer to the harms caused by gender data collection by the state\(^{149}\)), the law is not done binarizing gender data streams after mandating collection. As the next Part describes, the law also determines how that data will be shared in the automated state, privileging the gender binary along the way.

III. LAW AND THE SHARING OF BINARY GENDER DATA

Data from official government forms replicate and spread throughout the automated administrative state. As Professor Bridget Fahey notes, data are nonrivalrous and complementary: The same data can be used by multiple agencies without interfering with anyone’s access, and datasets increase in value as they increase in size by giving the state the means to learn more about the people it surveils.\(^{150}\) Large datasets are now cheap to store and easy to copy. They are even easier to use now that sophisticated AI systems are just a procurement contract away.\(^{151}\) Gender data are no different.

But the replication of binary gender data across state agencies and across states is not merely a feature of modern technology. It is also a product of the law. In addition to requiring the collection of gender data, state law often requires agencies to share the data with other departments, spreading the gender binary across government bureaucracies. State agencies agree to share gender data with each other under memorandums of understanding (MOUs).\(^{152}\) There are also interstate compacts and federal funding rules that require states to share data with other states, coordinated bureaucracies, and the federal government. These data-

\(^{147}\) Bivens, supra note 40, at 891–93 (explaining Facebook’s invisible gender-recoding process).

\(^{148}\) Bruce Schneier, Data and Goliath 63 (2015).

\(^{149}\) See infra notes 355–374 and accompanying text.

\(^{150}\) Fahey, Data Federalism, supra note 16, at 1072–73.

\(^{151}\) See infra section IV.B.

sharing mandates, agreements, and MOUs include gender information that has already been binarized at the front end by perceptions of common sense and frontline civil servants. By sharing those data, the law entrenches and normalizes the gender binary, conflates sex and gender, and creates data-driven systems that function only on binary gender data.

A. Laws and Rules Requiring Gender Data Sharing

On the premise that larger and more detailed datasets are more valuable than smaller ones, many state laws either require interagency data sharing about individuals or permit agencies to enter into data sharing agreements in order to achieve administrative goals. Many of these laws focus on children and families. For instance, Pennsylvania requires agencies to share the “contents of county agency, juvenile probation department, drug and alcohol, mental health and education records” about any child in protective services “to enhance the coordination of case management” and “disposition.” This dataset includes demographic information about the child. Louisiana law envisions the creation of data-sharing agreements among state agencies “involved in the assessment, diagnosis, treatment, care, or rehabilitation of children.” Those health records include sex data. So too would any data shared among state and federal agencies to implement health exchanges under the Affordable Care Act.

Criminal justice laws frequently include gender data-sharing mandates. California’s Monthly Arrest and Citation Register includes binary gender in its “personal characteristics.” The state’s Juvenile Court and Probation Statistical System tracks the binary sex of everyone passing through the state juvenile criminal justice system. And the California Youth Authority’s Offender-Based Information Tracking System

153. See Fahey, Data Federalism, supra note 16, at 1073.
155. Id.
157. Id.
160. Worrall & Schram, supra note 159, at 21; Brousseau Letter, supra note 159.
extracts the binary sex of juvenile offenders across all California jurisdictions from the state’s Automated Criminal History System.161

California also has many statutorily created education- and health-related data-sharing programs that limit gender data to the binary. The state’s Longitudinal Pupil Achievement Data System collects discipline and achievement data on all students in both general and special education programs.162 Its demographic dataset includes gender.163 And the state’s Cradle to Career Data System Act authorized the creation of a system-wide database that uses gender, among other data points, to help students and families successfully transition from California K–12 schools to college and the workforce.164 Notably, California includes a nonbinary gender option in annual reports about students who graduate from the state’s public schools and meet state university entry requirements.165

Then there are laws that require regulatory agencies to use data-sharing agreements to enforce the law and to verify identity. The Louisiana Gaming Control Board is authorized by state law to enter into agreements that would, among other things, share information from workers’ “personal history forms” to ensure they are who they say they are.166 Those forms only allow workers to enter “M” or “F” in response to a question about sex.167 And Montana requires its chief elections official to enter into data-sharing agreements with the state’s department of motor vehicles to “verify voter registration information.”168 Both departments collect only

161. Worrall & Schram, supra note 159, at 21; Brousseau Letter, supra note 159.
binary sex data. In Oklahoma, leaders at several state agencies have arranged to share gender data with the State Election Board, including the Department of Health (death records), court clerks (lists of convicted felons), and the Department of Public Safety (voter registration). These data-sharing laws create what Professor Fahey calls “data pools”: aggregations of information collected for a variety of purposes by other agents of the state. Data pools “aggregate power and diffuse access” by allowing more state agencies to more intensively track, surveil, and verify identities. When the laws sweep in sex and gender data, they do not always specify what that data should look like; rather, that depends on how the state agency decided to collect the data in the first place and how technical systems are programmed to use the data in the end. As we have seen, because the vast majority of that data is collected along binary lines, data-sharing mandates replicate the gender binary throughout the government’s larger data ecosystem.

B. Interagency Agreements

Interagency data-sharing agreements supplement statutory data-sharing mandates, replicating binary gender in the same way. Although many statutes permit data-sharing agreements involving the transfer of personal data, engaging with other departments and other states is often up to the agencies themselves. This type of lawmaking is more informal but no less binding on agency behavior. And many of these agreements include gender data to be used for a variety of purposes—identifying individuals and detecting fraud, conducting research, or implementing the law—or, in some cases, for no stated purpose at all. In almost all cases, the agreements are broad and traffic in binary gender data.

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170. Okla. Stat. tit. 26, § 4-109.3A (2023) (voter registration); Id. § 4-120.3A (death records); Id. § 4-120.4A (felons).
171. Fahey, Data Federalism, supra note 16, at 1012.
172. Id.
173. E.g., Conn. Gen. Stat. Ann. § 9-50c(a) (West 2023) (“The Secretary of the State may enter into an agreement to share information or data with any other state . . . .”); 105 Ill. Comp. Stat. Ann. 13/25(b) (West 2023) (providing that “[a]ny State agency, board, authority, or commission may enter into a data sharing arrangement” as part of implementing the Longitudinal Education Data System Act); Wash. Rev. Code Ann. § 50A.25.070(1) (West 2022) (“The department may enter into data-sharing contracts and may disclose records and information deemed confidential to state or local government agencies . . . .”).
174. This section is based on the results of public records requests sent to three departments—the chief election division, the motor vehicle division, and the division that administers professional licensure—in forty-five states and the District of Columbia.
Many state agencies share binary gender data with the goal of detecting fraud and verifying identity.\textsuperscript{175} Departments of motor vehicles (DMVs) and those in charge of elections and voter registration share data frequently to verify identity for benefits programs.\textsuperscript{176} DMVs share data with boards of elections to assist with voter registration.\textsuperscript{177} To verify identities, DMVs distribute binary gender data to fishing and hunting licensure divisions,\textsuperscript{178} organ donor registries,\textsuperscript{179} departments of veterans’ affairs,\textsuperscript{180} police departments,\textsuperscript{181} municipal courts dealing with traffic violations,\textsuperscript{182} Arkansas, Delaware, Kentucky, Tennessee, and Virginia only allow residents of those states to submit public records requests and receive documents, see supra note 152; therefore, those states were excluded. Additional research could cover additional divisions of state government.

\textsuperscript{175} See, e.g., Driver License Data Verification System Jurisdiction Service Agreement Between Vt. Dep’t of Motor Vehicles and Am. Ass’n of Motor Vehicle Adm’rs cls. 1 & 3(B)(xii) (Aug. 23, 2018) (on file with the \textit{Columbia Law Review}) (sharing driver license data, including gender, with the American Association of Motor Vehicle Administrators (AAMVA), a nonprofit that provides participating states with a nationwide database against which to verify the identities of those seeking licenses); Data Licensing Agreement for Driver Record Information Between [Wash.] Dep’t of Licensing and [Wash.] Emp. Sec. Dep’t 12 (Mar. 19, 2019) (on file with the \textit{Columbia Law Review}) [hereinafter Wash. Driver Record Agreement] (sharing license data, including gender, “for the purposes of fraud investigations”).


\textsuperscript{177} E.g., R.I. DMV Agreement, supra note 176, at 1; Data Sharing Memorandum of Understanding Between Vt. Dep’t of Motor Vehicles and Vt. Sec’y of State 1 (Sept. 8, 2021) (on file with the \textit{Columbia Law Review}).

\textsuperscript{178} E.g., Memorandum of Understanding Between Iowa Dep’t of Transp., Motor Vehicle Div., and Iowa Dep’t of Nat. Res. 4 (Oct. 1, 2021) (on file with the \textit{Columbia Law Review}) [hereinafter Iowa DNR MOU].

\textsuperscript{179} E.g., Contract for Acquisition of Records in Bulk for Permissible Purposes Between Idaho Transp. Dep’t and DonorConnect 2 (Oct. 12, 2021) (on file with the \textit{Columbia Law Review}) [hereinafter Idaho DonorConnect Contract].

\textsuperscript{180} E.g., Memorandum of Agreement Between the Idaho Transp. Dep’t and the Idaho Div. of Veteran Servs. 1 (Sept. 17, 2020) (on file with the \textit{Columbia Law Review}).

\textsuperscript{181} E.g., Memorandum of Agreement for Use of Records Among N.C. Dep’t of Transp., Div. of Motor Vehicles, Dep’t of N.C. Pub. Safety, State Highway Patrol, and Interplat Solutions, Inc. 11 (Sept. 5, 2022) (on file with the \textit{Columbia Law Review}); Wash. State Dep’t of Licensing, DSC-425-009, Moxee Police Dep’t, Driver and Plate Search (DAPS) and Driver Information and Internet Query System (IHPS) Agency Access Request 5 (Oct. 5, 2016) (on file with the \textit{Columbia Law Review}). Public records requests resulted in more than 217 identical or similar agreements with different police departments and federal investigative units.

\textsuperscript{182} E.g., Interagency Data Sharing Agreement Between [Wash.] Dep’t of Licensing and Wash. State Admin. Off. of the Cts. 13 (July 9, 2019) (on file with the \textit{Columbia Law Review}).
and departments of social services.\footnote{E.g., Memorandum of Agreement for Secure Online Access to Information Between Mo. State Emps.' Ret. Sys. (MOSERS) and Mo. Dep’t of Revenue 1 (Mar. 12, 2014) (on file with the \textit{Columbia Law Review}).} And all of these agreements include gender data.

States that share borders with Canada or Mexico exchange all data on Enhanced Driver’s Licenses with the Department of Homeland Security for border security purposes.\footnote{E.g., Addendum to the Memorandum of Agreement Between State of Vt. and DHS 1 (Mar. 15, 2017) (on file with the \textit{Columbia Law Review}).} DMVs also share gender data with departments, like those responsible for enforcing child support orders, that can order driver’s license suspensions for people who fail to meet their obligations.\footnote{E.g., Memorandum of Agreement Between Idaho Transp. Dep’t and Idaho Dep’t of Health & Welfare l–2 (n.d.) (on file with the \textit{Columbia Law Review}).} When the departments originating the data collect only binary sex and gender information, only male/female data can be shared.

A second cluster of interagency agreements that share gender data focuses on research. Rhode Island shares voter registration data, including the identification information provided at registration, with Brown University’s Rhode Island Innovative Policy Lab for research into how voter identification requirements impact registration and turnout rates.\footnote{Cooperation and Data Sharing Agreement Between R.I. Innovative Pol’y Lab at Brown Univ. and R.I. Dep’t of State 6 (May 30, 2018) (on file with the \textit{Columbia Law Review}).} Iowa shares binary sex and gender data with the University of Northern Iowa to “assist in identifying any health disparities . . . for those seeking treatment for problem gambling and/or substance abuse disorders.”\footnote{Monitoring and Evaluation Contract, Special Conditions for Contract #5882BH11 Between Iowa Dep’t of Pub. Health and Univ. of N. Iowa 3–4 (Sept. 27, 2021) (on file with the \textit{Columbia Law Review}).} In both cases, sex and gender data are exclusively binary.

State agencies also share sex and gender data with divisions of criminal justice, schools, and health to, among other things, “carry[] out . . . investigations [and] prosecutions of criminal offenses.”\footnote{Data Sharing Agreement Between Wash. Dep’t of Licensing and Wash. Att’y Gen.’s Off. 15 (Mar. 9, 2020) (on file with the \textit{Columbia Law Review}).} In Washington State, for example, the automobile licensing division shares gender data with all “authorized criminal justice authorities throughout the state” for general use.\footnote{Contract Between Wash. State Dep’t of Licensing and State of Wash. Admin. Off. of the Cts. 5 (Sept. 30, 2017) (on file with the \textit{Columbia Law Review}).} North Carolina’s FAST Program, which facilitates the state department of health’s provision of social services to families, has collected gender data from the state’s DMV since 2013.\footnote{Memorandum of Understanding Between N.C. Div. of Motor Vehicles and N.C. Dep’t of Health & Hum. Servs. attaches. 1, 2 (Sept. 25, 2013) (on file with the \textit{Columbia Law Review}).}
These are just a handful of examples available through public record requests. But data-sharing agreements are common arrangements among a variety of agencies. Including agreements signed between 2016 and 2022, the Florida Department of Highway Safety and Motor Vehicles is currently a party to at least 1,172 active data-sharing agreements with state agencies, agencies in other states, the federal government, or private entities. The Washington Department of Licensing has data-sharing agreements for driver data—which include gender—with at least 349 other agencies.

C. Interstate Compacts and Data Federalism

There are also explicit intergovernmental dependencies that spread sex and gender data throughout the government data ecosystem. For instance, state agencies have agreed to share binary sex and gender data with other departments and the federal government to determine eligibility for public benefits programs, including the Tenant Rental Assistance Certification System (TRACS) and the Supplemental Nutrition Assistance Program (SNAP). Federal funding for state agencies involved in coordinating foster care programs is also tied to a long-running data-sharing agreement in which states must report children’s sex as either “male” or “female.”


192. See Washington Dep’t of Licensing, DIAS Account List (n.d.) (on file with the Columbia Law Review) (listing 349 accounts).

193. Professor Fahey chronicled many of these but did not focus on whether—or how—they shared gender data. See Fahey, Data Federalism, supra note 16, at 1016–29.


All states participate in the CDC’s National Notifiable Disease Surveillance System (NNDSS), a “passive surveillance system” that collects data from state health departments on incidents or outbreaks of more than 120 diseases. The NNDSS collects gender data chaotically: Each division within the CDC designs sample forms for the reportable diseases in its portfolio. Its Adult and Pediatric HIV/AIDS Confidential Case Report Forms, which are used in at least eleven states, asks for individuals’ “sex assigned at birth” with “male,” “female,” and “unknown” answer options, as well as “gender identity” with a variety of inclusive options. Many of the CDC’s other disease surveillance forms ask for “sex” with just three answer options, and its Multisystem Inflammatory Syndrome Associated With COVID-19 Form asks for “sex” but provides only “male” and “female” answer options.

Twenty-five states and the District of Columbia are part of the Electronic Registration Information Center (ERIC), a nonprofit corporation that helps states improve voter roll accuracy and increase

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access to voter registration.²⁰⁰ Twenty of the current twenty-six ERIC members explicitly collect sex or gender data during the voter registration process, and all of them collect it when individuals apply for driver licenses.²⁰¹ Only two of those states allow gender designations other than “male” or “female.”²⁰²

The National Crime Information Center (NCIC), which “anchors the intergovernmental exchange of information for day-to-day policing,”²⁰³ allows law enforcement to cross-check information on license plates and identifications with various law enforcement databases. Within the NCIC system, the Interstate Identification Index (III) includes, among other things, a person’s “sex” with male, female, and unknown coding options.²⁰⁴ Similarly, the National Instant Criminal Background Check System, which allows federal or state agents to run background checks on individuals before firearm purchases, leverages only binary sex information for identity verification purposes.²⁰⁵ And the National Adult Mistreatment Reporting System gathers information about perpetrators of elder abuse, including the genders of victims. This data is reported annually, broken down by “men” and “women.”²⁰⁶

Several interstate compacts include gender data and privilege the gender binary.²⁰⁷ For instance, all fifty states and the District of Columbia are part of the Interstate Compact on Juveniles, a contract that has been

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²⁰¹. See supra notes 95–98 and accompanying text.
²⁰². See supra notes 95–98 and accompanying text.
adopted as law regulating the interstate movement of minors under court supervision or who have run away to another state.\(^{208}\) The Compact requires those staffing its administrative body, the Interstate Commission for Juveniles, to “establish a system of uniform data collection on information pertaining to juveniles.”\(^{209}\) Therefore, the Commission, not individual states, dictates how the data should be gathered.\(^{210}\) Six of the Compact’s ten approved forms ask for sex, with “male,” “female,” and “unknown” answer options.\(^{211}\) All participating jurisdictions must follow that protocol.

D. *Entrenching the Gender Binary at Data Sharing*

Just like the law of data collection, data-sharing mandates and more informal interagency agreements entrench the gender binary by making similar assumptions about gender data as static, secure identifiers. But the law of data sharing goes further. It solidifies the gender binary throughout the government’s data ecosystem in three ways: Data-sharing agreements have expressive, conflationary, and interoperability effects.

As it spreads gender data, data-sharing law generates expressive and normalizing effects, framing how anyone who sees and uses the data understands sex and gender.\(^{212}\) As many scholars have argued, law is an instrument of norm production that influences people’s behavior indirectly by signaling what society thinks is right or wrong.\(^{213}\) In other words, law has an “expressive function”\(^{214}\) that creates “cultural consequences.”\(^{215}\) Professor Dan Kahan has argued that “gentle nudge[s]”

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\(^{211}\) Id. (listing Commission-approved forms, including six that require sex data: Forms I, II, III, IV, and VII).

\(^{212}\) Flynn, supra note 88, at 466.

\(^{213}\) See, e.g., Citron, Expressive Value, supra note 88, at 377; Sunstein, supra note 88, at 2022–24.

\(^{214}\) Sunstein, supra note 88, at 2024; see also Deborah Hellman, The Expressive Dimension of Equal Protection, 85 Minn. L. Rev. 1, 39–40 (2000) (arguing that “to treat people with equal concern, government must attend to the expressive dimension of its actions”).

can incrementally change existing social norms by encouraging individuals to “revise upward” or downward “their judgment of the degree of condemnation warranted by the conduct in question.” Data streams created and maintained by law are no different. The more binary gender data spreads, the more people will encounter it, and the more power it will have to reify sex and gender as binary and static. In this way, laws that spread binary gender data normalize it as true and correct; they facilitate elision between frequency and propriety, nudging us to think that the things we see often—male/female-only categories—are the normal, commonsense ways to conceptualize and classify by sex and gender.

Many of these agreements also conflate sex and gender. For instance, although the Iowa DMV collects sex data only from applicants for licenses and identification cards, its data-sharing agreement with the state’s Department of Natural Resources refers to sharing gender data. Idaho makes the same mistake in its MOU with the state’s organ donor registry. More than half of the relevant interagency agreements provided under public records requests conflate sex and gender.

Doing so helps reify the gender binary. Sex is primarily a matter of chromosomes or genital anatomy; gender is primarily a matter of social expectations and performance. Sex and gender are undoubtedly

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217. Normalization is cognitive slippage from statistical frequency to moral propriety; it is a process through which common things come to be understood as acceptable, ordinary, and, ultimately, good. See Adam Bear & Joshua Knobe, Normality: Part Descriptive, Part Prescriptive, 167 Cognition 25, 25 (2017) [hereinafter Bear & Knobe, Normality]. Political scandals are good examples of this phenomenon. As psychologists Adam Bear and Joshua Knobe have written, when a politician “continues to do things that once would have been regarded as outlandish, [their] actions are not simply coming to be regarded as more typical; they are coming to be seen as more normal[,] . . . as less bad and hence less worthy of outrage.” Adam Bear & Joshua Knobe, Opinion, The Normalization Trap, N.Y. Times (Jan. 28, 2017), https://www.nytimes.com/2017/01/28/opinion/sunday/the-normalization-trap.html (on file with the Columbia Law Review); see also Diane Vaughan, The Challenger Launch Decision: Risky Technology, Culture, and Deviance at NASA 77–195 (1996) (demonstrating how routinized decisions that violated rules and norms came to be normalized as part of engineering and testing work).


219. Iowa DNR MOU, supra note 178, at sched. A.

220. Compare Idaho Code § 49-306 (2023), with Idaho DonorConnect Contract, supra note 179, at 2. It could be argued that this change from sex to gender reflects bureaucratic discretion or an agency exercising its delegated power to implement the law through its unique expertise. See Edward H. Stiglitz, Delegating for Trust, 166 U. Pa. L. Rev. 633, 635 (2018) (noting that the primary justification for the administrative state is agency expertise).

221. See supra section III.B.

entangled; each influences the other. But smashing them together without a second thought “forcibly homogenizes” human personalities and “validates hetero-patriarchy” by associating gender with the biological definition of sex. Conflating the two concepts can deny the existence of masculine or androgynous women and feminine or androgynous men.

Data-sharing law also creates interoperability effects. In computer science and engineering, interoperability refers to the capacity of technical systems to interact, connect, and function together. Interoperability can be an anticompetitive barrier to information flow: App Store mobile apps will only run on Apple’s operating system, giving the company significant influence over individuals’ downstream technology purchases; Facebook made Instagram interoperable with itself but not with Twitter. But from the government’s perspective, interoperability is a key driver in law enforcement data sharing.

When disparate technologies in a federal system are integrated, authorities have more data to use, more surveillance capacity, and seamless, efficient access to information. Indeed, interoperability in law enforcement intelligence data systems is actually federal law.

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230. See 8 U.S.C. § 1722(a)(2) (2018) (“[T]he President shall develop and implement an interoperable electronic data system to provide current and immediate access to
But because the benefits of interoperability hinge on system integration, any state wishing to participate in data-sharing systems must conform its data-collection practices to the designs of interagency databases. For instance, if they want to participate in the National Driver Register (NDR) Problem Driver Pointer System (PDPS), a database of information about those whose driving privileges have been revoked, suspended, or canceled, states can collect and share only binary sex information from DMV records because the PDPS is designed with only “male” and “female” options for sex. Therefore, regardless of how state agencies might decide to collect gender data within a vague statutory mandate, data-sharing agreements force those agencies to follow the designed-in limits of the databases and technological systems that use gender data. What is more, decades-old systems are difficult to change. Inclusivity at the data-sharing stage would require not only more nuanced agreements that might dictate inclusive data collection but also wholesale refactoring of the underlying databases to accept that inclusive data. That is a tall order.

IV. LAW AND THE USE OF BINARY GENDER DATA

Having collected and pooled gender data, street-level bureaucrats in state agencies then exercise their discretion to use those data. Indeed, sex and gender have long but checkered histories as classification tools.


233. Courts have a history of using gender (and race) data to calculate injured persons’ future lost earning capacities. Martha Chamallas, Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss, 38 Loy. L.A. L. Rev. 1435, 1438–39 (2005). Many areas of family law still expect spouses to conform to social expectations associated
Even automated processing of gender data by the state is not new. But AI-driven automation makes things qualitatively different today.

This Part tells the legal story behind how and why automated technologies in the administrative state tend to rely on and reify the gender binary. With the growth of what Professor Aziz Huq called the “allocative state,” state agencies that have to distribute benefits are incentivized to use AI to determine eligibility, detect fraud, and calculate entitlements. Enforcement obligations and backlogs have pushed agencies to use AI to predict violations of the law. These developments in law coincide with trends in the political economy of the state: Statutorily imposed austerity, budgetary constraints, and the significant increase in state data collection and sharing have pressured state and local governments to automate.

But the law does more than restrict budgets and get out of the way of innovation. The reality is that the law actively binarizes gender data at
use by directly mandating and indirectly incentivizing agencies to automate their administrative functions to improve efficiency and to rely on more and more data as the basis for effective governance.

A. Mandating Automation: The Law on the Books

For decades, states have explicitly required agencies to automate their work to increase efficiency. In 1979, Virginia established an automation fund to “fully automate[]” the entire system of vital statistics.\(^{240}\) California required all counties and its department of health to automate the process “that accepts and screens applications for benefits under the Medi-Cal program” to streamline identity verification and eligibility determinations.\(^{241}\) The state also made new county grant-reporting requirements contingent on implementing the “necessary automation to implement” the law efficiently\(^{242}\) and required the Student Aid Commission to “develop an automated system to verify a student’s status as a foster youth to aid in the processing of applications for federal financial aid.”\(^{243}\) The Colorado Public Assistance Act incentivized counties to use the state’s automated case management and child support systems rather than spending additional funds on their own.\(^{244}\) Arizona and West Virginia, among many other states, require their agencies in charge of enforcing child support orders to use “automated administrative enforcement” to respond to requests “promptly.”\(^{245}\) California law also tasks the director of Child Support Services with “implementing and managing all aspects of a single statewide automated child support system” that carries out state child support obligations promptly and efficiently.\(^{246}\)

If these and countless other statutes mandate the automation of specific state functions, general declarations of the efficiency benefits of automation have established automation as official state policy. When enacting campaign disclosure laws, the Kentucky General Assembly found that “computer automation is a necessary and effective means” of processing “vast amounts of data.”\(^{247}\) California has declared that statewide-automated systems are “essential.”\(^{248}\) The federal government

\(^{242}\) Id. § 11265.1(c)(3)(B)(ii).
has also connected automation with increased efficiency in several administrative spaces, including family support.249

Many states have also created chief data, information, or innovation offices (CIOs) with the explicit goal of automating state decisionmaking systems to increase efficiency.250 Vermont created an Agency of Digital Services to provide technological solutions to all parts of state government and avoid costs or save money "as a result of technology optimization."251 Ohio recently created an Office of Human Services Innovation in its Department of Jobs and Family Services, in part to make statewide policy recommendations for “[s]tandardizing and automating eligibility determination policies and processes for public assistance programs.”252 When creating its CIO position, Puerto Rico stated that the systems the CIO would create “must contribute to a more efficient use” of government resources.253 In Utah, the state’s CIO will approve new funding for automation only if it “will result in greater efficiency in a government process.”254 This is a pattern. Nearly 200 state laws associate automation, CIO missions, and efficiency.255

In addition to formalizing automation as a government goal, laws on the books also establish efficiency as government policy, guiding the terms on which agencies use automated tools. At the federal level, the Office of Management and Budget (OMB) and one of its subdivisions, the Office of Information and Regulatory Affairs (OIRA), use technical review and approval processes to implement efficiency mandates like budget controls and narrow versions of cost–benefit analyses over a host of agency actions.256 As Professor Julie Cohen has demonstrated, OMB/OIRA


251. Vt. Stat. Ann. tit. 3, § 3303 (2023); see also id. at §§ 3301–3305 (“The Agency of Digital Services is created to provide information technology services and solutions in State government.”).


involvement prioritizes efficiency over other values. In particular, OMB/OIRA’s integration into the administrative state brings accountants and other professionals focused on “efficient management” to the forefront of agency decisionmaking even when those agencies’ missions center public health, equity, or welfare. Those professionals use the logics of accounting and management to make normative decisions about a program’s value seem like detached, neutral appraisals of dollars and cents.

This creates a fertile ground for automation. Efficiency mandates to do necessary government work with less funding decouple agency missions from experts trained in the agency’s goals and shift power to number crunchers focused on one thing—efficiency—that takes primacy over other agency goals. And automated technologies are universally touted as enhancing administrative efficiency. More specifically, cost–benefit appraisal methods are inherently utilitarian and, therefore, assume that even serious harm, especially to a small minority of the population, could be outweighed by higher levels of economic benefits for others. As a result, cost–benefit analysis implements efficiency mandates in ways that make realizing those benefits through automation more likely.

B. Efficiency and the Gender Binary

What do efficiency mandates have to do with binary gender? In addition to falling prey to the same problems as the law of gender data collection and sharing, gender data law privileges the gender binary because it creates a certain type of regulatory automation—namely, one guided by values of efficiency and risk management. This system erases transgender and gender-nonconforming individuals in three ways: The resulting technologies model probabilities that exclude minorities, reflect managerial interests that ignore inclusion, and incorporate coding language that binarizes data inputs.

As we have seen, the law of gender data use mandates and incentivizes automation primarily to verify identity, prevent fraud, and achieve security. In that way, the law envisions automation as a form of governmentality

258. Id. at 194.
259. Id.
260. Id. at 194–95.
261. See, e.g., Citron, Technological Due Process, supra note 17, at 1259.
aimed at risk management. Algorithmic technologies like the ones experienced by Sasha and Toby are forms of “targeted governance” in which the logics of information, surveillance, and prediction are carried out through data-driven assessment of systemic threats. But assessing risk requires modeling threats and statistical modeling “depend[s] on assumptions about variables and parameters that are open to contestation.” This kind of quantification has been shown to accelerate predictable injustice.

But the problem runs deeper. Modeling for risk requires technologies to rely on probabilities; even systemic threats are potential future harms that may or may not occur. So when technological systems are assessing whether Sasha is a terror threat or Toby is a fraud threat, they are using gender data in a complex probabilistic equation. Policy by probabilities is ostensibly efficient: It captures the realities of most people most of the time. As applied to any given individual, however, what that probability predicts could be off the mark or incorrect. Because transgender and nonbinary individuals make up less than 0.8% of the U.S. population and usually far less in surveys, statistical models designed for efficiency are likely to fail when applied to them, excluding them as “noise.” Gender-diverse populations are certainly not the only marginalized groups victimized by technical tools that are trained on data about the general population norm; queer people of color and those at the intersection of


265. Calo, Modeling, supra note 90, at 1395.


268. Cohen, Between Truth and Power, supra note 16, at 183; see also Calo, Modeling, supra note 90, at 1398–405; Scheuerman et al., supra note 56, at 144:6.


several matrices of domination fare worse. But as Os Keyes, a scholar of human-centered design and engineering, has argued, when “an error rate . . . disproportionately falls on one population[,] [it] is not just an error rate: it is discrimination.”

Sex and gender data use in the automated state is also decidedly managerial. Managerialism is an ideology and set of practices closely associated with neoliberal governmentality in which values like efficiency, innovation, and data-driven policy take primacy over social values. Efficiency is by no means a bad thing, but a managerial approach to governance relies on narrow, financialized conceptions of costs and benefits to determine efficiencies. That leaves little room for social welfare and gender inclusivity.

For instance, even though scholars talk about interagency MOUs and data-sharing agreements as if they are between governments or government departments, they are really agreements between those departments’ managers. As noted above, the law of sex and gender data sharing is often not the product of statutory permission but civil servant discretion. Therefore, interagency agreements reflect the goals and orientations of departmental managers or what their departments need to fulfill the jobs of governance. Those goals can undoubtedly overlap with other values, like equity and antisubordination, democracy, or the general welfare. But the extent to which those values are realized through agency action depends on whether they align with managers’ goals. And if keeping costs down is state law, efficiency will take center stage in those goals.

The managerial automated state is one that judges its automation on cases closed and dollars saved. Those metrics are designed to elide even significant harm to small populations. That means consigning transgender and gender-nonconforming individuals to repeated moments of everyday vulnerability even as the automated tools responsible for that

271. See Buolamwini & Gebru, supra note 12, at 10 (concluding that, based on an “intersectional demographic and phenotypic analysis, . . . all algorithms perform worse on female and darker subjects when compared to their counterpart male and lighter subjects”).
274. Id.
275. Willard F. Enteman, Managerialism: The Emergence of a New Ideology 154 (1993) (identifying managers of organizations and negotiations among managers as the key instruments of authority in managerialist societies).
276. Id. at 184.
278. Id. at 190–91, 195.
vulnerability are legitimized as effective, “intelligent,” and efficient risk-management policymaking.279

A third way that the efficiency-focused law of gender data use entrenches the male/female binary centers on database design, coding, and function. If the state wants to put its sex and gender data into databases so the data can be used by data-matching and data-mining systems in the most efficient way possible, coders will choose “Boolean variables” to describe gender instead of a box for an open-ended answer.280 A Boolean variable is a binary variable with only two options: 0 and 1. As critical information studies scholar Meredith Broussard notes, if the state designs code “for maximum speed and efficiency using a minimum of memory space, you try to give users as few opportunities as possible to screw up the program with bad data entry. A Boolean for gender, rather than a free text entry field, gives you an incremental gain in efficiency.”281 Coding for gender as a Boolean or binary variable is also deeply ingrained in computer science and programming education282 as well as governments’ long history of digitization and automation.283 At the same time, the practice excludes those who do not identify as either male or female.

C. Guiding Automation: The Law on the Ground

While the laws on the books mandate or foster automation to realize efficiency benefits, the law on the ground—including public-sector procurement and the applications of trade secrecy and procedural privacy law in practice—further facilitates the kind of automation that tends to

279. Valverde & Mopas, supra note 264, at 239. The problem of regulatory managerialism also explains the insufficiency of the procedural due process proposals in the algorithmic accountability literature. These proposals include audit trails, impact assessments, and humans in the loop of automated decisionmaking systems. See, e.g., Reisman et al., supra note 17, at 3–6 (recommending impact assessments); Citron, Technological Due Process, supra note 17, at 1258, 1305 (fairness standards and audit trails); Froomkin et al., supra note 17, at 38 (requiring humans in the loop); Jones, supra note 17, at 217 (audit trails and requiring humans in the loop); Kaminski, supra note 17, at 1535 (audit trails); Selbst, supra note 24, at 129–25 (impact assessments). Imbued with management values and implemented by compliance professionals, these tools are easily subject to capture. Ari Ezra Waldman, Privacy Law’s False Promise, 97 Wash. U. L. Rev. 773, 776 (2020) [hereinafter Waldman, False Promise] (noting that compliance professionals define privacy law’s implementation, leading to compliance measures promoting efficiency and risk management rather than the law’s stated goals).


281. Id.


283. See Hicks, supra note 73, at 29.
flatten gender data into binary male/female options. Procurement, as Professors Deirdre Mulligan and Kenneth Bamberger argue, is both a process and a mindset.284 As a process, procurement is a pathway through which government agencies send out requests for proposals (RFPs) for new technologies, evaluate them based on a series of defined metrics, and acquire technologies by entering into contracts with for-profit, third-party vendors.285 It is governed by detailed regulations that promote certain values: low costs, fair bidding, innovation, and healthy competition.286 As a mindset, procurement positions AI and machine learning as “the next logical step” in administrative automation and as “machinery used to support some well-defined function” instead of an exercise in the distribution of power.287

Both the process and mindset of technology procurement make it more likely that the technology purchased by the state will embed the gender binary. They do this by immunizing algorithmic technologies from the interrogation necessary to disrupt the status quo—which almost always relies on the gender binary—in three related ways.

First, the process and mindset conceptualize AI and algorithmic technologies as neutral processes that simply help fulfill agencies’ missions.288 In theory, that is why procurement can be done through the neutral language and process of RFPs rather than the political language and process of policy.289 RFPs are not supposed to make policy; they solicit bids for technologies to implement policy.290 Under this logic, the technology does what the agency has always done, only more quickly, more cheaply, and supposedly with fewer mistakes. This was precisely the position of the Department of Homeland Security when federal law authorized the creation of new “fusion centers” that pooled national

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285. Id.


288. Id. at 789.

289. Traditional agency policymaking, at least at the federal level, is governed by the Administrative Procedure Act, which provides two pathways for agency policymaking: rulemaking, which includes a public notice and comment period during which members of the public can provide feedback, and adjudication, in which the agency applies its rules to the entities it regulates. See 5 U.S.C. §§ 551–559 (2018).

The Department’s privacy impact assessment (PIA) stated that fusion centers, which used advanced technology to collect, share, and process large amounts of data related to law enforcement, national security, and terrorism, were simply replicating “many of the interactions the Department was already undertaking.” And if technology simply does what an agency has always done, then there is no need to evaluate its underlying assumptions, normative choices, and design. This means that any existing state practice that uses binary sex and gender data will simply be integrated and encoded into a new system without interrogation.

Second, the procurement process and mindset situate agency expertise as dependent on and subordinate to technological expertise, privileging the latter over the former. If agency staff have few technical skills and conceptualize their role as simply using a complex tool that a private-sector expert built, they often assume they are incapable of interrogating the technology even if they wanted to. This presumed ignorance has taken center stage in litigation. In State v. Loomis, a due process challenge to Wisconsin’s use of an algorithm that took gender into account when determining likelihood of recidivism, no one from the state (even the judges deciding the case) knew how the algorithm worked. The same thing happened in Estate of Jacobs v. Gillespie, a challenge to Arkansas’s use of an automated system to determine disability benefits. No one from the state saw it as their responsibility to understand how a critical system actually functioned. Without public willingness or desire to interrogate the normative, political, and distributive choices made by algorithmic design, private-sector engineers and managers make those choices. The values and norms of their sociotechnical environment get embedded into automated decisionmaking systems. Therefore, even if an engineer could capture legally relevant variables in design, the technology might still not capture the law’s normative goals.

291. Fahey, Data Federalism, supra note 16, at 1024–26 (explaining how fusion centers facilitate information exchange between government law enforcement agencies by collocating government personnel and sharing access to information in each other’s possession).


293. 881 N.W.2d 749, 753 (Wis. 2016).


296. Calo & Citron, supra note 23, at 799 (describing that agency officials “did not know how the system worked”).

297. See Bear & Knobe, Normality, supra note 217, at 25.

298. See Noëmi Manders-Huits, What Values in Design? The Challenge of Incorporating Moral Values Into Design, 17 Sci. & Eng’g Ethics 271, 279 (2011) (arguing...
managers’ traditional goals: efficiency, technical function, and profit. Inclusive and respectful gender data is not one of those goals.

Third, the procurement process and mindset defer to private companies’ demands for maximalist intellectual property and trade secrecy protections. To obtain technologies they find both necessary and complex, governments often use procurement contracts that protect the trade secrets of their vendors. For instance, the Alaska Procurement Policies and Procedures Manual requires agencies to treat as confidential anything designated as a trade secret by a third-party vendor in a procurement contract. The Freedom of Information Act and its state equivalents exempt trade secrets, allowing vendors to provide necessary information in response to RFPs without fear of any of it being released to the public. And, as the law and technology scholar Rebecca Wexler has shown, vendors have routinely used trade secrecy claims to protect their sentencing, recidivism, and parole algorithms from being interrogated in court. At present, at least twenty-one states have codified trade secrecy privileges in their evidence rules, further insulating automated technologies from public interrogation. By privileging private technology over the public interest, the procurement process and mindset shield automated technologies from the kind of deep public review that could uncover transgender and nonbinary erasure.

D. Immunizing Automation: Information Law in Action

Alongside the procurement process and mindset, agencies and the technology companies that build algorithmic decisionmaking systems leverage information law to foster automation that binarizes gender. Specifically, both the state and technology vendors weaponize privacy impact assessments (PIAs) to prevent anyone from interrogating how algorithmic technologies use gender while prioritizing efficiency and the utilitarianism of cost–benefit analysis.

At the federal level, the E-Government Act of 2002 requires agencies to conduct PIAs for any electronic information system or program that
collects information about citizens.\textsuperscript{304} Several state laws also require agencies to develop rules for conducting or completing PIAs for any use of technology involving citizen data.\textsuperscript{305} PIAs are supposed to describe the information to be collected, its purpose and use, how the information will be secured, when individuals will have opportunities to deny or grant consent, and to what extent the technological system will impact individual privacy.\textsuperscript{306} Their goal is to legitimize the use of data-driven technologies by passing them through a form of informal due process, checking them against values like security and privacy.\textsuperscript{307} But in reality, both in their design and their application, PIAs do not consider transgender and nonbinary erasure.

Consider, for example, the PIA used by the executive branch of West Virginia.\textsuperscript{308} In a “threshold analysis,” agencies designate whether the technology being reviewed is major, minor, a support system, or something else.\textsuperscript{309} They then have to acknowledge if personally identifiable information (PII) is involved in the system. Gender is included in the list of PII, but there is no opportunity to describe how the technology collects or uses gender data or if those uses are in any way problematic.\textsuperscript{310} West Virginia’s Data Classification Policy considers gender data “sensitive” but not “restricted,”\textsuperscript{311} which means that no additional work or special

\begin{itemize}
\item \textsuperscript{307} Selbst, supra note 24, at 123–35 (arguing that for algorithmic impact assessments to be successful, they must take into account the way regulation is filtered through institutional logic).
\item \textsuperscript{309} Id. at 5.
\item \textsuperscript{310} Id. at 5–6.
\item \textsuperscript{311} State of W. Va. Off. of Tech., Policy: Data Classification 2–3 (Jan. 6, 2010), https://drive.google.com/file/d/1NNqhxRmfaKSEa0PBuIrIQGG0MYvJc/view [https://perma.cc/NX59-JLWF] [hereinafter W. Va., Data Classification Policy] (last
restrictions are necessary to protect it. For instance, if the technology uses only “sensitive” data, the vendor can have free access to those data and store them in jurisdictions with weak privacy laws. The PIA then asks if there is statutory authorization to collect and use citizen data, how it will be used, where the information will be stored, and whether the data can be shared electronically or on paper. Finally, it accounts for controls, asking: “Are there controls in place to ensure that access to PII is restricted to only those individuals who need the PII to perform their official duties?” There are three answer options: “yes,” “no,” and “NA.” “Are there physical controls in place to ensure the files are backed up?” Again, “yes,” “no,” and “NA” are the only possible—and only required—answers. The PIA concludes by asking whether the agency has an incident response plan and requesting a simple dropdown yes/no answer for whether “additional risk mitigation [is] needed.”

The TRACS PIA completed by HUD’s Office of Housing follows the same pattern. It notes that the genders of those receiving federal housing assistance will be collected and processed, but there is no space in the PIA design to consider the impacts on diverse gender identities. With PII in the system, the PIA asks for “security control” and provides a check box to indicate that such controls exist. It asks for remote work policies and rules about downloading information, which the Office of Housing answered by listing rules from the Department’s handbook. The PIA concludes with questions about security protocols.

This is how PIAs function in the information industry as well. Reduced to checkbox compliance and simple questions, PIAs tend to focus on procedure and security. The capacity of PIAs to have any substantive impact on underlying technologies is also a matter of PIA design. That is, if PIAs do not ask about the scope of gender data, whether the data include transgender, nonbinary, and gender-nonconforming individuals, or how the technology might cause gender erasure, those questions will not be considered. PIAs interrogate only those aspects of technology captured by...
their questions; civil servants can answer only with the options they are provided.

Asking more probing questions on PIAs will not solve the problem. PIAs are necessarily cursory. They are often reduced to simple charts with “yes” or “no” answer options so they can be completed by nonexperts. As a result, they become tools for legitimizing otherwise data-extractive technologies without any deep interrogation of their impact on even those facets of technology design covered by the PIA. For government agencies that have already decided they want to purchase a particular automated technology, PIAs like the ones used by HUD or West Virginia become window-dressing procedures, a form of performative compliance, that offer the gloss and patina of accountability without any of the work. They are, in short, formalities. And yet, they retain power backed by the formal law; a PIA is a necessary precondition of using new automated systems. Just like their corporate counterparts, state providers of PIAs legitimize quests for automation.

V. Lessons for the Automated State

Law plays a critical role in creating an automated state that prioritizes efficiency and, therefore, binarizes sex and gender data. This conclusion reinforces the notion, now well established in the law and political economy literature, that economic and distributional systems are creatures of law. In addition to buttressing some of what we already know about the law, this Article’s case study of sex and gender data offers several additional insights into the automated administrative state in general, insights that challenge and add nuance to the conventional wisdom about the state’s use of algorithmic tools. This Part explores four of those lessons.

First, despite the popular view that automation erodes discretion, this Article demonstrates discretion’s persistence. Second, contrary to the conventional account about the primacy of engineering expertise in the automated state, this Article shows how much the state and engineers rely on stereotypes and perceptions of common sense when designing technology and doing their jobs. Third, challenging the view that automation occurs in a regulatory void, this Article shows how automation is a product of neoliberal approaches to law. Finally, contributing to scholarship focusing on technology’s subordinating capacities, this Article shows how the law of automation creates a state that is simultaneously awash in gender data but devoid of gender-diverse data, subjecting transgender, nonbinary, and gender-nonconforming individuals to all the

324. Id. at 133.
325. Waldman, False Promise, supra note 279, at 785.
harms of the data-driven state without any of the benefits. With these lessons, this Part concludes by returning to privacy law principles of data minimization and antisubordination for a new framework to govern sex and gender data: The state should collect, share, and use only as much gender data as is necessary to contribute to the liberation of gender-diverse populations.

A. Persistent Discretion

Many law and technology scholars have argued that automating state apparatuses takes away opportunities for civil servants to exercise discretion, a key rationale for the administrative state in the first place and a critical tool for individualized care for those in need of government assistance.327 Although discretion in the administrative state looks different today than it once did, the law of sex and gender data collection, sharing, and use demonstrates the continued strength and persistence of street-level bureaucratic discretion in the automated state.

Automated decisionmaking does disrupt some of the traditional functions of street-level bureaucrats. For instance, instead of having a social worker visit disabled residents in person to determine how much in-home care they needed, Arkansas turned to an algorithm (with disastrous results).328 But frontline worker discretion is critical to data pathways in the automated state. Required by law to collect sex and gender data, civil servants decide how to collect it. And they sometimes change the law while doing so: Whether out of ignorance or intent, frontline workers sometimes decide to ask for gender on voter registration forms even though the law requires sex.329 In addition, because some state laws merely permit rather than explicitly require interagency data sharing, street-level bureaucrats also decide how, when, with whom, and under what terms to share sex and gender data. Within frameworks constructed by law, civil servants also have significant discretion when procuring new technologies from third-party vendors. And civil servants squeeze and stretch the formal procedural requirement of PIAs to push their procurement decisions over the finish line. There appears to be far more discretion in the automated state than scholars have realized.

Much scholarship elides street-level bureaucrats’ persistent and significant discretion in the automated state because it is focused

327. See Lipsky, supra note 126, at 10–22; Calo & Citron, supra note 23, at 799; Metzger, supra note 154, at 1900; Mulligan & Bamberger, supra note 284, at 778.
329. See supra note 139.
elsewhere—namely, on the algorithmic system itself. That focus yields essential insight. Expanding the scope of scholarly attention to the prerequisite stages of automation can yield even more. Algorithms need data, and those data can effectively train algorithmic systems only when aggregated and pooled in large quantities. Sometimes, states purchase data from brokers. Large amounts of sex and gender data are collected through forms and aggregated through interagency agreements and interstate compacts, all of which are drafted and negotiated by street-level bureaucrats. Civil servants even have some discretion to affect the designs of the technologies they buy from private, for-profit companies depending on the nature of the procurement contracts. At the automation stage, civil servants exercise their power and discretion to immunize algorithmic technologies from public interrogation. Automation may muddle our traditional conceptions of agency expertise, but it does so while adding new opportunities for frontline workers to exercise power, discretion, and knowledge.

History shows that the persistence of such discretion poses risks for transgender, nonbinary, and gender-nonconforming individuals. Dean Spade has written extensively about the administrative state’s hostility to transgender people. Political scientist Paisley Currah points to state agencies’ inconsistent and irrational practices for changing gender designations on official documents as evidence of systemic transphobia in government. And technology historian Mar Hicks has shown how bureaucrats took advantage of newly computerized welfare allocation systems in post–World War II Britain to erase transgender identities: They used their discretion to deny gender designation change requests while programming transgender citizens’ files into the computer as “aberrant” instead of simply changing M to F or F to M. This history is reason enough for gender-diverse communities to doubt the promises of an automated state, whether infused with discretion or not.

B. Persistent Stereotypes

In addition to showing that discretion persists, this Article’s case study of the state’s use of sex and gender data complicates the extant narrative about agency expertise in the information age. Scholars argue that

330. See supra note 17.
331. See David Lehr & Paul Ohm, Playing With the Data: What Legal Scholars Should Learn About Machine Learning, 51 U.C. Davis L. Rev. 653, 655–58 (2017) (making a similar recommendation, but focusing only on machine learning rather than the law’s role in mandating, fostering, and incentivizing data collection, sharing, and use).
332. See supra note 144.
333. See Spade, Normal Life, supra note 19, at 9–11; Spade, Documenting Gender, supra note 36, at 737–39.
334. Currah, supra note 67, at 7–9, 28.
335. Hicks, supra note 73, at 27.
automation shifts expertise in state agencies from frontline workers hired because of their substantive knowledge of agency work to engineers and programmers who design the algorithms that make policy. That is undoubtedly true to an extent, but the reality is more complicated. When it comes to the collection, sharing, and use of sex and gender data, expertise takes a back seat to stereotypes and perceptions of common sense.

Popular understandings of sex and gender affect data pathways from the beginning. Statutes, sharing agreements, and procurement contracts capturing sex and gender data are often imprecise; they refer only to “sex” or “gender” without specifying how that information should be collected or used. This could be explained by the limits of language, the need to build majorities and coalitions when passing laws, or the inherent complexity in governing the modern state. But interviews with civil servants responsible for designing forms and negotiating data-sharing and procurement contracts make clear that many civil servants simply presume that sex and gender are obvious and matters of common sense. Vague statutes are also often interpreted according to common sense or ordinary meaning. Unfortunately, although views are changing, most people think that sex and gender are binary and static.

When they conceptualize sex and gender as “common sense” categories, the laws on the books and on the ground codify, rely on, and entrench stereotypes. For instance, as legal historian Anna Lvovsky demonstrates, anti-vice police and state liquor board agents claimed they could use “common sense” to identify gay people and, thereby, shut down bars for “becom[ing] disorderly” or knowingly “permitt[ing] . . . degenerates and undesirable people to congregate.” To do so, they

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336. Citron, Technological Due Process, supra note 17, at 1296–98.
338. Waldman, Opening, supra note 133 (manuscript at 21) (demonstrating the salient role of supposedly “common-sense” assumptions about sex and gender in how civil servants involved in form design do their work).
341. Anna Lvovsky, Vice Patrol 29–41 (2021) (first quoting NY. Alcohol & Bev. Law § 106(6) (McKinney 2021); then quoting Record on Review at 7, Gloria Bar & Grill v. Bruckman, 259 A.D. 706 (N.Y. App. Div. 1940)); see also, e.g., Nan Alamilla Boyd, Wide Open Town 109–11 (2003); Chauncey, supra note 37, at 8–9; John D’Emilio, Sexual Politics,
relied on queer stereotypes and then arrested any man who did not meet police expectations of masculinity.\textsuperscript{342} This same idea, that sex categorizations are common sense and that individuals obviously fit into one or the other, is still being used by those seeking to restrict the rights of transgender people to use public restrooms that accord with their gender identities.\textsuperscript{345} Therefore, statutes and agreements that leave the words “sex” and “gender” unspecified allow supposedly “commonsense” perceptions—namely, stereotypes—to dominate how the law is implemented in practice.

C. Persistent Legal Intervention

Some scholars have suggested that automation and its harms have arisen in a regulatory or legal void.\textsuperscript{344} But, as this Article shows, the law has not been hands-off. This Article’s case study of sex and gender data pathways suggests that the law creates a particular kind of neoliberal state—namely, one premised on the pathologies of risk-based governance and data maximalism. This puts gender-diverse populations at risk.

The neoliberal state is thoroughly infused with market-oriented thinking: a belief that the market is the best way to advance social welfare and that only market-based options are workable.\textsuperscript{345} Unlike the classical liberal state, neoliberal governance can be interventionist, leveraging law to enhance efficiency in institutions, minimize transaction costs, make decisions based on cost–benefit analysis, and use ever-growing information databases to deliver so-called “smart” forms of governance.\textsuperscript{346} This type of governance relies on mass quantification, datafying as much about a population as possible and using those data to model potential future outcomes about who or what poses risks.\textsuperscript{347}

\footnotesize{Sexual Communities 14–15 (1983); Lillian Faderman & Stuart Timmons, Gay L.A. 28–30 (2006).}

\textsuperscript{342} See Lvovsky, supra note 341, at 42 (noting that agents built their cases on the confidence “that they could spot queer men, immediately and infallibly, on the basis of the telltale mannerisms of the fairy”). For a more robust discussion of queer stereotypes that law enforcement officers and investigators relied on, see generally id. at 36–41.

\textsuperscript{343} See, e.g., Petition for a Writ of Certiorari at 14, Gloucester Cnty. Sch. Bd. v. Grimm, No. 20-1163 (U.S. filed Feb. 19, 2021), 2021 WL 723101 (suggesting that a public school should be free to make “commonsense” distinctions between male and female use of public bathrooms).

\textsuperscript{344} Calo & Citron, supra note 23.


\textsuperscript{346} See Britton-Purdy et al., supra note 326, at 1796–800 (“Planning was essential if politics was to serve the goal of efficiency.”).

That poses two problems for gender-diverse populations. First, the technologies used to model risk are not neutral; rather, their “assumptions about variables and parameters are open to contestation.” So, too, are the decisions to weigh a particular problem as more or less of a threat and to accept a certain amount of harm as too small enough or too unlikely to require remediation. If—and that is a big if—they account for small populations like transgender, nonbinary, and gender-nonconforming individuals, these models may accept even extreme and likely harm as insufficiently weighty.

Second, data maximalism is uniquely dangerous to those whose data are not always consistent. Under the logics of neoliberal governance, more is better because more data means better trained algorithms, better predictions, and better security at a fraction of the cost of overinclusive or “dumb” surveillance. Data maximalism means “a utopian governance dream—a 'smart', specific, side-effects-free, information-driven utopia.” In other words, more data are supposed to allow the government to use the resources of the neoliberal state—concerned not with social welfare but with risk management—in as efficient, targeted a manner as possible.

Sex and gender data are used by the state in automated forms of “targeted governance” that identify and evaluate the presence and magnitude of risk factors in people, spaces, and activities. More information is supposed to help the state do that better. For example, more data are supposed to help the state distinguish between two or more people with similar names. Sex and gender are not the only types of data that can do that. But that doesn’t matter. Once the state commits to the neoliberal goal of targeted or smart governance, surveillance and data collection become pathologies. Collecting more data is always better.

But the state’s use of gender data poses difficult-to-resolve data dilemmas for transgender, nonbinary, and gender-nonconforming individuals such that more is not always better. On the one hand, traditional approaches to collecting sexual-orientation and gender-
identity (SOGI) data erase the identities of millions of people, harming nonbinary people, LGBTQ+ elders, bisexuals, and many other marginalized groups within the queer community. Therefore, more and more accurate data could improve LGBTQ+ access to healthcare, help identify discrimination, and highlight injustice, thereby informing needed policy changes. Still, data are power, and the state has a long history of weaponizing demographic data in service of white supremacy, cisnormativity, and heteropatriarchy.


359. See, e.g., Ruha Benjamin, Race After Technology: Abolitionist Tools for the New Jim Code 36 (2019) (arguing that race-neutral technologies, laws, and policies perpetrate white supremacy); Catherine D’Ignazio & Lauren F. Klein, Data Feminism 14–17 (2020) (arguing that data historically have been used by those in power to consolidate their control); María Lugones, Heterosexualism and the Colonial / Modern Gender System, Hypatia, Winter 2007, at 186, 196 (arguing that gender differentials were a tool of colonization); Lauren E. Bridges, Digital Failure: Unbecoming the “Good” Data Subject
sometimes knowing less.\textsuperscript{360} This is why many transgender and nonbinary individuals refuse to disclose or are uncomfortable disclosing gender identity data, even in trans-specific studies, out of concern for their privacy.\textsuperscript{361} And because gendered classifications cannot be extricated from racial ones, transgender and nonbinary persons of color feel these harms most acutely.\textsuperscript{362}

Scholars and advocates have long debated how to navigate this dilemma with respect to racial categories on the U.S. census and SOGI data in government surveys and in healthcare contexts.\textsuperscript{363} Some think the state should get out of the business of collecting and using SOGI data altogether.\textsuperscript{364} Indeed, despite how technology companies frame their algorithms’ strengths, many algorithms do not need that much data to achieve their results. Several algorithmic systems that claim to make accurate predictions because they use hundreds or thousands of data inputs fare no better than standard linear regressions that use two or four.\textsuperscript{365}

Banning certain types of data collection, sharing, and use has been central to some social movements. For instance, the movement to “ban the box” seeks, at a minimum, to remove the box to check on employment application forms if job applicants have been convicted of felonies.\textsuperscript{366} The policy intends to stop discrimination at its source by eliminating, or at least


\textsuperscript{361} See, e.g., Hale M. Thompson, Patient Perspectives on Gender Identity Data Collection in Electronic Health Records: An Analysis of Disclosure, Privacy, and Access to Care, 1 Transgender Health 205, 210 (2016).

\textsuperscript{362} Currah, supra note 67, at 18, 21 (noting that the gender binary is inherently a function of race and colonization).

\textsuperscript{363} Several of the many excellent explorations of the U.S. Census’s collection of data on race include the sources cited supra note 36. For a discussion of how the Census undercounts members of the LGBTQ+ community, see Kyle C. Velte, Straightwashing the Census, 61 B.C. L. Rev. 69, 72–73 (2020).

\textsuperscript{364} See, e.g., Clarke, supra note 2, at 942; Katri, supra note 35, at 644, 712–14; Wipfler, supra note 35, at 529–30.

\textsuperscript{365} See, e.g., Dressel & Farid, supra note 61, at 2–3 (finding that the COMPAS risk assessment software, which incorporates 137 different data points, performed no better than a linear regression relying on two independent variables); Matthew Salganik, Ian Lundberg, Alexander T. Kindel & Sara McLanahan, Measuring the Predictability of Life Outcomes With a Scientific Mass Collaboration, 117 Proc. Nat’l Acad. Scis. 8398, 8400 (2020) (demonstrating that machine-learning methods using thousands of data points poorly predicted life outcomes and were only somewhat better than regressions using four predictor variables).

\textsuperscript{366} See Johnathan J. Smith, Banning the Box but Keeping the Discrimination?: Disparate Impact and Employers’ Overreliance on Criminal Background Checks, 49 Harv. C.R.-C.L. L. Rev. 197, 200 (2014).
delaying, a data point that allows employers to screen out candidates without looking at their credentials.\footnote{See Michelle Natividad Rodriguez & Anastasia Christman, Nat’l Emp. L. Proj., Fair Chance—Ban the Box Toolkit: Opening Job Opportunities for People With Records 4 (2015), https://s27147.pcdn.co/wp-content/uploads/NELP-Fair-Chance-Ban-the-Box-Toolkit.pdf [https://perma.cc/5983-UDR2]; see also Jessica S. Henry & James B. Jacobs, Ban the Box to Promote Ex-Offender Employment, 6 Criminology & Pub. Pol’y 755, 757 (2007) (describing how, “in addition to promoting employment discrimination against ex-offenders, the question deters ex-offenders from even applying for city jobs”).} To achieve their goal, advocates built a movement with formerly incarcerated persons and successfully lobbied city and state governments across the country to remove the criminal history box from public employment forms.\footnote{See Smith, supra note 366, at 211–15.} Similarly, some advocates have called for eliminating gender designations on birth certificates, passports, and other official documents.\footnote{See, e.g., Clarke, supra note 2, at 947 (passports); Katri, supra note 35, at 644, 710–14 (birth certificates and other official documentation); Wipfler, supra note 35, at 529–30 (birth certificates).} They argue that the risks are too high and that alternative technologies exist to verify identities.\footnote{See, e.g., Clarke, supra note 2, at 981–83; Katri, supra note 35, at 644, 710–14; Wipfler, supra note 35, at 529–30.}

But these abolitionist responses may not achieve their goals and could have unintended effects. Even if algorithms exclude certain datapoints, machine learning may still be able to identify patterns by proxy.\footnote{See, e.g., Talia Gillis, The Input Fallacy, 106 Minn. L. Rev. 1175, 1180–81 (2022).} Furthermore, at least a couple of studies suggest that the current iteration of “ban the box” laws have unintended consequences; employers may be discriminating even more on the basis of race.\footnote{See Stephen Raphael, The Intended and Unintended Consequences of Ban the Box, 4 Ann. Rev. Criminology 191, 205 (2021); see also Angela Hanks, Ctr. for Am. Progress, Ban the Box and Beyond 14 (2017), https://www.americanprogress.org/wp-content/uploads/sites/2/2017/07/FairChanceHiring-report.pdf [https://perma.cc/9S32-94VR] (arguing that “ban the box” should be “just one element of a multi-pronged strategy to remove barriers to employment that people with criminal records face”).} And, as Professor Jessica Clarke has shown, the relevance of sex, gender, assigned gender at birth, and gender identity varies.\footnote{See Clarke, supra note 2, at 990.} There are powerful reasons to want “each context of sex or gender regulation [to] consider[] the relative merits of various strategies for achieving nonbinary gender rights, including third-gender recognition, the elimination of sex classifications, or integration into binary sex or gender categories.”\footnote{Id.}
D. Persistent Subordination

The automated administrative state’s approach to sex and gender data is both over- and underinclusive, harming gender-diverse populations from both sides. On the one hand, the state collects sex and gender data in a myriad of contexts. As a result, many transgender people who hold inconsistent gender designations on official documents avoid participating in daily life, from obtaining healthcare and practicing licensed professions to traveling and attending school. Transgender and nonbinary people vote at lower rates than the broader LGBTQ+ community and the population at large in part because strict voter identification laws transform the voting booth into gender dysphoric triggers. Knowing that the state uses sex and gender data to determine identity and maintain security, many gender-diverse populations are forced to the margins of society as they avoid the risk of harm.

On the other hand, the law, civil servants, and technology designers make decisions that exclude those who do not fit neatly in binary gender categories. The law of gender data collection triggers a form design process riddled with incentives to maintain the status quo and integrates biased perceptions that sex and gender are matters of common sense, elevating the gender binary. The law of gender data sharing normalizes the gender binary, conflates sex and gender, and makes all state agencies dependent on databases that look the same. The law of gender data use prioritizes efficiency and immunizes algorithmic systems from interrogation, which leaves the gender binary intact. To be sure, some transgender individuals can respond honestly to questions with binary answer options. But without any way of identifying who among those who check “male” are transgender men and who among those who check...
“female” are transgender women, transgender individuals remain hidden within the data, unable to benefit from granular insights.381

Some argue that substantive due process and equal protection law can effectively solve these problems. Substantive due process is supposed to guarantee fundamental rights essential to a democratic society;382 equal protection requires that similarly situated individuals be treated similarly unless there is a valid justification otherwise.383 Legal scholar Margaret Hu has argued that the use of data-matching systems and AI to classify certain individuals as risks of fraud, terrorism, or general criminality may constitute a violation of the presumption of innocence.384 Several scholars argue that a state violates the equal protection clause when its algorithmic decisionmaking systems disproportionately harm certain marginalized populations.385

But antidiscrimination protections are hanging on by mere threads. Courts have chipped away at their efficacy in general.386 It is particularly difficult to demonstrate discriminatory intent in the design and use of automated systems, when algorithms often operate as black boxes and when using proxy variables closely associated with protected identities can achieve discriminatory goals just as well.387 Besides, our goal should be to do what we can to stop these problems from happening in the first place.

381. Albert & Delano, supra note 77, at 540–41 (referring to this phenomenon as “category-based erasure”).


383. See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985) (“The Equal Protection Clause of the Fourteenth Amendment commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.” (quoting U.S. Const. amend. XIV, § 1) (citing Plyler v. Doe, 457 U.S. 202, 216 (1982))).


385. E.g., Barocas & Selbst, Big Data’s Disparate Impact, supra note 12, at 673–76.

386. See, e.g., Cristina Isabel Ceballos, David Freeman Engstrom & Daniel E. Ho, Disparate Limbo: How Administrative Law Erased Antidiscrimination, 131 Yale L.J. 370, 375–84 (2021) (“When agencies act in ways that have significantly different effects along racial or ethnic lines, a claim to that effect is cognizable under neither administrative law nor antidiscrimination law.”).

VI. PRIVACY LAW PRINCIPLES AND NON-REFORMIST REFORMS

So far, this Article has demonstrated how law creates an automated state aimed at efficiency and, as a result, binarizes gender and erases and harms gender-diverse populations. This Part considers the normative question of the role of the state: Given the law’s role in transgender and nonbinary erasure, should the state ever collect, share, and use gender data at all? If so, can the state to do so in a way that serves the interests of gender-diverse populations in an automated state rather than the disciplinary and surveillant goals of the government? I confess to being uncertain. State power has long been used to force legibility on state subjects. Even state-sponsored schemes to improve the human condition through legibility often fail inside a structure designed to do the opposite. And yet, some legibility seems necessary to provide effective healthcare, enforce antidiscrimination law, and consciously account for historic marginalization and erasure. Therefore, this Part offers a tentative middle ground based on privacy principles: As advocates strive for the abolition of gender data as a classificatory, securitizing, and identification tool, we can also engage with policymakers and local, state, and federal street-level bureaucracy to find a better balance between legibility and privacy in an age of automation.

A. Which Kind of Privacy

Legal philosopher Anita Allen argues that historically, “Women have had too much of the wrong kinds of privacy.” Patriarchal forces pretextually leverage privacy to entrench traditional gender roles; “enforce isolation” in the home to cut off opportunities for growth, education, and flourishing; and, in one not-uncommon but extreme case, permit a husband to abuse his wife behind the “curtain [of] domestic privacy.”

Gender-diverse populations suffer the same imbalance. This Article has shown that transgender, nonbinary, and gender-nonconforming
individuals are erased or hidden from much public health surveillance. In these cases, they have too much of the wrong kind of privacy. At the same time, they are made legible as potential fraudsters by automated systems created by laws focusing on security, classification, categorization, and identification. Here, gender-diverse populations have too little of the right kind of privacy.

Managing state gender-data collection means reversing this imbalance. Gender-diverse populations deserve legibility or privacy when each serves human flourishing, equity, and full democratic participation. Finding that balance is precisely what queer data scientist Kevin Guyan seeks to do with his call for advocates, scholars, and representatives of affected communities to help build the state’s “gender competence.” In other words, policymakers, street-level bureaucrats, and coders building algorithmic technologies for the state do not understand the power, limits, history, and dangers of collecting, sharing, and using gender data. They write and implement laws that collect sex and gender data without knowing why and assuming that doing so is uncontroversial common sense. They disseminate sex and gender data as if they are fungible with other pieces of information. And they use that data in algorithmic systems as if doing so has no special consequences. Our job is to teach them otherwise, growing popular consciousness along the way. Engaging with these civil servants and policymakers requires advocates to embrace the nitty-gritty of government work, but it offers opportunities for direct impact.

Those responsible for the law on the books and on the ground must have an “understanding that historical and social factors mean that equality of opportunity is a fiction, an awareness of power differences between and within LGBTQ communities, and attention to the intersection of LGBTQ identities with other identity characteristics.” They need to be willing “to assume a contrarian role in data discussions” that decenter traditional pathways and hierarchies of power.

B. Principles for Gender Legibility

To achieve that goal, this Article suggests three principles, derived from privacy scholarship, to govern state gender-data practices: necessity, antisubordination, and inclusivity. A necessity principle asks whether sex or gender data are necessary to achieve a government goal, and if so, which goal. For example, as argued above, gender is an ineffective metric for security and identification; genders (and sexes) can change. Only cisgender people retain the sexes and genders they are assigned at birth; everyone else is at risk when gender is presumed static. Plus, there are so many other effective means of verifying identity, from using static traits to

392. Guyan, supra note 41, at 155.
393. Id. at 156.
394. Id.
personal histories. Therefore, using sex or gender data simply to ensure applicants for government assistance or voters or licensed professionals are who they say they are violates the necessity principle.

That said, the state has often argued that sex or gender data are necessary for some purpose it considers legitimate. Before marriage equality, for instance, sex was considered necessary for determining the validity of marriages. Therefore, we need an antisubordination principle to clarify which government goals merit the use of sex or gender data—namely, those goals, like antidiscrimination and health equity, that disrupt traditional hierarchies of power and benefit gender-diverse populations. Transgender and nonbinary scholars have long argued that deficits in gender-affirming healthcare stem from, among other things, the marginalization of gender diversity in health studies, the subsequent erasure of populations not identifying as men or women from public reports and policymaking, and the ultimate neglect of gender diversity in medical and public health degree-granting programs. In these contexts, taking gender into account may improve the lives of people traditionally erased.

And an inclusivity principle will ensure that when the state does need to collect, share, and use sex or gender data, it does so in ways that respect gender-nonconforming individuals. Here, transgender and nonbinary scholars have provided recommendations for how to ask for gender data in certain contexts, including providing two-step questions (asking for assigned sex at birth and gender, for example), opportunities to opt out, and spaces to self-identify. This is not simply a matter of adding more boxes to gender questions on forms, as we have seen, gender binaries can be entrenched in data-sharing agreements, interstate compacts, and automation mandates. Inclusivity also means writing gender diversity into law, redesigning algorithms and technologies procured from private vendors, updating legacy computer systems, and rethinking the role of gender data in the automated state from the ground up.

Although ambitious, this framework is well within the tools available under current legal discourse on privacy. Privacy law and theory are important places for inspiration here because privacy law is supposed to allow individuals to disclose certain information in certain contexts and

395. See, e.g., Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. Ct. App. 1999) (voiding a marriage between a woman who was assigned male at birth and a cisgender man as a same-sex marriage); see also Frontiero v. Richardson, 411 U.S. 677, 690–91 (1973) (holding unconstitutional a federal law that required different qualification criteria for male and female military spousal dependency).
396. See supra notes 356–357.
397. See supra notes 354–355.
398. See Bivens, supra note 40, at 893.
withhold that information in other contexts.\textsuperscript{399} Privacy scholars are also used to dealing with data dilemmas such as data in exchange for access and disclosure in exchange for seamless commerce.

One way privacy law tries to navigate these dilemmas while fostering prosocial behavior is through the principle of data minimization. Data minimization is the principle that organizations should collect only as much data as is absolutely necessary to achieve a stated purpose.\textsuperscript{400} It is at the core of modern approaches to consumer privacy law, both in the United States and in the European Union.\textsuperscript{401} In the context of an information economy in which data is used to manipulate consumers, data minimization could, if enforced effectively, starve data-extractive organizations of dangerous weapons.\textsuperscript{402} Therefore, the principle of data minimization (or necessity) seems like a perfect antidote to the automated state’s pathology of gender data maximalism.

That said, data minimization is half a loaf. It may try to stanch the flow of data, but it permits unrestricted data collection if its purpose is clearly defined, previously disclosed, and legitimate. States could easily meet that requirement, justifying gender data as necessary for verifying identity or securing spaces. Instead of relying on data minimization alone, policymakers and civil servants should also approach data collection, sharing, and use through an antisubordination lens. Privacy values do that, as well.

Over the last fifty years, much privacy scholarship has shifted from an individualistic conception of privacy to one that recognizes the inextricable connection between data, privacy, and hierarchies of power.\textsuperscript{403} Specifically, critical privacy scholars see privacy as an antidote to

\begin{itemize}
\item \textsuperscript{399} Ari Ezra Waldman, Privacy as Trust 69 (2018) [hereinafter Waldman, Trust] (discussing the privacy interests that relate to the disclosure of information); Julie Cohen, What Privacy Is For, 126 Harv. L. Rev. 1904, 1910–12 (2013) (discussing the role of privacy in society and for self-making).
\item \textsuperscript{401} Id. at 365–66; see also Regulation 2016/679, supra note 305, at art. 5(1)(c).
\item \textsuperscript{402} See Hartzog & Richards, Legislating, supra note 400, at 365–66.
\item \textsuperscript{403} Compare Alan F. Westin, Privacy and Freedom 7 (1967) (defining privacy with respect to autonomy and choice), with Neil Richards, Why Privacy Matters 39 (2022) (“Privacy is fundamentally about power . . . . Struggles over ‘privacy’ are in reality struggles over the rules that constrain the power that human information confers.”); see also Julie E. Cohen, Turning Privacy Inside Out, 20 Theoretical Inquiries L. 1, 22 (2019) (“[C]ommon relationships in contemporary commercial and civic life . . . are about power, and privacy theory should acknowledge that fact . . . .”); Daniel J. Solove, Privacy and Power: Computer Databases and Metaphors for Information Privacy, 53 Stan. L. Rev. 1393, 1398 (2001) (arguing that the problem with information databases is that they make “people feel powerless and vulnerable, without any meaningful form of participation in the collection and use of their information”).
\end{itemize}
manipulation and domination. Civil rights scholar Khiara Bridges noted this link early on; she recognized that privacy is a right of the privileged because those dependent on government services, like low-income pregnant persons of color, have no choice but to disclose personal information, accept surveillance, and submit to invasive inspections in exchange for critical medical, financial, and social support.\footnote{Bridges, Poverty, supra note 30, at 8–10.}

Many other scholars have followed Professor Bridges’s lead. Because of the centrality of privacy for sexually minoritized populations—including women, transgender people, and gay people, among others—law and technology scholar Danielle Citron has argued that the law should provide special protection for sexual privacy.\footnote{Danielle Keats Citron, The Fight for Privacy: Protecting Dignity, Identity, and Love in the Digital Age, at xvii, xviii (2022); Danielle Keats Citron, Sexual Privacy, 128 Yale L.J. 1870, 1881–82 (2019) [hereinafter Citron, Sexual Privacy].} Multifaceted rules from criminal law to tort law would ensure that intimate information available to others could only be used to benefit, rather than harm, the most vulnerable.\footnote{Citron, Sexual Privacy, supra note 405, at 1928–35.} In other words, Professor Citron wants privacy law to take sex into account. Professor Scott Skinner-Thompson has called for privacy law to take account of intersectional identity and provide additional protections for those subordinated by institutional marginalization.\footnote{Skinner-Thompson, supra note 42, at 6.}

Similarly, privacy law scholars Neil Richards and Woodrow Hartzog have argued that technology companies that collect and process data should not be allowed to benefit from that data if it means harming their users.\footnote{See Neil Richards & Woodrow Hartzog, A Duty of Loyalty for Privacy Law, 99 Wash. U. L. Rev. 961, 964–65 (2021) [hereinafter Richards & Hartzog, Loyalty]. This argument has a history. See, e.g., Daniel Solove, The Digital Person 103 (2004) (positing that businesses that are collecting personal information from users should “stand in a fiduciary relationship” with those users); Waldman, Trust, supra note 399, at 79–92; Jack M. Balkin, Information Fiduciaries and the First Amendment, 49 U.C. Davis L. Rev. 1183, 1186 (2016) (“[M]any online service providers and cloud companies who collect, analyze, use, sell, and distribute personal information should be seen as information fiduciaries toward their customers and end-users.”); Neil Richards & Woodrow Hartzog, Taking Trust Seriously in Privacy Law, 19 Stan. Tech. L. Rev. 431, 457 (2016).}

Like fiduciaries who are entrusted with their clients’ personal information to pursue their clients’ interests, state automation could be similarly informed by fiduciary values that ensure that data-driven tools will only help, not hurt, the most marginalized.\footnote{See Richards & Hartzog, Loyalty, supra note 408, at 966–67.}

These same principles can guide political and bureaucratic approaches to sex and gender data. The automated state collects, shares, and uses gender data in service of a commitment to efficient targeted governance that covers most people most of the time. That commitment takes us down a dangerous path: one in which the state collects a lot of sex and gender data while saddling transgender, nonbinary, and gender-
nonconforming individuals with all the dangers but none of the benefits of data-driven governance. This Article seeks a new path: one in which the state collects, shares, and uses only so much inclusive sex and gender data as is necessary to benefit, protect, and support gender-diverse populations. Achieving these goals will not be easy. Nor will they be realized tomorrow. But we can start tomorrow.

CONCLUSION

This Article begins a critical conversation about how law creates, fosters, and incentivizes a particular kind of automated governance that excludes and harms transgender, nonbinary, and gender-nonconforming individuals. The law both on the books and on the ground tends to binarize sex and gender data from collection to use. This not only harms those who exist outside of the gender binary the most but also endangers anyone subordinated by the reification of strict gender norms.

This narrative has been obscured because it is more than just statutes and court cases that are responsible for binary gender data in algorithmic systems. The on-the-ground policymaking of street-level bureaucrats, binding data contracts between state agencies, efficiency mandates, policy by procurement, and data protection compliance are all part of a larger puzzle that reveals institutionalized hostility to anyone outside the gender binary. Gender data in the automated state is, therefore, a case study in the risks posed by law: how it allocates power, how it forces legibility, and how it excludes.

But we are not without hope. In revealing the full picture of the law’s role in creating an automated state that excludes gender minorities, this Article gives space for experts and members of affected communities who have long recommended inclusive approaches to gender data collection and those who argue that gender data collection is unnecessary in certain contexts. Their work, cited throughout this Article, can bring data minimization and antisubordination principles into practice. The automated state is not going away; together, we can guide it on a new, more inclusive path.
NOTES

FREE THEIR MINDS: LEGACIES OF ATTICA AND THE THREAT OF BOOKS TO THE CARCERAL STATE

Jamie M. Jenkins*

Book bans and censorship battles have garnered considerable attention in recent years, but one of the most critical battlegrounds is kept out of the public eye. Prison officials can ban any book that threatens the security or operations of their facility. This means that the knowledge access rights of incarcerated people are subject to the judgments of the people detaining them. This Note focuses on books about Black people in America and books about the history of and conditions in prisons, which are often banned for their potential to be divisive or incite unrest. The result is that Black people, who are already disproportionately victimized by the criminal punishment system, cannot read their own history and the history of the institution imprisoning them.

This Note examines the legal backdrop enabling these book bans. As an example, it highlights the recent ban of Heather Ann Thompson’s Blood in the Water: The Attica Prison Uprising of 1971 and Its Legacy in the New York State prison system, including at the Attica Correctional Facility. This Note argues that prison book bans are coeval with attacks on Black history in American schools, and labels both practices as attempts to stifle the democratic engagement of Black people and other marginalized groups. As a guiding thesis, it draws inspiration from the organizers of the Attica prison uprising to assert that this fight is best understood from the vantage point of those most impacted by prison book bans: incarcerated people who are denied the right to read.

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* J.D. Candidate 2024, Columbia Law School. To Professor Kendall Thomas, thank you for your wisdom, for your guidance, and for always keeping me in alignment. To the staff of the Columbia Law Review, thank you for bridging the gap between my thoughts and the words on the page. To my family and friends, thank you for your unwavering support.
On September 9, 1971, 1,281 incarcerated men took control of the Attica Correctional Facility in upstate New York. The takeover of Attica initiated four days of protest and polemics about the politics of mass incarceration in the United States and the basic civil and human rights of people in prison. On the fourth day, New York Governor Nelson Rockefeller ordered a retaking of the facility. Twenty-nine incarcerated men and nine civilian hostages were gunned down and killed during the ensuing siege.

The Attica uprising and its aftermath sparked a nationwide conversation about what we have come to call “the carceral state.” Some saw the Attica rebellion as a vindication of the politics of “governing through crime”;
others argued that it was an indictment of the prison system and the anti-Black violence that defines it.7

Forty-five years after the Attica uprising, historian Heather Ann Thompson published Blood in the Water: The Attica Prison Uprising of 1971 and Its Legacy.8 The book is considered to provide the most comprehensive history of the events leading up to, during, and after the uprising.9 In March 2022, Thompson filed suit against New York State officials, challenging the blanket censorship of Blood in the Water in the New York prison system.10 This struggle was foreshadowed by the original Attica uprisers: Abolishing censorship at the prison was one of their core demands.11 Settlement proceedings between Thompson and the institutional defendants began in October 2022.12

The Attica uprisers’ critique extended beyond their facility. They argued that their circumstances were not unique but archetypal: “Attica Prison is one of the most classic institutions of authoritative inhumanity upon men.”13 Prison conditions were a focus, but the men of Attica also were intentional in describing the prison system as “the authoritative fangs of a coward in power.”14 The mention of fangs implies the existence of a body. Critical to the uprisers’ argument was the idea that prisons are one component of a larger structure, a framing similar to that of scholars who choose to discuss the “carceral state” rather than the “penal state.”15 The

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7. The fight lives on through the Attica Brothers Foundation, which works to support the survivors of the retaking and keep the memory of Attica alive in the present-day struggle against America’s racist and dehumanizing prison system. For more information on their work, see generally Attica Brothers Foundation, https://www.atticabrothersfoundation.org/ [https://perma.cc/J9S6-YPP6] (last visited Sept. 9, 2023) (“Today there are only a handful of the Brothers left. Our goal is to support them in their retirement and support their causes in perpetuity.”).
8. Thompson, supra note 1, at xiii.
11. See infra notes 165–168 and accompanying text.
14. Id. at 29.
15. Dan Berger, Finding and Defining the Carceral State, 47 Revs. Am. Hist. 279, 281 (2019) (“Identifying the object of inquiry as the ‘carceral state’ rather than, as some in criminology have done, ‘the penal state’ . . . suggests a broader phalanx of institutions than just the prison.” (second quotation quoting Ashley Rubin & Michelle S. Phelps, Fracturing the Penal State: State Actors and the Role of Conflict in Penal Change, 21 Theoretical Criminology 422, 423 (2017))).
“carceral state” encompasses the physical institutions imprisoning people in America as well as the ideologies that fuel investment in those institutions.\(^\text{16}\) It is a larger government apparatus that functions as a means of social ordering against targeted groups and profit maximization for others.\(^\text{17}\) In recounting the uprisers’ critique, \textit{Blood in the Water} offered a narrative that would have allowed the people incarcerated in Attica today to understand their history and, through that history, the meaning of their experience. This Note stems from a desire to understand the censorship of Thompson’s book from the vantage point of the people deprived of the right to read it.\(^\text{18}\)

The carceral state and the carceral system are also a racist state and a racist system. The abolition of slavery brought with it a surge in Black criminalization and incarceration.\(^\text{19}\) In Alabama, for instance, the prison population shifted from ninety-nine percent white to ninety percent Black after the Civil War.\(^\text{20}\) By the 1870s, Black people made up ninety-five percent of the prison population in the South.\(^\text{21}\) In the absence of slavery, incarceration became the container for Black freedom and the vehicle for Black labor exploitation.\(^\text{22}\) In state prisons today, Black people are

\begin{itemize}
\item \(^\text{17}\) See id. (“Consider the days of colonization. Black people were brought to be slaves, and this sparked the roots of connecting Blackness to captivity, a carceral condition. These are the roots of the racialized prison industrial complex that looms over Americans in present day.”); see also Aisha Khan, \textit{The Carceral State: An American Story}, 51 Ann. Rev. Anthropology 49, 50 (2022) (defining the “carceral state” as “governmentality that relies on institutionalized punishment and surveillance (including mass incarceration), particularly of targeted populations”).
\item \(^\text{18}\) See generally Mari J. Matsuda, \textit{Looking to the Bottom: Critical Legal Studies and Reparations}, 22 Harv. C.R.-C.L. L. Rev. 323, 398–99 (1987) (describing the importance of looking to the people most impacted by an oppressive structure to facilitate positive change).
\item \(^\text{19}\) Ruth Delaney, Ram Subramanian, Alison Shames & Nicholas Turner, \textit{American History, Race, and Prison}, Vera Inst. Just., https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison [https://perma.cc/AU2P-T2V3] (last visited May 11, 2023) (“The year 1865 should be as notable to criminologists as is the year 1970. While it marked the end of the Civil War and the passage of the 13th Amendment, it also triggered the nation’s first prison boom when the number of [B]lack Americans arrested and incarcerated surged.”).
\item \(^\text{21}\) Delaney et al., supra note 19.
\item \(^\text{22}\) See id. (“State penal authorities deployed these imprisoned people to help rebuild the South—they rented out convicted people to private companies through a system of convict leasing and put incarcerated individuals to work on, for example, prison farms to produce agricultural products.”); see also Ashley Nellis, \textit{The Color of Justice: Racial and Ethnic Disparity in State Prisons}, Sent’g Project 11 (2021), https://www.sentencingproject.
incarcerated at almost five times the rate of white people. While Black people make up thirteen percent of the population in America, they represent thirty-eight percent of the incarcerated population. One in three Black men will be sentenced to time in prison, in contrast with one in seventeen white men. These disparities make clear that incarceration is simply the latest iteration of racial persecution in America.

Books are central to an analysis of the American prison because of the nexus between race, literacy, and incarceration. Black people are disproportionately imprisoned in America, and rates of illiteracy are disproportionately high among incarcerated people. Participation in education programs while incarcerated has been shown to reduce recidivism; fewer educated people are reincarcerated upon release. The interests of proponents and opponents of incarceration would seem to converge on reduced recidivism rates, which would mean that fewer people commit crimes and are reincarcerated after release. Nevertheless,
battles over the censorship of reading and educational materials rage on in America’s prisons.\textsuperscript{30}

So how does censorship serve, or disserve, the goal of reducing recidivism? Prison officials rely on safety and security concerns to justify banning certain books.\textsuperscript{31} More specifically, books discussing race or the experience of incarceration might be banned for inciting division or unrest among incarcerated people.\textsuperscript{32} On the other hand, people focused on reducing prison populations point to the positive benefits that reading offers to incarcerated people, one of which is lowering the rate of recidivism and reincarceration.\textsuperscript{33} From this perspective—and factoring in the lack of empirical data showing that books cause disruptions in prisons—maintaining order through censorship makes little sense.\textsuperscript{34} But at present, the evidence of reading’s benefits, and the absence of evidence of harm, receive little (if any) weight in censorship decisions.\textsuperscript{35} The fact that decisionmakers don’t consider the real effects of censorship on incarcerated people raises the question whether reduced recidivism can be honestly touted as a goal of incarceration or if book bans are merely one cog in a purely punitive machine. The history of withholding education to oppress freed Black people in America lends credence to the latter understanding of prison censorship.\textsuperscript{36}

This Note uses Thompson’s case to unpack the racialized censorship of reading materials in prisons. Its specific focus is texts about the subjugation of Black people in America, which necessarily discuss the history of prisons and imprisonment. Part I offers a critical assessment of the statutes, administrative regulations, and case law that have shaped the law and policy around prison censorship. Part II revisits the Attica uprising, Thompson’s challenge to the present-day censorship of her book by the Attica Correctional Facility, and the politics of racially motivated book bans in prisons. It also connects Thompson’s prison censorship story to the broader attacks on Critical Race Theory (CRT) and the teaching of Black history outside of the prison system. Part III offers a proposal that rebalances the constitutional interests implicated by the current prison censorship regime. It places racial literacy and the knowledge access rights


\textsuperscript{31} See infra notes 57–58 and accompanying text.

\textsuperscript{32} See infra notes 88–89 and accompanying text.

\textsuperscript{33} See supra note 28.

\textsuperscript{34} See infra note 231 and accompanying text.

\textsuperscript{35} See infra section I.B.

I. ENABLING CENSORSHIP

The free exercise of First Amendment rights “serves not only the needs of the polity but also those of the human spirit.”38 This is equally if not more true for people in prison.39 Book bans in prisons threaten the First Amendment rights of incarcerated people, and the current legal landscape makes it nearly impossible for those rights to be vindicated in the courts. Section I.A discusses the means and ends of censorship in prisons. Section I.B summarizes the case law governing the constitutional rights of incarcerated people to access reading material.

A. Access to Books “Inside”

1. Why Reading in Prison Matters. — Reading in prison is important. Malcolm X said he “never had been so truly free” until he took up reading during his incarceration.40 Reading is a simple and important means for people in prison to engage with the outside world.41 Reading in prison is mental healthcare.42 For some incarcerated people, reading encourages them to pursue higher education upon release.43 Most importantly, the

39. See id. at 428 (“If anything, the needs for identity and self-respect are more compelling in the dehumanizing prison environment.”).
right to read encompasses basic ideas about human dignity. These positive factors weigh in favor of encouraging incarcerated people to read.

Those championing the right to read in prison often highlight its correlation with lower recidivism rates. Over forty percent of people released from state prison are re-arrested within one year of release. One study found that participation in educational programs in prison reduces the likelihood of recidivism by twenty-eight percent. Reducing recidivism is desirable for a few reasons: Less recidivism means less crime, less crime means fewer people in prisons, and fewer people in prisons means less money spent on incarceration. In spite of the evidence that education

44. See PEN America, supra note 41, at 16 (quoting Jonathan Rapping, founder of Gideon’s Promise, as emphasizing that intellectual engagement “is essential to human dignity” and demanding “a criminal justice system that does not refuse to allow people the ability to develop their mind”); see also Mzezewa, supra note 43 (quoting Elizabeth Alexander, a Columbia University professor, as equating the right of incarcerated people to read with “the right to be able to understand the condition of their life”).

45. See, e.g., PEN America, supra note 41, at 18 (“A meta-analysis by the RAND Corporation in 2018, for example, found that incarcerated people who participated in education programs were 28% less likely to return to incarceration than those who did not.” (citing Robert Bozick, Jennifer Steele, Lois Davis & Susan Turner, Does Providing Inmates With Education Improve Postrelease Outcomes? A Meta-Analysis of Correctional Education Programs in the United States, 14 J. Experimental Criminology 389 (2018))); Thurgood Marshall C.R. Ctr., Banning the Caged Bird: Prison Censorship Across America 8 (2021), https://thurgoodmarshallcenter.howard.edu/sites/tmrc.howard.edu/files/2021-10/HU8108%20%20%20Prison%20Censorship%20Report%20Update%20v1-revised.pdf [https://perma.cc/UV5C-TK7H] (“Reading books in prison helps reduce recidivism, in part, because it increases education among incarcerated persons and teaches them basic vocational and educational skills needed to succeed in our society.”); Kelly Jensen, Why and How Censorship Thrives in American Prisons, Book Riot (Oct. 21, 2019), https://bookriot.com/censorship-in-american-prisons/ [https://perma.cc/RRR2-LEV9] (“It’s been proven that access to books reduces recidivism.”); Mzezewa, supra note 45 (“One 2013 study found that people who participate in correctional education programs while incarcerated had . . . 43 percent lower odds [of] recidivating than those who did not.” (citing Lois M. Davis, Robert Bozick, Jennifer L. Steele, Jessica Saunders & Jeremy N.V. Miles, Evaluating the Effectiveness of Correctional Education (2013))); Skopic, supra note 42 (“[I]n one study, the University of Massachusetts found that incarcerated people who took part in reading programs were much better equipped to deal with the outside world on their release, showing only an 18.75% rate of recidivism compared to a control group’s 45%.” (citing G. Roger Jarjoura & Susan T. Krumholz, Combining Bibliotherapy and Positive Role Modeling as an Alternative to Incarceration, 28 J. Offender Rehab., no. 1–2, 1998, at 127, 132–33)).


48. See Yoon, supra note 28 (noting that reducing recidivism can save “states a combined $365.8 million in decreased prison costs per year”). For a critique of reform strategies focused on recidivism, see Avilana K. Eisenberg, The Prisoner and the Polity, 95 N.Y.U. L. Rev. 1, 29–30 (2020).
and reading are effective tools to combat mass incarceration, very few incarcerated people participate in educational programs.\textsuperscript{49} Literacy can also be a predictor of a person’s likelihood of being incarcerated in the first place. Young men who drop out of high school are forty-seven times more likely to be incarcerated than their college graduate counterparts.\textsuperscript{50} Barbara Fedders, Director of the Youth Justice Clinic at the University of North Carolina School of Law, observes this pipeline firsthand. She notes how children who struggle with reading are more likely to get left behind by the educational system and picked up by the juvenile justice system.\textsuperscript{51} Across the board, illiteracy rates are higher for people in prison than for those outside.\textsuperscript{52} One study found that Black and Hispanic people who aren’t incarcerated tend to have lower literacy rates than white people outside or inside prisons.\textsuperscript{53} These data are perhaps unsurprising given the history of education deprivation as a tool of Black oppression.\textsuperscript{54} Maintaining these disparities in literacy rates perpetuates


\textsuperscript{52} See Michon, supra note 27 (“People in prison are 13 to 24 percent more represented in the lowest levels of literacy than people in the free world.”).

\textsuperscript{53} Id.

\textsuperscript{54} See, e.g., Coleman, supra note 36 (“In 1833, an Alabama law asserted that ‘any person or persons who shall attempt to teach any free person of color, or slave, to spell, read,
disparities in incarceration rates, serving the larger carceral goal of racial
ing ordering.55 One way to correct these disparities would be to increase
literacy rates for people in prisons. Access to books seems like a
commonsense approach to combatting mass incarceration because
reading serves crime prevention on the front end and recidivism
prevention on the back end.56

2. Why and How Prisons Censor Books. — Prisons have broad power to
restrict the reading materials of the people they imprison, and they tend
to use it liberally.57 The Federal Bureau of Prisons uses a catchall provision
to censor any material deemed “detrimental to the security, good order,
or discipline of the institution or [that] might facilitate criminal activity.”58
Specific reasons for restricting a book (if given) include: The book poses
a serious security concern,59 the book is too “dangerous,”60 the book
contains “racially motivated” content,61 or the book contains nudity or
sexually explicit material.62 Any of these features could be deemed
disruptive to the rehabilitative function of prisons, justifying censorship in

55. See Nellis, supra note 22, at 15 (arguing that factors such as “unstable family
systems, exposure to family and/or community violence, elevated rates of unemployment,
and higher school dropout rates . . . are more likely to exist in communities of color” and
that these factors are the result of a history of intentional racial oppression).


57. See PEN America, supra note 41, at 3 ("[P]rison officials generally have broad
latitude to ban books based on their content, including the prerogative to develop their
own rationales for why a book should be blocked. . . . The results have been wide-ranging . . . ."

[https://perma.cc/DD8F-QMMQ] (noting also that this guideline is “generally
understood” to cover “content such as explanations on how to make explosives, martial arts
training manuals and books containing maps of the prison and its surrounding area”).

have provided prison officials discretion to censor reading material that is a serious threat
to security."); Lee Gaines, Who Should Decide What Books Are Allowed in Prisons?, NPR
(Feb. 22, 2020), https://www.npr.org/2020/02/22/806965684/who-should-decide-what-
books-are-allowed-in-prison [https://perma.cc/Y5N7-KFDN] (noting that decisionmakers
evaluate books and other publications based on their “potential threat to the security of
the operation of the prisons”).

60. Banning Books in Prisons, supra note 59 (noting an Alabama prison’s ban of an
award-winning book about racial oppression because it was “too dangerous for prisons”).

61. Gaines, supra note 59.

62. See id. (noting that Pennsylvania officials ban materials that are sexually explicit or
intended for “sexual gratification”). Connecticut prison officials recently pointed to
sexually explicit materials as creating an overly “sexually charged” environment that was
unsafe for female staff at the facilities. Reynolds v. Quiros, 25 F.4th 72, 79 (2d Cir. 2022).
The prison in that case considered a ban on such materials only for people convicted of
sexual offenses but found such a limitation impracticable given that those people were not
housed separately from the rest of the incarcerated population. Id. at 80.
the interest of public policy.\textsuperscript{63} Using this calculus, prison officials weigh preserving the function of the prison against incarcerated people’s right to read.\textsuperscript{64} As this Note will discuss, a closer analysis of censored material calls into question the safety and security motivations upholding book bans.\textsuperscript{65} The issue is whether book bans, examined critically, really can be justified by appeals to “corrections goals,”\textsuperscript{66} or if they serve more sinister ends. In any context, limiting access to information based on a cost–benefit analysis warrants closer attention.\textsuperscript{67}

Opacity and bureaucracy help First Amendment violations in prisons persist without effective opposition.\textsuperscript{68} Lists of banned books are rarely made available to the public.\textsuperscript{69} On its censorship page, the National Institute of Corrections simply provides that “[s]ome states do supposedly maintain lists of banned items,” but that there “certainly” isn’t one comprehensive database for the country.\textsuperscript{70} Advocacy organizations can use

\begin{footnotesize}
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\item See PEN America, supra note 41, at 1 ("Books in American prisons can be banned on vague grounds, with authorities striking titles and authors believed to be detrimental to ‘rehabilitation’ or somehow supportive of criminal behavior.").
\item See id.
\item See Thurgood Marshall C.R. Ctr., supra note 45, at 13 ("Few would take issue with prison officials seeking to maintain order in their institutions, but the content of the banned publications make clear that safety and order are not advanced by their prohibition."); see also Mzezewa, supra note 43 (questioning the reasoning behind prison book bans in light of research showing that reading and education lead to lower recidivism rates).
\item Cf. Turner v. Safley, 482 U.S. 78, 93 (1987) (upholding a restriction on correspondence between people incarcerated at different prisons because it was “reasonably related to valid corrections goals”).
\item See Andy Chan & Michelle Dillon, Opinion, Prison Systems Insist on Banning Books by Black Authors. It’s Time to End the Censorship., Wash. Post (Jan. 12, 2022), https://www.washingtonpost.com/opinions/2022/01/12/end-prisons-ban-books-black-authors-censorship-malcom-x-toni-morrison/ (on file with the Columbia Law Review) ("Limitations to access to information by the government should be deeply concerning, especially when considered within the known biases of the prison system.").
\item See PEN America, supra note 41, at 1 ("There is very little public visibility into how these policies are considered, adopted, implemented and reviewed.").
\item See id. at 4 ("Only a minority of states have made their prison banned book lists available."); Thurgood Marshall C.R. Ctr., supra note 45, at 12 ("While 26 states maintain lists of banned books, few states publicize their banned book lists on their websites, leaving the public with little understanding of what policies are in place in prisons."); Jensen, supra note 45 ("The Human Rights Defense Center has tracked state-by-state policies. According to their records as of writing, only two states have their banned books lists available online: Pennsylvania and Washington state."); Michael Van Aken, Prisons and Legal Perspectives on Book Challenges and Bans, Riverside Cnty. L. Libr.: Blog (Apr. 15, 2022), https://www.rcclawlibrary.org/blog/2022/04/prisons-and-legal-perspectives-on-book-challenges-and-bans/ [https://perma.cc/F7H8-NKVF] ("However, many book challenges and bans in prisons remain somewhat of a ‘hidden issue,’ meaning the issue rarely sees the light of day unless some form of reporting exposes it.").
\item Censorship and Banned Book Lists in Correctional Facilities, supra note 58 (emphasis added). For an example of advocacy organizations’ efforts to aggregate this information, see Keri Blakinger, The Books Banned in Your State’s Prisons, Marshall Project (Feb. 23, 2023), https://www.themarshallproject.org/2022/12/21/prison-banned-books-list-find-your-state [https://perma.cc/STY4-AM4K].
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Freedom of Information Act requests to compel officials to disclose their banned book lists. But such requests do not require officials to continuously update the public with revisions to banned book lists, meaning that these disclosures are merely “snapshots in a timeline of censorship.” Sometimes the only way to find out if a book has been censored is to mail it to a prison and see what happens. Using trial and error to obtain banned book lists from various facilities is time consuming and expensive, and some states charge for this information. Red tape makes banned book lists difficult to access, which makes them difficult to fight.

Restrictions also vary by jurisdiction and by facility. An incarcerated person could lose access to a book simply because they were transferred to another facility with a more restrictive policy. An incarcerated person could lose access to a book within a single facility because officials changed the internal censorship policy from one day to the next. Censorship decisions are generally decentralized and unorganized. A book could be kept from its intended incarcerated recipient based on the decision of the prison mailroom staff, a prison-wide policy, or statutory law. This lack of stability and consistency within and across institutions means the current state of censorship in America’s carceral state is unknowable with any certainty.

71. See PEN America, supra note 41, at 4–5 (“And even those states [who make their banned book lists available] normally only disclose their lists as the result of Freedom of Information Act (FOIA) requests from journalists or advocacy groups—requests for which they are legally obligated to respond.”).

72. Id. at 5.

73. Mzezewa, supra note 43 (“What’s clear is that in most states such policies are unclear, with people finding out if a book is not allowed only after it has been mailed, leading to frustration, wasted time and money.”).

74. See, e.g., Thurgood Marshall C.R. Ctr., supra note 45, at 12 (“Some states were only responsive to inquiries about banned books after the [Howard Human and Civil Rights Clinic] submitted public information requests. Even then, a number of states were still unresponsive.”); Jensen, supra note 45 (noting that the Human Rights Defense Fund was charged $2,000 for Alaska’s banned book records and that some states charge for the mere request of a banned book list even if such a list doesn’t exist).

75. See Chan & Dillon, supra note 67 (“With little transparency, these seemingly arbitrary bans are difficult and expensive to fight.”).

76. See Thurgood Marshall C.R. Ctr., supra note 45, at 5 (“[A]n incarcerated individual might have access to a specific book in one facility, but that same book might be off limits to that individual in the event that he or she is transferred to a different facility in that same state.”); Chan & Dillon, supra note 67 (“A book accepted in one prison may be censored in another.”).

77. See Chan & Dillon, supra note 67 (noting that within a prison “[a] book accepted one day may be banned the next”).

78. See PEN America, supra note 41, at 4 (“Prison systems function as a hierarchy, meaning officials at multiple levels can act as censors and block incarcerated people’s access to books.”).

79. See id. (“[W]ith so many overlapping and conflicting bans, it’s difficult to get a full accounting of just how many titles and authors are banned in U.S. prisons.”); Nazish
Book bans can be divided into two categories: content-neutral and content-based.\textsuperscript{80} Content-neutral bans restrict books based on how they enter the correctional facility.\textsuperscript{81} In theory, contraband might be smuggled into the facility inside books.\textsuperscript{82} To combat this potential threat, institutions limit the kind of mail incarcerated people can receive and may designate certain “approved vendors” to be the sole providers of books to the facility.\textsuperscript{83} Partnering with approved vendors also gives prison officials control over what kinds of books are offered to incarcerated people, meaning content-neutral policies can function similarly to their content-based counterparts.\textsuperscript{84}

Content-based bans serve a more overt censorship purpose: They target books based on what they are about.\textsuperscript{85} If a book contains subject matter considered disruptive to the functionality of the correctional facility, then it may be banned.\textsuperscript{86} This Note focuses on content-based bans.
that target books about race and carceral history. Books about race might be banned for their alleged potential to incite racial animus and conflict among groups within prisons. Books about the carceral state and its history might be banned for their alleged potential to incite disobedience against corrections staff. These subjects are, of course, highly relevant to people who are incarcerated, and the effort to exclude books about them from prisons is an effort to keep this knowledge away from the people who stand to benefit from it the most.

3. Procedural Barriers for Would-Be Plaintiffs. — Challenging a book ban as an incarcerated person is an onerous task. Notice is an initial obstacle. When a book is sent to someone in prison and authorities decide to censor it, the sender’s and recipient’s awareness of that decision depends on the facility’s notice policy (and whether staff comply with that policy). Just as lack of transparency makes it difficult to challenge

87. See id. (“This report also found a nationwide trend of prisons banning books relating to racial equality.”); Skopic, supra note 42 (“Like so many things in the carceral system, the pattern of restrictions is flagrantly racist. For instance, many prisons have blanket bans on ‘urban’ novels, a genre revolving around crime and intrigue in African-American communities. These are treated as contraband, and can’t be obtained through approved sources.”).


89. See, e.g., Wash. State Dep’t of Corr., supra note 88 (initially flagging Mariame Kaba’s We Do This ‘Til They Free Us because it “[a]dvocates violence against others and/or the overthrow of authority”).

90. See Thurgood Marshall C.R. Ctr., supra note 45, at 4 (“[E]qually valuable [as reduced recidivism] is the ability of the incarcerated to learn about and challenge the systems to which they are subjected. . . . When prisons ban books of this kind, they are purposefully cutting off the tools the incarcerated need to realize their civil and human rights.”); Andrew Hart, Librarians Despise Censorship. How Can Prison Librarians Handle That? It’s Complicated., Wash. Post (Jan. 16, 2018), https://www.washingtonpost.com/news/posteverything/wp/2018/01/16/librarians-despise-censorship-how-can-prison-librarians-handle-that-its-complicated/ (on file with the Columbia Law Review) (“Restricting [incarcerated people] from reading about injustices in the U.S. prison system struck many as a shocking and ironic overreach.”).

91. See Dholakia, supra note 79 (noting that the nonprofit Books to Prisoners “receives a handful of [censorship notices] every week,” making it “impossible to say how many books never make it to their intended recipients because such notices aren’t standard”); see also Censorship and Banned Book Lists in Correctional Facilities, supra note 58 (citing a claim against a prison that banned the Jailhouse Lawyer’s Handbook without notifying the publisher as required).
overarching censorship policies, lack of notice makes it difficult to challenge individual instances of censorship as they occur.\textsuperscript{92}

If an incarcerated person becomes aware of a censorship decision and wants to challenge it, they must also contend with the requirements of the Prison Litigation Reform Act (PLRA).\textsuperscript{93} The statute’s exhaustion requirement is particularly problematic since an incarcerated person’s failure to first exhaust administrative remedies offered by the prison is grounds for dismissal of any lawsuit they might file.\textsuperscript{94} If a prison offers the option to appeal a ban, an incarcerated person must take it, even if that option just means that a censorship decision will be reviewed only by other corrections officers and more likely than not upheld.\textsuperscript{95} Advocacy groups might choose to litigate on behalf of an author or publisher to vindicate the rights of an incarcerated person and avoid the cumbersome requirements of the PLRA.\textsuperscript{96} But this strategy relies on the author or publisher being sufficiently invested in the rights of incarcerated people to join the fight.\textsuperscript{97} In the unlikely case that an incarcerated person clears these procedural hurdles or that a third party decides to litigate an anti-censorship claim, they must overcome the damning precedent of three Supreme Court opinions.

\textsuperscript{92} Thompson cited lack of notice in her complaint against New York prison officials for censoring her book. Complaint, S.D.N.Y., supra note 10, at 9–10.


\textsuperscript{94} 42 U.S.C. § 1997e(a) (2018); ACLU, supra note 93, at 1 (“If you file a lawsuit in federal court before taking your complaints through every step of your prison’s grievance procedure, it will almost certainly be dismissed.”). For a broader discussion of the ways prisons erect administrative barriers, see generally PEN America, supra note 41, at 14 (“Prisons may . . . implement unreasonably short filing deadlines, extend timelines as a stalling tactic, create multiple layers of review, or craft procedural dead ends. These systems are difficult to navigate, and courts will seize on any error . . . as a reason to dismiss the claim, regardless of the underlying merits.”).

\textsuperscript{95} PEN America, supra note 41, at 6 (noting that since review committees usually comprise other corrections officers, “these committees are far more likely to uphold the censor’s decision than to reverse it”); Boston, supra note 93, at 363 (“You may believe that the complaint system in your prison is unfair or a complete waste of time, but you still must use and go through all of the steps and give the prison a chance to fix the problem first.”); see also infra text accompanying notes 220–222.

\textsuperscript{96} See PEN America, supra note 41, at 15 (noting that, since there is no exhaustion requirement for nonincarcerated people, “much of the litigation on book banning in U.S. prisons occurs not on behalf of incarcerated people, but on behalf of the book publishers and distributors”). For example, Dr. Thompson, not one of the incarcerated people to whom she tried to send her book, is the plaintiff in her suit against New York State prison officials. See Complaint, S.D.N.Y., supra note 10, at 1.

\textsuperscript{97} See PEN America, supra note 41, at 15 (“But this litigation is rare. Publishers have very little financial incentive to wage a protracted and expensive legal battle for the book access rights of an incarcerated person who ordered their book. Furthermore, publishers and authors often are seldom aware that their book has been censored.”).
B. *The Prevailing Power of Turner*

The prevailing standard of review for constitutional challenges to prison regulations was set by the Supreme Court in *Turner v. Safley*.\(^98\) This 1987 decision came on the heels of a period of increased incarcerated activism and litigation targeting apparently unconstitutional internal prison policies.\(^99\) Before this period, it was accepted that incarceration placed people “outside the bounds of constitutional protection,” and courts were very deferential to the “expertise” of prison officials when determining which rights could be compromised.\(^100\) Prison uprisings spiked in the 1950s, putting pressure on courts to actually consider the merits of incarcerated plaintiffs’ claims (something they had declined to do up to this point).\(^101\) Once these activism efforts revealed the completely arbitrary justifications behind many prison policies, the stage was set for the Supreme Court to rule on the issue definitively.\(^102\) The question at bar was how to protect incarcerated people’s constitutional rights while giving prisons enough deference to conduct their business safely.\(^103\)

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99. See Schnell, supra note 98, at 128–29 (describing waves of prison uprisings and litigation from the 1950s through the 1970s “challenging conditions of confinement and . . . treatment [of incarcerated people]”).

100. See id. at 127–28 (noting that for the first two centuries after the United States was founded, “[t]he only protections granted to [incarcerated people] could be found in state law, should a state choose to afford them”).

101. See Nicole B. Godfrey, Suffragist Prisoners and the Importance of Protecting Prisoner Protests, 53 Akron L. Rev. 279, 296 (2019) (describing how the Civil Rights Movement prompted federal courts to “recogniz[e] federal remedies for constitutional violations” by the state and “also began allowing [incarcerated people] to sue prison officials for unconstitutional prison conditions”); Schnell, supra note 98, at 128 (“The need for reform gradually drove the Warren Court to shift away from their 'hands-off' approach and rule on the merits of [incarcerated people’s] rights claims, directly addressing the unconstitutionality of prison conditions and treatment of [incarcerated people].”).

102. See Schnell, supra note 98, at 129 (“Early lawsuits during this second wave of litigation revealed that prison officials frequently could not justify or even explain their procedures, leading courts to call for reforms.”).

103. Id. (“Courts thus faced the difficult question of how to 'discharge their duty to protect constitutional rights,' while still affording appropriate deference to the judgment of newly 'professionalized' prison administrators as to what regulations were truly necessary to maintain safe prison environments.” (quoting Procunier v. Martinez, 416 U.S. 396, 404–06 (1974), overruled by Thornburgh v. Abbott, 490 U.S. 401, 415 (1989)).)
The standard of review for such claims was first considered in *Procunier v. Martinez*, which addressed mail censorship specifically. This 1974 case was a class-action suit brought by people incarcerated in California who challenged a content-based ban on mail communications. The Court struck down the ban as unconstitutional, objecting to the “extraordinary latitude” that the policy granted prison officials. The Court applied a heightened standard of scrutiny, requiring that restrictions on correspondence be “generally necessary” to protect the government interest of “internal order and discipline.” But the Court focused its holding on the First Amendment rights of the outside communicator. It expressly declined to refer to case law on “prisoners’ rights” and instead relied on precedent dealing more generally with restrictions on First Amendment liberties. In the aftermath, courts appeared confused about the standard the Court had set, applying varying levels of scrutiny to prison policies in claims brought by incarcerated people.

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105. *Martinez*, 416 U.S. at 398, 415 (evaluating ban prohibiting “statements that ‘unduly complain’ or ‘magnify grievances,’ expression of ‘inflammatory political, racial, religious or other views,’ and matter deemed ‘defamatory’ or ‘otherwise inappropriate’” (quoting Cal. Dep’t of Corr., Rules and Regulations of the Director of Corrections, DR-1201, -1205 (1972))).

106. Id.

107. Id. at 412–14.

108. See id. at 408 (“Whatever the status of a prisoner’s claim to uncensored correspondence with an outsider, it is plain that the latter’s interest is grounded in the First Amendment’s guarantee of freedom of speech.”).

109. Id. at 409; see also Keenan, supra note 104, at 509 (“The Court’s holding, however, was explicitly grounded on . . . the constitutional rights of non-inmates who sought to communicate with others who happened to be incarcerated. The Court looked not to prisoners’ rights cases, but to cases involving the incidental restriction of the first amendment rights of citizens generally.” (footnote omitted)).

110. See, e.g., *Martinez*, 416 U.S. at 412–13 (applying heightened scrutiny to a restriction on communications between incarcerated people and the general public); Pell v. Procunier, 417 U.S. 817, 827 (1974) (“[I]n the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.”). Many lower courts subsequently relied on the *Martinez* standard to ground their analysis. See Keenan, supra note 104, at 511 (“Despite this fairly coherent line of cases counseling deference and examination of regulations against a reasonableness standard, different standards of review emerged in the circuit courts of appeals. These alternate standards of review frequently incorporated the ‘least restrictive alternative’ analysis of *Martinez*.” (footnote omitted)); see also Godfrey, supra note 101, at 296–97 (“[F]or many years, the federal courts subjected certain First Amendment violations by prison officials . . . to a more exacting standard of review.”).
Over a decade later, the Supreme Court established a universal standard of review for prison regulations in *Turner*.111 The plaintiffs were people incarcerated in Missouri.112 They challenged two prison regulations: The first prohibited correspondence between people incarcerated at different facilities, and the second prohibited marriage between incarcerated people.113 The plaintiffs brought claims under the First and Fourteenth Amendments, challenging both the interfacility communication ban and the marriage ban.114 The district court applied the heightened scrutiny from *Martinez* and found the communication ban to be “unnecessarily sweeping”; in other words, it was broader than necessary to promote order and security.115 The district court struck down the policies as unconstitutional and the Eighth Circuit upheld that decision.116

*Turner* is most remembered for establishing a new test for evaluating rights infringements in prisons.117 The test the Court applied was “whether a prison regulation that burdens fundamental rights is ‘reasonably related’ to legitimate penological objectives, or whether it represents an ‘exaggerated response’ to those concerns.”118 The Court established a four-factor test to measure reasonable relatedness.119 Those factors were:

1) Whether there is a “valid, rational connection” between the prison regulation and the government interest said to justify the regulation;

111. Schnell, supra note 98, at 140–41 (“The *Turner* Court reviewed its past jurisprudence to synthesize what it believed to be a coherent standard for evaluating these and future claims.”).
113. Id.
114. Schnell, supra note 98, at 140–41.
116. Godfrey, supra note 101, at 298 (“The Eighth Circuit affirmed, concluding that correspondence between [incarcerated people] ‘is not presumptively dangerous nor inherently inconsistent with legitimate penological objectives’ and that the marriage rule as applied by Superintendent [William] Turner was unconstitutional on its face because it provided no alternative means of exercising the right to marry.” (quoting *Turner*, 777 F.2d at 1313)); Keenan, supra note 104, at 512 (“The circuit court approved the use of the strict scrutiny standard and found that neither regulation was the least restrictive means of achieving the asserted security interest.”).
117. See *Turner*, 482 U.S. at 81 (“The Court of Appeals for the Eighth Circuit, applying a strict scrutiny analysis, concluded that the regulations violate respondents’ constitutional rights. We hold that a lesser standard of scrutiny is appropriate in determining the constitutionality of the prison rules.”); see also Godfrey, supra note 101, at 298 (“The Supreme Court affirmed in part and reversed in part and, in so doing, announced a new test through which federal courts should examine First Amendment claims brought by [incarcerated people].”).
119. See Schnell, supra note 98, at 140–42 (crediting the *Turner* decision for setting “a universal standard of review for constitutional challenges to prison regulations”).
2) Whether there are “alternative means” of exercising the right that is limited by the regulation;
3) What impact accommodation of the asserted constitutional right would have on prison administrators, [incarcerated people], and prison resources; and
4) Whether there are “ready alternatives” to the chosen regulation.\textsuperscript{120}

\textit{Turner} was immediately cemented as a near-insurmountable barrier to the subsequent litigation of similar claims.\textsuperscript{121} The first factor, testing rational connection, is widely regarded as the core of the test, and most plaintiffs fail to clear that hurdle.\textsuperscript{122} Institutional defendants usually only need to offer some “plausible security concern” to defeat a constitutional challenge,\textsuperscript{123} an outcome feared by the dissenters.\textsuperscript{124} The Court cited deference to prison officials to justify judicial restraint, noting that “[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources.”\textsuperscript{125} The Court deemed the communication ban “logically connected” to prison security

\textsuperscript{120} Id. at 142 (footnotes omitted) (citing \textit{Turner}, 482 U.S. at 89–92). But see Justin L. Sowa, Note, Gods Behind Bars: Prison Gangs, Due Process, and the First Amendment, 77 Brook. L. Rev. 1593, 1598 (2012) (“The first prong . . . seems to have considerably more weight than the other three.”).
\textsuperscript{121} See Sowa, supra note 120, at 1600–01 (“The application of \textit{Turner}, therefore, is not nearly as protective of prisoners’ rights as its plain language would suggest. Because of the Supreme Court’s continued emphasis on deference to the decisions of prison authorities, much of the force of the decision has been neutered.”).
\textsuperscript{122} See id. at 1596 (“In practice, as long as the first prong—the rational relation test—is met, courts tend to find that the others are met as well.”); see also Godfrey, supra note 101, at 298 (“Oftentimes, this factor alone is dispositive in \textit{Turner} cases—if the prison system can come forward with any legitimate government interest to justify the regulation, even if that interest is not the actual reason the prison system enacted the policy, the [incarcerated person] loses.”).
\textsuperscript{123} See, e.g., Schnell, supra note 98, at 143–44 (“The Court has, for example, upheld regulations that allowed wardens to selectively reject incoming publications purportedly for ‘order and security,’ with no evidence in the record that publications would cause disruptions, nor any evidence that an incoming publication had caused a disciplinary or security problem.”).
\textsuperscript{124} See Keenan, supra note 104, at 515–16 (“[T]he dissent warned that if the Court’s standard can be satisfied merely by a ‘logical connection’ between the regulation and the asserted penological concern, then the standard would effectively be meaningless because it would permit abuses of . . . constitutional rights whenever an imaginative warden could produce a plausible security concern.”). In his dissent, Justice John Paul Stevens criticized the decision, including the Court’s “erratic use of the record” in distinguishing marriage from correspondence. \textit{Turner}, 482 U.S. at 116 (Stevens, J., dissenting).
\textsuperscript{125} \textit{Turner}, 482 U.S. at 84–85 (majority opinion); see also Keenan, supra note 104, at 512–13 (“The Court refused to subject day-to-day decisions of prison officials to ‘an inflexible strict scrutiny analysis’ for fear of distorting the decision-making process, hampering the efforts of prison officials to anticipate problems, and unnecessarily involving courts in the details of prison administration.” (quoting \textit{Turner}, 482 U.S. at 89)).
concerns and upheld it as constitutional.\textsuperscript{126} The only prison regulation to have failed \textit{Turner}'s reasonableness test before the Supreme Court is the marriage ban in \textit{Turner} itself.\textsuperscript{127}

The Court affirmed this low bar just a few years later with \textit{Thornburgh v. Abbott}.\textsuperscript{128} The \textit{Thornburgh} plaintiffs challenged the constitutionality of restrictions on “outside” publications within the prison based on institutional security concerns.\textsuperscript{129} They argued for application of the stricter \textit{Martinez} standard, which would have required heightened scrutiny for such restrictions.\textsuperscript{130} But the Supreme Court definitively held that \textit{Turner} controlled and overruled \textit{Martinez}.\textsuperscript{131} The Court focused on the rights of nonincarcerated correspondents,\textsuperscript{132} analogizing this focus to the \textit{Martinez} approach and distinguishing it from \textit{Turner}, which considered the rights of incarcerated people specifically.\textsuperscript{133} But the Court clarified that the more relevant distinction was the direction that communications flowed in the cases: out of the prison (\textit{Martinez}) versus into the prison (\textit{Turner} and the case at bar, \textit{Thornburgh}).\textsuperscript{134} Communications flowing into

\begin{quote}
\textsuperscript{126.} \textit{Turner}, 482 U.S. at 91–93; see also Keenan, supra note 104, at 514 (noting that prison officials testified that communications between incarcerated people posed a threat to security because there was the potential to “coordinate escapes, assaults, and gang activity,” and that the Court upheld the restriction in part because incarcerated people were still allowed to communicate with nonincarcerated people).

\textsuperscript{127.} Schnell, supra note 98, at 144; see also Keenan, supra note 104, at 511, 515 (describing how the Court in \textit{Turner} found the Missouri Division of Corrections’s prohibition on marriage between incarcerated people to be an “exaggerated response” to the cited security concerns (internal quotation marks omitted) (quoting \textit{Turner}, 482 U.S. at 97–98)). See generally Sowa, supra note 120, at 1599 (“Under the \textit{Turner} test, the Supreme Court has upheld prison regulations that . . . prevented [incarcerated] Muslim[s] from attending a religiously commanded Friday evening prayer service, severely restricted visitation rights, imposed up to sixteen-day delays in access to legal materials, and [forcibly] subjected an [incarcerated person] to treatment with antipsychotic drugs . . . .” (footnotes omitted)).

\textsuperscript{128.} 490 U.S. 401 (1989).

\textsuperscript{129.} Id. at 403.

\textsuperscript{130.} Id.; see also Procunier v. Martinez, 416 U.S. 396, 413 (1974) (“[T]he limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.”), overruled by \textit{Thornburgh}, 490 U.S. at 413–14.

\textsuperscript{131.} \textit{Thornburgh}, 490 U.S. at 414 (“[W]e recognize that it might have been possible to apply a reasonableness standard to all incoming materials without overruling \textit{Martinez} . . . . We choose not to go that route, however, for we prefer the express flexibility of the \textit{Turner} reasonableness standard.”).

\textsuperscript{132.} See id. at 408 (“In this case, there is no question that publishers who wish to communicate with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to [incarcerated people].”).

\textsuperscript{133.} See id. at 408–09 (noting that the question is what standard of review to apply to prison regulations limiting outsiders’ communications to incarcerated people and comparing that focus to other cases, including \textit{Turner}, which “involv[ed] ‘prisoners’ rights’” (quoting \textit{Turner} v. Safley, 482 U.S. 78, 89 (1987))).

\textsuperscript{134.} See id. at 413 (“[T]he logic of our analyses in \textit{Martinez} and \textit{Turner} requires that \textit{Martinez} be limited to regulations concerning outgoing correspondence. . . . Any attempt to
a prison could more logically be expected to interfere with penological interests than those flowing out of a prison. The Court determined that this distinction, rather than the identities of the rightsholders, was most relevant to the issues of prison order and security.

*Thornburgh* united the constitutional rights of incarcerated and nonincarcerated people with respect to reading materials “inside” under the *Turner* umbrella. For communications going into a prison, the inquiry (derived from *Turner*) was (1) whether the government objective at issue was legitimate and neutral and (2) whether the regulation was rationally related to that objective. This eliminated federal courts’ ability to apply a more exacting standard reminiscent of *Martinez*.

If *Turner* and *Thornburgh* left any room to question the rights of incarcerated people to access “outside” reading materials, the Court answered in *Beard v. Banks*. This 2006 case challenged the “deprivation theory of rehabilitation” in a Pennsylvania prison, where reading materials were restricted based on security levels. Incarcerated people in the more restrictive level had heightened restrictions on reading materials, and good behavior could allow them to move to the less restrictive level and earn access to those materials. In *Turner* terms, the legitimate penological interest at stake was rehabilitation.

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Justify a similar categorical distinction between incoming correspondence from incarcerated people . . . and incoming correspondence from nonincarcerated people would likely prove futile, and we do not invite it.”)

135. Id. at 412 (“We deal here with incoming publications, material requested by an individual but targeted to a general audience. Once in the prison, material of this kind reasonably may be expected to circulate . . . with the concomitant potential for coordinated disruptive conduct.”).

136. See id. at 411 (stating that the regulation in *Martinez* was rejected because “the regulated activity centrally at issue in that case . . . did not, by its very nature, pose a serious threat to prison order and security”).

137. Id. at 414.

138. 548 U.S. 521, 525 (2006) (plurality opinion); see also Schnell, supra note 98, at 145 (“Most extraordinarily, in the last case in which the *Turner* test was applied to a free speech challenge by the Supreme Court, the Court held that ‘deprivation’ of incarcerated people’s access to reading materials and photographs is reasonably related to prisoner rehabilitation and security.”).

139. See Schnell, supra note 98, at 145 (quoting *Beard*, 548 U.S. at 546 (Stevens, J., dissenting)).

140. Michael Keegan, The Supreme Court’s “Prisoner Dilemma:” How *Johnson*, RLUIPA, and *Cutter* Re-Defined Inmate Constitutional Claims, 86 Neb. L. Rev. 279, 310 (2007) (“[Incarcerated people] in the more restrictive level 2 have no access to the commissary, may only have one visitor per month, and are not allowed phone calls except in emergencies.”).

141. See id. at 310–11 (“An [incarcerated person] at level 1 still may not have photographs, but may receive one newspaper and five magazines.”).

142. See Schnell, supra note 98, at 145 (“As Justice Stevens noted in his dissent in *Beard*, there is no ‘limiting principle’ to this ‘deprivation theory of rehabilitation.’ Any number of constitutional rights could therefore be limited in the name of rehabilitation.” (quoting *Beard*, 548 U.S. at 546 (Stevens, J., dissenting))).
The Beard Court reaffirmed the Turner standard, which the prison policy easily satisfied.\textsuperscript{143} The Court found it necessary to review only one of three justifications offered for the prison policy and hinged its decision almost exclusively on the first factor of the Turner test.\textsuperscript{144} The Court held that the other Turner factors did not add much to the analysis so long as the regulation was reasonably related to at least one penological interest.\textsuperscript{145} The only evidence the Beard Court offered to show that it wasn’t “impossible” to defeat a prison regulation in court was that the marriage regulation from Turner failed the test laid out in that case.\textsuperscript{146} Would-be plaintiffs were left with a near-impossible standard, such that only one regulation was struck down in the span of two decades.\textsuperscript{147}

II. REVISITING ATTICA

The Attica prison uprising challenged the human and civil rights violations committed by New York State prison officials against incarcerated people.\textsuperscript{148} The original uprisers specifically called for an end to the harsh censorship policies limiting their right to read.\textsuperscript{149} The ban on Blood in the Water at the very prison whose history it recounts is a grim reminder that censorship is a weapon still wielded by the carceral state. Section II.A recounts the circumstances surrounding the Attica prison uprising. Section II.B gives an overview of the current legal struggle against the present-day censorship of Attica’s history at that same facility. Section II.C situates censorship in prisons alongside censorship of history in other contexts.

\textsuperscript{143} See Beard, 548 U.S. at 530–33 (plurality opinion) (applying Turner’s four-factor test to the regulation at issue).
\textsuperscript{144} See Keegan, supra note 140, at 311–12 ("The plurality began with the first Turner factor, accepting the valid rational connection offered by the Secretary . . . . Though the plurality opinion briefly looked at the second, third, and fourth factors, it noted that those factors ‘here add little, one way or another, to the first factor’s basic logical rationale.’" (quoting Beard, 548 U.S. at 532)).
\textsuperscript{145} See id.
\textsuperscript{146} See id. at 535–36 (referring to Turner itself to counter the argument that “the deference owed prison authorities makes it impossible for [incarcerated people] or others attacking a prison policy like the present one ever to succeed or to survive summary judgment”).
\textsuperscript{147} See supra note 127 and accompanying text; see also Schnell, supra note 98, at 145 ("As the most recent case of Beard demonstrates, [incarcerated people’s] free speech challenges essentially stand or fall with the first prong of Turner, i.e., whether there is a valid, rational connection between a prison regulation and the purported government interest.").
\textsuperscript{148} See The Attica Manifesto, supra note 13, at 28–30.
\textsuperscript{149} Id. at 30.
A. The Attica Prison Uprising\textsuperscript{150} 

The 1971 uprising was preceded by consistent efforts by the men incarcerated at Attica to negotiate with their imprisoners for better treatment. In the year prior to the uprising, the men forced to work in Attica’s metal shop went on strike in protest of their wages, which capped out at twenty-nine cents per day and were withheld by prison officials until the men’s release.\textsuperscript{151} The metal shops were dirty and hot, showers were limited, and men continued work throughout the hot summer months in up to eighty-nine degree weather.\textsuperscript{152} The strike forced negotiations, which resulted in a raise for metal shop workers.\textsuperscript{153} But responsibility for the peaceful strike was attributed to the “[B]lack militant[s]” of Attica, who unsettled the superintendent and corrections officers.\textsuperscript{154} Many of these organizers were subjected to increased surveillance following the strike.\textsuperscript{155}

Attica’s corrections staff were not alone in their fear of Black political organizing. Outside of prisons, anyone affiliated with the Black Power Movement had became a “national security threat,” and the government fought back against these domestic enemies by incarcerating them.\textsuperscript{156} Across the country, prison officials feared the larger numbers of Black “radicals” they suddenly found behind their walls.\textsuperscript{157} And their revolutionary energy was contagious. A manifesto that originated from the 1970 uprising at Folsom Penitentiary circulated throughout prisons nationwide.\textsuperscript{158} At the Auburn Correctional Facility in New York, a demonstration led by incarcerated Black political activists ended with violent retaliation from corrections officers.\textsuperscript{159} News of this violence spread

\begin{itemize}
\item \textsuperscript{150} The full story of the Attica prison uprising is better told by Thompson in Blood in the Water. The events of September 9 to 13 of 1971, including the uprising, negotiations, and retaking, are recounted in parts II, III, and IV of the book. See generally Thompson, supra note 1.
\item \textsuperscript{151} Id. at 15, 17; see also Attica: The Official Report of the New York State Special Commission on Attica 38–39 (1972) [hereinafter Attica: The Official Report] (noting that metal shop positions were hated among the men incarcerated at Attica).
\item \textsuperscript{152} Attica: The Official Report, supra note 151, at 39.
\item \textsuperscript{153} Thompson, supra note 1, at 17.
\item \textsuperscript{154} Id.
\item \textsuperscript{155} Id.
\item \textsuperscript{156} See Jordan T. Camp, Incarcerating the Crisis: Freedom Struggles and the Rise of the Neoliberal State 41–42 (2016) (describing how counterinsurgency efforts targeting Black radicals “marked a critical moment in the development of the neoliberal carceral state”).
\item \textsuperscript{157} Badillo & Haynes, supra note 2, at 161 (“In all prisons . . . a dangerous racial tinderbox terrified wardens and prison administrators. Alarmed about radicals, revolutionaries, and ‘ultra-liberal groups out to cause revolution’ . . . most officials [were] neither inclined nor equipped to handle this extremely sensitive problem.” (quoting John Zelker, Warden, Green Haven Correctional Facility)).
\item \textsuperscript{158} Mary Bosworth, Explaining U.S. Imprisonment 107 (2010).
\item \textsuperscript{159} Thompson, supra note 1, at 23–24.
\end{itemize}
quickly, and some of the organizers were transferred to Attica.\footnote{160} Riots in New York City jails ended with violence from prison officials, and some of the men deemed particularly culpable were also transferred to Attica.\footnote{161} Ironically, many of these transferees became the leaders of Attica’s own uprising.\footnote{162} Finally, George Jackson’s writings critiquing U.S. prisons as capitalist and oppressive were popular readings for organizers across the country.\footnote{163} He was murdered by prison guards in August 1971, to the outrage of those whom he inspired.\footnote{164}

Over the summer of 1971, the incarcerated men at Attica spent increased time forming critiques of their conditions of imprisonment.\footnote{165} Led by the Attica Liberation Faction, they collaborated on a document titled “The Attica Liberation Faction Manifesto of Demands,” in which they spoke out on behalf of all of the men of Attica and other incarcerated people against the human and civil rights violations perpetrated in the “fascist concentration camps of modern America.”\footnote{166} Their preamble targeted, among other grievances, the blanket censorship of reading materials at Attica.\footnote{167} The men framed their right to read as the “human right[...] to the wisdom of awareness” and accused prison officials of condemning them to “isolation status” by restricting this right.\footnote{168} The Faction sent the manifesto to the Commissioner of the New York State Department of Corrections and Community Supervision (DOCCS) for review in the summer of 1971.\footnote{169} Negotiations ensued over the course of the summer but ended on September 2 with an anticlimactic tape-
recorded message from the commissioner; prison officials took no reformatory measures in response to the Faction’s demands.170

The uprising itself emerged out of a chaotic frenzy the morning of September 9, 1971. A group of incarcerated men was leaving breakfast when one of the superintendents ordered them to return to their cells as a disciplinary measure.171 The men normally would have passed through a tunnel to the yard for recreation time, but the superintendent ordered that the tunnel gate be locked to redirect the group to their cells; at that point, the men realized they were trapped in the tunnel with a guard known to be violent.172 Panic broke out, and 1,281 incarcerated men successfully gained control of the facility.173

Once the frenzy dissipated, the men got organized.174 They gathered in one of the prison’s yards along with thirty-eight civilian employee and corrections officer hostages.175 Two-thirds of the men assembled in the yard were Black, one-quarter white, and one-tenth Puerto Rican.176 Over the next four days, nonviolent but tense negotiations ensued between the incarcerated men of Attica and the state, conducted through a team of civilian observers called in as middlemen.177 Though the demonstration garnered international attention, Governor Rockefeller did not visit Attica during the uprising and did not otherwise meaningfully acknowledge the demands of the uprisers.178

The state regained control of the facility and the narrative surrounding the uprising on September 13, 1971, when armed national guardsmen ambushed the prison and opened fire.179 They fatally shot twenty-nine incarcerated men and nine civilian hostages, but prison officials immediately reported to the media that the civilians had their throats slit by the rioters.180 The same day, newspapers across the country reported on the alleged throat slashings as fact.181 Though autopsy reports would soon prove this to be a complete fabrication, the damage to the collective interpretation and memory of Attica had already been done.182

170. See id. at 39–40 (“[I]t seemed clear [to the uprisers] that their foray into the democratic process and their patience as well as pledge of nonviolence had produced not a single improvement in their living conditions.”).
171. See id. at 51.
172. See id. at 51–52.
173. See id. at 52–59, 64.
174. See id. at 64.
175. See Badillo & Haynes, supra note 2, at 40.
176. Thompson, supra note 1, at 65–66.
177. See Badillo & Haynes, supra note 2, at 53–89 (summarizing the negotiations between the uprisers and state officials).
178. Id. at 85–89.
179. See supra notes 3–4 and accompanying text.
180. See Thompson, supra note 1, at 180, 187, 193–95.
181. See id. at 195–96.
182. See id. at 227–30, 236.
The story fed to the outside audience was one of state heroism finally restoring order not only to the immediate facility but to “our free society” as well.\textsuperscript{183} It took nearly fifty years for a competitive counternarrative to emerge.\textsuperscript{184}

The Attica prison uprising coincided with the birth of the prisoners’ rights movement.\textsuperscript{185} The uprising was only one of thirty-seven that took place in 1971, which was a mere foreshadowing of the forty-eight that followed in 1972.\textsuperscript{186} There was a cycle of incarcerated people educating themselves on the politics of their imprisonment through the work of Black organizers outside and those outside organizers eventually being incarcerated themselves.\textsuperscript{187} By arresting political activists, the state created direct links between incarcerated individuals and groups such as the Black Panther Party, Black Muslims, the American Civil Liberties Union, and the American Communist Party, and their political education was a direct threat to the system imprisoning them.\textsuperscript{188} The Attica prison uprising personified this threat; the lies spread about “knife-wielding prisoners” created moral panic and an enduring narrative about law and order, with the “insurgent prisoner” at the center.\textsuperscript{189} Governor Rockefeller leveraged this narrative to usher in two cornerstones of mass incarceration: “the super-maximum-security prison”\textsuperscript{190} and mandatory-minimum drug laws\textsuperscript{191} to funnel even more people behind those prison walls. These laws were duplicated across the country, and in this way Attica ushered in the tough-on-crime era responsible for mass incarceration today.\textsuperscript{192}

The Attica Manifesto properly identified a shift in American incarceration away from any harm-reduction end and toward an “era of punitive excess” that

\textsuperscript{183} See id. at 194.
\textsuperscript{184} See infra notes 194–197 and accompanying text.
\textsuperscript{186} See Robert T. Chase, We Are Not Slaves: Rethinking the Rise of Carceral States Through the Lens of the Prisoners’ Rights Movement, 102 J. Am. Hist. 73, 74 (2015).
\textsuperscript{187} See Bosworth, supra note 158, at 107–08 (“[M]ass media became a means of politicization, educating [incarcerated people] about their rights and shared experiences . . . . [F]rom the 1960s onwards, an increasing number of [incarcerated people] arrived already politicized by their experiences with the Civil Rights Movement and by the increasingly radical Black Power Movement.”).
\textsuperscript{188} Id. at 88, 111 (describing state efforts to quash Black Muslim and freedom movements within prisons).
\textsuperscript{189} See Camp, supra note 156, at 71.
\textsuperscript{190} Id. at 73.
\textsuperscript{191} See Thompson, supra note 1, at 563.
\textsuperscript{192} See id. at 562–63 (“That Attica had . . . helped fuel an anti-civil-rights and anti-rehabilitative ethos in the United States was soon clear . . . . Any politician who wanted money for his or her district had learned that the way to get it was by expanding the local criminal justice apparatus and making it far more punitive.”).
created and maintained an even worse status quo for American imprisonment.\textsuperscript{193}

B. Thompson v. Annucci

1. Blood in the Water and Its Impact. — In 2016, Dr. Heather Ann Thompson published \textit{Blood in the Water}, an almost 600-page account of the events at Attica.\textsuperscript{194} It is regarded as the first comprehensive, “definitive” history of the uprising.\textsuperscript{195} \textit{Blood in the Water} is not the only book about the Attica uprising, but it is unique for also covering both the sociopolitical context that birthed the uprising and the resulting fallout.\textsuperscript{196} Central to her narrative was Thompson’s condemnation of the state-sponsored cover-up that followed the uprising, and she is credited for bringing the extent of this cover-up to light.\textsuperscript{197} The book concludes by pointing to Attica as a key catalyst of mass incarceration as we know it today.\textsuperscript{198}

\textit{Blood in the Water} was met with critical acclaim. Reviewers agreed that the book was particularly timely given how many more people are incarcerated in America today than in 1971.\textsuperscript{199} Thompson accepted the

\textsuperscript{193} See Jeremy Travis & Bruce Western, The Era of Punitive Excess, Brennan Ctr. for Just. (Apr. 13, 2021), https://www.brennancenter.org/our-work/analysis-opinion/era-punitive-excess [https://perma.cc/584E-MAVP]; see also The Attica Manifesto, supra note 13, at 30 (arguing that the system claiming to rehabilitate them was in fact victimizing them).

\textsuperscript{194} See Thompson, supra note 1.


\textsuperscript{196} See Eisen, supra note 195; see also Michael Avery, Book Review: \textit{Blood in the Water: The Attica Prison Uprising of 1971 and Its Legacy}, 74 Nat’l Laws. Guild Rev. 57, 57 (2017) (“I was simply not prepared for the shock of Thompson’s painstaking recreation of the brutal retaking of the prison by the state police, or for her detailed account of the decades long callous indifference of New York State officials to the consequences of their actions.”); Oppenheimer, supra note 9 (“Had it only painstakingly reconstructed the events of that week in 1971, Ms. Thompson’s book would have been a definitive addition to a growing shelf of Attica literature . . . . But the uprising and its suppression barely get us halfway through the story.”).

\textsuperscript{197} See Avery, supra note 196, at 60 (“When it comes to the culpable officials, she names names, and provides detailed evidence, from Governor Rockefeller to Attica Superintendent Vincent Mancusi . . . . as well as the bevy of lawyers, bureaucrats, and elected officials who attempted to cover up the truth.”); Hartle, supra note 195 (noting that Attica would, but for the cover-up, be grouped with other trust-shattering incidents like the Vietnam War and Watergate).

\textsuperscript{198} See Thompson, supra note 1, at 563 (describing how Governor Rockefeller introduced mandatory minimums for drug possession in New York in 1972, ushering in the War on Drugs and mass incarceration).

\textsuperscript{199} See Orisanmi Burton, Diluting Radical History: \textit{Blood in the Water} and the Politics of Erasure, Abolition J. (Jan. 26, 2017), https://abolitionjournal.org/diluting-radical-
2017 Pulitzer Prize for her work, among other awards. Critics praised her depth of research and compared her to bestselling author of *The New Jim Crow*, Michelle Alexander, for her ability to make difficult history accessible to a general audience. While her reliance on official records translated to credibility for certain readers, others critiqued this methodology as telling the story “through the eyes of the state.” In any case, the fact that Thompson was able to use these records at all was a feat. The introduction of *Blood in the Water* describes how difficult it was for Thompson to access any of the official records surrounding the uprising. Thompson is clear that this cover-up by the state was deliberate. Prison and law enforcement officials had fought hard to prevent the disclosure of certain documents, and others were only released subject to heavy redaction. It was by happenstance that Thompson found out about “a bunch of Attica papers” that had been moved to the back room of a courthouse in upstate New York. A similar stroke of luck led her to piles of evidence recovered from Attica immediately after the uprising. Once she had compiled what she found, one of Thompson’s express goals was to get this information to people in prisons.

2. **Challenging Censorship in New York.** — Censorship in state prisons in New York is governed by regulation. Section 712.2 of the New York Administrative Code governs literature for incarcerated people. The regulation specifically prohibits materials containing child porn or that provide instructions on how to manufacture weapons. It more broadly

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200. See Complaint, S.D.N.Y., supra note 10, at 5–6 (listing Thompson’s awards for *Blood in the Water*).


202. Compare Burton, supra note 199 (critiquing Thompson for her overinvestment in official records to tell the story of Attica and her undisclosed “loyalty to the state”), with Oppenheimer, supra note 9 (lauding *Blood in the Water* as nonpartisan based on its reliance on various official documents).

203. Thompson, supra note 1, at xiii.

204. See id. at xvi–xvii (“That old wounds were never allowed to heal . . . is, I believe, the responsibility of officials in the state of New York. It is these officials who have chosen repeatedly, since 1971, to protect the politicians and members of law enforcement who caused so much trauma.”).

205. Id. at xiii.

206. Id. at xiv–xv.

207. Id. at xv.

208. Complaint, S.D.N.Y., supra note 10, at 1–2, 6.


210. Id. § 712.2(b), (f).
prohibits materials that “incite violence based on race,” “present[] a clear and immediate risk of lawlessness, violence, anarchy, or rebellion against governmental authority,” or encourage disobedience against correctional staff.\(^{211}\) The New York State DOCCS publishes more specific media review guidelines in Directive 4572.\(^{212}\) The directive tracks the New York Administrative Code but goes into greater procedural detail.\(^{213}\) A book sent to an incarcerated person may be flagged in the mailroom for potentially violating one of the above provisions.\(^{214}\) Flagged books are sent to the Facility Media Review Committee, comprising members of the facility’s prison staff, for an initial decision.\(^{215}\) If the committee is considering withholding delivery of a book, it must notify the incarcerated recipient.\(^{216}\) If the committee finds that the book violates the directive, the intended recipient may appeal to the statewide Central Office Media Review Committee.\(^{217}\) The directive mandates this review procedure but outlines no specific review criteria other than the list of prohibited content from section 712.2.\(^{218}\) Notice of the final decision to ban a book must be sent to the intended recipient of the book and its sender.\(^{219}\)

The shortcomings of New York’s media review procedures are typical of other carceral institutions.\(^{220}\) Initial censorship decisions are based on the “good faith belief[s]” of corrections staff, and review of those decisions is conducted by other corrections staff.\(^{221}\) The only outside, and potentially less biased, review of these decisions is conducted by federal courts who have pledged deference to corrections staff on the subject.\(^{222}\) The right to read in prison is thus almost completely subject to the whims of the imprisonment, which arbiters of justice are unlikely to check.

3. *The Case Against the State.* — Official efforts to prevent incarcerated people both in and outside New York from reading *Blood in the Water*
exemplify the book’s impact.\textsuperscript{223} Under Directive 4572, New York State prisons have banned \textit{Blood in the Water} since its publication.\textsuperscript{224} The directive prohibits materials that “advocate, expressly or by clear implication, acts of disobedience” toward “law enforcement officers or prison personnel.”\textsuperscript{225} Thompson received notice that her book had been censored not from the review committees, as the directive mandates,\textsuperscript{226} but instead from the incarcerated person she tried to send it to.\textsuperscript{227} She filed her claim in the Southern District of New York under the First and Fourteenth Amendments, seeking declaratory and injunctive relief.\textsuperscript{228} The named defendants were officials with authority over censorship decisions in New York State prisons, including DOCCS Commissioner Anthony Annucci.\textsuperscript{229} Thompson was represented by attorneys from the Cardozo Civil Rights Clinic at the Benjamin N. Cardozo School of Law and by the New York Civil Liberties Union.\textsuperscript{230} Thompson argued against the censorship of her book and for the right to read in prisons more generally. Thompson’s position was that there was no evidence, in New York prisons or elsewhere, that her book caused disruption or disobedience among incarcerated people.\textsuperscript{231} Thompson also noted the allowance of similar books, like \textit{Soledad Brother: The Prison Letters of George Jackson} and \textit{The New Jim Crow}, to point out the incoherence of the DOCCS policy as applied to her book in particular.\textsuperscript{232} She cited three instances in which prison officials prevented incarcerated people from receiving copies of her book.\textsuperscript{233} Thompson argued that preventing people from reading her book excluded them from a larger conversation and public moment, an argument that harks back to the demands of the original uprisers.\textsuperscript{234} Amid the litigation, the DOCCS lifted the ban on \textit{Blood in the Water} subject to one condition: The pages showing a map of the facility would be removed


\textsuperscript{224} Complaint, S.D.N.Y., supra note 10, at 8 (noting that bans of \textit{Blood in the Water} have been upheld by the Central Office Media Review Committee “on around a dozen occasions”).

\textsuperscript{225} Directive No. 4572, supra note 212, at 2.

\textsuperscript{226} See supra note 219 and accompanying text.

\textsuperscript{227} Complaint, S.D.N.Y., supra note 10, at 9.

\textsuperscript{228} Id. at 15–16.

\textsuperscript{229} Id. at 3.


\textsuperscript{231} Complaint, S.D.N.Y., supra note 10, at 12–13 (“There is no evidence that \textit{Blood in the Water’s} presence in correctional facilities—either in New York or in facilities across the country—has ever caused disruptions or safety concerns between officers and incarcerated persons.”).

\textsuperscript{232} Id. at 13–14.

\textsuperscript{233} Id. at 9–11.

\textsuperscript{234} Id. at 10; supra notes 167–168 and accompanying text.
from each copy.\textsuperscript{235} The parties reached a settlement agreement in June 2023, under which Thompson would supply each DOCCS library with two copies of her book and the defendants would pay $75,000 in attorney’s fees.\textsuperscript{236}

While litigation was ongoing in New York, an identical claim by Thompson was quashed in Illinois—almost. Thompson filed that complaint in 2018, advancing an almost identical claim to her New York suit.\textsuperscript{237} In October 2022, a judge in the Central District of Illinois decided on cross-motions for summary judgment in favor of the institutional defendants.\textsuperscript{238} Thompson’s First Amendment claim did not defeat the qualified immunity standard, which allows “reasonable but mistaken judgments” on the part of the prison officials.\textsuperscript{239} The court also deemed the dispute “academic, if not entirely moot,” given that Thompson did not assert an intention to send any incarcerated person a copy of \textit{Blood in the Water} in the future.\textsuperscript{240} Thompson filed her appeal from that decision in the Seventh Circuit in November 2022.\textsuperscript{241} In September 2023, the parties reached a settlement agreement under which the defendants would approve \textit{Blood in the Water} to be distributed in Illinois prisons and pay Thompson $8,500.\textsuperscript{242} The barriers Thompson faced—despite having more resources and facing fewer hurdles than an incarcerated plaintiff—demonstrate the inherent difficulties of fighting prison book bans in the courts.

C. Censorship as a Racial Project

1. \textit{Inside}. — Central to the critique launched by the Attica Liberation Faction was the racism of the system imprisoning them. Censorship was a focus, but the Faction made clear that not all incarcerated people were censored equally; prison officials used censorship to politically and racially persecute certain groups at the prison.\textsuperscript{243} Those labeled “Black militants”


\textsuperscript{236} Stipulation and Order of Settlement and Dismissal at 2, 4, Thompson v. Annucci, No. 1:22-CV-02632(ER)(SN) (S.D.N.Y. June 14, 2023), ECF No. 48.


\textsuperscript{239} Id. at *6–7.

\textsuperscript{240} Id. at *9. Thompson made this intention clear in her New York suit. Complaint, S.D.N.Y., supra note 10, at 2.

\textsuperscript{241} Notice of Case Opening, Thompson v. Baldwin, No. 22-3016 (7th Cir. filed Nov. 11, 2022).

\textsuperscript{242} Settlement Agreement and General Release, Thompson v. Baldwin, No. 22-3016 (7th Cir. filed Sept. 20, 2023) (on file with the Columbia Law Review).

\textsuperscript{243} See The Attica Manifesto, supra note 13, at 32 (“We demand an end to political persecution, racial persecution, and the denial of prisoners’ rights to subscribe to political papers, books or any other educational and current media chronicles . . . .”); see also
were more closely monitored, and censorship was fundamental to that monitoring.\textsuperscript{244} Today, prisons liberally apply bans to books by Black authors recounting and critiquing the treatment of Black people in America, especially those highlighting the racism of the carceral state.\textsuperscript{245} “Racial” books are monitored for fear that they will cause disruption and foster an unsafe environment in prisons.\textsuperscript{246} But given that books authored by KKK members and even Hitler are sometimes permitted, these broad content-based bans obscure a different goal: preventing incarcerated people from reading Black history and carceral history.\textsuperscript{247}

Censorship cuts off rare sources of hope for incarcerated people. Political writings are an easy target,\textsuperscript{248} as evidenced by the repression that led to the Attica uprising. So are books about life after prison; Florida prison officials deemed Keri Blakinger’s book about getting out of prison and making changes in her life “dangerously inflammatory.”\textsuperscript{249} Even abstract representations of optimism might not be safe. A mural by artist Faith Ringgold is being moved from Rikers to the Brooklyn Museum.\textsuperscript{250} The mural was completed in 1972; meant to provide inspiration to women detained at the facility, it depicts women in various careers “living happily

\textsuperscript{244} See supra notes 154–155 and accompanying text.

\textsuperscript{245} See PEN America, supra note 41, at 5–6 (“Perhaps most controversially, prison[,] systems frequently place bans on literature that discusses civil rights, historical abuses within America’s prisons, or criticisms of the prison system itself, often on the grounds that such titles advocate disruption of the prison’s social order.”); Tracy Onyenacho, Prisons Are Banning Black History Books, and the Law Has Made It Possible, Prism (Feb. 28, 2020), https://prismreports.org/2020/02/28/prisons-are-banning-black-history-books-and-the-law-has-made-it-possible/ [https://perma.cc/X997-LEWC] (listing authors like W.E.B. Du Bois, Frederick Douglass, and Toni Morrison as common targets of prison book bans).

\textsuperscript{246} See Onyenacho, supra note 245 (noting use of the term “racial stuff” to justify the blanket ban on hundreds of books in an Illinois prison); supra notes 88–89.


\textsuperscript{248} See, e.g., Seth Galinsky, Keep Up Pressure Against Florida Prison Censorship!, The Militant (Dec. 24, 2018), https://themilitant.com/2018/12/19/keep-up-pressure-against-florida-prison-censorship/ [https://perma.cc/U2WT-AVJ] (“After impounding seven issues in one 10-week stretch earlier this year, Florida prison officials have eased off on their censorship against the Militant. This isn’t because of any change in the socialist newsweekly’s political coverage of working-class politics and protests worldwide.”).


on their own terms.” The mural had to be restored at one point due to prison officials painting over it after deeming the art inappropriate for the men incarcerated at Rikers. After years of neglect, the painting is being moved in anticipation of the facility’s planned closure in 2027, though the people at Rikers remain. In these ways, censorship deprives people in prison of narratives that could inspire them to think beyond the conditions of their confinement. Censorship, when used like this, conflicts with the “principle of return,” the idea that imprisonment is finite and incarcerated people are entitled to return to free society. Formal educational opportunities are integral to a successful return, but so are reading materials and media that show possibilities to incarcerated people other than reoffending upon release. Censorship can effect perpetual punishment and recidivism when used to obscure these possibilities.

Prison book bans also continue the historical war on Black literacy in America. The application of book bans to books about race and prisons is disturbing given the disproportionate imprisonment of Black people in America. Alexander’s The New Jim Crow has been a common target of prison book bans. There is perhaps nowhere that her book is more


252. Dafoe, supra note 250.

253. See Budds, supra note 251 (noting that Ringgold supports the removal and preservation of her mural, “especially given the way it was treated in the past [at Rikers],” but that moving it to a museum “will further diminish its message since it will no longer be viewed in the context of a jail”); Dafoe, supra note 250 (“It is a shame that the Public Design Commission did not interrogate the serious concerns around lending public artwork to a private museum, especially an artwork specifically intended to serve people in jail.” (internal quotation marks omitted) (quoting public art preservationist Todd Fine)); Zachary Small, Faith Ringgold Mural at Rikers Island to Move to Brooklyn Museum, N.Y. Times (Jan. 18, 2022), https://www.nytimes.com/2022/01/18/arts/design/faith-ringgold-mural-rikers-brooklyn-museum.html (on file with the Columbia Law Review) (“And I just keep wondering whether they are doing a disservice to the people who are still in Rikers.” (internal quotation marks omitted) (quoting art historian Michele H. Bogart)).

254. See Eisenberg, supra note 48, at 48 (“After completing his or her punishment, a person is entitled to return as a free citizen.”).

255. See supra notes 41–43.

256. See Mzezewa, supra note 43 (“[T]he strategy of keeping information and limiting access to knowledge from [B]lack Americans . . . has a sordid history.”).

257. See Thurgood Marshall C.R. Ctr., supra note 45, at 4 (“In a prison system that disproportionately incarcerates African Americans relative to their population in the country, it is especially vital that those behind bars have access to books that affirm their racial identity and provide tools for coping with and challenging racist systems of oppression.”).

relevant than in the institutions it critiques, as it could offer Black incarcerated people the tools needed to understand and challenge their imprisonment. Indeed, Alexander has mused that prison officials are worried that “the truth might actually set the captives free.”\textsuperscript{259} After all, in the American system, where stakeholders can profit from filling prison beds, perverse incentives exist to keep people inside.\textsuperscript{260} Pre–Civil War literacy bans that upheld slavery parallel modern-day book bans that uphold mass incarceration.\textsuperscript{261} Further parallels can—and should—be drawn to a similar struggle outside.

2. \textit{Outside}. — The fight for inclusive education in schools provides a possible model for recognizing and elevating the issue of censorship in prisons. The NAACP Legal Defense Fund has dubbed the current trend of school censorship “anti-CRT mania.”\textsuperscript{262} The heroes are young people who are willing to speak out in defense of their right to inclusive education.\textsuperscript{263} The villains are anti-truth laws and their proponents, who use anti-CRT rhetoric to vilify and ban Black history from schools.\textsuperscript{264} The battleground is the classroom, “traditionally . . . the site of some of this nation’s most egregious acts of state sponsored racism.”\textsuperscript{265} This framing is accessible and powerful. And the characters and motivations are not so different from their carceral counterparts.

In both contexts, those suppressing certain parts of history seek to stifle the voices of the people and communities that history portrays, effectively eliminating their voices from our democracy.\textsuperscript{266} Anti-CRT

\begin{itemize}
\item 260. See id. (“After all, the multi-billion dollar prison industrial complex is a very profitable industry.”).
\item 261. See id.; see also Mzezewa, supra note 43 (“Slaves weren’t allowed to read because reading would directly lead to rebellion . . . .” (internal quotation marks omitted) (quoting Heather Ann Thompson)).
\item 263. See id. (describing student-led demonstrations opposing bans on ostensibly “divisive” books).
\item 264. See id. (“[T]he fearmongering around what politically-motivated forces are claiming is CRT has starkly illustrated the ever-shifting weapons being levelled at our multiracial democracy.”).
\item 265. Id.
\end{itemize}
activists target Black history in particular as being too political or inflammatory. They characterize discussions about race as “divisive” and therefore disruptive to the goals of the classroom. In the prison context, officials label books about race as divisive while labeling books about prisons as disruptive. The fear is the same: Accurate historical information about this country and its protected tradition of racism translates to powerful critiques of the status quo. As one teacher notes, “[W]e have to understand how [systems of oppression] formed and whose interests they serve today” in order to challenge them.

These issues should be addressed in tandem. Comparing anti-CRT mania with prison book bans makes it clear that prison censorship does not occur in the vacuum of “legitimate penological interests.” Both censorship regimes reflect the fragility of white supremacy and its alliance with the carceral state, since “[l]egitimate power does not fear discussion and study.” Eliminating truthful accounts of American history in schools can be seen as an attempt at “mind control,” in the words of the Beard dissenters. And if the attack on racial history in schools is part of “a multi-pronged attack on the lived experiences, voices, and political participation of the many diverse communities that make up this country,” then the attack on racial and carceral history in prisons is one

267. See Robinson, Anti-CRT, supra note 262 (“The disturbing proliferation of book bans in the past few months makes clear that the ultimate goal of these ‘anti-CRT’ efforts is to censor, silence, and suppress Americans’ ability to be fully informed about their own country and the lived experiences of their fellow citizens.”).

268. See supra note 263.

269. See supra notes 88–89.

270. See Robinson, Anti-CRT, supra note 262 (“Yet the realization of a truly functioning multiracial democracy, one in which even the most historically marginalized voices have power, is exactly what the ongoing war on truth aims to disrupt.”).

271. Robinson, Why Truthful, supra note 266 (internal quotation marks omitted) (quoting Kate Schuster, Director of the Hard History Project).


274. See Skopic, supra note 42.


276. Robinson, Why Truthful, supra note 266.
of the prongs. Finally, comparing these struggles makes the act of reading in prison more familiar. Incarcerated people, like schoolchildren, “have a right to know the truth, to know who they are, to know who they live with, and what their community is like.”

Juxtaposing these issues also allows us to better understand how carceral logic can reach those outside, too. Similarities between the two systems can be attributed to the strategy of running schools like prisons, a phenomenon that contributes to the school-to-prison pipeline. When schools incorporate the technologies and methods of prisons, sometimes through surveillance and monitoring by actual police officers, they simulate the experience of incarceration. Sociologist Carla Shedd argues that we can view today’s public high schools as “the extension of our larger ‘disciplinary society.’” Schools took inspiration from drug law enforcement to implement zero-tolerance disciplinary policies, and students are now increasingly likely to be disciplined by the criminal system rather than the school system. The disproportionate representation of Black people in prisons is replicated and produced by the disproportionate representation of Black students in public school arrests. In this context, banning Black history in schools is one of many mechanisms of socialization that primes students, particularly Black boys, to be ready to interact with the more formal criminal punishment system. The omnipresent surveillance and the deprivation of truthful narratives about Black life deprives students of opportunities to think beyond punishment, a punitive measure quite similar to prison censorship regimes.

277. Id. (internal quotation marks omitted) (quoting Kate Schuster).
278. See School-to-Prison Pipeline, ACLU, https://www.aclu.org/issues/juvenile-justice/juvenile-justice-school-prison-pipeline [https://perma.cc/ENA8-SS9D] (last visited May 11, 2023) (“‘Zero-tolerance’ policies criminalize minor infractions of school rules, while cops in schools lead to students being criminalized for behavior that should be handled inside the school. Students of color are especially vulnerable to push-out trends and the discriminatory application of discipline.”).
279. See Carla Shedd, Unequal City: Race, Schools, and Perceptions of Injustice 80–81 (2015) (“Metal detectors, surveillance cameras, and other mechanisms designed to monitor and control inhabitants are now standard equipment in American urban schools. Youth who must navigate these spaces are inevitably at high risk of police contact, which may lead to frustration, disengagement, and delinquency.”).
280. Id. at 81 (quoting John Devine, Maximum Security: The Culture of Violence in Inner-City Schools 97 (1996)).
281. Id. at 84–85.
282. See id. at 85 (“Over 8,000 [Chicago Public Schools] students, ages five to eighteen, were arrested in 2003. African American students, who make up just under half of the students enrolled in Chicago public schools, accounted for more than three-quarters of those arrests.” (footnote omitted)).
283. See id. at 114 (“The current structure and culture of urban public education is socializing young people to interact with agents of the law inside their schools, thereby conditioning them to be ready to interact with police outside the schoolhouse doors, not as students but as suspects.”).
Both censorship practices can be viewed as a form of “memory law,” or a government policy designed to guide public interpretation of the past and influence social behavior. Memory laws “work by asserting a mandatory view of historical events, by forbidding the discussion of historical facts or interpretations or by providing vague guidelines that lead to self-censorship.” The goal is to “cultivate a national feeling” that cannot exist when the negative parts of a society’s history are taught and known. Historian Timothy Snyder uses Russian intervention in Ukraine during the Soviet era as an example. Accurate historical accounts of World War II and critiques of Stalin were labeled as “revisionism,” and Russia established a presidential commission to legally attack any such “revisionist” history. The goal was to guide public memory, hence the label “memory laws,” and ensure that pro-Russia accounts dominated over more truthful and critical ones.

For Snyder, CRT scholars are America’s “revisionists,” targeted by those in power to maintain the racialized status quo. Anti-CRT legislation claims to fight against feelings of discomfort in classrooms and, like memory law, promotes a positive “national feeling.” The suppression of the legacy of the Attica uprising is another example of how memory laws function in America. It started with the lies spread by the government and cosponsored by media outlets in the wake of the retaking. The next iteration of these memory laws was the specific suppression of the archival documentation of the uprising, lasting decades until Thompson unearthed this history while writing Blood in the Water. Thompson argues that the cover-up is still active, since multiple bodies of evidence that she used for her book seem to have since vanished.

285. See id.
286. Id.
287. See id. (“To note that the Soviet Union had actually begun the war as a Nazi ally, by this logic, was to commit a crime; a Russian citizen who mentioned in a social media post that Nazi Germany and the Soviet Union both invaded Poland was prosecuted.”).
288. See id.
289. See id. (“By the same token, anyone looking at the United States from the outside immediately sees that our new memory laws protect the legacy of racism. We are only fooling ourselves.”); see also Tayyab Mahmud, Foreword: LatCrit@25: Mapping Critical Geographies and Alternative Possibilities, 20 Seattle J. for Soc. Just. 915, 921 (2022) (noting that CRT consists of “counter-stories” that “embody cultural difference that emerges as resistance to hegemonic modes of representation”).
290. Snyder, supra note 284; see also Danielle M. Conway, The Assault on Critical Race Theory as Pretext for Populist Backlash on Higher Education, 66 St. Louis U. L.J. 707, 716 (2022) (“State-sanctioned, punitive memory laws, such as those enacted or proposed to ban CRT, amount to self-serving attempts to apply self-exculpatory laws to protect states from criticism about systemic racial inequality.”).
291. See supra notes 180–183 and accompanying text.
292. See Thompson, supra note 1, at xiii–xvi.
to ban *Blood in the Water* in prisons are a last-ditch effort to repress the memory of a group the state can comfortably control: incarcerated people.

III. RECOGNIZING RIGHTS

Reports and surveys conducted by advocacy groups help to aggregate the otherwise poorly organized data on prison book bans. Such reforms assume the continued existence of book bans and seek to mitigate the harms they cause “[u]ntil the right to read is fully recognized” and book bans in prisons are abolished.

This Note also advocates for full recognition of the right to read for incarcerated people and the abolition of book bans in prisons. To reduce harm in the meantime, it suggests using the *Turner* factors to more critically examine the motivations behind book bans; involving more impartial decisionmakers in censorship decisions; and assigning more weight to the interests of incarcerated people. Section III.A discusses how the *Turner* factors could be better used to protect the rights of incarcerated people. Section III.B summarizes the lessons to be taken from the conflict surrounding inclusive education in America.

A. A Return to Heightened Scrutiny

1. *Resurrecting the Lost Turner Factors.* — Returning to the core of the *Turner* test and reframing the interests at stake could provide more protections for the rights of incarcerated people. Although the *Turner* Court claimed to step back from the heightened scrutiny of *Martinez*, Michael Keegan argues that the *Turner* test is itself a form of heightened scrutiny.

   True rational basis review should only require a “legitimate” government (in this case penological) interest to be put forth. *Turner*’s first factor, testing the “valid rational connection” between the challenged regulation and the penological interest justifying it, essentially “mirrors” rational basis review. But the *Turner* test has other factors. When the Court emphasizes the importance of the first factor and downplays the significance of the other factors, it applies something analogous to rational basis review.

293. See, e.g., Thurgood Marshall C.R. Ctr., supra note 45, at 26–68 (aggregating information about prison censorship policies in each state as well as in federal prisons).

294. See, e.g., id. at 22–23 (listing the recommendations to combat prison censorship).

295. Id. at 22.

296. Keegan, supra note 140, at 332.

297. Id.

298. Id. at 334 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

299. See supra notes 121–124 and accompanying text.
Courts should look more closely at whether book bans are reasonably related to maintaining safe and orderly prison conditions. The suppression of carceral history in prisons is meant to suppress feelings of dissatisfaction with prison conditions. Proponents of prison censorship would draw a direct line between dissatisfaction and violent unrest. This viewpoint easily satisfies the Court’s weakened Turner test: If racial and carceral history lead to dissatisfaction and dissatisfaction leads to violence, then censoring that content supports the “legitimate penological objective” of maintaining safe correctional facilities. In other words, safety and censorship could be seen as reasonably related. Sometimes, as with Thompson’s New York case, evidence exists to sever this connection. Thompson essentially demanded more scrutiny when she pointed to the lack of evidence linking her book to disorder in any prison. Courts must take the absence of corroborating evidence seriously. Otherwise, the safety and security narrative offered by prison officials will persist.

But the Court also raised the bar for prison regulations with Turner’s fourth factor. Keegan argues that Turner’s fourth factor, which focuses attention on alternatives to the proposed regulation, heightens scrutiny above rational basis review. The Turner Court included the fourth factor to prohibit “exaggerated response[s]” to the penological interests at stake, whereas practically any response would be permissible under regular rational basis review. This standard falls somewhere between strict scrutiny, which requires narrow tailoring, and rational basis, which requires no tailoring as long as the government interest is not “arbitrary or irrational.” For Keegan, this means that the Turner test should not be

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300. See Mzezewa, supra note 43 (“The more checked into internal prison world and isolated, the harder it is to challenge the conditions . . . .” (internal quotation marks omitted) (quoting Elizabeth Hinton, Professor, Harvard Univ.)); see also PEN America, supra note 41, at 5–6 (describing various justifications for banning books about racism and mass incarceration as security threats).

301. See supra note 300; see also Thompson v. Baldwin, No. 18-cv-03230-SEM-KLM, 2022 WL 6734896, at *3 (C.D. Ill. Oct. 11, 2022) (quoting a prison official arguing that there is always the potential for a prison riot and that Blood in the Water could easily be used “as a potential guideline and process” to that end).


303. See Keegan, supra note 140, at 334 (“The language fleshing out the fourth Turner prong raises the standard beyond that of the traditional rational-basis test.”).

304. Id.

305. See id. (internal quotation marks omitted) (quoting Turner v. Safley, 482 U.S. 78, 87 (1987)) (“Under the traditional rational-basis examination, where the government needs to show only a ‘reasonably conceivable set of facts,’ an ‘exaggerated response’ would be permissible. All that must be shown is that the means of achieving the government objective was not arbitrary or irrational.”).

classified as “toothless review,” even if the Court’s subsequent application of the test has rendered it so.\textsuperscript{307}

Courts should consider how prison administrations themselves contribute to disorder to weaken the causal relationship between books and unrest. For example, writings from and news of other prison protests certainly inspired the men at Attica to organize themselves, but they did so peacefully.\textsuperscript{308} The uprising was caused more immediately by the violent atmosphere created by corrections officers and the refusal of prison officials to acknowledge the demands of the organizers.\textsuperscript{309} The Attica Liberation Faction Manifesto specifically stated that no strike would accompany the demands and that they were “trying to do this in a democratic fashion.”\textsuperscript{310} A “ready alternative” to the banning of so-called inflammatory materials would have been meaningful negotiation and the removal of violent corrections staff. Discussion of these additional catalysts and alternative responses weakens the connection between access to certain reading materials and disorder. A weaker connection weighs against reasonable relatedness and supports the idea that complete bans on books critiquing prisons might be the kind of exaggerated response that \textit{Turner} prohibits.

Though far from ideal, the \textit{Turner} test has the potential to protect the interests of incarcerated people. And the Supreme Court seems unwilling to revisit its chosen standard for prison regulations.\textsuperscript{311} It has denied petitions for writs of certiorari for such claims since \textit{Beard} in 2006.\textsuperscript{312} Thus, the \textit{Beard} standard, with its emphasis on the first factor, stands.\textsuperscript{313} Thompson’s cases show that there are rightsholders other than incarcerated people dedicated to fighting this battle in the courts. The settlements reached secured the right to read as it pertains to \textit{Blood in the Water} in state prisons in New York and Illinois; victories in spite of the

\begin{itemize}
  \item \textsuperscript{307} Id. at 334–35. To observe the Court’s defanging of the \textit{Turner} test, see, e.g., \textit{Beard v. Banks}, 548 U.S. 521, 532 (2006) (plurality opinion) (“In fact, the second, third, and fourth factors, being in a sense logically related to the Policy itself, here add little, one way or another, to the first factor’s basic logical rationale.”).
  \item \textsuperscript{308} See supra notes 165–169 and accompanying text.
  \item \textsuperscript{309} See supra note 170 and accompanying text.
  \item \textsuperscript{310} The Attica Manifesto, supra note 13, at 29–30.
  \item \textsuperscript{311} See Schnell, supra note 98, at 145 (“The Supreme Court does not appear willing to revisit the standard of review question, having consistently reaffirmed \textit{Turner} and denied certiorari to cases involving \textit{Turner} since \textit{Beard} in 2006.”). But see Clay Calvert & Cara Carney Murrhee, Big Censorship in the Big House—A Quarter-Century After \textit{Turner v. Safley}: Muting Movies, Music & Books Behind Bars, 7 NW. J. L. & SOC. POL’Y 257, 293–94 (2012) (arguing that while heightened scrutiny could help incarcerated plaintiffs litigate these claims, the test is unlikely to be applied in the prison context given the fact that incarcerated people are not a suspect class).
  \item \textsuperscript{312} Schnell, supra note 98, at 145–46.
  \item \textsuperscript{313} See \textit{Beard v. Banks}, 548 U.S. 521, 532–33 (2006) (plurality opinion) (noting that \textit{Turner’s} other three factors “add little” to the reasonable relatedness analysis).
\end{itemize}
unfavorable forum for this kind of claim. Advocacy efforts by well-resourced parties like Thompson are necessary if courts are ever to incorporate the suggestions made by this Note and other commentators. Yet Thompson’s struggles with mootness and qualified immunity show how difficult this road will be. With success in the courts remaining improbable, opponents of censorship should consider additional battlegrounds to continue this fight.

2. Attacking Book Bans Before They Reach the Courts. — If the courts are an inhospitable environment for First Amendment claims brought by incarcerated plaintiffs, incarcerated people and advocates should seek to defeat book bans before they must be litigated. Critics agree that censorship review procedures in prisons are deeply flawed. This Note emphasizes the need for standardized and detailed review procedures across institutions. If the prison system must infringe upon an incarcerated person’s First Amendment rights, the degree of that infringement should not change based simply on where that person happens to be imprisoned. Criteria binding reviewers should balance the interests of incarcerated people against those of the institution; reviewers should be required to consider the value offered by a book rather than just the threat it poses. The Turner factors are a decent starting point for formulating these criteria. As Keegan suggests, the fourth Turner factor can and should operate as a check on the first factor. As discussed above, the first factor should be applied to scrutinize prison censorship decisions more heavily. And with a shift in perspective, the second and third factors can consider penological goals and the interest incarcerated people have in reading.

The perspective of incarcerated people is noticeably absent from the current balancing test. The test considers censorship from the perspective of prison administrators. Each act of censorship is analyzed based on how it serves a particular penological goal. This focus invites responses that

314. See Stipulation and Order of Settlement and Dismissal, supra note 236; Settlement Agreement and General Release, supra note 242.
316. See, e.g., PEN America, supra note 41, at 6–7 (describing the typical rubber-stamp review procedures for prison book bans); Thurgood Marshall C.R. Ctr., supra note 45, at 22–23 (recommending improvements to review procedures).
317. See supra notes 76–79 and accompanying text.
318. See PEN America, supra note 41, at 18 (“As a country, we deserve better than prison policies that view access to books only through the lens of potential risk, that formalize people’s biases and prejudices, and that treat incarcerated people as less deserving of literature than others.”).
319. See supra notes 303–307 and accompanying text.
320. See supra notes 300–310 and accompanying text.
reflect what Alan Freeman describes as the “perpetrator perspective,” which views racial discrimination “not as conditions, but as actions . . . inflicted on the victim by the perpetrator.” 321 Approaching a case of wrongful censorship from the perpetrator perspective would focus on “neutraliz[ing] the inappropriate conduct of the perpetrator.” 322 The proceedings surrounding Thompson’s cases are a good example of the perpetrator perspective in action: The settlements give incarcerated people access to Blood in the Water, stopping this discrete harmful act by prison officials. 323 In contrast, the victim perspective describes racial discrimination in terms of the conditions it produces for its victims. 324 A proper solution to a dispute over a book ban would look to the effects of censorship on the conditions of incarcerated people at Attica and would situate a particular book ban within larger patterns of censorship at the prison. Such a solution would be consistent with the victim’s perspective, which is everything that the perpetrator’s perspective is not: It is collectivist; it is part of the social fabric and has historical continuity; it sees racial discrimination via the restriction of knowledge access as a social phenomenon. 325 Without the victim perspective, solutions to censorship will be piecemeal and fail to address the oppressive conditions that book bans create.

Review boards and committees need more impartial decisionmakers to properly apply the victim perspective and weigh the criteria outlined above. The issue is not just how books bans are reviewed—it is who does the reviewing. On one side of the prison censorship debate are the victims: people in prison who have a First Amendment right to access their history and the history of the institutions that imprison them. On the other side are the perpetrators: prison and government officials interested in maintaining order, for both incarcerated people and corrections staff. Also involved are those who exist outside of the system, such as family and community members, politicians, nonprofits, and grassroots organizations. Any of these parties may be heavily invested in censorship decisions and biased toward one side or the other, making them

321. Freeman, supra note 37, at 1053.
322. Id.
323. See Stipulation and Order of Settlement and Dismissal, supra note 236, at 1–2 (stating that Thompson “brought this action pursuant to 42 U.S.C. § 1983 seeking declaratory and injunctive relief requiring that Defendants allow individuals in DOCCS’s custody to keep and read Blood in the Water”).
324. See Freeman, supra note 37, at 1052–53; see also supra text accompanying note 168 (describing the “isolation status” that the men incarcerated at Attica experienced as a direct consequence of the censorship policies).
325. Cf. Freeman, supra note 37, at 1054 (“The perpetrator perspective presupposes a world composed of atomistic individuals whose actions are outside of and apart from the social fabric and without historical continuity. From this perspective, the law views racial discrimination not as a social phenomenon, but merely as the misguided conduct of particular actors.”).
potentially polarizing additions to review boards. This Note suggests looking to another set of stakeholders for guidance: prison librarians.

Prison librarians are in a unique position to balance the interests at stake when considering a potential book ban. Due to the nature of their workplace, prison librarians have a duty to prioritize security. If they subscribe to the tenets of the American Library Association (ALA), they are also bound by a commitment to intellectual freedom. This positions them well to balance the harmful conditions created by censorship regimes against the interests of the correctional institution. The ALA has already done this specifically for incarcerated people in its interpretation of the “Library Bill of Rights.” The ALA advocates for selection in prisons rather than censorship. Censorship is restrictive, while selection is inclusive. It advocates for prison libraries to reflect the needs of the people incarcerated at that facility. Thompson argues that Blood in the Water is “essential reading” for incarcerated people. This Note backs Thompson and other advocates who argue that there is a need for people in prison, especially Black people, to access their own history and the history of the institution imprisoning them. Prison librarians can help meet this need.

The ALA’s interpretation of the Library Bill of Rights also addresses the lax application of rational basis review to First Amendment challenges in prisons. It states: “Only those items that present an actual compelling and imminent risk to safety and security should be restricted. Although these limits restrict the range of material available, the extent of limitation


329. See Right to Read, supra note 272 (“Censorship is a process of exclusion by which authority rejects specific viewpoints. Unlike censorship, selection is a process of inclusion that involves the search for materials, regardless of format, that represent diversity and a broad spectrum of ideas.”); see also Hart, supra note 90 (“There is nothing more contentious for librarians than censorship. . . . [T]he American Library Association has enshrined the core principles of [the] right [to read] in the Library Bill of Rights and in its Professional Code of Ethics.”).

330. See Right to Read, supra note 272 (citing informational needs, recreational needs, and cultural needs).


332. See supra note 44; see also supra text accompanying note 277.
should be minimized . . . ."333 While the ALA understands the potential need to restrict some reading materials, it also recognizes the need for real limits to these restrictions.334 In concert with critics of memory laws and censorship in other contexts, the ALA considers the “suppression of ideas” to be “fatal to a democratic society.”335 In sum, the Library Bill of Rights urges prison librarians to critically examine the reasons a book might be banned. Critical examination might reveal that the offered reasons are pretextual. This heightened scrutiny will be especially useful when applied to the first and fourth Turner factors: whether a ban is in the interest of security, and, if so, whether it is an exaggerated response to serve malign ends.

If reviewers use the Turner test, they should incorporate the victim perspective into their analysis of the second and third factors. Prison librarians are good candidates for this job because they understand the value of books generally and how important reading is to incarcerated people specifically.336 The second Turner factor looks to whether there are “alternative means of exercising the right” at issue.337 The Supreme Court requires the right at issue to “be viewed sensibly and expansively,” making alternative means easy to find.338 In the book ban context, the Court has deemed the availability of any other book a sufficient alternative means of exercising First Amendment rights.339 The ALA’s interpretation of the Library Bill of Rights identifies reading as an “essential right[].”340 Prison librarians can help define this right more precisely as the right to access specific books or information rather than books in general. For a book like Blood in the Water, a prison librarian could determine whether other permitted reading materials provide a similar-enough learning experience to satisfy the second factor. The third factor looks at the “impact” of allowing the right to be exercised.341 Prison librarians can help balance out prison officials’ proffered negative impacts with the benefits of reading for incarcerated people, ensuring that the Turner factors do not favor censorship by default.342

333. Right to Read, supra note 272.
334. See id.
335. Id; see also text accompanying note 266.
336. See, e.g., Andrew, supra note 326 (“The services prison librarians provide may seem insignificant, but have far reaching and lasting effects.”); Hart, supra note 90 (“[Incarcerated people] considered it a privilege to visit the library, and none of them wanted to mess up their chance at coming on their housing unit’s library days.”).
339. See id. at 418–19 (holding that even though the specific publications at issue were banned, the fact that other publications were available for incarcerated people to read satisfied the second factor).
341. Turner, 482 U.S. at 90.
The concept of including librarians on censorship review boards is not a new one. In New York, DOCCS Directive 4572 suggests that the Facility Media Review Committee for each facility include representatives from security staff and program services staff. Program services include mental health, education, recreation, and library services. In theory, this is a good starting point. If prisons don’t have a fleet of librarians available to handle censorship, other staff focused on the education and wellbeing of incarcerated people can similarly provide a different perspective from security staff. But under current regulations for New York prisons, including prison librarians, this is only a suggestion, not a requirement. Even if program services staff are included, they can likely only provide symbolic representation unless they have a voting majority. The mere inclusion of prison librarians and other program services staff cannot be the necessary “substantial check on prison censorship.”

This Note proposes a requirement that censorship review boards, like Facility Media Review Committees in New York, consist equally of security staff and program services staff (or their equivalents at a given facility). If a prison has library staff, they should be required to serve on review boards. The mandatory inclusion of nonsecurity staff, particularly librarians, in equal measure to security staff will help balance the interests at stake in censorship decisions.

To improve accountability, review boards should be required to publish written majority (and dissenting) opinions applying the Turner factors. Even if prison librarians and other program services staff succeed in striking down an unjust book ban, there is no guarantee that their decision will stand. Some states have a multilevel review system, meaning that the initial decision disfavoring censorship could be overturned on appeal. New York is one such state. It is also, of course, possible that

treatment of the “important constitutional dimension” encompassing the right to read in prison. The Court spoke vaguely about this “important constitutional dimension” in terms of First Amendment rights but did not specify the benefits of reading for incarcerated people. See id.

343. See, e.g., PEN America, supra note 41, at 19–20 (advocating for review committees to include trained librarians); Jeanie Austin, Melissa Charenko, Michelle Dillon & Jodi Lincoln, Systemic Oppression and the Contested Ground of Information Access for Incarcerated People, 4 Open Info. Sci. 169, 170 (2020) (“[C]ombating censorship within prisons . . . should, ostensibly, fall within the professional purview of [library and information science].”).


345. Id.

346. See id. (using the language “[i]t is suggested that” regarding the inclusion of program services staff on review boards).

347. See, e.g., PEN America, supra note 41, at 7 (describing the system in Washington State, where the review board consists of two prison officials and only one librarian).

348. Id.

349. See, e.g., supra text accompanying notes 216–217 (describing New York’s two-level review system).

350. See supra text accompanying notes 216–217.
the rest of the review board outvotes opponents of censorship. In these circumstances, a book ban may still be litigated. While the Supreme Court insisted in Beard that it was not “inconceivable” that an incarcerated person might overcome the Turner bar with the right evidence, meeting this burden remains difficult. Incarcerated plaintiffs could use a written opinion by opponents of censorship as evidence to counter prison officials’ safety and security narratives in court.

One concern with this solution is resources. Not all prisons have libraries, so there is not always a librarian to review censorship decisions. Existing prison libraries are underfunded and often first on the chopping block when budgets are cut. Prison librarians already do many jobs at once and might be overburdened by having to review censorship decisions on top of their other work. Additional funding dedicated to prison libraries could solve some of these issues. Another solution would be for one centralized board of decisionmakers—half security staff and half program services staff like prison librarians—to review all of the decisions in the state. This would make it irrelevant (for the discrete issue of book bans) whether each prison had its own librarian to review censorship decisions. It would also help make censorship policies consistent within each state.

The inclusion of librarians and other nonsecurity staff as decisionmakers cannot guarantee that books are never banned for the wrong reasons. Notwithstanding the ALA’s rights-affirming stance, many librarians may lack the requisite knowledge and training to put these values into action. On a systemic level, public library services in the United States have historically upheld and catered to the pro-white status quo. On an individual level, prison librarians are not immune to implicit (or explicit) biases that may prompt them to ban books about race or the history of prisons without valid cause. And even the ideal librarian representative can only ever be that: a representative. This solution relies

351. Beard v. Banks, 548 U.S. 521, 527, 535–36 (2006) (plurality opinion) (noting that the plaintiff’s evidence, consisting of one deposition of a prison official and various prison manuals and policies, was insufficient to support his claim).

352. See, e.g., PEN America, supra note 41, at 11 (“However, the nation’s prison libraries are under-funded, under-resourced, under-staffed, and under-stocked. On their own, our prison libraries are insufficient to address the incarcerated population’s need for access to literature.”).

353. Id.

354. See, e.g., Andrew, supra note 326 (“As you can see, this is a very busy schedule, and is typical for most prison librarians. One person performs the jobs of several. This can create a lot of stress and frustration.”).

355. See Austin et al., supra note 343, at 178 (noting that librarians “generally lack the skills and background knowledge needed to provide meaningful information access to . . . the groups of people most likely to be surveilled, policed, and incarcerated”).

356. See id. at 179, 182 (“[Library and information services] has been rooted in whiteness, heterosexuality, and gender normativity to the disadvantage of its patrons and professional codes.”).
on some level of collaboration between incarcerated people and prison librarians. As difficult as this work may be under carceral conditions, it is necessary to ensure that prison librarians successfully advocate for the victims of censorship.

This is an imperfect solution largely because it exists within the deeply flawed and racist prison system. Full recognition of the right to read for incarcerated people will require a multifaceted and sustained attack on censorship by stakeholders both within and outside of that system. The suggested amendments to review procedures are mitigation tactics for the meantime.

B. Lessons From the Battle for Inclusive Education

Anti-CRT efforts in schools offer some guidance for opponents of racially motivated censorship in prisons. First, public pressure is key in the ongoing fight for information access. A few quickly repealed bans prove that this tactic can be effective in the prison context. The challenge is getting more eyes on the issue when book bans persist in large part due to the secrecy around prison censorship policies. In the education context, advocates point to New Jersey’s Amistad Commission, an organization ensuring that New Jersey public schools teach Black history, as an example of what is necessary to achieve inclusive education goals. Likewise,

357. The years surrounding the Attica uprising provide some examples of collaboration between librarians and incarcerated people. See Jeanie Austin, Reform and Revolution: Juvenile Detention Center Libraries in the 1970s, 1 Librs.: Culture Hist. & Soc’y 240, 244 (2017) (“From reformists to revolutionaries, individual librarians practiced their ideological positions in the collections and programs they provided within the contexts of juvenile detention and the ways in which they documented these services.”). Of note, Inside-Outside was a political publication with contributions from both incarcerated people and librarians. See id. at 255–59 (“The newsletter’s revolutionary stance positions libraries as a potential site of ongoing . . . resistance [for incarcerated people].”).

358. At the time of the uprising, for example, the men incarcerated at Attica were held alone in their cells for fourteen to sixteen hours a day and sometimes had to pass messages by hand to communicate with each other. See Attica: The Official Report, supra note 151, at 33–34. Also recall the prison officials’ negative response to the political organizing at Attica before the uprising. See supra text accompanying notes 151–155.


360. See supra notes 68–75 and accompanying text.

361. See About Amistad, N.J. Gov’t, https://www.nj.gov/education/amistad/about/ [https://perma.cc/W2PC-8W9M] (last visited Jan. 15, 2023); Robinson, Why Truthful, supra note 266 (“Things have to be monitored—just because it’s written down on paper, doesn’t mean it’s actually being translated into reality.”).
oversight from outside the prison system will be necessary to ensure compliance with any newly implemented procedures or measures to combat censorship.

Second, incarcerated people must be centered in the fight against racist book bans. Advocates for inclusive education urge supporters to uplift the voices and efforts of schoolchildren, whom restrictive policies affect most.\textsuperscript{362} This wisdom applies equally to incarcerated people fighting against censorship. Protecting incarcerated people’s connection to the outside world ensures that they can be active in this fight and other political movements. Access to books helps this connection survive. As the Attica uprising exemplifies, incarcerated people have been doing this work long before it gained mainstream recognition and are in the best position to fashion solutions that protect their interests.\textsuperscript{363}

\textbf{CONCLUSION}

The banning of \textit{Blood in the Water} at the Attica Correctional Facility exemplifies the interests at stake in the fight against censorship and the inadequacies of the existing administrative and legal remedies. It also reifies the throughline of anti-Black censorship practices in American history and the present.\textsuperscript{364} In demanding the right to read freely, incarcerated people simply “seek the rights and privileges of all American people.”\textsuperscript{365}

Censorship policies inside and outside of prisons reflect vulnerability in the powers that be. Anti-CRT mania has risen at a time of historic critical resistance to systemic racism in America.\textsuperscript{366} Prison censorship attempts to stifle organized resistance among incarcerated people and uses “the façade of rehabilitation” to attack literature that highlights and inspires these movements.\textsuperscript{367} Conservative backlash in both instances can signal that proponents of knowledge access are on the right track.\textsuperscript{368} If the status quo were entirely secure, there would be no need to suppress history to

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\item[(362)] See, e.g., Robinson, Why Truthful, supra note 266 (“The first and I think most important is supporting young people in their school district. . . . They’re often the first people to say, ‘Hey, these books actually don’t make us feel guilt or anguish.’”).
\item[(363)] See supra note 18; see also supra text accompanying notes 167–168.
\item[(364)] See supra notes 256–261.
\item[(365)] The Attica Manifesto, supra note 13, at 30.
\item[(366)] Robinson, Anti-CRT, supra note 262.
\item[(367)] The Attica Manifesto, supra note 13, at 30; see also Skopic, supra note 42 (“Prisons in cities like St. Louis have seen mass uprisings—not ‘riots’ of random violence, as the press would have it, but concerted political actions with specific demands . . . .”).
\item[(368)] See Skopic, supra note 42 (“[I]n the Biden era, we can lack for obvious means of pursuing change. Sending free books to people in prison is one such means, and if the recent backlash against donations is anything to judge by, it’s a potent one.”).
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maintain it. The exposure of these insidious goals calls for nationwide recognition of the right to read in prisons. Proper recognition of this right will center the voices of incarcerated people, who are best situated to articulate their experience of information access, or lack thereof. Once the right is recognized, infringements can be remedied.

But more important than honoring the spirit of our Constitution, protecting the right to read in prison affirms the humanity of our people—all of them.

369. See id. (“Historically, systems of censorship and control are at their strictest when the regime in power knows it has something to hide, and fears exposure—if its position were unassailable, there would be no need.”).
TICKET TO DEBT: CITY OF CHICAGO V. FULTON AND THE TWO-TRACK CONSUMER BANKRUPTCY SYSTEM

Karen Lou*

In 2021, the Supreme Court decided City of Chicago v. Fulton, a landmark bankruptcy case that addressed the issue of whether passive retention of estate property violates § 362(a)(3) of the U.S. Bankruptcy Code, commonly known as the “automatic stay” provision. The automatic stay, as its name suggests, is a breathing spell that prevents creditors from taking certain collection actions against the debtor after a bankruptcy petition has been filed. The Court answered in the negative, significantly weakening the automatic stay’s protective power in cases involving creditor actions commenced pre-petition and maintained post-petition. This Note examines the aftermath of the Fulton decision. It considers Fulton’s impact on debtors, creditors, and bankruptcy courts. Specifically, this Note argues that Fulton sheds light on the shortcomings of the current bankruptcy system, and it discusses the ways in which debtors of color are disproportionally disadvantaged. In closing, this Note proposes that the Bankruptcy Code’s discharge provisions should be amended to provide debtors with a better chance at relief.

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INTRODUCTION

On Christmas Eve 2017, Robbin Fulton’s car was towed. She did not know that she was driving on a suspended license. Her license had apparently been suspended because she had failed to pay fees for a number of parking tickets. She would later discover that it actually was her ex-husband who had incurred the tickets, but it did not matter because the tickets were tagged to the car that the two of them once shared. Fulton, a woman of color and single mother to a preschooler, tried to get her car back but was told that her car would not be returned to her until she paid a fee of $4,000. Unable to pay, she subsequently filed for Chapter 13 bankruptcy.

Her case made its way to the Supreme Court. In 2021, the Court decided City of Chicago v. Fulton, a landmark bankruptcy case that addressed a long-standing circuit split on the issue of whether passive retention of estate property violates § 362(a)(3) of the U.S. Bankruptcy Code, commonly known as the “automatic stay” provision. The Court held that because the automatic stay merely prohibits “any act . . . to exercise control over property” of the bankruptcy estate, passive retention—wherein the creditors are simply holding onto the estate property—falls outside the scope of the provision and is therefore permissible.

This Note considers the problems arising out of this holding: that bankruptcy courts are struggling to draw a line between passive and affirmative acts, that communities of color are disproportionately affected, and that people experiencing insolvency are further disempowered—thus

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1. See Rafael I. Pardo, Racialized Bankruptcy Federalism, 2021 Mich. St. L. Rev. 1299, 1341 n.218 (“The court opinions related to Fulton’s bankruptcy case do not discuss her race. The profile picture from her Facebook page is one of a woman of color.”); see also Brief for Respondents at 7, City of Chicago v. Fulton, 141 S. Ct. 585 (2021) (No. 19-357), 2020 WL 1478598 [hereinafter Brief for Respondents] (“Robbin Fulton is the single mother of a preschool-aged daughter; at the time of her bankruptcy filing, she worked at a Chicago area hospital.”).
2. Brief for Respondents, supra note 1, at 7.
3. Id.
5. Id. at 592.
contravening the bankruptcy system’s dominant purpose to “help people who can no longer pay their creditors get a fresh start.” ⁶

This Note argues that the suggestions put forth by commentators, the Court, and Justice Sonia Sotomayor in her concurrence are attractive for their simplicity but ultimately fall short. ⁷ The problem cuts deeper; *Fulton* exposed the consumer bankruptcy system’s structural vulnerabilities. This Note proposes that a more complete solution must address bankruptcy’s “two-track” structure. The two-track system requires individual debtors to choose between Chapter 7 and Chapter 13 bankruptcy; the two Chapters are governed by similar but separate eligibility, relief, and discharge provisions. This Note argues that the two Chapters’ discharge provisions should be brought into closer alignment, which would allow debtors who have not engaged in willful or malicious behavior to access the protections provided by either Chapter 7 or Chapter 13.

This Note proceeds in three Parts. Part I provides relevant context. It lays out the basic framework of the Bankruptcy Code’s key provisions and bankruptcy procedure rules. It then provides a history of Chicago’s vehicle impoundment program, which has become too common a trigger for bankruptcy. Part II discusses the *Fulton* decision and the Court’s legal reasoning. It also explains the main problems arising out of the holding, primarily that it is now more difficult for debtors to get relief. Part III proposes a statutory solution that would shrink the gap between Chapter 7 and Chapter 13 bankruptcy to mitigate *Fulton*’s impact on the automatic stay.

I. BACKGROUND

*Fulton* is about passive retention: It’s about what creditors can and should do with debtors’ property that—for whatever reason—happens to be in their possession when the debtor first files for bankruptcy. The case directly invokes three separate subsections of the Bankruptcy Code. This Part provides a primer to the consumer bankruptcy system as context for understanding the *Fulton* decision. It begins with a broad summary of the fresh start principle and the two-track consumer bankruptcy system. It then introduces Chicago’s vehicle impoundment program as the trigger for Fulton’s decision to file for bankruptcy. Finally, it ends with descriptions of the three most relevant subsections of the Bankruptcy Code.

A. The “Fresh Start” Principle

The “fresh start” principle is closely related to the discharge of debt. Discharge of debt is a primary goal of individual bankruptcy, which exists

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⁷ See infra Part II.
to “free the debtors who would otherwise be so hampered by unmanageable debt that they would stop contributing to society in a meaningful way.”


10. See id. at 607 (“[T]he law must harmonize the conflicting goals of insuring borrowers and providing them with appropriate incentives.”).


12. See David Graeber, Debt: The First 5,000 Years 4 (1st ed. 2011) (“What could be a more obvious example of shirking one’s responsibilities than reneging on a promise, or refusing to pay a debt?”); Game of Thrones: A Golden Crown (HBO television broadcast May 22, 2011) (Tyron Lannister says to a guardsman, “And of course, you have also heard the phrase, ‘A Lannister always pays his debts,’” in an attempt to bribe his way out of captivity.); The Office: Money (NBC television broadcast Oct. 18, 2007) (Creed Bratton says to Michael Scott, “[T]he Code, like all statutes, balances multiple, often competing interests. . . . No statute pursues a single policy at all costs, and we are not free to rewrite this statute (or any other) as if it did.”); Rafael I. Pardo & Michelle R. Lacey, Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt, 74 U. Cin. L. Rev. 405, 413–14 (2005) (“Two principles generally provide the metric against which bankruptcy law and policy are tested for their soundness: (1) a fresh start for the debtor
system, therefore, reflects a fragile balance between forgiveness and accountability, between dischargeability and nondischargeability.

B. The Two-Track Consumer Bankruptcy System

The American consumer bankruptcy system is sometimes described as “two-track” to reflect the choice that individual debtors have between two main types of relief: Chapter 7, which immediately liquidates the debtor’s nonexempt assets to pay off creditors, and Chapter 13, which refinances debt to allow for long-term payment to creditors. The current system has roots in the 1898 Bankruptcy Act and was solidified with the passage of the Bankruptcy Reform Act of 1978. The latter was widely celebrated as a modernized system for obtaining financial relief. The Bankruptcy Reform Act of 1978 was designed with the hope that if a debtor was statutorily eligible for either option, the usefulness of each Chapter would come down to the individual debtor’s circumstances and priorities.

Regardless of which Chapter a debtor files under, a voluntary individual bankruptcy case begins when a debtor submits a petition to the bankruptcy court. The debtor must also submit (1) schedules of assets and liabilities; (2) a schedule of current income and expenditures; (3) a schedule of executory contracts and unexpired leases; and (4) a statement (the fresh start principle) and (2) equal treatment of similarly situated creditors (the equality principle)."


18. Debtors must meet several statutory requirements to be eligible under Chapter 7. See 11 U.S.C. § 707(b)(2)(A)(i) (2018) (providing that debtors must pass a formulaic means test to determine whether filing under Chapter 7 would be presumptively abusive); § 727(a)(8) (providing that debtors are ineligible for Chapter 7 relief if they were granted a Chapter 7 or Chapter 11 discharge within the last eight years); § 727(a)(9) (providing that debtors are ineligible for Chapter 7 relief if they were granted a Chapter 12 or Chapter 13 discharge within the last six years, unless the debtor paid either 100% of the allowed unsecured claims or at least 70% of the claims under the Chapter 12 or Chapter 13 plan).

19. Porter, supra note 17, at 105.

of financial affairs.\textsuperscript{21} If employed, debtors filing under Chapter 13 as well as debtors filing under Chapter 7 with primarily consumer debts must submit evidence of any payment they have received within sixty days before filing.\textsuperscript{22} Those filing under Chapter 7 must also include a copy of their tax returns.\textsuperscript{23} These requirements are intended to facilitate the bankruptcy process and to ensure that the debtor’s assets or future income are fairly and efficiently distributed.\textsuperscript{24}

After the petition is filed, the U.S. Trustee appoints an impartial case trustee to oversee the case.\textsuperscript{25} The mechanics of the trustee’s role differ somewhat between Chapter 7 and Chapter 13, but generally the trustee acts as a third party mediator between the debtors and the creditors.\textsuperscript{26} Most importantly, the trustee holds a meeting of creditors within forty or fifty days of filing, during which the trustee and the creditor(s) may relay additional information or ask the debtor questions about their assets or financial affairs.\textsuperscript{27}

Chapter 7 requires debtors to turn over all nonexempt assets to the trustee, who then sells off the assets to compensate the creditors.\textsuperscript{28} Debtors are permitted to retain any “exempt” property; most common, everyday assets like clothing and household goods are exempt, but the exact rules vary among states.\textsuperscript{29} Some debtors also are allowed to claim property deemed exempt by the Bankruptcy Code.\textsuperscript{30} Chapter 7 is usually a good option for debtors whose debts substantially outweigh their assets.

Chapter 13 is different. In a typical Chapter 13 case, the debtor instead is required to submit a “repayment plan” to the bankruptcy court within fourteen days after the petition is filed.\textsuperscript{31} The repayment plan provides that “the debtor [will receive] a discharge of his or her remaining dischargeable debts if he or she successfully complies with the terms of the . . . plan.”\textsuperscript{32} The plan provides a fixed amount for payments that must be made on a regular basis, usually biweekly or monthly.\textsuperscript{33} Under some circumstances, a plan will be approved even if it does not actually provide

\textsuperscript{22} Fed. R. Bankr. P. 1007(b).
\textsuperscript{23} Id.
\textsuperscript{25} 11 U.S.C. §§ 701(a), 1302.
\textsuperscript{26} Id. § 1302.
\textsuperscript{27} Fed. R. Bankr. P. 2003(a).
\textsuperscript{28} See Porter, supra note 17, at 116 (explaining Chapter 7 procedure generally).
\textsuperscript{29} See Jean Braucher, Dov Cohen & Robert M. Lawless, Race, Attorney Influence, and Bankruptcy Chapter Choice, 9 J. Empirical Legal Stud. 393, 394 (2012).
\textsuperscript{30} 11 U.S.C. § 522(b)(2), (d).
\textsuperscript{32} Kaplan & Meisel, supra note 14, § 1:4.
\textsuperscript{33} Chapter 13—Bankruptcy Basics, supra note 31.
creditors with full repayment of their claims.\textsuperscript{34} Regardless, the bankruptcy court must approve the repayment plan before the case trustee begins distributing funds to creditors.\textsuperscript{35}

While Chapter 7 is more popular overall and typically thought of as “quick forgiveness” or the “cheaper, easier, and faster” option,\textsuperscript{36} Chapter 13 is preferred when a debtor owns nonexempt and “large assets like a home, a car, or a retirement account.”\textsuperscript{37} This is because Chapter 13, unlike Chapter 7, restructures in lieu of liquidation. It allows debtors to recoup their assets, regardless of whether their assets are exempt under Chapter 7.\textsuperscript{38} Chapter 13 can be the better option when a debtor is dealing with more valuable assets such as a home or a car—useful possessions that a debtor likely would not want to be without. If a debtor has pledged valuable assets as collateral, Chapter 13 allows them to keep those assets upon repayment, but under Chapter 7, the assets will be lost unless the creditor agrees to a reaffirmation.\textsuperscript{39} The discharge provisions under Chapter 13 are also somewhat more generous to the debtor: Debts incurred from willful and malicious injury to property, nondischargeable tax obligations, and property settlements in divorce or settlement proceedings are dischargeable under Chapter 13 but not under Chapter 7.\textsuperscript{40} Because a discharge granted under Chapter 13 encompasses some debts that are dischargeable under Chapter 13 but not under Chapter 7, a Chapter 13 discharge is sometimes referred to as a “superdischarge.”\textsuperscript{41}

The main downsides of Chapter 13 are twofold: It takes longer to carry out, typically three to five years, and it costs more.\textsuperscript{42} Unsurprisingly, Chapter 13 is the riskier option because “debtors are vulnerable to changes of life circumstance, such as loss of employment, divorce, or

\begin{itemize}
\item \textsuperscript{34} Id.
\item \textsuperscript{35} Id.
\item \textsuperscript{36} Sara S. Greene, Parina Patel & Katherine Porter, Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes, 101 Minn. L. Rev. 1031, 1031 (2017).
\item \textsuperscript{38} Id.
\item \textsuperscript{39} See Kristopher Ramsfield, The Basics of Chapter 7 Bankruptcy, Legal Aid of Ark. (Feb. 2, 2017), https://arlegalaid.org/news-events/newsroom.html/article/2017/02/02/the-basics-of-chapter-7-bankruptcy [https://perma.cc/J45S-UDKV] (“Usually, if a debtor wishes to keep secured property (most often an automobile or home that is the collateral for the purchase loan), he or she must ‘reaffirm’ the debt.”). A reaffirmation is an agreement between the debtor and the creditor that the debtor will remain legally liable for otherwise dischargeable debt. Id.
\item \textsuperscript{40} Chapter 13—Bankruptcy Basics, supra note 31.
\item \textsuperscript{41} Pamela Foohey, Fines, Fees, and Filing Bankruptcy, 98 N.C. L. Rev. 419, 419 (2020) (“[P]eople who file bankruptcy under [C]hapter 13—one of the two most common chapters filed by consumers—are entitled to a so-called ‘superdischarge’ that provides for the discharge of a few categories of debt that are not dischargeable in [C]hapter 7.”).
\item \textsuperscript{42} Pappas, supra note 37.
\end{itemize}
unanticipated emergency.” Further, attorneys’ fees are higher under Chapter 13—often more than twice as much as they would be under Chapter 7—but Chapter 13 debtors are permitted to make incremental payments over a period of time. Under Chapter 7, the attorneys’ fees must be paid upfront.

The periodical nature of a Chapter 13 repayment plan makes it possible for a debtor to default on their payments. It is also possible for a creditor or a third-party trustee to object to the debtor’s Chapter 13 repayment plan, which would in turn require the debtor to adjust, and often increase, the payment amounts. In such cases, a debtor might ask the bankruptcy court to convert a petition initially filed under Chapter 13 to Chapter 7. If their request is granted, the debtor would no longer need to make payments under the original plan, but there still would be some debts that remain nondischargeable. As a final measure, a debtor might also ask the bankruptcy court to grant a hardship discharge, but this is available only under very limited circumstances.

A bankruptcy case generally ends in one of two ways. If debtors are successful, part or all of their debt will be discharged, and their creditors will be prevented from taking or continuing an action to collect from them. Some debts are statutorily barred from discharge, but because debtors can usually discharge most if not all of their consumer debt, filing for bankruptcy often is still worthwhile. If debtors are unsuccessful, however, their case will be dismissed. Notably, the dismissal rates for Chapter 7 cases are low—hovering around five percent—but the dismissal rates for Chapter 13 cases soar at around sixty-seven percent.

Dismissal generally is a bad outcome because it puts debtors in a worse position than the one in which they began. Absent the bankruptcy system’s protections, creditors are again free to collect against debtors, interest rates continue to mount, and by then, the debtor has “borne the costs of

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43. Id. (internal quotation marks omitted) (quoting Charles Hall, a spokesman for the Administrative Office of the U.S. Courts).
45. Id. at 287.
47. See id. § 523(a) (listing types of debts that are nondischargeable under Chapter 7).
48. See id. § 1328(b) (providing that hardship discharges are available when a debtor’s failure to complete payment is due to circumstances outside the debtor’s control, creditors have received at least as much as they would under Chapter 7, and modification of the plan is impossible).
49. Id. § 1328.
50. Id. §§ 523, 1328.
51. See infra note 174 and accompanying text.
bankruptcy—attorney and filing fees, a seven-year flag on their credit reports—without receiving its primary benefit.52

C. Chicago’s Vehicle Impoundment Program

In 2011, the City of Chicago faced a massive budget deficit.53 Under Mayor Rahm Emanuel’s leadership, the City revamped its vehicle impoundment program to increase fines and fees for parking and traffic violations.54 It also began enacting ordinances permitting boot-related impoundment for unpaid fines; boots were placed on cars that belonged to owners who had failed to pay traffic fees for more than one year.55 If a car was impounded, the City would charge additional fees for impounding, towing, and storing the car.56 Until all fees were paid, the car generally would not be returned to its owner, and the City retained the right to sell it.57 The program differed from its counterparts in that Chicago did not attach a statute of limitations to fines related to traffic tickets.58 This made it possible for fines to slowly yet substantially accumulate without any expiration date. Between 2011 and 2019, about 50,000 cars were sold under this program.59 Most were sold for scrap value, even if the market value of the car was much higher.60

57. Id. § 9-92-080(b).
59. Ramos, 50,000 Cars, supra note 57.
60. Id.
Today, four in ten American adults struggle to cover emergency expenses of $400.** Until Mayor Lori Lightfoot lowered the fines and fees in 2020, Chicago’s base fee for impoundment was $1,000. It is now $500, but this amount is still debilitating for many.**

Chicago is not alone in its practice of using municipal police power to raise revenue. One study found that at least 284 American cities and towns rely on fines and fees for 20% or more of their revenue.** States do the same, with California using “traffic citations to collect revenue for 18 different state and county funds” and North Carolina using them to “raise[] money for [its] court system, jails, counties, law enforcement, and schools.”

This practice, otherwise known as “taxation by citation,” is prevalent across the country. It entered into mainstream awareness in 2014 after Michael Brown was shot and killed by a police officer in Ferguson, Missouri.** A Department of Justice investigation revealed that in the months and years leading up to Michael Brown’s death, Ferguson city officials had been deliberately encouraging the police chief and municipal court judge to increase revenue through ramping up citations.

In 2013, the city of Montgomery, Alabama, collected almost $16 million in fines, a sum more than five times greater than what other similarly sized Alabama cities collected.** What accounted for this discrepancy? In 2017, Michael W. Sances and Hye Young You conducted a

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**61. See Alicia Loro, Ellen Merry, Jeff Larrimore, Jacob Lockwood, Zofsha Merchant & Anna Tranfaglia, Bd. of Governors of the Fed. Reserve Sys., Economic Well-Being of U.S. Households in 2022, at 31 (2023), https://www.federalreserve.gov/publications/files/2022-report-economic-well-being-us-households-202305.pdf [https://perma.cc/GRN3-2E4H] (noting that sixty-three percent of American adults would be able to cover a hypothetical expense of $400 with “cash, savings, or a credit card paid off at the next statement”); see also Brief of the American Civil Liberties Union, the American Civil Liberties Union of Illinois, the Cato Institute, the Fines and Fees Justice Center, the Institute for Justice, the R Street Institute, and the Rutherford Institute as Amici Curiae in Support of Respondents at 3, City of Chicago v. Fulton, 141 S. Ct. 585 (2021) (No. 19-357), 2020 WL 1305027 [hereinafter Brief of the ACLU et al.].


64. Brief of the ACLU et al, supra note 61, at 12.


67. Carpenter et al., supra note 65.
study and found that cities with larger Black populations are more likely to fine residents higher amounts on a per capita basis and tend to rely more heavily on fines for revenue. A *Chicago Reporter* study “showed that [in California] a 1% increase in Black population is associated with a 5% increase in per capita revenue from fines and a 1% increase in share of total revenue from fines.”

In Chicago, Black residents make up almost thirty percent of the population. The Chicago Police Department (CPD) recently reported data to the Illinois Department of Transportation indicating that between 2015 and 2021, the number of traffic stops increased by four times. The CPD report also showed that compared with white drivers, Black drivers were six times as likely to be stopped, while Latinx drivers were more than two times as likely to be stopped.

As part of its program, Chicago imposes additional requirements upon its residents, such as maintaining a City Vehicle Sticker, which costs between $95 and $225 for vehicles not classified as motorcycles or large trucks. Those who fail to display the City Sticker on their cars risk being issued a $200 fine, and there is no limit on how many times the fine can be issued. If the City Sticker is improperly displayed, a resident could be fined $200 each day for however many days in a row. Fees related to City Sticker violations are the largest source of ticket debt in Chicago.

Taxation by citation is generally unpopular. Cognizant of public opinion, Chicago—along with many other municipalities—recently

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72. Id. at 15–16.

73. Id. at 16.


75. Mun. Code of Chi. §§ 3-56-150(b), 9-64-125(f), -100-020(c) (2023).

76. Sanchez & Kambhampati, supra note 58.

lowered the fines and fees for traffic violations. At the federal level, Senators Chris Coons and Roger Wicker introduced the Driving for Opportunity Act, a bill designed to incentivize municipal and state governments to reinstate the licenses of those who failed to pay fees. These reforms might point to a greater national movement for racial and economic justice, but they do not offer debtors relief in instances in which estate property was seized by their creditors prior to filing for bankruptcy.

As of 2018, Chicagoans owed $1.45 billion in unpaid ticket fines dating back to 1990. Thousands of residents faced with prohibitively high fees have since sought relief through the bankruptcy system, and reforms to lower fines or to restore drivers’ licenses will not do them much good. These reforms also fail to address a persistent and overarching feature of the bankruptcy system: Although the law is racially neutral on its face, individual bankruptcy filings disproportionately are made by people of color. Further, the disparities are more severe for Chapter 13 filings, particularly in the south, where Black individuals more frequently make such filings.

A long history of racial segregation and discrimination has shaped Chicago’s landscape and transit system into what it is today: deeply divided and convenient for wealthier, white neighborhoods but lagging in poorer neighborhoods of color. In a study, Professor Edward Morrison found that poor people of color in Chicago “tend to live in neighborhoods that are not only far from their jobs but far from essential amenities such as

78. Vehicle Impoundment Program Reforms, supra note 62.
80. Sanchez & Kambhampati, supra note 58.
81. Between 2007 and 2017, the number of Chapter 13 bankruptcy filings increased from about 1,000 per year to about 10,000. Id. The median amount of Chicago debtors’ municipal debt increased from about $1,500 to $3,900. Id.
82. See Aisha Al-Muslim, Black People Are More Likely to File for Personal Bankruptcy, Choose Repayment Option, Wall St. J. (June 7, 2021), https://www.wsj.com/articles/black-people-are-more-likely-to-file-for-personal-bankruptcy-choose-repayment-option-11623058202 (on file with the Columbia Law Review) (“Black people in the U.S. . . . are more likely to file for bankruptcy protection, if they can afford to pay for the cost of filing, than any other racial group, according to studies, researchers and legal experts.”). But see Anthony J. Casey, Comment, Consumer Bankruptcy Pathologies, 173 Institutional & Theoretical Econ. 197, 200-01 (2017) (“[I]f parking tickets in Chicago have a disparate racial effect, the best solutions will almost certainly be targeted at fundamental racial inequalities either in the city or in the parking enforcement itself, rather than at Chapter 13.”). As for why people of color are more likely to file for bankruptcy, much has been written on the racial wealth gap, but this is largely beyond the scope of this Note. For a brief discussion of the racial wealth gap, see generally Ricardo Mimbela & Katie Duarte, Visualizing the Racial Wealth Gap, ACLU (Aug. 10, 2023), https://www.aclu.org/news/racial-justice/visualizing-the-racial-wealth-gap [https://perma.cc/9SYG-EKNV] (describing the racial wealth gap in relation to homeownership, mortgage loans, and median income).
supermarkets. They live in food deserts. Even worse, they are poorly served by mass transit, such as L trains.”

Another study found that “[t]he average Black resident can access 236,641 potential jobs in 45 minutes using transit, . . . compared to 344,182 for the average white resident.”

Despite efforts to revamp its public transit system, Chicago remains a car city. The City continues to tow and impound up to hundreds of cars every day; the City continues to send thousands of its residents into bankruptcy.

D. The Bankruptcy Estate: 11 U.S.C. § 541(a)

When a debtor first files for bankruptcy under Chapter 7 or Chapter 13, an “estate” is automatically created under the Bankruptcy Code. This is defined by 11 U.S.C. § 541(a), which includes as part of the estate “all legal or equitable interests of the debtor in property as of the commencement of the case.”

It is well established that the term “legal or equitable interests” includes all property in which the debtor has an ownership or leasehold interest and not only property over which the debtor is in actual possession.

This broad construction is one of several provisions that allow the bankruptcy system to make available to the debtor all assets that may be essential to, or simply contribute to, their rehabilitation efforts. Notably, the debtor’s property held by any party is part of the “estate”; property held by a creditor prior to a bankruptcy proceeding would also become part of the debtor’s “estate” upon filing, “wherever located and by whomever held.”


85. Kyle Whitehead, New Analysis Highlights Racial Disparities in Chicago Area Transit Access, Active Transp. All. (June 17, 2021), https://activetrans.org/blog/new-analysis-highlights-racial-disparities-in-chicago-area-transit-access [https://perma.cc/6BM3-2UPV]; see also Morrison et al., supra note 44, at 271 (“On average, African Americans may have longer commutes to work and live in areas that are farther from schools, medical services, and supermarkets.”).

86. Towed Vehicles (Impounded), City of Chi., https://www.chicago.gov/city/en/dataset/relocated_vehicles1.html [https://perma.cc/Q399-SPTC] (last visited Aug. 25, 2023) (listing the make and model of cars that have been towed and impounded within the last ninety days).


88. See United States v. Whiting Pools, Inc., 462 U.S. 198, 207 (1983) (“[Section] 542(a) grants to the estate a possessory interest in certain property of the debtor that was not held by the debtor at the commencement of reorganization proceedings.”).

89. Id. at 203.

90. 11 U.S.C. § 541(a).

Section 362(a)(3) of the Bankruptcy Code, the “automatic stay provision,” is at the core of Fulton. It governs the creditor’s treatment of an estate immediately after a Chapter 7 or Chapter 13 petition has been filed. It is, however, significantly more relevant to Chapter 13 because Chapter 13 proceedings last for several years and because the return of estate property is often necessary to completing a Chapter 13 plan. This provision is more immediate than an injunction in that “it operates without the necessity for judicial intervention,” and it becomes effective without notice to creditors. The stay is designed to be easy and efficient, and it prevents creditors from engaging in “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.” It lasts until a case ends, which is typically when the bankruptcy court closes a case, if and when the bankruptcy court dismisses a case, or when the debtor is granted discharge.

The automatic stay has long been considered one of the Bankruptcy Code’s most important debtor-friendly protections. It “gives the debtor a breathing spell from his creditors” while also “permitting] the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.” Creditors who violate the automatic stay—by attempting garnishment of wages, foreclosing on collateral, disconnecting utilities, or even by making phone calls demanding payment—without advance permission from the bankruptcy court may be subject to sanctions and ordered to pay punitive damages to the debtor.

annulling, modifying, or conditioning such stay.” Bankruptcy judges may in turn choose to limit the automatic stay if they find that the hardship to the creditor resulting from the stay outweighs the relief that it would provide to the debtor.

The automatic stay provision was last significantly amended in 1984. Before 1984, the provision applied to “any act to obtain possession of property of the estate or of property from the estate.” With little legislative history to offer insight as to why, Congress in 1984 appended the phrase “any act . . . to exercise control over property of the estate” to the existing statute. This phrase, along with Congress’s intent in adding it, has since been heavily litigated.

F. The Turnover Provision: 11 U.S.C. § 542(a)

Section 542(a) of the Bankruptcy Code, known as the “turnover provision,” is closely related to the automatic stay, and it further protects debtors by allowing a neutral third party—the bankruptcy trustee—to bring together and oversee the estate property during the bankruptcy proceeding. In effect, this provision affirmatively tells creditors what to do with estate property after a debtor has filed for bankruptcy, while the automatic stay provision tells creditors what not to do. The turnover provision mandates creditors in possession of the estate property to turn such property over to the trustee “unless such property is of inconsequential value or benefit to the estate.”

Although the Code’s express terms do not specify so, debtors—or trustees acting on their behalf—who wish to compel creditors to turn over estate property will trigger an adversarial court proceeding. Creditors are entitled to procedural due process, and they are entitled to put forth claims if “the property is of inconsequential value, the creditor has a right to adequate protection, or the debtor and estate lack a legal or equitable interest in the property.”

101. Id. § 362(d).
102. See id. § 362(d)(1).
105. See infra section II.B (discussing prior litigation on the automatic stay’s breadth).
107. Id.
II. THE PROBLEM

This Part begins with a summary of the *Fulton* holding. It then discusses two main problems that *Fulton* brings to light. First, *Fulton* illustrated that debtor-friendly protections are subject to judicial interpretation that adheres to the text of the Code at the expense of policy goals. Second, *Fulton* highlighted several pre-existing problems within the two-track consumer bankruptcy system.

A. City of Chicago v. Fulton

*City of Chicago v. Fulton* involved multiple consolidated individual bankruptcy cases, including Robbin Fulton’s.110 In each case, the City seized a resident’s car for motor vehicle infractions. Following seizure, the City also charged the resident an additional fee for impounding, towing, and storing of the car. Altogether, the fees came out to thousands of dollars,111 which each of the residents was unable to pay even under an installment plan.112 They subsequently filed for Chapter 13 bankruptcy under the assumption that the automatic stay and turnover provisions would mandate Chicago, their creditor, to immediately return their cars to them.

However moral or immoral, this assumption was widespread. Indeed, it was so widespread that some Chicagoans built enterprises around it. In 2015, Chicagoan Daniel Rankins was sentenced to eighteen weeks in prison for bankruptcy fraud.113 Rankins had been running a sophisticated scheme in which he charged at least $400—a sum lower than whatever his “clients” were supposed to pay the City—to file bogus bankruptcy petitions to secure the release of his “clients’” vehicles from the city’s auto pounds.114 The City would then turn over the impounded cars without checking whether the petitions were legitimate.115 Debtors believed that if they filed bankruptcy petitions, they would receive their car, be able to go to work, and contribute to their payment plan, and that eventually the City would be paid its due.

Eventually, Chicago had enough. The City refused to give Robbin Fulton her car back, arguing that the automatic stay and turnover

111. Brief for Respondents, supra note 1, at 7.
112. In re Fulton, 926 F.3d 916, 920–22 (7th Cir. 2019).
114. Sweeney, supra note 113.
115. Id.
provisions did not apply because, under its municipal code, it had a possessory lien on the cars. The liens were automatically established when the cars were first impounded, and upon the bankruptcy filings, the City did nothing further than maintain the status quo. The crux of the City’s argument was that mere retention of estate property does not violate the automatic stay.

The Bankruptcy Court and the U.S. Court of Appeals for the Seventh Circuit found Chicago’s argument unpersuasive, and both lower courts sided with the debtors. They held that “by retaining possession of the debtors’ vehicles after they declared bankruptcy,” the City had in effect acted to “exercise control over” the debtors’ estate property. The Seventh Circuit relied on its own reasoning applied in an earlier case and held that “limiting the reach of ‘exercising control’ to ‘selling or otherwise destroying the asset,’ as the creditor proposed, did not fit with bankruptcy’s purpose.” Further, the Seventh Circuit disagreed with the City’s argument that it was maintaining the status quo by holding onto estate property; instead, the Circuit invoked the turnover provision and held that the “status quo in bankruptcy is the return of the debtor’s property to the estate. In refusing to return the vehicles to their respective estates, the City was not passively abiding by the bankruptcy rules but actively resisting [the turnover provision] to exercise control over debtors’ vehicles.”

The Supreme Court reversed. It held that the language of the automatic stay does not apply to passive retention of estate property. The Court relied on three terms—“stay,” “act,” and “exercise control”—to conclude that the automatic stay applies only to “affirmative acts that would disturb the status quo of estate property.” Simply put, the Court held that retention of estate property is not commonly understood to be affirmative.

The Court found it unnecessary to address the debtors’ point that “[l]ogically, the only way for a creditor to stop controlling property it is holding is to relinquish its control to someone else.” Instead, to further

116. See Mun. Code of Chi. § 9-92-080(f) (2023) (“Any vehicle impounded by the City or its designee shall be subject to a possessory lien in favor of the City in the amount required to obtain release of the vehicle.”).
117. See Fulton, 926 F.3d at 925.
118. Id. at 924–25; In re Fulton, 588 B.R. 834, 838 (Bankr. N.D. Ill. 2018).
119. Fulton, 926 F.3d at 924–25.
120. See id. at 923 (citing Thompson v. Gen. Motors Acceptance Corp., 566 F.3d 699 (7th Cir. 2009) (holding that the 1984 amendment signaled Congress’s intent to make the automatic stay more inclusive)).
121. Id. (quoting Thompson, 566 F.3d at 702).
122. Id. at 925.
justify its holding, the Court relied on canons of statutory interpretation.\textsuperscript{125} The turnover provision, the Court explained, is self-executing and expressly governs the turnover of estate property and, barring some exceptions, orders creditors to turn over estate property to the bankruptcy trustee.\textsuperscript{126} If the automatic stay were read to carry the same turnover command, then the turnover provision would be largely superfluous. The Court went on to suggest that even if the two provisions were read to give different commands, they would be contradictory.\textsuperscript{127} The turnover provision is conditional. It makes several exceptions to the command that the automatic stay does not. The two cannot be reconciled unless one provision supplanted the other, but as the Court commented, “there [was] no textual basis” for such a conclusion.\textsuperscript{128}

The Court also relied on legislative history—or, more accurately, on its absence—to conclude that Congress did not intend for the automatic stay to apply to passive retention of estate property. The phrase “or to exercise control over property of the estate” was added in an amendment; the parties in \textit{Fulton} did not dispute that prior to 1984, the automatic stay would have permitted passive retention.\textsuperscript{129} The Court determined that the wording in the amendment is not sufficiently clear to signal that Congress wanted to expand the automatic stay to prohibit passive retention, as this would have been a significant change that would warrant stronger and clearer language.\textsuperscript{130} The Court concluded that “exercise control” in the provision suggests doing something that was not already being done, and in the present case, Chicago was only holding on to property that it had seized pre-bankruptcy.\textsuperscript{131} Had Congress intended to prohibit creditors from retaining estate property, the Court reasoned, Congress could have more clearly done so.

The \textit{Fulton} decision made clear that without the turnover provision, the automatic stay on its own does not instantly require creditors to return estate property to the debtor. This holding essentially stripped the automatic stay of its independent power.

The Court took pains to instruct that the \textit{Fulton} holding must be narrowly construed. The Court refrained from addressing what the holding meant for the turnover provision and left open the possibility that a remedy might be found in other Bankruptcy Code sections.\textsuperscript{132} In her concurrence, Justice Sotomayor nodded to the possibility that debtors

\textsuperscript{125} \textit{Fulton}, 141 S. Ct. at 591.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id. at 592.
\textsuperscript{131} Id.
\textsuperscript{132} Id. (Sotomayor, J., concurring).
could find relief under other provisions such as § 362(a)(4). She also considered the turnover provision as an option but conceded that turnover proceedings often last for months, too long a time for debtors to be deprived of property as essential as their cars. Further, turnover proceedings “resembl[e] the civil trial” in that they are expensive and adversarial, while the goal of bankruptcy, to get a fresh start, can and should be “achieved without any trial whatsoever.”

B. Other Approaches

The Fulton holding went against what most courts have held regarding the automatic stay. For instance, when Fulton was decided, the Seventh Circuit—concluding similarly to the Second, Eighth, Ninth, and Eleventh Circuits—had previously held that the ordinary meaning of “exercise control” is to “exercise restraining or directing influence over” or to “have power over.” As a practical matter, to retain estate property—actively or passively—is to have power over a debtor’s property. Only the Third, Tenth, and District of Columbia Circuits had found that passive retention did not violate the automatic stay.

133. Id. This provision prevents creditors from taking “any act to create, perfect, or enforce any lien against property of the estate.” 11 U.S.C. § 362(a)(4) (2018).

134. Id. at 594.


136. Thompson v. Gen. Motors Acceptance Corp., 566 F.3d 699, 702 (7th Cir. 2009) (internal quotation marks omitted) (quoting Control, Merriam-Webster’s Collegiate Dictionary (11th ed. 2003)); see also Weber v. SEFCU (In re Weber), 719 F.3d 72, 80 (2d Cir. 2013) (“In our view, the plain language of section 542 . . . and the broad language of the 1984 Amendments . . . point unmistakably away from any Congressional desire to impose such an additional burden on debtors seeking bankruptcy protection.”); Motors Acceptance Corp. v. Rozier (In re Rozier), 376 F.3d 1323, 1324 (11th Cir. 2004) (holding that where ownership remains with the debtor after repossession under state law, retention of property violates the automatic stay); Cal. Emp. Dev. Dep’t v. Taxel (In re Del Mission Ltd.), 98 F.3d 1147, 1151–52 (9th Cir. 1996) (holding that “knowing retention of estate property violates the automatic stay of §362(a)(3)’’); Knaus v. Concordia Lumber Co. (In re Knaus), 889 F.2d 773, 775 (8th Cir. 1989) (holding that the creditor’s exercise of control over the estate property “prevented the debtor from continuing his business with all his available assets”).

137. See In re Denby-Peterson, 941 F.3d 115, 126, 131 (3d Cir. 2019) (holding that the creditor was not required to turn over the debtor’s property unless the debtor received a court order requiring the creditor to do so); WD Equip., LLC v. Cowen (In re Cowen), 849 F.3d 943, 946, 948–51 (10th Cir. 2017) (reversing the judgment of a lower court imposing damages against a creditor because “passively holding onto an asset” does not violate the automatic stay (internal quotation marks omitted) (quoting Thompson, 566 F.3d at 703)); United States v. Inslaw, Inc., 932 F.2d 1467, 1474 (D.C. Cir. 1991) (“The automatic stay, as its name suggests, serves as a restraint only on acts to gain possession or control over property of the estate.”).
Prior to Fulton, United States v. Whiting Pools, Inc. was the leading Supreme Court case on this issue. There, the Court held that the creditor must turn over the seized estate property to the debtor, which in that case entailed the IRS turning over equipment, vehicles, inventory, and office supplies. The Court relied on the turnover provision to conclude that a creditor must turn over estate property immediately upon a bankruptcy filing. If a creditor wanted to repossess that property, the Court found, the creditor had to invoke other Bankruptcy Code provisions. The Court explained:

Congress anticipated that the business would continue to provide jobs, to satisfy creditors’ claims, and to produce a return for its owners. Congress presumed that the assets of the debtor would be more valuable if used in a rehabilitated business than if “sold for scrap.” . . . Thus, to facilitate the rehabilitation of the debtor’s business, all the debtor’s property must be included in the reorganization estate.

Notwithstanding the merits of its legal reasoning, Whiting Pools was widely accepted in cases involving either the automatic stay or the turnover provision because it was seen as consistent with underlying policy justifications. If a creditor could seize property pre-bankruptcy and if the property is of essential value to the debtor, then refusing to turn over such property would yield a lose–lose outcome. For both corporate and individual debtors, the physical possession of personal property advances the fresh start principle because it allows them to be more productive, therefore making repayment more likely. Otherwise, the debtor would be ill-equipped to successfully carry out the repayment plan, and the creditor would be unlikely to receive the payment owed. That the creditor continues to hold onto estate property is inefficient for all involved; the creditor’s interest in the estate property is typically low relative to that of the debtor.

Almost one century ago, the Supreme Court recognized that “[t]he power of the individual to earn a living for himself and those dependent

138. 462 U.S. 198 (1983); see also Weber, 719 F.3d at 77 (relying on Whiting Pools as the basis for deciding whether failure to turn over property seized pre-filing is a violation of the automatic stay); Knaus, 889 F.2d at 775 (same).
139. Whiting Pools, 462 U.S. at 200.
140. See id. at 205.
141. See id.
143. See Claudia A. Restrepo, Comment, A Pro Debtor and Majority Approach to the “Automatic Stay” Provision of the Bankruptcy Code—In re Cowen Incorrectly Decided, 59 B.C. L. Rev. E. Supp. 537, 548 (2018), https://storage.googleapis.com/jnl-bcls-j-bclr-files/journals/1/articles/455/63aa5699e300c.pdf [https://perma.cc/Z4GC-Y685] (“The expansion of the [automatic stay] provision is consistent with the Supreme Court’s explicit understanding that the overarching goal of bankruptcy is to allow the debtor to get back in a position where they can satisfy all of their debts.”).
upon him is in the nature of a personal liberty.” At least one other provision of the Bankruptcy Code supports this view. Section 522(d) exempts certain property from the bankruptcy estate, which protects debtors from having to relinquish essential items such as $1,500 in value in “implements, professional books, or tools[] of the trade,” in hopes that debtors can make use of those items to get back on their feet.

Yet the Court in Fulton followed a strict textualist approach and interpreted the lean legislative history of the automatic stay to mean that Congress did not want the automatic stay to apply to passive retention of estate property. Still, Fulton was not all that surprising because at least two years before it was decided, scholars and commentators had already observed a “jurisprudential trend” in which textualist Justices display a “willing[ness] to . . . argue in favor of overruling established statutory interpretation precedents—even though such a practice is difficult to reconcile with textualism’s core aims of promoting clarity and stability in the law.”

It is nonetheless significant that for many years, most courts landed differently on the question of congressional intent with respect to the automatic stay. The Second Circuit reasoned that the 1984 amendment of the automatic stay, which followed the Whiting Pools decision, signaled Congress’s intent for the automatic stay to apply to estate property seized pre-bankruptcy. The Eighth Circuit observed that “if persons who could make no substantial adverse claim to a debtor’s property in their possession could . . . compel the debtor or his trustee to bring suit as a prerequisite to returning the property, the powers of a bankruptcy court . . . would be vastly reduced.” Similarly, the Ninth Circuit held that “knowing retention of estate property violates the automatic stay” provision because that reading created no contradiction with the turnover

provision. Read together, the Ninth Circuit found, the two provisions provide that creditors have a duty to return estate property to the estate.149

The *Whiting Pools* holding took a purposivist approach that reconciled individual sections with the fresh start principle and the Bankruptcy Code as a whole.150 Under this approach, “[t]he various provisions of the Bankruptcy Act were adopted in light of [the fresh start] view and are to be construed when reasonably possible in harmony with it so as to effectuate the general purpose and policy of the act.”151 Ambiguity in the Code may be interpreted in favor of the debtor if doing so advances the goals of bankruptcy.

The *Fulton* holding went in a different direction and read the automatic stay and turnover provisions in isolation to inhibit debtors. *Fulton* shows that a debtor protection, even one that has long been seen as a staple in the Bankruptcy Code, can be significantly weakened despite the majority view if the weaker interpretation comports with the text of the law.152 Strikingly, the *Fulton* holding was unanimous.153 Though Justice Sotomayor wrote separately in a concurrence acknowledging the racially disparate impact that the holding may have absent further political action, she agreed that the language of the automatic stay provision precluded alternative readings.154 Although the *Fulton* Court emphasized that its holding should be interpreted narrowly, the decision inevitably has broader implications for private creditors in possession of a debtor’s property (typically held as collateral) at the time of filing. Creditors, both public and private, are now more able to retain estate property essential to debtors’ relief efforts.

Because the *Fulton* holding only gave an example of what does not count as an affirmative act that disturbs the status quo of estate property, lower courts now face a line-drawing challenge in determining whether creditors ran afoul of the automatic stay.155 While some acts fall squarely within the affirmative category, many acts could be construed as either


150. See United States v. Whiting Pools, Inc., 462 U.S. 198, 208 (1983) ("Any other interpretation . . . would deprive the bankruptcy estate of the assets and property essential to its rehabilitation effort and thereby would frustrate the congressional purpose behind the reorganization provisions.").


152. See Nina A. Mendelson, Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court’s First Decade, 117 Mich. L. Rev. 71, 73 (2018) ("When text straightforwardly suffices to answer a question, no further investigation is needed, and evidence about congressional purpose will not override it.").


154. See id. at 592 (Sotomayor, J., concurring) ("I join the Court’s opinion because I agree that, as used in § 362(a)(3), the phrase ‘exercise control over’ does not cover a creditor’s passive retention of property lawfully seized prebankruptcy.").

155. For examples of acts that traditionally fall within the “affirmative” category, see 11 U.S.C. § 362(k)(1) (2018).
passive or active. For example, “[i]f a creditor freezes or seizes property of the estate, so long as the creditor’s actions simply keep the status quo in place,” the act does not trigger the automatic stay under Fulton because creditors are not deemed to have performed an “act” despite having effectively prevented debtors from accessing the estate property.156

Unsurprisingly, creditors tend to argue for a broad reading of Fulton while debtors argue for a narrow one. Post-Fulton, some debtors have argued that creditors must have possession of the debtor’s property before filing to avoid triggering the automatic stay provision.157 Two courts have held that creditors retaining a pre-petition attachment of the debtors’ bank account does not violate the automatic stay because, as in Fulton, the creditors were merely maintaining the status quo.158 Yet another court relied on policy objectives and held that “inaction combined with other facts might nonetheless violate the automatic stay.”159

The Fulton decision also failed to provide clear guidance on whether the turnover provision can be used—when a creditor is not in violation of the automatic stay—to trigger turnover of estate property. In her concurrence, Justice Sotomayor seemed to imply that it could.160 But if debtors rely solely on the turnover provision, as she noted, they not only are required to undergo a lengthy adversarial proceeding but also are burdened with filing fees, and, if they choose to hire counsel, they must also cover additional attorney’s fees.161 Problematically, “[b]oth the out-of-pocket costs and the opportunity cost[’] of pursuing an action pursuant to § 542 could prove catastrophic to debtors already experiencing financial distress.”162

158. See id. at *6 (holding that the distinction between the present case and Fulton "is not particularly relevant and perhaps weighs more in favor of [the creditor] under the reasoning of Fulton since [the creditor] [is] not in actual possession of the funds"); see also Stuart v. City of Scottsdale (In re Stuart), 632 B.R. 531, 536 (B.A.P. 9th Cir. 2021) (affirming the lower court’s rejection of the plaintiff’s argument “that Fulton’s narrow holding under § 362(a)(3) [is] inapplicable . . . because the [defendant] denied ever possessing [the plaintiff’s] property”), aff’d, No. 21-60063, 2023 WL 5011739 (9th Cir. Aug. 7, 2023).
159. See Cordova v. City of Chicago (In re Cordova), 635 B.R. 321, 344 (Bankr. N.D. Ill. 2021) (noting that expansion of the Fulton holding to other subsections of § 362 would further inhibit the debtor’s “ability to earn the income on which a plan is predicated”).
160. City of Chicago v. Fulton, 141 S. Ct. 585, 592 (2021) (Sotomayor, J., concurring) (“[T]he Court has not decided whether and when §362(a)’s other provisions may require a creditor to return a debtor’s property. . . . Nor has the Court addressed how bankruptcy courts should go about enforcing creditors’ separate obligation to ‘deliver’ estate property to the trustee or debtor under §542(a).”).
161. See Golden & Hourany, supra note 156, at 313 (“Filing a complaint under § 542 most likely requires counsel, let alone the $350.00 filing fee that some debtors will struggle to afford in the first instance.” (footnote omitted)).
162. Id.
C. Fulton’s Impact

This Note has explained that Chapter 7 and Chapter 13 are distinct in several ways: in procedure, in benefits, in drawbacks, in who uses them, and in why they are used. Fulton is also important because it sheds light on how, even with two options, there remains a gap: For some debtors, neither option suits their goals.

For example, before Fulton, Chapter 13 was the better choice for those who wanted to use the automatic stay provision to stop the City of Chicago from impounding their vehicles or suspending their licenses. With or without the automatic stay, debtors are still incentivized to file under Chapter 13 because it allows them to discharge ticket debt, while Chapter 7 does not. But now, under Fulton’s weak construction of the automatic stay, Chapter 13 no longer halts the City from impounding cars or suspending licenses. In effect, Chapter 13 is still the better option because it at least retains the possibility of discharge. But simply because it beats out Chapter 7 does not make it a good option. Bankruptcy law lacks sufficient safeguards to make actual discharge feasible when the law’s effects inhibit people from getting to and from work and contributing to their payment plans.

Although most debtors are theoretically given a choice between Chapter 7 and Chapter 13, studies have shown that Black individuals tend to file under Chapter 13 even when Chapter 7 would or could be the better option. Controlling for variations in financial circumstances, Black debtors also are more than twice as likely to file under Chapter 13 instead of Chapter 7 than white debtors. This discrepancy suggests that in a simplified world, more Black debtors would file for Chapter 7 than currently do. Indeed, Chapter 7 is by far the preferred option in most parts of the country; “[o]nly in the South, in a band of states stretching from North Carolina to Texas, is Chapter 13 predominant.” That Black debtors are much more likely to choose Chapter 13 is troubling because at the time of filing, they often have few to no assets that would be liquidated under Chapter 7. Put differently, many Black debtors would almost certainly benefit more from Chapter 7 because their assets are almost, if not entirely, exempt, and their debts would be discharged with

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163. See supra Part I.

164. See Braucher et al., supra note 29, at 395 (“[A]n African American is about twice as likely to file Chapter 13 as compared to debtors of all other races, even after controlling for a multitude of financial, demographic, and legal factors.”); Pamela Foohey, Robert M. Lawless, Katherine Porter & Deborah Thorne, “No Money Down” Bankruptcy, 90 S. Cal. L. Rev. 1055, 1082 (2017).

165. Kiehl & ProPublica, supra note 52.

166. Id.

167. See Morrison et al., supra note 44, at 270 (“Yet [the] commonly cited explanation for preferring Chapter 13 [(that it can prevent the loss of one’s home)] seems implausible for the vast majority of filings by African Americans, most of whom have few or no assets vulnerable to liquidation in Chapter 7.”).
minimal liquidation. In contrast, the risks of choosing Chapter 13 loom large, and “[t]he same vulnerabilities that make [B]lack Americans more likely to file for bankruptcy make them less likely to succeed in bankruptcy.”

In our world, one in which for various reasons the majority of Black debtors file under Chapter 13, it is imperative that bankruptcy law provides safeguards so that debtors have a fair chance at repayment and discharging their debt. The automatic stay is one such safeguard, but after Fulton, it no longer holds the same power that it once did.

Though not directly at issue in Fulton, debtors likely chose to file under Chapter 13 in part because traffic fines such as parking ticket debt are not dischargeable under Chapter 7. Chapter 7 makes no distinction between criminal and civil fines; debts that are payable to a governmental entity generally are not dischargeable, and ticket debt is owed to local governments. If the debtors chose to file under Chapter 7, their nonexempt assets would be liquidated to repay their creditors, but their parking ticket debt would remain.

But these debts may be dischargeable under Chapter 13, which makes a criminal/civil fine distinction and bars relief only when debt takes the form of “restitution, or a criminal fine, included in a sentence on the debtor’s conviction of a crime.” Although some jurisdictions still consider traffic violations as criminal, most consider them to be civil penalties. As long as the violations are not criminal in a given jurisdiction, they are dischargeable upon complete repayment of a Chapter 13 plan.

But there is another problem: Chapter 13 has a meager thirty-three percent discharge rate compared to Chapter 7’s ninety-five percent. Although bankruptcy law technically permits it, most ticket debt incurred by Chapter 13 debtors will never actually be discharged. The Fulton holding makes actual discharge even more illusory because debtors now lack reliable transportation to get to and from work.

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168. See supra note 37 and accompanying text.
169. Kiehl & ProPublica, supra note 52; see also supra note 82 and accompanying text.
170. See 11 U.S.C. § 523(a)(7) (2018) (specifying that Chapter 7 discharge does not include debt “for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit”).
171. Id.
172. Id. § 1328(a)(3); see also Morrison et al., supra note 44, at 293 (“[T]he importance of Chapter 13 is driven, in part, by a quirk of the bankruptcy code: [F]ines, such as parking tickets, can be discharged in Chapter 13 but not in Chapter 7.”).
174. See Porter, supra note 17, at 153.
175. See supra section II.A.
Problematically, these differences may end up controlling the choice between filing under Chapter 7 and Chapter 13, which is considered “[o]ne of the most important decisions a person makes about bankruptcy” because the two chapters “are . . . distinct proceedings in substance and process.” Although Congress initially designed Chapter 13 to increase access to relief, the reality is that Chapter 13 debtors fail more often than they succeed. It remains a good choice for some, but importantly, it only makes sense for those who are very likely and well equipped to complete a repayment plan. Before Fulton, the automatic stay was one way in which bankruptcy law made Chapter 13 discharge more accessible. Now, a large class of debtors—those overwhelmed with debt incurred through taxation by citation—are left without a good option for relief.

The current bankruptcy system fails to provide an adequate remedy for debtors who are saddled with municipal debt incurred from parking fines and fees, who tend to be individuals of color. And because municipalities have power to pass legislation that might allow them to meet the Fulton standard of passive retention of estate property, the implications of this holding are far-reaching.

In this sense, Fulton did not so much create a new problem within bankruptcy law as show how the structure of the bankruptcy system has long been flawed. Without significant reform, bankruptcy law will continue to disproportionately disadvantage communities of color.

III. The Solution

The previous two Parts have shown how the bankruptcy system has failed to meet its objectives and that its individual Code provisions are vulnerable to the whims of the Court’s interpretation. The Court’s holding in Fulton narrowed the power of the automatic stay against the view of most circuit courts as well as bankruptcy law’s policy goals. Further, the decay of the automatic stay is felt heavily by debtors (and their creditors) who, because of various discharge provisions and personal circumstances, lack any meaningful choice between Chapter 7 and Chapter 13.

To address these problems, this Note draws inspiration from the Consumer Bankruptcy Act of 2020 and argues that Congress should amend the Bankruptcy Code’s discharge provisions on public policy grounds so that the provisions apply more equally to Chapter 7 and Chapter 13 debtors. The Bankruptcy Code’s discharge provisions are supposedly grounded in public policy considerations, the idea that

176. Foohey et al., supra note 164, at 1057.
177. See Porter, supra note 17, at 105 (describing the creation of Chapter 13 as “a cornerstone of the improved system of legal relief for consumers”).
178. For a brief description of how Chicago’s municipal code allowed the City a lien on estate property, see Brief for Petitioner at 10–11, City of Chicago v. Fulton, 141 S. Ct. 585 (2021) (No. 19-357), 2020 WL 583728.
179. See supra section II.A.
although bankruptcy should give debtors a second chance, it should never reward misconduct, that it must not “be a haven for wrongdoers.”\footnote{U.S. Dep’t of Hous. & Urb. Dev. v. Cost Control Mktg. & Sales Mgmt. of Va., Inc., 64 F.3d 920, 927 (4th Cir. 1995).} Congress added many of the nondischargeability provisions because it wanted to prevent bad actors from abusing the bankruptcy system.\footnote{See Grogan v. Garner, 498 U.S. 279, 287 (1991) ("Congress . . . concluded that the creditors’ interest in recovering full payment in [certain] categories [such as child support, alimony, certain unpaid taxes, and liabilities for fraud] outweighed the debtors’ interest in a complete fresh start."). For a more detailed discussion on how public policy came to justify the nondischargeability of student loan debt, see generally Doug Rendleman & Scott Weingart, Collection of Student Loans: A Critical Examination, 20 Wash. & Lee J. C.R. & Soc. Just. 215 (2014) (explaining how the complicated structure of the student loan collection scheme fails to accomplish the goal of accessible higher education).} But this premise is arbitrary and overly simplistic and ignores the reality that bankruptcy’s discharge provisions are a bad proxy for determining wrongdoing. This is particularly true in light of policies like taxation by citation, which have disparate racial impacts through selective enforcement and profit-motivated overregulation.\footnote{See supra section I.C.} Actual outcomes show that the current provisions are outdated and should be amended.\footnote{See supra notes 180–181 and accompanying text.}

As a starting point, Congress should repeal 11 U.S.C. § 523(a)(7) to allow the discharge of civil fines under Chapter 7 bankruptcy, which would ensure that honest debtors like Fulton have a fair chance at discharge. This change would make Chapter 7 a more viable alternative to Chapter 13 for debtors with ticket debt owed to governmental entities. It is also consistent with policy goals and would allow bankruptcy law to better fulfill its purpose.\footnote{See infra section III.D.} As a broader, long-term solution, this Part also proposes that the categorical discharge provisions should slowly be abandoned in favor of a flexible, holistic approach in which bankruptcy judges consider both the debtor’s circumstances and the creditor’s interests leading up to filing. Overall, this Part argues that amending the Code to bridge the gap between Chapter 7 and Chapter 13 would make discharge under Chapter 7 more accessible but still retain the option for debtors to choose Chapter 13 should that chapter make more sense for them.

A. Prior Congressional Attempts at Intervention

“made filing for bankruptcy more difficult and included harsh consequences for ‘fraudulent’ debtors.”\textsuperscript{186} It also included provisions designed to push debtors toward Chapter 13 over Chapter 7.\textsuperscript{187} In isolation, BAPCPA is not a positive indicator of Congress’s willingness to further amend the Code to better protect debtors.

But other efforts suggest that Congress might be willing to push forth debtor-friendly amendments, at least on a more moderate scale. In 2019, Congress enacted the Small Business Reorganization Act,\textsuperscript{188} which “created special provisions related to small business debtors in Chapter 11 and addressed certain issues with preferential transfers.”\textsuperscript{189} This Act suggests that “Congress realized BAPCPA was overly harsh on debtors.”\textsuperscript{190}

Some have even proposed that the two tracks should be completely overhauled. Twice recently, Senator Elizabeth Warren and Representative Jerrold Nadler introduced legislation that would eliminate the two-track system in favor of a single chapter.\textsuperscript{191} Under the Consumer Bankruptcy Reform Act of 2020, Chapter 7 and Chapter 13 would be repealed and replaced by “Chapter 10.”\textsuperscript{192} But the singular “Chapter 10” is somewhat misleading because it would still allow debtors to choose between two routes. The first route would allow for no-payment discharge, which tracks closely with how Chapter 7 currently works. The second route, which allows for “debt-specific plans,” requires debtors to have bankruptcy plans and looks more like Chapter 13. The bill provides that certain criminal justice fines and fees would be fully dischargeable but prevents “debts stemming from civil rights violations from being dischargeable.”\textsuperscript{193} This move suggests that Congress is still relying on public policy to drive dischargeability provisions but is becoming more aware that the existing framework of public policy is outdated.

\textsuperscript{189} McAuliffe, supra note 186, at 853.
\textsuperscript{190} Id.
Still, the 2020 bill failed to move on the floor of Congress, even during the COVID-19 pandemic, when some commentators hoped that the urgency of the pandemic might push Congress to act quickly. A renewed proposal has not moved since it was first introduced in September 2022. Even if the bill fails to pass, it has gained support among bankruptcy law professors, and it is indicative of an emerging awareness among public officials that bankruptcy’s dischargeability provisions are failing to serve those who need them most.

B. Reconciling Between Chapters 7 and 13

As a narrow solution, if Congress repeals § 523(a)(7), the discharge provisions will become more consistent between Chapters 7 and 13. Debtors filing under either Chapter would be able to have parking ticket debt discharged, and if they wish to liquidate under Chapter 7, they will no longer be steered into Chapter 13 based primarily on this distinction.

By retaining § 523(a)(6) and § 1328(a)(4), debt incurred from injuries arising out of “willful and malicious injury” would still be nondischargeable under either Chapter. Intentional conduct would be penalized by these provisions, and debt owed to a governmental body could still be nondischargeable if it falls into this category. The analysis will turn on whether the debtor acted with the requisite mental state.

These twin provisions also are more flexible than § 523(a)(7) and better suited to accommodate the range of circumstances that might prompt a debtor to file for bankruptcy. Unlike § 523(a)(7), which considers whether—but not why—the debtor has a penalty payable to a governmental entity, the willful and malicious injury provisions focus on the intent of the debtor, and the burden is placed on the party opposing the exemption to show that the debtor acted with the requisite intent.

Currently, § 523(a)(6) applies to most tort claims. Patent infringement debt offers a workable framework of analysis that could be


applied to debt payable to a governmental entity, including ticket debt. Patent infringement, like other torts, generally is dischargeable unless the opposing party meets their burden of showing that the debt arose out of “willful and malicious injury” pursuant to § 523(a)(6). To determine whether infringement is both willful and malicious, courts rely on *Kawaauhau v. Geiger*, a medical malpractice case in which the Supreme Court held that nondischargeability requires “a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury.” The Court also noted that “willful and malicious” intent under § 523(a)(6) attaches to intentional torts rather than negligence or recklessness. Further, intentional torts generally require that the actor intend “the consequences of an act,” not just “the act itself.” Under this framework, most garden-variety patent infringement debt is dischargeable because the opposing party is rarely able to show that the debtor acted with the requisite mental state.

If this model were applied to Fulton’s case, she would be able to discharge her ticket debt. Because she had no notice of overdue parking tickets, her failure to pay did not arise out of the requisite mental state.

C. The Discharge Provisions: 11 U.S.C. § 523(a) and § 1328(a)

Nondischargeability is inherently in conflict with the fresh start principle because it means “certain debtors whose debts are categorically nondischargeable are prevented from bankruptcy relief regardless of how debilitating the debt may be.” If a debt is nondischargeable, bankruptcy law has hit its limits, and the debt will stay with the debtor. Nondischargeability of debt is thus exceptional. Unless a provision specifically prohibits it, debts are dischargeable.

Debts that are barred from discharge under Chapter 7 are enumerated under 11 U.S.C. § 523(a). In the 1982 Code, § 523(a) included debt incurred from only nine sources: (1) certain taxes; (2) debts stemming from fraud; (3) liabilities that the debtor failed to disclose; (4) debts from fraud by a fiduciary; (5) domestic support obligations; (6) liabilities resulting from willful and malicious injury to property or person; (7) fines, fees, and forfeitures; (8) student loans unless undue

199. See In re Albarran, 347 B.R. 369 (B.A.P. 9th Cir. 2006).
202. Id.
203. Id.
204. Id.
205. See Ryan v. United States (In re Ryan), 389 B.R. 710, 713–14 (B.A.P. 9th Cir. 2008) (“[E]xceptions to discharge are interpreted strictly against . . . creditors and in favor of debtors.”).
hardship is shown; and (9) liabilities that the debtor failed to disclose in a previous bankruptcy proceeding.\textsuperscript{206} The list has since more than doubled to include nineteen types of debt, many of which broadened the scope of nondischargeability of penal debt or debt arising out of civil and criminal penalties and fines.\textsuperscript{207}

Section 1328(a) is parallel to § 523(a) and governs one type of Chapter 13 discharge. In the absence of liquidation and “[i]n exchange for committing some of their future income to the repayment of their debts,” Chapter 13 offers an important concession: It allows some debts to be discharged that are nondischargeable under Chapter 7.\textsuperscript{208} Thus, the “range of nondischargeable debts in Chapter 13 is smaller than in Chapter 7,”\textsuperscript{209} or more debtor-friendly, but there is still substantial overlap; many debts that are nondischargeable under Chapter 7 also are nondischargeable under Chapter 13.\textsuperscript{210}

In this way, between Chapters 7 and 13, the discharge provisions are similar but different. In some instances, Congress later added provisions to § 1328(a) that initially appeared under § 523(a). Restitution obligations—currently nondischargeable under either Chapter—once were only excluded under Chapter 7. In Pennsylvania Department of Public Welfare v. Davenport, the Supreme Court addressed the issue of whether restitution also can be discharged under Chapter 13.\textsuperscript{211} The Court answered in the affirmative, holding that restitution is not penal in nature, and Congress intended to reward Chapter 13 debtors with a “superdischarge” for repaying their debts.\textsuperscript{212} But Congress superseded Davenport just a few months after it was decided and amended § 1328(a) to make nondischargeable “any debt . . . for restitution . . . included in a sentence on the debtor’s conviction of a crime.”\textsuperscript{213}

At the time of writing, treatment of debt from civil penalties remains an area in which Chapter 7 and Chapter 13 diverge. As long as parking ticket debt is a civil penalty, it is dischargeable only under Chapter 13, though Davenport shows that this could change in the future. The differences between discharge under Chapters 7 and 13 are complex and often overlooked, but Fulton demonstrates why they matter greatly.\textsuperscript{214}

\textsuperscript{206} 11 U.S.C. § 523(a) (1982).
\textsuperscript{208} Atkinson, supra note 8, at 938.
\textsuperscript{209} Id.
\textsuperscript{210} See 11 U.S.C. §§ 523(a), 1328(a).
\textsuperscript{211} 495 U.S. 552, 557 (1990).
\textsuperscript{212} Id. at 557–60.
\textsuperscript{213} 11 U.S.C. § 1328(a)(3).
\textsuperscript{214} See supra notes 169–176 and accompanying text.
D. **Balancing Public Policy Concerns**

Bankruptcy’s discharge provisions, which rely in large part on moral considerations under the umbrella of public policy, lead to inconsistent outcomes. To illustrate, Chapter 7 bars discharge for debt stemming from “fines, penalty, or forfeiture payable to and for the benefit of a governmental unit.” It further defines a “governmental unit” as including foreign, federal, state, and municipal governments. This covers parking ticket debt—owed to municipal governments—even when the wrongdoing, if any, is minimal. Robbin Fulton, for instance, was unaware that she was doing anything wrong because she did not know that her ex-husband had incurred tickets. But the discharge provision fails to consider her circumstances, and she was barred from relief under Chapter 7.

At the same time, as Professor Abbye Atkinson noted, debts incurred from “environmental harms like toxic dumping are dischargeable [under a Chapter 7] bankruptcy proceeding” even when the harm caused by toxic dumping is far more devastating to local communities. This is because the debtor in a toxic dumping case usually is a corporation, and even if the debt is owed to a governmental entity, § 523(a)(7) applies only to individuals. For individual debtors, the dischargeability of an environmental claim depends on whether it falls within any of the enumerated § 523(a) exceptions. Most relevant are § 523(a)(7), which provides that the debt must not be owed to a governmental entity, and § 523(a)(6), which provides that the harm must not be willful and malicious. Because the damage that results from toxic dumping is typically widespread, environmental harm generally involves high financial liabilities. The financial harm that Fulton caused, if any, pales in comparison.

In *Ohio v. Kovacs*, Williams Kovacs, CEO of Chem-Dyne, faced a lawsuit after causing a ten-acre chemical waste dump, which at the time was considered the worst environmental hazard in Ohio and one of the worst in the nation. After he was found liable, he was given a cleanup order. But he failed to comply, which prompted Ohio to appoint a receiver to possess his assets. He then filed for Chapter 7 bankruptcy and claimed that his obligation was not statutorily barred from discharge. The Court agreed and held that his cleanup order was a debt and dischargeable

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215. Atkinson, supra note 8, at 943.
217. Atkinson, supra note 8, at 945–47 (emphasis added).
under Chapter 7. Although the Court emphasized that Kovacs could have faced nondischargeable fines and penalties if Ohio had decided to bring those charges instead, Kovacs still received a form of relief that was related to the toxic dumping and that was not available to Fulton, even though he demonstrated a higher level of misconduct. The difference is seemingly small but technically profound: He had the benefit of claiming that Ohio chose not to prosecute him and instead appointed a receiver to possess his assets. The receivership made it impossible for Kovacs to personally carry out the cleanup order, and it converted the order into a payable, dischargeable debt. But practically, his actions burdened the people and State of Ohio, a governmental entity with a strong interest in regulating environmental harm, while Fulton’s act was passive and had minimal bearing on public safety.

Similarly, in medical malpractice cases, practitioners found liable are ordered to compensate their patients, and this may prompt them to file for Chapter 7 bankruptcy. Again, because there is no separate nondischargeability provision for medical malpractice, debtors need only show that their conduct was not the result of willful and malicious intent. In *Kawaauhau v. Geiger*, because the debtor’s conduct was deemed unintentional, his malpractice debt was discharged after he improperly and unnecessarily amputated his patient’s leg above the knee. The debtor also failed to carry malpractice insurance. *Geiger* involved an individual victim whose quality of life suffered permanently and directly as a result of someone else’s misconduct. Yet the debtor in *Geiger* was granted relief that Fulton, whose conduct was victimless, was not.

These examples only begin to show that reliance on categorical characterizations of public policy leads to arbitrary and inconsistent outcomes. Section 523(a) bars relief for penalties owed to a governmental unit, but it does not bar relief for debt stemming from negligent or reckless conduct even when such conduct in some way affects a governmental body and more seriously invokes public policy concerns. This inconsistency can be reconciled with the flawed presumption that if a debtor owes a governmental unit a penalty, the debtor must have engaged in immoral conduct, and that the creditor is somehow entitled to “special treatment.” Bankruptcy’s view of public policy is outdated and fails to meet the demands of a society marred with persistent social challenges.

221. Id. at 278–79.
222. Id.
223. Id. at 282–83.
224. Id.
226. Id.
227. Pardo & Lacey, supra note 13, at 417 n.47.
Normatively, public policy aims to protect honest and unlucky individuals while deterring intentionally immoral or harmful behavior. The existence of § 523(a)(7) signals there is something about governmental debt that is different; that if someone owes a criminal or civil penalty, they must have engaged in wrongdoing that they must literally pay for. But there is a spectrum of wrongdoing, and the deterrence value of nondischargeability is low when debts are incurred for innocuous violations of laws that are themselves profit driven. Nondischargeability does not deter poor debtors from failing to pay fees that are prohibitively high in the first place. With or without discharge, poor debtors cannot pay these fees. Put bluntly, the current nondischargeability provisions are further punishing debtors’ inability to pay.

If public policy can be given as the reason for why categorical nondischargeability works the way it does, then it can also be given as a reason for why § 523(a)(7) should be repealed in favor of the more holistic § 523(a)(6). When bankruptcy first emerged in English common law, relief through discharge was available only to those formally designated as merchants because only they regularly engaged in credit dealings. Access to bankruptcy expanded as the general public began using credit. Historically, bankruptcy has demonstrated an ability to expand to accommodate societal changes and growing classes of consumers, and its discharge provisions ought to follow suit.

When Chicago’s Municipal Code was amended in 2017, the City admitted that expansion of its vehicle impoundment program hopefully would stop the “growing practice of individuals attempting to escape financial liability.” Notably, the City did not once invoke public safety and left unanswered the question of whether it was even justified in imposing financial liability upon its residents. As long as taxation by citation remains prevalent, a governmental entity can continue to take advantage of its poor residents. Because of its inflexibility, § 523(a)(7) will continue to inhibit debtors, including those who have not engaged in any significant wrongdoing, from accessing relief.

CONCLUSION

Fulton is a landmark case in bankruptcy law not only because it solidified the Supreme Court’s standing on the automatic stay but also

228. See supra notes 180–181 and accompanying text.
230. Id.
232. Id. at 51,164–65.
because it shed light on the ways in which our bankruptcy system has failed to protect the most marginalized debtors. *Fulton* was decided in early 2021, in the wake of the COVID-19 pandemic, the January 6 attack on the United States Capitol, and the murder of George Floyd. As the country reckoned with its history, Black and brown communities again bore the heaviest burden as our nation’s essential workers with little choice but to risk their lives for a steady income: In Chicago, Black residents accounted for 75% of COVID-19–related deaths despite making up less than a third of the population.  

Dario Alvarez, a Chicago based activist, shared his story:

> Today, I still don’t have a driver’s license. My fines and fees now total about $3,000. I’ve been paying what I can but barely making a dent in my debt because of the interest rate. I don’t know how long it will take to pay off my debt and get my license back with the $12 per hour I make at my current job as a dishwasher at a sushi restaurant. My job is unstable, especially now with restaurants closing due to the pandemic. If I lose my job, I will once again have to make the choice between driving without a license and making those payments. Right now, I walk or use city bikes to get to work, but winter is coming.  

This Note began with a story about a woman, Robbin Fulton, who filed for bankruptcy in hopes that she would get her car back so that she could work and pay Chicago back its $4,000. Fulton likely could not have anticipated that her story would become the basis of a Supreme Court decision, let alone that it would show that our current bankruptcy law, originally intended to empower individuals who become overwhelmed with unmanageable debt, is yet another aspect of our legal system that falls short of its purpose. Under *Fulton* and without the full protection of the automatic stay, debtors are less likely to succeed under Chapter 13. They are vulnerable to falling into an endless cycle of debt with no real chance at a fresh start. And because of the intricacies of bankruptcy’s two-track system, debtors like Fulton who struggle to pay off municipal ticket debt for traffic violations have little choice but to file under Chapter 13.  

This Note has illustrated that the two-track system in theory offers individual debtors a choice between liquidation and repayment, between Chapter 7 and Chapter 13. But the discharge provisions that apply to each Chapter vary, and the reasons for such variations are both unsatisfying and arbitrary. As a response, Congress should consider repealing 11 U.S.C. § 523(a)(7) while broadening the applicability of 11 U.S.C. § 523(a)(6).  

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233. See Building Vaccine Confidence: Our Shot at Curbing the Pandemic in Chicago and Beyond: Hearing Before the Select Subcomm. on the Coronavirus Crisis of the H. Comm. on Oversight & Reform, 117th Cong. 5 (2022) (statement of Lori E. Lightfoot, Mayor, City of Chi.) ("For example, in April 2020, despite making up only 29 percent of Chicagoans, Black residents accounted for 75 percent of COVID-related deaths. That was seven times the rate of any other demographic.").

234. Alvarez, supra note 173.
Nearly twenty years ago, at a time when COVID-19 was unfathomable and long before Chicago developed its vehicle impoundment program into what it is today, Professor Mechele Dickerson called on Congress to “consciously consider the racial impact of their decisions,” and to “commit to using the [Bankruptcy] Code to achieve substantive racial justice.”\textsuperscript{235} Her call is even more pertinent today.

Despite a burgeoning conversation about the centrality of information management to governments, scholars are only just beginning to address the role of legal information in sustaining authoritarian rule. This Essay presents a case study showing how legal information can be manipulated: through the deletion of previously published cases from China’s online public database of court decisions. Using our own dataset of all 42 million cases made public in China between January 1, 2014, and September 2, 2018, we examine the recent deletion of criminal cases from the China Judgements Online website. We find that the deletion of cases likely results from a range of overlapping, often ad hoc, concerns: the international and domestic images of Chinese courts, institutional relationships within the Chinese Party-State, worries about revealing negative social phenomena, and concerns about copycat crimes. Taken together, the decision(s) to remove hundreds of thousands of unconnected cases shape a narrative about the Chinese courts, Chinese society, and the Chinese Party-State. Our findings also provide insight into the interrelated mechanisms of censorship and transparency in an era in which data governance is increasingly central. We highlight how courts seek to curate a narrative that protects the courts from criticism and boosts their standing with the public and within the Party-State. Examining how Chinese courts manage the removal of cases suggests that how courts curate and manage information disclosure may also be central to their legitimacy and influence.
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INTRODUCTION

There has been a flood of scholarship on the importance of information to governance in recent years, focused on democratic and authoritarian countries alike. Scholars have recognized a shift in authoritarian regimes from rule by force and fear to increased use and manipulation of information as a way to build popular support and stay in power.1 Direct censorship remains a tool of authoritarian control, but authoritarian rulers also turn to other strategies to crowd out critical voices, including information flooding, distraction, manipulation of public opinion online, and the creation of technical barriers to those seeking information.2 Authoritarian countries have also borrowed

1. See Sergei Guriev & Daniel Treisman, Spin Dictators: The Changing Face of
   Tyranny in the 21st Century 3–30 (2022) (“[T]oday’s strongmen realize that in current
   conditions violence is not always necessary or even helpful . . . . In place of harsh repression,
   the new dictators manipulate information.”); see also Huirong Chen & Sheena Chestnut
   Greitens, Information Capacity and Social Order: The Local Politics of Information
   Integration in China, 35 Governance 497, 497–98 (2022) (discussing China’s use of
   information integration in its fragmented authoritarian form of governance).

2. See Margaret E. Roberts, Censored: Distraction and Diversion Inside China’s Great
   Firewall 105–11 (2018) [hereinafter Roberts, Censored] (discussing the various alternatives
governance mechanisms from liberal systems, including greater use of transparency as a tool for addressing a range of challenges. Borrowing runs both ways, with elected leaders in democratic as well as newly authoritarian states borrowing from authoritarian playbooks to cement their authority.

Despite this burgeoning conversation about the centrality of information management to democratic and authoritarian governments, scholars are only just beginning to address the role of legal information in sustaining authoritarian rule. Scholarship on the spread of authoritarian law has largely focused on how authoritarian rulers subvert legal norms or use law and courts to maintain social stability, foster economic development, or boost their own legitimacy. There has been less attention to how such states build narratives about their legal systems or the role of legal information in such systems. Rapid digitization of court information has brought renewed focus both to the lack of legibility in legal systems around the world and to the question of how courts produce and use public information.

There has been less attention to how such states build narratives about their legal systems or the role of legal information in such systems.

Rapid digitization of court information has brought renewed focus both to the lack of legibility in legal systems around the world and to the question of how courts produce and use public information. Courts play essential roles in information governance, including greater use of transparency as a tool for addressing a range of challenges. Borrowing runs both ways, with elected leaders in democratic as well as newly authoritarian states borrowing from authoritarian playbooks to cement their authority.

### Notes


4. Recent writing on liberal systems has likewise noted how new forms of information transmission as well as misinformation can destabilize existing frameworks for regulating information. See, e.g., Tim Wu, Is the First Amendment Obsolete?, 117 Mich. L. Rev. 547, 557–68 (2018).


7. One recent example is the work of David Freeman Engstrom and R.J. Vogt, who explore how rapid digitization may transform judicial governance in the United States. See David Freeman Engstrom & R.J. Vogt, The New Judicial Governance: Courts, Data, and the...
management: Courts are sites where information about law is negotiated, and their decisions about whether and how to publicize case outcomes have the potential to shape public perceptions of the legal system, society, and the state more generally.

This lack of attention to legal information stems in part from two common beliefs: Liberal legal systems are inherently transparent, and authoritarian legal systems closely guard information. Sustained scholarship has detailed problems with transparency and legibility in the U.S. legal system. At the same time, authoritarian legal systems, most notably China, have begun to put vast quantities of legal information online, with more than 141 million court judgments posted online since China’s Supreme People’s Court (SPC) established the China Judgements Online (CJO) website in 2014.

This Essay presents a case study showing how legal information can be manipulated: through the deletion of previously published cases from China’s online public database of court decisions. Using our own dataset

Future of Civil Justice, 72 DePaul L. Rev. 171, 176–80 (2023). In the literature on Western systems, and in particular the United States, the focus is often on whether digitization will facilitate more equitable access to the legal system or reinforce differences between the haves and the have-nots. See id. at 176. Digitization offers opportunities for legal systems to be more legible than in the past but also new challenges and possibilities for misuse. See id.

8. Many commentators have noted that U.S. courts are far less transparent and accessible than they are often made out to be. See, e.g., T.S. Ellis III, Sealing, Judicial Transparency and Judicial Independence, 53 Vill. L. Rev. 939, 947 (2008); Hillel Y. Levin, Making the Law: Unpublication in the District Courts, 53 Vill. L. Rev. 973, 975–77 (2008); Robert A. Mead, “Unpublished” Opinions as the Bulk of the Iceberg: Publication Patterns in the Eighth and Tenth Circuits of the United States Courts of Appeals, 93 Law Libr. J. 589, 597 (2001); Judith Resnik, Courts: In and Out of Sight, Site, and Cite—The Norman Shachoy Lecture, 53 Vill. L. Rev. 771, 772–74 (2008). This literature focuses not on censorship but on trends such as the reduced use of trials and the rise of private dispute resolution and settlement, the use of unpublished cases, the sealing of cases, and the increased paper-only review of cases. Commentators on other systems have made similar observations. See, e.g., Jeffrey K. Staton, Judicial Power and Strategic Communication in Mexico 4 (2010) (noting the prevalence of selective transparency among Latin American supreme courts); David T. Johnson, Where the State Kills in Secret: Capital Punishment in Japan, 8 Punishment & Soc’y 251, 253–56 (2006) (arguing that secrecy regarding capital punishment in Japan derives from an effort to prevent scrutiny of the practice); Liz Fekete, Europe: ‘Speech Crime’ and Deportation, Race & Class, Jan. 2006, at 82, 82–83 (arguing that some European states use immigration proceedings to evade transparency in their legal systems).

of all 42 million cases made public in China between January 1, 2014, and September 2, 2018, we examine the recent deletion of criminal cases from the CJO website. Our data suggest that the reasons court officials remove cases are often reactive and ad hoc. But, taken together, the decision(s) to remove hundreds of thousands of unconnected cases shape a narrative about the Chinese courts, Chinese society, and the Chinese Party-State.

Literature on authoritarian regimes has explored why such states embrace transparency. In this Essay, we ask different questions: What previously public information is removed, and why? Media accounts of the recent case removals in China frame case deletions largely as efforts to shield the Chinese legal system from international scrutiny. In contrast, we find that the deletion of cases likely results from a range of overlapping concerns. These include the international and domestic images of Chinese courts, institutional relationships within the Chinese Party-State, worries about revealing negative social phenomena, and concerns about copycat crimes. We identify a trend of “sensitivity contagion,” in which a small number of potentially sensitive cases leads to the removal of all cases involving certain categories of crimes, despite most cases being routine. These concerns reflect the multiple audiences for the public release of court data in China. Viewing disappeared cases also provides a window into fault lines in Chinese society, revealing areas of sensitivity largely overlooked in prior scholarship.

Our findings also provide insight into the interrelated mechanisms of censorship and transparency in an era in which data governance is increasingly central. We highlight how courts seek to curate a narrative that protects them from criticism and boosts their standing with the public and within the Party-State. Prior writing on authoritarian legal systems has generally assessed courts’ power in terms of their ability to decide cases on the law absent external influence or to rule against other state actors. Examining how Chinese courts manage the removal of cases suggests that how courts curate and manage information disclosure may also be central to their legitimacy and influence.

The findings we present reflect the Chinese political–legal system. Yet the questions raised are likely to have wider application as legal systems

10. See infra text accompanying notes 77–81.
11. See, e.g., Luo Jiajun & Thomas Kellogg, Verdicts From China’s Courts Used to Be Accessible Online. Now They’re Disappearing., ChinaFile: Viewpoint (Feb. 1, 2022), https://www.chinainfo.com/reporting-opinion/viewpoint/verdicts-chinas-courts-used-be-accessible-online-now-theyre-disappearing [https://perma.cc/845T-DKJW] (suggesting that the Chinese government has removed cases that “present an unflattering view of Chinese society,” including cases that highlight official corruption or the government’s “use of the criminal justice system to crack down on its critics”).
12. See, e.g., Peter H. Solomon Jr., Courts and Judges in Authoritarian Regimes, 60 World Pol. 122, 124–29 (2007) (book review) (grouping authoritarian courts into four categories based on their level of independence from other branches of government and ability to rule against the state).
worldwide confront how much information to make public, how long
information should remain public, who should determine when
information is removed from the public domain, and the effect of mass
digitization of court information on court and litigant behavior. Chinese
courts may be unusual in their emphasis on equating the total number of
cases made public to the fairness of the legal system and for the reasons
they remove cases from public view. But they are unlikely to be alone in
determining that not all court information should remain public or in
seeking to use legal information to shift how they are perceived.

This Essay proceeds in five parts. Following this introduction, Part I
discusses the background to Chinese courts’ embrace of transparency in
the 2010s through the mass publication of court judgments, as well as
more recent signs of and probable reasons for the retreat from such
policies. Part II provides a brief overview of three relevant but largely
disconnected strands of academic literature that provide a conceptual
background to this Essay: scholarship on transparency in authoritarian
regimes, writing on censorship in China, and studies of how authoritarian
states manage information to maintain power. Part III turns to our study
of cases deleted from the China Judgements Online website, setting forth
our methodology and findings regarding the deletion of criminal cases
from the site. Part IV analyzes the categories of deleted cases in detail,
highlighting broad categories of deleted cases: cases involving potential
criticism of the courts or legal system, and cases that involve negative social
phenomena or potentially portray other political–legal institutions in a
negative light. Part V discusses the implications of this Essay’s findings for
theories of authoritarian information management and for understanding
the role and authority of courts in authoritarian regimes. The Essay ends
with a brief conclusion, noting that the issues and questions this Essay
raises may not be limited to authoritarian legal systems.

I. BACKGROUND: JUDICIAL TRANSPARENCY IN CHINA’S COURTS

China’s courts began experimenting with putting large numbers of
cases online in the early 2010s. Since then, “judicial transparency” in
China has become synonymous with the placement of final court decisions
online. More recently, however, signs of a retreat from these transparency
efforts have become apparent, with courts posting fewer cases than in the
past and previously posted cases being removed from the China
Judgements Online website. This Part traces the development of Chinese
courts’ policy of placing cases online and then discusses apparent signs
that China’s courts may be retreating from their earlier commitment to
place most cases online.

A. Embracing Transparency

Following experiments with placing court decisions online in a small
number of provinces, the Supreme People’s Court in 2014 mandated that
courts place most decisions online.\textsuperscript{13} By June 2023, China’s courts had posted 141 million cases to the China Judgements Online website,\textsuperscript{14} with tens of thousands of new cases uploaded daily, a reported 40 to 50 million daily user visits, and more than 100 billion total visits.\textsuperscript{15} Official reports proclaim that China’s courts have created the largest database of court judgments in the world and that the high volume of visits from China and around the world reflects growing trust in the Chinese legal system. As the head of the Guangdong Province Lawyers’ Association stated in a 2020 report in the official People’s Court News, “As our country increasingly moves toward the center of the world stage, China Judgments Online has been an important window to showcase our country’s modern legal civilization.”\textsuperscript{16}

\textsuperscript{13} We discuss this history in more detail elsewhere. See generally Benjamin L. Liebman, Margaret Roberts, Rachel E. Stern & Alice Z. Wang, Mass Digitization of Chinese Court Decisions: How to Use Text as Data in the Field of Chinese Law, 8 J.L. & Courts 177, 180–82 (2020) (highlighting the impacts of Chinese disclosure of court judgments online).

\textsuperscript{14} Zhongguo Caipan Wenshu Wang (中国裁判文书网) [China Judgements Online], https://perma.cc/8EPE-3ERA (as updated June 7, 2023) [hereinafter CJO, June 2023].

\textsuperscript{15} As of September 30, 2023, the site stated that it had received more than 105 billion visits. Zhongguo Caipan Wenshu Wang (中国裁判文书网) [China Judgements Online], https://perma.cc/WJG3-KBLQ (as updated Sept. 30, 2023). A 2020 report by the People’s Court News reported that over a three-month period on average more than 77,000 cases were added each day. Jiang Peishan, Wan Ziqian & Zhao Lili (姜佩杉、万紫千、赵利丽), Shangxian 7 Nian Wenshu Zongliang Po Yi Rijun Zenzhang 7.7 Wan Pian Yishang Zhongguo Caipan Wenshuwang: Fazhi Zhongguo de “Yi” dao Liangli Fengjing (上线 7 年文书总量破亿 日均增长 7.7 万篇以上 中国裁判文书网:法治中国的“亿”道亮丽风景) [Total Number of Documents Exceeds 100 Million After 7 Years Since Launch, With an Average Daily Increase of More Than 77,000—China Judgements Online: “100 Million” Beautiful Sceneries in the Rule of Law in China], Renmin Fayuan Bao (人民法院报) [People’s Court News] (Sept. 5, 2020), https://www.court.gov.cn/zixun-xiangqing-252201.html [https://perma.cc/TJ2D-2APM]. It is likely that large portions of the recorded visits are by web crawlers. Professors Yingmao Tang and John Zhuang Liu argue that the sheer number of visits makes it likely that the site is being widely used by laypeople. Yingmao Tang & John Zhuang Liu, Mass Publicity of Chinese Court Decisions: Market-Driven or Authoritarian Transparency?, China Rev., May 2019, at 15, 20. We are not aware of any effort by the SPC to distinguish between web crawlers, legal practitioners, or laypeople in calculating users of the site.

As we discuss further below, although new cases continue to be posted, the rate of posting has declined since 2021. See infra text accompanying notes 45–49. As of June 7, 2023, the CJO website reported having more than 141 million cases and having been visited 103 billion times, with roughly 5,000 new cases posted daily. CJO, June 2023, supra note 14.

\textsuperscript{16} Jiang Peishan et al., supra note 15. The report mentioned our research team’s work as evidence of the “growing interest in Chinese law around the world.” Id. The theme of China’s transparency efforts being linked to growing global confidence in and influence of the Chinese legal system was echoed in a 2022 People’s Daily article, issued under the name of the Supreme People’s Court’s Communist Party Group, on “Xi Jinping Rule of Law Theory.” Zhonggong Zuigao Renmin Fayuan Dangzu (中共最高人民法院党组) [Chinese Communist Party Group of the Supreme People’s Court], Zai Xi Jinping Fazhi Sixiang Zhiyi xia Kuobu Xiangqian (在习近平法治思想指引下阔步向前 (深入学习贯彻习近平新时代中国特色社会主义思想)) [Step Forward With the Guidance of Xi Jinping Thought on the
The rapid embrace of judicial transparency is a sharp departure for a legal system in which obtaining court judgments had previously been difficult for anyone other than litigants. The CJO site is almost certainly the largest database of judicial decisions in any authoritarian legal system and is now one of the largest centralized collections of court judgments anywhere. Scholars writing in Chinese and in English have embraced this new resource, producing a large volume of new scholarship analyzing cases posted to the CJO site. \(^{17}\) Case publication has also begun to transform legal practice by making it easier for lawyers to mount arguments based on prior cases and by creating a new market for legal data. \(^{18}\)

The embrace of public disclosure of court judgments by China’s courts in the 2010s appeared to be the culmination of a global trend toward embracing transparency as a tool of governance, in both liberal and illiberal regimes. \(^{19}\) Beginning in the early 2000s, China embraced a range of transparency measures, including regulations on open government, public release of environmental data, the online posting of government procurement documents, and the release of court judgments. \(^{20}\) The embrace of transparency (as well as of village elections

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\(^{17}\) On the benefits to scholars, see Zuo Weimin & Wang Chanyuan (左卫民、王婵媛), Jiyu Caipan Wenshuwang de Dashuju Falü Yanjiu: Fansi yu Qianzhan (基于裁判文书网的大数据法律研究: 反思与前瞻) [Reflections and Looking Ahead: Big Data Legal Research Based on China Judgements Online], 23 Huadong Zhengfa Daxue Xuebao (华东政法大学学报) [E. China U. Pol. Sci. & L. J.], no. 2, 2020, at 64, 69.


\(^{19}\) There is extensive literature on the global spread of transparency across a range of domains and nations. See, e.g., Daniel Berliner, The Political Origins of Transparency, 76 J. Pol. 479, 487–90 (2014); Yong Suk Jang, Munseok Cho & Gili S. Drori, National Transparency: Global Trends and National Variations, 55 Int’l J. Compar. Socio. 95, 100–05 (2014).

\(^{20}\) See Arthur Kaufman & Adam Yu, China Digit. Times, CDT Report: Cloud Cover—Police Geographic Information System Procurement Across China, 2005–2022, at 6 (2023), https://drive.google.com/file/d/1KEWW_ExD1_Ho6p5FwSTfrt1zb4Ley3mF/view [discussing how data for the report were collected from procurement documents posted online]; Liebman et al., supra note 13, at 181–83 (discussing the policy of placing court decisions online); Peter Lorentzen, Pierre Landry & John Yasuda, Undermining Authoritarian Innovation: The Power of China’s Industrial Giants, 76 J. Pol. 182, 185–86 (2014) (describing this move toward transparency within the context of environmental governance in China, particularly how local obstruction of national environmental protection policies led to a transparency strategy encompassing publicly available reporting information, automatic disclosures, and investigation results);
and an enhanced role for civil society) in the 2000s and early 2010s reflected the high tide of borrowing from the West, suggesting that, just as elsewhere, the spread of transparency discourse and policies to China resulted from the Washington Consensus’s emphasis on transparency as a tool of strengthening economic performance.21

What was perhaps most striking about the shift was that the SPC’s decision was voluntary: There was no external legal requirement that courts place decisions online.22 Yet there were also clear benefits to the SPC from the new self-imposed disclosure requirement. Court leadership viewed transparency as a way to curb wrongdoing by lower-level judges, standardize outcomes, and boost the legitimacy of the traditionally weak courts at a time when legal reform centered on raising the status of the courts.23 Publishing cases online was also a rare example of an area where Chinese courts could claim to be leading the world. The new disclosure requirements aligned with central Party-State goals of curbing corruption and embracing limited forms of greater openness. The digitization that followed from the publication requirement was also a key building block for court efforts to embrace technology across a range of areas, including online filing of cases, tracking evidence, online hearings, and the growing use of artificial intelligence to monitor and guide court decisions. These efforts—generally grouped under the “smart courts” heading—permitted

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22. China’s regulations on open government do not apply to the courts, although China is not unusual in excluding court information from open government requirements. See Kyu Ho Youm & Toby Mendel, The Global Influence of the United States on Freedom of Information, in Troubling Transparency: The History and Future of Freedom of Information 249, 254 (David Pozen & Michael Schudson eds., 2018) (“The U.S. FOIA is . . . an outlier because [the right to information] does not apply to the legislature or the courts.”).

23. See Benjamin L. Liebman, Authoritarian Justice in China: Is There a “Chinese Model”? in The Beijing Consensus? How China Has Changed Western Ideas of Law and Economic Development 225, 231 (Weitseng Chen ed., 2017) [hereinafter Liebman, Authoritarian Justice in China] (discussing how the reform efforts focused on improving the quality and fairness of the courts); Liebman et al., supra note 13, at 180–83 (“[L]arge-scale release of court documents may . . . serve Party goals by curbing wrongdoing in the courts. Court officials in Henan made this line of argument explicit: judges are more likely to follow the law and less likely to engage in malfeasance when they know their work will be made public.”); Stern et al., Automating Fairness, supra note 18, at 520–29 (“Court leaders and rank-and-file judges saw the ways in which technology could boost the power and legitimacy of the courts and also ease their workload.”).
the courts to position themselves at the vanguard of state efforts to use technology to transform governance. Elsewhere, we examine in more detail both the reasons behind China’s decision to place most judicial decisions online and the challenges the initiative has encountered. The goal of these efforts has always been limited to the release of a final court decision. Litigant filings, court transcripts, and evidence are not made public. Over time, the SPC has also moved to limit how such data are used, in particular by curtailing efforts of private data providers to collect and market court data.

The SPC’s rules do not require all cases to be made public. SPC rules state that certain categories of cases should not be made public, including cases touching on state secrets, divorce or family law cases, and civil cases resolved through mediation. SPC rules also allow courts to exclude from online posting a catch-all category of “other cases not suitable for publication.” The rules thus give the courts discretion not to make a range of cases public. The rules do not specify sanctions for courts that fail to comply with requirements to post cases online, and posting cases online has generally been understood to be a soft target for court officials, meaning they are not formally evaluated based on the number or percentage of cases made public. When courts decide not to make a case public, they are required to provide a reason for such non-publication and post both the case number and the reason for non-publication online. Compliance with this requirement has been spotty. We located only one provincial high court, Jilin, that has consistently made this information available.

25. Liebman et al., supra note 13, at 180–83; Stern et al., Automating Fairness, supra note 18, at 520–29.
26. The SPC has also placed videos of tens of thousands of cases online, a resource largely not yet explored by scholars. Stern et al., Automating Fairness, supra note 18, at 523 (discussing how the SPC has publicly live streamed millions of cases to disclose more information to the public).
28. Id. Courts have not always complied with these rules. For example, tens of thousands of divorce cases were posted online despite the SPC’s prohibition. Stern et al., Automating Fairness, supra note 18, at 536.
29. Stern et al., Automating Fairness, supra note 18, at 533–37.
30. For data from Jilin, see Bushangwang Wenshu Gongshi (不上网文书公示) [Public Notice of Documents Not Online], Jilin Sheng Gaoji Renmin Fayuan Sifa Gongkaiwang (吉林省高级人民法院司法公开网) [Jilin High People’s Court Judicial Openness Net], http://www.jlsfy.gov.cn/bswwsgs/index.jhtml [https://perma.cc/4UKLAJ9J] (last visited
The SPC’s rules on online publication provide limited guidance on when and how public cases may be removed from the database. Since the launch of the CJO website in 2014, lawyers and scholars have noted that cases are sometimes removed after initially being posted. Commentators have largely understood removal to happen on a case-by-case basis, likely due to concerns or complaints raised by litigants, often influential companies or individuals; or to errors in cases that require correction; or to pressure from other sources. June 1, 2023. We located no other provincial high courts that made this information available for the entire provincial court system. Some municipal courts made this information available only for a limited period. For example, the courts in Nanjing released information on nonpublic cases only in 2017 and 2018. Bu Shangwang Wenshu (不上文书) [Documents Not Online], Nanjing Shenpan Wang (南京审判网) [Nanjing Trial Online], https://www.njfy.gov.cn/www/njfy/cpws_4.htm [https://perma.cc/7FXF-3SLH] (last visited May 17, 2023). The Guangzhou courts made this information public only from 2018 through 2021. Caipan Wenshu Bushangwang Qingkuang Tongji (裁判文书不上网情况统计) [Data of Documents Not Online], Guangzhou Shenpanwang (广州审判网) [Guangzhou Trial Online], https://www.gzcourt.gov.cn/cpws/ck486/index2.html [https://perma.cc/XT5P-BCPV] (last visited May 17, 2023). For other examples of courts’ partial disclosure of non-publication information, see Caipan Wenshu (裁判文书) [Decision Documents], Shanghai Shi Gaoji Renmin Fayuan (上海市高级人民法院) [Shanghai Municipality High People’s Court], https://www.hshfy.sh.cn/shfy/gweb2017/flws_list_bgkws_new.jsp [https://perma.cc/MW6D-VG6P] (last visited June 1, 2023) (disclosing information on selected cases not made public prior to 2017); Bu Shangwang Wenshu Gongshi (不上文书公示) [Public Notice of Documents Not Online], Zhonghua Renmin Gongheguo Tianjin Haishi Fayuan (中华人民共和国天津海事法院) [Tianjin Maritime Court of the People’s Republic of China], https://tjhsfy.tjcourt.gov.cn/article/index/id/MzTLNjAwNzAwMiACAAA.shtml [https://perma.cc/3TFS-Y47A] (last visited May 17, 2023) (listing information from 2017 to 2021 on cases not made public but not making such information available for cases decided after 2021).

31. The SPC’s 2016 rules state only that when there is an error in a case that has already been published on the website, courts may remove the case and repost a corrected version. See SPC Internet Publication Regulations, supra note 27, art. 16.


This practice has also spawned commercial entities that offer to have cases removed for a fee. For examples, see Beijing Changlong Shangwu Zixun Youxian Gongsi (北京昌隆商务咨询有限公司) [Beijing Changlong Com. Consulting Ltd.], Qiye You Daliang Susong Jilu Zennmeban? Zhihu Qiye Susong Jilu Kuaixiu Xiuifu! (企业有大量诉讼记录怎么办?助力企业诉讼记录快速修复!) [What to Do When a Business Has a Large Number of Litigation Records? Help Your Business Quickly Repair Its Litigation Records!], Douyin (抖音)
to realizations that certain cases should never have been posted in the first place.\textsuperscript{33} Courts also appear at times to remove cases after publication to protect the privacy of litigants, either because cases were insufficiently redacted or because litigants complain about a case being placed online.\textsuperscript{34} Commentary on the issue within China has largely occurred in social media posts noting that some cases appear to have been removed, but social media posts discussing the issue have also been deleted.\textsuperscript{35} Existing scholarship has largely examined the issue through the lens of variation in

\textsuperscript{33} See, e.g., Xu Wenjin & Yao Jingyan (徐文进、姚竞燕), Bei Yiwang Quan Fanshi xia Caipan Wenshu Shangwang hou Chehui Jizhi de Jianshi yu Youhua—Jiyu 131 fen Chehui Wenshu ji “Geren Xinxi Baohu Fa” de Dingxiang Fenxi (被遗忘权范式下裁判文书上网后撤回机制的检视与优化——基于 131 份撤回文书及《个人信息保护法》的定向分析) [Review on the Withdrawal Mechanism for Judicial Documents Online Under the Paradigm of the Right to Be Forgotten—A Targeted Analysis Based on 131 Withdrawal Documents and the “Personal Information Protection Law”], 139 Fazhi Yanjiu (法制研究), no. 1, 2022, at 82, 82–90 (suggesting potential reforms to publishing cases online from the perspective of the right to be forgotten); Yang Jinjing, Tan Hui & He Haibo (杨金晶、覃慧、何海波), Caipan Wenshu Shangwang Gongkai de Zhongguo Shijian—Jingzhan, Wenti yu Wanshan (裁判文书上网公开的中国实践——进展、问题与完善) [China’s Practice of Disclosing Judgment Documents Online: Progress, Problems and Improvements], Zhongguo Falü Pinglun (中国法律评论) [China L. Rev.], no. 6, 2019, at 125, 141–43 (noting several issues with the current online publication scheme, such as improper redaction).

\textsuperscript{34} Yang Jinjing et al., supra note 33, at 142 (noting improper redaction and privacy concerns as reasons for case removal).

\textsuperscript{35} Cf. Zhimian Chuanmei (直面传媒), Caipan Wenshu Wang Za Chengle Baomu Wang? (裁判文书网咋成了保密网?) [How Did China Judgements Online Become a Confidential Network?], China Digit. Times (July 9, 2021), https://chinadigitaltimes.net/chinese/668078.html [https://perma.cc/5575-BV9V] (demonstrating that social media posts discussing the removal of cases have themselves been removed).
disclosure rates across provinces, or by looking at specific categories of cases that are not made public.

Chinese courts have adopted other components to their transparency reforms, notably placing tens of thousands of videos of court proceedings online and establishing new filing systems that make it easier for litigants to track the progress of their cases. Generally, however, “transparency” in Chinese courts has become synonymous with placing final court decisions online. Media reports about CJO tend to focus on the sheer

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36. See, e.g., Lei Chen, Zhuang Liu & Yingmao Tang, Judicial Transparency as Judicial Centralization: Mass Publicity of Court Decisions in China, 31 J. Contemp. China 726, 733–34 (2022) (analyzing differences in disclosure rates among provinces); see also Tang Yingmao (唐应茂), Sifa Gongkai ji Qi Jueding Yinsu: Jiyu Zhongguo Caipan Wenshu Wang de Shuju Fenxi (司法公开及其决定因素:基于中国裁判文书网的数据分析) [Judicial Openness and Its Deciding Factors: Analysis Based on China Judgements Online Data], 12 Qinghua Faxue (清华法学) [Tsinghua U. L.J.], no. 4, 2018, at 35, 35–47 (noting that existing scholarship has largely examined the issue of transparency through the lens of variation in disclosure rates across provinces).


39. In our initial paper in this project, we avoided using the term “transparency,” opting instead to describe court efforts as “mass digitization.” See Liebman et al., supra note 13, at 180 & n.5 (“‘Transparency’ is a capacious word . . . .”). We use the term “transparency” here to align our analysis with existing literature on authoritarian transparency and with the growing body of work that examines CJO. In describing China’s judicial transparency as “translucent,” Susan Finder notes that judicial transparency includes far more than just judicial decisions and that a range of other basic information about China’s courts remains difficult to obtain despite the significant progress the SPC has made in making decisions public. Susan Finder, China’s Translucent Judicial Transparency, in Transparency Challenges Facing China 141, 160–62 (Fu Hualing, Michael Palmer & Zhang Xianchu eds., 2019) (showing that the difficulty in obtaining judicial statistics remains a challenge for the Chinese judiciary itself).
number of cases made public, not how such data are used. The emphasis on the volume of cases is made clear by CJO’s landing page, which updates in real time the total number of cases made public, the number of new daily uploads, and the total number of visits to the website.

B. Retreating From Transparency?

Official media accounts in China continue to praise the courts for embracing transparency. In the summer of 2021, however, social media postings noted a different trend. Categories of cases that had previously been available disappeared from the CJO official online database. These included cases that resulted in death sentences as well as those involving certain crimes, such as crimes implicating state security and “picking quarrels and provoking trouble,” which is sometimes used to target peaceful dissidents and petitioners.

The reports of cases being deleted were a harbinger of a decision to post far fewer judgments in the future. Social media posts within China in early 2022 noted that the CJO website had added far fewer cases for 2021 than it had done for prior years. Although it was initially unclear whether this was due to explicit policy or to a delay in posting cases, more recent

40. See, e.g., Jiang Peishan et al., supra note 15 (highlighting that the total number of “documents” posted on the CJO website exceeds 100 million).

41. See CJO, supra note 9.


43. See, e.g., Zhimian Chuanmei, supra note 35 (noting that various kinds of cases, including those involving theft, gambling, and fraud, became unavailable).


45. See, e.g., Shuju Hegui (数据合规) [Digit. Compliance], Xiaoshi de Caipan Wenshu (消失的裁判文书) [Disappearing Court Opinions], Weixin Gongzhong Hao (微信公众号) [WeChat Pub. Acct.] (Mar. 8, 2022), https://mp.weixin.qq.com/s/DNAHNCanu5ApwAthj2WOA [https://perma.cc/A9QC-LYVR] (describing a social media user’s research, in which they found that the number of judicial documents published on CJO’s website in 2021 declined by 30% as compared to 2020).

46. SPC rules state that cases should be published online only once they become final, meaning either no appeal is filed within seven business days of judgment or, if an appeal is filed, the case is decided on appeal. See SPC Internet Publication Regulations, supra note
data show a dramatic reduction in the volume of cases being made public.\textsuperscript{47} As Table 1 indicates, the trend is most clear in administrative cases: Among all the cases made public by October 2023, the total number of cases by decision year decreased from a high of 556,353 cases available from 2019 to just 854 cases available from 2022.\textsuperscript{48} The trend is also clear in criminal and civil cases, albeit with a less dramatic decline. Just 177,350 criminal cases decided in 2022 were available on CJO in October 2023, down from a high of 1,484,669 in 2019. The number of available civil cases decreased from a high of 14.4 million cases decided in 2019 to 5 million cases in 2022.\textsuperscript{49}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|}
\hline
\textbf{Decision Year} & \textbf{Criminal} & \textbf{Civil} & \textbf{Administrative} \\
\hline
2013 & 187,150 & 1,014,049 & 37,358 \\
2014 & 868,283 & 4,512,188 & 169,949 \\
2015 & 952,636 & 6,113,413 & 260,364 \\
2016 & 1,493,278 & 7,548,520 & 384,301 \\
2017 & 1,383,688 & 10,633,725 & 480,702 \\
2018 & 1,426,324 & 12,338,250 & 527,785 \\
\hline
\end{tabular}
\caption{Cases Available on CJO by Decision Year and Case Type as of October 24, 2023}
\end{table}

27, art. 7. Although cases move through the Chinese legal system quickly, courts often post cases a few months after they are decided. Wang Yijun (王亦君), Caipan Wenshu Shangwang Gongkai Hai Xu Maiguo Naxie Menkan (裁判文书上网公开还需迈过哪些门槛) [What Are the Requirements for Making Court Judgments Available Online], Zhongguo Qingnian Bao (中国青年报) [China Youth Daily] (Dec. 10, 2013), http://zqb.cyol.com/html/2013-12/10/nw.D110000zgqnb_20131210_3-11.htm [https://perma.cc/B9NL-RLQK].

47. See infra Table 1.

48. Some online commentators have noted the dramatic decline in available administrative cases but have not speculated as to the reasons behind the apparent change in policy. See, e.g., Alexander Boyd, Administrative Proceedings—“People Suing Government”—Removed From Chinese Legal Database in New Blow to Transpareny, China Digit. Times (Mar. 24, 2023), https://chinadigitaltimes.net/2023/03/administrative-proceedings-removed-from-chinese-legal-database-in-blow-to-transparency [https://perma.cc/6WTF-QXWK]; Xifei Long (龙习飞), Kai Lishi Daoche? 2022 Nian Xingzheng Anjian Yishen Caipan Wenshu Wangshang Gonkailü Jin 0.06%! (开历史倒车? 2022年行政案件一审裁判文书上网公开率仅0.06%!) [A Regression to the Past? The Rate of Publication of First Instance Judgments of Administrative Cases in 2022 Hit Only 0.06%!], Zhihu (知乎) [Zhihu] (Apr. 20, 2023), https://zhuanlan.zhihu.com/p/623580709 [https://perma.cc/CY29-TW3Z].

<table>
<thead>
<tr>
<th>Decision Year</th>
<th>Criminal</th>
<th>Civil</th>
<th>Administrative</th>
</tr>
</thead>
<tbody>
<tr>
<td>2019</td>
<td>1,484,669</td>
<td>14,403,929</td>
<td>556,353</td>
</tr>
<tr>
<td>2020</td>
<td>1,260,172</td>
<td>13,965,165</td>
<td>496,567</td>
</tr>
<tr>
<td>2021</td>
<td>634,977</td>
<td>9,642,778</td>
<td>101,521</td>
</tr>
<tr>
<td>2022</td>
<td>177,350</td>
<td>4,939,104</td>
<td>854</td>
</tr>
</tbody>
</table>

There has been little systematic discussion within China of either case deletions or why fewer cases are being posted than in the past. Some reports in China on the removal of cases or the reduction in the number of cases posted were themselves deleted. Commentators have come up with various explanations for the deletions and reduced case postings. Scholars have noted concerns that posting cases could harm individuals: There is one report of a litigant being denied a job after a prospective employer looked up a case. Some commentators have noted that publishing court decisions may be harmful to businesses. Likewise, commentators have noted risks that the media could use cases to stir up public opinion and have referenced European discussions of the right to be forgotten. There also appears to be discussion within the courts

50. See, e.g., Zhimian Chuanmei, supra note 43 (resharing information about removal of cases after the original post was taken down for violating internet policies). Not all such posts were deleted; some remain online, although generally with little analysis of the reasons for such deletions. See, e.g., Xiaoyi Liangjie (肖一凉介), Weixin Gongzhong Hao (微信公众号) [WeChat Pub. Acct.] (Feb. 22, 2022), https://mp.weixin.qq.com/s/GS8dK0RZE_2pa@g6qpg [https://perma.cc/RX73-G6PC] (discussing deletion of cases relating to cheating on national college entrance exams and discussing possible explanations); Shi Fulong Lǐshī (石伏龙律师) [Shi Fulong, Esq.], Xinlang Weibo (新浪微博) [Sina Weibo] (June 23, 2021), https://m.weibo.cn/status/4651274924721035 [https://perma.cc/PP73-8YP2] (asking why cases are being deleted); Wang Jun Bījī (王军笔记) [Notes by Wang Jun], Xinlang Weibo (新浪微博) [Sina Weibo] (Aug. 20, 2019), https://m.weibo.cn/status/4407509785981349 [https://perma.cc/NN8M-5JC6] (criticizing the SPC for deletions).


52. For a discussion of how a court “saved” a company by removing a judgment that affected the company’s ability to obtain credit, see Hubei Gaoyuan (湖北高院) [Hubei High People’s Ct.], Caipan Wenshu Xiawang, Qife Shunli Dujie (裁判文书下网、企业顺利渡劫) [Court Opinion Taken Offline, Company Smoothly Clears Hurdle], Weixin Gongzhong Hao (微信公众号) [WeChat Pub. Acct.] (Apr. 12, 2023), https://mp.weixin.qq.com/s?__biz=MzAwMDM0MzU1Mw==&mid=2649613386&idx=1&sn=4652de2b1de6a55f5e7b76525254178 [https://perma.cc/5GKV-JB]C.

53. See, e.g., Li Guangde (李广德), Caipan Wenshu Shangwang Zhidu de Jiazhì Quxiang Ji qi Fali Fansi (裁判文书上网制度的价值取向及其法理反思) [Value Orientation
of the System of Placing Judgments Online in China and Its Jurisprudential Reflections, 2 Fashang Yanjiu (法商研究) [Stud. L. & Bus.] 22, 22–35 (2022) (arguing that courts should consider omitting parties’ information and even the facts from online versions of court judgments); Xu Wenjin & Yao Jingyan, supra note 33, at 82–90 (discussing the right to be forgotten).

54. See, e.g., Chen Jincai, Zhang Junzhe & Ding Xiaoyu (陈金彩、张俊者、丁晓雨), Guanyu Binhai Xinqu Fayuan zai Hulianwang Gongbu Caipan Wenshu de Diaoyan yu Sikao (关于滨海新区法院在互联网公布裁判文书的调研与思考) [Investigation and Reflection on Binhai New District Court’s Publishing Opinions Online], Tianjinshi Binhai Xinqu Renmin Fayuan (天津市滨海新区人民法院) [Tianjin Binhai People’s Cts.] (Aug. 29, 2018), https://bhxfqfy.tjcourt.gov.cn/article/detail/2018/08/id/3476013.shtml [https://perma.cc/C3CK-6MQZ] (noting the risk of copycat crimes and that courts often have different understandings of the SPC’s rules regarding online publication of cases); Huang Caihua (黄彩华), Lun Caipan Wenshu Shangwang Gongkai de Chidu—Yi Huajie Shehui Maodun wei Shijiao (论裁判文书上网公开的尺度——以化解社会矛盾为视角) [Discussing the Degree of Openness of Judgments Published Online—Looking From the Perspective of Resolving Societal Conflicts], Guangdong Fayuan Wang (广东法院网) [Guangdong Cts. Online] (Oct. 9, 2018), https://www.gdcourts.gov.cn/index.php?v=show&cid=171&id =52335 [https://perma.cc/C38L-NCRQ] (arguing that publishing cases online may harm parties’ privacy rights and may impede the reintegration of criminal defendants into society); Jin Lijuan (金丽娟), Guanyu Caipan Wenshu Shangwang Gongkai de Wenti ji Jianyi (关于裁判文书上网公开的问题及建议) [Issues and Recommendations Regarding Uploading Judgments Online], Renmin Fayuan Bao (人民法院报) [People’s Ct. News] (Feb. 3, 2016), http://rmfyb.chinacourt.org/paper/html/2016-02/03/content_107866. htm [https://perma.cc/G9EC-PVK7] (arguing that placing cases online may also generate negative public opinion if the decisions contain errors).


A provincial-level branch of China’s cyber regulator issued sixteen warnings to CJO, most likely for violating these new laws, and that Baidu, the leading Chinese search engine, temporarily blocked searches of the CJO website.\footnote{See [404 Wenku] Fakesheng Zhijia | Zhongguo Caipan Wenshu Wang Bei Liaoning Wangxinban Jingpaolu Zheshi Weishenme? (【404 文库】法科生之家 | 中国裁判文书网被辽宁网信办警告! 这是为什么?) }\footnote{404 Library] Home of Law Students | China Judgements Online Was Warned by Liaoning Cyberspace Administration Office! Why Is That?\footnote{CHINA DIGITAL TIMES (Feb. 20, 2022), https://chinadigitaltimes.net/chinese/677214.html [https://perma.cc/XLL3-8CRV] (noting that the Liaoning Cyberspace Administration Office had issued sixteen warnings to websites including CJO for illicit and noncompliant online behaviors). The report also noted that some commercial providers of court data in China were rushing to delete personal information, including judges’ names, from cases posted online. Id. For reports on Baidu temporarily blocking CJO, see Li Li (李莉), Baidu Wufa Sousuo “Zhongguo Caipan Wenshu” Guangfang Huiying Xi Wushan, Yi Xiufu (百度无法搜索“中国裁判文书网”官方回应系误删、已修复) [Baidu Search Could Not Find “China Judgements Online,” Official Response Says It’s by Mistake, Has Been Fixed], Souhu (搜狐) (Feb. 21, 2022), https://www.sohu.com/a/524301687_120259137 [https://perma.cc/459H-5CRF]. Other online commentary has likewise suggested that the new laws are leading courts to remove cases and prompting commercial providers of court information to redact court data. See Huang Wenxu (黄文旭), Caipan Wenshu Gongkai Jiang Quchu Fayuan he Faguang Deng Xinqu? Lieian Jiansuo Yu Dashuju Fenxi de Weilai Zai Nali? (裁判文书公开将去除法院和法官等信息？类案检索与大数据分析的未来在哪里？) [Will Information Such as Name of Courts and Judges Be Removed From Disclosed Judgment Documents? Where Is the Future of Similar Case Retrieval and Big Data Analysis?], Zhihu (知乎) (Oct. 22, 2021), https://zhuanlan.zhihu.com/p/424640796 [https://perma.cc/7MSQ-XPLD] (reporting how commercial sites that provide cases were changing their practices in accordance with China’s new data privacy regulations); Ma Xiaohan (马晓晗), Weishenme Wo Yinian You 50 Ge Panjue de Anzi, Caipan Wenshu Wang Weishenme Zhineng Chadao 21 Jian ne? (为什么我一年有50个判决的案子、裁判文书网为什么只能查到21件呢?) [Why Did I Only Find 21 Cases on China Judgements Online While I Have 50 Cases Decided in a Year?], Zhihu (知乎) (Mar. 31, 2022), http://zhizhuo.link/?p=366 [https://perma.cc/9CDF-Q63K] (predicting that legal data platforms will be subject to stricter regulations following the enactment of the new data privacy laws)...}
Outside of China, most accounts of the deletion of cases from commentators assume that the changes resulted from a desire to shield the Chinese legal system from external scrutiny, noting that international NGOs and human rights groups had been using CJO data to report on developments in the Chinese legal system. One important early account of the shift argues that the SPC is engaging in a “purge” of cases that cast the courts, and the Communist Party, in an unfavorable light. Virtually all such explanations are anecdotal: Researchers run searches for individual cases that they had previously located online or search for categories of cases that they recall previously numbered in the thousands or tens of thousands.

Studying cases that have disappeared presents an obvious challenge: It is not easy to see what is not there. This challenge is a new twist on an old problem. The “missingness problem” has long plagued efforts to use Chinese court data. The percentage of first-instance cases made public between 2014 and 2017 (before the recent removals) ranged from 41% in civil cases to 56% in administrative cases and 67% in criminal cases. Disclosure rates vary widely across courts and even within courts depending on whether cases are civil, criminal, or administrative.

Although reports of the SPC removing entire categories of cases from the CJO site did not surface until 2021, there were signs in 2019 and 2020 that the SPC was seeking to restrict the use of court data. The SPC first required real-name registration based on phone numbers for users.

58. See, e.g., Luo & Kellogg, supra note 11 (“It seems clear that the SPC views certain kinds of cases as embarrassing to the Party: Some of the purged cases highlight official corruption or illustrate the Party’s use of the criminal justice system to crack down on its critics.”).

59. For example, in a 2022 complaint to the WTO, the European Union noted the apparent lack of availability on CJO of decisions in which Chinese courts have issued anti-suit injunctions in intellectual property cases. Request for the Establishment of a Panel by the European Union, China—Enforcement of Intellectual Property Rights, para. 2.1, WTO Doc. WT/DS611/5 (Dec. 9, 2022), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/611-5.pdf&Open=True [https://perma.cc/L3QM-GZK4].

60. See Luo & Kellogg, supra note 11 (“[T]he SPC wants its transparency mechanisms to paint a picture of a fair and benevolent CCP, and a healthy and wholesome Chinese society. Many verdicts that cut against that idyll have been removed.”).

61. See, e.g., id. (noting that a search for cases related to “picking quarrels” yielded tens of thousands of results in May 2020, but no results in February 2022).

62. See Liebman et al., supra note 13, at 185 (defining the “missingness problem” as the variation in Chinese court compliance with the national disclosure mandate).

63. See Wu et al., supra note 37, at 19.

64. See id. at 4 (“Even within one court there may be very different levels of transparency for different types of cases.”). Each Chinese court is generally divided into divisions or tribunals depending on the type of case: civil, criminal, or administrative. See id. at 8. A fourth substantive division, the enforcement division, is responsible for post-judgment enforcement of decisions. Id. Judges are assigned to particular divisions and thus generally hear cases only within that subject area. Id. Administrative tribunals hear lawsuits against state actors as well as cases brought by administrative agencies seeking compulsory enforcement of fines and other sanctions imposed by the agency. See id. at 47–51.
accessing the website in September 2020.\textsuperscript{65} The CJO website also began limiting the number of results users could view from any search to 600 cases\textsuperscript{66} and restricting each user’s daily downloads.\textsuperscript{67} In addition, CJO reportedly deployed new technology to block the scraping of its website and imposed new limitations on commercial providers who sought to replicate CJO’s content with better functionality and greater marketability to lawyers and litigants.\textsuperscript{68} Many of these sites went offline in 2021, with at least some of those that remain redacting case numbers and court and judge names, thus offering less functionality than the CJO website.\textsuperscript{69}

The recent case deletions and the new restrictions on CJO searches reflect a broader tightening of control in China in the past decade. China under Xi Jinping has retreated from many of the governance reforms of earlier periods that embraced transparency and made efforts to promote open government.\textsuperscript{70} China under Xi has seen a reassertion of top-down

\textsuperscript{65} See Luo Sha (罗沙), Zhonguo Caipan Wenshuwang Wenshu Zongliang Tupo 1 Yi Pian (中国裁判文书网文书总量突破1亿篇) [The Total Number of Documents on CJO Has Exceeded 100 Million], Xinhua She (新华社) [Xinhua News Agency] (Sept. 2, 2020), http://m.xinhuanet.com/2020-09/02/c_1126444909.htm [https://perma.cc/JWM8-A4NK] (describing the “upgrade” to the CJO requiring phone verification).

\textsuperscript{66} Stern et al., Automating Fairness, supra note 18, at 552 n.132.

\textsuperscript{67} In conducting the research for this Essay, we repeatedly encountered situations in which searches would be blocked after repeated searches on the same day. The precise number of searches or downloads that triggers such a block is unclear.

\textsuperscript{68} Stern et al., Automating Fairness, supra note 18, at 549, 552 n.132; Zuigao Renmin Fayuan (最高人民法院) [Supreme People’s Ct.], Guanyu “Zhonguo Caipan Wenshuwang” Wangzhan Jianshe Jianyi De Dafu (关于“中国裁判文书网”网站建设建议的答复) [Reply Regarding Recommendations Regarding the Construction of the “China Judgements Online” Website], Hangzhou Laodong Zhengyi Wang (杭州劳动争议网) [Hangzhou Lab. Disp. Website] (Feb. 19, 2019), http://www.hzldzy.com/detail-4272.html [https://perma.cc/H5ZY-73DG] (stating that “crawler systems” prompted the introduction of new measures designed to improve user experience, apparently through user restrictions).

\textsuperscript{69} See Huang Wenxu, supra note 57; Wen Ying, supra note 57.

\textsuperscript{70} Jieun Kim, Rachel E. Stern, Benjamin L. Liebman & Xiaohan Wu, Closing Open Government: Grassroots Policy Conversion of China’s Open Government Information Regulation and Its Aftermath, 55 Compar. Pol. Stud. 319, 332–36 (2022) (summarizing how judicial decisions began to restrict Open Government Information litigation starting in late 2015). One article published at the end of Xi’s first term in 2018 noted that there appeared to be no reduction in transparency, despite the reassertion of centralized political control. Deborah Seligsohn, Mengdi Liu & Bing Zhang, The Sound of One Hand Clapping: Transparency Without Accountability, 27 Env’t Pol. 804, 806 (2018). We are not aware of any scholarship that has sought empirically to analyze reductions in transparency under Xi. But recent media accounts have suggested that formerly public databases are becoming more difficult to access and that China’s leading academic database, CNKI, has come under pressure to curate what is available and to restrict access from overseas. See, e.g., Stella Chen & David Bandurski, CNKI’s Security Problem, China Media Project (July 6, 2022), https://chinamediaproject.org/2022/07/06/cnki-security-problem/ [https://perma.cc/8A7Z-82F4] (“Even if the trivial details discussed in publications [on CNKI] are prima facie non-sensitive, they can, taken collectively, help researchers piece together various aspects of Chinese politics, governance, society, industrial strategies and so on.”); Stephanie Yang, As China Shuts Out the World, Internet Access From Abroad Gets Harder Too, L.A. Times (June 23, 2022), https://www.latimes.com/world-nation/story/2022-06-23/china-great-
control, a merging of Communist Party and state functions, and an emphasis on data security. The 2014 Fourth Plenum Decision of the Eighteenth Communist Party Congress, the primary document setting forth legal reforms during Xi Jinping’s first term in office, made repeated references to the importance of transparency and “sunshine.” In contrast, neither a major 2021 speech by Xi on the rule of law nor numerous articles by senior officials and theorists analyzing the speech made any reference to transparency. Although official court documents firewall-foreign-domestic-virtual-censorship (on file with the Columbia Law Review) (“[M]any researchers who have experienced [data access] challenges suspect that their limited access is part of China’s attempt to ward off what it sees as international meddling, and present its own tightly controlled narrative to the outside world.”).

71. See Stern et al., Automating Fairness, supra note 18, at 552–53 (discussing how the emergence of data security as a societal value mirrors the Communist Party approach to control); see also Liebman et al., supra note 13, at 182–83 (noting how Chinese legal policies regarding court document transparency serve Communist Party judicial control functions).


Likewise, a search for the term “judicial openness” (司法公开) in the People’s Daily online database of Xi Jinping’s major speeches shows ten references to “judicial openness” between 2014 and 2018 and zero since 2018. Sifa Gongkai (司法公开) [Judicial Openness], Xi Jinping: Xilie Zhongyao Jianghua Shujuku (习近平：系列重要讲话数据库) [Xi Jinping: Series of Important Speech Database] (July 2, 2022), http://jhsjk.people.cn/result?
continue to emphasize the importance of transparency, courts have also stepped up efforts to control both which cases are made public and how they are used. In contrast, the term “data security” has come to the fore in political discourse.

II. TRANSPARENCY AND CENSORSHIP AS TOOLS FOR INFORMATION MANAGEMENT

Although most discussion has framed the removal of cases from CJO primarily in terms of censorship, the SPC’s management of judicial disclosure intersects with at least three scholarly conversations: those about authoritarian transparency, about the tools China uses to censor, and about how authoritarian states manage information to maintain and project authority and power. This Part provides a brief overview of each of these literatures, both to frame the discussion that follows and to highlight gaps in the literature on how courts, particularly those in authoritarian states, manage information.

Why would an authoritarian state embrace even limited forms of transparency? Explanations for authoritarian regimes’ embrace of transparency have largely been top-down and instrumental, treating authoritarian states as rational actors making a strategic decision to address domestic governance challenges by embracing limited forms of transparency. The embrace of transparency by authoritarian regimes in the early 2000s came against the backdrop of a global spread of transparency and allowed marketizing nonliberal regimes to align keywords=%E5%8F%B8%E6%B3%95%E5%85%AC%E5%BC%80&isFuzzy=0 [https://perma.cc/4SWC-MZ3W]. Similarly, references to the term “transparency” (透明度) in Xi’s speeches dropped significantly after 2018, with thirty-four references between 2013 and 2018 and only seven mentions of the word after 2018. Toumingdu (透明度) [Transparency], Xi Jinping: Xilie Zhongyao Jianghua Shujuku (习近平:系列重要讲话数据库) [Xi Jinping: Series of Important Speeches Database] (Aug. 28, 2023), http://jhsjk.people.cn/result?keywords=%E9%80%8F%E6%98%8E%E5%BA%A6&isFuzzy=0 [https://perma.cc/JXA9-SUDH].

74. See SPC Party Group, Step Forward, supra note 16 (noting that the Chinese courts’ integrated web-based platform for case handling allows for comprehensive online processing and full procedural transparency).

75. Stern et al., Automating Fairness, supra note 18, at 519 (detailing how Chinese government agencies are partnering with technology companies to maintain control over the use of official data).

76. A search for the term “data security” in Xi’s speeches yields fifty-one results, all but four of which were since 2017. Shuju Anquan (数据安全) [Data Security], Xi Jinping: Xilie Zhongyao Jianghua Shujuku (习近平:系列重要讲话数据库) [Xi Jinping: Series of Important Speeches Database] (Sept. 17, 2022), http://jhsjk.people.cn/result?keywords=%E6%95%B0%E6%8D%AE%E5%AE%89%E5%85%A8&isFuzzy=0 [https://perma.cc/PL8A-T66R].

themselves with perceived global norms. Benefits of enhanced transparency to authoritarian rulers include strengthening state legitimacy, enhancing oversight over lower-level actors to curb corruption, developing mechanisms for citizen input without democratizing, and economic development. Scholars writing on China have argued that the embrace of transparency has become a key feature of Chinese governance that is central to China’s economic success and political durability. Courts are mostly absent from this literature, largely because court

78. For example, in the early 2000s, China made numerous governmental transparency commitments to satisfy the requirements for accession to the WTO. Ming Du & Qingjian Kong, Explaining the Limits of the WTO in Shaping the Rule of Law in China, 23 J. Int’l Econ. L. 885, 893–94 (2020).

79. See Gary Rodan, Transparency and Authoritarian Rule in Southeast Asia: Singapore and Malaysia 73–78 (2004) (arguing that Singapore’s embrace of transparency in its private industries has been qualified and has been prompted by economic need); Jonathan Stromseth, Edmund Malesky & Dimitar Gueorgulev with Lai Hairong, Wang Xixin & Carl Brinton, China’s Governance Puzzle: Enabling Transparency and Participation in a Single-Party State 10 (2017) (“Seen from the regime’s vantage point, however, we consider China’s turn towards transparency and open decision-making not as a stepping stone towards greater democracy but as a response to rampant corruption and weak rule of law—problems that the regime itself admits threaten its survival.”); Lei Chen et al., supra note 36, at 731 (arguing that autocrats utilize government transparency to focus public scrutiny on lower-tier officials and consequently motivate them into controlled action); Benjamin Liebman & Curtis J. Milhaupt, Reputational Sanctions in China’s Securities Markets, 108 Colum. L. Rev 929, 980 (2008) (“The media are perhaps the most effective regulator of corporate wrongdoing in China today.”); Lorentzen et al., supra note 20, at 191–92 (arguing that powerful Chinese firms have impeded Open Government Information efforts, at least in the arena of environmental policy); Malesky et al., supra note 77, at 784 (showing that transparency can be used by leaders in authoritarian regimes to coerce delegates into greater compliance); Seligsohn et al., supra note 70, at 805 (“There is . . . a rich literature on how autocrats use information in the form of the media or citizen communications . . . to monitor local-level bureaucrats, to monitor and diffuse collective action, to improve citizens’ attitudes toward the regime, and even through monitoring to improve local government performance.”); Robert G. Vaughn, Transparency in the Administration of Laws: The Relationship Between Differing Justifications for Transparency and Differing Views of Administrative Law, 26 Am. U. Int’l L. Rev. 969, 971 (2011) (“Transparency can also be viewed as enabling market choices.”). Scholars have also noted that transparency can pose risks to authoritarian regimes. See, e.g., James R. Hollyer, B. Peter Rosendorff & James Raymond Vreeland, Transparency, Protest, and Autocratic Instability, 109 Am. Pol. Sci. Rev. 764, 764–65 (2015) (“We contend that, under autocratic rule, the availability of public economic information—which we term transparency—facilitates collective action and so renders regimes more vulnerable to threats from below.”).

80. Fu Hualing, Michael Palmer & Zhang Xianchu, Introduction: Selectively Seeking Transparency in China, in Transparency Challenges Facing China, supra note 39, at 1, 3 (arguing that “transparency is seen as an indispensable ingredient in the China reform process”). Scholars have also noted that China’s transparency is often limited and is not a means of granting rights to the public. See, e.g., Benjamin L. Liebman, The Media and the Courts: Towards Competitive Supervision?, 208 China Q. 833, 840–42 (2011) (arguing that media is often used as a mouthpiece of the Party-State in high profile cases); Zhang Xianchu, Challenge to China’s Socialist Market Economy, in Transparency Challenges Facing China, supra note 39, at 20, 42–43 (noting that the Chinese Communist Party has sought to “control transparency” to meet its “defined political needs”).
transparency efforts came somewhat later than government transparency initiatives.\footnote{81}

This expanding literature on the importance of transparency to authoritarian regimes developed with almost no discussion of the largely contemporaneous literature on the “dark sides” of transparency that emerged in writing about transparency in Western liberal systems.\footnote{82} Yet there is a common theme that links these literatures: Transparency is a tool that can be used to advance a range of interests, not a value itself.\footnote{83} In the United States, recent writing has noted how the Freedom of Information Act (FOIA) has been weaponized to serve special interests.\footnote{84} In China, by contrast, various transparency initiatives have always aimed to serve the interests of the Party-State, although China’s own open-government regulations have also produced some unexpected nonstate uses, followed by state retrenchment.\footnote{85} The fact that transparency remains ill defined and slippery\footnote{86} in the liberal democratic context also helps to make it easily adaptable for use by authoritarian states.\footnote{87}

\footnote{81. Susan Finder’s work is one exception. See generally Finder, supra note 39 (discussing a range of court transparency efforts in China).


83. See Pozen, Seeing Transparency More Clearly, supra note 82, at 326 (“[T]ransparency is not, in itself, a coherent normative ideal.”).

84. See, e.g., Pozen, Transparency’s Ideological Drift, supra note 21, at 118–27 (arguing that there has been an “ideological drift” in the use of FOIA from its progressive historical roots toward more libertarian goals of limiting or blocking government action).

85. See Kim et al., supra note 70, at 320–21 (“China’s experience with [Open Government Information] litigation offers a vantage point to watch a state-society feedback loop . . . in which the boundaries of political participation were first expanded through thousands of uncoordinated lawsuits and then narrowed though court decisions and rule-making designed to solve the perceived problem of ‘abusive’ litigation.”).

86. See Pozen, Transparency’s Ideological Drift, supra note 21, at 104 (“[T]ransparency is a protean concept that may be invoked in a wide range of settings for a wide range of ends.”).

87. Scholarship on transparency in China and in Western liberal systems focuses overwhelmingly on government transparency, not court or legal system transparency. See, e.g., Kim et al., supra note 70, at 320 (discussing the lack of attention on information demanded in an authoritarian context generally). Writing on the limits of legal transparency in the United States and in some other liberal legal systems reflects a different academic conversation. This is not only because court transparency is well-established, but also because those advocating for greater transparency in and about the U.S. legal system are pushing for more transparency about outputs, not disclosure of internal court deliberations or rationales. See, e.g., Ellis, supra note 8, at 940–42 (“By judicial transparency, I simply mean the general public’s ability to . . . examine the results of the [judicial] process as may be reflected in a judge’s decision or opinion and a jury’s verdict.”). This scholarly disconnect also reflects the impact of FOIA and similar statutes globally, which often
The scholarly discussion about authoritarian transparency is also largely disconnected from analysis of censorship and information control in authoritarian regimes: There is little recognition in the existing literature that transparency efforts are also mechanisms for managing the flow of information. There is thus little overlap between scholarship on transparency in authoritarian regimes and scholarship on censorship. Recent writing on censorship focuses on how China has adapted existing tools of information control to a commercialized media marketplace and social media. Strategies include information flooding to crowd out negative voices; focusing on the threat of collective action rather than solitary critics or individual grievances; and the creation of friction, making access to information outside the firewall difficult, but not impossible. Critical reporting on social ills is tolerated, up to a point. There are signs that this approach has shifted under Xi Jinping, with more reports of individuals being punished for isolated online criticism of the Party-State even absent a threat of collective action. But the focus on collective action and information flooding has remained, with the Party-State relying on commercial information providers to do most of the censorship.

exclude court information from open-government rules. Youm & Mendel, supra note 22, at 254–55 (“[FOIA] does not apply to the legislature or the courts.”); Pozen, Transparency’s Ideological Drift, supra note 21, at 158 n.259 (noting the exclusion of the courts from FOIA and transparency tools in the United States). In contrast, discussion of transparency initiatives in China’s courts fits into existing conversations about government transparency in China due to their common goals of rooting out malfeasance and standardizing outcomes.

88. See Roberts, Censored, supra note 2, at 104-05, 223–24 (“The Chinese government aggressively expanded Internet access . . . as the CCP saw [this] as linked to economic growth . . . . Yet as it was pursuing greater connectivity, the government simultaneously developed methods of online information control that would allow it to channel information online.”).


A related strand of recent scholarship has begun to look beyond how authoritarians censor information to how they manipulate information to engineer popularity and create an illusion of democracy—“substituting spin for fear.”

Although the leading work largely treats China as a more traditional rule-by-fear regime, not a modern “spin dictatorship,” there is also growing attention to how China seeks to use its discourse power to project power within and beyond its own borders. The role of legal information is absent from this literature, reflecting a focus on how authoritarian states manage information—not on how specific institutional actors within such states do so. Some within China’s courts have argued that maintaining judicial authority requires close management of media coverage and propaganda work, but no scholarship of which we are aware has examined the ways in which courts are actively embracing this approach.

III. METHODS AND DESCRIPTIVE STATISTICS

Which previously public cases have been deleted from the CJO website, and why? To answer this, we explored two questions. First, we sought to understand changes in the total number of cases available on CJO by case category—criminal, administrative, and civil. Second, we examined which specific types of criminal cases were deleted. We focused on criminal cases for a number of reasons. First, criminal cases were the substantive area with the highest percentage of cases previously made public. Further, criminal cases showed the greatest percentage decline in previously public cases available on CJO between 2020 and 2021. Criminal law also involves the direct exercise of state power to maintain political order and is thus one good starting place to understand which cases are removed and why. Because our dataset contains all 42 million

93. Guriev & Treisman, supra note 1, at 22.
94. Id. at 25–26.
97. See infra Table 2.
98. Malcolm Thorburn, Criminal Law as Public Law, in Philosophical Foundations of Criminal Law 21, 23 (R.A. Duff & Stuart P. Green eds., 2011) (noting the "uniquely coercive and state-dominated nature of the criminal justice system"). We extracted 374 criminal causes of action and 779 civil causes of action from our data. Both criminal and civil causes of action are relatively easy to parse. But the larger number of civil causes of action, the fact that many civil cases include numerous causes of action, and courts’ inconsistent practices for labeling civil causes of action, make data cleaning and matching causes of action more
cases made public between January 1, 2014, and September 2, 2018, our focus is on that period.

A. Changes in Total Available Cases

We began by comparing the total number of search results for civil, criminal, and administrative cases decided from 2013 to 2018 with the numbers available on the CJO website on two search dates in August 2020 and July 2021.\textsuperscript{99} The CJO website updates daily, with tens of thousands of new cases being added most days.\textsuperscript{100} Any decrease over time in the total number of cases available from a particular year strongly suggests a policy of deleting cases that have previously been made public.

Table 2 sets forth our findings from this first step. Searching CJO in 2020 and 2021 for the total number of available criminal judgments by decision year revealed that the total number of publicly available criminal judgments decided between 2013 and 2018 decreased by nine percent, or 633,153 cases.\textsuperscript{101} This suggests that a significant number of previously public criminal decisions were removed. We believe that the volume of removals strongly suggests a policy of categorical, not case-by-case, removals for reasons further explained below.\textsuperscript{102}

difficult in civil cases. We face a different problem in parsing administrative causes of action. Administrative causes of action often do little to differentiate the cases (and judges note that the classification of administrative cases is often somewhat arbitrary). Administrative and civil cases may also reveal sensitive areas, and future work may wish to repeat our analysis of deleted criminal cases for civil and administrative cases.

99. CJO allows users to filter cases by province, year, court, and various combinations of cause of action or case type. CJO, supra note 9.

100. See supra note 15 and accompanying text.

101. The total number of cases available decreased for each year from 2013 through 2018, suggesting that the decrease is not the result of older cases being taken down after being available online for a certain period of time.

102. The total number of publicly available administrative cases decided between 2013 and 2018 also decreased from 2020 to 2021, by just over five percent, or 109,194 cases. In contrast, the total number of civil cases available for the years 2013 to 2018 increased slightly from 2020 to 2021, likely reflecting cases that were delayed in being uploaded because they were pending on appeal.
<table>
<thead>
<tr>
<th></th>
<th>Decision Year</th>
<th>Search Year</th>
<th>% Change</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>2020</td>
<td>2021</td>
</tr>
<tr>
<td><strong>Civil</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2013</td>
<td>1,013,625</td>
<td>1,021,098</td>
<td>0.737</td>
</tr>
<tr>
<td>2014</td>
<td>4,569,623</td>
<td>4,561,925</td>
<td>-0.168</td>
</tr>
<tr>
<td>2015</td>
<td>6,177,322</td>
<td>6,169,354</td>
<td>-0.129</td>
</tr>
<tr>
<td>2016</td>
<td>7,628,756</td>
<td>7,901,220</td>
<td>3.572</td>
</tr>
<tr>
<td>2017</td>
<td>10,692,305</td>
<td>10,678,079</td>
<td>-0.133</td>
</tr>
<tr>
<td>2018</td>
<td>12,293,870</td>
<td>12,373,175</td>
<td>0.645</td>
</tr>
<tr>
<td><strong>2013–2018</strong></td>
<td><strong>42,375,501</strong></td>
<td><strong>42,704,851</strong></td>
<td><strong>0.777</strong></td>
</tr>
<tr>
<td><strong>Criminal</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2013</td>
<td>203,038</td>
<td>186,947</td>
<td>-7.925</td>
</tr>
<tr>
<td>2014</td>
<td>932,442</td>
<td>852,334</td>
<td>-8.591</td>
</tr>
<tr>
<td>2015</td>
<td>1,022,861</td>
<td>933,685</td>
<td>-8.718</td>
</tr>
<tr>
<td>2016</td>
<td>1,624,573</td>
<td>1,464,395</td>
<td>-9.86</td>
</tr>
<tr>
<td>2017</td>
<td>1,514,292</td>
<td>1,381,608</td>
<td>-8.762</td>
</tr>
<tr>
<td>2018</td>
<td>1,565,720</td>
<td>1,410,804</td>
<td>-9.894</td>
</tr>
<tr>
<td><strong>2013–2018</strong></td>
<td><strong>6,862,926</strong></td>
<td><strong>6,229,773</strong></td>
<td><strong>-9.226</strong></td>
</tr>
</tbody>
</table>

103. Searches for cases available as of 2020 were run on August 20, 2020, and searches for 2021 were run on July 20, 2021.
We reran this analysis a third time in June 2022 to see if any additional cases from the 2013 to 2018 period had been removed since our original analysis in July 2021. Table 3 shows the results. The total number of criminal cases available on CJO for the 2013 to 2018 period increased by 2.6% from 2021 to 2022. In contrast, the number of civil and administrative cases declined slightly. At first glance, the numbers suggest that some previously removed criminal cases from 2014 to 2018 might have

104. “Total” includes the three primary categories of cases, as well as state compensation cases, which decreased by 2.7% over the period, and enforcement cases, which decreased by 0.7%.
been reposted. Yet even this modest increase in criminal cases is likely not the result of previously deleted cases being reposted. As shown in Table 4, an analysis of first-instance (trial court) criminal cases shows no increase in the number of cases available online for decision years 2013 to 2017.\textsuperscript{105} The number of first-instance criminal cases available in June 2022 declined slightly for each year from 2013 to 2018 when compared to the number available in 2021. The increase in available criminal cases in 2022 appears to be due to an increase in the number of sentence modification cases\textsuperscript{106} and appellate decisions posted to CJO, as shown in Table 5.\textsuperscript{107}

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105. See infra Table 4. Table 4 also shows official statistics for the number of first-instance criminal cases decided by all courts in China for the same years.


107. Comparing the number of sentence modification decisions and second-instance (appellate) decisions on CJO to the numbers in our database for the years from 2013 through 2018 reveals that in July 2022, CJO included a large number of decisions not in our database—suggesting they were made public after we stopped updating our dataset in 2018. We did not scrape information on sentence modification decisions in 2021 and thus cannot compare the number of sentence modification cases available in 2022 to the number available in 2021. But our review of a sample of such cases suggests that a large number were posted in the second half of 2021, just as the deletion of criminal cases was drawing scrutiny. Did the SPC order that sentence modification decisions be uploaded to compensate for the removal of other criminal decisions? We have no way of being certain, and the SPC has been calling for courts to make all sentence modification decisions public online since 2014. “Wuge Yilü” Jian Shixiao, “Jian Jia Zan” Anjian Geng Touming (“五个一律”见实效 “减假暂”案件更透明) (“Five Uniforms” See Effectiveness, “Sentence Modification and Probation Cases Become More Transparent), Renmin Fayuan Bao (人民法院报) [People’s Ct. News] (Feb. 14, 2015), http://rmfyb.chinacourt.org/paper/html/2015-02/14/content_94023.htm?div=1 [https://perma.cc/5EU8-QAC3]. CJO shows an even larger increase in the number of criminal appeals over the same period, perhaps reflecting renewed efforts to post appellate cases online. Nevertheless, the data suggest that first-instance cases continue to be removed.
### Table 3. Total Number of Cases Available by Decision Year (2013–2018) on CJO by Search Date and Case Type

<table>
<thead>
<tr>
<th>Decision Year</th>
<th>Search Year</th>
<th>% Change</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2021</td>
<td>2022</td>
</tr>
<tr>
<td>Civil</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2013</td>
<td>1,021,098</td>
<td>1,018,330</td>
</tr>
<tr>
<td>2014</td>
<td>4,561,925</td>
<td>4,541,959</td>
</tr>
<tr>
<td>2015</td>
<td>6,169,354</td>
<td>6,150,994</td>
</tr>
<tr>
<td>2016</td>
<td>7,901,220</td>
<td>7,583,262</td>
</tr>
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<td>2017</td>
<td>10,678,079</td>
<td>10,665,089</td>
</tr>
<tr>
<td>2018</td>
<td>12,373,175</td>
<td>12,368,361</td>
</tr>
<tr>
<td>2013–2018</td>
<td>42,704,851</td>
<td>42,327,995</td>
</tr>
<tr>
<td>Criminal</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2013</td>
<td>186,947</td>
<td>190,114</td>
</tr>
<tr>
<td>2014</td>
<td>852,334</td>
<td>887,249</td>
</tr>
<tr>
<td>2015</td>
<td>933,685</td>
<td>971,686</td>
</tr>
<tr>
<td>2016</td>
<td>1,464,395</td>
<td>1,507,689</td>
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<tr>
<td>2017</td>
<td>1,381,608</td>
<td>1,396,862</td>
</tr>
<tr>
<td>2018</td>
<td>1,410,804</td>
<td>1,438,390</td>
</tr>
<tr>
<td>2013–2018</td>
<td>6,229,773</td>
<td>6,391,990</td>
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</tbody>
</table>

108. Searches for cases available as of 2021 were run on July 20, 2021, and searches for 2022 were run on July 27, 2022.
<table>
<thead>
<tr>
<th>Decision Year</th>
<th>Search Year 2021</th>
<th>Search Year 2022</th>
<th>% Change</th>
</tr>
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<tbody>
<tr>
<td>2013</td>
<td>37,684</td>
<td>37,574</td>
<td>-0.292</td>
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<tr>
<td>2014</td>
<td>172,122</td>
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</tr>
<tr>
<td>2015</td>
<td>264,905</td>
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</tr>
<tr>
<td>2016</td>
<td>392,295</td>
<td>389,183</td>
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<tr>
<td>2017</td>
<td>488,398</td>
<td>484,695</td>
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</tr>
<tr>
<td>2018</td>
<td>537,127</td>
<td>532,141</td>
<td>-0.928</td>
</tr>
<tr>
<td><strong>2013–2018</strong></td>
<td><strong>1,892,531</strong></td>
<td><strong>1,877,979</strong></td>
<td><strong>-0.769</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Decision Year</th>
<th>Search Year 2021</th>
<th>Search Year 2022</th>
<th>% Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013</td>
<td>1,431,169</td>
<td>1,433,891</td>
<td>0.19</td>
</tr>
<tr>
<td>2014</td>
<td>6,965,847</td>
<td>6,990,520</td>
<td>0.354</td>
</tr>
<tr>
<td>2015</td>
<td>9,780,316</td>
<td>9,812,880</td>
<td>0.333</td>
</tr>
<tr>
<td>2016</td>
<td>12,792,885</td>
<td>12,620,079</td>
<td>-1.351</td>
</tr>
<tr>
<td>2017</td>
<td>16,670,179</td>
<td>16,804,272</td>
<td>0.804</td>
</tr>
<tr>
<td>2018</td>
<td>19,260,091</td>
<td>19,420,563</td>
<td>0.833</td>
</tr>
<tr>
<td><strong>2013–2018</strong></td>
<td><strong>66,900,487</strong></td>
<td><strong>67,082,205</strong></td>
<td><strong>0.272</strong></td>
</tr>
</tbody>
</table>

109. “Total” also includes state compensation and enforcement cases.
TABLE 4. TOTAL NUMBER OF CRIMINAL FIRST-INSTANCE (TRIAL) CASES AVAILABLE ON CJO, COLUMBIA/UNIVERSITY OF CALIFORNIA (UC) DATABASE, AND OFFICIAL STATISTICS\textsuperscript{110}

<table>
<thead>
<tr>
<th>Year</th>
<th>Official Statistics</th>
<th>Columbia/UC Database</th>
<th>CJO Aug. 2021</th>
<th>CJO June 2022</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013</td>
<td>953,977</td>
<td>180,814</td>
<td>166,376</td>
<td>166,153</td>
</tr>
<tr>
<td>2014</td>
<td>1,023,017</td>
<td>773,367</td>
<td>715,124</td>
<td>714,276</td>
</tr>
<tr>
<td>2015</td>
<td>1,099,205</td>
<td>815,723</td>
<td>762,622</td>
<td>761,805</td>
</tr>
<tr>
<td>2016</td>
<td>1,115,873</td>
<td>820,734</td>
<td>842,629</td>
<td>841,080</td>
</tr>
<tr>
<td>2017</td>
<td>1,296,650</td>
<td>782,588</td>
<td>958,641</td>
<td>956,951</td>
</tr>
</tbody>
</table>

TABLE 5. COMPARISON OF SENTENCE MODIFICATION (刑更) AND CRIMINAL APPEAL (刑终) CASES ON CJO AND COLUMBIA/UC DATABASE

<table>
<thead>
<tr>
<th>Year</th>
<th>Sentence Modification (刑更)</th>
<th>Criminal Appeals (刑终)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Columbia/UC Database</td>
<td>CJO July 2022</td>
</tr>
<tr>
<td>2013</td>
<td>4,591</td>
<td>2,603</td>
</tr>
<tr>
<td>2014</td>
<td>27,454</td>
<td>43,820</td>
</tr>
<tr>
<td>2015</td>
<td>44,699</td>
<td>57,756</td>
</tr>
<tr>
<td>2016</td>
<td>550,617</td>
<td>552,184</td>
</tr>
<tr>
<td>2017</td>
<td>277,505</td>
<td>306,994</td>
</tr>
<tr>
<td>Total</td>
<td>904,866</td>
<td>963,357</td>
</tr>
</tbody>
</table>

\textsuperscript{110} “Official statistics” reflects the total number of first-instance cases handled by Chinese courts in a given year as reported in the annual China Law Yearbook (中国法律年鉴). “Zhongguo Falü Nianjian” She (《中国法律年鉴》社) [China Law Yearbook Publishing House], Zhongguo Faxuehui (中国法学会) [China L. Soc’y], https://www.chinalaw.org.cn/portal/list/index/id/45.html [https://perma.cc/9YP6-6KZN] (last visited Aug. 29, 2023). We explore transparency rates in more detail elsewhere. Wu et al., supra note 37.
B. Removal of Criminal Cases by Crime Type

Our second step was to measure and analyze which criminal cases were deleted. We focus on first-instance (trial) criminal cases. We compared the number of publicly available cases as of July 2021 for each of the 405 crime categories listed on the CJO website for the years 2013 to 2017 with the number of cases in our database (referred to here as the “Columbia/UC database”). We focused on cases from decision years 2015 and 2016 involving crimes for which the CJO website (surveyed in July 2021) contained at least one-third fewer cases than the number of cases in our database (Table 6), and we limited our analysis to crimes for which we had more than ten cases in either 2015 or 2016 in our database.

We read a random sample of fifty cases for each of these crime types and also manually audited the cases in our random sample to confirm whether these cases had been deleted.


112. This figure of 405 crime types includes both categories of crimes and specific crimes. For example, the category of “production or sale of shoddy products” (生产、销售伪劣商品罪) can be further divided into ten crimes, such as the sale of shoddy products (生产、销售伪劣产品罪) and the sale of fake medicine (生产、销售假药罪). Our dataset includes twenty-two crimes that do not appear in the CJO filter of case types, likely due to censorship but also possibly due to problems with CJO’s parser. The larger number of crime types in CJO than in our database reflects the fact that the CJO filter lists categories of crimes as well as specific crimes; category names likely do not appear in case decisions. In addition, CJO likely includes some crimes that did not appear in the years covered by our dataset.

113. For each case, we extracted the crime for which the defendant was convicted and counted the total number of cases involving each crime. We counted cases involving convictions for multiple crimes toward the total for each crime category involved. CJO appears to do the same in calculating the number of cases for each crime so that a case involving two crimes is counted in each crime category.

114. We read all of the available cases for crimes with fifty or fewer total cases in our database.

115. We checked whether each individual case was available on CJO by searching for the case number and parties’ names or other identifying information. Although our initial comparison of the number of cases available in CJO was done using data from mid-2021, our audit of whether individual cases from our random samples remained online was done in June 2022, meaning that it should reflect any cases that were reposted between mid-2021 and mid-2022.
### Table 6. Comparison of the Number of Cases Available on CJO in July 2021 to Cases in Columbia/UC Database by Crime Type for 2015 and 2016

<table>
<thead>
<tr>
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<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Illegal business activities (非法经营罪)</td>
<td>4,603</td>
<td>1</td>
<td>-100</td>
<td>4,110</td>
<td>4</td>
<td>-100</td>
</tr>
<tr>
<td>Extortion (敲诈勒索罪)</td>
<td>4,152</td>
<td>0</td>
<td>-100</td>
<td>3,752</td>
<td>1</td>
<td>-100</td>
</tr>
<tr>
<td>Illegally producing or selling equipment used for espionage (非法生产、销售间谍专用器材罪)</td>
<td>60</td>
<td>0</td>
<td>-100</td>
<td>17</td>
<td>0</td>
<td>-100</td>
</tr>
<tr>
<td>Picking quarrels and causing trouble (寻衅滋事罪)</td>
<td>23,044</td>
<td>0</td>
<td>-100</td>
<td>22,828</td>
<td>2</td>
<td>-100</td>
</tr>
<tr>
<td>Organizing or using superstitious sects, secret societies, and cults to use superstition to undermine the implementation of the law (组织、利用会道门、邪教组织、利用迷信破坏法律实施罪)</td>
<td>613</td>
<td>0</td>
<td>-100</td>
<td>734</td>
<td>0</td>
<td>-100</td>
</tr>
<tr>
<td>--------------------------------------------------------------------------</td>
<td>-------------------------------------</td>
<td>-------------------</td>
<td>----------</td>
<td>-------------------------------------</td>
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<td>----------</td>
</tr>
<tr>
<td>Stealing or insulting a corpse (盗窃、侮辱尸体罪)</td>
<td>29</td>
<td>0</td>
<td>-100</td>
<td>34</td>
<td>0</td>
<td>-100</td>
</tr>
<tr>
<td>Stealing, damaging, or insulting a corpse, bones, or ashes (盗窃、侮辱、毁坏尸体、尸骨、骨灰罪)</td>
<td>15</td>
<td>0</td>
<td>-100</td>
<td>23</td>
<td>0</td>
<td>-100</td>
</tr>
<tr>
<td>Deceit through impersonation (招摇撞骗罪)</td>
<td>621</td>
<td>4</td>
<td>-99</td>
<td>539</td>
<td>9</td>
<td>-98</td>
</tr>
<tr>
<td>Impersonation of a soldier (冒充军人招摇撞骗罪)</td>
<td>123</td>
<td>4</td>
<td>-97</td>
<td>102</td>
<td>3</td>
<td>-97</td>
</tr>
<tr>
<td>Slander (诽谤罪)</td>
<td>12</td>
<td>0</td>
<td>-100</td>
<td>21</td>
<td>1</td>
<td>-95</td>
</tr>
<tr>
<td>Illegally obtaining state secrets (非法获取国家秘密罪)</td>
<td>48</td>
<td>5</td>
<td>-90</td>
<td>49</td>
<td>6</td>
<td>-88</td>
</tr>
<tr>
<td>Illegal production, sale, or transport of narcotics or smuggling of narcotics (非法生产、买卖、运输、制毒物品、走私制毒物品罪)</td>
<td>191</td>
<td>0</td>
<td>-100</td>
<td>178</td>
<td>23</td>
<td>-87</td>
</tr>
<tr>
<td>---------------------------------------------------------------------------</td>
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<td>------------------</td>
<td>---------</td>
</tr>
<tr>
<td>Intentional release of state secrets (故意泄露国家秘密罪)</td>
<td>12</td>
<td>0</td>
<td>-100</td>
<td>6</td>
<td>1</td>
<td>-83</td>
</tr>
<tr>
<td>Forging or alteration of state securities (伪造、变造国家有价证券罪)</td>
<td>14</td>
<td>4</td>
<td>-71</td>
<td>13</td>
<td>3</td>
<td>-77</td>
</tr>
<tr>
<td>Organizing, leading, or participation in organized crime organizations (组织、领导、参加黑社会性质组织罪)</td>
<td>76</td>
<td>15</td>
<td>-80</td>
<td>49</td>
<td>22</td>
<td>-55</td>
</tr>
<tr>
<td>Retaliation against a witness (打击报复证人罪)</td>
<td>10</td>
<td>6</td>
<td>-40</td>
<td>13</td>
<td>6</td>
<td>-54</td>
</tr>
<tr>
<td>Illegal sale or provision of test questions and answers (非法出售、提供试题、答案罪)</td>
<td>2</td>
<td>0</td>
<td>-100</td>
<td>15</td>
<td>8</td>
<td>-47</td>
</tr>
<tr>
<td>Counterfeiting registered trademarks (假冒注册商标罪)</td>
<td>1,063</td>
<td>598</td>
<td>-44</td>
<td>1,111</td>
<td>593</td>
<td>-46</td>
</tr>
</tbody>
</table>

We also reran our analysis in July 2022 to check for any new categories of cases deleted since July 2021. We focused on crimes for which the number of cases available in June 2022 was ten percent or more below the number available ten months earlier, suggesting a policy of removing such
cases during the course of the year.\textsuperscript{116} Table 7 lists these crimes, the total number of cases decided in 2015 and 2016 available online in August 2021, and the percentage of those cases removed ten months later. We read random samples of fifty cases each of six of the seven crimes that showed ten or more cases on CJO as of August 2021.\textsuperscript{117}

\begin{table}[h]
\centering
\caption{Criminal Cases Deleted Between August 2021 and June 2022}
\begin{tabular}{|l|c|c|}
\hline
Crime & Total Cases Decided in 2015 and 2016 on CJO in August 2021 & Percentage Removed as of June 2022 \\
\hline
Retaliation against a witness (打击报复证人罪) & 12 & 68 \\
Fraudulent activities with financial bills (金融凭证诈骗罪) & 21 & 19 \\
Abducting and trafficking women or children (拐卖妇女、儿童罪) & 1,107 & 15 \\
Smuggling prohibited rare animals and their products (走私珍贵动物、珍贵动物制品罪) & 124 & 14 \\
Buying abducted women or children (收买被拐卖的妇女、儿童罪) & 128 & 11 \\
Illegally hunting or killing rare or endangered wild animals (非法猎捕、杀害珍贵、濒危野生动物) & 525 & 10 \\
Illegally purchasing, transporting, or selling rare or endangered wild animals or their manufactured products (非法收购、运输、出售珍贵、濒危野生动物、珍贵、濒危野生动物制品罪) & 1,029 & 10 \\
\hline
\end{tabular}
\end{table}

\textsuperscript{116} We used a ten percent threshold to compare the number of cases on CJO in June 2022 to the number available ten months earlier because we observed relatively lower percentages of deletions compared to our original analysis in 2021. We examined crimes for which at least ten cases from 2015 and 2016 were available as of 2021.

\textsuperscript{117} The seventh crime, “retaliation against a witness,” was also in the first list of crimes removed. We read a random sample of this group of cases as part of our analysis of crimes listed in Table 6.
C. Additional Steps: Provincial Variation and Random Samples

We selected seven crimes to examine for differences in removals among provinces.\(^\text{118}\) When nearly all cases of a particular crime are deleted, such decisions are likely made at the national level. When removals are concentrated in certain provinces, in contrast, it is likely that removal decisions are being made at the provincial level. For example, Guangdong Province has removed all eighty-four first-instance cases involving the crime of abducting and trafficking women or children, while many other provinces have only deleted a small number of such cases.\(^\text{119}\) Conversely, Henan Province, home to the largest number of trafficking cases in our database, showed more cases on CJQ than we have in our database. Another example of provincial-level removal of cases is the crime of smuggling protected rare animals and their products. Guangdong appears to have deleted two-thirds of the forty-eight cases originally made public. In contrast, all twenty cases decided in Yunnan remained online.\(^\text{120}\)

Most deleted crimes showed no provincial variation: Only crimes related to human trafficking and the trade in wild animals showed differences across provinces. For crimes with no or very few cases remaining online, it appears likely that decisions to delete cases are being made at the national level. For crimes with some cases remaining online, there may be court-level differences in deletion practices.

We also manually audited a random sample of 2,500 criminal cases to check which cases had been deleted. We audited 500 cases from each of the five provinces with the largest decrease in the number of first-instance criminal cases online. We did this to check whether we had missed any categories of deleted cases.

D. Caveats

Our approach is subject to obvious caveats. Most significantly, although close reading of cases provides a general sense of common fact patterns for each crime and allows us to infer possible reasons cases have

\(^{118}\) We looked at variation by province in crimes for which more than twenty cases from 2015 and 2016 combined remained online in August 2022. We include both crimes we identified in our original analysis of deletions as of August 2021 and those for which we identified deletions between 2021 and 2022.

\(^{119}\) Yunnan Province deleted 83% of the trafficking cases. No other province deleted more than 25% of such cases: Hunan Province had the third-highest rate of deletions, with 23% of cases deleted. Of particular note is Shandong, which had the second-largest number of trafficking cases in our database, 196, but deleted only 2 cases.

A second human trafficking-related crime, buying abducted women or children, shows a similar pattern, with Guangdong and Jiangxi deleting all cases and Yunnan deleting 90% of cases, while many other provinces had most cases still online. But the total number of such cases was small (in the single digits) in most provinces.

\(^{120}\) We also observed provincial-level variation in the related crimes of illegally purchasing or transporting rare or endangered wild animals and illegally hunting wild animals.
been deleted, we cannot know for sure why particular categories of cases have been removed. Qualitative work that might help shed light on rationales was not possible due to the COVID-19 pandemic. We cannot explain all removals, and we are at times left guessing at the reason a particular type of case has been deleted. Court judgments also do not necessarily reflect what occurred at trial or the reasons behind court decisions. Nevertheless, our approach of combining analysis of the number of cases publicly available over time with a close reading of cases yields strong clues about why cases are being removed and thus insight into how and why Chinese courts are managing the release of information to the public.

We also do not know who decides which cases are removed or whether such removals are done at the national, provincial, or local level. Informal conversations suggest that although local courts often request that individual cases be removed from CJO, decisions to remove entire categories of cases (or significant portions thereof) are likely made at the national level.

CJO’s case counts may also not be reliable: The system often appears unstable, and there is no way of knowing if case counts accurately reflect the available data. It is possible that some of the reduction in case numbers we observe reflects efforts to eliminate duplicate cases from the CJO site and that some cases are removed to correct errors or to comply with new rules on data privacy. Yet we find such reasons insufficient to explain the near-complete elimination of cases involving certain crimes. By focusing on categories of cases that have been removed, not individual case removals, we believe we are able to identify cases that are being removed due to policy determinations, not the discretionary actions of judges in individual cases.

Removing cases is not the only way CJO may shield criminal cases from observation. CJO’s “filter by crime type” feature omits more than fifty crimes listed in the criminal law, including all crimes listed under the broad category of “harming state security.” These include crimes ranging from subversion and secession to the crimes of illegal border crossing and obstructing the management of drugs. The fact that crimes are not listed on CJO’s filter does not mean that all cases have been removed: We found that cases sometimes remained available on the CJO website even though the crime did not appear on CJO’s filter by crime type. This suggests that CJO prevents searches of some categories of cases rather than remove

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121. SPC rules state that courts should redact all but family names from court decisions, see SPC Internet Publication Regulations, supra note 27, arts. 8–9, but courts posting cases often failed to do so, particularly in the initial years after the CJO website’s launch.

122. We located four crimes for which we had more than ten cases in one year in our dataset but that do not appear on the CJO filter by type of crime. We initially believed that this indicated that these cases had been removed. Our audit of random samples of fifty cases from each of these crimes revealed that most of these cases remained online, with only a few having been removed for each of the four crimes.
cases, may lack the institutional capacity to remove all sensitive cases, or may rely on imperfect algorithms to classify cases.  

IV. Disappeared Cases

Close reading of deleted cases allows us to infer the reasons that categories of cases have been removed. This exercise is speculative, as we were not able to identify who ordered the takedown of specific cases, much less ask them why. But identifying what was deleted offers a solid empirical starting point to reflect on the politics of administrative censorship. Two broad concerns of the courts emerge from our reading of more than 1,200 cases. The first is discomfort with criticism of the courts or the Chinese legal system, both domestically and internationally. Deleted cases are sometimes politically sensitive, although they also sometimes reflect concern about criticism of cases that appear unlikely to touch on core areas of potential political sensitivity. The second is concern with the negative portrayal of social phenomena or other political–legal institutions. In these cases, courts appear particularly concerned with the potential impact of case publication on institutional reputations and relationships.

The two categories of deleted cases are broad, and some deleted cases are in both categories. Other motivations, most notably concerns about litigants’ privacy, may also help to explain case deletions, although we believe privacy concerns offer less explanatory power for the removal of entire categories of crimes from CJO than for individual case deletions. Reading disappeared cases surfaces previously overlooked sensitivities and anxieties for the courts as well as their sometimes-idiosyncratic approach to deleting cases.

A. International and Domestic Scrutiny of the Legal System

Most case removal accounts that have appeared outside of China have focused on cases that touch on topics for which the Chinese legal system has been criticized internationally. Our research confirms that some categories of clearly sensitive cases are being removed. The crime of “picking quarrels and causing trouble,” for example, is at times used to target dissidents, a fact that has been widely covered by international media and human rights organizations. Other cases in this category

123. In informal conversations, we have repeatedly heard that the SPC has a database of all cases, including those not available publicly.

124. In the discussion that follows, all of the cases we discuss have been deleted, unless specifically identified in our discussion as remaining online.

target those organizing protests or petitioning. These cases were virtually entirely deleted from CJO: While our database includes just over 45,000 cases involving this crime from 2015 and 2016, no cases from 2015 or 2016 remained online as of September 2023. Another category of deleted cases involves the crime of “organizing or using superstitious sects, secret societies, and cults to undermine the implementation of the law.” Falun Gong adherents, as well as members of other religious groups that the Chinese state has long targeted, notably the millennial Church of Almighty God (also known as Eastern Lightning), are often prosecuted under this law. Most of the defendants in these cases had previously been sanctioned and often jailed, suggesting the persistence of belief in the face of state repression. All such cases have been deleted. What is


127. At the time we originally examined missing cases (in the summer of 2021), CJO listed two cases involving picking quarrels and causing trouble from 2015 or 2016. As of September 2023, CJO showed no such cases from 2015 or 2016 remaining online, although eleven first-instance cases mentioning the crime from 2021 to 2023 were available on CJO.


most striking in these cases is that they were posted in the first place, given the longstanding international criticism of China for its treatment of the Falun Gong and other religious groups.

Concern with international audiences also likely explains the deletion of cases involving the crime of “counterfeiting registered trademarks.”131 These cases largely involve the counterfeiting of prominent global brands.132 This may explain why “counterfeiting registered trademarks” is the only category of intellectual-property-related crime that our data show declining by thirty percent or more on the CJO site. Yet unlike cases involving picking quarrels and causing trouble or superstitious sects, a significant number of cases involving the counterfeiting of trademarks remain online: Our data show forty-four percent of 2015 cases being removed and forty-six percent of 2016 cases being deleted (Table 6). A close reading reveals that deleted cases involve brands ranging from Nike133 to Michael Kors134 to Head & Shoulders.135 Although most

previously served three years of reeducation through labor for Falun Gong activities, for violating the criminal law; Xinjiang Kuutun City People’s Proc. v. Bu (新疆维吾尔自治区奎屯市人民检察院诉卜某某, 李某某, 张某某), Xinjiang Kuutun City People’s Ct. (新疆维吾尔自治区奎屯市人民法院), (2016)新 4003 刑初 33 号, May 31, 2016 (on file with the Columbia Law Review) (convicting defendants who had previously been convicted for being active members of the Falun Gong).


deletions involve international brands, cases involving Moutai, the leading Chinese spirit, were also deleted. Yet other cases involving prominent international brands remain online, and it is unclear why some are deleted while others remain online. It appears likely that individual courts are independently deciding to remove these cases.

Other deleted cases seem to reflect concern with domestic criticism, including by scholars and legal professionals. The crime of “illegal business activities” has long been criticized within China for being a “pocket crime,” a crime so ill-defined that almost any conduct can fit within it. Although there have been previous reports of the crime being used to target illegal publications, the cases we reviewed mostly involved mundane offenses such as the illegal sale of cigarettes, agricultural

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138. We also saw no difference between cases involving prominent U.S. brands and those from Europe or other jurisdictions. Our audit of a random sample of forty-nine counterfeit trademark cases showed that twenty-one of them had been removed. Provincial-level analysis likewise suggests little difference in the frequency with which these cases are deleted.

139. We examined the number of cases on CJO and our database for each court in Guangdong Province and found widespread differences in whether courts had deleted all or only some counterfeit trademark cases. This finding suggests that decisions on deletions may be made at the court level, at least for some types of crimes.

products, or lottery tickets.\textsuperscript{141} It is likely that the perceived domestic sensitivity to the crime (including criticism of the police for excessive use of the crime) led the courts to remove more than 8,000 of these cases from 2015 and 2016 that had previously been published online.\textsuperscript{142}

Some cases appear to have been deleted out of concern for both domestic and international criticism. Some scholars within China have noted the trend of courts using the crime of extortion to punish petitioners and protestors;\textsuperscript{143} the issue has also attracted international attention.\textsuperscript{144} Nearly 8,000 cases were deleted from the CJO database, with

\begin{quote}
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\begin{quote}
\textsuperscript{142} Our audit confirmed that illegal business cases are being removed: All fifty cases in our random sample were removed from CJO.
\end{quote}

\begin{quote}
\textsuperscript{143} See Cao Bo & Xiao Zhonghua (曹波、肖中华), Yi Qiaozha Lesuo Zui Guizhi Xinfang Xingwei de Jiaoyixue Pipan (以敲诈勒索罪规制信访行为的教义学批判) [Doctrinal Criticism on Regulating Petitions With the Crime of Extortion], Falü Shiyong (法律适用) [J.L. Application], no. 9, 2016, at 43, 43–51 (criticizing the application of antextortion laws to petitioners); Yang Lanchen (杨兰臣), Lun Xinfang Guocheng Zhong Zhengfu Kefou Chengwei Qiaozha Lesuo Zui de Beihairen (论信访过程中政府可否成为敲诈勒索罪的被害人) [On Whether the Government Can Become a Victim of Extortion in the Petitioning Process], 29 Shandong Jingcha Xueyuan Xuebao (山东警察学院学报) [J. Shandong Police Coll.], no. 3, 2017, at 25, 25–31 (discussing how courts limit the people's right to petition through a nebulous definition of extortion); Zhu Jianhua & Li Dingtao (朱建华、李丁涛), Fei Zhengchang Shangfang Xingwei Xingfa Guizhi de Fansi yu Xiansuo—yi 2018–2019 Nianjie de Sanbai'ershi fen Caipan Wenshu wei Yangben (非正常上访行为刑法规制的反思与限缩——以2018–2019年间的320份裁判文书为样本) [Rethinking and Limiting Criminal Law Regulation of Abnormal Petitions—Taking 320 Judgment Documents From 2018 to 2019 as a Sample], 50 Neimenggu Shifan Daxue Xuebao (Zhexue Shehui Kexue Ban) (内蒙古师范大学学报 (哲学社会科学版)) [J. Inner Mong. Normal U. (Phil. & Soc. Sci. Ed.)], no. 6, 2021, at 46, 46–58 (discussing how the government illegitimately and unlawfully regulates protests through the crime of extortion).
\end{quote}

\begin{quote}
\end{quote}
just one case remaining. A review of a random sample of cases reveals that some cases do involve collective action. One case, for example, involved petitioning following a land taking. A second case involved three defendants who were convicted of extortion for organizing a protest complaining about the lack of halal food at a company canteen. But the number of collective action cases was relatively small, with fewer than five in our random sample of fifty cases in this category. Other claims were more routine, including prosecutions for faking traffic accidents to extort money from drivers, extorting money from those accused of a crime, and threatening to reveal details of sexual relationships.

Extortion cases are one example of a phenomenon that we term “sensitivity contagion”: the removal of many routine cases because they fall within the same provision of the criminal law as a small number of sensitive cases. Another example is the crime of picking quarrels and causing trouble, discussed above. Although the crime is sometimes used to target political dissidents or collective protests, our random sample of fifty cases included only three cases that involved petitioners or collective protests against the state. A small number of other cases involved group


146. The protestors were upset after being denied employment because the company said that the company canteen could not provide halal food. See Beijing Mentougou Dist. People’s Proc. v. Yang (北京市门头沟区人民检察院诉杨某、赵某、马某、余某), Beijing Mentougou Dist. People’s Ct. (北京市门头沟区人民法院), (2015)门刑初字第93号, June 1, 2015 (on file with the Columbia Law Review). The case may also have been deleted because it included the words “picking quarrels and causing trouble,” as police initially arrested the protestors for that crime.

147. See, e.g., Hebei Julu Cnty. People’s Proc. v. Li (河北省巨鹿县人民检察院诉李某甲), Hebei Julu Cntr. People’s Ct. (河北省巨鹿县人民法院), (2016)冀0529刑初45号, June 16, 2016 (on file with the Columbia Law Review) (involving defendant’s coconspirator who claimed to have been hit by a passing vehicle).

148. See, e.g., Zhejiang Yongkang City People’s Proc. v. Xiong (浙江省永康市人民检察院诉熊某、袁某、颜某、文某某、张某某), Zhejiang Yongkang City People’s Ct. (浙江省永康市人民法院), (2016)浙0784刑初1394号, Nov. 18, 2016 (on file with the Columbia Law Review) (involving a defendant who kidnapped a heroin dealer and threatened to report him if he did not pay the defendant).


150. See supra note 125 and accompanying text.

151. Our random sample of fifty cases in our dataset revealed no cases that remained online.

fights and thus may have been sensitive simply because of the number of individuals involved. It appears that the courts have determined that it is easier to delete all cases that mention the crime than to determine which picking quarrels cases are actually sensitive—a fact confirmed by the deletion of cases involving other crimes that include mention of the words “picking quarrels and causing trouble,” often in summarizing a defendant’s prior criminal history.

Concern with the image of the legal system and the courts is also evident in the deletion of cases relating to the crime of “retaliation against a witness.” The SPC has worked to encourage greater use of witnesses in trials, particularly since the 2012 revision of the Criminal Procedure Law. Anyone reading the (now-removed) cases relating to retaliation against a


157. It is likely that the most sensitive “picking quarrels and causing trouble” cases—those targeting political dissidents—are never released publicly. Our findings are confirmed by a topic model of 105,000 “picking quarrels and causing trouble” cases, which shows that the vast majority of such cases previously made public were routine.

158. See infra notes 209–211 and accompanying text (discussing the results from our audit of a random sample of criminal cases).
witness can quickly see why many remain reluctant to serve as witnesses. The cases describe in graphic detail a range of abuse against witnesses: stabbings, being covered in chili pepper and forced to drink urine, and having one’s home gate rammed with a car.

B. Social Ills and Institutional Images

Other deleted cases reflect concern with the portrayal of social ills. There is no evidence of domestic or foreign criticism of the crimes of “stealing and insulting a corpse” or “stealing, insulting or causing intentional injury to a corpse, remains, or ashes.” Yet these cases have almost entirely disappeared from CJO, suggesting concern about cases revealing details of social ills that the Party-State has sought to eradicate. Many of the cases exposed the market for freshly buried women’s bodies due to the continued traditional practices of ensuring that a deceased relative has a spouse in the underworld by burying the deceased with a spouse. Other cases involved feuds about the placement of graves


161. See Guangdong Lianjiang City People’s Proc. v. Chen (广东省廉江市人民检察院诉陈某某), Guangdong Lianjiang City People’s Ct. (广东省廉江市人民法院), (2016)粤 0881 刑初 444 号, Oct. 13, 2016 (on file with the Columbia Law Review). Not all such cases were removed, but there appears to be little to distinguish deleted cases from those that remain online. Virtually all of these cases involve violence against witnesses. Nine of the twenty-two cases remained online as of June 2022. Some of the deleted cases also included mention of the crime of “picking quarrels and causing trouble,” perhaps suggesting another reason the cases were deleted.

162. Three of the forty-five cases involving “theft or insulting a corpse” remained online at the time we conducted our audit in 2022. As of September 2023, CJO showed eighteen cases online. Seventeen of these were notices regarding cases not being published; the one other case was misclassified. See Daoqie, Wuru Shiti Zui (盗窃、侮辱尸体罪) [Theft or Insulting a Corpse], CJO, https://perma.cc/JZD5-ENE3 (as updated Sept. 30, 2023). In all three cases of the 2022 audit that then remained online, the crime was not the primary crime charged. In two of the cases that remained online, the defendant was charged with murder as well as theft or insulting a corpse and was thus sentenced to death. All thirty-seven cases involving “stealing, insulting, or causing intentional injury to a corpse, remains, or ashes” that are in our database were deleted from CJO.

causing bad luck. Two deleted cases involved the purchase of a substitute corpse in an effort to avoid a government requirement for cremation. These cases are mixed in with cases in which the decedent died at the defendants’ place of business and the defendants sought to dispose of the body to cover up other criminal conduct, usually prostitution or drug use.

Yet these cases may also be sensitive for an additional reason: Some decisions suggest that the crime of “harming a corpse” is being used to impose light punishment in cases that should be murder cases. The courts may be worried about public criticism for allowing defendants to escape serious punishment. One case in our sample involved a defendant sentenced for the killing of a fellow migrant worker. The court found that the defendant had a “non-organic sleep disorder” that caused him to become unconscious at the time he committed the killing. According to the court, when he awoke and realized what he had done, he decided to chop up the body and dispose of it in a river. Defendant Wang was convicted of insulting a corpse, not murder, and given only three years in prison. The decision noted that the defendant was also ordered to pay

Networks in Rural China, 17 Asian J. Criminology 371 (2022) (discussing the history and current practice of ghost marriages and analyzing two widely reported cases to illustrate the processes involved).


168. Id.

169. Id.

170. Id.
504,866 yuan to the victim’s family, strongly suggesting that the court had managed the case so that payment of compensation was made in exchange for leniency. A subset of cases involving social ills may also be deleted due to concerns that publishing cases online may encourage copycat crimes. Chinese academics and judges have expressed concerns that posting cases online could reveal “criminal techniques.” Cases involving “leading or participating in a black society organization” are generally cases targeting organized criminal activity including prostitution, violence, and gambling.

Other deleted cases suggest courts are concerned about portraying particular state institutions in a negative light and thus perhaps damaging courts’ relationships with such institutions. Virtually all of the more than

171. Id.
173. He Xiaorong, Liu Shude & Yang Jianwen (贺小荣、刘树德、杨建文), “Guanyu Renmin Fayuan zai Hulianwang Gongbu Caipan Wenshu de Guiding” de Lijie yu Shiyong (关于人民法院在互联网公布裁判文书的规定的理解与适用) [Understanding and Application of the “Regulations on the Issuance of Judicial Documents on the Internet”], Renmin Sifa (人民司法) [People’s Judicature], no. 1, 2014, at 23, 28 (calling for courts to delete information from cases that might provide details of “criminal techniques”); Yuan Jinfan & Li Xiang (袁锦凡、李响) Xingshi Caipan Wenshu Jingzhi Shangwang Wenti Yanjiu (刑事裁判文书禁止上网问题研究) [A Study on Prohibitions on Placing Criminal Judgments Online], Xinan Zhengfa Daxue Xuebao (西南政法大学学报) [J. Sw. U. Pol. Sci. & L.], no. 3, 2021, at 100, 100–12 (explaining that revealing special criminal methods or investigative techniques in judgments would undermine judicial order); Caipan Wenshu Wangshang Gongkai Guanli Banfa (裁判文书网上公开管理办法) [Measures for Administering the Online Disclosure of Judgment Documents], Qingliu Xian Renmin Fayuan (清流县人民法院) [People’s Ct. of Qingliu Cnty.] (Aug. 19, 2014), http://www.qlyf.com/index.php?m=content&c=index&a=show&catid=105&id=658 [https://perma.cc/3D3Z-M73V] (stating that judgments may not be published on the internet when they would reveal unique or novel crime methods or investigative techniques).
176. Hunan Qiangyang Cnty. People’s Proc. v. Yi (湖南省祁阳县人民法院诉易某某), Hunan Qiangyang Cnty. People’s Ct. (湖南省祁阳县人民法院), (2016)湘 1121 刑初 176 号, June 30, 2016 (on file with the Columbia Law Review); Shantou Longhu Dist. People’s Proc. v. Hu (广东省汕头市龙湖区人民检察院诉胡某某), Shantou Longhu Dist. People’s Ct. (广东省汕头市龙湖区人民法院), (2015)汕龙法刑初字第 339 号, June 29, 2015 (on file with the Columbia Law Review). Not all such cases were deleted. Our audit of fifty organized crime cases showed that thirty-three had been deleted, but we could not differentiate between those deleted and those that remained online. Likewise, there does not appear to be significant provincial variation regarding the deletion of cases involving organized crime.
200 cases of “impersonating a soldier” were removed. These cases involve fraud committed by those pretending to be in the military, ranging from accepting payment to get someone into the military,\textsuperscript{177} to claiming to be in the military, to offering to obtain military drivers’ licenses.\textsuperscript{178} Many cases involve men claiming to be in the military to seduce women for sex.\textsuperscript{179} The more general crime of “deceit through impersonation” involved similar cases in which individuals pretended to be police or other officials, often to extort fines,\textsuperscript{180} coerce sex workers for sex,\textsuperscript{181} or seize money from drug users.\textsuperscript{182} Both crimes risk suggesting that such conduct is common among the police and military (even if none of the cases involved actual police or members of the military), and perhaps encouraging copycat crimes.\textsuperscript{183}

\begin{itemize}
\item \textsuperscript{182} Guangdong Suixi Cnty. People’s Proc. v. Chen (广东省遂溪县人民检察院诉某某、某某), Guangdong Suixi Cnty. People’s Ct. (广东省遂溪县人民法院), (2016)粤0823刑初123号, Apr. 12, 2016 (on file with the Columbia Law Review).
\item \textsuperscript{183} A leading website affiliated with the military argued that media coverage of “negative phenomena” concerning the military harms its image. See Ma Hongsheng, Guo Majing & Zhang Xi (马宏省、郭马菁、张曦), Quan Meiti Shidai Fangfan Jundui Xingxiang bei Fumian Guanlian Tanxi (全媒体时代防范军队形象被负面关联探析) [An Analysis on Preventing Negative Associations With the Military’s Image in the All-Media Era], Junshi Jizhe (军事记者) [China Mil. Reporter], http://www.81.cn/jsjz/2021-03/05/content_9997246.htm [https://perma.cc/T66U-T4T8] (last visited Oct. 4, 2022). Another report in a military newspaper called for cases of impersonating military personnel to be punished strictly. See Chen Yu & Cao Kun (陈羽、曹昆), Maochong Junren Weifa Fanzui Bixu Yancheng (冒充军人违法犯罪必须严惩) [Impersonating a Soldier Must Be Punished Severely], Renming Wang (人民网) [People’s Daily Online] (Apr. 13, 2020), http://military.people.com.cn/n1/2020/0413/c1011-31671355.html [https://perma.cc/V8J9-WHEA].

In our audit of cases involving the general crime of “deceit through impersonation,” three of fifty cases remained online, one of which was a mislabeled case. There was no discernible difference between the removed cases and the two that remained publicly available, suggesting that the two remaining cases might have been accidentally left online.
The crime of “intentionally revealing state secrets” might suggest core concerns about national security. In fact, almost all of the published cases in this category involve cheating on national exams—in particular, university admissions tests. The cases risk casting the integrity of national exams in a bad light. The removal of the related crimes of illegally selling exam questions and answers and the crime of illegally producing or selling espionage equipment (such as hidden spy cameras used to cheat on exams) likewise reflect concern about public confidence in state-run exams.

Other deleted cases involved direct criticism of the police and other state officials. For example, criminal slander cases (which are one of a small number of categories of criminal cases that are initiated by private litigants, not the Procuratorate) often involve police or officials who file

184. There is a total of seventeen such cases in our dataset, and our audit confirmed that they have all been deleted from CJO.


charges in response to criticism. In a case brought by prison officials, for instance, the court convicted a defendant of slander for alleging he was tortured while in prison. Virtually all these cases were removed.

Our data also reveal removals in response to hot-button issues that have drawn widespread domestic and international discussion and criticism. The crimes listed in Table 7 are all crimes for which the total number of cases available on CJO declined by at least ten percent between 2021 and 2022, meaning these cases continued to be deleted after the initial removal of cases that we observed in 2021. Many of the categories of crimes showing continued deletions involve case types that were partially deleted in 2021 or earlier, including cases involving extortion, illegal business activities, and picking quarrels and causing trouble. Continued deletion of these cases suggests an ongoing process of ensuring that these categories of crimes are removed. A small number of recently deleted cases involved state security or terrorism charges, and were likely never intended to have been posted online.

Six new crimes appeared in our analysis in 2022—crimes for which we did not observe deletions in 2021. Five of the six relate to issues in domestic and international news. Three categories of removed cases involve the sale or hunting of wild animals. There appear to be
inconsistent practices regarding the deletion of these cases, with many deleted cases coming from Yunnan Province, which borders Burma and Vietnam. But the wild animal trade drew renewed attention both within China and internationally following the outbreak of COVID-19. The definition of “wild animal” was also debated and clarified in 2022, and the courts may have removed previously decided cases that were in tension with the new interpretation. Two other crimes related to human

wild animals or their manufactured products (非法收购、运输、出售珍贵、濒危野生动物、珍贵、濒危野生动物制品罪); and smuggling prohibited rare animals and their products (走私珍贵动物、珍贵动物制品罪). See supra Table 7.


199. In 2022, the Supreme People’s Court and Supreme People’s Procuratorate issued a judicial interpretation clarifying that trading domestically raised wild animals is not a crime. Guanyu Banli Pohuai Yesheng Dongwu Ziyuan Xingshi Anjian Shiyong Falu Ruogan
trafficking, an issue that burst into the headlines following reports in Chinese media in early 2022 regarding a trafficked woman who had been found chained in a hut in Jiangsu Province.²⁰⁰

These cases also show significant regional variation, suggesting that the decision to remove cases is being made at the provincial (or lower) level. As of July 2022, the CJO website listed zero “trafficking women and..."
children” cases from Guangdong for the years 2014 to 2016, while our dataset includes eighty-four cases. Yunnan likewise removed most cases, leaving one case online, while our database includes 105 cases from 2014 to 2016. Most other provinces showed a decline of only a small number of cases in this category.

These hot-button issues were the only crime types that showed significant regional variation in deletion practices. For types of crimes in which at least thirty percent of cases were deleted but more than twenty cases remained online, we examined deletions by province. With the exception of the human trafficking and wild animal cases, we found no significant provincial-level differences in deletion practices. This suggests that variation may result not from provincial-level policy determinations but rather from differences in how courts implement or interpret signals and guidance from above. Given how risk-averse courts are, we might also expect there to be significant cross-court learning when it comes to deletions. This learning process may explain the ongoing deletions of some categories of cases.

C. Remaining Puzzles

Many puzzles remain regarding CJO’s deletion practices. CJO only appears to remove a small number of crimes that expose social ills. For example, many forced labor cases remain on the CJO site despite

201. Thirteen documents from Guangdong remain online, but none are decisions in criminal cases—all are sentence modification decisions. See Guaimai Funü, Er tong Zui, Guangdong Sheng (拐卖妇女、儿童罪、广东省) [Trafficking Women and Children, Guangdong Province], CJO, https://perma.cc/AVR2-N8HN (as updated Sept. 30, 2023).

202. As of September 2023, a search for trafficking cases on CJO by province showed seventeen cases available from Yunnan from 2014 to 2016. See Guaimai Funü, Er tong Zui, Yunnan Sheng (拐卖妇女、儿童罪、云南省) [Trafficking Women and Children, Yunnan Province], CJO, https://perma.cc/VSY6-EGS5 (as updated Sept. 30, 2023) (listing the number of trafficking cases by year in CJO). Clicking through the cases, however, reveals that only one case is posted in full. See Yunnan Malipo Cnty. People’s Proc. v. Ran (云南省麻栗坡县人民检察院诉冉某某), Yunnan Malipo Cnty. People’s Ct. (云南省麻栗坡县人民法院), (2016)云 2624 刑初 25 号, June 2, 2016 (on file with the Columbia Law Review). Clicking on the other cases reveals that only the case titles have been posted, not the actual decision.

203. Yunnan Province also appears to delete more cases involving the sale or hunting of wild or endangered animals than do other provinces, perhaps reflecting the greater concentration of such cases in Yunnan.

204. Similarly, we did not find evidence suggesting that cases involving certain types of litigants are more likely to be removed. Scholars writing on the United States have noted that there is less transparency in parts of the legal system that involve impoverished populations. See, e.g., Jay D. Blitzman & Steven F. Kreager, Transparency and Fairness: Open the Doors, 102 Mass. L. Rev. 38, 39 (2021) (arguing that juvenile court proceedings stemming from the cradle-to-prison pipeline in economically depressed areas have been afforded less transparency).

widespread attention to the issue in the domestic and international media and commitments from the central government to reduce such abuses.\textsuperscript{206} Some forced labor cases from 2015 and 2016 involved employers compelling work from those with physical or cognitive disabilities, minor girls, or homeless individuals.\textsuperscript{207} We are left guessing why revealing the trade in dead bodies is more sensitive than cases exposing forced labor and wondering about the trigger that resulted in the dead bodies cases being removed.\textsuperscript{208} Such inconsistencies suggest that decisions to delete categories of cases are likely in response to specific concerns or media coverage, not to a general policy of covering-up social ills. Likewise, isolated corruption cases have been deleted, but many corruption cases remain available on CJO.

Our audit of a random sample of 500 criminal cases from each of 5 provinces, a total of 2,500 cases, suggests that the majority of case deletions are cases that mention one of the 19 deleted crime categories.\textsuperscript{209} Of the

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\textsuperscript{208} Our initial comparison of our data to the CJO case numbers suggested that more than a third of the forced labor cases had been removed. Our subsequent auditing of a random sample of these cases, however, showed that these cases remained online.

\textsuperscript{209} We selected the five provinces where comparing CJO data to our database showed that at least five percent of criminal cases had been deleted: Jiangsu, Gansu, Beijing, Shandong, and Zhejiang. We then manually audited five hundred cases from each province...
2,500 audited cases, 292 cases, or 12%, are no longer available online. Yet 64% of the deleted cases, 187 cases, involve categories of crimes analyzed above or mention such crimes in their description of the facts of the case. For example, 3 deleted cases from Beijing involved routine drunk driving cases. One included the phrase “picking quarrels and causing trouble” and one referred to “extortion.” This suggests that cases are being deleted not just by searching for cases by crime-type, but also through keyword searches for particular crimes. Only 4 of the 68 deleted cases from Beijing made no mention of the categories of crimes that we have identified as being deleted.

Privacy concerns appear to play a lesser role than do the mention of specific deleted crimes. Some deleted cases in the random sample of 2,500 cases included personal information, including the full name, of defendants or witnesses—information that should have been redacted per SPC rules. The inconsistent practice of redacting names reflects the fact the SPC’s policy on redacting litigants’ given names only became clear in 2016; in the early years of CJO, many local courts did not redact names. But these cases make up a relatively small percentage of the cases in the random sample. In cases from Beijing, for example, only one case appeared likely to have been deleted due to concerns about privacy. The
The case included the defendant’s full name, gender, and date of birth, suggesting that the case had not been properly redacted.$^{215}$

$^{215}$ See id. These cases may have been deleted due to their significant social impact. See Beijing Chaoyang Dist. People’s Proc. v. Huo (北京市朝阳区人民检察院诉霍某), Beijing Chaoyang Dist. People’s Ct. (北京市朝阳区人民法院), (2016) 京 0105 刑初 2481 号, Dec. 21, 2016 (concerning harm to telecommunications equipment); Beijing Chaoyang Dist. People’s Proc. v. Zhao (北京市朝阳区人民检察院诉赵某某), Beijing Chaoyang Dist. People’s Ct. (北京市朝阳区人民法院), (2016) 京 0105 刑初 1024 号, Aug. 12, 2016 (on file with the Columbia Law Review) (concerning fraud that involved alleged corruption); Beijing Fengtai Dist. People’s Proc. v. Li (北京市丰台区人民检察院诉李某、杨某), Beijing Fengtai Dist. People’s Ct. (北京市丰台区人民法院), (2016) 京 0106 刑初 1529 号, Nov. 22, 2016 (on file with the Columbia Law Review) (involving the sale of fake medicine). It is also possible these cases were removed at the request of the defendants. We have no explanation for the deletion of the final case, a routine theft case. Beijing Huairou Dist. People’s Proc. v. Guo (北京市怀柔区人民检察院诉郭某某), Beijing Huairou Dist. People’s Ct. (北京市怀柔区人民法院), (2016) 京 0116 刑初 6 号, Jan. 21, 2016 (on file with the Columbia Law Review).

In the cases from Jiangsu, 30 of the 48 deleted cases mentioned crimes listed in Table 6. Ten deleted cases appeared to involve private information about litigants. Eight deletions did not appear to be explained by either privacy concerns or the mention of sensitive crimes. In the cases from Zhejiang, 35 of the 40 cases mentioned deleted crimes while 6 cases appeared to relate to privacy concerns. Only 1 deletion was not explained. In the cases from Shandong, 40 of the 64 deleted cases mentioned one of three deleted crimes: picking quarrels and causing trouble, extortion, or illegal business activities. The outlier in our sample was Gansu, where only 21 of 71 deleted cases mentioned deleted categories of cases. Gansu deleted 27 cases due to apparent privacy concerns; some of these cases mentioned the names of witnesses or the personal identification number of defendants. Twenty-three deletions were not explained by privacy or crime type; these largely involved minor crimes such as dangerous driving or theft. The difference between Gansu and the 3 other provincial-level jurisdictions is likely due to court resources: Gansu courts appeared to have redacted far less information from cases than the 3 eastern and more developed jurisdictions. One of the deleted cases from Shandong appeared to be deleted for an unusual reason: A lawyer in the case was named Li Keqiang, the identical name to China’s then-premier. See Shandong Junan Cnty. People’s Proc. v. Cheng (山东省莒南县人民检察院诉程某某), Shandong Junan Cnty. People’s Ct. (山东省莒南县人民法院), (2016) 鲁 1327 刑初 484 号, Sept. 29, 2016 (on file with the Columbia Law Review). The deletion of this case supports our finding that keyword searches are likely being used to delete cases. A keyword search of the name on CJO turned up no results. Li Keqiang (李克), CJO, https://perma.cc/UES2-D9J8 (as updated June 11, 2023). In all five provinces, some of the unexplained deletions were for dangerous driving or other driving-related crimes. This is likely due to pressure from litigants to remove such cases.

We also conducted an audit of a random sample of 500 theft cases from 2015 from Jiangsu province. We did this because theft was the most commonly prosecuted crime in China at the time. See China Among Countries With Lowest Crime Rate as Violent Crime Plummets Over Past Five Years: Top Procuratorate, Glob. Times (Feb. 15, 2023), https://www.globaltimes.cn/page/202302/1285499.shtml [https://perma.cc/LB9W-ZT5H] (noting that theft topped the list of cases filed and cases prosecuted in China for over forty years but was replaced by drunk driving in 2019). Of these 500 samples theft cases, 32 were no longer available online as of September 2023. Ten of these cases referred to prior convictions or arrests for a deleted crime. Another four deleted cases involved possible sensitive issues—two cases referred to a prior conviction for hooliganism, a crime that was replaced by “picking quarrels and causing trouble” in the 1990s. Jiangsu Zhangjiagang City People’s Proc. v. Hou (江苏省张家港市人民检察院诉侯某), Jiangsu Zhangjiagang City People’s Ct. (江苏省张家港市人民法院), (2015)张刑二初字第 00254 号, July 28, 2015 (on
Taken together, the audits suggest that most deletions are because cases involve or mention one of the crimes listed in Table 6. Of the thirty-seven percent of deleted cases not explained by mention of one of these crimes, at least some appear to relate to privacy concerns, for which there also appears to be some variation in provincial practice. Other deletions may be ad hoc, may occur in response to complaints from individuals, or may reflect local sensitivities.

V. IMPLICATIONS

The removal of cases from the CJO website reflects shifting policies, nationally and in the courts. The initial launch of CJO came at a time when many in the legal system and academia were optimistic about the possibility of deepening legal reforms and about using transparency to address a range of governance challenges. Today, courts are far more risk-averse and reforms are more limited. The courts are following signals from the top, and Party leaders have deemphasized transparency amid new calls for data security, enhanced censorship, and greater emphasis on top-down control over Chinese society.216 The retreat from transparency in the courts is just one manifestation of a broader shift away from a range of governance tools that are more often associated with democratic governance than authoritarianism. China originally embraced a range of these governance tools in the early 2000s, including village elections, public participation in legislative drafting, media oversight, public interest
lawyerizing, and open government litigation. The removal of hundreds of thousands of cases also suggests a heightened level of insecurity about public discussion of court cases within China, despite few examples of the publication of cases online causing problems for or criticism of the courts.

Yet the deletions also suggest a desire by court officials to manage transparency, not abandon it. The number of deleted crimes remains relatively small: fewer than 20 out of more than 450 possible crimes. The fact that so much energy is being put into making cases public and to curating what has been made public, however, also suggests a recognition of the potential of legal information to shape both relationships between the courts and other parts of the Party-State and courts’ role in Chinese society. How authoritarian courts shape narratives about the legal system may be a source of judicial authority, one that prior scholarship on authoritarian courts has largely overlooked.

This Part discusses two implications of our findings. We first examine the mechanism by which China’s courts have made cases public, and specifically, we evaluate how the transparency initiatives of China’s courts resonate with prior scholarship on censorship and information management in China. We discuss the implications of our findings for the conceptualization of information management in authoritarian regimes, highlighting the interconnectedness of censorship, transparency, and surveillance. We then turn from the mechanism of court transparency to the implications of this Essay’s findings for understanding the role of courts in authoritarian states. We discuss how beyond addressing malfeasance in the courts, the embrace of transparency has allowed Chinese courts to curate a narrative of being world-leaders, a narrative with the potential to boost Chinese courts’ image and authority with multiple audiences.

217. See Lorentzen et al., supra note 20, at 184 (noting that the Chinese Communist Party had introduced practices like “holding village elections, reinvigorating legislative bodies, tolerating small-scale public protests, and granting greater journalistic freedom” (citing Jean C. Oi, Realms of Freedom in Post-Mao China, in Realms of Freedom in Modern China 264, 264–84 (William C. Kirby ed., 2004); Andrew J. Nathan, China’s Changing of the Guard: Authoritarian Resilience, J. Democracy, Jan. 2003, at 6, 6–17). One counterexample may be the Party-State’s embrace of laws protecting privacy, where China appears to be following other states in responding to the growth of the digital economy and profusion of personal data online by strengthening legal protections. As Mark Jia shows, enhanced legal protections for privacy may be best understood as a response to popular demands for greater protections within China, not merely an attempt to boost the digital economy, to expand China’s international influence, or to enhance the state’s ability to control data. See Mark Jia, Authoritarian Privacy, 91 U. Chi. L. Rev. (forthcoming 2024) (manuscript at 4–6), https://ssrn.com/abstract=4362527 [https://perma.cc/DLY5-MESW] (“The [P]arty-state’s strategy has been to deploy a mix of policy responsiveness, law-making, and law-enforcement to repair legitimation deficits stemming from data discontent. This is discernible from an array of sources, including speeches, reports, media, cases, laws, regulations, and campaigns . . . .”).

218. See supra Table 7.
A. Authoritarian Information Management

The limited prior scholarship on the online publication of court judgments in China (including some of our own) largely focuses on why China’s courts suddenly shifted to embrace the release of vast amounts of information. Most of the explanations fit with existing instrumentalist explanations for why authoritarian states embrace transparency. This literature is disconnected from the empirical study of censorship, which focuses on the mechanisms used to manage information. Examining CJO suggests that transparency is bi-directional and that transparency, censorship, and surveillance are interconnected parts of a toolkit for information management, each of which can be modulated and manipulated.

CJO’s user interface and the curation of data on the CJO site both borrow from China’s own propaganda practices. Crimes such as picking quarrels and causing trouble that potentially involve protest have been removed, as have speech crimes and cases involving Falun Gong adherents. All of these involve the possibility of collective action and escalation (even if only in a very small number of cases), and potentially international criticism. As with censorship more generally, CJO’s case removals are often reactive and blunt tools. Sensitivity contagion is common, with non-sensitive cases being removed because the crime charged is the same as the crime in cases with more sensitive facts. Concern about exposing social ills is also not novel in China or other socialist countries. Similarly, the interests of state entities, organizations,

219. In many courts, the task of managing the release of information has been given to court propaganda offices, which manage media coverage of the courts and generate positive news about the courts. Bangongting (Xinwenju) (办公厅(新闻局)) [Gen. Off. (News Bureau)], Zuigao Renmin Fayuan (最高人民法院) [Supreme People’s Ct.], https://www.court.gov.cn/jigou/fayuanjigou/zhineng/81.html [https://perma.cc/8735-ZHJV] (last visited Sept. 29, 2023).

220. A related insight from our findings is that just as transparency can encourage more transparency, rollbacks from transparency can encourage other actors to restrict access to information. Scholarship on the United States has noted a similar phenomenon of “cascades of transparency” that can follow from the initial disclosure of information through the Freedom of Information Act. Seth F. Kreimer, The Freedom of Information Act and the Ecology of Transparency, 10 J. Const. L. 1011, 1056 (2008); see also David E. Pozen, The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information, 127 Harv. L. Rev. 512, 624 (2013) (discussing how leaks can encourage further disclosure of information). The sensitivity contagion that we observe is in many ways the mirror image of this phenomenon. Removals of small numbers of sensitive cases appear to lead to wider retreats from transparency, including the deletion of thousands of routine cases simply because they involve the same crime as do a small number of sensitive cases or mention such crimes in summarizing defendants’ prior convictions.

221. Scholarship on East German courts, for example, has noted courts’ concerns with covering up or minimizing social ills. See Inga Markovits, Justice in Luritz: Experiencing Socialist Law in East Germany 122, 150–54 (2010) (explaining that the East German Criminal Code allowed for state supervision of “people whose disorderly lifestyle suggested that at some future point in time they might conceivably be tempted to break the law”); see

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and localities have long played a role in censorship in China, most notably in the longstanding practice of local media only being permitted to write negative stories about events outside their home jurisdictions.\footnote{222}{See Benjamin L. Liebman, Watchdog or Demagogue? The Media in the Chinese Legal System, 105 Colum. L. Rev. 1, 47 (2005) [hereinafter Liebman, Watchdog or Demagogue] (noting that "critical media reports generally expose misdeeds either at a lower administrative rank than or in a jurisdiction other than that in which the report will be published or aired").}

CJO has also embraced a strategy of transparency flooding, a parallel to the information-flooding strategy China deploys in managing the media.\footnote{223}{See Roberts, Censored, supra note 2, at 195, 198–99 (reviewing China’s “information flooding strategies” by evaluating how the government coordinates information as a censorship method).}

In the courts, the volume of cases released obscures holes in what is made available and what is removed. With so much data available for study, scholars, lawyers, and journalists have little reason to focus on the more difficult task of analyzing gaps in the data.\footnote{224}{There have been notable attempts to do so, however, by a few scholars in China. See supra notes 36–37.}

CJO’s poor user interface and often-frustrating search functionality may also be by design.\footnote{225}{Friction is not unique to CJO. In the United States, the federal courts’ public database, PACER, has been widely criticized for its poor user interface, high cost, and limited search functionality. See, e.g., Rachel F. Adler, Andrew Paley, Andong L. Li Zhao, Harper Pack, Sergio Servantez, Adam R. Pah, & Kristian Hammond, A User-Centered Approach to Developing an AI System Analyzing U.S. Federal Court Data, 31 A.I. & L. 547, 548 (2023) (characterizing PACER as having a "non-intuitive user interface"); see also Terri Williams, Out of Pace With Reality? PACER’s Flaws Run Counter to Original Purpose of Increasing Access to Law, ABA J. (Apr. 30, 2020), https://www.abajournal.com/web/article/out-of-pace-with-reality-pacer [https://perma.cc/8YN7-9RGE] (emphasizing the high costs associated with PACER usage and reinforcing the need for free access).}

Creating friction for users seeking information and thus diverting their attention elsewhere has been a key element of China’s approach to censorship, particularly through constructing firewalls limiting access to sources overseas.\footnote{226}{Roberts, Censored, supra note 2, at 2, 147.}

In the courts, the friction comes from CJO itself, with often-inconsistent search results, limits on daily downloads, and a slow user interface. Recent redactions of cases by commercial websites that mirror CJO raise the question of whether data may in the future be so redacted as to limit their effective use.\footnote{227}{Huang Wenxu, supra note 57.}
sensitive cases online, such as a small number of illegal border-crossing cases involving Uyghur defendants, despite others being deleted? Censorship in China has always been arbitrary; the ambiguity about what is permitted is part of the censorship strategy.\textsuperscript{228} For the courts, this ambiguity is written into the law in the form of rules authorizing courts not to post any “other cases not suitable for publication.”\textsuperscript{229}

Recognizing the interconnectedness of transparency and censorship yields three insights. The first is that the plasticity of the idea of transparency means that it is relatively easy for official actors to claim to embrace transparency while at the same time expanding the range of reasons for managing or restricting information disclosure. Much writing on authoritarian transparency has framed such efforts as borrowing an effective governance tool from Western liberal systems and deploying transparency to serve the interests of authoritarian rulers.\textsuperscript{230} Yet Western literature has long recognized that transparency can breed deception and manipulation of the truth by inducing actors to change the reasoning given for their decisions.\textsuperscript{231} Recent writing on transparency in the United States has noted how transparency can be weaponized to serve corporate interests seeking to block government regulation. One irony is that official voices in China, in the courts and in government, began to buy into the narrative of transparency as a cure-all to a range of governance challenges at the same time that scholars and government actors elsewhere were recognizing the limits of transparency as a tool for changing institutions.\textsuperscript{232} This should not be surprising: The goals of transparency efforts in China have been designed to be limited to improving governance and oversight.

\textsuperscript{228} See, e.g., Liebman, Watchdog or Demagogue, supra note 222, at 46–50 (discussing inconsistency in censorship practices and widespread use of informal norms in regulating the media).

\textsuperscript{229} See supra notes 27–28 and accompanying text. The inconsistent practices may also reflect mixed incentives facing court leaders and individual judges, who have faced pressures to put cases online but also do not want to offend powerful litigants or institutions. Removing cases is likely easier than not doing so, particularly when courts are faced with a specific request to remove them.

\textsuperscript{230} See supra notes 3–4 and accompanying text.


and have not aimed to fundamentally reshape governance or society. Although there has been some concern within China that corporate actors might seek to use SPC data in ways that serve private, not public, interests, there has been generally little attention to the potential “dark side” of sunlight, in the courts or elsewhere. The fact that transparency is so widely embraced but also lacks substantive content may be one of the key attractions of the idea of transparency for Chinese authorities. A second insight is that censorship of information increasingly takes place not just via the propaganda department, cybersecurity agency, or social media companies but also through the day-to-day actions of a range of state actors who produce public information. Courts are just one of many institutions that are both producing and censoring information. Information management has become an overarching political goal in China, akin to stability maintenance. Most, if not all, Party-State institutions are now engaged in various forms of information management. More public data means more information managers, each with their own potential agendas. Decisions to censor reflect not just top-down commands but also horizontal learning among frontline bureaucratic actors in response to what is made public and also what is removed. Regional differences are also apparent at times. Concerns about political sensitivity and institutional interests are combining with relatively new worries about data security and the release of personal information in ways that lead state and private actors to be increasingly risk-averse in making information public. This helps to explain the changes to the commercial websites that had been mirroring CJO. Such moves also highlight how concerns about data security and privacy can be used to justify the removal of an almost limitless range of information.

Third, our findings highlight ways in which China’s transparency efforts may be a two-way mirror. Existing literature focuses on how higher-level authorities can use transparency to monitor lower-level wrongdoing. Our findings suggest that transparency platforms can also be an effective tool for monitoring those who seek official information. The SPC has

233. To some degree, the goals of the transparency effort were not entirely clear, beyond a general sense that making cases public would help to curb judicial wrongdoing and boost courts’ legitimacy.
234. See supra note 82 and accompanying text.
235. At least some official writing on transparency in the Chinese courts describes it in technocratic terms, positioning transparency as a tool that, alongside other innovations such as increased use of technology, can provide higher “quality” results. SPC Party Group, Step Forward, supra note 16.
236. See Benjamin L. Liebman, Legal Reform: China’s Law-Stability Paradox, 143 Dædalus, no. 2, 2014, at 96, 102 (analyzing China’s efforts to “maintain stability at all costs” using the legal system to resolve “threats to stability”).
237. In the courts, these frontline bureaucrats are most likely to be the court propaganda officials responsible for removing individual cases.
238. Regional differences have long been evident in censorship of traditional media as well. Liebman, Watchdog or Demagogue, supra note 222, at 44, 93.
published reports of visits to the CJO website by province and by country, celebrating the use of CJO globally.\textsuperscript{239} We do not know what the SPC does with information about how individuals use the site. The fact that all users must register with an authenticated phone number\textsuperscript{240} (and when creating a new account via WeChat, China’s dominant social media platform, must submit a signature, personal identification number, and photo for facial recognition) creates the possibility that any search can be linked back to an individual user. The SPC has stated that such steps are necessary to combat commercial web scraping that reduces the functionality of the website for other users.\textsuperscript{241} But the fact that CJO may have information on every search made on its website may also serve as a deterrent to those seeking information on sensitive topics. Transparency can also be a tool of surveillance.\textsuperscript{242}

Recognizing the interconnectedness of transparency, censorship, and surveillance also carries important implications for scholars seeking to use CJO or other official databases. Scholars must continue to study what is missing, seek to understand how states curate data, and identify pockets of good quality data. What is public and what is not public are likely to be important research questions across a range of legal systems.

B. \textit{Transparency as a Narrative}

Tracking deleted cases adds a layer of complexity to explanations of why Chinese courts embraced transparency in the first place. Prior writing on CJO (including our work) has largely focused on instrumental explanations: Placing cases online was a tool for courts to curb malfeasance and align courts with national policies of embracing data and new technologies as instruments of governance.\textsuperscript{243} Yet Chinese courts are not just borrowing existing tools of information management and applying them to court data to curb corruption or facilitate access to the

\begin{itemize}
\item \textsuperscript{239} See Jiang Peishan et al., supra note 15 (describing the number of publicly available cases as a watermark for the realization of a more transparent judiciary).
\item \textsuperscript{240} Luo Sha, supra note 65.
\item \textsuperscript{241} Id.
\item \textsuperscript{242} The idea that transparency can become a tool of surveillance is addressed by philosopher C. Thi Nguyen, who argues that excessive focus on transparency can become “a form of intrusive monitoring” of state actors that may undermine objectivity. Nguyen, Transparency Is Surveillance, supra note 231, at 333. In contrast, the surveillance we describe moves in the other direction, from state actors to those seeking to use state data.
\item \textsuperscript{243} See, e.g., Liebman et al., supra note 13, at 182 (“[L]arge-scale release of court documents may be viewed … as a way to serve Party goals by curbing wrongdoing in the courts. … [J]udges are more likely to follow the law and less likely to engage in malfeasance when they know their work will be made public.”); Stern et al., Automating Fairness, supra note 18, at 519 (“Overall, then, Chinese courts have tried to use technology in three ways: to improve the courts’ ability to monitor society and defuse social conflict, to improve oversight of judges and reduce malfeasance, and to move toward a world in which judges rely on algorithms to boost efficiency and consistency.”).
\end{itemize}
legal system. Courts are building a narrative surrounding transparency to boost their domestic and international legitimacy.

Creating a narrative that equates the volume of cases made public with fairness may be the most significant accomplishment of the CJO website. The fact that 141 million cases are public is taken as evidence by court officials that the courts are fair. Placing vast numbers of cases

244. On the curation of narrative as a tool of censorship, see Roberts, Censored, supra note 2, at 108 (“The government keeps a much closer watch on the media infrastructure itself than on typical citizens. The propaganda department issues directives to the traditional media ordering them either not to report on content or to promote particular types of content.”). Court leadership has repeatedly noted that transparency is central to boosting public trust in the courts. See, e.g., Bai Wansong (白宛松), Zhou Qiang: Shenru Tuijin Zhihui Fayuan Jianshe, Kaifang Dongtai Touming Biaomin de Yuanguang Sifa Jizhi Jiben Xingcheng (周强:深入推进智慧法院建设、开放动态透明便民的阳光司法机制基本形成) [Zhou Qiang: Further Promote the Construction of Smart Courts in Order to Create the Basis for an Open, Dynamic, Transparent and Convenient Judicial System], Xinhua Wang (新华网) [Xinhua Net] (Mar. 9, 2018), http://www.xinhuanet.com/politics/2018lh/2018-03/09/c_137027491.htm [https://perma.cc/M3AJ-NV2L] (stating that transparency is central to ensuring that "the people can feel fairness and justice in a visible way"). A July 2022 article in People's Daily issued under the byline of the SPC's Communist Party Group made the link explicit, stating that transparency "has become an important window for revealing the fairness of the Chinese judiciary, and a beautiful business card showing the self-confidence of the judicial system" ("成为展示中国司法公正的重要窗口、彰显司法制度自信的靓丽名片"). SPC Party Group, Step Forward, supra note 16.

245. Reports from the courts have repeatedly argued that CJO is the largest database of court judgments in the world and that a central goal of placing cases online is to improve the fairness of the courts and public trust in the legal system. Sun Suqing (孙溯清), Zhongguo Caipan Wenshu Wang Wenshu Zongliang Po Yin Fen Sifa Gongkai Guifan Sifa Xingwei Cujin Sifa Gongzheng (中国裁判文书网文书总量突破1亿份 司法公开规范司法行为促进司法公正) [The Total Number of Documents on China Judgements Online has Exceeded 100 Million—Judicial Openness Has Standardized Judicial Behavior and Promoted Judicial Fairness], Renmin Fayuan Xinwen Chuanmei Zongshe (人民法院新闻传媒总社) [News & Media Ctr of the People's Cts.] (Sept. 1, 2020), https://www.court.gov.cn/zixun-xiangqing-251141.html [https://perma.cc/A5NQ-7XQQ] (citing the number of new cases and user visits as demonstrating the centrality of transparency in boosting efforts to build a fair legal system); see also Dong Jingling (董金玲), Zuigao Fayuan Juban Caipan Wenshu Gongkai Xiangguan Qingkuang Fabu Hui (最高法院举办裁判文书公开相关情况发布会) [The Supreme People’s Court Hold Press Conference on the Situation of the Disclosure of Judgment Documents], Guowuyu xuan Xinwen Bangongshi Wangzhan (国务院新闻办公室网站) [State Council Info. Off. Website] (Aug. 30, 2016), http://www.scio.gov.cn/xwfbh/ghgjxwfbh/xwfbh/44193/Document/1691824/1691824.htm [https://perma.cc/4JPX-5NHT] (citing the number of cases made public as evidence that courts were accepting supervision from all parts of society and that "the masses feel fairness and justice in every judicial case"); Luo Shuzhen (罗书臻), Zhongguo Caipan Wenshu Wang Fangwen Zongliang jin 125 Yi Gi (中国裁判文书网访问总量近125亿次) [Total Number of Visits to China Judgements Online Approaches 12.5 Billion], Zhongguo Fayuan Wang (中国法院网) [China Ct. Net] (Jan. 2, 2018), https://www.chinacourt.org/article/detail/2018/01/id/3144727.html [https://perma.cc/KTT-DVQ2] (reporting that the total number of user visits had exceeded 12.5 billion and that this represented a "new step for the world’s largest case publication platform," with more than 1.8 billion visits coming from outside China); Yu Ziping (于子平), Yong Sifa Gongkai Cujin Sifa Gongzheng (用司法公开促进司法公正) [Use Judicial Openness to Promote Judicial Justice], Renmin Ribao (人民日报) [People’s Daily] (Sept. 10, 2020), https://www.court.gov.cn/zixun-
online has allowed the courts to claim credit for dramatically increasing public information about the courts. Focusing on the total number of cases made public, as well as the billions of visits to the website, has also allowed the courts to claim international leadership in such efforts.\textsuperscript{246} The fact that significant numbers of cases are never made public, or are deleted, is less important than the volume that is made public.\textsuperscript{247} Transparency is a narrative as well as an outcome. Reforming and maintaining the courts’ image becomes as important as other more specific court reform efforts, and publishing cases online and deleting selected cases are both mechanisms for boosting court legitimacy.\textsuperscript{248} The goal of curbing judicial misconduct is served by the fact that any case could be made public, even if some cases never become public or are removed from view.\textsuperscript{249} This shift to focusing on total numbers rather than individual cases serves not just to obscure the examination of individual cases but also

\textsuperscript{246} Although Chinese courts’ focus on the total number made public is unusual, there are resonances with how the U.S. Supreme Court uses low-salience cases to build public trust. Frederick Schauer, Foreword: The Court’s Agenda—and the Nation’s, 120 Harv. L. Rev. 4, 58 (2005).

\textsuperscript{247} The limited role of precedent in the Chinese legal system also may lessen any potential downsides from not making cases public or deleting already-public cases. On precedent in China, see generally Benjamin L. Liebman & Tim Wu, China’s Network Justice, 8 Chi. J. Int’l L. 257, 289 (2007) (discussing China’s civil law system in which higher court cases and legal publications provide advice for judges but do not carry weight as precedent); Note, Chinese Common Law? Guiding Cases and Judicial Reform, 129 Harv. L. Rev. 2213, 2213–17 (2016) (“In 1985, the SPC commenced its now well-established practice of publishing ‘typical cases’ (\textit{dianxin anli}) in its official publication, the \textit{Gazette of the Supreme People’s Court}, alongside other guidance documents, including regulations, speeches, judicial interpretations, and replies.”).

\textsuperscript{248} There is a parallel here to recent writing on performative governance and legality in China. See Iza Ding, Performative Governance, 72 World Pol. 525, 537–42 (2020) (discussing how officials in China engage in performative actions to assuage popular complaints); Alex L. Wang, Symbolic Legitimacy and Chinese Environmental Reform, 48 Env’t L. 699, 726 (2018) (“State actors or opponents of regulation can . . . actively control information in ways that enhance symbolic performance. This can be done through misdirection, contradictory messaging, information overload, censorship, and control of common agents of public supervision, such as media, scholars, lawyers, and civil society actors.”); Rachel Stern, Jeun Kim & Benjamin Liebman, Performing Legality: When and Why Chinese Government Leaders Show Up in Court 2, 4–9 (Aug. 2022) (on file with the \textit{Columbia Law Review}) [hereinafter Stern et al., Performing Legality] (unpublished manuscript) (exploring how Chinese agency leaders “perform legality” when their unit is sued and they are required to attend court). David Pozen has noted the related phenomenon of “transparency theater” in the United States. Pozen, Freedom of Information, supra note 232, at 1120 (describing the Freedom of Information Act as engaging in transparency theater by failing to respond to a rise in government secrecy).

\textsuperscript{249} We make a similar argument regarding the use of artificial intelligence in China’s courts: The threat of computer-assisted monitoring of judges is sufficient to change judicial behavior, regardless of the accuracy of the algorithms used. Stern et al., Automating Fairness, supra note 18, at 519–20.
to form a basis for claiming greater trust and confidence in the courts.\(^{250}\)

And the narrative appears to be working, if recent repetition in English-language literature of the SPC’s claims to be world-leaders in transparency is any indication.\(^{251}\)

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250. Doing so may also divert attention away from other potential areas of reform. This focus on numbers is not entirely new for the courts or for other parts of the Party-State. Annual court work reports are full of statistics meant to highlight court efforts to resolve disputes and to serve Party-State priorities. See, e.g., Zuigao Renmin Fayuan (最高人民法院) [Supreme People’s Ct.], Zuigao Renmin Fayuan Gongzuobao—2023 Nian 3 Yue 7 Ri zai Dishisi Jie Quanguo Renmin Daibiao Dahui Diyi Ci Huiyi Shang (最高人民法院工作报告——2023年3月7日在第十四届全国人民代表大会第一次会议上) [Supreme People’s Court Work Report—Delivered on March 7, 2023, at the First Session of the Fourteenth National People’s Congress], Zhongguo Renda Wang (中国人大网) [Website of Nat’l People’s Cong. of China] (Mar. 17, 2023), http://lianghui.people.com.cn/2023/n1/2023/0317/c452482-32646450.html [https://perma.cc/4T5M-BT2P] (citing the increase in the number of concluded criminal and commercial cases as evidence of greater safety, stability, and high-quality economic development). Within the courts, there is often focus on the percentage of positive votes the annual SPC Work Report receives in the National People’s Congress, and in particular, whether the SPC’s work report earns more positive votes than the report from the Supreme People’s Procuratorate. See, e.g., Zuigao Renmin Fayuan Xinwenju & Renmin Fayuan Xinwen Chuanmei Zongshe (最高人民法院新闻局、人民法院新闻传媒总社) [Supreme People’s Court News Bureau & People’s Court News Media Group], Ganggang Zuigao Renmin Fayuan Gongzuobao Zanchenglü Chuang Xingao! (刚刚，最高人民法院工作报告赞成率创新高!) [Just Now, the Approval Rate for the Supreme People’s Court Work Report Has Reached a New High], Zhongguo Faguan Peixun Wang (中国法官培训网) [Chinese Jud. Training Network] (May 28, 2020), http://peixun.court.gov.cn/index.php?m=content&c=index&a=show&catid=6&id=1608 [https://perma.cc/H5ZC-NYNB] (emphasizing the approval rate of the report by the National People’s Congress as a key metric of success).

251. See, e.g., Björn Ahl & Daniel Sprick, Towards Judicial Transparency in China: The New Public Access Database for Court Decisions, 32 China Info. 3, 4 (2018) (“[T]he online database is a huge innovative step through which the Party-State overtake almost all Western liberal constitutional systems with regard to the accessibility of full-text court decisions.”); Lei Chen et al., supra note 36, at 738 (“Perplexingly, China runs the largest judicial online publicity venue in the world . . . .”); Liu et al., supra note 3, at 235 (“Paradoxically, the largest public judicial online outlet in the world is run by the authoritarian government of China . . . .”); Björn Ahl, Lidong Cai & Chao Xi, Data-Driven Approaches to Studying Chinese Judicial Practice: Opportunities, Challenges, and Issues, China Rev., May 2019, at 1, 2 (“In sheer number terms, this SPC disclosure initiative justifies China’s claim to have overtaken many of the ‘advanced’ legal systems to which it has long looked to for inspiration.”).

One reason this narrative has taken hold is that most other legal systems are far less centralized, and thus are less likely to have one web portal for the entire legal system. Other systems, particularly common law systems, may also produce much less in the way of written decisions for simple cases (for example, misdemeanor convictions). In addition, few other legal systems appear focused on counting the number of documents online. In the United States, for example, there do not appear to be any recent figures listing the total number of documents posted to either PACER, the federal court database, or any state database. One report from nearly a decade ago estimated that PACER hosted more than a billion documents. John G. Roberts, Jr., 2014 Year-End Report on the Federal Judiciary 6 (2014), https://www.supremecourt.gov/publicinfo/year-end/2014year-endreport.pdf [https://perma.cc/Q9T7-MVBL].
Who is the audience for the narrative that China’s courts lead the world in transparency? It is impossible to know for sure, but the courts appear to have multiple audiences for these efforts: Party-State leaders, other state actors, litigants, judges, ordinary people, and international observers. The SPC’s efforts appear to be aimed at maintaining strong relationships with other state actors, painting a generally positive picture of society, and claiming legitimacy from being transparent while managing any potential (real or imagined) downsides resulting from transparency. Some of the deletions from the CJO site reflect concerns with offending central Party-State authorities and preventing collective action. But many of the deletions go beyond these fears and suggest concern with maintaining relationships and building trust among multiple audiences, from other official actors such as the police, procuratorates, and military, to legal academics, litigants, and lawyers.

Literature on U.S. courts has explored the range of audiences for court decisions. Although writing on authoritarian political systems has noted that authoritarian leaders are also accountable to domestic audiences in ways that shape their decisionmaking, scholarship on courts in authoritarian systems has rarely explored the possibility that judges may have multiple audiences for their decisions. When scholars have examined the audiences for authoritarian law, they have largely done so in the context of exploring why judges dare to challenge authoritarian leaders. In contrast, Chinese courts are building a narrative in which the courts’ collective efforts serve the interests of the Party-State and support Party-State efforts to boost state legitimacy domestically and internationally. Court leaders in China make explicit their view that transparency is a route to public trust and that public trust in the courts is

252. See, e.g., Lawrence Baum, Judges and Their Audiences: A Perspective on Judicial Behavior 4 (2006) (arguing that judges consider the opinions of their audience in decisionmaking).


254. See Yasser Kureshi, When Judges Defy Dictators: An Audience-Based Framework to Explain the Emergence of Judicial Assertiveness Against Authoritarian Regimes, 53 Compar. Pol. 233, 235–36 (2021) (“[I]nterests-based scholars cannot explain high-risk judicial activism, where the judiciary risks likely retaliation when acting assertively, but does so anyway.”); see also Raul A. Sanchez Urribi, Courts Between Democracy and Hybrid Authoritarianism: Evidence From the Venezuelan Supreme Court, 36 Law & Soc. Inquiry 854, 860 (2011) (discussing how judges in hybrid regimes may consider audiences in their decisions).

central to maintaining stability, economic development, and the leadership of the Communist Party.\textsuperscript{256}

China is not alone in this effort at creating a narrative about its court system. Judicial mythmaking is common across a range of systems.\textsuperscript{257} But this focus represents a shift for a court system that was historically seen as a laggard internationally.\textsuperscript{258} Today, China’s courts seek areas in which they can claim international primacy and, in so doing, support China’s claim to global leadership.\textsuperscript{259}

Might this effort result in increased judicial authority? The growth and curation of the CJO website suggest that judicial authority may be the product not just of how much space an authoritarian state permits for its courts or what courts do in individual cases but also of how courts manage information and construct a narrative about their performance. Whether this is true empirically is a topic for future scholarship. We have no way at present of measuring whether the SPC’s efforts to construct a narrative about the courts are working—whether confidence in the courts is increasing among the public or the Party-State. Likewise, we have few measures for whether China’s traditionally weak courts can exert more influence within the political–legal system, although there are some signs that the challenges courts face in enforcing their decisions have lessened


\textsuperscript{257} See Laurence H. Tribe, Politicians in Robes, N.Y. Rev. Books (Mar. 12, 2022) (book review), https://www.nybooks.com/articles/2022/03/10/politicians-in-robes-justice-breyer-tribe/ (on file with the Columbia Law Review) (critiquing the myth of American judges as apolitical actors); see also Staton, supra note 8, at 16 (noting public relations efforts of the Mexican courts); Pratap Bhanu Mehta, The Indian Supreme Court and the Art of Democratic Positioning, in Unstable Constitutionalism: Law and Politics in South Asia 233, 234 (Mark Tushnet & Madhav Khosla eds., 2015) (noting Indian courts’ efforts to position themselves and adjust the basis for their legitimacy “in an ongoing democratic discourse” in which judicial myths “seem, for the most part to be dead”).

\textsuperscript{258} See Randall Peerenboom, What Have We Learned About Law and Development? Describing, Predicting, and Assessing Legal Reforms in China, 27 Mich. J. Int’l L. 823, 827 n.14 (2006) (“Turn of the century legal and political reforms were often described in terms of an ‘impact-response’ model . . . . [This reflects] the notion that China’s turn of the century reforms were driven by the sudden realization that China lagged behind Western states in . . . legal-political matters[,] [which] was too simple.”); see also Liebman, Authoritarian Justice in China, supra note 23, at 226 (describing how scholarship on Chinese law has shifted from comparison to the West to recognition of the Chinese legal system as a distinct paradigm).

\textsuperscript{259} See Mark Jia, Special Courts, Global China, 62 Va. J. Int’l L. 559, 621 (2022) (discussing the role of the recent court reform in furthering China’s global ambitions).
in recent years. Yet the significance of courts’ transparency efforts lies not just in measurable outcomes but in the fact that court leadership views constructing this narrative as important to its legitimacy. How the courts manage information after it is released may be a complementary source of authority to what courts decide.

Recognizing that courts may build authority beyond how they decide cases suggests the need for future research on authoritarian legal systems to move beyond its traditional focus on whether courts merely serve as tools of social control or can carve out areas of autonomy in which they push back against the state. Similarly, researchers may wish to expand...


261. For overviews of the literature on authoritarian courts, see Ginsburg & Moustafa, supra note 5, at 1–22 (describing the functions of courts in authoritarian regimes and how these regimes control the courts); Kathryn Hendley, Legal Dualism as a Framework for Analyzing the Role of Law Under Authoritarianism, 18 Ann. Rev. L. & Soc. Sci. 211, 218–21 (2022) (summarizing various approaches to analyzing the role of the law under authoritarianism); Solomon, supra note 12, at 123 (“Underlying all of [the discussed books and studies] and the study of courts in authoritarian states more generally, is a basic dilemma—the idea of empowered judges does not fit with the classic understanding of authoritarianism.”). On the purposes of law and courts in China in particular, see generally Xin He, The Politics of Courts in China, 2 China L. & Soc’y Rev. 129 (2017) (surveying the literature on the relationship between Chinese courts and politics). On judicial innovation in authoritarian states, see generally id. at 139 (“Because of political ambivalence, judicial innovation is also cautious and constrained [in Chinese courts].”); Moustafa, supra note 3, at 282 (providing a “roadmap to the new literature on law and courts in authoritarian regimes”). There are exceptions to this framing in work on China’s courts, with scholars examining the roles courts play beyond the courtroom. See generally Benjamin L. Liebman, A Populist Threat to China’s Courts?, in Chinese Justice: Civil Dispute Resolution in Contemporary China 269 (Margaret Y.K. Woo & Mary E. Gallagher eds., 2011) (“Western literature has devoted extensive attention to the problems in the Chinese legal system . . . from corruption to lack of competence to continued Communist Party intervention . . . . I examine another possibility: that one impediment . . . is that courts are too responsive to protests, petitions, and public opinion.”); Yang Su & Xin He, Street as Courtroom: State Accommodation of Labor Protest in South China, 44 L. & Soc’y Rev. 157, 182 (2010) (“[W]hen the workers cannot vindicate . . . substantive rights through the established institutional channels, the state, afraid of losing control, is extremely uncomfortable enshrining the rights of strike, association, and demonstration. With maintaining social stability as the most serious concern, the state has to accommodate many such labor protests.”).

Recent scholarship on administrative litigation in China has also challenged the citizen-versus-state framework that has dominated analyses of why and when lawsuits are brought against the state in China. See, e.g., Liebman et al., supra note 13, at 179, 190–91
the focus of writing on court legitimacy in authoritarian states from the traditional focus on outcomes in individual cases to how court narratives may shape public perceptions. This reminder to look beyond case decisions in assessing the roles and authority of courts is particularly important at a moment when CJO has generated an explosion of research focused on Chinese court decisions and when qualitative work in China remains difficult.

Chinese courts’ efforts to manage information about court decisions are largely consistent with Party-State efforts to build new narratives, both within and outside of China. Courts’ efforts serve to hide social ills, stake a claim to being a world leader, and perhaps rebrand Chinese society. Courts are using new forms of data not just as a tool of surveillance and control but to mold an image of society and institutions within society. They are playing a collaborative role, not seeking new authority or to challenge other institutions. But courts are unlikely to be the only institutions curating data to boost their image. The potential for conflict between the courts and other institutions may grow as more information becomes public. Already, we are seeing signs of retreat from transparency in the courts. The degree to which the courts move away from such policies may indicate changes in court leadership and a growing emphasis on data security. It may also suggest significant pushback against judicial transparency from both other Party-State institutions and from many within the court system, for whom publishing cases online adds both work and a greater risk of being criticized for their decisions.

Yet to view CJO solely as an example of authoritarian spin would also be a mistake: The goal is managed information, not misinformation. CJO is also changing the practice of law in China in fundamental ways, from increased reliance on case research by lawyers and judges, to increased attention to consistency in how similar cases are adjudicated both across (reporting data suggesting that “a large proportion of administrative lawsuits are private disputes in which litigants are trying to leverage the power and authority of state agencies, rather than efforts to challenge or constrain officials”). But recent writing on Chinese courts has also returned repeatedly to the question of whether China is creating a “dual state,” with courts able to carve out areas of autonomy in their decisions. For one recent example, see Hualing Fu, Duality and China’s Struggle for Legal Autonomy, 116 China Persps., no. 1, 2019, at 3, 6 (arguing that duality allows autonomy to some extent in private law).

262. To date we have seen little evidence of such conflict, other than the removal of categories of cases involving the police and military from CJO. See supra notes 168–173 and accompanying text. In Shanghai, courts’ use of artificial intelligence to track evidence submissions has reportedly led to pushback from procuratorates and the police. Stern et al., Automating Fairness, supra note 18, at 540–42. The idea that authoritarian institutions may compete with each other is not novel, and the proliferation of data management as a source of authority seems likely to accelerate such dynamics. See id. at 540–43 (“[T]echnology that makes things easier for one state agency may create problems for others. Resistance from other agencies can also exacerbate the problem of data silos, where each agency builds a stand-alone data system with little data-sharing or coordination across the Party-State.”).

264. See supra notes 185–186 and accompanying text.
China and within individual courts, to fostering the development of a nascent (and still controlled) market for legal information.265 CJO is transforming legal scholarship in China and internationally, as scholars use CJO data as a tool of discovery and for a wide range of quantitative studies of the Chinese legal system.

CONCLUSION

China’s embrace of judicial transparency fits into an emerging global conversation on how the proliferation of technology and data is transforming authoritarian governance. A growing body of research has focused on the centrality of information to twenty-first-century authoritarian rule.266 One insight that follows from our study is that the management of information and data is also central to the role courts play in such systems. Courts need at least some transparency to support their claim to authority and carefully curate their image. Another insight is that the way institutions shape narratives regarding their behavior may be an important determinant not just of public trust or confidence but of their relationships with other state institutions. Authoritarian states are engaged in multiple overlapping (and perhaps competing) efforts to shape narratives using information management. Understanding this dynamic of multiple information managers may also shed light on how information politics shapes institutional relationships.

Our findings are also relevant to emerging conversations about the importance of judicial data beyond the authoritarian context. China’s embrace and management of judicial information disclosure are the product of China’s system of information management, and the sensitivities revealed may be unique to China. But questions regarding how the rapid proliferation of court data relates to issues such as the privacy of litigants, copycat crimes, national security, and institutional interests—as well as who is able to use judicial data, for what purposes, and for how long—cut across regime type. Courts from many jurisdictions, including Canada,267 France,268 and the

265. See supra notes 16–18 and accompanying text.
266. See supra note 79 and accompanying text.
United Kingdom,269 are confronting issues ranging from whether to permit scraping of court data, to how much personal information should be disclosed in public court opinions, to how to protect commercial trade secrets,270 to how to maintain state secrets.271 Courts everywhere face a radically changing information management landscape. What is made public is important. What happens after information enters the public domain may likewise be central to shaping the role courts play and to judicial authority in a range of legal systems.


270. For a recent discussion of how the European Court of Justice has addressed this issue in light of the General Data Protection Regulation of the European Union, see Peter Oliver, Anonymity in CJEU Cases: The Court Changes Its Approach, EU L. Analysis (Jan. 23, 2023), http://eulawanalysis.blogspot.com/2023/01/ [https://perma.cc/4665-RYN8].

BOOK REVIEW

METHODOLOGY AND INNOVATION IN JURISPRUDENCE

Elucidating Law
Pp. 208. $110.00.

Kevin Tobia*

Jurisprudence aims to identify and explain important features of law. To accomplish this task, what method should one employ? Elucidating Law, a tour de force in “the philosophy of legal philosophy,” develops an instructive account of how philosophers “elucidate law,” which in turn elucidates jurisprudence’s own aims and methods. This Review introduces the book, with emphasis on its discussion of methodology.

Next, the Review proposes complementing methodological clarification with methodological innovation. Jurisprudence should ask some timeless questions, but its methods need not stagnate. Consider that jurisprudence has a long tradition of asserting claims about how “we” understand the law—in which “we” might refer to all people, citizens of a jurisdiction, ordinary people, legal experts, or legal officials. There are now rich empirical literatures that bear on these claims, and methods from “experimental jurisprudence” and related disciplines can assess untested assertions. Today’s jurisprudence can achieve greater rigor by complementing traditional methods with empirical ones.

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INTRODUCTION

To produce knowledge, scholars employ procedures or methods. This is true of any field, including legal philosophy. To investigate the nature of good government, Aristotle began by collecting a sample of constitutions of 158 Greek city-states.\(^1\) To elucidate causation in ordinary life and law, H.L.A. Hart and Tony Honoré marshaled dozens of intuitive, ordinary examples and common law case studies.\(^2\) Ronald Dworkin tested (and rejected) the theory that law depends only on matters of plain historical fact by providing “sample cases” that seem to be “counterexamples” to that view.\(^3\) In a philosophical defense of racial integration as an imperative of justice, Elizabeth Anderson analyzed empirical studies of racial segregation and inequality in the United States, both to test ideal theories of justice and to help generate new conceptions of justice.\(^4\)

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2. See H.L.A. Hart & Tony Honoré, Causation in the Law 130–430 (1985). Some have criticized Hart and Honoré’s intuitive methodology. See, e.g., Jane Stapleton, Law, Causation and Common Sense, 8 Oxford J. Legal Stud. 111, 124 (1988) (reviewing Hart & Honoré, supra) (“Bald assertions of what the ordinary person recognizes as causal connection are also objectionable in theory. [Hart & Honoré] do not provide a discussion of the work of social psychologists who have attempted to examine empirically the attribution of causal connection by ordinary people.”).
4. Elizabeth Anderson, The Imperative of Integration 6–7, 21 (2010) (“In nonideal theory, ideals embody imagined solutions to identified problems in a society. They function as hypotheses, to be tested in experience. . . . Reflection on our experience can give rise to new conceptions of successful conduct.”).
Systematically generating knowledge as part of a discipline requires cultivating robust and rigorous methodologies. If questions are the seeds of a successful discipline, methods are its sustenance. Legal philosophy can grow by asking new questions—and much of modern legal philosophy’s excitement stems from its diversifying questions. But disciplines also flourish with methodological clarification and innovation. This Review explores that methodological possibility for legal philosophy.

This Review begins with Professor Julie Dickson’s *Elucidating Law*, a careful, thoughtful, and exciting contribution to legal philosophy. Following the book, this Review uses “legal philosophy,” “philosophy of law,” and “jurisprudence” interchangeably. *Elucidating Law* considers fundamental questions, including: What are legal philosophy’s goals, and with what methods should legal philosophers address the discipline’s questions? More broadly, the book sketches a modern vision of legal philosophy and its future. Philosophy of law is not dead, and Dickson helpfully clarifies the work that remains and how to do it.

The Review’s Part I summarizes some of *Elucidating Law*’s central ideas. Part II highlights the book’s emphasis on how a legal system’s participants understand law and the relationship between that understanding and legal-philosophical methodology. Part III takes inspiration from the book’s call for innovation in legal philosophy. The Review argues that new empirical methods, especially psychological studies of ordinary people’s understanding of law, provide unique insights

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5. See infra notes 26–34 and accompanying text.

7. Julie Dickson, Elucidating Law (2022) [hereinafter Dickson, Elucidating Law].
8. See id. at 1 n.1.
9. See id. at 1.
that inform central jurisprudential questions. Legal philosophy has a long tradition of asserting claims about how “we” understand the law.\textsuperscript{10} Today, there are rich literatures of empirical work about these understandings across many areas of law and new methods for investigating untested claims. Some of this work flies under the banner of “experimental jurisprudence”;\textsuperscript{11} this and similar empirical approaches provide rich insight into the understandings of legal participants.

Part III also proposes that the experimental jurisprudence model is consistent with Dickson’s proposed “two-stage” model of legal-philosophical inquiry. It concludes by considering two objections to the proposal to methodologically innovate jurisprudence with empirical methods: Legal philosophy is concerned with (only) expert understandings of law,\textsuperscript{12} and legal philosophy is concerned with the nature, not concept, of law.\textsuperscript{13}

Of course, empirical methods are not a panacea and they should not “replace” traditional jurisprudence.\textsuperscript{14} Nor should jurisprudence abandon its longstanding consideration of how “we” understand our law. Instead, jurisprudence should continue the project of methodological clarification and also welcome a project of methodological innovation: Jurisprudence could elucidate these understandings of law more fully with new data and methods. Today’s jurisprudence would achieve greater rigor by complementing traditional methods with new empirical data and methods.\textsuperscript{15}

\textsuperscript{10} See infra Part II.


\textsuperscript{12} See infra section III.C.

\textsuperscript{13} See infra section III.D.

\textsuperscript{14} See, e.g., Kenneth Einar Himma, Replacement Naturalism and the Limits of Experimental Jurisprudence, 14 Jurisprudence 348, 350 (2023) (“[E]xperimental jurisprudence can supplement, but not replace, the traditional philosophical methodology for addressing conceptual questions.”). To my knowledge, no advocate of experimental jurisprudence has proposed that it could or should replace (in total) traditional legal philosophy.

\textsuperscript{15} John Burgess and Silvia De Toffoli’s understanding of “philosophical rigor” is instructive:

Rigor can be seen as an intellectual virtue beyond mathematics. A philosophical argument, for example, is rigorous when it is scrupulous. Outside mathematics, rigor is, however, a much vaguer concept. A rigorous argument can be shared among relevant experts. It is the kind
I. THE AIMS AND METHODS OF JURISPRUDENCE

A. A Broad, Inclusive, Innovative Jurisprudence

*Elucidating Law*’s opening sentences reveal its broad scope: “What do we do when we do legal philosophy? This book explores this question and develops and defends my own answer to it.”16 The book is a tour de force in “the philosophy of legal philosophy.”17 The “philosophy of legal philosophy” includes the study of “methodology”18 and “the way in which legal philosophy ought to be done.”19 But it also includes legal philosophy’s “aims, criteria of success, constraints incumbent upon it, prospects for progress, and indeed how we should determine and understand its very domain and subject matter.”20

For better and for worse, much of today’s legal philosophy has a narrow scope. *Elucidating Law* is an energizing and refreshing contrast, a sweeping but ever-careful meditation on legal philosophy.21 Equally refreshing is its inclusive conception of legal philosophy and call for innovation: “[L]egal philosophy about the nature of law is but one part of legal philosophy and is just one valuable approach amongst many to theorizing about law.”22 Moreover, legal philosophy about the nature of law is not “intellectually or otherwise superior to . . . other sorts of legal philosophy.”23 Rather, it “should be open to, and be willing to explore, various potential complementarities” with other approaches, “including...
those which feature empirical and sociological studies about law.” Legal philosophy “should both exemplify, and champion, an approach to understanding law wherein the questions of legal philosophy multiply, diversify, change, and innovate.” This is a picture of legal philosophy as broad, inclusive, and dynamic.

This egalitarian conception of legal philosophy is in some tension with the book’s emphasis on one jurisprudential question and tradition. The book mostly discusses general jurisprudence, mostly related to the question of the “nature of law,” and mostly in the context of the esteemed figures of twentieth-century Oxford—H.L.A. Hart, Joseph Raz, John Finnis, and Ronald Dworkin. Yet, as Elucidating Law’s broader statements recognize, there are many other (equally) worthy legal-philosophical questions, from the general—“What is law?”—to specific contract, tort.

24. Id. at 52–53.
25. Id.
26. This broad conception is consistent with Dickson’s earlier scholarship, which does not limit legal philosophy to a particular method and includes both descriptive and normative questions. See Julie Dickson, Ours Is a Broad Church: Indirectly Evaluative Legal Philosophy as a Facet of Jurisprudential Inquiry, 6 Jurisprudence 207, 209 (2015) (“For in my view, ours is a broad church, and all theoretical accounts able to illuminate and help us understand any aspect of law’s variegated and complex character are (to invoke a Scottish saying) welcome in the main body o’ the kirk.”). It is also consistent with other views of jurisprudence. See Richard A. Posner, The Problems of Jurisprudence, at xi (1990) (characterizing jurisprudence as “the most fundamental, general, and theoretical plane of analysis of the social phenomenon called law” and noting that “[p]roblems . . . include whether and in what sense law is objective, . . . the meaning of legal justice, . . . and the problematics of interpreting legal texts”); Tobia, Experimental Jurisprudence, supra note 11, at 737 (“In the United States, jurisprudence is ‘mostly synonymous with “philosophy of law” [but there is also] a lingering sense of “jurisprudence” that encompasses high legal theory . . . [—] the elucidation of legal concepts and normative theory from within the discipline of law.”” (first and second alterations in original) (quoting Lawrence Solum, Legal Theory Lexicon 044: Legal Theory, Jurisprudence, and the Philosophy of Law, Legal Theory Lexicon (May 30, 2005), https://solum.typepad.com/legal_theory_lexicon/2005/05/legal_theory_le.html [https://perma.cc/ERE3-CMHW] (last updated May 6, 2018))).
property,\textsuperscript{30} criminal law,\textsuperscript{31} evidence,\textsuperscript{32} interpretation,\textsuperscript{33} tax,\textsuperscript{34} and constitutional law questions,\textsuperscript{35} just to name a few. And there are numerous relevant philosophical traditions—analytic philosophy, critical theory, critical race theory, feminist jurisprudence, comparative approaches, sociolegal studies, and so on.

This tension is less a fault than an inevitability of the project’s ambitious scope. As an expansive meditation on legal philosophy, the book benefits from its concrete examples, and it is natural to draw examples from the scholarly traditions within which one primarily works. The book’s two core examples of its method of “staged inquiry”\textsuperscript{36} are also close to Oxford, concerning the university’s academic dress requirement and tutorial teaching system.\textsuperscript{37} Perhaps this is the way to square the book’s preaching—a magnanimous “broad church” approach to legal philosophy—with its practice—near-exclusive focus on the influential twentieth-century Oxonian tradition about law’s nature. The latter is just one example of legal philosophy, but not one “intellectually or otherwise superior to” various other traditions and questions.\textsuperscript{38}

Yet the book also pushes twentieth-century Oxonian general jurisprudence into different territory, such as the philosophy of race and contract law, and into conversation with other traditions, such as critical legal studies (CLS) and critical race theory. A brief discussion of Patricia Williams’s \textit{The Alchemy of Race and Rights} calls attention to individuals’
differing experiences and understandings of the law. Williams responds from a critical race theory perspective to Peter Gabel’s “pact of the withdrawn selves,” a CLS critique of rights.

Gabel’s critique focuses on the alienation that rights produce. For example, when one purchases groceries from a store clerk, rights constrain us within social roles (clerk and customer, who must respect each other’s rights), inhibiting deeper human connection. The clerk’s scripted “Hi, how are you?” can only be answered with another script, “I’m well; how are you?” To Gabel, rights are alienating.

Williams’s famous response notes that her experience of rights as a Black woman in America is different. While Gabel (a white man) could secure a lease with a loose verbal commitment, contract rights are essential for Williams to secure a lease. Rights bring her closer to others and into society—thereby overcoming alienation. Dickson cites this classic debate as an example of law being experience-sensitive and as a justification for legal-philosophical inquiry to attend to those experience-sensitive features, which are critical to fully elucidating law. A footnote hints that “more remains to be said” about this example, which will be explored in future work.

Again, Elucidating Law’s broad, inclusive, and innovative conception of legal philosophy is welcome. And in parts, the book practices what it preaches, infusing traditional jurisprudence with insights from multiple traditions and perspectives, shining new light on features of law. Beyond the book’s contributions to elucidating law, it is also instructive in elucidating the elucidation of law. It clarifies not just law, but legal philosophy’s aims and methods. These methodological questions are the focus of the remainder of this Review.

B. Elucidating Law

What is it to “elucidate law”? The book begins with four main motifs:

(i) the legal philosopher’s task is to identify, illuminate, and explain aspects of something—law—which . . . exists in our social reality and has a character that legal philosophy attempts to capture;

(ii) law is a multi-faceted and complex phenomenon, different aspects of which can be illuminated from different

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39. See id. at 72–73 (citing Patricia J. Williams, The Alchemy of Race and Rights (1991)).
41. See id.
42. See id. at 1567–68, 1576–77.
44. See Dickson, Elucidating Law, supra note 7, at 72–74.
45. Id. at 73 n.53.
theoretical directions . . . Accordingly, the questions of legal philosophy are various, diverse, arise in and change over time, and its quest is never-ending;

(iii) . . . Elucidation is an active process and involves bringing out from law its most important and significant features and offering illuminating accounts of those features . . . ;

(iv) developing an explanatorily apt understanding of law can, in turn, help to identify, bring into focus, and shed light on other important issues including other important moral issues.\[46\]

Law’s nature, Dickson says, is not like the nature of natural kinds (e.g., “Jupiter”\[47\] or “water”\[48\]). But law nevertheless has a nature, and legal philosophy’s aim is to illuminate that nature from various perspectives. Because law is a social creation, a central legal-philosophical goal is to elucidate the “attitudes, beliefs, actions, intentions, and self-understandings of the human beings whose law it is.”\[49\] All these phenomena “constitute the explanandum for legal philosophers.”\[50\]

The book’s first four chapters develop this picture about law’s social nature and legal philosophy’s aims. The next four chapters develop a more specific proposal for elucidating law: “indirectly evaluative legal philosophy” (IELP). IELP has six tenets: (1) seeking to explain the nature of law and the methodology of inquiring into law’s nature; (2) remaining sensitive to the multiple, diverse, and changing questions of legal philosophy; (3) adopting an “attitude of due wariness’ at the outset of jurisprudential inquiries”; (4) explaining the relevance of and respecting the constraints “imposed by the self-understandings . . . of those who create, administer, and are subject to the law”; (5) limiting the role of moral evaluation until a later stage of jurisprudential inquiry; and (6) engaging in evaluation and reform of law.\[51\]

To elucidate law, Dickson proposes a two-stage method. The first stage involves identifying and analyzing the legal features and concepts that are

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46. Id. at 2–3.
47. Id. at 21.
48. Legal philosophers often offer natural kinds like water as analogues: “Being H\(_2\)O is what makes water \textit{water}. With respect to law, accordingly, to answer the question ‘What is law?’ . . . is to discover what makes all and only instances of law instances of \textit{law} and not something else.” Scott J. Shapiro, Legality 9 (2011). But even natural kinds are not so simple. Philosophers have argued that, chemically, water is not simply H\(_2\)O. See, e.g., Michael Weisberg, Water Is \textit{Not} H\(_2\)O, \textit{in} Philosophy of Chemistry: Synthesis of a New Discipline 337, 337 (Davis Baird, Eric Scerri & Lee McIntyre eds., 2006). Moreover, psychologists have argued that, conceptually, water is not simply H\(_2\)O. See, e.g., Barbara C. Malt, Water Is \textit{Not} H\(_2\)O, 27 Cognitive Psych. 41, 41–43 (1994); Kevin P. Tobia, George E. Newman & Joshua Knobe, Water Is and Is \textit{Not} H\(_2\)O, 35 Mind & Language 183, 183–85 (2020) (“Research across philosophy and psychology suggests that natural kind concepts are associated with both . . . superficial properties[,] and . . . deeper causal properties.” (emphasis omitted)).
49. See Dickson, Elucidating Law, supra note 7, at 121.
50. Id.
51. Id. at 82–83.
important in our law.\textsuperscript{52} This stage requires the philosopher to make indirect evaluative judgments about which features are most important in explaining law and thus worthy of analysis.\textsuperscript{53} The second stage involves direct evaluative judgments about whether those features (or features of those features) are good or bad in light of the first-stage philosophical analysis.\textsuperscript{54}

After Chapter 5 introduces the tenets of IELP, Chapter 6 addresses the significance of the “self-understandings” of members of a legal community (the focus of this Review’s next Part). Chapter 7 elaborates and further defends IELP. Dickson distinguishes between directly and indirectly evaluative judgments. The former “take a stance on[] whether and to what extent some X, or some feature of some X, is good or valuable.”\textsuperscript{55} The latter are judgments that “pick out those aspects or features of law that are important and significant to explain.”\textsuperscript{56} Dickson argues that legal philosophy can (and should) proceed in a staged inquiry: first picking out which features of law are important to explain and only in a later stage determining whether those features are good or bad.\textsuperscript{57}

Chapter 8 reflects more broadly on the nature of legal philosophy, a “broad church.”\textsuperscript{58} IELP, by distinguishing the indirect identification of important features of law from the direct moral evaluation of those features, “enables legal philosophers to approach law and to begin to understand it in a clear, cool-headed, and unromanticized way[,] which lessens the risk of prematurely assuming law to have the moral value, justifiability, and obligatoriness that it claims for itself.”\textsuperscript{59}

II. HOW THOSE LIVING UNDER LAW THINK OF IT

\textit{Elucidating Law’s} Chapter 6 introduces “self-understandings” and defends their role in legal philosophy. It also highlights methodological challenges concerning legal philosophers’ appeal to self-understandings and begins to outline a new methodological path forward.

A. “Our” Intuitions and Self-Understandings

Dickson notes that “[c]laims regarding the importance of how those living under law think of it . . . are frequently made in one form or another by a variety of legal philosophers.”\textsuperscript{60} Philosophers also regularly make

\begin{itemize}
\item \textsuperscript{52} Id. at 140.
\item \textsuperscript{53} See id. at 140–41.
\item \textsuperscript{54} See id.
\item \textsuperscript{55} Id. at 137–38.
\item \textsuperscript{56} Id. at 138.
\item \textsuperscript{57} Id. at 140.
\item \textsuperscript{58} Id. at 161.
\item \textsuperscript{59} Id. at 176.
\item \textsuperscript{60} Id. at 104.
\end{itemize}
claims about the substance of those self-understandings: how those living under law think of it or of some aspect of it. Appeal to “intuitions” or “self-understandings” is a transsubstantive feature of legal philosophy—from scholarship in general jurisprudence to that in specific areas like philosophy of criminal law, tort law, and human rights law.

Appeal to shared intuition is also a longstanding philosophical practice. Consider how Socrates relies on common understandings in Plato’s Republic to illuminate the nature of justice:

Well said, Cephalus, I replied: but as concerning justice, what is it?—to speak the truth and to pay your debts—no more than this? And even to this are there not exceptions? Suppose a friend when in his right mind has deposited arms with me and he asks for them when he is not in his right mind, ought I to give them back to him? No one would say that I ought or that I should be right in doing so, any more than they would say that I ought always to speak the truth to one who is in his condition.

You are quite right, he replied.

But then, I said, speaking the truth and paying your debts is not a correct definition of justice.

61. See John Austin, The Province of Jurisprudence Determined 279 (London, John Murray 1832) (“If [critics of slavery] said that the [slaveowner’s legal] right is pernicious, and that therefore he ought not to have it, they would speak to the purpose. But to dispute the existence or possibility of the right, is to talk absurdly.”); Joseph Raz, Practical Reason and Norms 164 (Oxford Univ. Press 1999) (1975) [hereinafter Raz, Practical Reason] (“We are all sadly familiar with laws which are racially discriminating, which suppress basic individual liberties . . . . It is precisely because such obvious laws are ruled out as non-laws by the theory [of natural law] that it is incorrect. It fails to explain correctly our ordinary concept of law . . . .”); Brian Flanagan & Ivar R. Hannikainen, The Folk Concept of Law: Law Is Intrinsically Moral, 100 Australasian J. Phil. 165, 166 (2022) (“The fact that an account [of the nature of law] does not square with some of our intuitions—that it requires us, say, to deny that the Nazis had law—may count against that account.” (alteration in original) (internal quotation marks omitted) (quoting Shapiro, supra note 48, at 17)); Langlinais & Leiter, supra note 6, at 677 (“[I]n legal philosophy . . . almost everyone, following Hart, employs the method of appealing to intuitions about possible cases to fix the referent of ‘law,’ ‘legal system,’ ‘authority’ and the other concepts that typically interest legal philosophers.”).


63. E.g., Gregory C. Keating, Reasonableness and Rationality in Negligence Theory, 48 Stan. L. Rev. 311, 311 (1996) (“Latent in our ordinary moral consciousness, and manifest in philosophical reflection, is a distinction between reasonableness and rationality.”).

64. See, e.g., Jeremy Waldron, How to Argue for a Universal Claim, 30 Colum. Hum. Rts. L. Rev. 305, 313 (1999) [hereinafter Waldron, Universal Claims] (arguing that “[i]t is not enough that we have considered what Kant said to Fichte,” as intuitions of legal philosophers are to be assessed against what is in fact “out there, in the world”).
Quite correct, Socrates.65

Here, Socrates sets out to explore the nature of justice. To achieve that aim, he employs a common method in (legal) philosophy: He offers a thought experiment ("[s]uppose a friend . . .") and elicits an intuition. Specifically, Socrates observes his own reaction to the thought experiment and asserts that everyone would share his understanding ("[n]o one would say . . "). That assertion gains some support from Cephalus’s agreement ("[y]ou are quite right, he replied"). And Socrates takes that universal understanding to provide insight into the nature of justice.

Legal philosophers appeal to thought experiments and shared understandings for different reasons.66 Some take these intuitions or understandings to reliably track the truth about some mind-independent entity (about, for example, the nature of law as an entity that exists independently of our minds).67 For others, including Dickson, the understandings themselves are part of what the legal philosopher seeks to explain:

The self-understandings of those living under and using law play such a weighty role in legal philosophers’ accounts of aspects of law’s nature . . . because those self-understandings simply are part of the data, or the explanandum, that we seek to explain . . . Law is a human-made social construction. It comes into being, is maintained in being, is applied, executed, altered, etc. by virtue of the attitudes, beliefs, actions, intentions, and self-understandings of human beings whose law it is. All these phenomena, therefore, are precisely what a theory of law attempts to characterize and constitute the explanandum for legal philosophers seeking to identify and explain law’s nature.68

65. See Stephen Stich & Kevin P. Tobia, Experimental Philosophy and the Philosophical Tradition, in A Companion to Experimental Philosophy 5, 6 (Justin Sytsma & Wesley Buckwalter eds., 2016) (emphasis omitted) (internal quotation marks omitted) (quoting Plato, The Republic bk. I (c. 370 B.C.E.), as reprinted and translated in 3 The Dialogues of Plato 1, 6 (Benjamin Jowett trans., London, Oxford Univ. Press 1892)).

66. See Langlinais & Leiter, supra note 6, at 677. For thought experiments about the nature of law, see, e.g., Raz, Practical Reason, supra note 61, at 159–61 (imagining a society of angels and positing that they could have a legal system, even without sanctions); Shapiro, supra note 48, at 407 (introducing a thought experiment about aliens); H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593, 623 (1958) (imagining law operating in a society of invulnerable crabs). For examples concerning legal interpretation, see Lon Fuller, The Case of the Speluncean Explorers, 62 Harv. L. Rev. 616, 616–19 (1948) (introducing a hypothetical case in which five explorers are trapped in a cave and must decide who to kill and eat to survive); Lon Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630, 664 (1958) [hereinafter Fuller, Positivism] (providing "[i]t shall be a misdemeanor . . . to sleep in any railway station" as a hypothetical to test one of Hart’s hypotheses (internal quotation marks omitted)); Frederick Schauer, A Critical Guide to Vehicles in the Park, 83 N.Y.U. L. Rev. 1109, 1124 (2008) (examining Hart’s hypothetical about the indeterminacy of a “no vehicles in the park” rule).

67. See also infra section III.D.

68. Dickson, Elucidating Law, supra note 7, at 121.
Ultimately, “the self-understandings of those who create, administer, and are subject to the law are important ‘data points’ which a successful theory of law must sufficiently take into consideration and do adequate justice to.”69 One of the central aims of legal philosophy is to explain (or elucidate) our own understanding of law. In Dickson’s words: “[A] significant part of what we study in philosophy of law are people’s self-understandings[,] and . . . we have a responsibility in our theories of law to accord adequate emphasis to those self-understandings in terms of law held by those living under and administering it.”70

B. Methodology Concerning How We Think of Our Law

While intuition and legal participants’ understandings are critical to legal philosophy, there remain methodological challenges: What do legal philosophers mean when they appeal to “our” understanding, and are these claims true? Dickson helpfully acknowledges these problems and suggests a path forward through an empirically grounded “active elucidation.”71

1. Methodological Challenges. — Elucidating Law acknowledges some of the critical methodological challenges with legal philosophy’s usual appeal to self-understandings. One arises from a lack of clarity. “[A]lthough frequently made, such claims [about self-understandings] are not always clearly explained or understood.”72 Often, legal philosophers’ assertions about self-understandings come in the first-person plural: our intuitions, our concept of law, law as we all understand, and so on.73 In these claims, “our” and “we” are often ambiguous. These could refer to the intuitions or self-understandings of all persons, members of the legal community, legal experts, legal officials, or perhaps other groupings of persons.

A second methodological challenge concerns interpersonal conflict. “[D]ifferent legal philosophers make different, and often contested, claims about the content of the self-understandings they draw on in constructing their theories.”74 How should we adjudicate among these conflicting proposals?75 And even when there is no seeming conflict, an

69. Id. at 107.
70. Id. at 14.
71. See, e.g., id. at 108 (noting concerns that self-understandings may be indeterminate, inchoate, or divided); id. at 114 (noting that Dickson is “not advocating a wholesale rejection of . . . experimental philosophy techniques in legal philosophy” and that these data are “at best” a “starting point” for legal philosophers).
72. See, e.g., id. at 106 (“[O]thers focus on self-understandings in terms of what we might think of as aspects of the concept of law . . . .”).
73. See, e.g., supra notes 50–52 and accompanying text.
74. Dickson, Elucidating Law, supra note 7, at 107; see also Fuller, Positivism, supra note 66, at 631 (“A rule of law is . . . the command of a sovereign . . . [or] a pattern of official behavior . . . .”).
expert legal philosopher might hold a false belief about the law. 76 When a philosopher offers the intuition that “we” all have, do we all share it? Insofar as law is “experience-sensitive,” 77 these interpersonal conflicts in understanding could also be organized by factors related to such experience sensitivity.

A third methodological concern, less explicit than the first two in Elucidating Law, is intrapersonal conflict. The same philosopher might herself have dueling intuitions, either about a thought experiment or some area of law. For example, perhaps when evaluating a “trolley problem,” one simultaneously feels the pull of conflicting consequentialist and deontological intuitions. 78 Legal philosophers have recognized the pull of intrapersonally conflicting intuitions (e.g., concerning legal consent), asking what “we should do” in the face of them. 79

Intrapersonal and interpersonal conflict in legal philosophy may be underestimated, as philosophy sometimes discourages revealing such conflicts. Regarding intrapersonal conflict, consider that we often associate theories with theorists, and philosophers are more strongly rewarded for offering a full-throated defense of a theory than an ambivalent analysis. Those defending theory X have a stronger incentive to consider, discover, and report intuitions that favor X than to consider and report intuitions that favor not-X. 80 A related interpersonal phenomenon can emerge within entire philosophical subfields or debates. If everyone in the seminar, including the powerful and esteemed professor, purports to share an intuition, there is social pressure to conform one’s own intuitive report. Robert Cummins laments that this phenomenon was so strong with respect to the philosophical debate about “Twin Earth” that philosophers with dissenting intuitions were not

(“How can we tell whether ‘we’ have one concept of law or more than one? If there is more than one, should the theorist select just one, and if so, on what grounds should a selection be made?”).

76. See Dickson, Elucidating Law, supra note 7, at 44.
77. See id. at 72.
80. In the social sciences, “pre-registration” attempts to deal with this problem. Before an experimentalist runs a study to test their theory, the materials, hypotheses, and planned analyses are registered publicly. This helps ensure that “unsuccessful” tests are still made public rather than hidden. To my knowledge, there is no similar mechanism in philosophy. Philosophers have been free to discard thought experiments or intuitions that do not support their theory.
“invited” to some of the debates. This interpersonal phenomenon could be active: The powerful party actively “intuition polices” by disinviting or disregarding those who do not share the standard view. But it also could occur more subtly, as the less powerful parties “intuition self-censor.” In either case, genuine diversity and dissensus can be quieted when mistaken for misunderstanding.

When these phenomena interact with the experience sensitivity recognized by *Elucidating Law*, they could lead to especially pernicious effects for the field of legal philosophy. If members of some minority group M tend not to share intuition I (because of their experience sensitivity) while members of a powerful majority group P tend to have intuition I (because of their experience sensitivity) and the field is composed primarily of group P, then disinviting those who do not share or “understand” I results in excluding members of minority group M. Experience sensitivity is critical to law, as Dickson recognizes. But it is also critical to legal philosophy and its methodology.

A final challenge concerns the source of our understandings about law and the method of generating those understandings. Dickson cautions against taking lay views of law “wholesale.” Legal philosophers differ in how much stock they put in intuition, particularly when weighing a theoretical argument against a counterintuitive conclusion. But few adopt either extreme position: that jurisprudence must perfectly reflect all our intuitions or that there is never a reason for jurisprudence to consider our intuitions. More often, legal-philosophical practice falls between these extremes. Legal philosophers report intuitions or “our” understandings, suggesting that these reports have some relevance, but they also recognize that different theorists may have conflicting intuitions and that some intuitions are more reliable than others. This necessitates developing (a) methods for generating good, reliable, and useful intuitions and (b) methods for evaluating the status of asserted intuitions. This Review’s Part III offers methods from experimental jurisprudence as one path forward. But even if one rejects that suggestion, fundamental methodological questions remain. When legal philosophy asserts “our” understandings of law, should theorists accept those assertions uncritically; if not, what methods should they use to examine the assertions’ truth?

83. Compare Kwame Anthony Appiah, *Experiments in Ethics* 177 (2008) (praising the ability of Jeremy Bentham’s theory to overcome “prevailing moral intuitions of his day about slavery, the subjection of women, homosexuality, and so forth”), with Thomas Nagel, *Mortal Questions*, at x (1979) (“Given a knockdown argument for an intuitively unacceptable conclusion, one should assume there is probably something wrong with the argument that one cannot detect—though it is also possible that the source of the intuition has been misidentified.”).
84. One example Thomas Nagel suggests is to evaluate the intuition’s “source.” See Nagel, supra note 83, at x.
More broadly, how should philosophers adjudicate among disagreeing assertions about self-understandings? Most broadly, what procedures should philosophers use to identify self-understandings—and is there good reason to limit the method to individual armchair introspection?

These methodological challenges are difficult ones for legal philosophy: (1) In philosophical claims about “our” intuitions or understandings “we” share, it is not always clear to whom “our” refers; (2) there are interpersonal intuitive conflicts; (3) there are intrapersonal intuitive conflicts; (4) experience sensitivity can give rise to different interpersonal conflicts associated with demographic factors; and (5) it is not clear what method philosophy uses to ensure that these intuitions are useful or to resolve conflicts between them. While answering these challenges is not simple, acknowledging them is a fundamental first step toward jurisprudential progress.

2. Active Elucidation, "Vox Pop," and Experimental Jurisprudence. — In an answer to the question, “[H]ow should the self-understandings of those living under law be used by legal philosophers in their theories?,” Dickson proposes a model of “active elucidation.” Dickson describes active elucidation, in part, through litotes. “Vox-pop” interviews are the foil—what legal philosophers should avoid. Self-understandings “are not to be lifted wholesale or in a ‘vox-pop’ manner from those holding them.” The legal philosopher should not simply interview people on the street and insert their lay understanding of law directly into law. Some legal theories propose the opposite—that law should incorporate lay understandings of law to foster compliance or promote democracy—but they are not the focus of this Review.

At the same time, Dickson is “not advocating a wholesale rejection of, for example, ‘vox-pop’ or survey data or experimental philosophy techniques in legal philosophy.” Rather, “such data could at best be a starting point, and something for the legal philosopher to work with, interpret, and extrapolate from.” This kind of activity—working with,
interpreting, extrapolating—makes the process of consulting people’s self-understandings “active,” not “passive,” in nature.  

This is a middle-ground approach to experimental jurisprudence. It recognizes that self-understandings are “data”—whether supported by one philosopher’s introspection, dialogue with a layperson, or larger empirical study. Moreover, such data do not alone suffice to resolve broad legal-philosophical debates. “It is the theorist’s task to work with that ‘raw material’ and to extract from it what is most important, significant, and revelatory about the character of law. At times, this may involve generating a more fine-grained understanding and set of distinctions than is contained in the ‘raw material.’” On this view, experimental jurisprudence is a welcome “starting point” temporally—the philosopher looks to empirical data and then builds a philosophical analysis. It is also a “starting point” methodologically—empirical data is not sufficient as legal philosophy; it is but a possible first step.

The next Part defends a stronger conclusion about experimental jurisprudence and related empirical approaches in legal philosophy. As this Part has noted, jurisprudence regularly asserts untested claims about the understandings of all people, ordinary people, legal experts, or legal officials. But the available “data” and methods are no longer the same as in earlier decades. There are now rich empirical literatures that often bear on these claims. Moreover, there are now-standard experimental jurisprudence methods that can assess untested claims. These data and methods, coupled with a process of “active elucidation,” offer a path forward for an innovative and more rigorous jurisprudence.

III. INNOVATING JURISPRUDENCE

Building on Dickson’s call for innovation, this Review proposes a stronger claim: Jurisprudence that asserts how or what “we” understand would be made more rigorous by examining empirical data that bear on the truth of these claims. Section III.A introduces this claim, section III.B elaborates it in the context of Dickson’s two-stage jurisprudential method, and sections III.C and III.D defend it against two objections: that legal

94. See id.
95. See id. at 107.
97. Dickson, Elucidating Law, supra note 7, at 114; see also Langlinais & Leiter, supra note 6, at 678 (“Folk reports about some phenomenon are not infallible guides even to the folk concept of that phenomenon (and for obvious reasons: they can be unreflective, inconsistent, etc.).”).
98. On the meaning of “rigor” here, see generally Burgess & De Tiffoli, supra note 15.
philosophy is only concerned with expert understandings and that legal philosophy examines the nature of law, not concepts of law.

A. Twenty-First Century Jurisprudence

At first, it might seem that legal philosophy and empirical legal study are mutually exclusive categories. They address different questions: The former addresses abstract, general, and often normative questions about what law is or should be in theory, while the latter addresses concrete, specific, and descriptive questions about what law is in practice. And they are methodologically distinct: The former uses “analytical methods” based in theory rather than observation, while the latter uses empirical methods grounded in observation.

We should reject this picture. Historically, philosophers have pursued philosophical questions with empirical methods. And although some influential twentieth-century legal philosophy purports to shift to nonempirical territory, one of the pervasive methods of that philosophy is still an empirical one. As Elucidating Law recognizes, “[c]laims regarding the importance of how those living under law think of it . . . are frequently made in one form or another by a variety of legal philosophers.” When a philosopher offers an intuition in good faith, as a putatively shared response to a thought experiment or as an observation of a legal participant’s understanding of law, they are already engaging in an empirical methodology. The philosopher treats their intuition as a datapoint that is representative of others. As James Macleod put it, “Hart and Honoré, after all, had a sample size of two: Hart and Honoré.” The knowledge produced is not derived from theory but based on observation (e.g., of an observed person’s reaction to the thought experiment); the philosopher is simply the observer and the observed. As such, “experimental jurisprudence,” understood broadly as the use of empirical methods in pursuing questions of legal philosophy, is not new.

The appeal to shared intuition and people’s understanding of law is pervasive in general jurisprudence. It is also critical across specific jurisprudence. For example, tort law often makes reference to ordinary understandings, and legal philosophers and theorists endorse passing the


100. See Dickson, Elucidating Law, supra note 7, at 104.


102. See Tobia, Experimental Jurisprudence, supra note 11, at 736.

103. See, e.g., Waldron, Universal Claims, supra note 64, at 307. Although, sometimes legal philosophers are careful to note that “our intuition” may be limited to “my” intuition. E.g., Joseph Raz, The Institutional Nature of Law, in The Authority of Law: Essays on Law and Morality 103, 105 (2d ed. 2009) (noting that “the assumption of the importance of municipal law . . . reflects our, or at least my, intuitive perception”).
buck from law to ordinary morality or reasoning.\textsuperscript{104} So too for some doctrines and concepts of criminal law\textsuperscript{105} and contract law.\textsuperscript{106} There is nothing new about devoting jurisprudential attention to shared and ordinary understandings of law and legal concepts.

What is new is an explosive growth in the breadth and depth of empirical work related to legal philosophy. In the twenty-first century, philosophers seeking legal participants’ “self-understandings” of law have access to rich data about topics ranging from the nature of law generally\textsuperscript{107} to other topics in general jurisprudence\textsuperscript{108} to topics in philosophy of criminal, human rights, constitutional, international, tort, contract, property, evidence, settlement, and disability law.\textsuperscript{109} Whether or not the traditional approach (armchair reflection) is “empirically sound,”\textsuperscript{110} there

\textsuperscript{104} See, e.g., John Gardner, The Many Faces of the Reasonable Person, 131 Law Q. Rev. 563 (2015), reprinted in John Gardner, Torts and Other Wrongs 271, 285 (2019) ("Understandably, officials of the law are often keen for the law to be in tune with the thinking of ordinary folk."); see also id. at 283 (citing Aristotle, Nicomachean Ethics 1137b, as an example of the argument for passing the buck from law to non-law); Mark A. Geistfeld, Folk Tort Law, in Research Handbook on Private Law Theory 338, 338 (Hanoch Dagan & Benjamin C. Zipursky eds., 2020) ("Folk law—how lay individuals understand legal obligations—is particularly important for tort law.").


\textsuperscript{107} See Raff Donelson, Experimental Approaches to General Jurisprudence, in Advances in Experimental Philosophy of Law 27, 27 (Karolina Prochownik & Stefan Magen eds., 2023) (showing the access to broad legal topics in the twenty-first century).


\textsuperscript{109} See Tobia, Experimental Jurisprudence, supra note 11, at 744–50. The growing field of "experimental jurisprudence" emphasizes the study of people’s intuitions and understandings related to legal philosophical questions and debates. But decades of work in empirical legal studies also provides rich insight into law and participants’ understanding of it. See, e.g., Stewart Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 Am. Socio. Rev. 55, 55–56 (1963) (employing interviews of sixty-eight businessmen and lawyers representing forty-three companies and six law firms to demonstrate "the functions and dysfunctions of using contract to solve exchange problems and the influence of occupational roles on how one assesses whether the benefits of using contract outweigh the costs"). See generally Lawrence M. Friedman, Coming of Age: Law and Society Enters an Exclusive Club, 1 Ann. Rev. L. & Soc. Sci. 1 (2005) (describing "law and society" as a field of legal inquiry and assessing its scope, assumptions, advances, and obstacles).

\textsuperscript{110} See Brian Leiter, Introduction to Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy 1, 4 (2007) (questioning the soundness of this method).
are now growing literatures of relevant empirical data and accessible empirical methods.\textsuperscript{111}

B. \textit{Integrating Experimental Jurisprudence in the Two-Stage Inquiry}

\textit{Elucidating Law}'s critiques of “vox-pop” surveys are instructive: Legal philosophy should not be outsourced to surveys. But most experimental jurisprudence avoids this pitfall, and none explicitly claims that the law is or should be simply whatever laypeople say it is. In fact, much of experimental jurisprudence fits well with \textit{Elucidating Law}'s model of two-staged inquiry. This section elaborates this connection.

First, there is a distinction between a “survey” and an “experiment.” Experimental jurisprudence generally does not present “surveys” in the sense of a simple vox-pop interview or poll. Rather, it presents experiments that randomly assign participants to different treatments in an effort to ascertain subtle features of self-understandings. For example, Markus Kneer and Sacha Bourgeois-Gironde have studied whether severity of an outcome influences the lay concept of intent:\textsuperscript{112} If Joseph performs an action, does our evaluation of whether Joseph intended the action depend on how severe the consequences are? To examine people’s understanding of intent, Kneer and Bourgeois-Gironde presented to some participants a scenario in which the action leads to a minor consequence and to other participants a scenario in which the action leads to a more severe one. That

\textsuperscript{111} For examples of overviews of research related to general jurisprudence, see generally Guilherme da Franca Couto Fernandes de Almeida, Noel Struchiner & Ivar Hannikainen, Rules, in The Cambridge Handbook of Experimental Jurisprudence, supra note 96, https://ssrn.com/abstract=4421183 [https://perma.cc/GA5V-4RSK] (reviewing and commenting on experimental studies that assess how the textual and extra-textual elements of rules influence people’s perception of rules); Donelson, supra note 107 (focusing on how “experimental techniques and empirical findings” can help answer the “questions raised by general jurisprudence scholars”). For overviews of work in causation as it relates to law, see generally Joshua Knobe & Scott Shapiro, Proximate Cause Explained: An Essay in Experimental Jurisprudence, 88 U. Chi. L. Rev. 165 (2021) (using empirical studies to assess how moral considerations influence people’s judgments about proximate cause); David A. Lagnado & Tobias Gerstenberg, Causation in Legal and Moral Reasoning, in The Oxford Handbook of Causal Reasoning 565 (Michael R. Waldmann ed., 2017) (employing research in psychology, philosophy, and cognitive science to explore commonsense understandings of causation). For an overview related to tort law, see generally Jennifer K. Robbennolt & Valerie P. Hans, The Psychology of Tort Law, in 1 Advances in Psychology and Law 249 (Monica K. Miller & Brian H. Bornstein eds., 2016) (describing the contributions of psychology to tort law). For reviews of many other areas, including ordinary understandings of settlement, health and disability law, and consumer contract law, see generally The Cambridge Handbook of Experimental Jurisprudence, supra note 96.

severity manipulation affects attribution of intentionality, suggesting that our understanding of intent is influenced by outcome severity.\textsuperscript{113}

Unlike surveys, experiments more directly clarify (or “elucidate”) features of lay understandings of law. The above example provides evidence that intent has a severity-sensitivity feature. Other experimentalists have uncovered that lay self-understandings of the “reasonable” are predicted by a complex combination of statistical and prescriptive norms,\textsuperscript{114} that lay self-understandings of “consent” track essentialist judgment;\textsuperscript{115} and that lay self-understandings of “law” itself may be sensitive to multiple criteria.\textsuperscript{116} These subtle features could not be easily identified by armchair introspection or a more superficial survey; the experimental method uniquely furthers the deep, philosophical interrogation of self-understandings that Elucidating Law calls for.\textsuperscript{117}

On Dickson’s view, legal philosophizing has both descriptive and evaluative elements. “[T]o elucidate law is not merely to shine a flat and invariant intellectual light upon it, and then passively record those attitudes towards, and beliefs about it, which appear.”\textsuperscript{118} Experimental jurisprudence offers a model of how even stage one (descriptive, not evaluative, philosophical work) is not merely to shine a flat light on lay beliefs. Experimentalists carefully and intentionally design studies that test specific hypotheses that bear on jurisprudential debates. This is an empirical stage of analysis, but it is also a philosophical one. The process of developing thoughtful, important hypotheses and effective experimental design and materials is an active one. This careful descriptive work all precedes the collection of data from laypeople, and thus it generally precedes the normative evaluation of whatever the study reveals.

More broadly, the experimental jurisprudence movement generally aligns with Dickson’s proposed “two-stage” mode of inquiry. Experimental philosophers begin by studying lay understandings of law; only in a later

\textsuperscript{113} See Kneer & Bourgeois-Gironde, supra note 112, at 141–44.

\textsuperscript{114} See Kevin P. Tobia, How People Judge What Is Reasonable, 70 Ala. L. Rev. 293, 316–30 (2018) (testing the hypothesis that “reasonableness is a hybrid judgment, one that is partly statistical and partly prescriptive” as well as the hypothesis that “ordinary reasonableness judgments are systematically intermediate between the relevant average and the ideal”).

\textsuperscript{115} See Roseanna Sommers, Commonsense Consent, 129 Yale L.J. 2292, 2292–95 (2020) [hereinafter Sommers, Commonsense Consent] (conducting a survey-based experiment and finding that respondents judged a “more essential, less material lie” to undermine consent more than a “less essential, more material lie”).

\textsuperscript{116} See Guilherme de Franca Couto Fernandes de Almeida, Noel Struchiner & Ivar Rodriguez Hannikainen, Rule Is a Dual Character Concept, Cognition, art. 105259, Jan. 2023, at 1, 14 (providing empirical support for the theory that people understand the concept of rules as comprising “two independent sets of criteria,” one that is moral and one that is based on the rules’ text).

\textsuperscript{117} Much of experimental jurisprudence uses experiments like these. But other empirical methods could also shine new and unique light, including methods from neuroscience, linguistics, behavioral economics, and computer science.

\textsuperscript{118} Dickson, Elucidating Law, supra note 7, at 9.
stage does the philosopher assess whether those self-understandings are good or bad. In that second stage, the experimental philosopher does not always endorse (normatively) the lay beliefs about law. For example, Roseanna Sommers finds (at stage one) that laypeople evaluate that some agreements induced by deception are nevertheless “consensual,” but Sommers (at stage two) does not recommend that law adopt this conception of consent.119 Kneer and Bourgeois-Gironde find that laypeople (and legal experts) understand “intent” in law in a way that is sensitive to the stakes of the outcome (at stage one)—and they argue that legal intent should exclude this feature (at stage two).120

Inevitably, a theorist’s priors and interests influence the questions they study and the tenor of their typical “stage two” evaluation. Some research programs tend toward critique, while others tend toward a rosier picture of law and ordinary people’s understanding of it. This is true both of traditional jurisprudence and experimental jurisprudence. As examples within the former, consider that both critical legal studies and the New Private Law recognize law’s important connection with ordinary people, despite the approaches’ divergent orientations toward legal doctrine, concepts, and the merit of law’s congruence with ordinary norms and understandings.121 Within experimental jurisprudence, there are certainly research programs that tend towards criticism of lay understanding of law,122 and there may be some future programs that tend to offer more favorable evaluations. These trends—in traditional or experimental jurisprudence—should not necessarily be taken as evidence that theorists are blurring the line between stage one and two. The trends may simply

120. Kneer & Bourgeois-Gironde, supra note 112, at 144 (“[I]t is less evident how the law could adopt a severity-sensitive concept of intentionality without generating large-scale inner-systematic incoherence.”).
121. Compare Robert W. Gordon, Critical Legal Histories, 36 Stan. L. Rev. 57, 109–13 (1984) (noting that law is “among the primary sources of the pictures of order and disorder . . . that ordinary people carry around with them and use in ordering their lives,” but retaining a critical stance towards law’s necessary normative congruence with ordinary understandings), with Andrew S. Gold & Henry E. Smith, Sizing Up Private Law, 70 U. Toronto L.J. 489, 504–05 (2020) (“The set of legal concepts benefits from its congruence with relatively simple local forms of conventional morality. . . . Certainly, contract law can diverge from the morality of promising, just as legislation can go beyond corrective justice. Nevertheless, the ability to draw on simple local morality is an important starting point.”).
122. E.g., Kneer & Bourgeois-Gironde, supra note 112; Markus Kneer, Reasonableness on the Clapham Omnibus: Exploring the Outcome-Sensitive Folk Concept of Reasonable, in Judicial Decision-Making: Integrating Empirical and Theoretical Perspectives 25, 25–26 (Piotr Bystranowski, Bartosz Janik & Maciej Próchnicki, eds. 2022) (“[F]olk judgments concerning the reasonableness of decisions . . . depend strongly on whether they engender positive or negative consequences. . . . This finding is worrisome for the law . . . .”); Markus Kneer & Izabela Skoczeń, Outcome Effects, Moral Luck, and the Hindsight Bias, 232 Cognition, no. 105258, 2023, at 1, 17 (“[T]he downstream effects of the hindsight bias constitute a serious threat to the just adjudication of legal trials, in particular in countries where mens rea is determined by lay juries . . . .”).
reflect that theorists who favor criticism or conceptualism have an eye for questions that bear out these priors.

In sum, experimental jurisprudence is not only complementary to the project of elucidating law; it is precisely the sort of innovation in philosophical method that will help modern philosophers continue to elucidate law. Philosophers’ use of the experimental method has helped unearth interesting features of lay understanding of law—many of which are not observable from individual armchair introspection—setting the stage for a second-stage normative inquiry into the merit of those features.

C. An Objection: Expertise

This section and the next consider common objections to experimental jurisprudence. There are other objections, which cannot be addressed fully here; for example, that experimental jurisprudence materials do not adequately explain to participants the implications of their responses. The objection considered in this section concerns expertise. The objection in the next section concerns the object of study: the nature of law or concepts of law.

Some object to the experimental jurisprudence approach because legal philosophers are not seeking or asserting the common person’s understanding. Instead, the argument goes, legal philosophers seek the understanding of legal experts. This Review offers three responses to this objection.

123. See Himma, supra note 14, at 355 (“A poll is not equipped to tell us much about even what subjects believe about the law unless the questions expose all of the implications of an answer that might affect how they respond.”). Kenneth Himma critiques Lucas Miotto, Guilherme FCF Almeida, and Noel Struchiner, arguing that in the society-of-angels experiment, participants should have been made aware that answering “This is law” entails that “criminalizing harmful acts” is “not a necessary condition for the existence of a legal system.” Himma, supra note 14, at 353–56 (citing Miotto et al., supra note 108). There are two brief responses to Himma’s important critique. First, a follow-up experiment could address this specific hypothesis: When participants are made aware of this implication, do their answers change? If we read Himma’s critique narrowly (about just this specific entailment), the critique is primarily a contribution to experimental jurisprudence, not a global critique of the method. On this interpretation, Himma agrees that lay views are worthy of study and offers a new, testable hypothesis about the source of those lay views. Second, if the objection is very general in nature (i.e., that experimental jurisprudence is useful only if respondents to a thought experiment are made aware of every entailment or a very large set of entailments), it is not clear that the traditional philosophical methodology survives this critique. Moreover, experimentalists may have already conducted a study responsive to Himma’s suggestion: Miotto et al., supra note 108, at 24–26 (study 5). That study describes a society of humans whose local means of enforcement are temporarily disabled by a terrorist attack. The attack’s implications last several years, and without any legal enforcement, crime increases and compliance decreases. Participants tended to agree (rather than disagree) that this society, with no criminal enforcement, “has a legal system.”

124. E.g., Himma, supra note 14, at 368–69 (arguing that background information should be included in the poll questions used in experimental jurisprudence studies, but that such information, which is inherently infused with legal experts’ views, may push
First, as Hart recognized, often the law is itself concerned with the ordinary person’s understanding:

These [ordinary] features need to be brought to light and described in literal terms; for the assertion often made by the courts, especially in England, that it is the plain man’s notions of causation (and not the philosopher’s or the scientist’s) with which the law is concerned, seems to us to be true. At least it is true that the plain man’s causal notions function as a species of basic model in the light of which the courts see the issues before them, and to which they seek analogies, although the issues are often very different in kind and complexity from those that confront the plain man. These notions have very deep roots in all our thinking and in common ideas of when it is just or fair to punish or exact compensation. Hence even lawyers who most wish the law to cut loose from traditional ways of talking about causation concede that at certain points popular conceptions of justice demand attention to them.\(^{125}\)

Legal philosophers aim to elucidate law, and where the law concerns the plain man’s notions (e.g., of causation), legal philosophers should aim to elucidate those ordinary notions.

Second, experimental jurisprudence is not limited to studying ordinary understandings. It can also examine expert understandings. There are different versions of the “expertise defense” of the traditional method—some claiming that the relevant population is legal officials, others claiming that the relevant population is legal philosophers. If legal officials are the relevant source of intuitions or understandings, the dominant twentieth-century method (one philosopher asserting their intuition) also faces a challenge: Most legal philosophers are not legal officials, and it is not immediately clear why legal-philosophical training provides special insight into the understandings of legal officials. But in either case, some extant empirical studies have examined the self-understandings of legal philosophers or legal officials as related to legal philosophical questions.\(^{126}\)

Third, and most importantly, there are methodological reasons for legal philosophers to examine and elucidate ordinary understandings. Even when law does not clearly employ ordinary understandings, it is entangled with ordinary people and ordinary language. As Dickson’s *Elucidating Law* explains, law impacts ordinary people, structuring their respondents in a certain direction); Jiménez, supra note 96 (manuscript at 7–8) (“[T]hose in the driver’s seat regarding legal concepts are legal officials and participants, not laypeople.”).

\(^{125}\) Hart & Honoré, supra note 2, at 2.

\(^{126}\) E.g., Kneer & Bourgeois-Gironde, supra note 112, at 141–44 (studying how French judges understand intentionality in light of the severity of the associated action); Eric Martínez & Kevin Tobia, What Do Law Professors Believe About Law and the Legal Academy?, 112 Geo. L.J. 111, 134–64 (2023) (conducting a survey of law professors’ views on various schools and theories within the legal academy).
families, welfare, employment, freedoms, and responsibilities.\textsuperscript{127} Ordinary people also create law, contributing directly to the production of legal content as jurors deciding mixed questions or as statutory interpreters.\textsuperscript{128} Moreover, any legal expert (whether a legal philosopher or legal official) was once an ordinary person, and it is plausible that they bring some aspects of that ordinary experience and understanding to law. There are similar considerations about legal language: Law is clearly written and expressed with technical language,\textsuperscript{129} but it is not a foreign language to its ordinary citizens. Legal notions—cause, consent, reasonableness, intent—share names with similar notions that we use in ordinary life, whose legal meanings are not entirely distinct from their ordinary ones. Empirical study of ordinary notions and ordinary people can help disentangle the ordinary from the legal. In Dickson’s two-stage terms, in stage one we can begin to unearth facts about ordinary understanding (e.g., of law, cause, consent, or reasonableness), and in stage two we can evaluate (normatively) the value these features have or would have in law.

Beyond the methodological benefits of disentangling the ordinary from the legal, illuminating the ordinary may cast light on the legal. Raz remarked on the connection between legal reasoning and ordinary reasoning:

Legal reasoning is reasoning about the law, or reasoning concerning legal matters. A humble enough activity in which most people regularly engage as part of the conduct of their normal affairs. . . .

. . . Courts’ decisions are legally binding; the decisions of ordinary people are not, at least not normally. But it does not follow that courts reason in a special way. We may—people sometimes do—think of problems which arise before the courts. In reasoning about the merits of the case for plaintiff or defendant we reason—if we reason well—as the courts do, if they reason well. You may say that this is so only because ordinary people imitate the reasoning of the courts. . . .

But that is not legal reasoning. . . . People and courts alike attempt to establish the law, or to establish how—according to law—cases should be settled.\textsuperscript{130}

\textsuperscript{127} See Dickson, Elucidating Law, supra note 7, at 106 (“[S]elf-understandings in terms of law feature in how both non-legally expert individuals living their lives under law, and legal professionals and legal officials, understand aspects of their lives and of the social reality around them.”).


In sum, there is much common ground between “X-Jurists” and defenders of legal expertise who are skeptical of unfiltered “vox-pop” surveys of laypeople. Both agree that neither law nor legal philosophy should, as a general matter, simply adopt whatever the folk say law is. In fact, no scholar of experimental jurisprudence has endorsed such a strong and general claim. But to elucidate law in a way that takes seriously its social reality, we must elucidate ourselves, including our ordinary and expert understandings—and the complex relationship between them.

To take a concrete example, return again to causation. Legal causation is not simply ordinary causation. In fact, one task of legal philosophy is to disentangle the two and elucidate their relationship. To do that, one must also elucidate ordinary causation. Some progress can come from the armchair (i.e., by individual introspection). But not all features of ordinary causation have proven accessible from armchair reflection. A rich literature on causation has shown subtle, complex features of the ordinary notion, some of which map in interesting and illuminating ways onto legal notions. Philosophical insights from empirical studies are not limited to purely descriptive projects. In evaluating some normative questions about law (e.g., How should law’s causation differ from ordinary causation?), it is beneficial to elucidate the relevant ordinary notions (e.g., What is ordinary causation?). To examine how legal causation should differ from ordinary causation, one should understand ordinary causation.

D. A Second Objection: Concept vs. Nature

Another objection begins by claiming that legal philosophy is concerned with natures, not concepts: General jurisprudence studies the nature of law, not our concept of law, and specific jurisprudence studies the nature of legal causation, not our concept of legal causation.

131. I use “X-Jurist” here to refer to scholars working within experimental jurisprudence.
132. See, e.g., Hart & Honoré, supra note 2, at 2.
133. E.g., Knobe & Shapiro, supra note 111, at 209–34.
134. Consider, for example, the project of studying the relation of causation rather than our concept of causation. See generally Michael S. Moore, Causation and Responsibility: An Essay in Law, Morals, and Metaphysics 5 (2009). Many of these projects, however, still rely on intuition or the corresponding concept to shed light on the object of inquiry. See, e.g., id. (“In short, what criminal law and the law of torts mean by ‘cause’ is what we ordinarily mean by ‘cause’ as we explain the world, viz some kind of natural relation. It thus behooves us to enquire after the nature of such a relation.”); id. at 76 n.135 (“[T]he exemption seems to allow those acts which intuition tells us are clearly permissible . . . .” (second alteration in original) (internal quotation marks omitted) (quoting Judith Jarvis Thomson, The Trolley Problem, 94 Yale L.J. 1395, 1408 (1985))); id. at 417 (“[I]ntuitions in this actual case seem persuasive here . . . .”); id. at 445 (discussing “the intuition of difference” (internal quotation marks omitted) (quoting Phil Dowe, Physical Causation 217–18 (2000))); id. at 542 (“Intuitively the first proximate cause doctrine seems correct for this class of cases . . . .”).
Accordingly, it is unclear what relevance empirical studies of ordinary understanding have to jurisprudential inquiries about the metaphysical nature of law. The ordinary understanding of gravity does not reveal the nature of gravity; why expect the ordinary understanding of law to illuminate facts about (real) law?

The concept-versus-nature distinction arises outside of legal-philosophical analysis, including in moral philosophy and epistemology. As Alvin Goldman and Joel Pust explain: “Broadly speaking, views about philosophical analysis may be divided into those that take the targets of such analysis to be in-the-head psychological entities versus outside-the-head non-psychological entities. We shall call the first type of position mentalism and the second extra-mentalism.”

Many of the questions that this section addresses about experimental jurisprudence’s relationship to jurisprudence parallel questions about experimental philosophy’s relationship to philosophy.

Kenneth Himma’s recent critique of experimental jurisprudence draws a similar, but not identical, distinction between “modest conceptual analysis” (Modest CA) and “immodest conceptual analysis” (Immodest CA). Modest CA seeks:

[T]o explicate the nature of a kind as it is constructed—or determined—by our conventions for using the corresponding term together with various shared assumptions about its nature that qualify the application of those conventions in hard cases; the goal is to learn something about the world as our words structure or construct it.

On the other hand, Immodest CA seeks:

[T]o explicate the nature of a kind as determined independently of anything we do with words; the goal is to learn something about the world as it really is, presumably from some sort of objective, or God’s-eye, perspective that is neither conditioned nor limited by anything we do in the world—with or without language.

The remainder of this section considers the nature/concept objection as related to different types of jurisprudential projects: (1) those clearly engaged in mentalism or Modest CA; (2) those clearly engaged in extramentalism or Immodest CA; and (3) those not clearly engaged in either project.

1. Jurisprudence Clearly Engaged in Mentalism or Modest Conceptual Analysis. — First, consider mentalism or Modest CA in jurisprudence. As

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135. Alvin Goldman & Joel Pust, Philosophical Theory and Intuition Evidence, in Rethinking Intuition, supra note 81, at 179, 183 (emphasis omitted).
136. One’s approaches or answers to these questions need not be the same. For example, one might seek the nature of moral truths while simultaneously seeking to understand our concept of law.
137. Himma, supra note 14, at 350 (emphasis omitted).
138. Id. at 351 (emphasis omitted).
this Review has argued, many traditional projects in jurisprudence conduct this type of analysis, seeking to articulate or elucidate our concepts or understandings of law. This is also a significant part of Dickson’s vision for legal philosophy in *Elucidating Law*. For these projects, there may be other objections to experimental jurisprudence (e.g., expertise defenses), but the objection that legal philosophy is concerned only with the natures of mind-independent entities is not relevant.

2. **Jurisprudence Clearly Engaged in Extramentalism or Immodest Conceptual Analysis.** — Jurisprudence’s extramentalist or Immodest CA projects present different methodological issues. As Himma explains:

Though critics frequently bemoan the dependence of traditional conceptual jurisprudence on intuitions, the intuitions [Modest CA] relies on are considerably more reliable than those on which [Immodest CA] relies. While [the former] relies on intuitions that we have about the application-conditions of words because and only because we are competent with those words, [the latter] relies on intuitions we have no reason to trust; we have no reason to believe that our intuitions about the nature of a kind as determined independently of anything we do with words can tell us what it is “really” like[—]that is, what that kind is like independent of the conceptual framework we impose on the world with our semantic conventions to talk about it.

Himma is right: Some apparently “extramentalist” projects rely on intuitions or appeals to our understanding. One essential question for a philosopher engaging in such a project is: What reasons support the claim that your intuition tracks the (mind-independent) truth about (for example) the nature of justice or the nature of legal relations (e.g., causation)? And a second question for a critic of experimental jurisprudence is: Does your answer to the first question not imply that empirical methods also have some usefulness as a complement to individuals’ armchair introspection?

Taking inspiration from the “negative program” in experimental philosophy, experimental jurisprudence can examine the reliability of the relationship between armchair intuition and the truth about the nature of law. The claim that “our” intuitions track the truth is subject to empirical scrutiny. If true, we should not expect significant variation or disagreement among people: If some intuit (only) a proposition, P, and others intuit

139. See supra notes 58–64 and accompanying text.
140. Himma, supra note 14, at 352 (emphasis omitted).
141. See, e.g., Richard W. Wright, Causation: Metaphysics or Intuition?, in Legal, Moral, and Metaphysical Truths: The Philosophy of Michael S. Moore 171, 171 (Kimberly Kessler Ferzan & Stephen J. Morse eds., 2016) (“Although [Michael Moore] purports to disavow . . . reliance on ordinary language usage as an indicator of actual causal relations, his frequent and often heavy reliance on supposed common intuitions to support his arguments belies that disavowal.” (footnotes omitted)).
142. See, e.g., Tania Lombrozo, Explanation, in A Companion to Experimental Philosophy, supra note 65, at 491, 498–99.
(only) its negation, not-P, not all intuitions are truth-tracking.\textsuperscript{143} Similarly, we could examine whether clearly irrelevant factors affect people’s intuitions. If people’s intuitions about case A differ depending on whether they have previously read case B (an “order effect”) and we agree that order of consideration is clearly irrelevant to the truth of an intuition, these order effects would suggest some degree of unreliability in the production of intuitions.\textsuperscript{144}

Another argument for philosophers concerned with the nature of law to attend to experimental evidence comes from Lucas Miotto, Guilherme Almeida, and Noel Struchiner:

One corollary about metaphysical possibility is that whatever is actual is metaphysically possible. We can, therefore, use our background knowledge and experience of actual scenarios as baselines for metaphysical possibility: the closer a given scenario is from the baseline, the more confident we can be that the scenario is metaphysically possible. When several individuals who have some background knowledge and experience of actual legal systems, for example, voice the intuition that an institution described in a hypothetical scenario is a legal system, this gives us a reason to believe in the metaphysical possibility of the described institution. Of course, the reason is defeasible. But in normal conditions, intuitive judgments (especially those that are vastly shared) are not something that can be dismissed in an argumentative exchange; they give us defeasible reason for metaphysical possibility and must be explained away by opponents.\textsuperscript{145}

3. Jurisprudence Whose Aims and Methods Are Unclear or Debatable. —
There is a final category: jurisprudence whose aims and methodology are unclear between the first two options considered. Philosophers propose that some general jurisprudential debate about law’s nature falls into this category. Consider the introduction to the general jurisprudential section from a casebook on the philosophy of law:

For generations, Jurisprudence courses had been organized around the question, “What is Law”—without stopping to consider the fundamental strangeness of that question. What kind of question is it? Legal philosophers are frequently surprisingly coy about the nature of the questions they are asking:

\textsuperscript{143} Importantly, for a person to “intuit a proposition, $P$” is not identical to a person expressing (in a seminar or on a survey) that they agree with $P$. Perhaps the person has made a mistake about the underlying thought experiment or scenario; or perhaps the question presented was ambiguous, misleading or unclear; or perhaps the person was forced to choose between two options (e.g., “$P$” or “$Q$”), neither of which adequately expresses their views. These are just a few reasons that could explain one group’s apparent endorsement of “$P$” and another’s apparent endorsement of “not-$P$” which would not raise a challenge about the incompatibility of people’s intuitions concerning $P$. Thanks to Guilherme Almeida for calling attention to this set of issues.

\textsuperscript{144} See Lombrozo, supra note 142, at 489–99.

\textsuperscript{145} Miotto et al., supra note 108, at 102–03 (emphasis omitted) (footnotes omitted).
is “what is Law?” an inquiry regarding linguistics, sociology, morality, metaphysics—or all of the above? . . . The common response, that theories of law might be “descriptive” in some sense, only leads to further questions. Legal systems, and people’s experiences of them, are extremely complex. Inevitably, a theory about (the nature of) law can capture only a portion of the relevant facts. Once one accepts the importance of selection in constructing social theories, the focus then turns to the basis on which selection occurs.\textsuperscript{146}

There is famous disagreement about the aims and methods of philosophers like Hart and what “descriptive” means as a feature of these projects. Yet it is hard to construe most of these projects as entirely extra-mental, unrelated to our ordinary understanding and concepts. Himma’s critique of experimental jurisprudence proposes that both Hart and Raz were engaged in a Modest CA project focused on our concepts of law.\textsuperscript{147}

Ironically, many of these twentieth-century-jurisprudence figures accuse each other of failing to employ empirical methods in their descriptive projects. Raz accuses Hans Kelson of “merely paying lip-service to what he regards as a proper methodological procedure. He never seriously examined any linguistic evidence and he assumed dogmatically . . . that law is the only social institution using sanctions (other than divine sanctions).”\textsuperscript{148} Dworkin levels a similar critique at one interpretation of Hart’s project: If Hart’s descriptive sociology is really descriptive, then:

\begin{quote}
[N]either Hart nor his descendants have even so much as begun on the lifetime-consuming empirical studies that would be needed. They have not produced an anthill let alone an Everest of data. . . .

. . . If we conceive Hart’s theories—or those of his descendants—as empirical generalizations, we must concede at once that they are also spectacular failures.\textsuperscript{149}
\end{quote}

\begin{flushright}
\textsuperscript{146} Stephen E. Gottlieb, Brian H. Bix, Timothy D. Lytton & Robin L. West, Jurisprudence: Cases and Materials: An Introduction to the Philosophy of Law and Its Applications 103 (2d ed. 2006).
\textsuperscript{147} Himma, supra note 14, at 352 n.8 (“Hart clearly understands himself to be doing what we would now describe as [Modest CA]. The same is true of Joseph Raz.”). Moreover, argues Himma, “[i]f there are any prominent theorists who explicitly endorse and deploy [Immodest CA], I am unfamiliar with their work.” Id.
\textsuperscript{148} Joseph Raz, The Problem About the Nature of Law, 3 Contemp. Phil. 107 (1982), reprinted in Ethics in the Public Domain, supra note 130, at 195, 201; see also Hans Kelsen, General Theory of Law and State 4 (John H. Wigmore, Jerome Hall, Lon L. Fuller, George W. Goble, Edward A. Hogan, Josef L. Kuntz, Edwin W. Patterson & Max Rheinstein eds., Anders Wedberg trans., 1945) (“Any attempt to define a concept must take for its starting-point the common usage of the word . . . . In defining the concept of law, we must begin by examining . . . [whether] social phenomena generally called ‘law’ present a common characteristic distinguishing them from other social phenomena . . . .”).
\end{flushright}
More recent scholarship critiques general jurisprudence more broadly: “[T]he question whether . . . [people have a coherent and determinate set of intuitions about law] is an empirical one, and none of the participants in the debate have undertaken any proper empirical research to establish their views.”

This description of jurisprudence, as “descriptive” but concerned with something “deeper” about “law’s nature,” beyond just our ordinary intuitions, is opaque but also common. Hilary Nye provides an excellent overview of this possibility as jurisprudence that is “descriptive” in some sense but nevertheless seems to have some “immodest” or thicker metaphysical ambitions:

Theorists usually say or imply that the truths about law they seek are not social-scientific observations about judicial practices or other observable phenomena. Their aim is something deeper—the nature of law. Further, many theorists claim that concepts can help us understand the nature of law. We use the method of conceptual analysis to provide insight not into our concept, but into the nature of the thing the concept represents.\textsuperscript{151}

Moreover, notes Nye, on this picture “our intuitions” and “conceptual analysis” are taken to provide insight into the nature of the thing we study.\textsuperscript{152} Scott Shapiro offers a similar view of Hart (that conceptual analysis can determine the “nature” of law).\textsuperscript{153} And some of Raz’s statements seem to fit within this picture.\textsuperscript{154}

This Review essay cannot sort out all of these methodological issues in traditional jurisprudence. But return to the broader context of the argument here. Some have objected to experimental jurisprudence because jurisprudence studies natures, not concepts. If this means that jurisprudence uses intuitions only in extramental or immodest conceptual analysis, there is still a role for experimental jurisprudence.\textsuperscript{155} Moreover, much jurisprudence engages in straightforward mentalist or

\begin{itemize}
\item \textsuperscript{150} Grant Lamond, Methodology, in The Cambridge Companion to Philosophy of Law 17, 34–35 (John Tasioulas ed., 2020).
\item \textsuperscript{151} Hillary Nye, Does Law ‘Exist’? Eliminativism in Legal Philosophy, 15 Wash. U. Juris. Rev. 29, 33 (2022).
\item \textsuperscript{152} See id. at 35–36.
\item \textsuperscript{153} See Shapiro, supra note 48, at 406 n.16 (“[Hart] seemed to have assumed that the nature of law could be determined exclusively by conceptual analysis.”).
\item \textsuperscript{154} See, e.g., Nye, supra note 151, at 34 (“Concepts are how we conceive aspects of the world, and lie between words and their meanings, in which they are expressed, on the one side, and the nature of things to which they apply, on the other.” (internal quotation marks omitted) (quoting Joseph Raz, Can There Be a Theory of Law?, in The Blackwell Guide to the Philosophy of Law and Legal Theory 324, 325 (Martin P. Golding & William A. Edmundson eds., 2005))); see also Joseph Raz, Two Views of the Nature of the Theory of Law: A Partial Comparison, 4 Legal Theory 249, 255 (1998) (“[T]he explanation of a concept is the explanation of that which it is a concept of.”).
\item \textsuperscript{155} See supra section III.D.2.
\end{itemize}
modest conceptual analysis, in which experimental jurisprudence also has a role. For traditional jurisprudential projects that are unclear about their aims and methods, if the ambiguity resolves into one of these two, then experimental jurisprudence has a role. Perhaps there are some remaining projects that offer a different jurisprudential aim and methodology. It would benefit both experimental jurisprudence and jurisprudence more broadly for theorists engaging in those projects to more clearly and precisely articulate the nature of the relevant questions, aims, and traditional methods.

**CONCLUSION**

In working to achieve jurisprudential knowledge, what methods should we use? This Review commends calls for legal philosophers to attend to the connection between their aims and methods. One longstanding aim is to elucidate our law by elucidating how “we” understand our law. Jurisprudence will (and should) continue to elucidate our self-understandings, but in asking traditional questions it need not limit itself to traditional methods. Today, there is opportunity for methodological innovation. Rich empirical studies cast light on our understandings, and methods from experimental jurisprudence and related disciplines can assess untested claims.

To be clear, this Review has not recommended that experimental jurisprudence replace traditional jurisprudence. Critics caution against such a strong view: Experimental jurisprudence cannot “by itself” resolve jurisprudential debates—it is not sufficient as a methodological approach to jurisprudence. No doubt, experimental jurisprudence is not a sufficient method to address all of jurisprudence’s rich questions (nor is any other method).

This Review’s claim, however, is stronger than a mere call for methodological pluralism. Some legal philosophers have generously endorsed pluralism, welcoming an empirical approach as one among many or as a “starting point” for jurisprudence. But given jurisprudence’s traditional questions, extant empirical data, and the availability of empirical methods, experimental jurisprudence warrants

156. See supra section III.D.1.
157. See, e.g., Jiménez, supra note 96 (manuscript at 9); see also Brian Bix, Conceptual Questions and Jurisprudence, 1 Legal Theory 465, 478 (1995) (noting that empirical data have a place in legal conceptual analysis but cannot be used to solve all questions in legal conceptual analysis).
158. Consider a narrower construal of this critique: Experimental jurisprudence cannot resolve any single jurisprudential debate. I would register disagreement. Even traditional methods only “resolve” local jurisprudential disputes; no one has “resolved” the most general debates about the nature of law or the nature of causation. But with respect to some more local questions (e.g., How does ordinary causation differ from legal causation?), experimental jurisprudence contributes as significantly as traditional methods.
159. See, e.g., Dickson, Elucidating Law, supra note 7, at 114.
more than the invitation that a hundred flowers bloom. Empirical engagement should be recommended, not merely welcomed, within some jurisprudential debates: When jurisprudence scholarship advances claims about “our” intuitions or understanding of law, the work would be more rigorous if it supplemented individuals’ assertions with evidence (e.g., from relevant empirical studies).

Today’s legal philosophy should improve on that of the past, and methodological clarification and innovation offer avenues of improvement. Of course, this Review’s proposals are not a timeless panacea. Future legal philosophers will likely unearth deficiencies in the emerging methods—as experimental jurisprudence and other branches of modern legal philosophy mature into traditional approaches. They will question unexamined assumptions, call for new methods, ask new questions, and creatively depart from established approaches. Insofar as these further innovations allow legal philosophy to shed more light on law, one cannot hope for a brighter future of the discipline.
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