

COLUMBIA LAW REVIEW



ARTICLES

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RELATIONAL DEFICIT OF DISABILITY RIGHTS LAW *Yaron Covo*

ADMINISTRATIVE ENSLAVEMENT *Adam Davidson*

NOTES

THE WEAPONIZATION OF TRADE SECRET LAW *Lena Chan*

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BOOK REVIEW

THE FORESHADOW DOCKET *Bert I. Huang*

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ABSTRACTS

ARTICLES

INVERSE INTEGRATION AND THE RELATIONAL DEFICIT OF DISABILITY RIGHTS LAW

Yaron Covo 563

Integration has long been a central tenet of U.S. disability law. In both doctrine and scholarship, however, disability integration has been understood to operate in only one direction: integrating disabled persons into mainstream society. This conventional approach has overlooked a different model, inverse integration, whereby nondisabled persons enter or participate in disability-focused settings or activities. As this Article demonstrates, inverse integration is surprisingly popular. For example, nondisabled children study in special education programs, nondisabled persons reside in housing projects for disabled individuals, hearing actors perform in Deaf theaters, and nondisabled athletes compete in wheelchair sports.

This Article develops a typology of inverse-integration practices and analyzes the interaction of such practices with existing U.S. disability law. It shows that legal and social norms generally hinder the involvement of nondisabled persons in disabled spaces or activities. Against this backdrop, the seeming popularity of inverse integration is a puzzle. What is driving this practice? The answer, this Article argues, involves interpersonal relationships. Combining insights from various disciplines, this Article demonstrates how inverse integration fosters relationships by allowing disabled and nondisabled persons to share experiences, interests, and common language with family members, friends, and significant others. These interactive features of inverse integration, in turn, highlight disability law's failure to protect and facilitate interpersonal relationships, which is particularly problematic in an increasingly lonely society.

Drawing upon instances of inverse integration, this Article imagines what a more relational disability rights regime would look like and proposes specific interventions.

ADMINISTRATIVE ENSLAVEMENT

Adam Davidson 633

There are currently over a million people enslaved in the United States. Under threat of horrendous punishment, they cook, clean, and even fight fires. They do this not in the shadow of the law but with the express blessing of the Thirteenth Amendment's Except Clause, which

permits enslavement and involuntary servitude as punishment for a crime.

Despite discussions of this exception in law reviews, news reports, and Netflix documentaries, few commentators have recognized that this enslavement happens silently. No prosecutor, judge, or defense attorney tells convicted people that they will be enslaved as punishment for their crime. It is only once they are incarcerated that a prison administrator informs them they will be forced to work.

This Article uncovers how this state of the world has come to be. It argues that our current regime is one of administrative enslavement: a constellation of judicial and legislative choices that places the punishment of enslavement outside the scope and processes of our traditional criminal punishment structure and into the hands of prison administrators. This Article is the first to provide a taxonomy of the administrative-enslavement regime. It uncovers the weak jurisprudential underpinnings of that regime, and it surveys all fifty states' and the federal government's legislative implementation of the Except Clause. It concludes by utilizing this taxonomy to analyze administrative enslavement's legal weaknesses as well as how the status quo might evolve in the face of growing attacks from states removing Except Clauses from their state constitutions.

NOTES

In criminal proceedings, courts are increasingly relying on automated decisionmaking tools that purport to measure the likelihood that a defendant will reoffend. But these technologies come with considerable risk; when trained on datasets or features that incorporate bias, criminal legal algorithms threaten to replicate discriminatory outcomes and produce overly punitive bail, sentencing, and incarceration decisions. Because regulators have failed to establish systems that manage the quality of data collection and algorithmic training, defendants and public interest groups often stand as the last line of defense to detect algorithmic error. But developers routinely call upon trade secret law, the common law doctrine that protects the secrecy of commercial information, to bar impacted stakeholders from accessing potentially biased software.

This weaponization of trade secret law to conceal algorithms in criminal proceedings denies defendants their right to present a complete and effective defense. Furthermore, the practice contravenes the early policy objectives of trade secret law that sought to promote a public domain of ideas on which market actors could fairly compete and innovate. To remedy this misalignment, this Note proposes a novel framework that redefines the scope of trade secret protection and revives the first principles underlying the doctrine. It concludes that while algorithms themselves constitute protectable trade secrets, information ancillary to the algorithm—such as training data, performance statistics, or descriptions of the software's methodology—do not. Access

to ancillary information protects accused parties' right to defend their liberty and promotes algorithmic fairness while aligning trade secret law with its first principles.

DEAD IN THE WATER? ADDRESSING THE FUTURE OF
WATER CONSERVATION IN THE COLORADO
RIVER BASIN

Harmukh Singh 741

The Colorado River Basin is drying up, and with it, the water supply of seven states in the American West. Historically, the West relied on consumption-based laws to fuel development despite the arid landscape. The Colorado River Compact allocated water among the states, but those allocations suffered from two basic flaws: (1) The agreed-upon water flow of the river was based on a particularly wet season in the region, and (2) the Compact was not designed to adapt to changing environmental circumstances. As climate change decreases rainfall and increases temperatures, water availability will sharply decline. But outdated legal doctrines incentivize farmers to use all their water or otherwise see their water allocations dwindle, increasing water waste. Furthermore, water rights and agriculture are mostly within the jurisdiction of states, which are often paralyzed to act due to either economic competition or a lack of resources.

This Note argues that the federal government must step in to overcome the collective action problem and realign market incentives. It proposes a program focused on improving water efficiency, paying farmers not to plant harmful crops, and allowing farmers to exit the market entirely. Particularly, the Department of the Interior's Bureau of Reclamation has rulemaking authority to implement necessary programs to counteract harmful incentives in the region. Other agencies, like the Department of Agriculture, can bolster this approach. Effectively, the end result would be a market that promotes conservation as an economically beneficial and rational decision for every farmer.

ESSAY

THE CHICKEN-AND-EGG OF LAW AND ORGANIZING:
ENACTING POLICY FOR POWER BUILDING

Kate Andrias & Benjamin I. Sachs 777

In a historical moment defined by massive economic and political inequality, legal scholars are exploring ways that law can contribute to the project of building a more equal society. Central to this effort is the attempt to design laws that enable the poor and working class to organize and build power with which they can countervail the influence of corporations and the wealthy. Previous work has identified ways in which law can, in fact, enable social-movement organizing by poor and working-class people. But there's a problem. Enacting laws to facilitate social-movement organizing requires social movements already powerful enough to secure enactment of those laws. Hence, a chicken-and-egg dilemma plagues the relationship between law and organizing: power-building laws may be needed to facilitate social-movement growth, but social-movement growth seems a prerequisite to enactment

of power-building laws. This Essay examines the chicken-and-egg puzzle and then offers three potential solutions. By engaging in disruption, shifting political jurisdictions, and shifting from one branch of government to another, organizations of poor and working-class people can enact laws to enable the construction of countervailing power.

BOOK REVIEW

THE FORESHADOW DOCKET

Bert I. Huang 851

Imagine the Supreme Court issuing an emergency order that signals interest in departing from precedent, as if foreshadowing a change in the law. Seeing this, should the lower courts start ruling in ways that also anticipate the law of the future? They need not do so in their merits rulings. That much is clear. Such a signal does not create new binding precedent. Rather, it reflects the Justices' guess about the future of the law—and what if that guess is wrong?

Yet for a lower court ruling on a temporary stay or injunction, the task seems to call for a guess about a future decision and hence a future state of the law. And if the Justices have already made such a guess in a parallel case, doesn't the lower court have the answer it needs?

Not necessarily, this analysis shows. It looks closely at the architecture of stays and injunctions in the federal courts, while drawing upon ideas presented in a rich new compilation of essays, Philosophical Foundations of Precedent. Intriguing questions for theory arise, in turn. For instance, should an earlier judicial guess ever be deemed binding on a later guess? That would not be stare decisis, of course—but could there be such a thing as stare divinitatis?

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ARTICLES

INVERSE INTEGRATION AND THE RELATIONAL DEFICIT OF DISABILITY RIGHTS LAW

*Yaron Covo**

Integration has long been a central tenet of U.S. disability law. In both doctrine and scholarship, however, disability integration has been understood to operate in only one direction: integrating disabled persons into mainstream society. This conventional approach has overlooked a different model, inverse integration, whereby nondisabled persons enter or participate in disability-focused settings or activities. As this Article demonstrates, inverse integration is surprisingly popular. For example, nondisabled children study in special education programs, nondisabled persons reside in housing projects for disabled individuals, hearing actors perform in Deaf theaters, and nondisabled athletes compete in wheelchair sports.

This Article develops a typology of inverse-integration practices and analyzes the interaction of such practices with existing U.S. disability law. It shows that legal and social norms generally hinder the involvement of nondisabled persons in disabled spaces or activities. Against this backdrop, the seeming popularity of inverse integration is a puzzle. What is driving this practice? The answer, this Article argues, involves interpersonal relationships. Combining insights from various disciplines, this Article demonstrates how inverse integration fosters relationships by allowing disabled and nondisabled persons to share

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experiences, interests, and common language with family members, friends, and significant others. These interactive features of inverse integration, in turn, highlight disability law's failure to protect and facilitate interpersonal relationships, which is particularly problematic in an increasingly lonely society.

Drawing upon instances of inverse integration, this Article imagines what a more relational disability rights regime would look like and proposes specific interventions.

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INTRODUCTION

More than a decade ago, a beer commercial featured a group of people playing wheelchair basketball.¹ In the ad, the game is raucous. The players shout, push, collide, and fall out of their chairs. Their shirts are soaked in sweat. When the game ends, however, all but one of the players stand up out of their chairs and walk off the court. It turns out that only one participant actually needs a wheelchair. This image, together with a voice-over about “loyalty” and “commitment,” suggests that this is a story about companionship. If one of the friends cannot run, the rest will play in wheelchairs.

While the commercial’s portrayal of disability drew both criticism and praise,² one marketing aspect does not seem to be in dispute: the use of surprise. After all, most viewers probably did not expect to see individuals using wheelchairs for reasons unrelated to physical impairment. Indeed, in the popular imagination, disability integration generally goes in only

1. @CaSjUs212, Guinness Beer Wheelchairs Basketball Commercial, YouTube (Sept. 6, 2013), <https://www.youtube.com/watch?v=iiB3YNTcsAA> (on file with the *Columbia Law Review*).

2. Compare Just One of the Guys—A Critique of the Wheelchair Basketball Guinness Commercial, Emily Ladau: Blog (Sept. 5, 2013), <https://emilyladau.com/2013/09/just-one-of-the-guys/> [<https://perma.cc/JY2N-K42U>] [hereinafter Ladau, Just One of the Guys] (arguing that the ad depicts disabled persons as “needing kindhearted non-disabled people to pay them some attention”), with Aaron Taube, An Incredible New Guinness Ad Breaks the Industry Stereotype, Bus. Insider (Sept. 5, 2013), <https://www.businessinsider.com/new-guinness-ad-breaks-the-mold-2013-9> [<https://perma.cc/WU68-NKHA>] (lauding the ad for portraying the nondisabled friends as kind and sensitive). For further engagement with Ladau’s critique, see *infra* section II.A.1.

one direction: integrating disabled³ people into mainstream society. People⁴ rarely think about what this paper calls *inverse integration*,⁵ a term that refers to nondisabled persons participating in disability-focused settings, frameworks, or activities.

Inverse integration may be surprising, but it is neither rare nor entirely new. In the past three decades, for example, an increasing number of high schools and colleges have started offering American Sign Language (ASL) courses to hearing students.⁶ As a result, ASL is currently the third most studied “foreign language”⁷ in higher education.⁸ Other examples

3. This Article will use identity-first language (“disabled persons”), rather than people-first language (“people with disabilities”), for the same reasons explained by Emily Ladau. See Emily Ladau, *Demystifying Disability: What to Know, What to Say, and How to Be an Ally* 10–13 (2021) [hereinafter Ladau, *Demystifying Disability*] (explaining that identity-first language “is all about acknowledging disability as part of what makes a person who they are”).

4. This includes legal scholars. The few law professors who have discussed inverse integration in their work have generally done so without treating it as a distinct phenomenon. See Ruth Colker, *When Is Separate Unequal? A Disability Perspective* 6 (2009) (describing an inverse-integration practice employed by the preschool of the author’s son); Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* 85, 95–96 (1990) [hereinafter Minow, *All the Difference*] (proposing several practices that may constitute inverse integration, although not by that name); Yaron Covo, *Reversing Reverse Mainstreaming*, 75 *Stan. L. Rev.* 601, 615–61 (2023) (documenting and criticizing the way in which inverse integration in education has been implemented in the United States); Elizabeth F. Emens, *Integrating Accommodation*, 156 *U. Pa. L. Rev.* 839, 866 (2008) [hereinafter Emens, *Integrating Accommodation*] (noting that the question of whether “including nondisabled people in contexts principally populated by people with disabilities” could counteract stigma “deserves an empirical study”).

5. A note on terminology: Some disability scholars and advocates prefer to use “inclusion” rather than “integration.” Covo, *supra* note 4, at 604 n.1. In the disability context, inclusion usually refers to changing societal structures and conventions by creating “communities of acceptance and support” that would be open to people “of varying abilities and social identities.” Scot Danforth & Phyllis Jones, *From Special Education to Integration to Genuine Inclusion*, in *Foundations in Inclusive Education Research* 1, 2 (Chris Forlin, Phyllis Jones & Scot Danforth, eds., 2015). In other words, inclusion is an ideology. The practices described in this Article, however, do not necessarily subscribe to this ideology. Thus, the word “inclusion” would be inappropriate for the purposes of this Article.

6. Russell S. Rosen, *American Sign Language: Access, Benefits, and Quality*, 1 *Soc’y Am. Sign Language J.* 6, 11 (2017) [hereinafter Rosen, *American Sign Language*] (noting that the number of U.S. national research universities recognizing ASL as a foreign language that meets the undergraduate admission requirements has grown from 48 in 1991 to 181 in 2015). For the reasons why teaching hearing people sign language may constitute inverse integration, see *infra* notes 73–75, 176–178 and accompanying text.

7. On whether ASL should be considered a “foreign” language, see Brenda Jo Brueggemann, *Deaf Subjects: Between Identities and Places* 26–27 (2009); Russell S. Rosen, *American Sign Language as a Foreign Language in U.S. High Schools: State of the Art*, 92 *Mod. Language J.* 10, 11–12 (2008) [hereinafter Rosen, *ASL as a Foreign Language*]; Sign Language: *A Way to Talk, but Is It Foreign?*, *N.Y. Times*, Jan. 8, 1992, at B7 (on file with the *Columbia Law Review*).

8. Dennis Looney & Natalia Lusin, *Enrollments in Languages Other Than English in United States Institutions of Higher Education, Summer 2016 and Fall 2016: Final Report* 6, *Mod. Language Ass’n* (June 2019), <https://www.mla.org/content/download/110154/file/2016-Enrollments-Final-Report.pdf> [<https://perma.cc/T7U9-M3BP>].

abound: Nondisabled persons reside in housing projects for disabled individuals,⁹ nondisabled students participate in “special education” programs,¹⁰ hearing actors perform in Deaf theaters,¹¹ and, as the beer commercial illustrates, nondisabled athletes engage in wheelchair sports.¹²

9. One example is the trend of integrating higher education students into elder care facilities and senior care homes. Such projects, offered by colleges and universities across the United States, often involve the provision of affordable housing arrangements for students who volunteer in cultural events with seniors, some of whom are disabled. See, e.g., Meet the 26-Year-Old Living in a Retirement Home, ABC News (Sept. 20, 2016), <https://abcnews.go.com/Lifestyle/meet-26-year-living-retirement-home/story?id=42222728> [<https://perma.cc/AWG5-A8KY>] (describing a program whereby music students join retirement communities where it is common “to see someone in a wheelchair”); Cathy Free, One Roommate Is 85, the Other Is 27. Such Arrangements Are Growing., Wash. Post (July 15, 2022), <https://www.washingtonpost.com/lifestyle/2022/07/15/multigenerational-housing-roommates-nesterly-senior/> (on file with the *Columbia Law Review*) (describing the move of a music student into a senior living community, where many of the residents “have limited mobility” (quoting Arlene DeVries)); see also *infra* note 168 and accompanying text (discussing other forms of inverse integration in housing).

10. As early as the mid-nineteenth century, educators have included nondisabled children in classrooms designed for disabled students, a practice that is still widely used today. See Covo, *supra* note 4, at 616–17.

11. From the early days of the National Theatre of the Deaf in the late 1960s, it included hearing actors. See Carol Padden & Tom Humphries, Inside Deaf Culture 101–02, 108, 112 (2005) (“The hearing actors were given their own lines to sign . . .”). Other theaters have followed suit, and today some Deaf theaters include both Deaf and hearing actors. Jessica Gelt, Deaf West Artistic Director David Kurs: Why Deaf Actors Should Be Cast to Play Deaf Characters, L.A. Times (July 13, 2017), <https://www.latimes.com/entertainment/arts/la-ca-cm-authenticity-deaf-west-20170713-story.html> (on file with the *Columbia Law Review*) (noting that Deaf West Theatre includes Deaf and hearing actors); Heather Skyler, A Theater Experience for the Deaf and the Hearing, UGAToday (July 8, 2019), <https://news.uga.edu/hands-in-theater-for-deaf-hearing/> [<https://perma.cc/F7EQ-4JB3>] (“Both Deaf and hearing actors perform, but everyone signs their lines . . .”). For more on the inclusion of hearing actors in Deaf theaters, see *infra* notes 278–282 and accompanying text. This Article distinguishes between the terms “Deaf,” which recognizes the cultural aspects of deafness, and “deaf,” which refers to deafness as an audiological matter. See Brueggemann, *supra* note 7, at 9–15.

12. Whether nondisabled persons should be permitted to participate in competitive wheelchair sports has been in dispute for several decades. Currently, nondisabled athletes are not allowed to compete in the U.S. National Wheelchair Basketball Association or the Paralympics. See *infra* note 150 and accompanying text. In Canada and other countries, however, nondisabled athletes compete “at the highest levels of the sport.” Carl Bialik, Seeking Integration in Wheelchair Basketball, Wall St. J. (Sept. 7, 2012), <https://www.wsj.com/articles/BL-DFB-19093> (on file with the *Columbia Law Review*) (describing the participation of nondisabled athletes in Canada’s wheelchair basketball league); see also Stefan Nestler, Wheelchair Basketball: How Disabled Do You Have to Be?, Deutsche Welle (Mar. 8, 2020), <https://www.dw.com/en/wheelchair-basketball-how-disabled-do-you-have-to-be/a-54406662> [<https://perma.cc/S555-DBTZ>] (noting that nondisabled athletes are allowed to participate in Germany’s wheelchair basketball competitions); Rebecca Ramsden, Rick Hayman, Paul Potrac & Florentina Johanna Hettinga, Sport Participation for People With Disabilities: Exploring the Potential of Reverse Integration and Inclusion Through Wheelchair Basketball, *Int’l J. Env’t Rsch. & Pub. Health*, Jan. 30, 2023, at 1, 2 (noting that, in the United Kingdom, “21% of players in the

The seeming popularity of inverse-integration practices is a puzzle, however, since both legal and social norms seem to push in the opposite direction. On the legal side, disability rights law advances a “mainstreaming” model of integration,¹³ which focuses on allowing disabled persons to enter predominantly nondisabled spaces. On the social side, disability rights advocates are often suspicious of initiatives in which the presence of nondisabled persons has the potential to disrupt the dynamics of disability-focused spaces or siphon opportunities and resources away from disabled persons.¹⁴ And then, of course, there is the fact that mainstream society still stigmatizes disability, which means that nondisabled persons are often reluctant to engage with disability culture in the first place.¹⁵

Thus, if legal and social norms are not driving inverse integration, then what is? This Article argues that what may motivate some disabled persons to invite nondisabled persons into disabled spaces, and what propels some nondisabled persons to enter those spaces, is the need to establish close interpersonal relationships.¹⁶ For example, inverse integration allows disabled and nondisabled persons to share experiences, interests, and common language with family members, friends, and intimate partners.¹⁷

This understanding, in turn, sheds new light on the problems with the existing disability rights framework. Specifically, this Article reveals the relational deficit of traditional integration. While some scholars have noted that disability rights statutes are focused on commercial transactions rather than “humane relationships,”¹⁸ this Article conceptualizes this issue as a systemic feature of disability rights law. By juxtaposing inverse

national league are said to be non-disabled”). Moreover, in the United States, nondisabled persons sometimes participate in wheelchair basketball and other disability-focused sports at the recreational level. See, e.g., Mary A. Hums, Samuel H. Schmidt, Andrew Novak & Eli A. Wolff, *Universal Design: Moving the Americans With Disabilities Act From Access to Inclusion*, 26 *J. Legal Aspects Sport* 36, 46 (2016) (describing the participation of nondisabled children in a baseball league for disabled children); *Community-Based Sports, Adaptive Sports Ohio*, <https://adaptivesportsOhio.org/community-based-sports/> [<https://perma.cc/UM37-7E77>] (last visited Jan. 22, 2024) (“Often, non-disabled family members and friends join in on the fun at our recreational drop-in [wheelchair basketball] sessions.”).

13. Jasmine E. Harris, *The Aesthetics of Disability*, 119 *Colum. L. Rev.* 895, 904–11, 921–22 (2019) [hereinafter Harris, *The Aesthetics of Disability*]; see also *infra* section I.A.

14. See *infra* section II.A.1. To be clear, these suspicions do not necessarily translate into a wholesale rejection of inverse integration. See *infra* note 20 (noting support for inverse integration by disabled persons in some contexts).

15. See *infra* section II.A.2.

16. See *infra* Part III.

17. See *infra* Part III.

18. E.g., Adam M. Samaha, *Opening and Reopening: Dealing With Disability in the Post-Pandemic World*, *Slate* (July 6, 2021), <https://slate.com/technology/2021/07/pandemic-disability-reopening-essay.html> [<https://perma.cc/5XDM-PQGT>]; see also *infra* section IV.A (describing the relational deficit of disability rights law).

integration against the existing framework, this Article opens the door to an examination of how the law can better promote and cultivate interpersonal relationships.¹⁹

This is not to suggest, however, that we should give up on traditional integration or that inverse integration itself can end disability discrimination. In fact, even though some disabled persons find inverse integration desirable,²⁰ it may, in some cases, be detrimental to the disability community. Inverse integration can, for example, potentially involve tokenism, co-optation, or cultural appropriation.²¹ Thus, rather than promoting inverse integration, this Article has the following three goals: (1) to identify interpersonal relationships as the underlying principle that likely drives inverse integration, (2) to use this relationality principle to test the normative underpinnings of conventional integration, and (3) to show how current disability law could benefit from the incorporation of this principle.²²

19. By close interpersonal relationships, this Article refers to interactions between individuals that involve interpersonal communication, reciprocity, and shared experiences. See *infra* Part III.

20. See, e.g., Nancy Spencer-Cavaliere & Danielle Peers, “What’s the Difference?” Women’s Wheelchair Basketball, Reverse Integration and the Question(ing) of Disability, 28 *Adapted Physical Activity Q.* 291, 304–06 (2011) (finding, based on a qualitative study, that disabled wheelchair-basketball players support inverse integration in sports, albeit not at the elite level); Ramsden et al., *supra* note 12, at 1, 5 (same); see also Samuel J. Supalla, Anita Small & Joanne S. Cripps, American Sign Language for Everyone: Considerations for Universal Design and Youth Identity, 4 *Soc’y Am. Sign Language J.* 43, 50 (2020) (advocating universal instruction of ASL to both deaf and hearing students); John Loeppky, Where Do Able-Bodied Athletes Belong in Wheelchair Basketball?, *Defector* (July 14, 2021), <https://defector.com/where-do-able-bodied-athletes-belong-in-wheelchair-basketball/> [<http://perma.cc/A8JJ-VRSY>] (quoting Mak Nong, a disabled professional athlete, as supporting the inclusion of nondisabled players in competitive wheelchair basketball); *infra* notes 221–225 and accompanying text (discussing a Deaf person’s support of hearing people learning ASL).

Other disabled scholars and activists have also provided indirect and implicit support for the concept. See, e.g., Haben Girma, Haben: The Deafblind Woman Who Conquered Harvard Law 49, 124 (2019) (“Blind hide-and-seek beats sighted hide-and-seek. It’s more challenging, more exciting, more fun. *We could give sighted people sleepshades and teach it to them.*” (emphasis added)); M. Leona Godin, There Plant Eyes: A Personal and Cultural History of Blindness 145 (2021) (“[R]eading and writing braille can be learned not only by the blind but by the sighted as well. Motivation is the key.”); Tobin Siebers, Disability Theory 93–94 (2008) (“[A]ll worlds should be accessible to everyone, but it is up to individuals to decide whether they will enter these worlds.”); Mia Mingus, Access Intimacy, Interdependence and Disability Justice, *Leaving Evidence* (Apr. 12, 2017), <https://leavingevidence.wordpress.com/2017/04/12/access-intimacy-interdependence-and-disability-justice/> [<https://perma.cc/NRY5-WKGV>] (“The power of access intimacy is that it reorients our approach from one where disabled people are expected to squeeze into able bodied people’s world, and instead *calls upon able bodied people to inhabit our world.*”).

21. See *infra* section II.A.1.

22. See *infra* Parts IV–V (arguing that U.S. disability rights laws suffer from a relational deficit and proposing a number of principles for incorporating relationality into these laws).

Studying a relationship-based model of integration is particularly exigent given that in-person interactions are becoming less frequent.²³ Indeed, despite research establishing the significance of relationships for individual well-being²⁴ and workforce participation,²⁵ people in the United States today experience high rates of loneliness and social isolation.²⁶ And this burden falls disproportionately on disabled persons,²⁷ who may be the only people in their families or communities with the specific type of

23. Vivek H. Murthy, *Our Epidemic of Loneliness and Isolation: The U.S. Surgeon General's Advisory on the Healing Effects of Social Connection and Community* 13, 16, 19–20 (2023), <https://www.hhs.gov/sites/default/files/surgeon-general-social-connection-advisory.pdf> [<https://perma.cc/3DCE-6SPU>] [hereinafter Murthy, *Our Epidemic of Loneliness and Isolation*].

24. See, e.g., Clare Huntington, *Failure to Flourish: How Law Undermines Family Relationships* 6 (2014) (“From ancient philosophers to modern psychologists, there is widespread agreement that strong, stable, positive relationships are essential for human growth and well-being.”); Murthy, *Our Epidemic of Loneliness and Isolation*, *supra* note 23, at 23–34 (reviewing scientific studies showing that social connection (1) “decreases the risk of premature death,” (2) is associated with “better self-rated health and disease management among individuals with diabetes,” and (3) may protect against depression, suicidal behavior, and the risk of dementia); Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 *Harv. L. Rev.* 1307, 1374–76 (2009) [hereinafter Emens, *Intimate Discrimination*] (surveying studies showing that intimate relationships and marriage are correlated with improved health and increased lifespan, happiness, and satisfaction); Julianne Holt-Lunstad, Timothy B. Smith, Mark Baker, Tyler Harris & David Stephenson, *Loneliness and Social Isolation as Risk Factors for Mortality: A Meta-Analytic Review*, 10 *Persps. on Psych. Sci.* 227, 236 (2015) (estimating that “heightened risk for mortality from a lack of social relationships is greater than that from obesity” (citing Katherine M. Flegal, Brian K. Kit, Heather Orpana & Barry I. Graubard, *Association of All-Cause Mortality With Overweight and Obesity Using Standard Body Mass Index Categories*, 309 *JAMA* 71, 71–82 (2013))).

25. See Tom Shakespeare, *Disability Rights and Wrongs Revisited* 189 (2d ed. 2014) (describing the workforce as a valuable network); Emens, *Intimate Discrimination*, *supra* note 24, at 1377; see also Samaha, *supra* note 18 (“I got my first post-college job when a friend was hired first and he left the impression that we were a package deal.”).

26. See Murthy, *Our Epidemic of Loneliness and Isolation*, *supra* note 23, at 4, 13, 22, 45; *infra* notes 331–332 and accompanying text.

27. Murthy, *Our Epidemic of Loneliness and Isolation*, *supra* note 23, at 19; *infra* notes 333–340 and accompanying text. This is not to suggest that disabled persons are the only ones who suffer from loneliness and social isolation. See *infra* notes 331–332 and accompanying text. Nor is it to say that disabled persons are the sole beneficiaries of relationships with nondisabled persons. See, e.g., Eva Feder Kittay, *At Home With My Daughter*, in *Americans With Disabilities: Exploring Implications of the Law for Individuals and Institutions* 64, 73 (Leslie Pickering Francis & Anita Silvers eds., 2000) (“In the case of my daughter, her dependence is most prominent, but nonetheless, I depend on her as well—on her welcome when I return home[,] . . . on her laughter to remind me of sunshine when I'm overburdened with commitments and sadness, on her love when I feel alone.”). Moreover, many disabled persons are satisfied with their social lives; others may actually favor more independent lives that involve less interference from family members and care workers. Andrew Pulrang, *Disabled People Have Unique Perspectives on Solitude*, *Forbes* (Mar. 25, 2020), <https://www.forbes.com/sites/andrewpulrang/2020/03/25/disabled-people-have-unique-perspectives-on-solitude/?sh=52938f2b5e73> (on file with the *Columbia Law Review*).

impairment in question.²⁸ Drawing upon instances of inverse integration, this Article imagines what a more relational disability rights regime would look like and proposes specific legal and policy interventions.

This Article proceeds in five parts. Part I defines and elucidates the concept of inverse integration. It explains that the definition of inverse integration relies on three elements, each construed broadly: disability, focus, and integration. Part II explores the interaction between inverse integration and legal and social norms. It shows that social norms and the law are not the primary drivers of inverse integration. In fact, they often hinder the involvement of nondisabled persons in disabled spaces or activities. On the basis of this observation, Part II concludes that there must be another principle that facilitates inverse-integration practices. In Part III, this Article suggests a possible driver: the need to foster interpersonal relationships. Specifically, this Article posits that inverse integration offers unique relational opportunities by promoting three primary elements of interpersonal relationships: communication, shared experiences, and reciprocity.

Recognizing the relational advantages of inverse integration, Part IV uses it as a lens through which to evaluate traditional integration. This analysis shows that the mainstreaming model of integration suffers from a relational deficit in that it generally fails to protect, facilitate, and reinforce interpersonal relationships between disabled and nondisabled persons. Thus, the analysis of inverse integration serves as a vehicle to identify the flaws in disability rights law and shows the importance of incorporating relationality into the disability integration regime at the structural level. Last, Part V proposes legal and policy interventions aimed at

28. Unlike disabled persons, members of other marginalized groups—people of color, women, and members of low-income families—are more likely to share experiences, networks, or neighborhoods with people who share the same identities. Shakespeare, *supra* note 25, at 191; Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. Pa. L. Rev. 789, 835–36 (2006) [hereinafter Colker, *The Disability Integration Presumption*]. Of course, disability often intersects with other identity axes, which means that drawing distinctions between disabled persons and members of other social groups can be analytically misguided. See Jamelia Morgan, *On the Relationship Between Race and Disability*, 58 Harv. C.R.-C.L. L. Rev. 663, 665–67 (2023) [hereinafter Morgan, *Relationship Between Race and Disability*]; see also *infra* notes 325–327 and accompanying text (describing the Disability Justice movement, which centers on intersectionality). In addition, families in which more than one person is disabled are not rare. But much of this Article’s focus is on the ways in which integration measures interact with *specific* impairments, as opposed to disability more generally. This focus raises an interesting question whether a situation in which a person with one type of impairment engages in a disability-focused activity associated with another impairment (e.g., a deaf person who plays wheelchair basketball) meets the definition of inverse integration. Although the definition proposed in this Article refers specifically to nondisabled persons, as a theoretical matter, the answer might be yes. See *infra* note 405 (describing how activist and author Simi Linton, who is a sighted wheelchair user, participated in a museum “blind people’s tour,” in which people are allowed to touch artwork).

strengthening the relational potential of disability rights laws in the United States.

I. INVERSE INTEGRATION

Because inverse integration is a mirror image of traditional integration in many respects, one cannot understand the former without first addressing the latter. Thus, this Part begins with a brief summary of traditional integration in section I.A. Next, section I.B provides a working definition of inverse integration and offers some examples of inverse-integration practices. Additional examples can be found in section II.B, which discusses the interaction of inverse integration with disability rights laws.

A. *Traditional Integration: The Mainstreaming Model*

Historically, disabled individuals were isolated and segregated from mainstream society.²⁹ Through official state action and informal measures, disabled persons were separated from their families, sent to asylums and institutions, sterilized,³⁰ and removed from the public sphere altogether.³¹ In fact, public officials operating under the influence of eugenic ideology declared that disabled persons “had to be kept from mingling with others.”³²

In the 1960s and 1970s, however, disability activists began fighting against institutionalization and for civil rights for disabled persons.³³ It was at this time that the legal and social treatment of disability started to shift. In a 1966 law review article titled “The Right to Live in the World,” Professor Jacobus tenBroek, a prominent scholar and activist, called upon American policymakers to adopt and implement a policy of “integrationism,” focused on “entitling” disabled persons to full participation in the “life of the community.”³⁴

29. For historical accounts, see Timothy M. Cook, *The Americans With Disabilities Act: The Move to Integration*, 64 *Temp. L. Rev.* 393, 399–407 (1991); Mark C. Weber, *Exile and the Kingdom: Integration, Harassment, and the Americans With Disabilities Act*, 63 *Md. L. Rev.* 162, 165–69 (2004).

30. For an infamous example, see *Buck v. Bell*, 274 U.S. 200, 207 (1927).

31. Weber, *supra* note 29, at 166–69.

32. *Id.* at 167.

33. For an excellent historical account of a leading deinstitutionalization case, see Karen M. Tani, *The Pennhurst Doctrines and the Lost Disability History of the “New Federalism”*, 110 *Calif. L. Rev.* 1157, 1163–81 (2022). For a more general overview of deinstitutionalization litigation, see Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 *Cardozo L. Rev.* 1, 7–29 (2012).

34. Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 *Calif. L. Rev.* 841, 843 (1966).

Since then, integrationism has become a fundamental principle in the pursuit of disability rights.³⁵ Indeed, Congress and governmental agencies have adopted an array of disability rights statutes and regulations aimed at integrating disabled persons into mainstream society.³⁶ The most prominent among these laws is the Americans with Disabilities Act (ADA). The ADA and its related statutes currently require public entities,³⁷ schools,³⁸ employers,³⁹ and places of public accommodation⁴⁰ to remove barriers to access and provide reasonable accommodations to disabled individuals.⁴¹

By integrating disabled persons into mainstream life, the traditional integration model has at least three goals: first, to reduce prejudice and foster more accurate attitudes toward disability by facilitating interactions between disabled and nondisabled persons;⁴² second, to develop disabled persons' "human capital" by providing new opportunities for development and contribution, such as educational and work

35. See Samuel R. Bagenstos, *Abolish the Integration Presumption? Not Yet*, 156 U. Pa. L. Rev. Online 157, 157 (2007), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1003&context=penn_law_review_online [<https://perma.cc/6GTX-X5R8>] ("[I]f there is one goal that has achieved near-consensus status among disability rights supporters, the goal of integration is a strong candidate.").

36. Samuel R. Bagenstos, *From Integrationism to Equal Protection: tenBroek and the Next 25 Years of Disability Rights*, 13 U. St. Thomas L.J. 13, 14–15 (2016) (reviewing a series of federal disability rights laws enacted after tenBroek's article).

37. 29 U.S.C. § 794(a) (2018) (prohibiting recipients of federal funding from excluding disabled individuals from programs or activities on the basis of disability); 28 C.F.R. § 35.130(d) (2024) (requiring public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities"); *id.* at § 35.130(b)(7) (requiring public entities to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability").

38. 20 U.S.C. § 1412(a)(5)(A) (2018) (mandating that the removal of disabled children from general educational settings occurs only when "the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily").

39. 42 U.S.C. § 12112(b)(5)(A) (2018) (treating a refusal to make reasonable accommodations for current or prospective employees as discrimination).

40. *Id.* §§ 12182(b), 12183 (establishing provisions aimed at removing accessibility barriers and modifying exclusionary policies that pertain to places of public accommodation).

41. See Weber, *supra* note 29, at 173 (reviewing integrative provisions and describing the ADA as a "thoroughly integrationist statute").

42. The underlying theory is that intergroup contact can reduce prejudice. See Gordon W. Allport, *The Nature of Prejudice* 261–81 (25th Anniversary ed. 1979) ("Prejudice (unless deeply rooted in the character structure of the individual) may be reduced by equal status contact between majority and minority groups in the pursuit of common goals."); Thomas F. Pettigrew & Linda R. Tropp, *When Groups Meet: The Dynamics of Intergroup Contact* 77–90 (2011) (discussing how intergroup contact may enhance intergroup knowledge and empathy). For more on the "contact hypothesis," see *infra* notes 348–356 and accompanying text.

opportunities;⁴³ and third, to convey the message that disabled persons are “full members of society” by offering “a tangible invitation of admission” to community life.⁴⁴

B. *Inverse Integration: A Working Definition*

While traditional integration focuses on equipping disabled persons with the means to enter mainstream settings, inverse integration does the opposite. In other words, it focuses on integrating *nondisabled* persons into disability-focused settings, frameworks, or activities.⁴⁵ By definition, then, the term inverse integration effectively contains the following three necessary elements: *disability*, *focus*, and *integration*, each of which will be examined below.

1. *Disability*. — It is generally accepted that any understanding of “disability” depends on the cultural, geographical, and environmental backdrops attendant to the particular use of the term.⁴⁶ As most scholars recognize, disability results from the interaction between a specific impairment and social factors.⁴⁷ This concept of disability, also known as the “social model,”⁴⁸ is inherent in the ADA’s perception of disability.⁴⁹ Indeed, the Act’s definition of disability has always included three prongs that are connected to social factors, only one of which must be satisfied.⁵⁰ Thus, someone can be disabled under the ADA if they *presently* have an

43. Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 *Va. L. Rev.* 825, 844 (2003).

44. *Id.*

45. Cf. Bennett Capers, *The Law School as a White Space*, 106 *Minn. L. Rev.* 7, 18–19 (2021) (referring to a “plethora of spaces that are associated with different groups,” including “ableist spaces” and “disabled spaces”); *id.* at 20 (“[S]paces can be physical places. . . . But they don’t have to be. . . . ‘[S]pace is also meaning. It is expressive and symbolic [and] it is educative.” (fourth and fifth alterations in original) (quoting Lua Kamál Yuille, Rúhíyyih Nikole Yuille & Justin A. Akbar-Yuille, *Love as Justice*, 26 *Langston Hughes Rev.* 49, 49 (2020))).

46. See Jamelia N. Morgan, *Toward a DisCrit Approach to American Law*, in *DisCrit Expanded* 13, 15–16 (Subini A. Annamma, Beth A. Ferri & David J. Connor eds., 2022) (“[D]isability studies emphasize that disabled people are not defective persons or victims but, rather, are limited by social and environmental barriers.”).

47. *Id.*

48. See Rabia Belt & Doron Dorfman, *Disability, Law, and the Humanities: The Rise of Disability Legal Studies*, in *The Oxford Handbook of Law and Humanities* 145, 147 (Simon Stern, Maksymilian Del Mar & Bernadette Meyler eds., 2020) (“The social model of disability distinguishes between an ‘impairment,’ which is a biological condition, and ‘disability,’ which is the social meaning given to the impairment.”); Adi Goldiner, *Understanding “Disability” as a Cluster of Disability Models*, 2 *J. Phil. Disability* 28, 31 (2022) (describing the social model of disability as attributing the exclusion experienced by disabled persons to the larger social environment).

49. Jamelia N. Morgan, *Policing Under Disability Law*, 73 *Stan. L. Rev.* 1401, 1406 (2021) (arguing that “the ADA embodies a *social model* of disability”).

50. 42 U.S.C. § 12102(1)(A)–(C) (2018).

impairment that substantially limits them in a major life activity;⁵¹ or if they have a *past* record of such an impairment;⁵² or if they are *regarded* as having such an impairment.⁵³

In 2008, Congress enacted the Americans with Disabilities Act Amendments Act (ADAAA), which reinforced the federal government's commitment to an expansive and evolving definition of disability.⁵⁴ While the three-pronged framework remains under the ADAAA, Congress explicitly instructed courts to construe the definition "in favor of broad coverage of individuals."⁵⁵

In defining inverse integration, this Article adopts a similarly expansive understanding of disability. For example, it considers the engagement of nondisabled children in a "peanut-free" classroom (which entails the expectation that these children would avoid peanuts during school time) as an inverse-integration practice, because, after the enactment of the ADAAA, food allergies effectively became a disability under the Act.⁵⁶

2. *Focus*. — Similarly, the second element of inverse integration—namely, whether a setting, framework, or activity is focused on disability—does not depend on one conclusive criterion. Rather, this Article uses Professor Lawrence Lessig's concept of "social meaning," which he describes as "frameworks of understanding within which individuals live."⁵⁷ In other words, a disability-focused setting, framework, or activity is one where social meaning is significantly marked by disability culture or participation.⁵⁸

The most obvious way to determine "focus" would be to use quantitative analysis. Thus, an association between disability and a specific activity or framework is most evident when the majority of people inhabiting a certain space are disabled. But this is not necessarily the

51. Id. § 12102(1)(A).

52. Id. § 12102(1)(B).

53. Id. § 12102(1)(C).

54. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified at 42 U.S.C. §§ 12101–12102, 12111–12114, 12201, 12211).

55. 42 U.S.C. § 12102(4)(A).

56. See D'Andra Millsap Shu, Food Allergy Bullying as Disability Harassment: Holding Schools Accountable, 92 U. Colo. L. Rev. 1, 40–60 (2021) (concluding that if the ADA (as amended) "is properly interpreted and used, food allergy should usually be a disability" (cleaned up)). Inverse integration may thus occur either when a student's classmates avoid peanuts during the school day to accommodate the student's peanut allergy (i.e., they engage in a disability-focused activity) or when they join the student's peanut-free table (i.e., they enter a disability-focused space).

57. Lawrence Lessig, The Regulation of Social Meaning, 62 U. Chi. L. Rev. 943, 952 (1995); see also id. at 951 (defining social meaning as "the semiotic content attached to various actions, or inactions, or statuses, within a particular context").

58. Id. at 952 (noting that social meanings are "contingen[t] on a particular society or group or community within which social meanings occur").

case.⁵⁹ The focus on disability can also manifest in leadership, design, or culture. For example, a classroom can be “disability-focused” when: (1) the classroom is taught by a “special education” teacher; (2) the classroom is specifically designed to support disabled children;⁶⁰ or (3) the classroom instruction is conducted in sign language. And this would be true even if the majority of the students were nondisabled.

The focus element can also be satisfied by a reference to disability culture. The most obvious example is Deaf culture, which perceives sign language as a cultural expression and which manifests in various ways, including theater and cinema.⁶¹ Other cultural manifestations of disability may also be considered “disability culture,” even if they are not widely recognized as such. Consider, for example, the Australian dance company named “Restless,” whose performances include both intellectually disabled and nondisabled dancers.⁶² Because this company employs a choreography method that is configured around “the personal styles, nuances and attitudes of dancers with intellectual disability,”⁶³ its performances reflect “cultures of intellectual disability” and thus satisfy this Article’s focus element.⁶⁴

In contemporary society, disability-focused settings or activities traditionally carry a social stigma. Indeed, society often treats devices typically used by disabled persons, such as wheelchairs, hearing aids, or white canes, as “stigma symbols”⁶⁵ (although disabled persons have recently begun to “reclaim” the negative meaning of such devices and turn them into a source of self-pride⁶⁶). However, social meanings—and hence, stigma—can change, even dramatically, over time.⁶⁷ The wearing of face

59. Cf. Capers, *supra* note 45, at 18 (“[A] space can be gendered even when people of different genders are present.”).

60. One example is a physical education space designed for disability sports. See, e.g., Ronald Davis, Yvonne Woolley & Ron French, *Reverse Mainstreaming*, 44 *Physical Educator* 247, 247–49 (1987) (proposing such an approach). A classroom designed to support disabled children is thus different from a classroom that merely includes specific disability accommodations.

61. E.g., Padden & Humphries, *supra* note 11, at 1–2, 4–5, 57–58, 101–02, 150, 155–57.

62. Anna Catherine Hickey-Moody, *Unimaginable Bodies: Intellectual Disability, Performance and Becoming*, at xiii–xv (2009).

63. *Id.* at xiii.

64. *Id.* at xii.

65. Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* 43–44 (1963) (defining stigma symbols as “signs which are especially effective in drawing attention to a debasing identity discrepancy . . . with a consequent reduction in our valuation of the individual”).

66. Alice Sheppard, *So. Not. Broken.*, in *Disability Visibility: First-Person Stories From the Twenty-First Century* 155–57 (Alice Wong ed., 2020); cf. Goffman, *supra* note 65, at 100 (“One method of disclosure is for the individual voluntarily to wear a stigma symbol, a highly visible sign that advertises his failing wherever he goes.”).

67. See Lessig, *supra* note 57, at 964–65, 999. One example concerns walking canes. Between the seventeenth and nineteenth centuries, the use of decorative canes was prevalent in Western Europe and other parts of the world. See Leslie Harris, *Canes and*

masks during the COVID-19 pandemic provides one example. In the early stages of the pandemic, masks were generally viewed as mainstream.⁶⁸ But as the pandemic wore on and mask mandates were lifted, masks began to be associated with vulnerability and disability in some places.⁶⁹ Now, face masks themselves are perceived by many as stigma symbols.⁷⁰ In many respects, then, wearing a mask has become a disability-focused activity.⁷¹

3. *Integration.* — The third element of inverse integration is whether a nondisabled person actually integrates into a disability-focused activity, framework, or setting. Because defining integration is difficult, as Professor Audrey McFarlane and others have noted,⁷² this Article’s use of “integration” is limited to the way this term has been used in disability rights scholarship. In that literature, integration has been described as a policy aimed at promoting interactive goals (i.e., facilitating interaction

Walking Sticks, in *Encyclopedia of Clothing and Fashion* 219 (Valerie Steele ed., 2005); Peter K. Andersson, *The Walking Stick in the Nineteenth-Century City: Conflicting Ideals of Urban Walking*, 39 *J. Transp. Hist.* 275, 276 (2018); Duncan Phillips, ‘Canes Were Much More of a Fashion Accessory Than a Walking Aid’: Under the Hammer With Duncan Phillips, *W. Daily Press*, Feb. 4, 2017, at 33.

68. This does not mean, of course, that everyone actually wore masks.

69. See, e.g., Ruth Colker, *The Americans with Disabilities Act’s Unreasonable Focus on the Individual*, 170 *U. Pa. L. Rev.* 1813, 1847 (2022) [hereinafter Colker, *The Americans with Disabilities Act*] (“Masking is the new ramp.”); Sarah Wildman, *Opinion, In the Rush to Return to ‘Normal,’ What Happens to the Vulnerable?*, *N.Y. Times* (Apr. 9, 2022), <https://www.nytimes.com/2022/04/09/opinion/covid-mask-risk-society.html> (on file with the *Columbia Law Review*); Joe Biden, *President of the U.S., Remarks of President Joe Biden—State of the Union Address as Prepared for Delivery*, *White House* (Mar. 1, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/01/remarks-of-president-joe-biden-state-of-the-union-address-as-delivered/> [https://perma.cc/P5YT-MG2P] (“If you’re immunocompromised or have some other vulnerability, we have treatments and *free high-quality masks*.” (emphasis added)).

70. See, e.g., Kiara Alfonseca, *Mask Shaming Ignores COVID-19 Fears of Immunocompromised People*, *ABC News* (July 14, 2021), <https://abcnews.go.com/Health/mask-shaming-affects-immunocompromised-people/story?id=78731948> [https://perma.cc/P42Q-CV6K] (“[M]ask shaming has shifted targets—instead of people being shamed for not wearing masks, people who continue to wear a mask are being scrutinized for being cautious.”); cf. Doron Dorfman, *Penalizing Prevention: The Paradoxical Legal Treatment of Preventative Medicine*, 109 *Cornell L. Rev.* 311, 383 (2024) (describing how “structural stigma stands in the way of successfully implementing preventive interventions through laws, policies, and court decisions”).

71. It might be more accurate to say that, in many respects, prepandemic norms have resurfaced. See Aimi Hamraie (@AimiHamraie), *Twitter* (Apr. 4, 2020), <https://twitter.com/AimiHamraie/status/1246436950078361600> [https://perma.cc/5NYJ-KKBR] (noting, during the first months of the COVID-19 pandemic, that do-it-yourself quilt fabric masks are in fact “disability fashion”).

72. Audrey G. McFarlane, *The Properties of Integration: Mixed-Income Housing as Discrimination Management*, 66 *UCLA L. Rev.* 1140, 1176 (2019).

between disabled and nondisabled persons)⁷³ and institutional goals (i.e., increasing the presence of disabled persons in mainstream spaces).⁷⁴

Thus, this Article defines integration broadly to include practices that fulfill either the interactive or institutional aspect of the term. For example, inverse integration includes nondisabled persons using sign language, wearing face masks, and avoiding certain foods. At first glance, these situations may not appear to be “integration.” However, because these actions often facilitate interactions or allow disabled and nondisabled persons to share a space, they meet the criterion.⁷⁵ Admittedly, this definition still leaves some ambiguity as to what constitutes “integration.” Thus, perhaps a more useful way to understand what inverse integration means is to look at what it *is not*.⁷⁶

a. *It Is Not a One-Off Event, but Rather a Sustained Practice.* — Scholars generally recognize that to qualify as “integration,” an interaction must involve a sustained process or practice.⁷⁷ Thus, one-off engagements with disability culture do not constitute inverse integration.⁷⁸ For this reason,

73. See generally Harris, *The Aesthetics of Disability*, *supra* note 13, at 897, 916, 926 (arguing that, in the United States, the disability integration framework was designed to facilitate contact between disabled and nondisabled persons); see also Martha Minow, *In Brown's Wake: Legacies of America's Educational Landmark 76* (2010) (“[L]earning alongside students with disabilities also can benefit nondisabled students by enhancing their understanding and appreciation of the struggles and talents of others . . .”).

74. See Colker, *The Disability Integration Presumption*, *supra* note 28, at 817, 820, 843, 851–52, 859 (referring to the institutional dimensions of “integration” in the context of disability education); see also Allison F. Gilmour, *Has Inclusion Gone Too Far?*, *Educ. Next*, Fall 2018, at 8 (noting that, in theory, integration involves increasing the numbers of disabled students in the general education classrooms for the purpose of improving disabled students’ academic outcomes).

75. See *infra* notes 265–268; see also Ariane de Vogue, *Gorsuch Declines to Wear Mask, as Bench-Mate Sotomayor Works From Her Office*, CNN, <https://edition.cnn.com/2022/01/18/politics/neil-gorsuch-mask-sotomayor-supreme-court/index.html> [<https://perma.cc/FA6T-LV2Z>] (last updated Jan. 19, 2022) (noting that Supreme Court Justice Sonia Sotomayor participated in oral arguments remotely—in isolation from her colleagues—because not all of them wore face masks during the COVID-19 pandemic).

76. There are other practices that may come to mind when thinking about engagement of nondisabled persons with disability culture, but they are not relevant to the discussion in this Article. For example, inverse integration does not include situations where nondisabled persons “fake disabilities” to exploit disability rights. See Doron Dorfman, *Suspicious Species*, 2021 U. Ill. L. Rev. 101, 103 n.5. Inverse integration also does not include situations in which a person deliberately changes their body to become “disabled” through elective amputation or paralysis, a process known as “transability.” See Bethany Stevens, *Interrogating Transability: A Catalyst to View Disability as Body Art*, *Disability Stud. Q.*, Fall 2011 (exploring transability and using this concept “to consider disability as body art”).

77. See Elizabeth Anderson, *The Imperative of Integration* 116 (2010) [hereinafter Anderson, *The Imperative of Integration*] (describing integration as involving four stages); Weber, *supra* note 29, at 173 (explaining that integration requires a process of reshaping attitudes).

78. This part of the definition is tricky, given that many so-called one-off experiences can be repeated. Still, there are activities—such as simulation exercises—that are more likely than others to occur only once, and only for a short period.

inverse integration does not include simulation exercises, whereby non-disabled persons try to understand what living with an impairment looks like by using a wheelchair or wearing a sleepshade.⁷⁹ By definition, these exercises are single events (indeed, they are often called “a wheelchair for a day”), which is one reason they drew heavy criticism from the disability community.⁸⁰ Similarly, one-off visits of sighted people to “dining in the dark” restaurants—where people ostensibly experience what it is to be blind⁸¹—do not constitute inverse integration. In fact, as disability activist Simi Linton recounts from an email conversation with her friend, noted disability historian Catherine Kudlick: “The experience is not genuine, nor can it ever be, because the visitor always knows that it’s nothing but a visit.”⁸²

b. *It Is Not the Same as Traditional Integration, but Sometimes the Boundaries Are Blurry.* — As suggested above, the focus of any activity, context, or framework exists on a spectrum. At one end are spaces generally associated with disability, such as Gallaudet University, the national university for Deaf people.⁸³ At the other end are mainstream institutions, such as any other higher education institution where instruction is conducted orally. In between, we can find “hybrid” spaces that involve both disability and mainstream cultures.

Applying the concept of inverse integration to these spaces moves along a similar spectrum. Figure 1 below uses educational practices that involve sign language to illustrate this continuum. Thus, hearing students who attend Gallaudet are considered at the far end of inverse integration.⁸⁴

79. See Ariella M. Silverman, Jason D. Gwinn & Leaf Van Boven, *Stumbling in Their Shoes: Disability Simulations Reduce Judged Capabilities of Disabled People*, 6 *Soc. Psych. & Personality Sci.* 464, 464 (2014) (explaining that “experience simulations of disability can be misleading because they highlight the initial challenges and failure experiences of *becoming* disabled, rather than the competencies and adaptations of *being* disabled”). Usually, such simulations take place as part of “disability awareness” days. In recent years, however, simulations have also taken the form of virtual practices. See Johanna Smith & John Inazu, *Virtual Access: A New Framework for Disability and Human Flourishing in an Online World*, 2021 *Wis. L. Rev.* 719, 740.

80. See, e.g., Emily Ladau, *I Won’t Pretend that Disability Simulation Works*, *HuffPost* (Mar. 11, 2014), https://www.huffpost.com/entry/i-wont-disability-simulation_b_4936801 [<https://perma.cc/PJ9A-U3CK>] (last updated Dec. 6, 2017) [hereinafter Ladau, *I Won’t Pretend*] (criticizing simulation exercises).

81. See Siegfried Saerberg, *The Dining in the Dark Phenomenon*, *Disability Stud. Q.*, Summer 2007, <https://dsq-sds.org/index.php/dsq/article/view/24> [<https://perma.cc/GMH4-CBMT>] (analyzing situations in which sighted people dine in completely dark restaurants operated by blind people).

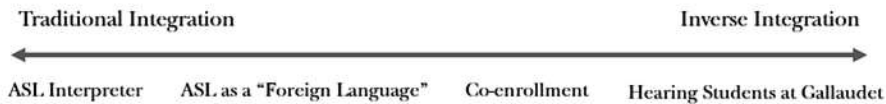
82. Simi Linton, *My Body Politic* 215 (2006) [hereinafter Linton, *My Body Politic*] (quoting Professor Catherine Kudlick).

83. See *About*, Gallaudet Univ., <https://gallaudet.edu/about/> [<https://perma.cc/7E3Z-5PKQ>] (last visited Oct. 30, 2023).

84. While the vast majority of the students are deaf, Gallaudet admits each year a number of hearing students who know ASL. Specifically, Gallaudet has admitted hearing students to its

Conversely, the presence of a Deaf student at a mainstream university who requires an ASL translator is at the other end. In-between practices, such as co-enrollment⁸⁵ and teaching hearing students ASL,⁸⁶ exist in the middle, and in many respects satisfy both traditional and inverse integration.

Figure 1. An Illustration of the Continuum of “Integration”



*c. It Is Not Allyship (or at Least Not All the Time).*⁸⁷ — Under certain circumstances, nondisabled persons who enter disabled spaces might be perceived as allies, such as when nondisabled students join a disability rights student organization.⁸⁸ But not every act of allyship is inverse integration, nor does every inverse-integration practice reflect allyship. Consider, for example, the participation of nondisabled persons in protests for disability rights. We might think of these nondisabled participants as allies, but we would not refer to such participation as integration into a disability-focused activity, because the act of protesting, in and of itself, is not associated with disability.⁸⁹

Hearing Undergraduate Program (HUGS) since the early 2000s. Gallaudet Univ., Apply, <https://gallaudet.edu/admissions/undergraduate/uga-apply/#hearing> [<https://perma.cc/3WNJ-W4GR>] (last visited Nov. 19, 2023) (“If you are a hearing student who knows American Sign Language (ASL) that wants to study alongside deaf and hard of hearing individuals and will pursue a career that furthers the education of deaf and hard of hearing people, Gallaudet University has an immersive hearing undergraduate experience designed for you.”); see also Brueggemann, *supra* note 7, at 14 (noting that Gallaudet established the “HUGS” program in 2002 and that the majority of “Gallaudet’s graduate and professional students are hearing students”).

85. “Co-enrollment” classes include hearing children and a “critical mass” of Deaf and hard-of-hearing students. Shirin Antia & Kelly K. Metz, Co-enrollment in the United States: A Critical Analysis of Benefits and Challenges, *in* Bilingualism and Bilingual Deaf Education 424, 424 (Marc Marschark, Harry Knoors & Gladys Tang eds., 2014); see also Simi Linton, Claiming Disability: Knowledge and Identity 61 (1998) (describing a school in Burbank, California, in which both hearing and Deaf students sign).

86. See *supra* notes 6–8 and accompanying text.

87. In the disability context, author and activist Emily Ladau refers to allyship as “taking meaningful action,” explaining that “[s]imply saying ‘I’m an ally to the XYZ-marginalized community’ isn’t how allyship works. . . . [B]eing an ally is really a more of a ‘show, don’t tell’ kind of thing.” Ladau, Demystifying Disability, *supra* note 3, at 141. For a critique of “allyship,” see Ernest Owens, Opinion, Why I’m Giving Up on “Allies”, Philadelphia (June 23, 2017), <https://www.phillymag.com/news/2017/06/23/allyship-vs-solidarity/> [<https://perma.cc/HP2J-EX4K>].

88. Cf. Vinay Harpalani, “Safe Spaces” and the Educational Benefits of Diversity, 13 Duke J. Const. L. & Pub. Pol’y 117, 147–49 (2017) (referring to the involvement of white students in safe spaces for racial minorities in college campuses as a form of integration).

89. Cf. Ian Ayres & Jennifer Gerarda Brown, Straightforward: How to Mobilize Heterosexual Support for Gay Rights 8 (2005) (noting that “[t]hose who speak for gay rights are often assumed to be gay or lesbian themselves”).

Solidarity campaigns such as “F*** Stairs,” where nondisabled persons “pledge to use only accessible pathways in solidarity with wheelchair users,”⁹⁰ are perhaps more complicated. It is unclear, for example, whether such activities satisfy the interactive or institutional components of the integration element.⁹¹ By using only accessible pathways, nondisabled persons do not necessarily integrate into disability-specific settings or spaces. And unlike other disability-focused activities, such as learning ASL or Braille, using accessible pathways is not strongly related to interacting or communicating with disabled individuals.⁹² Still, it may be argued that in a society where inaccessibility is pervasive (and in which disabled persons have few choices when it comes to accessible settings), the use of accessible infrastructure by nondisabled persons—either to express solidarity or for another reason—has the potential to foster interactions between disabled and nondisabled individuals.⁹³

d. *In Most Instances, It Does Not Reflect “Universal Design.”* — Because inverse integration typically requires active⁹⁴ engagement or participation in a disability-focused space or activity, it does not fully overlap with “Universal Design,” a design philosophy that aspires to shape all physical and social environments to fit a wide range of users.⁹⁵ Thus, modifications to the physical or digital environment such as curb cuts, ergonomic furniture, closed-captioning, or speech-to-text would not be considered inverse integration under the definition proposed here, even though they serve society at large.⁹⁶

II. THE LEGAL AND SOCIAL NORMS THAT REGULATE INVERSE INTEGRATION

As section I.A explains, the rise of traditional integration in the 1970s is generally attributed to a shift in legal and social norms regarding the

90. Join the Movement, F*** Stairs, <https://www.fstairs.com/> [https://perma.cc/7LLH-FCSX] (last visited Oct. 31, 2023).

91. See *supra* notes 73–75 and accompanying text.

92. Moreover, because this practice is not the equivalent of using a wheelchair (a disability-focused activity), it may also fail to satisfy the focus element. See *supra* notes 57–71 and accompanying text.

93. Cf. Elizabeth F. Emens, *Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act*, 60 *Am. J. Compar. L.* 205, 230–31 (2012) [hereinafter Emens, *Disabling Attitudes*] (noting that “‘disability houses’ of course occur all the time on campuses and elsewhere, when only one building or part of an institution is accessible”).

94. That said, this Article does consider some behaviors that involve omissions (e.g., avoiding peanut-based products) to be inverse integration because such behaviors usually reflect informed decisions to refrain from acting in a certain way. Thus, for the purpose of this Article, this kind of omission constitutes an active engagement with disability culture. See *supra* note 56 and accompanying text (discussing peanut allergy in the context of inverse integration).

95. See Aimi Hamraie, *Building Access: Universal Design and the Politics of Disability* 5–6 (2017) (explaining that “Universal Design” refers to the notion that “inclusive design benefits everyone, regardless of disability or age”).

96. See Emens, *Integrating Accommodation*, *supra* note 4, at 841.

involvement of disabled persons in civic life. Indeed, while mainstream attitudes toward disability may still reflect prejudice and hence hinder inclusion,⁹⁷ contemporary social conventions no longer endorse the exclusion of disabled persons from public life. In fact, such norms have now been codified in legislation: Exclusion and segregation are largely prohibited under federal and state law.⁹⁸

Against this backdrop, one might expect the story of inverse integration to follow a similar pattern. That is, that the emergence of inverse integration would be the result of social and legal norms pushing nondisabled persons into disabled spaces and activities. As this Part shows, however, this is not the case.

A. *Inverse Integration and Social Norms*

Professor Elizabeth Emens's conceptualization of "inside" and "outside" views of disability are critical to understanding the social norms that regulate inverse integration.⁹⁹ As she notes, "[t]hose on the inside and the outside of disability often look differently at the experience, the theory, and the law of disability."¹⁰⁰ Notably, what Emens calls the "inside view" does not necessarily reflect the views of *all* disabled individuals, just as the "outside view" does not necessarily represent the perspectives of all nondisabled persons.¹⁰¹ This Article's goal, however, is to use these "imperfect generalizations" to "demonstrat[e] differences in perspective across lines of subordination."¹⁰²

1. *Applying the Inside View to Inverse Integration.* — According to Emens, the inside view commonly sees disability as "a mundane feature of a no-less-happy life, rendered inconvenient or disabling largely by interactions with the surrounding environment."¹⁰³ In a recent essay, disabled author and journalist s.e. smith illustrates this concept by describing the "intense sense of belonging" they experience in spaces created for and by disabled persons, where "disability is celebrated and embraced."¹⁰⁴ Conversely, smith argues that when nondisabled persons

97. Jasmine E. Harris, Taking Disability Public, 169 U. Pa. L. Rev. 1681, 1688 (2021) (noting that the ADA has had "significantly less success in shifting social norms of disability, such as the association of disability with deficit").

98. See *supra* section I.A.

99. Elizabeth F. Emens, Framing Disability, 2012 U. Ill. L. Rev. 1383, 1389–99 [hereinafter Emens, Framing Disability].

100. *Id.* at 1386.

101. *Id.*

102. *Id.* at 1386 & n.3.

103. *Id.* at 1386.

104. s.e. smith, The Beauty of Spaces Created for and by Disabled People, *in* Disability Visibility: First-Person Stories From the Twenty-First Century, *supra* note 66, at 242–43; see also Adrienne Lu, In Fight Against Ableism, Disabled Students Build Centers of Their Own, Chron. Higher Educ. (July 15, 2022), <https://www.chronicle.com/article/in-fight-against->

enter such settings—that is, when inverse integration actually occurs—they may disrupt the unique dynamics of disability-specific settings.¹⁰⁵

These observations by smith reflect the broader social norm surrounding an inside view of inverse integration: The norm reflects a suspicion toward the involvement of nondisabled persons in disabled spaces. In fact, disabled persons sometimes wonder whether acts aimed at “supporting” disabled persons are actually designed to help *nondisabled* persons feel better about *themselves*.¹⁰⁶ For example, Emily Ladau, an activist and writer, has criticized the beer commercial referenced in the Introduction.¹⁰⁷ Ladau argues that the idea that nondisabled individuals who play wheelchair basketball are “made of more,” as the commercial suggests, conveys the message that “spending time with a guy in a wheelchair means you’re a good person.”¹⁰⁸

Other commentators also report feeling “absolute infuriation” towards nondisabled persons “play[ing]” with disability in public “to obtain emotional or psychological satisfaction.”¹⁰⁹ This is sometimes referred to as a form of cultural appropriation¹¹⁰—in part because

ableism-disabled-students-build-centers-of-their-own (on file with the *Columbia Law Review*) (noting that disability cultural centers in colleges and universities help disabled students to “build a sense of community and culture” and “find a sense of self and belonging”). For personal accounts describing how disability-specific summer camps provide opportunities to form friendships, see Girma, *supra* note 20, at 49–60; Judith Heumann with Kristen Joiner, *Being Heumann: An Unrepentant Memoir of a Disability Rights Activist* 25–31 (2020).

105. See smith, *supra* note 104, at 245–46; cf. Harpalani, *supra* note 88, at 162 (“[I]t is possible that the frequent presence of too many White students may prevent students of color from feeling ‘safe’ in these spaces.”).

106. See, e.g., Emily Ladau, *Dear Kylie Jenner, My Wheelchair Isn’t a Prop: Stop Playing Dress-Up Games With My Reality*, Salon (Dec. 3, 2015), https://www.salon.com/2015/12/03/dear_kylie_jenner_my_wheelchair_isnt_a_prop_stop_playing_dress_up_games_with_my_reality/ [<https://perma.cc/PLD2-V4J9>] [hereinafter Ladau, *Dear Kylie Jenner*] (criticizing Kylie Jenner for using a wheelchair in photos for a magazine article); Lady Gaga Rolls Out in a Wheelchair for Sydney Performance, Gets Egged, HuffPost (July 13, 2011), https://www.huffpost.com/entry/lady-gaga-wheelchair-egged-sydney-concert_n_897200 (on file with the *Columbia Law Review*) (last updated Dec. 6, 2017) (describing disability activists’ reaction to singer Lady Gaga taking the stage in a wheelchair).

107. Ladau, *Just One of the Guys*, *supra* note 2.

108. *Id.*

109. Stevens, *supra* note 76; see also Ladau, *Dear Kylie Jenner*, *supra* note 106 (“[W]heelchairs are not a costume choice.”); cf. Ben Mattlin, *Opinion, When Wheelchairs Are Cool*, N.Y. Times (July 31, 2014), <https://www.nytimes.com/2014/08/01/opinion/when-wheelchairs-are-cool.html> (on file with the *Columbia Law Review*) (“So go ahead and play disabled. As long as it’s done with joy and respect—not to tease or poke fun—I won’t be offended.”). Members of other marginalized groups also generally disapprove of situations where members of the majority “play[]” with oppressed axes of identity in “trivializing ways,” even if they do not try to gain any tangible benefit from such action. Ayres & Brown, *supra* note 89, at 108.

110. See, e.g., Ladau, *Dear Kylie Jenner*, *supra* note 106 (describing Kylie Jenner’s use of a wheelchair for a magazine cover photo shoot as “appropriat[ion]”); cf. Ashley Fetters,

nondisabled persons have the ability to choose “when to perform able-bodiedness,” a privilege that disabled persons often do not have.¹¹¹

Nondisabled persons’ engagement with disability-focused activities can be viewed negatively from an inside perspective, even when the express purpose of such engagement is to show solidarity. For example, because shaving one’s hair is not the same as losing hair as a result of chemotherapy, some cancer survivors have criticized fundraising initiatives that involve hair shaving for being “offensive” and “facile.”¹¹² In fact, as some disabled scholars point out, explaining to nondisabled persons why some of their ostensibly well-intentioned actions are actually demeaning can be a frustrating and emotionally taxing task in and of itself.¹¹³

Another reason for suspicion relates to fairness in accessing limited resources.¹¹⁴ For example, disability activists often criticize situations where a hearing person is cast to play a deaf role in a movie or play.¹¹⁵ One of the concerns raised by critics is that deaf and hard-of-hearing people have scarce acting, directing, and performing opportunities in the first

The Problem With This Year’s Most Comfortable Holiday Fad, *The Atlantic* (Dec. 17, 2018), <https://www.theatlantic.com/health/archive/2018/12/weighted-blanket-history-holiday-gift/578347/> (on file with the *Columbia Law Review*) (critiquing the mass production and mass marketing of weighted blankets as appropriating “calming aids” for profit, at the expense of small businesses that have been dedicated producers and suppliers of weighted blankets for decades). But see Sara Luterman, You Can’t “Culturally Appropriate” a Weighted Blanket, *Slate* (Jan. 10, 2019), <https://slate.com/human-interest/2019/01/weighted-blanket-appropriation-autism-controversy.html> [<https://perma.cc/VA3N-MGK2>] (“There is no way to culturally appropriate from disabled people. . . . [T]he physical objects disabled people use—fidget spinners and cubes, weighted blankets, shower chairs, scooters—are not a culture. . . . If that’s cultural appropriation, please, appropriate away.”).

111. Stevens, *supra* note 76 (“This selective performativity feels disingenuous and even infuriating to some disabled people because many of us do not get the option to take time off from disability.”); see also Carol J. Gill, Questioning Continuum, *in* *The Ragged Edge: The Disability Experience From the Pages of the First Fifteen Years of the Disability Rag* 44, 49 (Barrett Shaw ed., 1994) (“[Nondisabled persons] are in a position to escape the stigma. They can leave our sides and go out among strangers as ‘normal people,’ if only for a few minutes of peaceful anonymity.”).

112. May Bulman, Cancer Sufferers Label Shaven Head Fundraiser ‘Offensive’ and ‘Facile’, *The Independent* (Sept. 6, 2016), <https://www.independent.co.uk/news/uk/home-news/brave-shave-cancer-sufferers-macmillan-fundraiser-offensive-facil-a7225126.html> [<https://perma.cc/WQ24-AC4X>].

113. I thank Mercy Renci Xie for helping me think through this point. Professor Adrienne Asch, for example, described the indignity she had experienced when “a friend of more than twenty years” explained to her that her irritation and frustration with incidents of ableism were “unreasonable responses to people who were ‘trying to do the right thing’.” Adrienne Asch, *Critical Race Theory, Feminism, and Disability: Reflections on Social Justice and Personal Identity*, 62 *Ohio St. L.J.* 391, 395–96 n.21 (2001).

114. Cf. Mattlin, *supra* note 109 (“So go ahead and play disabled. . . . Just don’t do it for the freebies which are harder and harder to find these days anyway.”).

115. Gelt, *supra* note 11.

place.¹¹⁶ Another example can be found in schools. Integrating nondisabled children into special education classrooms sometimes allows them to use scarce resources and services otherwise available only to disabled students.¹¹⁷

Insiders' suspicion toward the involvement of nondisabled persons in disabled spaces also pertains to questions of who gets to speak on behalf of disabled persons and make decisions regarding disability-related issues.¹¹⁸ Disabled activists have long protested against the tendency to appoint nondisabled persons to leadership positions in disability-focused organizations.¹¹⁹ While some of these protests resulted in more disabled persons in positions of management, these were not easy victories.¹²⁰ Against this backdrop, disabled activists may be wary of any attempt by nondisabled persons to enter disability-specific organizations.

116. See, e.g., Amelia Hensley, *Hollywood & Broadway, Stop Overlooking Deaf Actors for Deaf Roles*, OnStage Blog (Nov. 8, 2017), <https://www.onstageblog.com/columns/2017/11/8/hollywood-broadway-stop-overlooking-deaf-actors-for-deaf-roles> [<https://perma.cc/6KH6-NFFZ>].

117. Covo, *supra* note 4, at 621, 656 (“[R]everse mainstreaming may aggravate an already unfair distribution of resources.”).

118. See generally Linton, *My Body Politic*, *supra* note 82, at 138–39 (discussing these questions in the context of the involvement of nondisabled persons in the Society for Disability Studies); Sins Invalid, *Skin, Tooth, and Bone: The Basis of Movement Is Our People: A Disability Justice Primer* 13, 18, 23 (2d ed. 2019) (extending this notion to challenge a leadership that is centered around the experiences of white disabled persons); Katie Eyer, *Claiming Disability*, 101 *B.U. L. Rev.* 547, 602 (2021) (noting that “many organizations that serve people with disabilities or advocate on disability issues are staffed primarily or exclusively by people who do not currently self-identify as disabled”); Michael A. Rembis, *Athlete First: A Note on Passing, Disability, and Sport*, in *Disability and Passing: Blurring the Lines of Identity* 111, 121–22 (Jeffrey A. Brune & Daniel J. Wilson eds., 2013) (referring to the “overwhelmingly male, nondisabled” leadership of the Paralympic movement during the 1980s). Interestingly, even in sign language communities, often celebrated as “utopian” settings, there are disparities between hearing and Deaf individuals when it comes to who holds leadership positions. Annelies Kusters, *Deaf Utopias? Reviewing the Sociocultural Literature on the World’s “Martha’s Vineyard Situations”*, 15 *J. Deaf Stud. & Deaf Educ.* 3, 7 (2010).

119. One example is the 1988 “Deaf President Now” protests in Gallaudet University, where students and faculty demanded to replace the hearing president, previously selected by the Board of Trustees, with a deaf president. The Board of Trustees eventually agreed to the protesters’ demands and appointed the first Deaf president of Gallaudet after more than one hundred years. *About: Deaf President Now*, Gallaudet Univ., <https://www.gallaudet.edu/about/history-and-traditions/deaf-president-now/> [<https://perma.cc/9KJ3-U395>] [hereinafter *Gallaudet University, About: Deaf President Now*] (last visited Oct. 31, 2023). For a recent protest with similar goals, see Amanda Morris, *The Student Body Is Deaf and Diverse. The School’s Leadership Is Neither.*, *N.Y. Times* (Oct. 26, 2021), <https://www.nytimes.com/2021/10/26/us/deaf-students-protests-schools.html> (on file with the *Columbia Law Review*) (last updated Nov. 10, 2021).

120. See sources cited *supra* note 119.

The suspicion towards nondisabled involvement in disabled spaces also stems from the pervasive inaccessibility of the mainstream world.¹²¹ As some disabled persons have consistently (albeit implicitly) asked: If nondisabled individuals were genuinely committed to engaging with disability culture, wouldn't they invest more effort to make *mainstream* spaces accessible?¹²² In other words, the failure to provide satisfactory accessibility casts doubt on the motives of nondisabled persons who wish to enter disabled spaces.

Interestingly, insiders' scholarly endeavors to challenge the inaccessibility of mainstream spaces can be read, if unintentionally, as inverse-integration advocacy. For example, in his 1975 essay, Vic Finkelstein imagines a society in which the majority of the residents are wheelchair users and all apartments have low ceilings and doors.¹²³ As a result, the few nondisabled residents in the society constantly knock their heads on the door lintels and therefore carry stigmatizing bruises on their foreheads.¹²⁴ In such an "upside-down" world,¹²⁵ nondisabled persons would have no choice but to use wheelchairs.¹²⁶ Deaf culture has a similar utopian folk myth.¹²⁷ In that narrative, which takes place on a planet called Eyeth, "deaf people communicate freely and live without stigma" because everyone—including hearing people—uses sign language.¹²⁸ While these tales invoke inverse integration to make a larger point about inclusion, they both reflect a skepticism as to whether mainstream society would be committed to promoting inverse integration. As the next section shows, this skepticism is not unfounded.

2. *Applying the Outside View to Inverse Integration.* — In contrast to the inside view, the outside view often perceives disability as "an unhappy place

121. Smith, *supra* note 104, at 242–43 ("It is very rare, as a disabled person, that I have an intense sense of belonging, of being not just tolerated or included in a space but actively owning it . . .").

122. See Ladau, *I Won't Pretend*, *supra* note 80 (criticizing simulation exercises and their perceived failure to change participants' attitudes regarding accessibility barriers that wheelchair users face).

123. Vic Finkelstein, *To Deny or Not to Deny Disability*, 26 *Magic Carpet* 31 (1975).

124. *Id.*

125. *Id.*

126. For reasons not fully explored in Finkelstein's story, he did not consider the idea that nondisabled persons would use wheelchairs to be a viable solution. Other scholars, however, were less skeptical. See, e.g., Shakespeare, *supra* note 25, at 43–44 ("No village for wheelchair users would be inaccessible to non-disabled people, for the simple reason that non-disabled people always have the choice to use wheelchairs, just as hearing people have the choice to learn sign language."); Janet Radcliffe Richards, *How Not to End Disability*, 39 *San Diego L. Rev.* 693, 708–09 (2002) (noting that in Finkelstein's imaginary village, "there is nothing to stop [nondisabled persons] from learning to use wheelchairs").

127. Sara Novic, *Opinion, Don't Fear a Deaf Planet*, *N.Y. Times* (Oct. 10, 2021), <https://www.nytimes.com/2021/10/10/opinion/deaf-population-integration.html> (on file with the *Columbia Law Review*).

128. *Id.*

created by an individual medical problem.”¹²⁹ Accordingly, the norm surrounding the outsiders’ view of inverse integration is a norm of reluctance.

The conventional account is that, given the choice, nondisabled persons would not choose to engage with disability culture and identity.¹³⁰ According to many scholars, such sentiment results from fear, or what Harlan Hahn termed “existential anxiety”—a cognitive and emotional response to disability that triggers “worries about the potential loss of physical or behavioral capabilities.”¹³¹ There is perhaps no better example of this cognitive process than the superstition that if a nondisabled person sits in a wheelchair, they will one day wind up needing a wheelchair.¹³² The implication of this superstition for inverse integration seems obvious: It may deter, for example, a nondisabled person from playing wheelchair basketball.¹³³

The reluctance to engage with disability culture also stems from the social preference in favor of assimilation of minority groups into mainstream society. This norm has been most apparent in the context of deafness.¹³⁴ Beginning in the latter part of the nineteenth century, influential educators and innovators such as Alexander Graham Bell advocated for “oralism”—a methodology aimed at teaching deaf children orally through lip-reading and residual hearing.¹³⁵ In fact, in many “oral”

129. Emens, *Framing Disability*, supra note 99, at 1386.

130. See Emens, *Disabling Attitudes*, supra note 93, at 231 (“[M]ainstream culture has so little sense that . . . nondisabled people could affirmatively seek out a disability-centered context.”); cf. Tobin Siebers, *Disability as Masquerade*, 23 *Literature & Med.* 1, 5 (2004) (“Only rarely do dominant groups try to pass as lesser ones.”).

131. Harlan Hahn, *The Politics of Physical Differences: Disability and Discrimination*, 44 *J. Soc. Issues* 39, 43 (1988).

132. See Connor Wilson, *Beware of Wheelchairs*, USC Digit. Folklore Archives (May 1, 2017), <http://folklore.usc.edu/?p=38593> (on file with the *Columbia Law Review*).

133. See Bernie Carter, Janette Grey, Elizabeth McWilliams, Zoe Clair, Karen Blake & Rachel Byatt, ‘Just Kids Playing Sport (in a Chair)’: Experiences of Children, Families and Stakeholders Attending a Wheelchair Sports Club, 29 *Disability & Soc’y* 938, 946–47 (2014) (“[T]here was a palpable sense that using a wheelchair could in some way blight their health and invoke the need for a chair.”); Amy Merrick, *Designing for Disability*, *New Yorker* (Apr. 16, 2015), <https://www.newyorker.com/business/currency/designing-for-disability> (on file with the *Columbia Law Review*) (noting that retailers have few incentives to design fashionable canes because canes “bear[] a subtle reminder of mortality, a subject that Americans, in particular, tend to want to ignore”).

134. Mainstream society’s response to autism tells a similar story. The “best practice” of educating autistic children in the United States is based on the premise that “inappropriate” behaviors should be replaced with “normative” (read: mainstream) ones. Anne McGuire, *War on Autism: On the Cultural Logic of Normative Violence* 44–46 (2016). Thus, nonverbal autistic students are often coaxed to speak, even though other methods of communication might be more suitable. Covo, supra note 4, at 641–42.

135. Douglas C. Baynton, *Deaf History: 1881–1920*, in 1 *The SAGE Deaf Studies Encyclopedia* 197, 198–200 (Genie Gertz & Patrick Boudreault eds., 2016).

schools for deaf children, signing was prohibited.¹³⁶ One of the ideological underpinnings of this methodology was assimilation.¹³⁷ By encouraging deaf individuals to speak, oralists hoped to make deaf children “as like their hearing counterparts as possible.”¹³⁸

Inverse integration was directly and indirectly affected by the promotion of oralism. For example, the fact that so many resources were devoted to teaching deaf children orally made it highly unlikely that hearing people would decide to learn sign language.¹³⁹ In fact, one integrated school punished *hearing* children who signed to deaf peers by forcing them to wear gloves, which was also supposed to signal “stupidity.”¹⁴⁰

B. *Inverse Integration and the Law*

Social conventions are not the only norms that influence inverse integration. Statutes, regulations, and court decisions also regulate and impact this practice. This section will identify a new typology of inverse-integration practices and use it to analyze the relationship between the law and inverse integration. The typology distinguishes among three types of inverse integration that are particularly significant from a normative perspective: (1) Affiliation, (2) Inverse Integration Modifications, and (3) Sustained Engagement with Disability-Focused Activities. The analysis shows that, although a number of legal norms indirectly facilitate the formation of *some* inverse-integration practices, the law does not generally contemplate or promote inverse integration.

1. *Affiliation*. — The Affiliation category includes situations in which a nondisabled person is affiliated with a disability-focused organization or framework. Such inverse-integration practices can be found in K–12

136. E.g., Padden & Humphries, *supra* note 11, at 49 (describing how, during the late 1800s, some schools for the deaf prohibited the use of sign language); John Vickrey Van Cleve, *The Academic Integration of Deaf Children: A Historical Perspective*, in *The Deaf History Reader* 116, 119 (John Vickrey Van Cleve ed., 2007) (describing the same phenomenon in private daily schools).

137. Baynton, *supra* note 135, at 199–200 (describing oralists’ goal for deaf students to “naturally assimilate and marry into the hearing world”).

138. Margret A. Winzer, *The History of Special Education: From Isolation to Integration* 192 (1993).

139. Deaf activists used mostly written language to communicate with hearing people, as they assumed that “it would be difficult if not impossible to communicate to [hearing people] through the language of signs.” Padden & Humphries, *supra* note 11, at 71–72 (“Self-expression to hearing people who did not already know sign language could not be imagined; instead, the written language was used to communicate.”); see also *id.* at 157 (“Deaf people believed there was little interest in the language outside the group. They had been told by others that their language wasn’t worth preserving.”).

140. Van Cleve, *supra* note 136, at 119.

education,¹⁴¹ higher education,¹⁴² student organizations,¹⁴³ theater,¹⁴⁴ dance companies,¹⁴⁵ and summer camps.¹⁴⁶

There are potentially three areas of the law that regulate such affiliation of nondisabled persons with disability-focused settings: (a) the ADA; (b) the Individuals with Disabilities Education Act (IDEA); and (c) federal regulations pertaining to Medicaid funding for Home and Community-Based Services.

a. *The ADA.* — As previously discussed, the ADA requires that mainstream settings be accessible to disabled persons and that reasonable accommodations be provided.¹⁴⁷ The opposite, however, is not true. When it comes to disability-specific spaces, the ADA does not mandate that such spaces be accessible to *nondisabled* persons. Unlike Title VII of the Civil Rights Act, the ADA is not a “symmetrical” statute; its antidiscrimination provisions protect only individuals who meet the statutory definition of a person with a disability.¹⁴⁸ In fact, Congress included explicit language in the ADA that bars nondisabled individuals from claiming to be subject

141. See Covo, *supra* note 4, at 604, 615–24 (describing the inclusion of nondisabled children in special education settings).

142. See, e.g., *supra* note 84 and accompanying text (describing Gallaudet’s practice of admitting hearing students).

143. See, e.g., Disabled and Allied Law Student Association, Fordham Univ. Sch. of L., https://www.fordham.edu/info/24770/student_organizations/12030/disabled_and_allied_law_student_association [<https://perma.cc/TK4Y-PHF7>] (last visited Oct. 31, 2023).

144. See *supra* note 11 and accompanying text.

145. Wheelchair ballroom dancing programs sometimes include nondisabled dancers who perform in wheelchairs. See, e.g., Michelle Berg, Eight Wheels, Four Dancers and One Exceptional Teacher, *Saskatoon StarPhoenix* (June 17, 2021), <https://thestarphoenix.com/news/local-news/eight-wheels-four-dancers-and-one-exceptional-teacher> [<http://perma.cc/4L2Z-JX8G/>] (“The reverse inclusion of the able-bodied dancers dancing in a chair brings a whole awareness to that aspect of the group.” (quoting Laurel Scherr)). Other dance companies offer disability-informed performances involving both disabled and nondisabled participants. See *supra* notes 62–64 and accompanying text (describing the choreographic methodology of Australian dance company “Restless”).

146. See Steve Brannan, Joel Arick, Ann Fullerton & Joyce Harris, Inclusionary Practices: A Nationwide Survey of Mainstream Camps Serving All Youth, 70 *Camping Mag.*, Jan.–Feb. 1997, at 32, 32 (noting that, of seventy-one accredited residential summer camps that responded to a nationwide survey, twenty-four camps primarily serve campers with disabilities but also “reverse mainstream campers without disabilities in their summer residential programs”); Jane E. Brody, Personal Health, *N.Y. Times*, Apr. 3, 1985, at C10 (on file with the *Columbia Law Review*) (noting that some camps for disabled children “offer ‘reverse mainstreaming’ [programs] in which nondisabled children are invited to participate”); Brooke Phillips, Morgan’s Wonderland Announces Plans to Build Ultra-Accessible Camp, *News4SA* (Apr. 4, 2019), <https://news4sanantonio.com/news/local/morgans-wonderland-announces-plans-to-build-ultra-accessible-camp> [<http://perma.cc/HA4Q-9G7D/>] (reporting a plan to build an “ultra-accessible” summer camp for individuals “with and without special needs”).

147. See *supra* notes 37–41 and accompanying text.

148. 42 U.S.C. § 12102(1)(A)–(C) (2018).

to discrimination because of their *lack* of disability.¹⁴⁹ Thus, the National Wheelchair Basketball Association's prerequisite of a physical impairment does not violate the law,¹⁵⁰ and a basketball player without any physical impairments does not have a legal right to participate in the league's competitions.¹⁵¹

b. *The IDEA*. — Similar to the ADA, the IDEA does not provide nondisabled children with an affirmative right to access disabled spaces.¹⁵² Nondisabled children (and their parents) cannot join a special education classroom (and receive the services provided in that classroom), unless a school district, using discretionary funds, actively invites them to join.¹⁵³ Interestingly, however, the implementation of the IDEA has resulted in promoting a subcategory of inverse integration, sometimes known as "reverse mainstreaming" or "reverse inclusion,"¹⁵⁴ which involves the integration of *nondisabled* children into disability-specific classrooms.¹⁵⁵ This practice has roots in educational experiments from the mid-

149. *Id.* § 12201(g) (noting that the statute does not cover "an individual without a disability" who "was subject to discrimination because of the individual's lack of disability").

150. Player Eligibility Rules, Nat'l Wheelchair Basketball Ass'n, <https://www.nwba.org/playereligibility> [<http://perma.cc/NS6K-TRS4>] (last visited Oct. 31, 2023). For differing views on whether this rule should be modified, see Frank M. Brasile, Wheelchair Sports: A New Perspective on Integration, 7 *Adapted Physical Activity Q.* 3 (1990); Armand Thiboutot, Ralph W. Smith & Stan Labanowich, Examining the Concept of Reverse Integration: A Response to Brasile's "New Perspective" on Integration, 9 *Adapted Physical Activity Q.* 283, 289 (1992) (explaining that in 1987, the NWBA opposed a proposal to admit people without impairments); Loepky, *supra* note 20; John Powers, No Reinventing the Wheel: BAA Unseats Able Runners, *Boston.com* (Apr. 15, 2001), http://archive.boston.com/marathon/stories/2001/the_wheel.htm [<https://perma.cc/2ZQZ-9TBK>]; Paul Valley, Athletics: What Place for the Able-Bodied in Wheelchair Racing?, *The Independent* (Mar. 29, 2002), <https://www.independent.co.uk/sport/general/athletics-what-place-for-the-able-bodied-in-wheelchair-racing-9188532.html> [<http://perma.cc/2BM5-66GX>]. Notably, nondisabled athletes are also not allowed to participate in the Paralympic Games' wheelchair basketball competitions. Rules of Classification, Paralympic Movement, <https://www.paralympic.org/classification> [<http://perma.cc/82WK-7AKN>] (last visited Oct. 31, 2023).

151. *Cf. Apilado v. N. Am. Gay Amateur Athletic All.*, 792 F. Supp. 2d 1151, 1156, 1160–63 (W.D. Wash. 2011) (holding that an amateur athletic organization operating the Gay Softball World Series has a constitutional right under the First Amendment to limit the number of heterosexual athletes participating in the tournament).

152. 20 U.S.C. § 1401(3)(A)(i) (2018) (restricting eligibility under the IDEA to children having one of the impairments enumerated in the statute); see also James E. Ryan, *Poverty as Disability and the Future of Special Education Law*, 101 *Geo. L.J.* 1455, 1461 (2013) ("Eligibility for special education depends, in the first instance, on whether students have one of the enumerated disabilities set forth in IDEA . . .").

153. See Mark Kelman & Gillian Lester, *Jumping the Queue: An Inquiry Into the Legal Treatment of Students With Learning Disabilities* 86 (1997) (describing how one New York school district allowed all students to use services offered in "resource room[s]," regardless of disability diagnosis).

154. See Covo, *supra* note 4, at 629–30 (discussing terminology surrounding inverse integration in schools).

155. *Id.* at 613 (providing definition and typology of inverse integration in schools).

nineteenth century,¹⁵⁶ but it largely emerged as a response to the IDEA's "integration presumption,"¹⁵⁷ which requires that, "[t]o the maximum extent appropriate," disabled children must be educated with nondisabled peers.¹⁵⁸

The integration presumption, of course, was designed for exactly the opposite purpose of inverse integration; it was intended to move disabled children from separate schools into mainstream educational settings.¹⁵⁹ Still, school districts and courts have latched onto the language in the integration presumption that requires educating disabled students alongside their nondisabled peers to justify decisions to integrate nondisabled children into special education classrooms—mostly (but not only) in situations where the disabled child does not qualify for education in a general education classroom.¹⁶⁰

The actual reasons behind such reverse mainstreaming—a surprisingly common phenomenon¹⁶¹—are many and complex (and include financial considerations).¹⁶² For example, it is sometimes cheaper for a school district to bring nondisabled children into a special education classroom, at least for part of the day, than to include a disabled child in a general education classroom.¹⁶³ And while keeping a disabled child in a disability-specific setting even though they could succeed in the mainstream classroom violates the integration presumption,¹⁶⁴ the practice of reverse mainstreaming may distort the analysis and lead courts to uphold such educational configurations.¹⁶⁵ The upshot is that the IDEA served as the normative basis for some inverse-integration practices in schools, even though it was not intended to promote such practices.

156. *Id.* at 616–18.

157. *Id.* at 618–21.

158. 20 U.S.C. § 1412(a)(5)(A) (2018). This imperative applies to situations where disabled children study in "public or private institutions or other care facilities," *id.*, which may partly explain why it has served as the normative foundation for reverse mainstreaming. However, this imperative should be read together with another imperative embedded in the "integration presumption," which requires school districts to place disabled students in mainstream classrooms unless such mainstreaming is inappropriate. For more on the relationship between these two imperatives, see Covo, *supra* note 4, at 605 n.12, 610–12.

159. 20 U.S.C. § 1412(a)(5)(A) ("To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled . . ."); Covo, *supra* note 4, at 610–13.

160. Covo, *supra* note 4, at 631–37, 659–60.

161. *Id.* at 618–24 (detailing the rise in popularity of reverse mainstreaming programs in the 1980s and referring to evidence that such programs are still being used across the country).

162. *Id.* at 616–24, 659–61.

163. *Id.* at 659–60.

164. *Id.* at 658–59.

165. *Id.* at 658–59 & n.353 (arguing that educational and legal decisionmakers sometimes conflate traditional and reverse mainstreaming).

c. Federal Regulations Pertaining to Medicaid Funding for Home and Community-Based Services. — Similar to the IDEA, federal regulations, as interpreted by the Supreme Court,¹⁶⁶ mandate that states provide disabled individuals with services that allow such individuals to live in the community—that is, in settings that enable them “to interact with nondisabled persons to the fullest extent possible.”¹⁶⁷

The straightforward way to meet this standard, of course, is to provide services where other nondisabled persons reside. A few organizations, however, have done the opposite: they bring *nondisabled* residents into housing complexes and projects designed to serve disabled persons.¹⁶⁸ Yet

166. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 600 (1999) (holding that “unjustified institutional isolation of persons with disabilities is a form of discrimination”).

167. 28 C.F.R. pt. 35 app. B (2024). This requirement is not absolute, however. Most notably, the Supreme Court held that a state could avoid liability if it shows “that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities.” *Olmstead*, 527 U.S. at 604.

168. In most cases, these are communities in rural areas where the majority of the residents are disabled persons; the nondisabled residents usually serve as volunteers who join the community for limited periods. See Dan McKanan, *Camphill and the Future: Spirituality and Disability in an Evolving Communal Movement 2* (2020) (noting that the nondisabled residents of Camphill accommodate themselves to the community’s lifestyle, which is centered around disabled persons’ “distinctive gifts and needs”); Carrie Griffin Basas, *Olmstead’s Promise and Cohousing’s Potential*, 26 Ga. St. U. L. Rev. 663, 678–79 (2010) (describing “[i]ntentional communities of people with disabilities and non-disabled co-residents”); Identity & Mission, L’Arche Int’l, <https://www.larche.org/about-larche/identity-and-mission/> [<https://perma.cc/3PKN-3S4E>] (last visited Oct. 31, 2023) (describing L’Arche’s communities where “people with and without intellectual disabilities[] shar[e] life in communities”); Katie O’Connor, *Icelandic Community for People With Disabilities Built on Reverse Integration, Sustainability*, Am. Psychiatric Assoc.: Psychiatric News (Dec. 8, 2020), <https://psychnews.psychiatryonline.org/doi/10.1176/appi.pn.2020.12b3> [<https://perma.cc/KV2X-BDMX>] (“Sólheimar is an example of ‘reverse integration,’ meaning the community developed based on the needs of its residents with disabilities, and those without disabilities adapted to their needs.”); Residential Volunteers, Innisfree Village, <https://www.innisfreevillage.org/volunteer/> [<https://perma.cc/A2XS-7G7R>] (last visited Oct. 31, 2023) (“[F]ull-time, residential volunteers . . . liv[e] side-by-side with Innisfree’s residents with intellectual disabilities, known as coworkers.”). Other programs of inverse integration in housing take different forms. See, e.g., Affordable Housing for Social Inclusion, Can. Mortg. & Housing Corp. (Mar. 10, 2021), <https://www.cmhc-schl.gc.ca/en/nhs/nhs-project-profiles/2020-nhs-projects/affordable-housing-social-inclusion> [<https://perma.cc/W6X2-4Z9C>] (discussing a Canadian “reverse inclusion” housing project, which would “bring the wider community into housing for people with developmental disabilities, potentially leading to increased social inclusion”); Frequently Asked Questions, Luna Azul, <https://www.lunaphx.com/faqs/> [<https://perma.cc/HXG4-XGTA>] (last visited Oct. 31, 2023) (“Luna Azul is designed to be suitable for everyone, especially those who may have life challenges, including those with intellectual, developmental, acquired and physical disabilities. We welcome residents of all ages, abilities and disabilities”); Phoebe Petrovic, *Wisconsin Parents Team Up to Build Housing for Their Adult Children With Disabilities*, Wis. Pub. Radio (Jan. 24, 2019), <https://www.wpr.org/wisconsin-parents-team-build-housing-their-adult-children-disabilities> [<https://perma.cc/3RYG-HFTE>] (“Home of

the Centers for Medicare and Medicaid Services (CMS) recently clarified that, in general, such settings do not qualify as home and community-based services (HCBS)¹⁶⁹ and thus are ineligible for HCBS funding.¹⁷⁰ In other words, bringing nondisabled individuals from the community into a disability-focused setting is not a “sufficient strategy for complying with the community integration requirements.”¹⁷¹

2. *Inverse Integration Modifications.* — As noted, several disability rights laws contain mandates that require covered entities to provide reasonable accommodations to disabled persons, as long as the requested accommodation does not impose “undue hardship” or fundamentally alter the nature of the service in question.¹⁷² In most cases, the requested accommodations are being provided directly by employers, schools,

Our Own dreamed up a specific plan: an integrated community in small-town New Glarus, welcoming residents of all abilities and incomes.”).

169. While Medicaid requires states to provide funding for long-term services and supports in institutional settings and nursing homes, the provision of long-term care in home and community-based settings depends on the existence of state “waiver” programs. See 42 U.S.C. § 1396n(c) (2018) (establishing the state waiver requirements); Mandatory and Optional Benefits, Medicaid & CHIP Payment & Access Comm’n, <https://www.macpac.gov/subtopic/mandatory-and-optional-benefits/> [<https://perma.cc/5EGT-V6ER>] (last visited Oct. 31, 2023) (explaining the application of state waiver program requirements to long-term services and supports). For a detailed analysis of this “institutional bias” in the context of long-term care, see Larisa Antonisse, Note, Strengthening the Right to Medicaid Home and Community-Based Services in the Post-COVID Era, 121 Colum. L. Rev. 1801, 1817–26 (2021).

170. According to CMS’s final rule, to qualify as a home and community-based setting, a setting must be “integrated in and support[] full access of individuals receiving Medicaid HCBS to the greater community” and must provide opportunities to “receive services in the community, to the same degree of access as individuals not receiving Medicaid HCBS.” 42 C.F.R. § 441.301(c)(4)(i) (2024). Moreover, the setting must not create the “effect of isolating individuals receiving Medicaid HCBS from the broader community.” *Id.* at § 441.301(c)(5)(v). It appears that residential communities that include inverse-integration components do not satisfy the “community-based” requirements under that rule. See McKanan, *supra* note 168, at 201–04 (discussing the rule’s application in the context of a residential community that employs a “reverse inclusion” approach); Barbara Coulter Edwards, Sharon Lewis, Rachel Patterson & Lilly Hummel, Home and Community-Based Services Settings Rule: Community Integration Options and Resident Choice Are Key in Assessment of Co-Located Assisted Living Communities and Inpatient Facilities 2 (n.d.), https://www.ahcancal.org/Assisted-Living/Policy/Documents/NCALBrief_Co-located%20Settings.pdf [<https://perma.cc/6FPR-ZD6A>] (last visited Oct. 31, 2023) (noting that CMS has clarified that “reverse integration” strategies “are insufficient to demonstrate community integration”).

171. Letter from Ralph F. Lollar, Div. of Long Term Servs. & Supports Dir., HHS Ctrs. for Medicare & Medicaid Servs., to Matt Wimmer, Div. of Medicaid Adm’r, Idaho Dep’t of Health & Welfare 6 (Sept. 23, 2016), <https://www.aucd.org/docs/policy/HCBS/references/id-initial-approval.pdf> [<https://perma.cc/TQ6E-C9GL>].

172. See, e.g., 42 U.S.C. § 12112(b)(5)(A) (employment); *id.* § 12182(b)(2)(A)(ii) (public accommodations); 28 C.F.R. § 35.130(b)(7)(i) (2024) (public entities).

government agencies, or businesses.¹⁷³ Employers, for example, may be required to install accessible toilets in the workplace or provide ergonomic furniture.¹⁷⁴ While the provision of such accommodations may affect nondisabled third parties, such as colleagues or classmates, the impact is usually indirect.¹⁷⁵

But some requested accommodations require nondisabled third-parties to *directly engage* in a disability-focused activity. Although such accommodations often take place in mainstream settings, some of them constitute inverse-integration practices because they trigger the involvement of nondisabled persons in disability-focused activities. (Recall that inverse and traditional integration practices exist on a spectrum.¹⁷⁶) Examples of such modifications include: (1) expecting hearing students or employees to use sign language or gestures to accommodate a Deaf classmate¹⁷⁷ or colleague;¹⁷⁸ (2) keeping a certain classroom, playground, or workplace “peanut-free” to accommodate life-threatening allergies of children or employees;¹⁷⁹ and (3) maintaining universal face-mask policies aimed at protecting immunocompromised students or employees from

173. See generally Emens, Integrating Accommodation, *supra* note 4, at 848–50 (distinguishing between second parties (employers) and third parties (the rest of the population) in the context of disability accommodations).

174. See 42 U.S.C. § 12111(9)(A)–(B) (“[Reasonable accommodations] may include[] making existing facilities used by employees readily accessible to and usable by individuals with disabilities.”).

175. See Emens, Integrating Accommodation, *supra* note 4, at 845–82 (discussing third-party costs and benefits).

176. See *supra* Figure 1 and accompanying text.

177. See, e.g., Redding Elementary Sch. Dist. v. Goyne, No. Civ. S001174WBSGGH, 2001 WL 34098658, at *6–7, *6 n.6 (E.D. Cal. Mar. 6, 2001) (describing the ways in which hearing children “learned to communicate comfortably” with Amanda, their Deaf classmate, through voluntary sign language lessons and other class activities that encouraged them to sign (quoting the California Special Education Hearing Officer assigned to the Goyne case)); see also *id.* at *7 (mentioning that Amanda’s new school will offer a sign language elective for sixth, seventh, and eighth grade students to accommodate Amanda).

178. See, e.g., Keith v. County of Oakland, 703 F.3d 918 (6th Cir. 2013). That case involved a Deaf person who applied for a lifeguard position at a local swimming pool. *Id.* at 918. As an accommodation, it was proposed that the pool would change its Emergency Action Plan (EAP), so that it would not be based solely on sound. *Id.* at 921. According to the proposed revised plan, “To initiate the EAP, lifeguards will be required to signal with a fist in the air, opening and closing it like a siren,” and “[o]nce activated, other lifeguards who are required to maintain their position would put their fist in the air and make the same signal.” *Id.* at 921, 926; see also Murphy v. Mattis, No. 2:14-cv-00400-JAW, 2017 WL 1157086, at *8 (D. Me. Mar. 27, 2017) (noting that a Deaf employee’s supervisor took six classes offered in basic ASL to better communicate with the employee); Campbell v. Wal-Mart Stores, Inc., 272 F. Supp. 2d 1276, 1290–91 (N.D. Okla. 2003) (noting that a hearing employee “developed several signs used for communicating with” her Deaf colleague, who relied on this communication to perform job assignments, and mentioning that the hearing employee’s requests for ASL training were denied by the employer).

179. See, e.g., Shu, *supra* note 56, at 18 (“[M]any schools regulate peanuts, or all nuts, by implementing policies that ban nuts from certain cafeteria tables, classrooms, or even the entire school.”).

infectious diseases.¹⁸⁰ We may call such practices “inverse-integration modifications.”¹⁸¹

In some respects, inverse-integration modifications are the mirror image of inverse-integration affiliation. While inverse-integration affiliation is sometimes the result of a *nondisabled* person’s request to join a disability-focused organization, inverse-integration modifications are sometimes triggered by a disabled person’s request to accommodate their needs in a mainstream setting.¹⁸² And while nondisabled persons generally do not have the legal right to be affiliated with a disability-specific organization, nondisabled persons may be *required* to engage in disability-focused activities under the ADA’s accommodation mandate.

Indeed, while it is rare for inverse-integration modifications to be litigated, recent developments involving COVID-19 accommodations suggest that some courts recognize that the ADA’s accommodation mandate may include requiring *nondisabled* persons to engage in disability-focused activities. For example, several federal courts have upheld universal mask mandates in schools, specifically to accommodate immunocompromised students.¹⁸³ The implications of these judgments are limited for a number of reasons, including the fact that most of them were rendered in the

180. See, e.g., Mical Raz & Doron Dorfman, *Bans on COVID-19 Mask Requirements vs Disability Accommodations*, JAMA Health Forum, Aug. 6, 2021, at 1, 2, <https://jamanetwork.com/journals/jama-health-forum/fullarticle/2782893> [<https://perma.cc/9K8J-SCSM>] (arguing that allowing immunocompromised employees to “require masking of unvaccinated individuals in their presence” is a reasonable disability accommodation); *infra* note 183 and accompanying text.

181. The category of inverse-integration modifications is both narrower and broader than what Professor Doron Dorfman calls “Third-Party Accommodations.” See Doron Dorfman, *Third-Party Accommodations*, 123 Mich. L. Rev. (forthcoming 2025) (manuscript at 3), <https://ssrn.com/abstract=4742287> [<https://perma.cc/X57H-MPZ4>]. Narrower, because Dorfman’s category includes modifications that do not involve inverse integration, such as no-smoking policies. *Id.* at 19. Broader, because Dorfman’s category pertains only to behaviors that “are not job-related,” *id.* at 16, and so requiring nondisabled employees to communicate with a deaf coworker using sign language seems to fall outside Dorfman’s category. For examples of such inverse-integration modifications, see *supra* notes 177–178.

182. See Leslie A. Zukor, *Letter to the Editor: Wear a Mask for People Like Me*, Colum. Spectator (Feb. 24, 2022), <https://www.columbiaspectator.com/opinion/2022/02/24/letter-to-the-editor-wear-a-mask-for-people-like-me/> [<https://perma.cc/4SF6-Q7K9>] (asking the Columbia community to wear face masks indoors to relieve the burden faced by “disabled and immunocompromised Columbians”).

183. Notably, these cases arose primarily in states that prohibited school districts from implementing such mask policies. See, e.g., *Arc of Iowa v. Reynolds*, 24 F.4th 1162, 1179 (8th Cir. 2022), reh’g granted and opinion vacated, No. 21-3268, 2022 WL 898781 (8th Cir. Mar. 28, 2022), and vacated, 33 F.4th 1042 (8th Cir. 2022); *G.S. ex rel. Schwaigert v. Lee*, No. 21-5915, 2021 WL 5411218, at *3 (6th Cir. Nov. 19, 2021); *Doe 1 v. Perkiomen Valley Sch. Dist.*, 585 F. Supp. 3d 668, 685–99 (E.D. Pa. 2022); *Seaman v. Virginia*, 593 F. Supp. 3d 293, 324–27 (W.D. Va. 2022), appeal dismissed, No. 22-1455, 2022 WL 15798679 (4th Cir. Aug. 24, 2022). But see, e.g., *E.T. v. Paxton*, 19 F.4th 760, 768 (5th Cir. 2021) (“[T]he record before us likely does not support the conclusion that a mask mandate would be both *necessary* and *obvious* under the ADA or the Rehabilitation Act.”).

context of a preliminary proceeding.¹⁸⁴ It therefore remains to be seen whether and to what extent these developments unfold in the masking context or expand to other areas, such as requiring nondisabled persons to learn sign language or avoid allergens—accommodations that have so far been made primarily voluntarily.¹⁸⁵

In any event, because courts primarily use a cost-benefit analysis to determine the “reasonableness” of an accommodation,¹⁸⁶ judicial analysis of inverse-integration modifications is likely to involve balancing the benefits that accrue to the disabled person (and the public at large) from the requested modification¹⁸⁷ against the costs involved in requiring nondisabled third parties (e.g., classmates, colleagues) to engage in a disability-focused activity.¹⁸⁸ Thus, even if a court is generally inclined to recognize inverse-integration modifications, it may nevertheless refuse to uphold specific accommodations or modifications because of the perceived costs involved in implementing them.¹⁸⁹

3. *Sustained Engagement With Disability-Focused Activities.* — The third category of inverse integration is a residual one, consisting of situations in which people without impairments engage in disability-focused activities regardless of affiliation or accommodation. For example, some hearing people may learn sign language independently, perhaps to communicate

184. In one case, *Seaman*, 593 F. Supp. 3d 293, the parties reached a settlement according to which “schools must make accommodations under federal disability law if a child with a disability requires peer and teacher masking.” Media Contact, Parents and State Settle Lawsuit on School Masking Accommodations for Students with Disabilities, ACLU Va. (Dec. 12, 2022), <https://www.acluva.org/en/press-releases/parents-and-state-settle-lawsuit-school-masking-accommodations-students-disabilities> [<https://perma.cc/QAP8-6EBS>].

185. *Supra* notes 177–179 and accompanying text.

186. *Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538, 542–43 (7th Cir. 1995); *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 142 (2d Cir. 1995).

187. For example, in the *Keith* case discussed *supra* note 178, the court discussed how a modification that would require lifeguards to use physical gestures and signs in addition to a siren in a time of emergency “would improve the [Emergency Action Plan] for everyone It would allow other lifeguards and staff to see the [Emergency Action Plan] visually if they are not in a position to hear it.” *Keith v. County of Oakland*, 703 F.3d 918, 926 (6th Cir. 2013); see also *Doe I*, 585 F. Supp. 3d at 704 (“[P]rotecting public health, and specifically, preventing the spread of COVID-19, is a compelling public interest.”).

188. Compare *Arc of Iowa*, 24 F.4th at 1178 (“Requiring masks also is not an unreasonable infringement on third parties’ rights.”), with *Seaman*, 593 F. Supp. 3d at 329 (“[H]aving to wear a mask can be uncomfortable, especially for extended periods. It is no small thing for schools or health officials to ask (or require) persons to wear masks for substantial periods in order to reduce risk of spread of COVID-19.”).

189. For example, in *U.S. Airways, Inc. v. Barnett*, the Supreme Court held that, “in the run of cases,” the reassignment of a disabled employee to another position would be deemed unreasonable if it conflicted with “the interests of other workers with superior rights to bid for the job under an employer’s seniority system.” 535 U.S. 391, 393–94, 402–03 (2002).

with family members or to enjoy the benefits associated with vision-based communication.¹⁹⁰

Federal and state laws are largely silent with respect to this category of inverse integration. Legally speaking, a nondisabled person can decide to ride a wheelchair,¹⁹¹ use a cane as a fashion accessory,¹⁹² wear “adaptive clothing,”¹⁹³ or communicate in sign language¹⁹⁴ without first asking for permission. Or they may choose not to do so. In most situations, unless any form of fraud is involved, none of these decisions will result in a legal sanction, although they may ignite social backlash.¹⁹⁵ At the same time, the law generally does not provide nondisabled persons any protection from adverse action by employers or schools for engaging in such disability-focused activities.¹⁹⁶

In sum, while some legal provisions may inadvertently encourage or require the engagement of nondisabled persons in disability-focused settings or activities, it is clear that disability rights statutes in the United States were not designed to promote inverse integration. In fact, some of these laws and regulations push *against* inverse integration, implicitly conveying the message that the practice is not a desirable outcome, at least as far as the law is concerned. In this respect, the legal norms concerning inverse integration are consistent with the social norms in that they are unlikely to be the primary motivating factor behind inverse integration.

190. See Supalla et al., *supra* note 20, at 44 n.5, 46 (describing how hearing students may choose to attend “signed language schools,” in part to be “enriched by the signed language and culture”).

191. See Stevens, *supra* note 76 (discussing the use of wheelchairs and other disability-focused instruments by people without impairments).

192. See Blake Lively Uses a CANE in NYC but It Appears to Just Be a Prop to Go With Her Eye-Catching Suit, *Daily Mail* (Sept. 10, 2018), <https://www.dailymail.co.uk/tvshowbiz/article-6152011/Blake-Lively-spotted-walking-cane-New-York-City-wearing-eye-catching-suit.html> [<https://perma.cc/4SZC-SGVY>] (discussing a celebrity’s use of a cane as a fashion accessory); John Jannuzzi, *New York Mag Says Canes Are a Thing. We Say No*, *GQ* (Apr. 9, 2014), <https://www.gq.com/story/new-york-mag-canes> (on file with the *Columbia Law Review*) (discussing canes as a fashion accessory).

193. Abigail Malbon, Selma Blair Wants to Create an Accessible Fashion Line for Disabled People After MS Diagnosis, *Cosmopolitan* (Mar. 1, 2019), <https://www.cosmopolitan.com/uk/fashion/celebrity/a26585041/selma-blair-fashion-line-ms/> [<https://perma.cc/9DWE-YVU2>] (reporting actress Selma Blair’s desire to design an adaptive clothing line “for everyone—not just people who necessarily need adaptive clothing, but for those who want comfort, too”).

194. See Supalla et al., *supra* note 20, at 44 n.5, 46 (describing how hearing students may attend “signed language schools”).

195. See Timothy Reagan, *The Politics of L2/Ln Sign Language Pedagogy*, in *The Routledge Handbook of Sign Language Pedagogy* 262, 271 (Russell S. Rosen ed., 2020) (referring to some uses of sign language by hearing people as a “sociolinguistic territorial invasion” (quoting Jerome D. Schein & David A. Stewart, *Language in Motion: Exploring the Nature of Sign* 155 (1995))); sources cited *supra* note 106.

196. See *infra* notes 398–405 and accompanying text.

Thus, the question remains: What are the primary forces driving inverse integration? In other words, why would people find this practice desirable? One possible answer, this Article argues, has to do with interpersonal relationships. The next Part sets out to prove this hypothesis.

III. INVERSE INTEGRATION: A RELATIONSHIP-BASED MODEL

This Part demonstrates how inverse integration allows disabled and nondisabled persons to develop new relationships and maintain existing ones. It uses research by social scientists¹⁹⁷ and legal scholars,¹⁹⁸ who have identified the building blocks of meaningful interpersonal relationships, to show how these elements are at play in the context of inverse integration. Specifically, this Part examines the following factors: common language¹⁹⁹ and dialogue,²⁰⁰ shared experiences,²⁰¹ and reciprocity.²⁰²

A. *Communication and Dialogue*

Sociologists have long recognized that interpersonal communication is essential for forming, maintaining, and describing our relationships with family members, friends, and intimate partners. Indeed, as social

197. See *infra* notes 199–201.

198. See, e.g., Hanoch Dagan, *Restitution and Relationships*, 92 B.U. L. Rev. 1035, 1040–41 (2012) (referring to reciprocity, trust, and mutual support as necessary elements of relationships); Elizabeth F. Emens, *On Trust, Law, and Expecting the Worst*, 133 Harv. L. Rev. 1963, 1994 (2020) (reviewing Jill Elaine Hasday, *Intimate Lies and the Law* (2019)) (noting that relationships generally depend on trust and that intimate relationships generally involve interdependency); Ethan J. Leib, *Friendship & the Law*, 54 UCLA L. Rev. 631, 642–46 (2007) (enumerating the following characteristics among the “attributes that friendships may instantiate”: voluntariness, intimacy, reciprocity, warmth, mutual assistance, equality, and duration over time).

199. See Steve Duck, *Human Relationships* 10–13, 34–35 (4th ed. 2007) (“Communication, language, and all that is culturally encoded within it are thus crucial bases for establishing conduct for human relationships and their quality.”).

200. *Id.* at 12 (“Talk composes relationships—whether they are starting, getting better, disintegrating, or just carrying on. Everyday talk creates intimacy, pulls families together, enacts friendship and ‘does’ social support. Talk changes relationships, expresses emotion, handles conflict, and indicates affection Talk declares love, desires, goals and relational fantasies.” (citations omitted)).

201. See Graham A. Allan, *A Sociology of Friendship and Kinship* 41–42 (Routledge 2022) (1979); Duck, *supra* note 199, at 63 (describing “the importance of shared activity—and in particular exciting shared activity—in the process of developing love”).

202. See Allan, *supra* note 201, at 43–44; Harold H. Kelley, Ellen Berscheid, Andrew Christensen, John H. Harvey, Ted L. Huston, George Levinger, Evie McClintock, Letitia Anna Peplau & Donald R. Peterson, *Close Relationships* 38 (1983) (defining close relationships as involving “strong, frequent, and diverse interdependence that lasts over a considerable period of time” (emphasis omitted)); Shakespeare, *supra* note 25, at 190 (“[R]eciprocity is a necessary feature of friendship—each serves a function for the other, and there is give and take in the relationship.”); Philip Blumstein & Peter Kollock, *Personal Relationships*, 14 Ann. Rev. Socio. 467, 476 (1988) (identifying interdependence as an essential element in relationships).

psychologist Steve Duck has observed, “language is the medium through which many relationship activities are conducted.”²⁰³ Because inverse integration allows nondisabled and disabled persons to share a common language, one can view this practice as satisfying that need.

Consider, for example, a hearing child whose parents and siblings are Deaf. If the child wants to engage in a meaningful conversation with a family member without intermediaries or assistive devices, then the likely method of communication is ASL.²⁰⁴ Even in the opposite scenario, where only one family member is Deaf, the rest of the family will also likely use ASL to communicate.²⁰⁵ Similarly, some sighted people learn Braille and use it to write personal letters to their blind family members.²⁰⁶

The idea that hearing people’s use of sign language can foster meaningful relationships is illustrated in the work of cultural anthropologist Nora Groce, who studied the history of the Deaf community on Martha’s Vineyard.²⁰⁷ Groce found that during the seventeenth and eighteenth centuries, Deaf residents on the island accounted for a much larger proportion of the population compared to other geographic locations.²⁰⁸ She also found that during that time, “the deaf were completely integrated into all aspects of society.”²⁰⁹ But it wasn’t the ability to read lips²¹⁰ or the use of written notes,²¹¹ translators,²¹² or hearing aids that facilitated such integration; rather, at least in some parts of the island, all of the hearing residents were bilingual—fluent in both English and sign language.²¹³ In fact, the use of sign language was so entrenched among the local hearing

203. Duck, *supra* note 199, at 10.

204. See Supalla et al., *supra* note 20, at 44 n.5, 46; see also Alina Tugend, How Robots Can Assist Students With Disabilities, *N.Y. Times* (Mar. 29, 2022), <https://www.nytimes.com/2022/03/29/technology/ai-robots-students-disabilities.html> (on file with the *Columbia Law Review*) (“When I have to use a smartphone or laptop when talking to someone, I can’t maintain face-to-face contact.” (quoting Roshan Mathew, a Deaf student)).

205. See, e.g., Sonja Sharp, Deaf Education Vote Is the Latest Parents’ Rights Battleground in L.A., *L.A. Times* (May 10, 2022), <https://www.latimes.com/california/story/2022-05-10/deaf-educators-want-asl-la-unified-bilingual-program> (on file with the *Columbia Law Review*) (describing how the hearing parents of a Deaf child started learning ASL when the child was two years old).

206. Godin, *supra* note 20, at 145.

207. Nora Ellen Groce, *Everyone Here Spoke Sign Language: Hereditary Deafness on Martha’s Vineyard* (1985).

208. *Id.* at 3.

209. *Id.* at 4.

210. *Id.* at 57 (“All communication was in sign language, for it seems that none of the deaf Vineyarders read lips.”).

211. *Id.*

212. *Id.* at 63 (“[T]here was little need for translators on a day-to-day basis.”). During Sunday church sermons and town meetings, however, a hearing person translated the discussions into sign language. *Id.* at 62–63.

213. *Id.* at 53.

population that they would reportedly sign even when Deaf people were not present.²¹⁴

The integration Groce has documented was not limited to formal, transactional contexts.²¹⁵ During those years, Deaf and hearing people on Martha's Vineyard "intermingled everywhere—at home, at the general store, at church, at parties."²¹⁶ Indeed, close personal friendships on the island were not based on hearing ability. Rather, such friendships were based on where someone grew up or who lived nearby.²¹⁷ As a result, Deaf individuals were always part of, and never excluded from, discussions, telling jokes, and social gatherings.²¹⁸ Approximately eighty percent of the Deaf people who lived to marriageable age married hearing or Deaf persons²¹⁹—almost double the marriage rate of the general deaf population in the United States during the nineteenth century.²²⁰

Inverse integration still plays a similar role in intimate relationships. A recent "Modern Love" column in the *New York Times* provides an example.²²¹ In that essay, Ross, a Deaf person, recounts how touched he was when Will, a hearing man he was dating, sent him a video message in ASL.²²² While many of Ross's previous dates had promised to learn ASL, Will was the first to keep his word.²²³ Notably, Will's gesture was more symbolic than practical since Ross could read lips.²²⁴ The anecdote illustrates how the willingness of a nondisabled person to enter the disabled person's world is a precondition for facilitating communication and trust. As Ross notes, "Relationships only move forward once the work of communication begins."²²⁵

As social scientists have observed, language sometimes fosters and defines relationships by *excluding* others from the conversation. Such is the case, for example, when intimate partners develop private languages,

214. *Id.* at 63–67.

215. *Id.* at 75 ("There was no language barrier and, by extension, there seems to have been no social barrier.").

216. *Id.* at 87; see also *id.* at 50 (noting that Deaf people "were included in all of the community's work and play situations").

217. *Id.* at 93.

218. *Id.* at 59–61, 90–94.

219. *Id.* at 50, 78–79.

220. *Id.* at 79.

221. Ross Showalter, *A Love Language Spoken With Hands*, *N.Y. Times* (Dec. 17, 2021), <https://www.nytimes.com/2021/12/17/style/modern-love-deaf-sign-language.html> (on file with the *Columbia Law Review*).

222. *Id.* For another instance in which a hearing person learned sign language after entering a romantic relationship with a Deaf person, see *Mullen v. S. Denver Rehab., LLC*, No. 18-cv-01552-MEH, 2020 WL 2557501, at *2 (D. Colo. May 20, 2020).

223. Showalter, *supra* note 221.

224. *Id.*

225. *Id.* But see Kusters, *supra* note 118, at 7 (noting that even in several shared signing communities, "deaf people typically have more problems than hearing people in finding a marriage partner" (citing numerous disability scholars)).

which “draw boundaries around the relationship,” and help “personalize” the couple’s communication.²²⁶ This role of language in shaping relationships is particularly pertinent to inverse integration. In Martha’s Vineyard, for example, hearing and Deaf people used sign language when they wanted to separate themselves from off-Islanders²²⁷ or when speaking was not allowed, such as in school.²²⁸ The engagement of sighted people with Braille tells a similar, though not identical, story:²²⁹ Some sighted people have used Braille to exchange notes with a blind peer during class.²³⁰

Educators and scholars, too, have recognized that the acquisition of nonverbal language by nondisabled individuals can be perceived as a tool to improve existing interpersonal relationships. One example is David Bartlett’s “Family School”—a school for Deaf children and their hearing siblings that operated between 1852 and 1861.²³¹ At the time, this school was deemed “revolutionary,” in part because *all* students—hearing and Deaf—were taught to sign and instruction was conducted in sign language.²³² Bartlett believed that by acquiring sign language skills, a hearing child would serve as an interpreter between a Deaf sibling and other family members.²³³ Almost 150 years later, Professor Martha Minow would propose a similar solution.²³⁴ In 1990, she advocated integrating hearing-impaired children into mainstream classrooms where teachers would simultaneously instruct *all* students using both spoken and sign language.²³⁵ In Minow’s view, that solution would address the “problem of difference” by focusing on “the *relationships* among all the students.”²³⁶

The idea that interpersonal relationships are the organizing principle of at least some inverse-integration practices can also be gleaned from the research regarding ASL courses in U.S. high schools. That research shows that there has been an exponential growth in hearing students’ demand

226. Duck, *supra* note 199, at 34–35.

227. Groce, *supra* note 207, at 66 (“[U]se of [sign] language was a way to delineate who was and who was not a member of the community. Island people frequently maintained social distance from off-Islanders by exchanging comments about them in sign language . . .”).

228. *Id.* at 63–64.

229. Interestingly, one of the early tactile reading systems was invented as a method for conveying messages in the dark. Godin, *supra* note 20, at 134–35. The idea behind that system, which its inventor referred to as “night writing,” was that tactile messages would allow (sighted) soldiers to convey intelligence reports “without alerting the enemy.” *Id.* Although this use of tactile writing was not in furtherance of developing a personal relationship, it still illustrates how this writing system can be used to maintain privacy.

230. See *id.* at 144.

231. Van Cleve, *supra* note 136, at 118.

232. Edward L. Scouten, *Turning Points in the Education of Deaf People* 118 (1984).

233. Van Cleve, *supra* note 136, at 118–19.

234. Minow, *All the Difference*, *supra* note 4, at 84.

235. *Id.*

236. *Id.* (emphasis added).

for such courses and that the reason articulated for that demand is that hearing students wish to maintain relationships with their Deaf classmates.²³⁷ Thus, while school administrators were hoping that the IDEA's "mainstreaming" of deaf and hard-of-hearing students into the general education system would improve the oral communication skills of deaf and hard-of-hearing students,²³⁸ the mainstreaming process has instead led to an inverse outcome: Hearing students now request ASL courses so that they can communicate better with their Deaf classmates.

B. *Shared Experiences*

The second building block of interpersonal relationships identified by scholars has to do with shared experiences. The theory is that shared experiences are a necessary component in developing close interpersonal relationships because it is through such activities and shared memories that we maintain rapport and affinity.²³⁹ Scholars have particularly pointed to activities that involve excitement, physical activity, and joy as playing a critical role in the development of close relationships.²⁴⁰

When it comes to inverse integration, the involvement of nondisabled persons in disability-focused frameworks has proven successful in allowing people to share a variety of activities, even when traditional integration measures fall short. Wheelchair sports are a prime example of this phenomenon. For instance, Daniel Sadler, who is nondisabled but was "one of the best wheelchair racers in Britain," credits his interest in the sport to his desire to spend time with his father, who was a wheelchair user.²⁴¹ As he recalled in an interview, "[B]ecause my dad was a wheelchair racer for 20 years, it seemed the natural thing to me to do."²⁴² Other inverse-integration practices, particularly those pertaining to sports

237. See Rosen, *ASL as a Foreign Language*, supra note 7, at 12–13, 19 (describing how the integration of deaf and hard-of-hearing students into classrooms caused hearing students and teachers to "increasingly request courses in ASL and the American Deaf community and culture").

238. *Id.* at 13.

239. See sources cited supra note 201.

240. Duck, supra note 199, at 63; Janet E. Lord & Michael Ashley Stein, *Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation, and Play*, 27 *B.U. Int'l L.J.* 249, 271 (2009) (referring to the "potential for sport, recreation and play to serve as relational vehicles").

241. Tom Fordyce, *Sadler's Sit-Down Protest*, BBC (Apr. 3, 2002), http://news.bbc.co.uk/sport2/hi/other_sports/1909192.stm [https://perma.cc/M9Q8-JGQQ].

242. *Id.*

competitions,²⁴³ summer camps,²⁴⁴ educational programs,²⁴⁵ and culture and recreation activities,²⁴⁶ also allow nondisabled family members to share activities with their disabled siblings, parents, and children.

Indeed, when families want to share a leisure activity together, the need to accommodate one family member may drive decisions about what activities to pursue as a family. The ability to accommodate a disabled family member, however, may depend on whether disability-focused leisure activities are available where the family lives.

This point can be illustrated by Professor Elizabeth Emens's work.²⁴⁷ Using a hypothetical involving two cities—Accessible City (A-City) and Inaccessible City (I-City)—Emens demonstrated that the level of urban accessibility could bolster or hinder the ability of a disabled person to date a nondisabled person (and vice versa). Her hypothetical, which has now become well known,²⁴⁸ recounted the story of Janet, a young lawyer who used a wheelchair, and John, a nondisabled librarian.²⁴⁹ In A-City, John and Janet could “go wherever they please[d] together—parks, museums, restaurants, bars.”²⁵⁰ In I-City, by contrast, “dating proves difficult. . . . Most restaurants have steps up to their entrance” and “[m]ovie theaters and stores are all hit or miss in their accessibility.”²⁵¹ According to Emens, this

243. Carter et al., *supra* note 133, at 940–41, 944; Yeshayahu Hutzler, Rachel Barda, Ahuva Mintz & Tali Hayosh, Reverse Integration in Wheelchair Basketball: A Serious Leisure Perspective, 40 *J. Sport & Soc. Issues* 338, 348 (2016) (“I [a nondisabled interviewee] have two disabled parents, both played wheelchair basketball for many years. My mom still plays today, so I grew up in this sport.” (quoting study interviewee)); Joan Medland & Caroline Ellis-Hill, Why Do Able-Bodied People Take Part in Wheelchair Sports?, 23 *Disability & Soc’y* 107, 110 (2008) (“[M]ost able-bodied wheelchair athletes became involved in wheelchair sports due to a disabled member of their family or a friend recruiting them into the sport . . .”); Powers, *supra* note 150 (noting that a nondisabled person first took an interest in wheelchair racing to share the same sport as his brother, a paraplegic person).

244. See, e.g., Frequently Asked Questions, Camp Yakety Yak, <https://www.campyaketyyak.org/faq> [<https://perma.cc/3JVX-UQE3>] (last visited Nov. 1, 2023) (“Typically, our peer models are siblings of campers with special needs and they come to enjoy the camp activities and model strong participation and friendship skills.”).

245. Covo, *supra* note 4, at 622.

246. Hannah Booth, Theatre Shows Autistic Children Can Enjoy, *The Guardian* (May 25, 2013), <https://www.theguardian.com/lifeandstyle/2013/may/25/theatre-shows-autistic-children> [<https://perma.cc/43U6-36DF>] (“Many parents told us how nice it was to do something as a family for once—rather than taking their autistic child off with other autistic kids.”); Vidya Viswanathan, Making Theater Autism-Friendly, *The Atlantic* (Apr. 6, 2015), <https://www.theatlantic.com/health/archive/2015/04/making-theater-autism-friendly/388348/> (on file with the *Columbia Law Review*) (noting that an eight-year-old girl, whose brother is autistic, has seen “all the autism-friendly shows”); see also Booth, *supra* (“Siblings of autistic children often attend relaxed performances.”).

247. Emens, *Intimate Discrimination*, *supra* note 24, at 1316.

248. Elizabeth F. Emens, The Art of Access: Innovative Protests of an Inaccessible City, 47 *Fordham Urb. L.J.* 1359, 1360–61 (2020).

249. Emens, *Intimate Discrimination*, *supra* note 24, at 1370.

250. *Id.*

251. *Id.*

hypothetical shows how access (or lack thereof) can affect intimate relationships.²⁵²

For our purposes, let us consider a variation of Emens’s hypothetical. Imagine that Janet and John continued dating in A-City and got married. Ten years and two children later, they move to a new town, replete with opportunities to engage with disability culture. In this city, which we can call “Inverse Integration City,” (I-I-City) Janet and John join a wheelchair dancing club, where everyone uses a wheelchair, and a wheelchair basketball league, where disabled and nondisabled persons practice. In addition, John and Janet go to supermarkets and zoos only during “quiet hours”²⁵³ because their seven-year-old, Jeremy, who is autistic, finds loud noise and bright lights overwhelming. On weekends, Janet and John take the entire family on “tactile tours” in the local museum, where everyone, not just blind people, is allowed to touch the art.²⁵⁴ They also go to a Deaf theater, where their hearing children can understand the play without the simultaneous translation because they learned ASL in school.

As this hypothetical suggests, this new I-I-City offers a much more promising future for Janet and John’s family than A-City, because it provides opportunities for each member of the family to integrate into the others’ “disabled world,” and ultimately into strangers’ disabled worlds.

It is important not to paint a too-rosy picture of such family-based inverse-integration practices. One reason is that the involvement of nondisabled family members in disability-focused frameworks raises

252. *Id.* at 1372.

253. “Quiet hours” are offered by supermarkets, museums, zoos, and shopping malls in the United States and worldwide. See, e.g., Joanne Cleaver, *Combating Sensory Overload: How Zoos and Museums Are Redefining Inclusion*, N.Y. Times (Apr. 22, 2022), <https://www.nytimes.com/2022/04/22/travel/sensory-disabilities-travel.html> (on file with the *Columbia Law Review*) (last updated Apr. 25, 2022) (describing how the quiet hours introduced by a North Carolina mall—whereby music was not played to reduce stimuli—allowed a family with an autistic member to “finally have the classic holiday experience” as an entire family); Lauren Del Valle, *Stores Offer Quiet Shopping for Families of Kids With Autism*, CNN (Dec. 9, 2016), <https://www.cnn.com/2016/12/09/health/sensory-friendly-shopping/index.html> [<https://perma.cc/KE74-CJGZ>]. Most of these programs are open to both disabled and nondisabled persons. Matt Kempner, *Atlanta Malls Offer Quiet Holiday Shopping Hour for Kids Who Need It*, Atlanta J.–Const. (Dec. 6, 2019), <https://www.ajc.com/news/atlanta-malls-offer-quiet-holiday-shopping-hour-for-kids-who-need/MOUjCqUHRJbeGEB068qDOL/> [<https://perma.cc/RQZ9-2DXT>]. And at least some nondisabled persons reported benefitting from these programs. See Eleanor Ainge Roy, *New Zealand Supermarket Launches ‘Quiet Hours’ for Customers With Autism*, The Guardian (Oct. 8, 2019), <https://www.theguardian.com/world/2019/oct/09/new-zealand-supermarket-launches-quiet-hours-for-customers-with-autism> [<https://perma.cc/M87p-WR8C>]. But see Morrison’s ‘Quiet Hour’ for Autistic Shopping Introduced, BBC (July 19, 2018), <https://www.bbc.com/news/uk-44884183> [<https://perma.cc/3679-TT8X>] (quoting a mother of an autistic child as saying she would like to see “a time zone where disabled children, young adults and so on—not just with autism but other disabilities—should be allowed to shop without the normal public in the shops”).

254. See *infra* note 405 and accompanying text (discussing “tactile” tours in museums).

concerns about paternalism.²⁵⁵ In fact, in some respects, the motivation to design specific programs for disabled persons may be understood as a way to allow participants to thrive without the familiar restrictions and judgments imposed by mainstream society—and even their own families. In such a case, intergroup experiences may be in conflict with the original purpose of creating a disability-focused framework—facilitating *intragroup* conversations in an uninhibited environment.

Another concern is that disability-focused organizations might shift their responsibility to the nondisabled family member to provide support or accommodations. In other words, even if the integration of nondisabled family members into a disability-focused setting stems from good intentions, there may still be an implicit expectation that the nondisabled participant would share in the work of accommodation. For example, a disability-focused summer camp might rely upon a nondisabled camper to assist in communicating with their nonverbal sibling. This is not only unfair to both campers but may also violate the ADA's regulations.²⁵⁶

While these are important concerns, they do not change the underlying principle that may make inverse integration desirable for disabled and nondisabled persons alike: It is a way for family members to do things together. In fact, in some respects, inverse integration is sometimes inevitable when it comes to families including both disabled and nondisabled members.²⁵⁷

Inverse integration may promote shared experiences not only at the family level, but also at the community level. One example comes from Deaf culture. For years, Café Crema in San Diego served as a gathering place for Deaf and hearing signers.²⁵⁸ Weekly “Deaf Nights” at that café provided opportunities for “curious” hearing people to practice their sign language while serving as a platform to form friendships and maintain a signing community.²⁵⁹ More recently, many cities across the United States

255. Faye Ginsburg & Rayna Rapp, *Family*, in *Keywords for Disability Studies* 81, 81 (Rachel Adams, Benjamin Reiss & David Serlin eds., 2015) (noting that in disability studies, “families are recognized as potential sites of repression, rejection, and infantilization”).

256. 28 C.F.R. § 36.303(c) (2024) (requiring places of public accommodation to provide auxiliary aids and services to ensure “effective communication” with disabled persons and clarifying that such places generally cannot meet the requirement by relying on disabled individuals’ family members).

257. See Groce, *supra* note 207, at 93 (noting that, in Martha’s Vineyard, “[i]f a deaf Islander wanted to entertain only other deaf individuals, he or she probably would have had to exclude spouse, siblings, children, best friends, or immediate neighbors, all of whom would have been hurt”).

258. Carol A. Padden & Jennifer Rayman, *The Future of American Sign Language*, in *The Study of Signed Languages* 247, 252–53 (David F. Armstrong, Michael A. Karchmer & John Vickrey Van Cleve eds., 2002) (“At the [Café Crema in Pacific Beach], both hearing signers and deaf people gather to socialize.”).

259. *Id.* at 253; Tyler Huff, “Deaf Nights” at Cafe Crema Give Students Opportunity to Converse in Sign Language, *U.C. San Diego Guardian* (Feb. 24, 2003),

have organized annual “DEAFestivals,” which connect deaf and hearing individuals around elements of Deaf culture and history.²⁶⁰

Here again, inverse integration at the community level does not come without costs. Two scholars have pointed out, for example, that Deaf people who attend “Deaf Nights” at Café Crema sometimes get irritated when novice hearing signers ask them for help in fulfilling a “homework assignment” for their ASL class.²⁶¹ This reflects a broader notion that must be acknowledged: There is no guarantee that shared experiences will actually improve interpersonal relationships. Still, the same scholars go on to recognize that the “forum of the coffeehouse allows for the building of relationship within the community, as a venue for the symbolic work that takes place in conversations about deaf culture and identity.”²⁶² Such inverse integration is not limited to special occasions or unique circumstances. Rather, it is often a mundane aspect of social life. In Martha’s Vineyard, for example, hearing children needed to learn sign language so that they could communicate with deaf playmates.²⁶³ Likewise, some nondisabled children have asked their parents to provide them with peanut-free sandwiches so that they could join a friend with allergies during lunch.²⁶⁴

Because of their universal nature, inverse-integration modifications may also allow disabled and nondisabled persons to inhabit shared spaces in situations where other methods of integration fail to bring members of the two groups together.²⁶⁵ For example, designating a peanut-free table

<https://ucsdguardian.org/2003/02/24/deaf-nights-at-cafe-crema-give-students-opportunity-to-converse-in-sign-language/> [https://perma.cc/92HG-X82Y].

260. See, e.g., Lisa Deaderick, San Diego DEAFestival Is a Celebration of Deaf Culture and Community, San Diego Union-Trib. (Oct. 12, 2019), <https://www.sandiegouniontribune.com/lifestyle/people/story/2019-10-12/san-diego-deafestival-is-a-celebration-of-deaf-culture-and-community> (on file with the *Columbia Law Review*) (noting that the San Diego DEAFestival “is an opportunity for members of both Deaf and hearing communities to connect and celebrate different sign languages and elements of deaf culture and history”); Soraya Mattei, DEAFestival Brings Hearing and Deaf Together, El Vaquero (Oct. 7, 2015), <https://elvaq.com/news/2015/10/07/deafestival-brings-hearing-and-deaf-together/> [https://perma.cc/9HD6-GSRJ] (noting that the Los Angeles DEAFestival provides “a communal space for the deaf and hearing communities”).

261. Padden & Rayman, *supra* note 258, at 253.

262. *Id.*

263. Groce, *supra* note 207, at 54.

264. *Student v. Mystic Valley Reg’l Charter Sch.*, BSEA No. 03-3629, slip op. at 23 (Mass. Bureau of Special Educ. Appeals Mar. 19, 2004); see also Roni Caryn Rabin, In a Children’s Theater Program, Drama Over a Peanut Allergy, *N.Y. Times* (Jan. 16, 2019), <https://www.nytimes.com/2019/01/16/well/eat/peanut-nut-food-allergy-discrimination.html> (on file with the *Columbia Law Review*) (noting that Mason, a child who has a life-threatening nut allergy, is “active in kung fu, where the group often asks him to choose the snacks”).

265. See, e.g., Katherine Macfarlane, Negotiating Masks in the Workplace: When the ADA Does and Does Not Apply, *Petrie-Flom Ctr.: Bill of Health* (Mar. 8, 2022),

during lunch may protect a student with a life-threatening peanut allergy, but it may isolate the student from the rest of the class.²⁶⁶ By contrast, keeping the entire classroom peanut-free—an inverse-integration modification—allows the disabled child to be fully included in all class activities.²⁶⁷ Similarly, during pandemics such as COVID-19, a universal-masking policy can protect immunocompromised students, while still avoiding the segregating effect of alternative accommodations, such as using plastic barriers or allowing disabled students to attend class virtually.²⁶⁸ And, of course, if everyone shares the same space, there are more opportunities for intergroup friendships to emerge.

Admittedly, nondisabled students who are required to wear masks or avoid peanut-based products might resent the kinds of inverse-integration modifications discussed above. Such resentment, in turn, can be counterproductive when it comes to facilitating intergroup friendships. This is especially problematic given that disabled children are already at risk of bullying and harassment.²⁶⁹ Thus, while inverse-integration modifications may allow people to share the same space, they do not necessarily facilitate shared experiences and positive interactions.

There is evidence, however, that some forms of inverse integration provide opportunities to meet people and develop new relationships. Qualitative studies provide support to this proposition by showing that the participation of nondisabled persons in wheelchair sports—both at the elite and recreational levels—led to the formation of intergroup friendships.²⁷⁰ These studies have also found that such inverse integration

<https://blog.petrieflom.law.harvard.edu/2022/03/08/masks-workplace-ada-reasonable-accomodation/> [<https://perma.cc/24QT-NGWA>] (“The presence of high-risk people with disabilities simply requires others to continue to wear masks for the foreseeable future. . . . Isn’t masking in our presence a small price to pay for keeping us around?”).

266. *Mystic Valley Reg’l Charter Sch.*, slip op. at 22 (determining that assigning a student with a life-threatening peanut allergy to a designated peanut-free table is “stigmatizing and isolating,” especially given that the regular set up of the classroom is “designed to promote closeness”).

267. *Id.* at 23 (“Student is entitled to equal access to a pool of other students during snacks and lunchtime . . .”).

268. *E.g., Doe I v. Perkiomen Valley Sch. Dist.*, 585 F. Supp. 3d 668, 695–97 (E.D. Pa. 2022) (discussing the segregating effect of plastic barriers and optional remote learning policies).

269. See Shu, *supra* note 56, at 20–29 (describing the bullying of children with food allergies); Weber, *supra* note 29, at 180–82 (illustrating a story of a teacher ostracizing a student for their visual impairment).

270. Carter et al., *supra* note 133, at 946–48 (noting that “sporting activities can promote the development of new friendships for children with disabilities”); Hutzler et al., *supra* note 243, at 353 (“I have a lot of friends with disabilities that I met in basketball. . . . I have more friends with disabilities than friends without.” (quoting a nondisabled wheelchair basketball player)); Medland & Ellis-Hill, *supra* note 243, at 111 (“[B]oth disabled and able-bodied wheelchair athletes stated that they had developed friendships that had ‘made it worthwhile to stay involved’ [with wheelchair sports].”); Joshua R. Pate, Chris Scroggins & Emeka Anaza, *Reverse Integration Through Wheelchair Basketball*:

equipped the nondisabled participants with a more accurate perception of how inaccessibility and ableism affect disabled persons,²⁷¹ which in turn promoted closeness and mutual understanding.²⁷²

C. *Reciprocity and Interdependence*

Reciprocity and interdependence, which together constitute the third building block of interpersonal relationships, are another element that distinguishes close relationships from other types of interactions.²⁷³ This is particularly true about friendships. Indeed, friendships often require “equality of respect, investment, and commitment” from each of the individuals engaged in the relationship.²⁷⁴

As this section will show, reciprocity and interdependence are central to many inverse-integration practices, both practically and expressively. Unlike traditional integration measures, which usually expect disabled persons to adapt to mainstream norms, many inverse-integration practices put both sides of the interaction on equal footing. For example, when a hearing person communicates with a deaf individual using sign language, neither side needs an accommodation—they are communicating in a language that each of them is capable of understanding.

In fact, some inverse-integration practices even provide disabled persons with opportunities to assist and accommodate nondisabled individuals—opportunities that are rare in a society where mainstream norms

Exploring Participants’ Views of Sport for People With Disabilities, 13 *J. Contemp. Athletics* 197, 202 (2019); Spencer-Cavaliere & Peers, *supra* note 20, at 302–03 (“[T]he wheelchair basketball environment led to integrated social relationships between people of varying abilities, an integration that according to participants is not common outside of this community.”).

271. See, e.g., Hutzler et al., *supra* note 243, at 346 (“[A]lthough none of the [able-bodied] players directly said so, it would appear that the difficulty and complexity they encountered in trying to play wheelchair basketball gave them a new-found respect for the players with disabilities.”); Cathy McKay, Justin Haegele & Martin Block, *Lessons Learned From Paralympic School Day: Reflections from the Students*, 25 *European Physical Educ. Rev.* 745, 751–57 (2019) (documenting an attitudinal shift among nondisabled students who participated in Paralympic sports activities); Spencer-Cavaliere & Peers, *supra* note 20, at 302–03 (“An aspect of wheelchair basketball that was apparent in all of the interviews was that reverse integration provided an opportunity for all of the athletes to share knowledge about both sport and disability.”); see also Groce, *supra* note 207, at 98 (describing how the common use of sign language by hearing people in Martha’s Vineyard accompanied more accurate and favorable attitudes toward deafness and deaf people).

272. See Girma, *supra* note 20, at 147.

273. Blumstein & Kollock, *supra* note 202, at 468–69.

274. David Wasserman, Adrienne Asch, Jeffrey Blustein & Daniel Putnam, *Disability: Health, Well-Being, and Personal Relationships*, *Stan. Encyc. of Phil.* (Edward N. Zalta ed., Feb. 18, 2016), <https://plato.stanford.edu/entries/disability-health/> (on file with the *Columbia Law Review*) (last updated Apr. 21, 2022).

prevail.²⁷⁵ Indeed, when disability-focused organizations accommodate nondisabled persons for their *lack of disability* (e.g., disabled athletes teaching their nondisabled counterparts how to use a wheelchair²⁷⁶), they challenge misconceptions about the one-sidedness of the relationships between disabled and nondisabled individuals.²⁷⁷

The inclusion of hearing actors in Deaf theaters, as early as the late 1960s, is also instructive in terms of the ways in which disabled persons can accommodate their nondisabled peers.²⁷⁸ In those theaters, Deaf actors modified the way they had previously performed by adjusting to the presence on stage of their hearing counterparts, who both spoke and signed.²⁷⁹ The Deaf audience, too, had to adjust to the new style of performing.²⁸⁰ This practice continues today, although some Deaf people may find it difficult to understand the signing of hearing actors.²⁸¹ Nevertheless, existing research suggests that such accommodations²⁸² by Deaf actors and audiences recast disabled persons as “helpers” in contrast to the popular narrative—according to which accommodations were in the sole purview of the nondisabled.²⁸³ Indeed, in accommodating nondisabled individuals for their lack of disability, some disabled persons have

275. See, e.g., Godin, *supra* note 20, at 143 (“[J]udging by some of the conversations I have with my blind friends, being useful is something that we often feel our lives sorely lack.”).

276. Carter et al., *supra* note 133, at 949.

277. Cf. Emens, *Disabling Attitudes*, *supra* note 93, at 232 (noting that discussions of disability integration are often based on an implicit assumption that the benefits of integration travel “one way—from nondisabled to disabled”).

278. See *supra* note 11 and accompanying text.

279. Padden & Humphries, *supra* note 11, at 101–02, 110–12.

280. *Id.* at 111 (“Almost immediately, the Deaf audiences complained about the new theater: Too fast! Incomprehensible! Too elite!”).

281. Kayla Epstein & Alex Needham, *Spring Awakening on Broadway: Deaf Viewers Give Their Verdict*, *The Guardian* (Oct. 29, 2015), <https://www.theguardian.com/stage/2015/oct/29/spring-awakening-broadway-deaf-viewers-give-verdict> [<https://perma.cc/T42N-2JVU>] (providing Deaf people’s insights about a Deaf theater production, which included critiques of the hearing actors’ signing).

282. The “accommodation” terminology can be found in the literature describing the inclusion of hearing actors in Deaf theater. *Id.* at 61, 122 (“Where once [Deaf actors] occupied the stage entirely and without compromise, they now have to share the stage with voice actors and accommodate the constraints of voiced performance.”); see also TDF, *Meet the Theatre: New York Deaf Theatre*, YouTube, at 03:00 (May 10, 2018), https://www.youtube.com/watch?v=am_INcwPzFY&t=119s (on file with the *Columbia Law Review*) (“We want to make sure that our stories are equally accessible for all audiences because we are the ones who typically don’t have that kind of access for other shows.”).

283. See Covo, *supra* note 4, at 649 n.298 (citing sources that describe the stereotype of disabled persons as dependent).

reported feeling a sense of pride²⁸⁴ and empowerment,²⁸⁵ even if such accommodations also entail costs. Thus, the power dynamics of the traditional accommodation process are reversed.

Similarly, the affiliation of nondisabled persons in disability-focused settings may allow disabled persons to rise to positions of leadership over nondisabled persons. Of course, this is not the only way for disabled persons to reach leadership positions. But situations like this show how inverse integration can be an important tool to challenge prevailing social conventions and hierarchies.²⁸⁶ They can also show the potential for altering the meanings of traits when those traits are attached to power. The myth about how King Ferdinand's lisp in the thirteenth century affected Spanish dialects is a good example. As the story goes, Ferdinand's constituents imitated him to show respect, and the modified pronunciation was ultimately incorporated into the popular dialect.²⁸⁷ Drawing on that story, disability activist and scholar Simi Linton observes that "when personal power gets attached to physical or psychological characteristics, it alters the meaning of those traits."²⁸⁸

In sum, inverse integration's organizing principle is its potential to promote relationality—the creation or support of human connection between disabled and nondisabled persons. Specifically, inverse-integration practices allow members of each group to share common language and experiences with family members, friends, and intimate partners. As the next Part will show, this model shines a light on what is currently missing from the traditional integration model.

284. McKanan, *supra* note 168, at 2 (referring to the disabled residents at Camphill, an intentional community for disabled persons that includes some nondisabled volunteers, as "the most seasoned Camphillers" and noting that the disabled residents take pride in welcoming and offering tours to visitors).

285. See, e.g., Carter et al., *supra* note 133, at 949 ("The children who had disabilities often found that they were in the position of being an expert who was able to teach wheelchair skills to their able-bodied peers. This was something that many of them relished."); Amelia Cavallo & Maria Oshodi, *Staring at Blindness: Pitch Black Theatre and Disability-Led Performance*, in *Theatre in the Dark: Shadow Gloom and Blackout in Contemporary Theatre* 169, 178 (Adam Alston & Martin Welton eds., 2017) ("In most instances, [audio description] reinstates ableist hierarchies in that the blind spectator is dependent on the sighted describer for information. The act of a blind individual having control over visual content and naming where to look yet again presented a sociopolitical role reversal.").

286. This is not necessarily the case in all inverse-integration practices. For example, inverse integration in employment may be a notable exception. See Susan Stefan, *Beyond Residential Segregation: The Application of *Olmstead* to Segregated Employment Settings*, 26 Ga. St. U. L. Rev. 875, 920 (2010) (arguing that sheltered workshops, which congregate disabled persons in close quarters, "limit and minimize their abilities to form friendships with non-disabled people, and reinforce dependence").

287. Gerald Erichsen, *Where Did Spaniards Get Their 'Lisp' From?*, ThoughtCo., <https://www.thoughtco.com/where-did-spaniards-get-their-lisp-3078240> [<https://perma.cc/F7EX-PS36>] (last updated Jan. 11, 2019).

288. Linton, *My Body Politic*, *supra* note 82, at 238.

IV. RELATIONSHIPS, LAW, AND DISABILITY INTEGRATION

A. *The Relational Deficit of Disability Rights Law*

The relational advantages of inverse integration stand in stark contrast to the failure of disability rights law to protect, facilitate, and reinforce interpersonal relationships in many instances.²⁸⁹

Scholars have long documented the deficiencies of disability rights statutes when it comes to disabled persons' personal relationships. For example, some scholars have shown how, notwithstanding the passage of the ADA, disabled persons are still subject to legal restrictions with respect to their right to get married,²⁹⁰ have²⁹¹ and raise children,²⁹² or otherwise engage in sexual relationships.²⁹³ Other scholars have observed that, as a result of the limited application of accessibility provisions to private buildings,²⁹⁴ disabled persons are sometimes excluded from the spaces

289. The relational deficit of U.S. disability rights law becomes clearer when juxtaposed against the United Nations Convention on the Rights of Persons with Disabilities (CRPD), which the United States signed but never ratified. See U.N. Convention on the Rights of Persons With Disabilities, Mar. 30, 2007, 2515 U.N.T.S. 3. For example, article 23 of the CRPD requires state parties to take antidiscrimination measures "in all matters relating to marriage, family, parenthood and relationships." *Id.* art. 23. Moreover, the CRPD recognizes a robust human rights framework to participate in cultural life, recreation, leisure, and sport. *Id.* art. 30. In addition, Deaf people are entitled to "recognition and support of their specific cultural and linguistic identity, including sign languages and deaf culture." *Id.* For more on the CRPD's recognition of social rights and the relational value of such rights, see Lord & Stein, *supra* note 240, at 257–74.

290. Rabia Belt, *Disability: The Last Marriage Equality Frontier* 1–8 (Stan. Pub. L. Working Paper No. 2653117, 2015), <https://ssrn.com/abstract=2653117> [<https://perma.cc/MZF9-HLJU>] (providing examples of how the American legal system disadvantages disabled persons seeking to marry or raise children); see also Emens, *Intimate Discrimination*, *supra* note 24, at 1316 & nn.19–24 (citing sources).

291. See Nat'l Women's L. Ctr., *Forced Sterilization of Disabled People in the United States* 8, 15 (2021), https://nwlc.org/wp-content/uploads/2022/01/%C6%92.NWLC_SterilizationReport_2021.pdf [<https://perma.cc/LCD9-G4H8>].

292. See, e.g., Sarah H. Lorr, *Unaccommodated: How the ADA Fails Parents*, 110 *Calif. L. Rev.* 1315, 1321 (2022) (noting that "the ADA remains an ineffective tool to preserve and protect the rights of parents with [intellectual disabilities]"); Robyn M. Powell, *Achieving Justice for Disabled Parents and Their Children: An Abolitionist Approach*, 33 *Yale J.L. & Feminism* 37, 79–81 (2022) (reviewing data regarding courts' reluctance to apply the ADA in termination-of-parental-rights decisions and concluding that the law has "not effectively safeguarded the rights of disabled parents and their children").

293. Alexander A. Boni-Saenz, *Sexuality and Incapacity*, 76 *Ohio St. L.J.* 1201, 1223 (2015); Jasmine E. Harris, *Sexual Consent and Disability*, 93 *N.Y.U. L. Rev.* 480, 495 (2018); Matthew S. Smith, Tara Allison & Michael Ashley Stein, *Sexual Agency as a Rights-Based Imperative for Persons With Intellectual Disabilities*, in *Disability, Health, Law, and Bioethics* 171, 173–74 (I. Glenn Cohen, Carmel Shachar, Anita Silvers & Michael Ashley Stein eds., 2020).

294. The accessibility requirements enshrined in Title III of the ADA apply only to "commercial facilities" and do not cover private buildings. 42 U.S.C. §§ 12182(b)(2)(A)(iv), 12183 (2018). As for the Fair Housing Act, it imposes accessibility and accommodation

“where most intimate gatherings occur.”²⁹⁵ More abstractly, some scholars have noted that disability rights’ focus on the individual, rather than the community, renders it difficult to perceive and discuss “interactions, mutual benefits, relational gains, and interdependence.”²⁹⁶

This Article does not reexamine those scholarly works. Instead, it draws upon other theories, sources, and evidence from a variety of disciplines to demonstrate: (1) that the U.S. disability rights regime is lacking in terms of relationship-building opportunities and (2) that this deficit is particularly important as the United States struggles with a sharp rise in loneliness and social isolation.

1. *The Unfulfilled (Relational) Promise of Disability Accommodations.* — In the United States, disability rights law is grounded in the principle of reasonable accommodation,²⁹⁷ which many scholars believe fosters fruitful interpersonal interactions.²⁹⁸ Recent scholarship, however, raises doubts about whether the law’s focus on reasonable accommodations actually fosters positive interactions. Specifically, scholars suggest that the “interactive process,” a negotiation mechanism between the employee and the employer that is triggered once the former requests an

obligations when it comes to “multifamily dwellings.” Id. § 3604(f)(3). These requirements, however, are limited. First, multifamily dwellings constructed before 1988 are not subject to the Act’s accessibility requirements for new buildings. Id. § 3604(f)(3)(c). Second, multifamily dwellings in which the owner and no more than three other families live are exempt from the Act’s antidiscrimination provision altogether. Id. § 3603(b)(2).

295. Siebers, *supra* note 20, at 85–86.

296. Martha Minow, *Accommodating Integration*, 157 U. Pa. L. Rev. Online 1, 3, 6 (2008), <https://heinonline.org/HOL/P?h=hein.journals/pennumbra157&i=1> (on file with the *Columbia Law Review*) [hereinafter Minow, *Accommodating Integration*]; see also Colker, *The Americans with Disabilities Act*, *supra* note 69, at 1816 (“[P]eople who are deaf but not mobility impaired cannot challenge the lack of a wheelchair-accessible entrance at a restaurant even if that problem means the individual could not invite various friends to join them at the restaurant.”).

297. Shirley Lin, *Bargaining for Integration*, 96 N.Y.U. L. Rev. 1826, 1828 (2021).

298. See, e.g., Carlos A. Ball, *Looking for Theory in All the Right Places: Feminist and Communitarian Elements of Disability Discrimination Law*, 66 Ohio St. L.J. 105, 149–50 (2005) (maintaining that the interactive process “links equality with communication and dialogue”); Dallan F. Flake, *Interactive Religious Accommodations*, 71 Ala. L. Rev. 67, 79, 111 & n.288 (2019) (arguing that the “interactive process”—a mandatory negotiation mechanism whereby employees and employers are expected to identify and choose an appropriate accommodation—promotes dialogue between the parties, facilitates “favorable employer–employee relations,” and encourages “a host of ‘pro-social and cooperative workplace behavior[s]’” (first citing Susan Daicoff, *Law as a Healing Profession: The “Comprehensive Law Movement,”* 6 Pepp. Disp. Resol. L.J. 1, 19–20 (2006); then quoting Victor D. Quintanilla, *Taboo Procedural Tradeoffs: Examining How the Public Experiences Tradeoffs Between Procedural Justice and Cost*, 15 Nev. L.J. 882, 891–92 (2015))).

accommodation,²⁹⁹ may involve tension,³⁰⁰ suspicion,³⁰¹ uncertainty, and fear of stigma.³⁰² Professor Katherine Macfarlane, for example, argues that the detailed medical documentation an employee is typically required to provide during such an exchange “converts the interactive process into a complicated and adversarial negotiation.”³⁰³ Professor Shirley Lin also notes that the interactive process, as currently applied, can disempower employees, particularly workers from marginalized communities, due to differences in bargaining power and access to information.³⁰⁴ As a result, some employees might not even ask for accommodation in the first place.³⁰⁵ To make things more complicated, as Professor Nicole Porter has noted, the focus on accommodation can create resentment among nondisabled colleagues.³⁰⁶ And this, in turn, can indirectly undercut the ability of the law to promote interpersonal relationships between disabled and nondisabled persons.

More controversially, research shows that some types of accommodations arguably *reduce* opportunities for interaction.³⁰⁷ For example, allowing a disabled employee to work remotely may result in missed social interactions that a physical workplace might facilitate.³⁰⁸ Similarly, accommodations for “social impairments,”³⁰⁹ which may involve room dividers, quiet time, or the option to wear headphones,³¹⁰ may also reduce opportunities for interaction. Lastly, although using a sign

299. 29 C.F.R. § 1630.2(o)(3) (2024).

300. See generally Michael Ashley Stein, Anita Silvers, Bradley A. Areheart & Leslie Pickering Francis, *Accommodating Every Body*, 81 U. Chi. L. Rev. 689, 755 (2014) (suggesting that disabled workers who request accommodations may feel “as if they are advancing a unique adversarial request” or may perceive their identity “as the object of scrutiny”).

301. Katherine A. Macfarlane, *Disability Without Documentation*, 90 Fordham L. Rev. 59, 84 (2021) [hereinafter Macfarlane, *Disability Without Documentation*].

302. Michelle R. Nario-Redmond, *Ableism: The Causes and Consequences of Disability Prejudice* 220 (2019); Stacy A. Hickox & Keenan Case, *Risking Stigmatization to Gain Accommodation*, 22 U. Pa. J. Bus. L. 533, 539 (2020).

303. Macfarlane, *Disability Without Documentation*, supra note 301, at 84.

304. Lin, supra note 297, at 1852, 1866–70.

305. *Id.* at 1858–59.

306. Nicole Buonocore Porter, *Accommodating Everyone*, 47 Seton Hall L. Rev. 85, 98–106 (2016).

307. E.g., Minow, *Accommodating Integration*, supra note 296, at 4–5 (discussing the example of accommodating blind students in schools by allowing them to use educational materials that are designed in “specialized formats”).

308. See Arlene S. Kanter, *Remote Work and the Future of Disability Accommodations*, 107 Cornell L. Rev. 1927, 1989 (2022) (“Some employees may choose not to work remotely because they will miss the social interaction that an office provides, including those disabled employees who already experience social isolation.”).

309. Susan D. Carle, *Analyzing Social Impairments Under Title I of the Americans With Disabilities Act*, 50 U.C. Davis L. Rev. 1109, 1113 (2017) (defining social impairments as “situations in which an employee’s *social functioning* constitutes an important aspect of her impairment”).

310. Emens, *Integrating Accommodation*, supra note 4, at 851–53.

language interpreter may remove communication barriers and foster relationships,³¹¹ it too may hinder “fluidity and proximity” by injecting a third party into the conversation.³¹²

Admittedly, many employees—both disabled and nondisabled—may not desire increased levels of social interaction, particularly during work hours.³¹³ But the fact remains that the practicalities of implementing reasonable accommodations may conflict with the goal of fostering positive communication and creating opportunities for shared experiences, two of the fundamental building blocks of interpersonal relationships.

2. *The Gap Between Formal Integration and Informal Social Isolation.* — Personal narratives of disabled activists and scholars also demonstrate the law’s limitations when it comes to facilitating connectedness and shared experiences. Consider the example brought by the late scholar Adrienne Asch, who was blind. As Asch explained, while disability rights law would not allow a swimming club to turn her away, it will “do nothing to help [her] persuade a group of new friends that [she] could join them for a carefree afternoon at a lake.”³¹⁴

This gap between formal integration and informal social isolation has been identified by other activists and scholars, including Eric Garcia,³¹⁵ Haben Girma,³¹⁶ Judith Heumann,³¹⁷ Amy Rowley,³¹⁸ and Adam Samaha.³¹⁹ All of these authors, who were educated in mainstream classrooms, have

311. Emens, *Intimate Discrimination*, supra note 24, at 1393.

312. *Id.*; see also Bonnie Poitras Tucker, *The ADA’s Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 *Ohio St. L.J.* 335, 347 (2001) (“Instead of looking at the speaker, I am forced to watch the interpreter, thus losing valuable eye contact with the person who is speaking. . . . Because I am sitting with the interpreter and watching the interpreter[,] other individuals often feel that they are precluded from speaking with me.”).

313. See David Brooks, *Opinion, The Immortal Awfulness of Open Plan Workplaces*, *N.Y. Times* (Sept. 8, 2022), <https://www.nytimes.com/2022/09/08/opinion/open-plan-office-awful.html> (on file with the *Columbia Law Review*) (noting several studies showing that open floor plans designed to facilitate employee social interaction actually “hurt morale and productivity” among employees).

314. Asch, supra note 113, at 395–96.

315. Eric Garcia, *We’re Not Broken: Changing the Autism Conversation* 153–54 (2021). Garcia, an autistic journalist and author, described how, during high school, he had a small circle of friends and felt isolated. *Id.*

316. Girma, supra note 20, at 13. Girma, the first deafblind person to attend Harvard Law School, shared in her memoir that when she had attended middle school, she had no friends and just felt “tolerated.” *Id.*

317. Heumann, supra note 104, at 30–32 (“[T]he nondisabled kids had a way of interacting in class and telling jokes that felt unfamiliar. It was as if I’d lived my life speaking a different language, in a completely different culture.”).

318. Amy June Rowley, *Rowley Revisited: A Personal Narrative*, 37 *J.L. & Educ.* 311, 327 (2008). Professor Rowley, who is Deaf, described how, after moving from a mainstream classroom to a school for deaf children, she immediately stopped “feel[ing] alone.” *Id.*

319. Samaha, supra note 18. Samaha, a law professor at NYU, recently described how, as his disability became visible at the age of eight, “the social world became more closed.” *Id.*

recounted how, notwithstanding their academic success, they had experienced social isolation and rejection. Girma, for example, recalls in her memoir that, during her K–12 education, her peers never invited her to their cafeteria tables.³²⁰ Similarly, when Heumann attended high school, she was “excluded from dances and dates and kissing boys behind the football stadium” just because she was using a wheelchair.³²¹

A number of studies have shown that the same pattern exists at the more structural level.³²² Even though many disabled students currently study in mainstream settings, “social separation continues to exist.”³²³ Or, to use Tom Shakespeare’s words, even when disabled persons “are in the community,” many of them are often “not part of the community.”³²⁴

3. *Problems With the Law Identified by the Disability Justice Movement.* — Community and interpersonal relationships play an important role in the agenda of Disability Justice,³²⁵ a burgeoning social movement that offers a critique of the disability rights framework.³²⁶ Led by disabled persons of

320. Girma, *supra* note 20, at 145.

321. Heumann, *supra* note 104, at 31.

322. E.g., Scott L.J. Jackson, Logan Hart, Jane Thierfeld Brown & Fred R. Volkmar, *Self-Reported Academic, Social, and Mental Health Experiences of Post-Secondary Students With Autism Spectrum Disorder*, 48 *J. Autism & Developmental Disorders* 643, 646–47 (2018) (finding that while the majority of autistic students who attended post-secondary academic institutions reported high degrees of academic comfort, over seventy-five percent experienced a subjective sense of isolation and lack of companionship); Andrew Weis, *Jumping to Conclusions in “Jumping the Queue”*, 51 *Stan. L. Rev.* 183, 199–200 (1998) (reviewing Kelman & Lester, *supra* note 153) (citing sources regarding students with learning impairments); see also Yu-Han Xie, Miloň Potměšil & Brenda Peters, *Children Who Are Deaf or Hard of Hearing in Inclusive Educational Settings: A Literature Review on Interactions With Peers*, 19 *J. Deaf Stud. & Deaf Educ.* 423, 424 (2014) (“[C]hildren who are [deaf or hard of hearing] are more likely to be neglected by their hearing peers in regular schools and less likely to have a friend in the class than their classmates with normal hearing.” (citations omitted)).

323. Virginia Buysse, Barbara Davis Goldman & Martie L. Skinner, *Setting Effects on Friendship Formation Among Young Children With and Without Disabilities*, 68 *Exceptional Children* 503, 505 (2002); see also Harris, *The Aesthetics of Disability*, *supra* note 13, at 913 (“[T]he physical integration of students with disabilities into neighborhood schools largely resulted in shared physical space rather than inclusion.”).

324. Shakespeare, *supra* note 25, at 197.

325. *Sins Invalid*, *supra* note 118, at 68 (“[D]isability justice is ultimately about reimagining and reinventing all of our relationships with one another, as well as with our own bodyminds.”); Lydia X.Z. Brown, Loree Erickson, Rachel da Silva Gorman, Talila A. Lewis, Lateef McLeod & Mia Mingus, *Radical Disability Politics* (A.J. Withers & Liat Ben-Moshe eds.), in *Routledge Handbook of Radical Politics* 178, 179, 181 (Ruth Kinna & Uri Gordon eds., 2019) (describing how the Disability Justice framework values “interdependence and the intrinsic value of disabled people” and calls for “community-based, organic . . . accessibility”).

326. *Sins Invalid*, *supra* note 118, at 15, 18 (“Rights-based strategies often address the symptoms of inequity but not the root. The root of disability oppression is ableism and we must work to understand it, combat it, and create alternative practices rooted in justice.”); see also Sami Schalk, *Black Disability Politics* 7 (2022) (describing the Disability Justice movement).

color as well as queer and gender-nonconforming activists, the Disability Justice movement emphasizes intersectionality, interdependence, and collective liberation among its overarching principles.³²⁷

Unlike the individualized focus of the disability rights model, the Disability Justice movement advances community-based notions of accessibility. For example, Disability Justice writer and activist Mia Mingus has argued that while making society more accessible is an important goal, “[a]ccess for the sake of access is not necessarily lib[er]atory.”³²⁸ Mingus has developed the concept of “access intimacy,” which strives to use access to promote connection, community, and love.³²⁹ Mingus emphasizes the significance of reciprocity in crafting access measures. In other words, the concept of access should work both ways, allowing *traditional* and *inverse* access. In Mingus’s words, access intimacy “reorients our approach from one where disabled persons are expected to squeeze into able bodied people’s world, and instead *calls upon able bodied people to inhabit our world.*”³³⁰

4. *The Loneliness Epidemic.* — In recent decades, researchers have documented a sharp rise in loneliness and social isolation among American individuals.³³¹ The “loneliness epidemic” has the potential to affect everyone,³³² but research suggests that disabled persons are more prone to experience loneliness and social isolation.³³³ For example, a recent study found that disabled persons aged 50–65 were more than twice as likely as nondisabled persons in the same age group to face this problem.³³⁴ Such social isolation creates a potentially vicious cycle, because

327. Sins Invalid, *supra* note 118, at 22–26 (listing “ten principles” of Disability Justice).

328. Mingus, *supra* note 20.

329. *Id.*

330. *Id.*

331. Shmuel I. Becher & Sarah Dadush, Relationship as Product: Transacting in the Age of Loneliness, 2021 U. Ill. L. Rev. 1547, 1572 (citing Vivek Murthy, Work and the Loneliness Epidemic, Harv. Bus. Rev. (Sept. 26, 2017), <https://hbr.org/cover-story/2017/09/work-and-the-loneliness-epidemic> (on file with the *Columbia Law Review*)).

332. There are many reasons for the increase of loneliness and social isolation, including technological and sociocultural developments, as well as the COVID-19 pandemic, which significantly curtailed in-person interactions. See Murthy, Our Epidemic of Loneliness and Isolation, *supra* note 23, at 4, 12–21.

333. See *id.* at 19 (identifying physical or mental health and disabilities as a risk factor for loneliness and isolation); Stephen J. Macdonald et al., ‘The Invisible Enemy’: Disability, Loneliness and Isolation, 33 *Disability & Soc’y* 1138, 1149–52, 1156 (2018); see also Eric Emerson, Nicola Fortune, Gwynnyth Llewellyn & Roger Stancliffe, Loneliness, Social Support, Social Isolation and Wellbeing Among Working Age Adults With and Without Disability: Cross-Sectional Study, 14 *Disability & Health J.*, Jan. 2021, at 1, 4 tbl.1 (finding, based on a survey among “working age” adults in England, that disabled persons experience loneliness at a rate approximately four times higher than their nondisabled peers).

334. Rsch. & Training Ctr. on Disability in Rural Communities, Research Report: Social Isolation and Loneliness Among Rural and Urban People With Disabilities 3 (2021), https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=1057&context=ruralinst_health_wellness [<https://perma.cc/M5GL-2ZT2>].

the initial isolation makes it harder to make friends and meet potential partners.³³⁵ As a result, disabled persons are significantly less likely to get married than nondisabled persons.³³⁶

Of course, it is dangerous to generalize. Some disabled persons who need daily assistance from caregivers or service providers may actually prefer to have more time alone.³³⁷ Other disabled individuals are happy with their social lives as they are.³³⁸ A key element in any analysis, however, is the question of choice: Did the individual voluntarily choose to avoid social interactions or was there an external influence at play, hindering such interactions? Indeed, there is evidence that, when it comes to disability, social isolation may be involuntary, stemming from stigma,³³⁹ accessibility barriers, and “social neglect.”³⁴⁰

In sum, a range of sources and theoretical perspectives demonstrate that the reasonable accommodations and accessibility generated by disability rights law are insufficient to promote social inclusion or interpersonal relationships between disabled and nondisabled persons.

B. *Is It the Job of Integration Laws to Promote Relationships?*

The preceding discussion suggests that while inverse integration may promote closeness, the traditional integration model suffers from a relational deficit. Does this mean that the traditional model—which primarily relies on disability antidiscrimination laws—has something to learn from inverse integration? The answer depends on whether one believes that protecting and promoting relationships is among the responsibilities of the legal regime governing integration.

A common argument against invoking the coercive powers of the state to regulate friendships or intimate relationships is the belief that individuals should be allowed to choose with whom they interact and form relationships.³⁴¹ This argument, which is closely related to the concept of “freedom of association,” is often invoked to justify the law’s focus on formal commercial transactions, as opposed to deeply personal

335. Cf. Huntington, *supra* note 24, at 10–11 (referring to research showing that happier people tend to be married, and that married people tend to be happier).

336. See Nario-Redmond, *supra* note 302, at 7 (“The rate for first marriages for people from 18 to 49 years of age is 71.8 per 1000 but only 41.1 per 1000 for people with disabilities . . .”).

337. Pulrang, *supra* note 27.

338. The anthology *Disability Visibility*, for example, includes powerful portrayals of romantic and platonic relationships involving disabled individuals. See generally *Disability Visibility: First-Person Stories From the Twenty-First Century*, *supra* note 66.

339. Shakespeare, *supra* note 25, at 199 (“[T]he effect of stigma is to undermine the possibilities of interaction, at least at the outset.” (citing Goffman, *supra* note 65)).

340. Pulrang, *supra* note 27.

341. See Katharine T. Bartlett & Mitu Gulati, *Discrimination by Customers*, 102 *Iowa L. Rev.* 223, 238–40 (2016) (“[A]ssociational rights include the freedom to engage in discriminatory behavior in private spaces—freedom that is not allowed in more public settings.”).

decisions.³⁴² Thus, the argument goes, while the legal prohibition of disability discrimination in employment is socially desirable and widely accepted, the idea that individuals' choices about friendships and love should be restricted in the name of disability equality "seems misguided and beyond the realm of appropriate state intervention."³⁴³

Another argument against the imposition of antidiscrimination duties at the "personal" level is that in some instances, "intimate discrimination" may serve important goals from an anti-subordination perspective.³⁴⁴ Consider, for example, people with mobility impairments who might desire someone who shares that impairment simply because of the sense of identity that comes from belonging to the same minority group or from "inhabiting unconventional bodies."³⁴⁵ In these situations, requiring people to be involved in relationships with nondisabled persons would be undesirable from a disability equity perspective. For these and other reasons, most (if not all) scholars oppose a legal norm that would intervene in a person's decision of whether to establish and maintain personal relationships with a member of another social group.³⁴⁶

Yet this widely accepted conclusion tells only part of the story. In recent decades, scholars from various disciplines have shown why the law, in general, and integration mandates, in particular, must attend to interpersonal relationships at the *structural* level.³⁴⁷ That is, although the law should refrain from imposing affirmative duties in connection with personal relationships, lawmakers should still consider how certain legal norms, and the theories underlying these norms, affect interpersonal relationships, and vice versa.

342. See Sophia Moreau, *Faces of Inequality: A Theory of Wrongful Discrimination* 217, 233, 235–36 (2020) (“[W]e permit people to decide for themselves how to relate to the members of their families and friends . . .”); Elizabeth Anderson, Reply to Critics of *The Imperative of Integration*, 12 *Pol. Stud. Rev.* 376, 381 (2014) [hereinafter Anderson, Reply to Critics] (acknowledging that the “ideal of integration is in tension with principles of freedom of association in private life,” and that “the law has obvious limitations when it comes to promoting integration of friendship circles and marriages”); Bartlett & Gulati, *supra* note 341, at 242–45 (“[I]t is hard to imagine a direct ban on [discrimination] . . . in [certain markets]. This choice . . . carries the potential of harmful discrimination, yet it goes to deeply intimate decisions . . .”); Leib, *supra* note 198, at 663–65 (arguing that legal regulation of friendship would “undermine its defining characteristic”).

343. Emens, *Intimate Discrimination*, *supra* note 24, at 1366.

344. *Id.* at 1346–47, 1355; see also Moreau, *supra* note 342, at 235 (discussing the justification of exempting “small, artisanal businesses” from employment antidiscrimination laws); Russell K. Robinson, *Structural Dimensions of Romantic Preferences*, 76 *Fordham L. Rev.* 2787, 2799–800 (2008) (“Because not all reasons for racial preferences are problematic, we must consider the identities and the contexts that shape any particular preference.”).

345. Emens, *Intimate Discrimination*, *supra* note 24, at 1349.

346. See, e.g., Moreau, *supra* note 342, at 233–36; Bartlett & Gulati, *supra* note 341, at 242–47; Emens, *Intimate Discrimination*, *supra* note 24, at 1356–57.

347. See, e.g., Anderson, *The Imperative of Integration*, *supra* note 77, at 116 (“Formal desegregation consists in the abolition of laws and policies enforcing racial separation. . . . Social integration requires intergroup cooperation on terms of equality.”).

Consider, for example, the “contact hypothesis,” a social psychology theory that underlies disability rights law in the United States.³⁴⁸ That theory is based on the idea that intergroup interactions can potentially reduce prejudice and promote social acceptance.³⁴⁹ It turns out, however, that simply allowing disabled and nondisabled persons to interact does not necessarily reduce prejudice. Ideally, the interactions should involve some forms of meaningful communication and shared experiences. Indeed, Gordon Allport, who developed the contact hypothesis in the 1950s, warned against “casual” intergroup relations.³⁵⁰ To Allport, it was only through “true acquaintance” that prejudice could be reduced and “accurate social perceptions” could occur.³⁵¹ Among other conditions, Allport hypothesized that only “contact that leads people to *do* things together is likely to result in changed attitudes.”³⁵² Allport used a team-sports analogy, which by definition involves a “cooperative striving” for a goal, to demonstrate his point.³⁵³

Recent work by social psychologists emphasizes how the desired shift in attitudes may be related to interpersonal relationships.³⁵⁴ As one scholar has noted, “the more disabled friends people have, the longer these relationships have lasted, or the more people interact with those who experience disabilities, the more positive their attitudes are.”³⁵⁵ All of this

348. As noted, some disability rights laws are designed to promote intergroup contact. See, e.g., 20 U.S.C. § 1412(a)(5)(A) (2018) (requiring participating states to educate disabled students alongside their nondisabled peers “[t]o the maximum extent appropriate”); 28 C.F.R. § 35.130(d) (2024) (requiring public entities to administer services in the “most integrated setting appropriate”); *id.* pt. 35 app. B (2024) (defining an appropriate integrated setting as one that “enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible”); Emens, *Disabling Attitudes*, *supra* note 93, at 231 (discussing American disability law as focused on promoting interactions between disabled and nondisabled individuals).

349. See *supra* note 42 and accompanying text.

350. Allport, *supra* note 42, at 264.

351. *Id.* at 264, 272.

352. *Id.* at 276.

353. *Id.*

354. See John Dixon, Kevin Durrheim & Colin Tredoux, *Beyond the Optimal Contact Strategy: A Reality Check for the Contact Hypothesis*, 60 *Am. Psych.* 697, 698–700 (2005) (enumerating various principles found by social psychologists to be prescriptive for “good contact,” including: (1) “[c]ontact should be regular and frequent,” (2) “[c]ontact should have genuine ‘acquaintance potential,’” and (3) “[c]ontact should be personalized and involve genuine friendship formation”). Importantly, while the authors believe that social psychologists should continue to study the ideal conditions under which contact can shift attitudes, they urge researchers to explore more mundane encounters between members of different social groups. *Id.* at 703–07.

355. Nario-Redmond, *supra* note 302, at 275 (citing Megan MacMillan, Mark Tarrant, Charles Abraham & Christopher Morris, *The Association Between Children’s Contact With People With Disabilities and Their Attitudes Towards Disabilities: A Systematic Review*, 56 *Developmental Med. & Child Neurology* 529 (2014); Elizabeth Levy Paluck & Donald P. Green, *Prejudice Reduction: What Works? A Review and Assessment of Research and*

is to say that, insofar as disability rights law relies on the contact hypothesis,³⁵⁶ it is built, at least in part, on the very idea that reduction of prejudice would be achieved through creating some form of interpersonal relationships, more than mere “casual” interactions.

There are other reasons why interpersonal relationships matter for the law of disability integration, however. These reasons have to do with the complex interface between legal norms and personal choices about informal interactions, as illustrated in the following three points: First, while we tend to think that our decisions regarding whom to have as friends or intimate partners are purely personal, these decisions are in fact shaped by a robust legal infrastructure.³⁵⁷ Indeed, as Professor Russell Robinson and others have made clear, the law is *already involved* in shaping our relational choices, even if this is not apparent at first glance.³⁵⁸ In the disability context, for example, the law’s recognition of disability-specific classrooms indirectly shapes the pool of potential friends for a student in

Practice, 60 Ann. Rev. of Psych. 339 (2009)); see also Cara C. MacInnis & Elizabeth Page-Gould, How Can Intergroup Interaction Be Bad if Intergroup Contact Is Good? Exploring and Reconciling an Apparent Paradox in the Science of Intergroup Relations, 10 Persps. on Psych. Sci. 307, 311 (2015) (“Cross-group friendships, which by definition involve multiple intergroup interactions as a friendship develops, are especially effective in reducing intergroup bias.” (citations omitted)); cf. Emens, Intimate Discrimination, *supra* note 24, at 1378 (“[S]tudies of friendship and race also suggest that interracial friendship positively affects racial attitudes.”).

356. Critics of the contact hypothesis, in the disability context and beyond, have recently questioned the reliance on contact in crafting policies aimed at promoting a more inclusive society. See, e.g., Elizabeth Levy Paluck, Seth A. Green & Donald P. Green, The Contact Hypothesis Re-Evaluated, 3 Behav. Pub. Pol’y 129, 133, 151–54 (2019) (questioning whether existing research on contact can inform policy). Professor Jasmine Harris, for example, has challenged the primary premise that intergroup contact will automatically reduce prejudice against disabled persons. Harris, *The Aesthetics of Disability*, *supra* note 13, at 899, 926–27. She suggests that disability prejudice results from “structural aesthetic and affective distaste for disability” that is triggered when disabled and nondisabled persons interact. *Id.* at 926. Harris speculates that part of the solution has to do with the order of magnitude. *Id.* at 968–70. In other words, exposing nondisabled persons to greater numbers of disabled persons may in fact reduce prejudice and enhance social acceptance. Interestingly, this idea largely aligns with inverse integration. But see *id.* at 971 (“[I]t is possible that further study will show that placing nondisabled students in classrooms with a diverse array of students with disabilities of varying degrees of deviation from the aesthetic ‘norm’ actually *reduces* attitudinal shifts by the nondisabled students.”).

357. See Huntington, *supra* note 24, at xii (“[T]he law profoundly shapes families and family life . . .”); Emens, *Intimate Discrimination*, *supra* note 24, at 1311 (noting that law “controls the infrastructure of our lives—our neighborhoods, schools, workplaces, public spaces, and more—in ways that affect affiliations along the lines of race, disability, and sex”).

358. Emens, *Intimate Discrimination*, *supra* note 24, at 1311 (noting that the state “affects rational calculations in the dating market through social policies that contribute to social hierarchies and wealth distribution”); Robinson, *supra* note 344, at 2788 (noting that legal norms “create structures that channel and limit our interaction with people of various identities”).

such a classroom.³⁵⁹ In other words, a student in a special education setting is more likely to interact and make connections with other disabled children than with nondisabled children.³⁶⁰

Second, the same stereotypes and misconceptions that shape people's preferences in choosing their intimate partners and friends also give rise to discrimination in employment, housing, and public accommodations.³⁶¹ And third, the real-world consequences of discrimination at the personal level can be just as harmful as discrimination in commercial transactions,³⁶² in part because "personal" and "formal" forms of discrimination are not always easily distinguishable.³⁶³

Against this backdrop, there is growing recognition among scholars that the law can, and indeed should, facilitate and shape, as opposed to coerce, the formation of interpersonal relationships, including relationships between members of different social groups.³⁶⁴ Such attempts to foster relationships at the structural level may take various forms. It may involve, for example, regulating dating apps or websites in a way that prevents or discourages a user from filtering out other people based on certain identity-based preferences. That strategy, however, is contentious among researchers.³⁶⁵ Less controversial proposals include the develop-

359. 34 C.F.R. § 300.115 (2024) (recognizing "special classes," "special schools," and "institutions" among the possible settings that school districts have to offer along the "continuum of alternative placements").

360. See Emens, *Intimate Discrimination*, *supra* note 24, at 1367–68 (using a hypothetical to make this point).

361. See Robinson, *supra* note 344, at 2793 (maintaining that "many racial preferences rest on nothing more substantial or legitimate than rank stereotyping"); see also Russell K. Robinson & David M. Frost, *LGBT Equality and Sexual Racism*, 86 *Fordham L. Rev.* 2739, 2746 (2018) (referring to research demonstrating "associations between sexual racism and general measures of multiculturalism and racial discrimination").

362. Moreau, *supra* note 342, at 227 ("[E]ven the private or personal realm is a realm in which my actions have significant effects on the power, authority, and freedoms enjoyed by others.").

363. *Id.* (noting that "deeply personal decisions" are "never purely 'personal'"); Emens, *Intimate Discrimination*, *supra* note 24, at 1334 ("The norms from the intimate domain . . . extend beyond the bedroom walls into other domains. For instance, these norms affect the ways that courts understand claims of employment discrimination.").

364. Moreau, *supra* note 342, at 227 (arguing in favor of noncoercive state intervention to promote interpersonal community); Anderson, *Reply to Critics*, *supra* note 342, at 381 (calling on "centrally administered organizations," such as colleges, to facilitate social integration); Robinson, *supra* note 344, at 2819 ("[O]nline dating may provide a productive example of a context in which the law might remove barriers to equality through structural changes without regulating intimacy preferences as comprehensively as it attempts to regulate discrimination in employment and housing.").

365. Compare Karen Levy & Solon Barocas, *Designing Against Discrimination in Online Markets*, 32 *Berkeley Tech. L.J.* 1183, 1210 (2017) (suggesting that platforms should consider refraining from "providing tools that allow users to effectively remove members of entire racial or ethnic groups from the apparent marketplace of potential partners"), with Bartlett & Gulati, *supra* note 341, at 242–43 (opposing regulation of dating apps). See also

ment of educational programs aimed at fostering a better understanding of different identities and cultures, as well as the creation of public spaces, parks, and community centers, “where people from different backgrounds can come together and share recreational pursuits and gradually learn more about each other.”³⁶⁶

The upshot is that taking relationships seriously is not irrelevant to laws governing integration. Quite the contrary: Relationships should be taken into account in designing the structural laws of integration. The challenge, then, is not *whether* to use law to foster and support relationships. Rather, it is *how* to design an integration framework that allows interpersonal relationships to thrive without forcing specific individuals to enter relationships that they do not wish to pursue. The next Part turns to this task.

V. POLICY AND LEGAL INTERVENTIONS

In Part III, this Article explored the relational advantages of inverse integration. In Part IV, it demonstrated that the traditional integration model suffers from a relational deficit. This Part connects the dots: It draws upon the concept of inverse integration to imagine how relationality could be incorporated into the current disability integration regime.³⁶⁷

This Part begins with a reminder of some of the concerns and guiding principles that need to be considered in any discussion regarding the legal framework governing disability integration. First, the engagement of nondisabled persons in disability-focused activities raises questions of exploitation, co-optation, and access to resources.³⁶⁸ Second, allowing nondisabled and disabled persons to share the same space does not necessarily guarantee meaningful communication, reciprocity, and shared experiences.³⁶⁹ And third, disability laws should promote interpersonal relationships at the structural level in order to create an infrastructure in

Robinson, *supra* note 344, at 2792–800, 2818–19 (presenting arguments on both sides of the debate).

366. Moreau, *supra* note 342, at 239; see also Murthy, *Our Epidemic of Loneliness and Isolation*, *supra* note 23, at 48–49 (arguing that combating social isolation requires the adoption of “pro-connection” policies, with a particular emphasis on equity, inclusion, and accessibility).

367. One interesting question, which is beyond the scope of this Article, is what lessons can be learned from this study with respect to other axes of identity. In any future analysis, it will be important to recognize the differences between disability and other axes of identity in the context of interpersonal relationships. See *supra* note 28 and accompanying text (describing one such difference). Specifically, while various marginalized groups suffer from “intimate discrimination,” mainstream society often treats disability in a unique way, namely by excluding disabled persons “from the sexual realm.” Emens, *Intimate Discrimination*, *supra* note 24, at 1314; see also Ladau, *Demystifying Disability*, *supra* note 3, at 134 (noting that disability, romance, and sexuality are perceived by mainstream society as being “completely at odds”).

368. See *supra* section II.A.1.

369. See *supra* notes 314–324 and accompanying text.

which disabled and nondisabled persons can engage in meaningful dialogues and shared experiences.³⁷⁰

Translating these principles into a comprehensive framework extends beyond the scope of this Article, in part because any such framework would need to be tailored to specific impairments (e.g., physical, developmental, psychosocial) or social arenas (e.g., education, housing, theater).³⁷¹ Thus, for example, it might be easier to facilitate interpersonal relationships through inclusive team sports, which usually involve cooperation, creativity, and sense of pride, than through integrative housing complexes, which raise a range of issues that pertain to funding, safety, and personal choice. Moreover, any attempt to incorporate relationality into integrative measures should consider not only disability but also the ways in which disability intersects with other axes of identity, such as race and gender.³⁷² As Professor Jamelia Morgan notes, ignoring intersectionality risks overlooking the ways in which “social and legal constructions of disability are informed by racist ideas and how social and legal constructions of race are informed by ableist ideas.”³⁷³ In lieu of a comprehensive plan, then, this final Part discusses a number of guiding principles and specific interventions to help incorporate relationality into a disability integration regime.

A. *Protect Disabled Spaces*

Perhaps counterintuitively, the first conclusion that follows from the understanding of inverse integration as a relationship-based model is that the involvement of nondisabled persons in disabled spaces is not always desirable. After all, we have seen that creating and maintaining safe spaces for disabled individuals is essential for the promotion of *intragroup* relationships within the disabled community,³⁷⁴ as well as for protecting disabled individuals from exploitation and abuse. Indeed, in some contexts—especially those pertaining to the most private and personal spaces, such as housing—imposing restrictions on the involvement of

370. See supra notes 364–366 and accompanying text.

371. See, e.g., Covo, supra note 4, at 661–68 (proposing guidelines for reform in the education arena).

372. For a comprehensive analysis of intersectionality in the context of race and disability, see Morgan, *Relationship Between Race and Disability*, supra note 28, at 664–729. For an analysis of the ways in which inverse integration in schools may affect disabled students of color or those who are from low-income families, see Covo, supra note 4, at 654–58.

373. Morgan, *Relationship Between Race and Disability*, supra note 28, at 680.

374. See supra notes 104–105 and accompanying text; see also Anderson, *The Imperative of Integration*, supra note 77, at 113 (“[S]ome degree of racial solidarity and affiliation on the part of the racially stigmatized is needed to spur integrative policies and cope with the stresses of integration. Thus, integration should also not be confused with the dissolution of black institutions . . .”).

nondisabled persons in disabled spaces might be necessary for protecting disabled persons' mental and physical integrity.³⁷⁵

Against this backdrop, this Article proposes the concept of "integration by invitation,"³⁷⁶ whereby disabled individuals should, to the maximum extent possible, initiate or influence nondisabled persons' involvement in disability-focused settings. Accordingly, the ADA provision that precludes nondisabled persons from bringing "reverse discrimination" lawsuits makes sense and should remain intact.³⁷⁷ This provision allows disability-focused organizations to make decisions about whether to invite nondisabled persons to join without having to fear legal liability.

The need to protect the dynamics of disability-focused settings, however, does not end once disability-specific organizations are given the option to decide whether to admit nondisabled persons. Even if such organizations decide to accept everyone, it might be worthwhile to further limit inverse integration in terms of timing, number of participants, or leadership positions. In fact, disability-focused organizations have already employed myriad strategies to guarantee that disability-specific settings remain focused on disabled persons' needs and interests.³⁷⁸ These strategies include: (1) clarifying, as a substantive principle, that the organization is committed to having disability-based leadership;³⁷⁹ (2) insisting that the president of an organization be disabled;³⁸⁰ (3) setting a provision in the organization's bylaws declaring that disabled persons must constitute at least fifty-one percent of the governing board;³⁸¹ (4) relying

375. Cf. Gregory Schmidt, *Inside a Home for L.G.B.T.Q. Seniors: 'I Made Friends Here,'* N.Y. Times (Apr. 22, 2022), <https://www.nytimes.com/interactive/2022/04/22/realestate/lgbtq-senior-housing-new-york.html> (on file with the *Columbia Law Review*) (describing the fears of a resident in an "L.G.B.T.Q.-friendly housing development" in New York regarding encounters with "residents and visitors from the neighborhood who are intolerant and even hostile toward L.G.B.T.Q. people").

376. I thank Professors Danielle Peers and Ruth Colker for helping me think through this notion and terminology.

377. See 42 U.S.C. § 12201(g) (2018).

378. Cf. Harpalani, *supra* note 88, at 163 (discussing similar points in the racial context).

379. Sins Invalid, *supra* note 118, at 18, 23 (including, as part of a ten-principle framework, a principle about leadership that states the leaders of the Disability Justice movement must be disabled persons of color and queer and gender-nonconforming disabled persons).

380. See Gallaudet University, *About: Deaf President Now*, *supra* note 119 (describing the "Deaf President Now" protests at Gallaudet University).

381. See *About Centers for Independent Living, Disability Achievement Ctr.*, <https://www.mydacil.org/about-centers-for-independent-living> [<https://perma.cc/WA6C-395G>] (last visited Oct. 31, 2023) ("Fifty-one percent of the staff and boards of [Centers for Independent Living] are persons with disabilities, which means that they play significant roles in the decision-making responsibilities of the Centers."). The "Deaf President Now" protesters had a similar demand with respect to Gallaudet University. Gallaudet University, *About: Deaf President Now*, *supra* note 119; see also *About: President's Council on Deafness*, Gallaudet Univ.,

on the input of disabled participants in making significant decisions regarding the scope of nondisabled participation;³⁸² and (5) limiting the number of nondisabled participants by imposing a cap³⁸³ or otherwise guaranteeing that most participants are disabled.³⁸⁴

B. *Avoid Integrative Measures Based on Hierarchical Roles*

To promote reciprocity, policymakers should avoid integration measures that assign hierarchical roles, in which nondisabled persons are expected to protect, help, or make decisions for disabled individuals. Instead, integration should be based, to the maximum extent possible, on reciprocity and mutual dependency.

The way that inverse integration has generally been implemented in American schools (in most cases, under the heading of “reverse mainstreaming”) violates this principle and provides a cautionary tale. Reverse mainstreaming was supposed to foster companionship through face-to-face interactions between disabled and nondisabled students.³⁸⁵

<https://www.gallaudet.edu/about/history-and-traditions/presidents-council-on-deafness> [<https://perma.cc/YKZ8-ANBA>] (last visited Oct. 31, 2023) (“We demand that the Board initiate the process of changing its By-Laws to conform with the [Commission on Education of the Deaf]’s recommendations to Congress of a 51 percent deaf member representation on the Board of Trustees.”).

382. See, e.g., Thiboutot et al., *supra* note 150, at 291 (describing a 1987 National Wheelchair Basketball Association meeting in which delegates voted on a proposal to admit nondisabled athletes); Loepky, *supra* note 20 (describing a similar vote at the 2021 annual meeting).

383. For example, Gallaudet University admits hearing students to the undergraduate program up to eight percent of the student population. See U.S. Dep’t of Educ., Gallaudet University: Fiscal Year 2024 Budget Request 8–9 (n.d.), <https://www2.ed.gov/about/overview/budget/budget24/justifications/m-gallaudet.pdf> [<https://perma.cc/55FS-JSMK>] (last visited Mar. 17, 2024) (“[I]ncoming hearing students on-campus and in the Online Degree Completion Program may not exceed 8 percent of each year’s total number of newly enrolled undergraduate students.”).

384. These rules to guarantee disabled persons’ participation are sometimes complex. For example, wheelchair basketball organizations usually employ a points system based on the functional ability of each player, as well as a cap on the total number of points that can be on the court at any given time. In practical terms, this means that a five-player wheelchair basketball team cannot have more than one nondisabled player on the court. See Loepky, *supra* note 20. These classification systems not only guarantee that nondisabled players will not take over wheelchair sports but also ensure that athletes with severe impairments are least impacted by nondisabled involvement in the sports.

385. Covo, *supra* note 4, at 648, 653 n.318 (“Educators and parents . . . argue that reverse mainstreaming fosters empathy among the nondisabled participants and gives ‘confidence’ to the disabled students.”); see also Scott K. McCann, Melvyn I. Semmel & Ann Nevin, *Reverse Mainstreaming: Nonhandicapped Students in Special Education Classrooms*, 6 *Remedial & Special Educ.* 13, 18 (1985) (“[R]everse mainstreaming may provide opportunities for handicapped students to establish friendships with nonhandicapped students which may become critical sources of social acceptance . . .”); Kimberly D. Schoger, *Reverse Inclusion: Providing Peer Social Interaction Opportunities to Students Placed in Self-Contained Special Education Classrooms*, 2 *Teaching Exceptional*

Indeed, some reverse mainstreaming practices are called “buddy programs.”³⁸⁶ But because reverse mainstreaming generally assumes that the benefits of interactions flow in only one direction,³⁸⁷ it fails to promote close relationships. For example, peer tutoring programs, a common component of reverse mainstreaming practices,³⁸⁸ tend to be one-sided in that the nondisabled students always take on the role of tutor.³⁸⁹ Similarly, nondisabled children are often assigned titles and roles such as “helper” or “teacher’s assistant,” which suggests that the relationship has a professional dimension.³⁹⁰ These distinctions, in turn, keep the two students at arm’s length. In fact, some nondisabled peer-tutors report that they would prefer to interact with their disabled peers without preset responsibilities or titles because they get in the way of friendship formation.³⁹¹

The problem of centering intergroup interactions around hierarchical roles extends beyond the education arena. When disabled individuals work in so-called “sheltered workshops,” the only nondisabled persons with whom they interact are the people running the workshop.³⁹² From a relational perspective, such integration measures are far from desirable. Most notably, they are not based on “equal status” in the organization and, in turn, do not reflect reciprocity.³⁹³ In fact, Gordon Allport, the social psychologist who formulated the contact hypothesis, found that this kind of contact may actually *exacerbate* negative attitudes,³⁹⁴ undermining one of the primary goals of integration.

To avoid such undesirable consequences, policymakers should structure integration measures in a way that encourages cooperative work and allows disabled persons to take leadership roles.

C. Reinforce Friends’ and Family Members’ Rights

A number of disability rights laws extend rights to family members of disabled persons. Thus, for example, parents of disabled children are entitled to participate in the drafting of individualized education programs (IEPs) for their children.³⁹⁵ These ancillary rights, however, are

Children Plus, no. 6, 2006, at 1, 4 (“[I]t was hoped that the participants would develop mutually reciprocal friendships.”).

386. Covo, *supra* note 4, at 629, 649 n.299.

387. *Id.* at 649–50, 652.

388. *Id.* at 619, 649 & n.296.

389. *Id.*

390. *Id.* at 649.

391. *Id.*

392. Stefan, *supra* note 286, at 920.

393. Covo, *supra* note 4, at 651–52.

394. Allport, *supra* note 42, at 275–76.

395. 20 U.S.C. § 1414(d)(1)(B)(i) (2018) (stipulating parents’ rights to be part of the “individualized education program team” in the education context).

notoriously limited,³⁹⁶ and their underlying justifications are based in part on the premise that a family member serves as a caregiver of, or advocate for, a disabled individual.³⁹⁷ In other words, the concept of relationships in these provisions is perceived as a means to an end (e.g., a better education), rather than an end in itself.

Inverse integration, on the other hand, which often occurs among friends and family members, invites us to imagine an integration system that recognizes the role of friends and family in disabled persons' lives—not solely as caregivers or advocates, but rather, as companions, lovers, and siblings.

One possible way to incorporate this idea into the U.S. legal system might involve providing antidiscrimination protection to nondisabled friends or family members who engage in disability-focused activities or practices.³⁹⁸ Granted, the idea to extend reasonable accommodations³⁹⁹ to

396. For example, the ADA's "association discrimination" provision, 42 U.S.C. § 12112(b)(4) (2018), does not require employers to provide reasonable accommodations to parents or caregivers. *Kelleher v. Fred A. Cook, Inc.*, 939 F.3d 465, 469 (2d Cir. 2019) ("[T]he ADA does not require an employer to *provide* a reasonable accommodation to the nondisabled associate of a disabled person . . .").

397. Julie F. Mead & Mark A. Paige, *Parents as Advocates: Examining the History and Evolution of Parents' Rights to Advocate for Children With Disabilities Under the IDEA*, 34 J. Legis. 123, 147–56 (2008) (reviewing and analyzing parental rights aimed at allowing parents to advocate for their children under the IDEA); Lawrence D. Rosenthal, *Association Discrimination Under the Americans With Disabilities Act: Another Uphill Battle for Potential ADA Plaintiffs*, 22 Hofstra Lab. & Emp. L.J. 132, 137–38 (2004) (describing several situations that the association discrimination provision was intended to address, most of which pertain to caregiving).

398. The ADA's association discrimination provision, which prohibits employers from "excluding or otherwise denying equal jobs or benefits" to individuals because of their association or relationship with a disabled person, is unlikely to apply to at least some of the situations discussed in this section, at least as interpreted by courts. 42 U.S.C. § 12112(b)(4); see also *infra* notes 402–405. First, it is unclear whether, and to what extent, the association discrimination provision applies to non-job-related situations. Cf. *Cortez v. City of Porterville*, 5 F. Supp. 3d 1160, 1164 (E.D. Cal. 2014) (holding that a nondisabled individual can assert an association discrimination claim under ADA's Title II, which covers public entities). Second, courts have been reluctant to apply this provision in cases where the only reason for the alleged discrimination was nondisabled persons' expression of support for disabled individuals. See, e.g., *Sifre v. Dep't of Health*, 38 F. Supp. 2d 91, 101 (D.P.R. 1999), *aff'd sub nom. Oliveras-Sifre v. Puerto Rico Dep't of Health*, 214 F.3d 23, 26 (1st Cir. 2000) (holding that the association discrimination provision does not apply in situations where the adverse action was the result of advocacy on behalf of disabled persons); see also *Larimer v. Int'l Bus. Machs. Corp.*, 370 F.3d 698, 700 (7th Cir. 2004) (identifying three categories of discrimination association: (1) "expense," (2) "disability by association," and (3) "distraction," none of which fits the situations described in this section). And third, as noted above, this provision does not include a reasonable accommodation requirement. See *supra* note 396.

399. Under the ADA, a failure to provide reasonable accommodations constitutes unlawful discrimination. See, e.g., 42 U.S.C. § 12112(b)(5)(A) (requiring reasonable accommodations for disabled individuals who are seeking employment or are already employed); *id.* § 12182(b)(2)(A)(ii) (categorizing the failure to provide "reasonable modifications" in public accommodations as discrimination).

nondisabled persons is not entirely new.⁴⁰⁰ Existing proposals, however, have focused on workplace accommodations and addressing the stigma associated with disability accommodations.⁴⁰¹ By contrast, this Article's proposal moves beyond the employment realm and is aimed at allowing nondisabled persons to share experiences with disabled family members or friends.

Thus, for example, a retail establishment that barred customers from wearing face masks could no longer deny entry to a person who wears a mask as an act of solidarity with a disabled partner.⁴⁰² This would avoid the situation in which a disabled person would be entitled to wear a mask while their partner could not.⁴⁰³ Similarly, people who shave their heads in solidarity with relatives or friends with cancer could no longer be fired or banned from school activities for such conduct.⁴⁰⁴ In the same vein, this

400. See, e.g., Porter, *supra* note 306, at 89, 108–09 (“The idea of a universal accommodation mandate is simple: any employee has the right to request a workplace accommodation and the employer cannot refuse the request based on the reason for the request.”); Stein et al., *supra* note 300, at 693–94, 737–44 (proposing a solution that would grant “an ADA-like reasonable-accommodation mandate to all work-capable members of the general population”).

401. See, e.g., Porter, *supra* note 306, at 108–09, 123–24, 128 (“Another benefit of this proposal is that accommodating everyone mostly avoids the stigma of classification.”); Stein et al., *supra* note 300, at 752–53 (“Detaching the right to accommodation from assignment of a special disability identity is consistent with integrating employees with disabilities rather than marking, and perhaps stigmatizing, them as essentially different from most workers.”).

402. See, e.g., Poppy Noor, *No Masks Allowed: Stores Turn Customers Away in US Culture War*, *The Guardian* (May 22, 2020), <https://www.theguardian.com/us-news/2020/may/22/us-stores-against-face-masks> [<https://perma.cc/A3HV-NREC>]; Gloria Oladipo, *Texas Couple Denied Service at Restaurant for Breaking ‘No Mask’ Rule*, *The Guardian* (Sept. 20, 2021), <https://www.theguardian.com/us-news/2021/sep/20/texas-couple-restaurant-masks> [<https://perma.cc/PVW8-FT73>].

403. Under Title III of the ADA, retail establishments are obligated to modify their “no-mask” rules to allow a disabled customer who is immunocompromised to visit the establishments. See 42 U.S.C. § 12182(b)(2)(A)(ii) (noting that discrimination includes “a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities . . .”). There is no equivalent provision for nondisabled persons.

404. Melanie Strandberg, for example, shaved her head to express solidarity with her sister, who was diagnosed with cancer. After Strandberg's employer had required her to wear a wig to work, she decided to quit. Harry Bradford, *Melanie Strandberg Shaved Her Head to Support Her Sister, Then Had to Quit Her Hairstyling Job*, *HuffPost* (June 18, 2013), https://www.huffpost.com/entry/hairstylist-quit-for-shaving-head_n_3460623 [<https://perma.cc/Z2PM-NBVT>]; see also Keith Coffman, *Colorado School Suspends Girl Who Shaved Head to Support Friend With Cancer*, *Reuters* (Mar. 25, 2014), <https://www.reuters.com/article/us-usa-colorado-shavedhead-idINBREA2O21C20140325> [<https://perma.cc/7BHP-AC2H>] (reporting on a Colorado school briefly suspending a nine-year-old student after she shaved her head in support of a friend who had cancer); *Waitress Fired After Cancer Head-Shave*, *Toronto Star* (Jan. 27, 2011), https://www.thestar.com/news/world/waitress-fired-after-cancer-head-shave/article_f97dbf88-9d5a-5759-9cae-cdc10ac9dale.html (on file with the *Columbia Law Review*)

new approach would allow sighted people to touch artwork when they accompany their blind friends and family members on museum “tactile tours.”⁴⁰⁵

Providing nondisabled friends and family members with such anti-discrimination protection would thus promote and solidify close interpersonal relationships in three important ways. First, it would allow nondisabled persons to show support for disabled friends and family without having to fear adverse consequences. Second, such legal protection would allow members of the two groups to do (fun) things together. And third, it would convey the desirable social message that promoting and maintaining relationships is a practice worth safeguarding.⁴⁰⁶

D. *Cultivate and Support Disability Culture*

As the hypothesis of Inverse Integration City in section III.B has demonstrated, the ability of disabled and nondisabled persons to share experiences often depends on the availability of disability-focused activities in the areas of culture, arts, entertainment, recreation, and sports. What this means is that incorporating disability culture into the legal and social infrastructure is key for facilitating social connection.⁴⁰⁷ As long as ableism

(reporting a similar story in Canada involving employment); *Woman Fired After Shaving Head for Cancer Charity*, CTV News (June 5, 2008), <https://www.ctvnews.ca/woman-fired-after-shaving-head-for-cancer-charity-1.300399> [<https://perma.cc/M8KE-7QCH>] (same). Granted, cancer patients do not always welcome shaving one’s head as an act of solidarity, especially when done as part of a large-scale fundraising initiative, as noted above. *Supra* note 112 and accompanying text. Thus, to address concerns that such an approach might trivialize disability, this new rule would only extend to close friends and family of disabled persons.

405. This hypothetical is based on an actual event, recounted by disability rights activist and author Simi Linton in her memoir. Linton, *My Body Politic*, *supra* note 82, at 217–22. According to Linton, who is sighted and uses a wheelchair, she was allowed to touch the sculptures when she joined a “special blind people’s tour” at the Museum of Modern Art (MoMA) with her blind friend Gene. *Id.* at 217–18 (“I’d copped a feel before in a museum, a furtive fondle when the guard wasn’t looking. But here I was in full view with authority to touch and to linger.”).

In some museums, tactile tours are still offered primarily to blind people. See, e.g., *Visitors Who Are Blind or Have Low Vision*, Art Inst. Chi., <https://www.artic.edu/visit/accessibility/visitors-who-are-blind-or-have-low-vision> [<https://perma.cc/4WR8-L42A>] (last visited Nov. 1, 2023). In others, however, such tours are open to the general public. See, e.g., Roxana Azimi, *Museums Are Letting Visitors Get to Grips With the Exhibits*, *The Guardian* (Oct. 16, 2015), <https://www.theguardian.com/artanddesign/2015/oct/16/museums-visitors-touch-feel-art> [<https://perma.cc/N7V2-NEDJ>] (listing several museums with tactile or multisensory exhibits, including the Louvre and the Tate Britain). Still other museums do not allow visitors to touch the artwork altogether. Linton, *My Body Politic*, *supra* note 82, at 220.

406. On the social meaning that is attached to certain actions or legal measures, see Lessig, *supra* note 57, at 951 & n.20.

407. Cf. Lord & Stein, *supra* note 240, at 264 (“Isolation from socialization opportunities such as sport, recreation and play serves to reinforce internalized oppression and disconnection from others for persons with disabilities.”).

is still prevalent in the cultural world and the dominant culture is centered around nondisabled persons,⁴⁰⁸ however, one cannot assume that the market will provide sufficient incentives for private entities to invest in disability culture. Thus, governmental recognition and public funding are necessary to ensure that there are sufficient opportunities for disabled and nondisabled persons to engage in disability-focused activities.⁴⁰⁹

One such set of policies may involve encouraging people to learn and use ASL. For example, the state can be involved in establishing and funding ASL-based academic institutions,⁴¹⁰ recognizing ASL in legislation,⁴¹¹ and supporting ASL instruction at the preschool and K–12 levels.⁴¹² Other initiatives may involve supporting the development of community-based wheelchair basketball tournaments,⁴¹³ disability-based dance companies,⁴¹⁴ “ultra-accessible” theme parks,⁴¹⁵ “relaxed” theater performances,⁴¹⁶ and disability-focused playgrounds.⁴¹⁷

408. See Ladau, *Demystifying Disability*, *supra* note 3, at 120–39 (noting the lack of representation of disabled persons in the media); Linton, *My Body Politic*, *supra* note 82, at 153, 213 (describing how disabled identities are marginalized in the majority culture).

409. See, e.g., N.Y.C. Dep’t of Cultural Affs., *Proposed 5-Year Accessibility Plan Pursuant to Local Law 12 of 2023 (2024–2028)*, at 5 (Feb. 17, 2023), [https://www.nyc.gov/assets/dcla/downloads/pdf/DCLA-Proposed_Five-Year_Accessibility_Plan-\(2024-2028\).pdf](https://www.nyc.gov/assets/dcla/downloads/pdf/DCLA-Proposed_Five-Year_Accessibility_Plan-(2024-2028).pdf) [<https://perma.cc/8BUM-LYJV>] (describing citywide initiatives “to help make participation in NYC’s cultural life—as artists, cultural workers, or audience members—increasingly accessible, inclusive, and equitable” for disabled persons).

410. For example, Gallaudet University is a federally chartered university for Deaf people. *History & Traditions*, Gallaudet Univ., <https://gallaudet.edu/about/history-traditions/> [<https://perma.cc/K6D4-6NPH>] (last visited Nov. 1, 2023).

411. See, e.g., Maartje De Meulder, *The Legal Recognition of Sign Languages*, 15 *Sign Language Stud.* 498, 505 (2015); Rosen, *American Sign Language*, *supra* note 6, at 10–11.

412. See, e.g., De Meulder, *supra* note 411, at 505.

413. See *supra* note 243 and accompanying text.

414. See *supra* notes 62–64, 145 and accompanying text.

415. E.g., *About Us: The Story of Morgan’s Wonderland*, *Morgan’s Wonderland*, <https://www.morganswonderland.com/about-us/> [<https://perma.cc/T4BD-GDKW>] (last visited Nov. 1, 2023). The park offers accessible rides and attractions—all of which are constructed to enable people with various types of impairments to participate, including equipment to keep ventilators dry and radio tracker bracelets to protect children from getting lost. Yet, the park is open for guests “of all different abilities” and, in fact, most of the park’s guests are nondisabled. See Tina Rosenberg, *Opinion, A Place to Play, on Wheels or Feet*, *N.Y. Times* (Dec. 5, 2017), <https://www.nytimes.com/2017/12/05/opinion/morgans-wonderland-waterpark-kids-play.html> (on file with the *Columbia Law Review*).

416. E.g., Booth, *supra* note 246; Viswanathan, *supra* note 246.

417. E.g., Janene Holzberg, *Blandair’s Next Phase Has a Focus on Inclusive Play*, *Balt. Sun* (Aug. 16, 2018), <https://www.baltimoresun.com/maryland/howard/bs-md-ho-blandair-groundbreaking-20180816-story.html> (on file with the *Columbia Law Review*) (last updated May 31, 2019). Some “food allergy alert signs” around playgrounds ask parents and children not to bring food into the playgrounds to avoid the risk of contact reactions experienced by children with food allergies. See, e.g., Mariam Matti, *Ohio Mom Helps Food Allergy Alert Signs Spread to Cincinnati Parks*, *Allergic Living* (Nov. 15, 2018),

Admittedly, promoting disability-focused activities that are open to the public at large can raise concerns about co-optation and diversion of resources. For instance, as noted above, integrative measures that allow nondisabled persons to enjoy scarce resources otherwise available only to disabled individuals is generally not desirable.⁴¹⁸ Thus, for each and every activity, it will be necessary to determine the extent to which nondisabled involvement is allowed. While fine-tuning will surely be needed, one thing is clear: Finding a solution need not be an all-or-nothing approach.

Wheelchair basketball is a good example. At the elite level, where the opportunities to participate are limited,⁴¹⁹ the participation of nondisabled athletes may come at the expense of disabled individuals.⁴²⁰ The picture changes, however, at the recreational level, where the participation of nondisabled persons is not likely to take away resources or opportunities from disabled persons. In fact, the participation of nondisabled players is sometimes *necessary* to form teams in situations in which there are not enough disabled players who want to play.⁴²¹ For this reason, it might make sense to restrict the participation of nondisabled persons in elite wheelchair basketball competitions (or to create an additional inverse-integration category at the elite level), while at the same time encouraging nondisabled participation in recreational, community-based wheelchair basketball tournaments.

CONCLUSION

This Article has introduced and analyzed the concept of inverse integration, a practice whereby nondisabled persons engage in disability-focused activities, settings, or frameworks. By examining inverse integration across various settings and contexts, this Article has tested the normative underpinnings of conventional integration. It has concluded that inverse integration's potential to foster relationships highlights one of the problems with traditional integration: its lack of attention to interpersonal relationships. This problem is particularly acute in a world where loneliness is prevalent and in-person interactions are becoming less common.

<https://www.allergicliving.com/2018/11/15/ohio-mom-helps-food-allergy-alert-signs-spread-to-cincinnati-parks/> [https://perma.cc/88GE-NS44]; Town Makes Playgrounds Safer for Children With Food Allergies, Town of Oyster Bay (Sept. 26, 2019), <http://oysterbaytown.com/town-makes-playgrounds-safer-for-children-with-food-allergies/> [https://perma.cc/X6VJ-TS9Z].

418. See *supra* notes 114–117 and accompanying text.

419. See sources cited *supra* note 12.

420. Cf. Spencer-Cavaliere & Peers, *supra* note 20, at 300 (“[D]espite supporting reverse integration in nearly every other context, the majority of participants felt that unclassifiable athletes should continue to not be permitted to compete at the Paralympics.”).

421. See Hutzler et al., *supra* note 243, at 356; Medland & Ellis-Hill, *supra* note 243, at 114.

To address this relational deficit, this Article has proposed a number of legal measures designed to foster relationships between disabled and nondisabled persons at the structural level. Admittedly, these proposals cannot end disability discrimination or solve every issue that inverse integration raises: unfair distribution of resources, perpetuation of stigma, and intrusion into spaces designed by and for disabled persons.

But these measures do help us recognize that if we care about disability integration, we need to take interpersonal relationships seriously and consider how the U.S. disability rights regime can incorporate relationality in a meaningful way.

ADMINISTRATIVE ENSLAVEMENT

Adam Davidson*

There are currently over a million people enslaved in the United States. Under threat of horrendous punishment, they cook, clean, and even fight fires. They do this not in the shadow of the law but with the express blessing of the Thirteenth Amendment's Except Clause, which permits enslavement and involuntary servitude as punishment for a crime.

Despite discussions of this exception in law reviews, news reports, and Netflix documentaries, few commentators have recognized that this enslavement happens silently. No prosecutor, judge, or defense attorney tells convicted people that they will be enslaved as punishment for their crime. It is only once they are incarcerated that a prison administrator informs them they will be forced to work.

This Article uncovers how this state of the world has come to be. It argues that our current regime is one of administrative enslavement: a constellation of judicial and legislative choices that places the punishment of enslavement outside the scope and processes of our traditional criminal punishment structure and into the hands of prison administrators. This Article is the first to provide a taxonomy of the administrative-enslavement regime. It uncovers the weak jurisprudential underpinnings of that regime, and it surveys all fifty states' and the federal government's legislative implementation of the Except Clause. It concludes by utilizing this taxonomy to analyze administrative enslavement's legal weaknesses as well as how the status quo might evolve in the face of growing attacks from states removing Except Clauses from their state constitutions.

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INTRODUCTION

In 2020, there were at least 600,000 slaves in the United States.¹ They cooked.² They cleaned.³ They did building maintenance and repair work.⁴ Some fought fires.⁵ And others, harking back to an age most thought long past, even picked cotton.⁶

These slaves, unlike many of their forebears, were not stolen from the coast of Africa or marked for this fate purely by dint of their birth. These people were enslaved by our criminal legal system: by prosecutors and judges empowered by our cities, counties, states, and nation. What's more, they were almost uniformly enslaved by these carceral actors without a word that they were about to suffer this fate.⁷ Indeed, it seems that even their advocates—their defense attorneys—made no mention that slavery was in their future.

1. See ACLU & Univ. of Chi. L. Sch. Glob. Hum. Rts. Clinic, *Captive Labor: Exploitation of Incarcerated Workers* 5, 24, 47 (2022), https://www.aclu.org/sites/default/files/field_document/2022-06-15-captivelaborresearchreport.pdf [<https://perma.cc/6MAU-G8N3>] [hereinafter *Captive Labor*] (estimating that, based on data from 2020, “at least 791,500 people incarcerated in U.S. prisons perform work as part of their incarceration” and 76.7% of those workers “are *required* to work” or “face additional punishment” (emphasis added)); see also *id.* at 112 n.170 (explaining the report’s methodology to arrive at the number of incarcerated people with work assignments). This 600,000 figure represents a minimum based on the number of incarcerated people forced to work under threat of punishment. More capacious definitions of slavery may more accurately capture the comparison between chattel enslavement and Except Clause enslavement. See *infra* text accompanying notes 38–40.

2. *Captive Labor*, *supra* note 1, at 27–36 (categorizing types of prison labor).

3. *Id.*

4. *Id.*

5. *Id.* at 30–31 (describing programs in thirteen states through which “[i]ncarcerated firefighters also fight wildfires”).

6. Daniele Selby, *How the 13th Amendment Kept Slavery Alive: Perspectives From the Prison Where Slavery Never Ended*, Innocence Project (Sept. 17, 2021), <https://innocenceproject.org/how-the-13th-amendment-kept-slavery-alive-perspectives-from-the-prison-where-slavery-never-ended> [<https://perma.cc/J5VT-8DSY>].

7. Some states have statutes that allow for an explicit sentence of hard labor, but these seem rarely used. See, e.g., Ohio Rev. Code Ann. § 5147.17 (2024) (allowing for sentences of hard labor alongside “the punishment of . . . imprisonment in the county jail or workhouse”); *infra* section II.A (overviewing the statutory placement and language of state provisions discussing prison enslavement).

This refers, of course, to the Thirteenth Amendment and its now infamous⁸ “Except Clause.”⁹ Despite being billed as a wide-ranging prohibition on slavery, the Thirteenth Amendment states that “[n]either slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction.”¹⁰

The puzzle and the problem at the heart of this Article, though, is not the existence of prison slavery or involuntary servitude; that practice is clearly contemplated by the Thirteenth Amendment itself. Instead, what motivates this Article is the silent enslavement of hundreds of thousands of incarcerated persons in the country. One might think that the decision to enslave someone—particularly given this country’s history of violent and purportedly successful resistance to the institution of slavery, and within a criminal legal system that disproportionately ensnares the descendants of those whom the country historically enslaved—would be a somber one, made with deep thought and reflection. But instead, prosecutors, judges, and even defense attorneys seem to give this potentially momentous punishment no thought at all, despite its near-constant imposition.

Why is this? In a system in which defense attorneys and prosecutors litigate every arcane issue affecting the sentence a judge can impose,¹¹ judges fiercely guard their discretion to impose individualized sentences,¹²

8. Criticisms of the Thirteenth Amendment’s “Except Clause” have come from all corners, including popular media—see, e.g., 13th (Netflix 2016)—the legal academy—see, e.g., Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 *Cornell L. Rev.* 899 (2019) [hereinafter Goodwin, *Modern Slavery*]; Alvaro Hasani, ‘You Are Hereby Sentenced to A Term of . . . Enslavement?’: Why Prisoners Cannot Be Exempt From Thirteenth Amendment Protection, 18 *Barry L. Rev.* 273 (2013); James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 *N.Y.U. L. Rev.* 1465 (2019) [hereinafter Pope, *Mass Incarceration*]; Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 *Wm. & Mary Bill Rts. J.* 395 (2009); Wafa Junaid, Note, *Forced Prison Labor: Punishment for a Crime?*, 116 *Nw. U. L. Rev.* 1099 (2022)—and public interest groups—see, e.g., *Captive Labor*, supra note 1; Selby, supra note 6.

9. Other commentators have called this portion of the Thirteenth Amendment the “Punishment Clause.” See, e.g., Goodwin, *Modern Slavery*, supra note 8, at 933; Pope, *Mass Incarceration*, supra note 8, at 1470. This Article uses the term “Except Clause” because it better encapsulates the current state of the world. The slavery and involuntary servitude discussed here is an “exception” to the norm, but it seems increasingly disconnected from the idea of “punishment.”

10. U.S. Const. amend. XIII, § 1 (emphasis added). The entire remainder of the Thirteenth Amendment states, “Congress shall have power to enforce this article by appropriate legislation.” *Id.* § 2.

11. See, e.g., *Descamps v. United States*, 570 U.S. 254, 257 (2013) (citing *Armed Career Criminal Act*, 18 U.S.C. § 924(e) (2018)) (explaining the categorical and modified categorical approaches to determining whether a past conviction qualifies to enhance a current sentence under the *Armed Career Criminal Act*).

12. See, e.g., Rachel Martin, *A Federal Judge Says Mandatory Minimum Sentences Often Don’t Fit the Crime*, NPR (June 1, 2017), <https://www.npr.org/2017/06/01/>

and something as miniscule as a five-dollar special assessment is mentioned in the pronouncement of a sentence,¹³ why does the fact that so many convicted defendants are about to be enslaved go unmentioned?

Past commentators have suggested that broader societal forces have pushed us here. Maybe capitalism is to blame, or racism, or the other systems that create the hierarchies within our society.¹⁴

Or maybe we should look to the personal instead of, or in addition to, the societal. Perhaps there are psychological and social reasons for this phenomenon. All of these people—legislators, prosecutors, defense attorneys, judges—may simply want to think of themselves as good people,¹⁵ and focusing on their role in enslavement makes that more difficult.¹⁶ After all, even without considering enslavement, judges routinely remark that sentencing is the hardest part of their job.¹⁷

531004316/a-federal-judge-says-mandatory-minimum-sentences-often-dont-fit-the-crime [https://perma.cc/K5FX-UCXV] (interviewing Judge Mark Bennett on his opposition to “mandatory minimum charging and sentencing guidelines for nonviolent drug offenses”); see also *Kimbrough v. United States*, 552 U.S. 85, 91 (2007) (holding that judges may depart from the guidelines based solely on a policy disagreement with them); *United States v. Booker*, 543 U.S. 220, 227 (2005) (holding unconstitutional the mandatory imposition of the United States Sentencing Guidelines).

13. See 18 U.S.C. § 3013(a)(1)(A)(i) (2018) (“The court shall assess on any person convicted of an offense against the United States . . . the amount of \$5 in the case of an infraction or a class C misdemeanor . . .”).

14. See, e.g., Michele Goodwin, *The Thirteenth Amendment’s Punishment Clause: A Spectacle of Slavery Unwilling to Die*, 57 *Harv. C.R.-C.L. L. Rev.* 47, 50–53 (2022) [hereinafter Goodwin, *A Spectacle of Slavery*] (arguing that prison slavery authorized by the Except Clause is an example of “the stunning insistence in law itself on the subordination of Black Americans” and suggesting ways to end it (citing *Jones v. Mayer Co.*, 392 U.S. 409, 445 (1968) (Douglas, J., concurring))).

15. See Carolyn Kaufman, *Why Bad Guys Think They’re Good Guys*, *Psych. Today* (Aug. 12, 2012), https://www.psychologytoday.com/us/blog/psychology-writers/201208/why-bad-guys-think-theyre-good-guys (on file with the *Columbia Law Review*) (“By convincing themselves their behavior is moral . . . people can separate and disengage themselves from immoral behavior and its consequences.”).

16. Indeed, ignoring or distorting the full consequences of one’s actions is far from a novel phenomenon in the context of American slavery. See, e.g., David Pilgrim, *The Mammy Caricature*, Ferris St. Univ. Jim Crow Museum (Oct. 2000), https://www.ferris.edu/HTMLS/news/jimcrow/mammies/homepage.htm [https://perma.cc/FXC9-TWFZ] (last updated 2023) (“From slavery through the Jim Crow era, the mammy image served the political, social, and economic interests of mainstream white America. . . . Her wide grin, hearty laughter, and loyal servitude were offered as evidence of the supposed humanity of the institution of slavery.”).

17. See, e.g., Mark Scarcella, *The Hardest Thing About Being a Judge? What Courts Say About Sentencing*, *Conn. L. Trib.* (Feb. 19, 2020), https://www.law.com/nationalalljournal/2020/02/19/the-hardest-thing-about-being-a-judge-what-courts-say-about-sentencing (on file with the *Columbia Law Review*) (last updated Feb. 20, 2020) (“As judges are often quick to say, sentencing defendants ranks near or at the top of the most challenging parts of serving on the bench.”); Benjamin Weiser, *A Judge’s Education, a Sentence at a Time*, *N.Y. Times* (Oct. 7, 2011), https://www.nytimes.com/2011/10/09/nyregion/judge-denny-chin-of-federal-court-discusses-sentencing.html (on file with the *Columbia Law Review*) (discussing Judge Denny Chin’s sentencing approaches and decisions).

But this Article is not about broader societal forces or carceral actors' unspoken psychological motivations. It is about the legal regime that has enabled enslavement as default. Presumably, if the law said that at each sentencing the judge must announce whether a defendant was to be enslaved and explain the reasons for that decision, that is what judges would do. But our current legal interpretations require no such thing. This Article seeks to uncover what the law does require and to tell a thus-far unappreciated story of how it came to be that way.

What this analysis finds is not a bombshell or a smoking gun. Instead, it shows that our current system of prison slavery is built on the sorts of mundane processes and decisions that seem small and unimportant individually but, in the aggregate, create a regime that this Article calls *administrative enslavement*.

For nearly a century, the federal courts have almost uniformly stated that the only trigger necessary for the Thirteenth Amendment's Except Clause is a conviction.¹⁸ The standard processes that apply to the taking of a plea or pronouncement of a sentence have no purchase here.¹⁹ There is no requirement, for example, that a defendant be told that a conviction carries with it the loss of Thirteenth Amendment rights as part of the punishment or that a sentencing judge (or legislature) offer any reason for why that punishment is appropriate.²⁰ Indeed, there may not even need to be a statute on the books imposing the punishment.

This permissive interpretation of the Except Clause did not come about through any sort of grand doctrinal innovation but through the slow march of common law decisionmaking. In cases across the federal courts, judges faced primarily with zealous—indeed, relentless—pro se and imprisoned litigants made broad, unreasoned pronouncements about the Except Clause.²¹ Those pronouncements then became the basis for courts throughout the country to dismiss challenges to enslavement-as-punishment, even when facing novel arguments.²² Narrower readings of the Except Clause occurred almost entirely in cases in which the plaintiffs were represented.²³ The common law, when combined with the realities of

18. See *infra* section I.B (tracing the development of this broad Except Clause reading).

19. See *infra* section III.A.

20. Cf. 18 U.S.C. § 3553(c) (2018) (requiring the court to “state in open court the reasons for its imposition of the particular sentence”).

21. See, e.g., *Draper v. Rhay*, 315 F.2d 193, 197–98 (9th Cir. 1963) (“The Thirteenth Amendment has no application where a person is held to answer for a violation of a penal statute.” (citing *Blass v. Weigel*, 85 F. Supp. 775, 785 (D.N.J. 1949))).

22. See, e.g., *Murray v. Miss. Dep’t of Corr.*, 911 F.2d 1167, 1168 (5th Cir. 1990) (per curiam) (finding no rights-based distinction between forced prison labor on public and private property).

23. See *Davis v. Hudson*, No. 00-6115, 2000 WL 1089510, at *3 (10th Cir. Aug. 4, 2000) (unpublished table decision) (“[T]here might be circumstances in which the opportunity for private exploitation and/or lack of adequate state safeguards could take a case outside the ambit of the Thirteenth Amendment’s state imprisonment exception or give rise to Eighth Amendment concerns”); *Watson v. Graves*, 909 F.2d 1549, 1552 (5th Cir. 1990)

pro se and prison litigation, became a one-way ratchet to restrict the rights of imprisoned people.

This one-way ratchet has, in turn, allowed states and the federal government to create statutes and regulations that require all incarcerated people to be enslaved, most visibly through their forced labor.²⁴ Though the Except Clause explicitly states that slavery and involuntary servitude are only allowed as “punishment,” nearly every federal and state provision regulating prison enslavement is contained within the portion of the code dedicated to prison administration.²⁵ Functionally, what results is that none of the preconviction process usually attached to criminal punishment occurs for the punishment of slavery, and it is instead controlled almost entirely by prison administrators.²⁶

Administrative enslavement is this systemic, broad jurisprudential reading of the Except Clause combined with legislation transferring prison-slavery decisions into the hands of prison bureaucrats. Contrary to the usual notions of criminal punishment, the administrative-enslavement regime requires no notice that this punishment will be imposed, no explanation of why it is appropriate, and no decision by a judge or jury.

The rest of this Article proceeds in three parts. Part I introduces the Thirteenth Amendment, the Except Clause within it, and the commentary that has analyzed its role in our law and society. It does this with an eye toward the question: How have we gotten to where we are today? While most commentators focus on “big issues” to answer this question—race, capitalism, and maintaining the hierarchies of social and economic control those systems entail—this Article suggests that it is through small, mundane, and rarely noticed decisions that courts and legislatures have built the administrative-enslavement legal regime that allows these “big issues” to flourish. To highlight these decisions, Part I traces modern Except Clause cases to their origins. In doing so, it uncovers how the previous story told about these cases was incorrect and how the real story is much more troubling. Starting with bare statements and citations to largely inapposite precedent, the courts developed an Except Clause

(“We agree that a prisoner who is not sentenced to hard labor retains his thirteenth amendment rights . . .”); *Craine v. Alexander*, 756 F.2d 1070, 1075 (5th Cir. 1985) (suggesting, in the context of a 42 U.S.C. § 1994 (2018) anti-peonage suit, that an imprisoned person might state a claim “by virtue of labor forced upon him by a custom or usage of the state that is, at the same time, outside the scope of a corrective penal regimen”).

24. To be clear, this Article does not mean to suggest a causal story about how the courts’ jurisprudence led to these statutes (or vice versa). Instead, it simply means that this jurisprudence and these statutes coexist in a way that allows for this particular structure to flourish.

25. This Article distinguishes provisions that call for a sentence of “hard labor” because while almost every imprisoned person can be forced to labor under the general prison slavery regimes on which this Article focuses, conviction under a statute calling for a specific sentence of hard labor is comparatively rare and so not relevant for the vast majority of imprisoned people. See *infra* section II.A.

26. See *infra* sections I.B.2, II.A.2, III.A.

jurisprudence that slowly but surely constricted the rights of imprisoned people, typically in response to the pro se imprisoned litigants who brought challenges to their enslavement. The courts did so with little reasoning, often waving away novel pro se arguments in the process.

Part II shifts from the courts to the statute books. It reviews how prison labor has been enacted and regulated in all fifty states and in the federal code, and creates a taxonomy of those laws. What it finds is striking: Statutes in almost every jurisdiction in the United States treat prison slavery as a piece of prison administration as opposed to a criminal punishment. Prison-slavery statutes are located in parts of the code distinct from those that set out criminal punishments. What's more, they do not empower the judiciary to impose this punishment; instead, they almost uniformly empower prison administrators. To the extent that the statutes mention punishment at all, it is through the lens of rehabilitation. Often, however, they state that incarcerated people should work for idleness-prevention and cost-saving reasons. Part II also discusses other statutory design features that, while currently dormant, will likely become relevant if the administrative-enslavement regime comes under attack. These are whether a prison-labor statute imposes labor through mandatory or permissive language and the (for now) rare statutes explicitly stating that some or all prison labor must be voluntary.

While Parts I and II merely illuminate the current state of the world, Part III seeks to change it. To that end, it sketches a number of arguments that might end, or at least contract, the administrative-enslavement regime. It argues that administrative enslavement is constitutionally suspect on numerous grounds from both living constitutionalist and originalist frames. Turning to practice, Part III suggests how prosecutors and defense attorneys might use plea bargaining to disrupt administrative enslavement by allowing accused people to bargain to retain their Thirteenth Amendment rights. Finally, Part III looks toward the future to analyze how the courts, legislatures, and prison administrators who have created the status quo might seek to maintain it as administrative enslavement comes under attack.

This Article comes at a particular moment in history. After well over a century of constitutional stasis, we have allowed the peculiar institution²⁷—which most imagined dead and gone—to instead evolve and recapture hundreds of thousands of people in its grasp.²⁸ But change is fomenting. In 2018, Colorado voted to amend its state constitution to prohibit slavery

27. Kenneth M. Stampp, *The Peculiar Institution: Slavery in the Ante-Bellum South* (1956).

28. See *supra* note 1 and accompanying text (showing that more than 600,000 people working in state and federal prisons must work or be punished); see also *Captive Labor*, *supra* note 1, at 5 (explaining that, for those workers required to work, the alternative is “fac[ing] additional punishment such as solitary confinement, denial of opportunities to reduce their sentence, and loss of family visitation, or the inability to pay for basic life necessities like bath soap”).

and involuntary servitude totally.²⁹ In 2020, Utah and Nebraska joined in this movement.³⁰ And in 2022, Alabama, Vermont, Oregon, and Tennessee did, too.³¹ In many of these states, the votes to entirely abolish slavery and involuntary servitude were overwhelming. Tennessee's measure passed with nearly eighty percent of the vote,³² and Vermont's passed with nearly ninety percent.³³ Now is a time when the possibility of truly ending slavery and involuntary servitude is not only imaginable but seemingly likely.³⁴ Attacking, and ending, administrative enslavement is one important step toward that goal.

* * *

Before continuing, a note on terminology is warranted. This Article uses the terms administrative *enslavement* and prison *slavery*³⁵ while also

29. Bill Chappell, Colorado Votes to Abolish Slavery, 2 Years After Similar Amendment Failed, NPR (Nov. 7, 2018), <https://www.npr.org/2018/11/07/665295736/colorado-votes-to-abolish-slavery-2-years-after-similar-amendment-failed> [<https://perma.cc/L7CM-CFLG>].

30. Nikki McCann Ramirez, Four States Banned Slavery on Tuesday. One Voted to Keep It . . . Sort Of, Rolling Stone (Nov. 9, 2022), <https://www.rollingstone.com/politics/politics-news/slavery-banned-states-louisiana-voted-keep-it-1234627635> (on file with the *Columbia Law Review*).

31. *Id.*

32. See Tennessee Amendment 3 Election Results: Remove Constitutional Language Allowing Slavery as Punishment, N.Y. Times, <https://www.nytimes.com/interactive/2022/11/08/us/elections/results-tennessee-amendment-3-remove-constitutional-language-allowing-slavery-as-punishment.html> (on file with the *Columbia Law Review*) (last updated Dec. 13, 2022).

33. See Vermont Proposal 2 Election Results: Prohibit Slavery in State Constitution, N.Y. Times, <https://www.nytimes.com/interactive/2022/11/08/us/elections/results-vermont-proposal-2-prohibit-slavery-in-state-constitution.html> (on file with the *Columbia Law Review*) (last updated Nov. 17, 2022).

34. Several members of Congress, to no avail thus far, have also pushed to alter the Thirteenth Amendment. See Scottie Andrew, Democratic Lawmakers Introduce a Resolution to Amend the 13th Amendment to End Forced Prison Labor, CNN (Dec. 3, 2020), <https://www.cnn.com/2020/12/03/politics/13th-amendment-prison-labor-trnd/index.html> [<https://perma.cc/TM58-LTKT>]; Elizabeth Crisp, Lawmakers on Juneteenth Push for Change to 13th Amendment, The Hill (June 6, 2022), <https://thehill.com/homenews/3529850-lawmakers-on-juneteenth-push-for-change-to-13th-amendment> (on file with the *Columbia Law Review*).

35. The majority of this piece uses people-first language. Cf. Erica Bryant, Words Matter: Don't Call People Felons, Convicts, or Inmates, Vera Inst. Just. (Mar. 31, 2021), <https://www.vera.org/news/words-matter-dont-call-people-felons-convicts-or-inmates> [<https://perma.cc/B8J2-4R55>] (“[P]oliticians, media outlets, and more . . . still use harmful and outdated language like ‘convict,’ ‘inmate,’ ‘felon,’ ‘prisoner,’ and ‘illegal immigrant.’ There are better alternatives—alternatives that center a person’s humanity first and foremost.”). But occasionally, as in this introduction, it uses the term “slave.” This language highlights that, like chattel slavery before it, our current enslavement regime does create a status distinction between those people who fall within the Except Clause’s ambit and those who do not. Cf. Justin Driver & Emma Kaufman, The Incoherence of Prison Law, 135 Harv. L. Rev. 515, 525 (2021) (explaining the article’s choice of the term “prisoner” in part because “the term prisoner rejects the government’s appellations while underscoring that prisons are degrading spaces, where numbers replace names and humans live in barren

occasionally mentioning involuntary servitude. The choice to name this phenomenon “slavery” is intentional, as it accurately describes the system that is this Article’s subject. Nevertheless, there are several serious objections to this choice. Grappling with them explicitly will illuminate the relatively limited scope of this Article and the broad scope of the problems and systems it describes.

Objections to calling the current regime “slavery” might come from two directions. First, one might argue that the Thirteenth Amendment’s Except Clause in fact only authorizes involuntary servitude, not slavery, thereby making the Amendment’s prohibition on slavery total.³⁶ That this potentially major interpretative question has gone largely uninterrogated by the courts for over 150 years is one example of the lack of thought, here in the form of doctrinal stagnation, that this Article suggests administrative enslavement has enabled. Ultimately, there are reasonable arguments on both sides,³⁷ and the answer to this question—while potentially momentous for the lives of imprisoned people—does not alter the analysis of *administrative* enslavement.

And while fully clarifying the distinction between involuntary servitude and slavery in this context is beyond the scope of this Article, it is worth briefly highlighting that the Article’s focus on forced labor is, in some ways, artificial. While forced labor for the benefit of another has always been at the core of American slavery, the institution included other pathologies that our current carceral system replicates.³⁸ For that reason,

cells”). While forced labor is perhaps the most obvious mark of this distinction, it is not the only one. See *infra* notes 43–46 and accompanying text.

36. For further discussion of the distinction between involuntary servitude and slavery, see, e.g., Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 *Seattle U. L. Rev.* 869, 882–86 (2012) [hereinafter *Armstrong, Slavery Revisited*] (“Whereas in cases of involuntary servitude the servant must justifiably believe there is no alternative other than service, in slavery there simply is no other alternative, as the law stands ready to enforce the obligation.”).

37. For arguments that the Except Clause permits slavery, see Scott W. Howe, *Slavery as Punishment: Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause in the Thirteenth Amendment*, 51 *Ariz. L. Rev.* 983, 989–90 (2009) (“The actual language purports to allow both [slavery and involuntary servitude], however, and there were no voices in Congress that proclaimed for it during the promulgation period any other meaning.”), and compare the language of the Except Clause to similar language in Iowa’s constitution. *Iowa Const. art. I, § 23* (“There shall be no slavery in this state; nor shall there be involuntary servitude, unless for the punishment of crime.”). By contrast, James Gray Pope has found that Senator Charles Sumner had shifting views on the Clause. While Sumner at one time believed that it might countenance slavery, he “later opined that the Senators had ‘supposed that the [Clause] was simply applicable to ordinary imprisonment.’” Pope, *Mass Incarceration*, *supra* note 8, at 1476 (quoting *Cong. Globe*, 39th Cong., 2d Sess. 238 (1867) (statement of Sen. Sumner)).

38. See, e.g., Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 *U. Pa. L. Rev.* 1789, 1790–93 (2012) (discussing how collateral consequences of a conviction create a new civil death); Alexandria Gutierrez, *Sufferings Peculiarly Their Own: The Thirteenth Amendment, in Defense of Incarcerated Women’s Reproductive Rights*, 15 *Berkeley J. Afr.-Am. L. & Pol’y* 117, 123–24 (2013) (connecting the

this Article does not identify a precise number of people that our carceral system has enslaved. At a minimum, the hundreds of thousands of people currently forced to work while incarcerated seem clearly within the Except Clause's ambit.³⁹ But a more capacious comparison between chattel enslavement and Except Clause enslavement might suggest that everyone who is incarcerated, or perhaps everyone who is on parole or probation, or has been convicted of a crime, has experienced the sort of status-based degradation of their place in civil society that previously marked those who were chattelly enslaved.

Second, one could argue that referring to the current regime of forced prison labor as enslavement belittles the experience of those who suffered through chattel slavery. I am particularly sensitive to this possibility, but I believe that referring to our current system as slavery is correct for three reasons. First, while chattel slavery may have been a particularly evil and extreme incarnation of slavery, it is not the only practice that warrants that label.⁴⁰ Slavery in various forms has existed in

lack of abortion rights for imprisoned women to "chattel breeding" in slavery); Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 *Calif. L. Rev.* 1239, 1245 (2012) (connecting the shackling of incarcerated pregnant people to "Black women's subjugation during slavery" and other past eras of punishment); Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism*, 133 *Harv. L. Rev.* 1, 34 (2019) [hereinafter Roberts, *Abolition Constitutionalism*] (describing how "[a] large body of social science literature explains criminal punishment as a form of social control of marginalized people").

39. See *supra* note 1 and accompanying text (showing that more than 600,000 people working in state and federal prisons must work or face punishment). Briefly comparing incarcerated people's experiences to how the Thirteenth Amendment protects people who have not been convicted of a crime illuminates why this figure appears to be an appropriate minimum. The Thirteenth Amendment's protection against slavery and involuntary servitude, though containing other labor protections, most prominently takes the form of an ever-present option to quit. See *Pollock v. Williams*, 322 U.S. 4, 17–18 (1944) ("The undoubted aim of the Thirteenth Amendment as implemented by the Antipeonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor [I]n general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers."); James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude"*, 119 *Yale L.J.* 1474, 1478–79 (2010) [hereinafter Pope, *Contract, Race, and Freedom of Labor*] ("One of [the unenumerated Thirteenth Amendment] rights, the inalienable right to quit work, is so prominent in our constitutional consciousness that it tends to overshadow other possibilities."). While there are a few exceptions, see *infra* section I.C, as a general matter you cannot be punished if you refuse to work for someone. That is not to say you will not face consequences, including dire ones—perhaps you will lose some government benefits that have work requirements, receive a negative reference, or simply no longer have the means to provide for yourself—but you cannot be forced to work for any employer by the state or a private entity. By contrast, whether, how, and for whom imprisoned people work is decided overwhelmingly by prison administrators, and if those people refuse to do their assigned work, they will suffer a variety of punishments, often including solitary confinement. See *Captive Labor*, *supra* note 1, at 5–6.

40. Indeed, African chattel slavery is not the only form of slavery that has existed on these shores. See, e.g., *Hudgins v. Wrights*, 11 Va. (1 Hen. & M.) 134, 135–36 (1806) (describing how in 1679 "an act passed declaring Indian prisoners taken in war to be slaves").

numerous cultures throughout human history. Even today, individuals, organizations, and governments fight against forced labor practices across the world that are rightly labeled slavery despite contours that differ from chattel enslavement.⁴¹

Relatedly, this Article uses the term “slavery” here because courts have attempted to use the depth of the evil of chattel enslavement to constrict the Thirteenth Amendment’s reach. Because even practices that fit well within the label “involuntary servitude” were not “akin to African slavery,” the courts have allowed them to continue.⁴²

Finally, and perhaps most importantly, the term slavery is used here because it is a term that numerous imprisoned people have used to describe their experiences,⁴³ experiences which too often reflect those of chattel enslavement. Indeed, their descriptions, which invoke traumas

41. See, e.g., Program to End Modern Slavery, U.S. Dep’t of State, <https://www.state.gov/program-to-end-modern-slavery> [<https://perma.cc/DFK3-5769>] (last visited Nov. 2, 2023); see also Nathan J. Robinson, *The Clintons Had Slaves*, *Current Affs.* (June 6, 2017), <https://www.currentaffairs.org/2017/06/the-clintons-had-slaves> [<https://perma.cc/VV4T-TEWG>] (noting how in attempting to draw fine distinctions, “‘involuntary servitude’ immediately begins to sound like little more than a euphemism for slavery, and many of the situations that modern anti-slavery advocates would consider to be slavery . . . do not necessarily include” the total intergenerational domination of chattel slavery).

42. See *Butler v. Perry*, 240 U.S. 328, 332 (1916); see also *infra* section I.C. (discussing the “exceptional” and housekeeping exceptions to the Thirteenth Amendment).

43. See, e.g., Kevin Rashid Johnson, *Opinion, Prison Labor Is Modern Slavery. I’ve Been Sent to Solitary for Speaking Out*, *The Guardian* (Aug. 23, 2018), <https://www.theguardian.com/commentisfree/2018/aug/23/prisoner-speak-out-american-slave-labor-strike> [<https://perma.cc/5WD3-593A>] (“I see prison labor as slave labor that still exists in the United States in 2018.”); Mitch Smith, *Prison Strike Organizers Aim to Improve Conditions and Pay*, *N.Y. Times* (Aug. 26, 2018), <https://www.nytimes.com/2018/08/26/us/national-prison-strike-2018.html> (on file with the *Columbia Law Review*) (“Much of the recent activism has focused on inmate pay, which can range from nothing at all in states like South Carolina and Texas to, at best, a few dollars for a day of hard labor in other places. Prisoners frequently refer to it as ‘slave labor[.]’ . . .”); Daniele Selby, *How a Wrongly Incarcerated Person Became the ‘Most Brilliant Legal Mind’ in ‘America’s Bloodiest Prison’*, *Innocence Project* (Sept. 17, 2021), <https://innocenceproject.org/how-a-wrongly-incarcerated-person-became-the-most-brilliant-legal-mind-in-americas-bloodiest-prison-2> [<https://perma.cc/4EU6-QAVP>] (quoting Calvin Duncan, who was exonerated after twenty-eight years of incarceration, as saying: “When people say this is modern day slavery—this ain’t no modern day slavery” and “[t]his shit *is* slavery”); Daniele Selby, *A Mistaken Identification Sent Him to Prison for 38 Years, But He Never Gave Up Fighting for Freedom*, *Innocence Project* (Sept. 17, 2021), <https://innocenceproject.org/a-mistaken-identification-sent-him-to-prison-for-38-years-but-he-never-gave-up-fighting-for-freedom> [<https://perma.cc/7R63-F9TB>] [hereinafter Selby, *A Mistaken Identification*] (describing Malcom Alexander’s experiences at Angola prison in Louisiana, stating that “[i]t was like you see in old pictures of slavery” and that “[w]e even had a quota we had to meet at the end of the day” (quoting Malcom Alexander)); Jailhouse Lawyers Speak, @JailLawSpeak, *Twitter* (Apr. 24, 2018), <https://x.com/JailLawSpeak/status/988771668670799872> [<https://perma.cc/N8W3-7L46>] (demanding “[a]n immediate end to prison slavery” as a condition of ending a prison strike).

beyond merely being forced to work,⁴⁴ accord with the conception of slavery put forward by Professors Jack Balkin and Sanford Levinson as “more than simply being free from compulsion to labor by threats or physical coercion. Rather, the true marker of slavery was that slaves were always potentially subject to domination and to the arbitrary will of another person.”⁴⁵ Though this Article focuses overwhelmingly on forced labor, it should not be lost that labor is only one way that the ever-present threat of domination manifests for convicted people.⁴⁶

I. THE THIRTEENTH AMENDMENT’S EXCEPT CLAUSE

Despite its core role in continuing the “peculiar institution”⁴⁷ into the twenty-first century, few scholars discussed the Thirteenth Amendment’s Except Clause until recently. And even with renewed scholarly and popular attention to it, the surrounding jurisprudence is sparse. This Part discusses the commentary about the Thirteenth Amendment and its Except Clause with an eye to figuring out why this state of the world has come to be. It then traces the development of Except Clause jurisprudence and in doing so uncovers an uncomfortable truth about those cases: They are an example of the common law at its worst. Beginning with a not-clearly-on-point and uncontroversial statement that an exception existed within the

44. For example, one seemingly large difference between prison slavery and chattel slavery is its effect on families of those enslaved. But these may be differences of degree, not of kind. While chattel slavery was fiercely intergenerational, empirical studies have consistently found that having a parent imprisoned increases the likelihood that a child will also be imprisoned at some point in their life. See Albert M. Kopak & Dorothy Smith-Ruiz, *Criminal Justice Involvement, Drug Use, and Depression Among African American Children of Incarcerated Parents*, 6 *Race & Just.* 89, 92 (2016) (reviewing studies describing the notable impact parental incarceration has on their children’s criminal justice involvement). But perhaps more drastically, the two systems have similar family separation dynamics. Professor Dorothy Roberts has explained how the criminal legal and child welfare systems intersect and overlap to remove children from the care of incarcerated, disproportionately Black mothers and to place them into state-run and state-sponsored foster care. See Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 *UCLA L. Rev.* 1474, 1491–99 (2012).

45. Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 *Colum. L. Rev.* 1459, 1484 (2012).

46. See, e.g., Chin, *supra* note 38, at 1790–93 (“A person convicted of a crime, whether misdemeanor or felony, may be subject to disenfranchisement (or deportation if a noncitizen), criminal registration and community notification requirements, and the ineligibility to live, work, or be present in a particular location.” (footnotes omitted)); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 *N.Y.U. L. Rev.* 881, 891 (2009) (arguing that “[t]he state, when it puts people in prison, places them in potentially dangerous conditions while depriving them of the capacity to provide for their own care and protection” and so creates “cruel” prison conditions when it violates its “ongoing duty to provide for prisoners’ basic human needs”); Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 *Berkeley J. Crim. L.* 259, 261 (2011) (using the rise of life without parole sentences and supermax confinement to explain how “exclusion and control has emerged . . . as the animating mission of the carceral project” (footnote omitted)).

47. Stamp, *supra* note 27.

Thirteenth Amendment, the courts have—across time and geography, with little or no reasoning—expanded the jurisprudence of the Except Clause. In cases brought overwhelmingly by pro se, incarcerated people, the federal courts have said not only that there is an exception within the Amendment but that *everyone* “duly convicted” is also subject to the punishment of enslavement and involuntary servitude.⁴⁸

A. *Commentary on the Thirteenth Amendment*

The state and federal governments have almost uniformly decided to site the decisionmaking power for implementing prison slavery in the hands of prison administrators.⁴⁹ As Part II will discuss further, this choice is odd. To pass constitutional muster, after all, prison slavery must be punishment for a crime. And in virtually every other facet of the criminal law, the responsibility for doling out punishment—even if not the exact implementation of that punishment—is placed in the hands of the judiciary.⁵⁰ Indeed, the judiciary has proven fiercely protective of this responsibility, criticizing legislative efforts to undermine its role through tactics like mandatory minimum sentences.⁵¹ But even in the case of mandatory minimums or other required parts of a criminal punishment, the judiciary at least announces the mandatory part of a sentence.⁵² In the regime of administrative enslavement, however, not only has the judiciary not fought against this derogation of their traditional power—they do not even pronounce enslavement as part of the punishment.

The looming question is: Why?² Scholars have offered numerous reasons for this and related problems arising under the Thirteenth Amendment. The following discussion catalogues many of these explanations, as they both engage the radical promise of the Thirteenth Amendment and grapple with reasons the courts have stifled that promise.

In his prior professorial writings, Judge Raja Raghunath⁵³ argues persuasively that the courts’ broad reading of the Except Clause and narrow reading of the rest of the Thirteenth Amendment is part of a broader regime of judicial deference to prison officials.⁵⁴ Raghunath reviews the histories of the Thirteenth Amendment and prison labor as well as the courts’ differential treatment of the word “punishment” in the

48. See U.S. Const. amend. XIII, § 1.

49. See *infra* Part II.

50. See, e.g., *People v. Davis*, 442 N.E.2d 855, 857 (Ill. 1982) (“It is, of course, indisputable that the power to impose sentence is exclusively a function of the judiciary.” (citations omitted)).

51. See, e.g., *Martin*, *supra* note 12 (“Mandatory minimums support unwarranted uniformity by treating everyone alike even though their situations are dramatically different.” (quoting Judge Mark Bennett)).

52. See, e.g., 18 U.S.C. § 3553(c) (2018) (requiring the court to “state in open court the reasons for its imposition of the particular sentence”).

53. Raghunath is now an administrative law judge.

54. See Raghunath, *supra* note 8, at 399–404.

Fifth and Eighth Amendments—where it is interpreted narrowly—and the Thirteenth Amendment—where it is interpreted broadly.⁵⁵ He then suggests returning to the “Hard Road” of explicitly sentencing people convicted of crimes to hard labor.⁵⁶ In returning to explicit sentencing, he argues, both courts and broader society may rethink the Thirteenth Amendment.⁵⁷ Wafa Junaid also argues that an intratextual analysis of the Eighth and Thirteenth Amendments’ use of the word “punishment” finds that “incarcerated individuals must be explicitly sentenced to labor in order to be excluded from Thirteenth Amendment protections.”⁵⁸

There may also be historical reasons for this development. Professor Scott Howe, for example, suggests that the broad power to enslave after conviction was confirmed shortly after the Thirteenth Amendment’s passage with the rise of convict leasing and similar systems, particularly in the South.⁵⁹ These interpretations gave rise to abhorrent practices and, as Howe notes, “were almost never legally challenged or condemned, except on rare occasions under nonconstitutional state law.”⁶⁰

But as Professor James Gray Pope carefully catalogues, this historical acquiescence is part of much broader circumstances. The lack of constitutional challenge was due in part to the political economy of both the South and the country more broadly.⁶¹ As Pope recounts, “With African Americans disenfranchised and excluded not only from juries, but also from positions in law enforcement, the legal profession, and the bench, this network [of people benefitting from convict leasing] could . . . block would-be challengers from gathering the facts and establishing the contacts necessary to bring a case.”⁶² To pursue the case that eventually

55. See *id.* at 409–35.

56. See *id.* at 435–44 (“The return of The Hard Road that is called for in this Article would provide an opportunity for us to once again measure the extent of an individual’s rights that we wish to withdraw upon his or her conviction for crime.”).

57. See *id.* at 442–43. While Raghunath’s work is foundational, his argument is distinct from that made in this Article. Although this Article agrees that Except Clause punishments should return to being explicitly pronounced parts of a sentence, it disagrees that a return to the “hard road” is necessary. Instead, as Part III argues, sentencing is only one manifestation of how paying deeper attention to the problem of slavery and involuntary servitude before a sentence is imposed might animate Except Clause jurisprudence, societal awareness and consideration of prison slavery, and on-the-ground changes to the lives of imprisoned people.

58. Junaid, *supra* note 8, at 1102.

59. See Howe, *supra* note 37, at 1008–19. Convict leasing was a common practice in southern states after the Civil War that allowed nongovernment parties to “lease” the labor of disproportionately Black incarcerated persons—giving nearly unfettered control to the leasing parties and resulting in widespread corporal abuse, torture, and prisoner killings. *Id.* at 1009–14.

60. *Id.* at 988.

61. See Pope, *Mass Incarceration*, *supra* note 8, at 1521–25 (“Forward-looking capitalists, including Northern corporations, depended upon convict labor.”).

62. *Id.* at 1522.

became *Bailey v. Alabama*,⁶³ for example, Bailey not only had to find a lawyer in a different city but also recruited Booker T. Washington, “a group of reform-minded whites in Montgomery,” and even President Theodore Roosevelt to his cause.⁶⁴

Pope’s discussion of *Bailey* sits within a larger historical project. Like Howe, Pope takes his analysis back to the time immediately after the passage of the Thirteenth Amendment. But there he finds not only the horrors Howe describes but also the Amendment’s Republican framers consistently attempting to fight back against them. He describes several attempts, some successful and part of our law today—like the Civil Rights Act of 1866⁶⁵—and some lost to time—like the Kasson Resolution⁶⁶—that suggest the broad reading of the Except Clause that has taken hold today would be anathema to the Amendment’s Republican framers. Instead, this broad reading, which “strip[s] all Thirteenth Amendment protection from any person who had been convicted of a crime,” is more akin to that put forward by “the former slave masters and their Democratic allies.”⁶⁷

Professor Michele Goodwin, by contrast, traces the historical developments and transformations of post–Civil War slavery in service of a broader point: The broad reading of the Except Clause enables the latest incarnation of systems of free or cheap labor that control and profit from disproportionately Black people.⁶⁸ Borrowing a phrase from Professor Paul Butler, Goodwin “exposes the persistence of slavery through the criminal justice system as the penultimate chokehold” that helps to maintain the country’s racial and economic stratifications.⁶⁹

Professor Cortney Lollar also links the continued existence of prison slavery and involuntary servitude to the broader racial and economic systems that define our country. The failure to define the words “slavery” and “involuntary servitude” in the Constitution, she argues, has allowed courts to narrowly define them to refer only “to possession of people as tangible personal property and the forced labor of those individuals,” thereby removing “coercive labor practices backed by the threat of incarceration . . . [from] the definitional ambit.”⁷⁰ Because of this jurisprudential move, there is now a “loophole to permit sheriffs, jails, and even private parties to require work from those convicted of committing a

63. 219 U.S. 219 (1911) (striking down an Alabama statute that effectively criminalized quitting a job under the Thirteenth Amendment and Anti-Peonage Statute).

64. Pope, *Mass Incarceration*, *supra* note 8, at 1523–24.

65. *Id.* at 1478–85.

66. *Id.* at 1485–90.

67. *Id.* at 1490–92.

68. See Goodwin, *Modern Slavery*, *supra* note 8, at 975–80.

69. *Id.* at 980; see also *id.* at 953–56 (discussing Paul Butler, *Chokehold: Policing Black Men* (2017)).

70. Cortney E. Lollar, *The Costs of the Punishment Clause*, 106 *Minn. L. Rev.* 1827, 1830 (2022).

crime.”⁷¹ By tracing the Except Clause’s life from the Black Codes to convict leasing to hard labor chain gangs and finally to the prison slavery of today, Lollar explains how “[c]riminal financial obligations are [used] to conscript the physical bodies of those convicted of crimes into revenue-generating labor that would be impermissible but for the presence of the Punishment Clause.”⁷²

This latter work, while examining the Except Clause in depth, relates to literature on the broader Thirteenth Amendment. That literature excavates the reasons for the Amendment’s narrow interpretation despite its broad potential as an instrument for change. For example, Professors Balkin and Levinson argue that the courts have been reticent to interpret the Thirteenth Amendment broadly because to do so “calls into question too many different aspects of public and private power, ranging from political governance to market practices to the family itself.”⁷³ And Professor Pope has written that the potentially expansive interpretation of the “badges and incidents” of slavery advanced by the Amendment’s Republican proponents was “interred” by the Supreme Court in *Plessy v. Ferguson* and *Hodges v. United States*.⁷⁴

Numerous scholars have also explored the Thirteenth Amendment’s relevance and untapped potential for advancing society across a range of issues. Perhaps most relatedly, scholars have written about the labor implications of the Thirteenth Amendment.⁷⁵ But other work has addressed the Thirteenth Amendment’s (potential) role in preventing

71. *Id.*

72. *Id.*; see also *id.* at 1850–78 (detailing this history).

73. Balkin & Levinson, *supra* note 45, at 1462.

74. James Gray Pope, Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery, 65 *UCLA L. Rev.* 426, 433–48, 455–57 (2018); see also *Hodges v. United States*, 203 U.S. 1 (1906); *Plessy v. Ferguson*, 163 U.S. 537 (1896).

75. See, e.g., Ifeoma Ajunwa & Angela Onwuachi-Willig, Combating Discrimination Against the Formerly Incarcerated in the Labor Market, 112 *Nw. U. L. Rev.* 1385, 1407–14 (2018) (arguing “that, to finally jettison prison labor practices as a particular remnant of racial slavery in the United States, prison labor cannot exist alongside private firm policies that compound the exclusion of the formerly incarcerated from the labor market”); Armstrong, Slavery Revisited, *supra* note 36, at 872 (examining penal plantation labor); Mary Rose Whitehouse, Modern Prison Labor: A Reemergence of Convict Leasing Under the Guise of Rehabilitation and Private Enterprises, 18 *Loy. J. Pub. Int. L.* 89, 90–91 (2017) (advocating for a presumption that all prison laborers are covered under the Fair Labor Standards Act); Noah D. Zatz, Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships, 61 *Vand. L. Rev.* 857, 861 (2008) (considering prison labor as a “window onto the much larger field of employment’s economic character”); Amy L. Riederer, Note, Working 9 to 5: Embracing the Eighth Amendment Through an Integrated Model of Prison Labor, 43 *Val. U. L. Rev.* 1425, 1461 (2009) (discussing variations of convict leasing).

sexual abuse of women in prisons,⁷⁶ payday lending,⁷⁷ animal rights,⁷⁸ private-prison contracts,⁷⁹ fair housing,⁸⁰ and numerous other areas.⁸¹

These various explanations—doctrinal, historical, critical, social, racial, and economic—almost certainly played a significant role in the development of the broad reading of the Except Clause that remains in place today. But this Article contributes an additional and previously unacknowledged reason: seemingly mundane structural choices within the law that guide its substantive direction.

76. See Brenda V. Smith, *Sexual Abuse of Women in United States Prisons: A Modern Corollary of Slavery*, 33 *Fordham Urb. L.J.* 101, 114–118 (2006) (“The Thirteenth Amendment applies both in letter and spirit to the protection of slaves and prohibits slavery-like conditions or treatment, even if the ‘slave’ is a woman prisoner subjected to sexual abuse by the state and its agents . . .”); I. India Thusi, *Girls, Assaulted*, 116 *Nw. U. L. Rev.* 911, 954–57 (2022) (“[T]he Thirteenth Amendment aims to address the ‘badges and incidents of slavery,’ and the continued acts of dominion over incarcerated girls’ bodies implicate its prohibitions.” (footnote omitted)).

77. See Zoë Elizabeth Lees, *Payday Peonage: Thirteenth Amendment Implications in Payday Lending*, 15 *Scholar: St. Mary’s L. Rev. on Race & Soc. Just.* 63, 90–95 (2012) (arguing that “[t]he Thirteenth Amendment is the vehicle that Congress should use to regulate payday lenders,” as “[t]he terms of these loans, the coercive nature of the lenders, and the demoralizing and destructive consequences for the borrowers reflect exactly what the framers of the Thirteenth Amendment sought to eliminate”).

78. See Jeffrey S. Kerr, Martina Bernstein, Amanda Schwoerke, Matthew D. Strugar & Jared S. Goodman, *A Slave by Any Other Name Is Still a Slave: The *Tilikum* Case and Application of the Thirteenth Amendment to Nonhuman Animals*, 19 *Animal L.* 221, 223–24 (2013) (“The Amendment contains no limiting language defining particular classes or types of slaves; instead, it uses broad language outlawing the conditions and practices of slavery and involuntary servitude imposed by humans.”).

79. See Ryan S. Marion, Note, *Prisoners for Sale: Making the Thirteenth Amendment Case Against State Private Prison Contracts*, 18 *Wm. & Mary Bill Rts. J.* 213, 215 (2009) (“[T]he Supreme Court would be justified in rendering the current private prison industry unconstitutional under the Thirteenth Amendment’s prohibition against ‘slavery [and] involuntary servitude.’” (second alteration in original) (quoting Akhil Reed Amar, *America’s Constitution: A Biography* 360 (2005))).

80. See George Lipsitz, “In an Avalanche Every Snowflake Pleads Not Guilty”: The Collateral Consequences of Mass Incarceration and Impediments to Women’s Fair Housing Rights, 59 *UCLA L. Rev.* 1746, 1803–08 (2012) (arguing that collective political action is necessary to secure fair housing in light of the broken promises of, among other legal tools, the Thirteenth Amendment’s prohibition on the badges and incidents of slavery).

81. See, e.g., Donald C. Hancock, *The Thirteenth Amendment and the Juvenile Justice System*, 83 *J. Crim. L. & Criminology* 614, 615–16 (1992) (discussing the Thirteenth Amendment’s role in punishing juveniles); Brandon Hasbrouck, *Abolishing Racist Policing With the Thirteenth Amendment*, 67 *UCLA L. Rev.* 1108, 1111 (2020) (arguing that “Congress must exercise its broad powers under the Thirteenth Amendment and propose several legislative measures that effectively abolish the current institution of policing while reimagining public safety”); Fareed Nasser Hayat, *Abolish Gang Statutes With the Power of the Thirteenth Amendment: Reparations for the People*, 70 *UCLA L. Rev.* 1120, 1130–31 (2023) (arguing that antigang statutes are an impermissible badge or incident of slavery); Michael A. Lawrence, *The Thirteenth Amendment as Basis for Racial Truth & Reconciliation*, 62 *Ariz. L. Rev.* 637, 669–73 (2020) (arguing that the Thirteenth Amendment could serve as the constitutional hook for a racial truth and reconciliation law).

Reviewing the cases and statutes that undergird this regime brings two such legal features to the fore. They are, first, the combination of the common law with courts' treatment of certain disfavored⁸² types of litigation—particularly pro se litigation and litigation by and affecting imprisoned people—and, second, legislative judgments.

To be clear, this story is not necessarily causal. These sorts of structural decisions and issues may not be the but-for cause of our current regime of administrative enslavement. Indeed, the history of the Except Clause suggests that the desire to implement something like the labor system we have today has been—and remains—strong enough to survive direct attack. Elements of both the Black Codes and convict leasing were, after all, held unconstitutional by the Supreme Court and further dismantled by state and federal legislation.⁸³

Instead, these seemingly small, structural, and rarely disputed choices help courts and legislatures enact, develop, and sustain a regime like administrative enslavement while rarely garnering the sort of attention that a politically charged issue like slavery would naturally attract.⁸⁴ Likewise, these same sorts of structures and choices can help administrative enslavement, and regimes like it, survive and evolve even in the face of massive legal changes. Here, as discussed in Part III, it is entirely possible that even an amendment to the Constitution—or the amendments to state constitutions gaining ground throughout the country—would not alter the working lives of many imprisoned people.

The remainder of Part I describes the modern jurisprudence of slavery and involuntary servitude and traces that jurisprudence to its origins.

B. *The Jurisprudence of the Except Clause*

1. *Pro Se and Incarcerated Litigants.* — It will quickly become clear that it is impossible to discuss the jurisprudence of the Except Clause without first addressing the pro se elephant in the room. A full accounting of the difficulties of pro se litigation by imprisoned persons is beyond the scope of this Article. But as several of the cases next discussed show, the

82. This Article uses the term “disfavored” not to connote that courts are substantively hostile to these types of cases, litigants, or claims (although that may be at play too) but to highlight that these cases are often structurally disfavored because of the prison setting. See, e.g., 42 U.S.C. § 1997e(c)(1) (2018) (requiring a court to dismiss an imprisoned person's suit on its own motion “if the court is satisfied that the action,” among other possibilities, “fails to state a claim upon which relief can be granted”); *Greyer v. Ill. Dep't of Corr.*, 933 F.3d 871, 874–75 (7th Cir. 2019) (discussing forms requiring imprisoned people to provide extensive detail of their litigation history, often from memory, under penalty of having their current case dismissed).

83. See Lollar, *supra* note 70, at 1831.

84. See, e.g., Kimberlee Kruesi, *Slavery Is on the Ballot for Voters in 5 US States*, Associated Press (Oct. 22, 2022), <https://apnews.com/article/2022-midterms-13th-amendment-slavery-4a0341cf82fa33942bda6a5d17ac4348> [<https://perma.cc/W2JJ-368X>].

frustration caused by this process is obvious. Indeed, in several of those cases, the court writes its frustration onto the pages of the Federal Reporter. But that frustration is, in some ways, understandable from everyone involved.

Pro se imprisoned litigants navigate the court system with little-to-no legal training and only the sparsest materials. Their filings often must be handwritten.⁸⁵ And the combination of incredibly high personal stakes and lack of legal training can make imprisoned litigants detrimentally zealous.⁸⁶

Apart from anything pro se litigants do themselves, their cases may be treated differently because of both a court's structure and applicable statutory provisions.⁸⁷ Pro se cases, for example, may be handled by different law clerks than those hired to work in a judge's chambers in the federal system.⁸⁸ And litigation by imprisoned people is subject to the

85. See Rebecca Wise, Note and Comment, Five Proposals to Reduce Taxation of Judicial Resources and Expedite Justice in Pro Se Prisoner Civil Rights Litigation, 52 U. Tol. L. Rev. 671, 684–85 (2021) (discussing nonsubstantive barriers to deciding pro se cases brought by imprisoned people, including that “a large percentage of *pro se* prisoner civil rights complaints are handwritten” because incarcerated people “are often not permitted to use word processing” software).

86. See, e.g., Appellate Brief of Pro Se, Informa Pauperis, Inmate Benjamin F. Shipley, Jr. Per Appellate Court's Rebriefing Order at 1 n.2, *Shipley v. Woolrich*, 428 Fed. App'x 4 (D.C. Cir. 2011) (No. 09-5063), 2010 WL 5324964 (arguing that court-appointed amicus counsel “fail[ed] to comprehend” the “distinctly different issues underlying” Shipley's claims, including his “thirty-nine (39) [sic] non-Fair Labor Standards Act (FLSA) claims”). Of course, courts must not let this frustration get in the way of fairly evaluating imprisoned litigants' claims. At times, that zealotry is warranted, and we are all the better for it. See, e.g., Adam Liptak, A Relentless Jailhouse Lawyer Propels a Case to the Supreme Court, N.Y. Times (Aug. 5, 2019), <https://www.nytimes.com/2019/08/05/us/politics/supreme-court-nonunanimous-juries.html> (on file with the *Columbia Law Review*) (reporting how Calvin Duncan, once a prison lawyer incarcerated in the Louisiana State Penitentiary in Angola, used the legal skills he developed while incarcerated to “help free several inmates” and developed the strategy that eventually led the Court to take up *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020)).

87. See Aaron Littman, Managing Pro Se Prisoner Litigation, 43 Rev. Litig. 43, 48–60 (2023) (reviewing fraught court tactics for managing high numbers of pro se incarcerated litigants).

88. See Katherine A. Macfarlane, Shadow Judges: Staff Attorney Adjudication of Prisoner Claims, 95 Or. L. Rev. 97, 105–13 (2016) (describing the role of pro se staff clerks in deciding litigation by pro se incarcerated persons and the differences between pro se and “elbow” law clerks); see also, e.g., Notice of Position Vacancy, U.S. Dist. Ct. N.D. Ill. (Sept. 23, 2021), [https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_clerksoffice/Human_Resources/Jobs/Pro%20Se%20Law%20Clerk%20\(Temporary\)%202021-21.pdf](https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_clerksoffice/Human_Resources/Jobs/Pro%20Se%20Law%20Clerk%20(Temporary)%202021-21.pdf) [<https://perma.cc/9VF5-ZJU7>] (advertising for a “Temporary Pro Se Law Clerk” in the Northern District of Illinois); Overview of Judicial Clerkships, Univ. Ill. Chi. L., <https://law.uic.edu/student-support/career-services/judicial-clerkship-overview> [<https://perma.cc/J5NY-ERNP>] (last visited Jan. 26, 2024) (describing “staff attorneys or court law clerks” as “responsible for such matters as *pro se* appeals, appeals to be decided summarily, substantive motions, jurisdictional issues, and other matters on the non-argument calendar”).

numerous requirements of the Prison Litigation Reform Act (PLRA).⁸⁹ But beyond these explicit structural differences, pro se litigation by imprisoned people is more difficult than most other litigation for both the imprisoned person and the judge deciding the issue, through no fault of either party. The limitations people face by nature of imprisonment—such as limited legal training, sparse attorney representation, and lack of access to research and writing materials—virtually ensure that a case brought by an imprisoned person will have more hurdles to overcome than a similar one brought by a free, and especially a counseled, party.⁹⁰ Empirical research confirms that these structural differences almost certainly lead to different substantive outcomes.⁹¹

Despite these complexities marking most Except Clause cases, Except Clause jurisprudence can be summed up in a single word: everyone. Everyone who is convicted of a crime falls within the Thirteenth Amendment's exception.⁹²

2. *The Except Clause's Reach.* — Except Clause jurisprudence might be best stated as the sort of if-then statement familiar to every lawyer: If you have been duly convicted of a crime, then you can be forced into involuntary servitude. While this statement may seem uncontroversial given the Thirteenth Amendment's text, what makes it so broad is that the usual limitations and protections that apply to punishments do not apply here. Judges rarely need to think about whether the punishment is appropriate for you; that decision is left up to prison administrators.⁹³ Case law offers no limits on which crimes warrant involuntary servitude. Thus,

89. See, e.g., Wise, *supra* note 85, at 678–81 (discussing barriers raised by the PLRA, including limits on attorney's fees, exhaustion requirements, three-strikes rules, and the ability for judges to dismiss the suit without requiring the other side to answer).

90. See *Greyer v. Ill. Dep't of Corr.*, 933 F.3d 871, 875–77 (7th Cir. 2019) (noting various barriers that imprisoned litigants face even to something as simple as relaying their own litigation histories).

91. See Littman, *supra* note 87, at 82 (arguing that “representation—and appointment of counsel—causes success in prisoner civil rights cases” because either “lawyering alone . . . makes for better outcomes” or “the other features that come along with the counseled litigation ‘track,’” like heightened attention, benefit plaintiffs); see generally Margo Schlanger, *Inmate Litigation*, 116 *Harv. L. Rev.* 1555 (2003) (analyzing the reasons for the volume and success of litigation by incarcerated people and the PLRA's effects on the prisoner litigation docket).

92. See, e.g., *Ali v. Johnson*, 259 F.3d 317, 317 (5th Cir. 2001) (“This appeal leads us to reiterate that inmates sentenced to incarceration cannot state a viable Thirteenth Amendment claim if the prison system requires them to work.”); *Pischke v. Litscher*, 178 F.3d 497, 500 (7th Cir. 1999) (calling “thoroughly frivolous” a Thirteenth Amendment claim arguing that an imprisoned person in a private prison could not be forced to work); *Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir. 1963) (“Where a person is duly tried, convicted, sentenced and imprisoned for crime in accordance with law, no issue of peonage or involuntary servitude arises.”); *Howerton v. Mississippi County*, 361 F. Supp. 356, 364 (E.D. Ark. 1973) (“Courts have long held that reasonable work requirements may be imposed on one convicted of a crime, whether misdemeanor or felony, without running afoul of the Thirteenth or Eighth Amendments.”).

93. See *infra* section II.A.2.

it is a punishment for *any* crime, whether homicide or failing to pay a fine.⁹⁴ And while the cases discussed here deal with incarcerated individuals, neither their logic nor the Constitution's text suggest that involuntary servitude as punishment is limited solely to incarceration.

This, to be clear, is not a jurisprudential choice that is mandated by the Constitution's text. To the contrary, the Thirteenth Amendment's Except Clause simply retains the option for slavery or involuntary servitude to be a punishment for a crime. It does not say that either slavery or involuntary servitude *must* be the punishment for any crime, and it certainly does not say that they must be the punishment for *every* crime.

But the face of the text does admit the possibility that every crime ("whereof the party shall have been duly convicted") *could* lead to a punishment of enslavement. In other words, nothing about the text of the Amendment places an obvious limit on what crimes can lead to enslavement as punishment. The courts have uniformly (with one brief and quickly corrected deviation) taken this ambiguity to give the Clause the broadest interpretation possible.

Perhaps the strangest part of this broad interpretation of the Except Clause is that while there is certainly a consensus among the federal courts now, it is unclear where it came from. Several commentators have traced this broad interpretation to *Ex parte Karstendick*.⁹⁵ That conclusion seems right on one count and deeply dissatisfying on another.

In *Karstendick*, a case about federal sentencing statutes, the Supreme Court held that when imprisonment at hard labor is part of the punishment called for by a statute, "it is imperative upon the court to include that in its sentence."⁹⁶ There is no such imperative, however, "where the statute requires imprisonment alone."⁹⁷ According to that case, the sentencing judge has discretion to impose "a wider range of punishment."⁹⁸ The judge can send a defendant to serve their sentence in a prison where hard labor is required or to a less demanding institution.⁹⁹ As Judge Raghunath recognizes, *Karstendick* likely "expressed the common law rule of the era" because this combination of imprisonment and assumed hard labor had been common over the past century, even if it was not quite universal.¹⁰⁰ *In re Mills* subsequently quoted that holding at

94. See Topher Sanders, A Lawsuit Over Ferguson's "Debtors Prison" Drags On, ProPublica (May 31, 2019), <https://www.propublica.org/article/a-lawsuit-over-ferguson-debtors-prison-drags-on> [<https://perma.cc/8QXK-89JR>] (describing how residents of Ferguson, Missouri, were incarcerated for not paying fines).

95. 93 U.S. 396 (1876); see also Pope, Mass Incarceration, *supra* note 8, at 1534 (calling *Karstendick* "[t]he jurisprudential roots of this approach"); Raghunath, *supra* note 8, at 411 (highlighting *Karstendick* in a discussion of the origins of "inmate labor").

96. 93 U.S. at 399.

97. *Id.*

98. *Id.*

99. *Id.*

100. Raghunath, *supra* note 8, at 411–12 & nn.94–99.

length.¹⁰¹ As the Ninth Circuit once recognized, “by 1835 confinement and hard labor were the most common punishments for all but the relatively few capital crimes in most states.”¹⁰²

Karstendick and *Mills* thus represent an obvious beginning for judicial interpretation of the Except Clause. They solidified the longstanding practice of assuming that a sufficiently long term of incarceration necessarily includes performing hard labor as a potential punishment.¹⁰³ On this point, past commentators seem correct. And because of their relevance, it is possible that courts in the early- to mid-twentieth century had these cases in mind as they faced challenges to forced prison labor.

But within this rosy picture, there are two glaringly large thorns. The first is that neither *Karstendick* nor *Mills* even mentions the Thirteenth Amendment.¹⁰⁴ Given that they do not mention the Amendment, it is unsurprising that neither purports to provide an interpretation of that Amendment or the Except Clause within it.

This first problem is exacerbated by a second issue that commentators have not noticed: None of the cases establishing the broad reading of the Except Clause in force today cite either *Karstendick* or *Mills*. Instead, they trace back to three origins. To the extent these cases rely on Supreme Court precedent at all, they stem from the *Slaughter-House Cases* or *Butler v. Perry*—neither of which purported to deal with incarcerated forced labor.¹⁰⁵ Alternately, they trace back to an unsupported statement in *Lindsey v. Leavy*, a 1945 Ninth Circuit case with a pro se plaintiff.¹⁰⁶

101. 135 U.S. 263, 265–66 (1890).

102. *United States v. Ramirez*, 556 F.2d 909, 911 n.4 (9th Cir. 1976) (citing Blake McKelvey, *American Prisons: A Study in American Social History Prior to 1915*, at 7, 16 (1936)).

103. *Karstendick* dealt with a statute requiring imprisonment longer than one year. See 93 U.S. at 398–99.

104. Professor Pope first recognized this fact in *Karstendick*. See Pope, *Mass Incarceration*, *supra* note 8, at 1534.

105. See *Butler v. Perry*, 240 U.S. 328, 329–33 (1916) (upholding a state law permitting county officials to require certain residents to work on the roads on threat of fine or imprisonment); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 59, 80–81 (1873) (upholding “[a]n act to protect the health of the city of New Orleans, to locate the stock-landings and slaughter-houses, and to incorporate the Crescent City Live-Stock Landing and Slaughter-House Company” (internal quotation marks omitted)).

106. The *Lindsey* court concluded that the court below properly granted appellees’ motions for summary judgment:

The record respecting appellees who were public officers and officials plainly shows that, aside from acting in their official capacities in the discharge of duties imposed on them by law when dealing with cases in which appellant was a party, these appellees did not come in contact with him and there is no evidence which sustains or tends to sustain appellant’s charge that appellees intimidated, or threatened him or denied him freedom from involuntary servitude and slavery. On the contrary, the record compels the conviction that appellant was the sole author of his

To see how this game of common law “telephone” happened, this Article begins at the beginning, with *Lindsey* and the *Slaughter-House Cases*. It ends with the “trio of frequently cited Fifth Circuit cases” identified by Professor Pope¹⁰⁷ that continue to serve as the linchpin for the broad reading of the Except Clause today.¹⁰⁸

Start with the progenitors of this case line, *Lindsey v. Leavy* and the *Slaughter-House Cases*. *Lindsey v. Leavy* was the end of a long series of cases in which Mr. E. R. Lindsey attempted to challenge his conviction and sentence for grand larceny and forgery.¹⁰⁹ Lindsey did, in fact, successfully challenge part of his sentence before the Supreme Court.¹¹⁰ Unfortunately for him, his win in the Supreme Court was short-lived, and at resentencing, he received functionally the same sentence.¹¹¹ After that defeat, Lindsey continued winding his way through the courts unsuccessfully until he found himself appearing pro se before the Ninth Circuit.¹¹²

As is sometimes the case with repeated pro se plaintiffs, the opinion in *Lindsey v. Leavy* is dripping with exasperation. At one point, the court lists Lindsey’s procedural journey: one successful appeal to the Supreme Court, a (in Lindsey’s view, unsuccessful) resentencing before the Washington Supreme Court, five separate failed attempts to get back before the Supreme Court, and two failed writs of habeas corpus in the United States District Court for the Eastern District of Washington.¹¹³ After all that, in this current case before the Ninth Circuit, Lindsey had sued forty-five defendants and alleged a conspiracy “to deprive him of the right to the free exercise and enjoyment of freedom from involuntary servitude and slavery secured to him by the 13th Amendment and by the laws of the United States.”¹¹⁴

It is in this context that the Ninth Circuit stated that the appellees did not violate Lindsey’s Thirteenth Amendment rights because he was “duly

own misfortunes; that he was duly tried, convicted, sentenced and imprisoned as a punishment for crime in accordance with law.

Lindsey v. Leavy, 149 F.2d 899, 901–02 (9th Cir. 1945) (emphasis added).

107. Pope, *Mass Incarceration*, supra note 8, at 1535–38 (citing *Wendt v. Lynaugh*, 841 F.2d 619, 619–20 (5th Cir. 1988); then citing *Ali v. Johnson*, 259 F.3d 317, 317–18 (5th Cir. 2001); and *Murray v. Miss. Dep’t of Corr.*, 911 F.2d 1167, 1167–68 (5th Cir. 1990) (per curiam)).

108. See, e.g., *Jordan v. Coffman*, No. 4:21-CV-1456-JCH, 2022 WL 1165825, at *8 (E.D. Mo. Apr. 20, 2022) (citing *Ali*, 259 F.3d at 318; *Murray*, 911 F.2d at 1168).

109. 149 F.2d at 900 (describing Lindsey’s past convictions, his appeal to the Supreme Court, his resentencing in state court, and his pursuit of the writ of habeas corpus, all of which occurred prior to the case before the court).

110. See *Lindsey v. Washington*, 301 U.S. 397, 402 (1937) (reversing Lindsey’s grand larceny conviction).

111. See *State v. Lindsey*, 77 P.2d 596, 597–98 (Wash. 1938) (affirming Lindsey’s sentence of between two and the statutory maximum of fifteen years’ imprisonment).

112. *Lindsey*, 149 F.2d at 900.

113. *Id.* at 900.

114. *Id.* at 900–01 (internal quotation marks omitted).

tried, convicted, sentenced and imprisoned as a punishment for crime in accordance with law.”¹¹⁵ And given this context, it is perhaps unsurprising that the court felt no need to provide a citation or additional reasoning for the proposition.

Unlike *Lindsey*, which provides clear, if unreasoned, fodder for the broad reading of the Except Clause, the *Slaughter-House Cases* hardly discuss that Clause at all. While the *Slaughter-House Cases* certainly discussed the Thirteenth Amendment, their only mention of the Except Clause was a single sentence: “The exception of servitude as a punishment for crime gives an idea of the class of servitude that is meant.”¹¹⁶ This statement largely served as an example to reinforce the general point that the Thirteenth Amendment, like the Fourteenth and Fifteenth, had as its core purpose the elimination of the institution of chattel slavery and other *human* bondages and not the sort of prohibition on state-created monopolies for which the plaintiff slaughterhouses had argued.¹¹⁷

From *Lindsey* and the *Slaughter-House Cases*, we wend our way to the United States District Court for the District of New Jersey. There, in *Blass v. Weigel*, a case rejecting naturopathic medical practitioners’ challenge to New Jersey’s medical regulatory scheme, the court relied on *Lindsey* and the *Slaughter-House Cases* to state that “[t]he Thirteenth Amendment has no application to a situation where a person is held to answer for violations of a penal statute.”¹¹⁸ This blunt and unreasoned statement, seemingly dicta given the nonpenal issue at hand, would serve as a stepping stone to the next case solidifying the broad Except Clause we have today.

Blass and *Lindsey* bring us to the next major player in this story, *Draper v. Rhay*.¹¹⁹ Robert Draper, like many plaintiffs in this story, appeared pro se before the Ninth Circuit to raise his thirty-four “Questions Presented.”¹²⁰ To these thirty-four questions, the court responded: “No answer we could give . . . would, we are certain, satisfy the appellant.”¹²¹ Though Draper had thirty-four questions, some more general than others,¹²² the core of his complaint was that he was imprisoned and forced

115. Id. at 901–02.

116. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 69 (1873).

117. See id. at 67–69 (“To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government—a declaration designed to establish the freedom of four millions of slaves . . . requires an effort, to say the least of it.”).

118. See *Blass v. Weigel*, 85 F. Supp. 775, 781 (D.N.J. 1949).

119. 315 F.2d 193 (9th Cir. 1963).

120. Id. at 195.

121. Id. at 197.

122. See, e.g., id. at 195 (“Is a citizen entitled to seek a determination of his Civil Rights in a United States Court, by right.” (quoting Draper’s Questions Presented)).

to work while his criminal case was still on appeal. When he refused to labor, he was thrown in the “hole”—that is, solitary confinement.¹²³

It is here that we start to see the game of common law telephone taking shape. To dismiss Draper’s claim, the Ninth Circuit cited three cases. Two of those, *Lindsey* and *Blass*, were cited for broad propositions about the inapplicability of the Thirteenth Amendment to someone convicted of a crime. For the proposition that “[w]here a person is duly tried, convicted, sentenced and imprisoned for crime in accordance with law, no issue of peonage or involuntary servitude arises,” it cited *Lindsey*.¹²⁴ Likewise, to support the idea that “[t]he Thirteenth Amendment has no application where a person is held to answer for a violation of a penal statute,” it cited *Blass*.¹²⁵

The third case, *Butler v. Perry*, is part of a series of cases wherein the Supreme Court recognized nonpenal, unstated exceptions to the Thirteenth Amendment.¹²⁶ Like *Lindsey* and *Blass*, the Ninth Circuit cited *Butler* to explain the inapplicability of the Thirteenth Amendment. Except now we received our first bit of reasoning: The *Butler* Court stated that the Thirteenth Amendment was concerned with “those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results.”¹²⁷ Therefore, *Butler* held that the long history of requiring people to participate in public-works projects (road maintenance, in that case) was not the sort of involuntary servitude the Thirteenth Amendment intended to upset.¹²⁸ For that same reason, the Ninth Circuit said, requiring Draper to work was “not the sort of involuntary servitude which violates Thirteenth Amendment rights.”¹²⁹

This, to be clear, is the sort of analogical reasoning on which the common law operates. Yet in the arena of slavery, these analogies overwhelmingly *expand* the possibility of slavery, not contract it. Here, the Ninth Circuit both shifted the Supreme Court’s reasoning from the exceptional example of public works to the Except Clause’s core concern of prisons and extended that reasoning to imprisoned people whose

123. *Id.* at 197. Draper also seemingly complained that he was not given adequate access to legal materials to prepare his case. See *id.* at 196 (“When a poor person, a layman, is forced to represent himself before the Courts of this Nation, is it not a denial of due process and/or his Civil Rights, to deny him access to the reference material (books) he needs to litigate . . . or help to establish his case.” (quoting Draper’s Questions Presented)). The court interpreted this as “being denied his right to contact the courts or correspond with attorneys” and quickly batted it away by noting the “voluminous record before” them. See *id.* at 197.

124. *Id.* at 197.

125. *Id.*

126. See 240 U.S. 328 (1916); *supra* section I.A.

127. *Butler*, 240 U.S. at 332.

128. *Id.* at 332–33.

129. *Draper*, 315 F.2d at 197.

convictions are still being appealed.¹³⁰ While it seems that the Ninth Circuit may not have intended to make new law, *Draper* became one of the go-to citations for courts denying Thirteenth Amendment claims. Indeed, every circuit that has addressed these Except Clause issues can trace their analyses back to *Draper*.¹³¹

While *Draper* may be a cornerstone of this area of law, a quartet of Fifth Circuit cases illuminates how far the modern Except Clause has stretched. In *Wendt v. Lynaugh*,¹³² the Fifth Circuit found itself at the core of the Except Clause, and its ruling was exactly what one might expect. Wendt, proceeding pro se, argued that his Thirteenth Amendment rights were violated when he was forced to work in prison without pay.¹³³ The court easily rejected this claim, affirming the district court's conclusion that it "obviously [was] frivolous."¹³⁴ Citing a litany of cases to support its conclusion, the court said that Wendt "had been duly convicted of a crime and was serving sentence in the Texas prison as punishment for that crime."¹³⁵ For that reason, he "in precise words [was] exempted from the application of the Thirteenth Amendment."¹³⁶ And like the *Draper* Court before it, the Fifth Circuit noted that the Supreme Court had also long excepted other "forced labor for a public purpose without pay."¹³⁷

While *Wendt* followed the blueprint of most Except Clause cases, *Craine v. Alexander* was decidedly different.¹³⁸ First, it was technically not a

130. *Id.* ("There is no federally protected right of a state prisoner not to work while imprisoned after conviction, even though that conviction is being appealed.")

131. See, e.g., *Rinaldi v. Doe #1*, 708 F. App'x 748, 749 (3d Cir. 2018) (per curiam) (citing *Ali v. Johnson*, 259 F.3d 317, 317–18 (5th Cir. 2001)); *Ali*, 259 F.3d at 318 (citing *Wendt v. Lynaugh*, 841 F.2d 619, 620–21 (5th Cir. 1988); *Draper*, 315 F.2d at 197; and *Craine v. Alexander*, 756 F.2d 1070, 1075 (5th Cir. 1985); among other cases); *Henthorn v. Dep't of Navy*, 29 F.3d 682, 686 (D.C. Cir. 1994) (quoting *Hale v. Arizona*, 993 F.2d 1387, 1394 (9th Cir. 1993)); *Williams v. Williams*, 993 F.2d 1552, 1993 WL 147476, at *1 (10th Cir. 1993) (unpublished table decision) (citing *Wendt*, 841 F.2d 619); *Hale*, 993 F.2d at 1394 (citing *Draper*, 315 F.2d at 197); *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992) (citing *Draper*, 315 F.2d at 197); *Cavender v. Kentucky*, 887 F.2d 265, 1989 WL 120791, at *1 (6th Cir. 1989) (unpublished table decision) (citing *Wendt*, 841 F.2d at 621; *Sigler v. Lowrie*, 404 F.2d 659, 661 (8th Cir. 1968)); *Wendt*, 841 F.2d at 620 ("Perhaps the most commonly quoted case to follow the obvious literal intent of the Thirteenth Amendment is *Draper v. Rhay* . . ."); *Craine*, 756 F.2d at 1075 (citing *Draper*, 315 F.2d at 197); *Omasta v. Wainwright*, 696 F.2d 1304, 1305 (11th Cir. 1983) (per curiam) (quoting *Draper*, 315 F.2d at 197); *Newell v. Davis*, 563 F.2d 123, 124 (4th Cir. 1977) (per curiam) (citing *Borror v. White*, 377 F. Supp. 181, 183 (W.D. Va. 1974) (citing *Sigler*, 404 F.2d at 661)); *Goodwin v. Oswald*, 462 F.2d 1237, 1249 n.2 (2d Cir. 1972) (Friendly, C.J., dissenting) (citing *Draper*, 315 F.2d at 193, for the proposition that "it goes without saying" that prisoners have no right to strike); *Sigler*, 404 F.2d at 661 (citing *Draper*, 315 F.2d 193).

132. 841 F.2d 619.

133. *Id.* at 619.

134. *Id.*

135. *Id.* at 620.

136. *Id.*

137. *Id.*

138. 756 F.2d 1070 (5th Cir. 1985).

Thirteenth Amendment case at all, as the claim before the court arose under the Anti-Peonage Act, which Congress passed as another bulwark against involuntary servitude.¹³⁹ Further, unlike most of these cases, *Craine* did not involve a pro se litigant. Indeed, with the help of his attorney, Ralph Craine won over \$80,000 in compensatory and punitive damages on one of his § 1983 claims.¹⁴⁰ But the district court directed a verdict against him on his Anti-Peonage Act claim.¹⁴¹ It was in reviewing that claim that the Fifth Circuit made the by-then-uncontroversial observation that “Craine does not complain of the labor imposed upon him as an aspect of the corrective regimen to which he was subject; nor could he do so with any hope of success.”¹⁴² At the same time, however, the court noted several “more difficult” issues that it was not reaching, those being whether an imprisoned person might have their rights violated under either the Anti-Peonage Act or the Thirteenth Amendment “by virtue of labor forced upon him by a custom or usage of the state that is, at the same time, outside the scope of a corrective penal regimen.”¹⁴³

Craine was the rare case to recognize the possibility that the Thirteenth Amendment’s Except Clause may not be as straightforward as courts have read it to be for convicted people.¹⁴⁴ It may be possible, the court realized, for an incarcerated person to be forced to perform work for reasons *other than* punishment.¹⁴⁵ In a way, the *Craine* court acknowledging this wrinkle should be unsurprising. Courts have long struggled with how to handle Thirteenth Amendment claims of people forced to work who were not traditionally “duly convicted” of a “crime” but were instead involved in pseudocriminal civil commitment or juvenile

139. See *id.* at 1075 (“[W]e do not reach the issue of whether Craine established a violation of his rights under the Thirteenth Amendment since this issue was not raised in his complaint.”); see also Anti-Peonage Act, 42 U.S.C. § 1994 (2018). While this was formally not a Thirteenth Amendment case, cases under the Anti-Peonage Act tend to be decided with the (at times explicitly stated) recognition that it and the Amendment often do similar work. See, e.g., *Bailey v. Alabama*, 219 U.S. 219, 245 (1911) (finding a violation of both the Thirteenth Amendment and the Act).

140. See *Craine*, 756 F.2d at 1072. Craine was incarcerated but permitted to leave the jail for work. His case arose after he was beaten and shot by a deputy who was escorting him back to the jail when he instead left it to go to a pool hall. *Id.* at 1071–72.

141. *Id.* at 1071–72 (citing 42 U.S.C. § 1994 (1982)).

142. *Id.* at 1075 (citing, among other cases, *Draper*, 315 F.2d at 197).

143. *Id.*

144. *Id.*; see also *Davis v. Hudson*, No. 00-6115, 2000 WL 1089510, at *3 (10th Cir. Aug. 4, 2000) (unpublished table decision) (suggesting that forced labor in a private prison or other private facility might give rise to a Thirteenth Amendment claim provided “circumstances in which the opportunity for private exploitation and/or lack of adequate state safeguards could take a case outside the ambit of the Thirteenth Amendment’s state imprisonment exception”).

145. See *Craine*, 756 F.2d at 1075 (“[W]e express no opinion on the more difficult question whether a prisoner can establish a § 1994 deprivation by virtue of labor forced upon him by a custom or usage of the state that is, at the same time, outside the scope of a corrective penal regimen.”).

detention.¹⁴⁶ In the same way courts struggle with finding the boundaries of a “crime,” it should not shock that they struggle with the boundaries of “punishment.”

While *Craine* recognized a potentially narrower Except Clause, *Watson v. Graves*¹⁴⁷ was among the few cases to do something about it. Like Ralph Craine, Kevin Watson and Raymond Wayne Thrash were not pro se prisoners at the time of their lawsuit. And like Craine, part of their suit (their FLSA claim) was successful. But *Watson* is exceptional because it is one of the few cases reading a limitation into the Except Clause. There, the Fifth Circuit stated that “a prisoner who is not sentenced to hard labor retains his [T]hirteenth [A]mendment rights.”¹⁴⁸

Unlike many cases with incarcerated litigants, wherein the court expresses some frustration with an imprisoned litigant, the facts of *Watson* drew the court’s ire in the other direction. The Fifth Circuit began:

Up to now this court believed, apparently naively, that in the last decade of the twentieth century scenarios such as the one now before us no longer occurred in county or parish jails of the rural south except in the imaginations of movie or television script writers. The egregious nature of this misanthropic situation in the instant case, however, disabuses us of that innocent misconception.¹⁴⁹

Watson and Thrash were imprisoned at the Livingston Parish Jail in Louisiana for nonviolent crimes.¹⁵⁰ Importantly, neither of their sentences expressly contemplated hard labor, “nor did the state demand work as part of their respective sentences.”¹⁵¹ At the jail, the sheriff and warden ran a work program that allowed certain imprisoned people to be lent out to private businesses in exchange for \$20-per-day pay to the imprisoned person.¹⁵² Shifts could sometimes last twelve hours.¹⁵³

None of this would be particularly shocking in the prison-slavery context except for two wrinkles. First, the company that Watson and Thrash worked for—Darryl Jarreau Builders—was owned by, and only formally employed, the sheriff’s daughter and son-in-law.¹⁵⁴ All of the

146. See, e.g., *Jobson v. Henne*, 355 F.2d 129, 132 (2d Cir. 1966) (finding that an individual forced to work in a mental health institution could state a Thirteenth Amendment claim); *Santiago v. City of Philadelphia*, 435 F. Supp. 136, 156–57 (E.D. Pa. 1977) (holding that juveniles at a Pennsylvania institution could state a Thirteenth Amendment claim depending on “the justification for confining” them); *King v. Carey*, 405 F. Supp. 41, 43 (W.D.N.Y. 1975) (same for minors who were “adjudicated juvenile delinquents . . . or persons in need of supervision”).

147. 909 F.2d 1549 (5th Cir. 1990).

148. *Id.* at 1552.

149. *Id.* at 1550.

150. *Id.* at 1551.

151. *Id.* at 1552.

152. *Id.* at 1551.

153. *Id.*

154. *Id.* at 1554.

company's other "employees" were imprisoned people at the sheriff's jail, like Watson and Thrash, or subcontractors.¹⁵⁵ Second, the sheriff's work program quite obviously violated Louisiana law.¹⁵⁶ And so, amid obvious and abusive self-dealing, the Fifth Circuit decided that imprisoned people retained their Thirteenth Amendment rights unless explicitly sentenced to hard labor.¹⁵⁷

But as the saying goes, bad facts make bad law. While this holding could have been a watershed moment in Thirteenth Amendment litigation, instead *Watson* has mainly come to be cited as a way to dismiss Thirteenth Amendment claims.¹⁵⁸ That is because, despite recognizing the possibility that an imprisoned person may retain their Thirteenth Amendment rights if they are not explicitly sentenced to labor, *Watson* declared there was no Thirteenth Amendment violation because Watson and Thrash both engaged in the sheriff's labor program voluntarily.¹⁵⁹ Despite being subjected to the "painful" choice of either remaining in jail or working for the sheriff's family, the court found that these facts were insufficient to show the compulsion necessary to constitute involuntary servitude.¹⁶⁰ Instead, "both [men] testified that they requested work outside the jail and took work release whenever possible," and there was no evidence that they could not have stopped participating in the program if they wished.¹⁶¹ In reaching this conclusion, *Watson* too helped to solidify the broad reading of the Except Clause, as courts began to cite it for the

155. See *id.* at 1551.

156. See *id.* at 1551 n.2 ("The Sheriff offered no justification for not following the wage mandate contained in [the statute], but stated that he simply created his own program based in part on the one used in Jefferson Davis Parish, although that program is only authorized for that one parish."); *id.* at 1552 n.6 ("Appellants claim the Livingston Parish work release program is illegal because it violates [a statute] which requires inmates to be paid wages similar to those paid to other workers doing similar work.").

157. *Id.* at 1552.

158. See, e.g., *Brooks v. George County*, 84 F.3d 157, 162–63 (5th Cir. 1996) (relying on *Watson* to hold that Robert Brooks's "choice between staying in jail or working when he was [legally] not supposed to be in jail" was sufficient choice to defeat his Thirteenth Amendment claim); *Polk v. Castillo*, No. 3:22-CV-1814-S-BN, 2023 WL 5810059, at *2–3 (N.D. Tex. June 14, 2023), report and recommendation adopted, No. 3:22-CV-1814-S-BN, 2023 WL 5807846 (N.D. Tex. Sept. 7, 2023) ("[So, 'w]hen the employee has a choice, even though it is a painful one, there is no involuntary servitude." (alteration in original) (quoting *Brooks*, 84 F.3d at 162)); *Donald v. Benson Motor Co.*, No. CIV. A. 97-1734, 1997 WL 436254, at *2 (E.D. La. Aug. 1, 1997) (ruling on motions to strike and dismiss) ("While the Court is sympathetic to Donald's situation and his need to feed his family, he was under no compulsion to remain at Benson.").

159. *Watson*, 909 F.2d at 1552–53.

160. *Id.*

161. *Id.* This baseline voluntariness problem—that we can and have made incarceration so horrific that people would rationally perform free (or near free) hard labor rather than endure it—will be discussed in more depth in Part III because it is the most likely way that courts could maintain the status quo in the face of a constitutional amendment to the Thirteenth Amendment or its state-law analogues.

proposition that *any* availability of choice invalidated a Thirteenth Amendment claim.¹⁶²

That, however, is not the only reason that *Watson's* limitation on the Except Clause never gained purchase. The other reason is *Ali v. Johnson*.¹⁶³ Ahmad Ali, proceeding pro se like many before him, argued that he could not have been sentenced to hard labor because, in addition to not being told as much during his sentencing, at the time he was sentenced in 1994, Texas had no law on the books stating that imprisoned people must work.¹⁶⁴ Therefore, relying on *Watson*, he claimed that the labor he was forced to do violated his Thirteenth Amendment rights.¹⁶⁵

The Fifth Circuit's response, taking up fewer than four pages of the Federal Reporter, was swift and clear. It was not required to, nor did it desire to, follow *Watson*. That language in *Watson*, the court noted, was dicta because *Watson* ultimately found no Thirteenth Amendment violation. Separate from the sometimes murky line between holdings and dicta, *Watson* was "an anomaly in federal jurisprudence."¹⁶⁶ Both the Fifth Circuit and other federal courts had essentially uniformly found that any convicted and imprisoned person could be forced into involuntary servitude, period.¹⁶⁷ The vagaries of state law and the explicitness of sentencing were simply, in the Fifth Circuit's view, not questions of constitutional import.¹⁶⁸

Ali helps to illuminate just how broadly the courts have read the Except Clause. It does not matter where, for whom, or how you are forced to work. You can work for the government's benefit in the prison or outside of it. Or you might be forced to work for a private employer inside or outside of the prison.¹⁶⁹ You can be forced to work long hours doing dangerous labor.¹⁷⁰ State law does not matter at all. Indeed, a state *does not even*

162. See, e.g., *Donald*, 1997 WL 436254, at *2 (citing *Watson* for the proposition that "a showing of compulsion is a prerequisite to proof of involuntary servitude" and concluding that "when the employee has a choice, even if it is a painful one, there is no involuntary servitude").

163. 259 F.3d 317 (5th Cir. 2001).

164. See *id.* at 318 & n.1.

165. *Id.* at 318.

166. *Id.*

167. *Id.*

168. *Id.* at 318 n.2 ("For Thirteenth Amendment purposes, however, the precise terms of state law are irrelevant. The Constitution does not forbid an inmate's being required to work. Whether that requirement violates state law is a separate, non-constitutional issue . . .").

169. See, e.g., *Murray v. Miss. Dep't of Corr.*, 911 F.2d 1167, 1168 (5th Cir. 1990) (per curiam) ("[W]e can find no basis from which to conclude that working an inmate on private property is any more violative of constitutional or civil rights than working inmates on public property.").

170. Here, there are at least some limits imposed by the Eighth Amendment. See, e.g., *Calhoun v. Hargrove*, 312 F.3d 730, 732, 734–35 (5th Cir. 2002) (holding that a prison

need a statute on the books stating that labor is part of the punishment for any given conviction (or all convictions).¹⁷¹ Nor is there any requirement that you be informed that part of your punishment will be enslavement or involuntary servitude at any point before you show up to prison.¹⁷²

But more than this, these cases illuminate how the common law can go wrong. The courts addressing Except Clause cases almost uniformly dealt with cases brought by people from an unpopular group (people convicted of crimes) who were acting without lawyers and attempting to upset pro-carceral-state status quo. In addressing these challenges, the courts removed *any* possible substantive or procedural guardrails from the Except Clause. And they did so with little, if any, reasoning beyond reliance on cases that are themselves either lightly reasoned or not clearly on point.

Contrary to the portrait of federal courts as countermajoritarian protectors of the downtrodden,¹⁷³ here they have uniformly served only to constrict the rights of an already unpopular and vulnerable group. And contrary to the idyllic picture of the common law as reasoning by analogy in new situations across time, here the common law has operated more like a game of schoolyard telephone, expanding the reach of the Except Clause to its maximum ambit through bare and conclusory reasoning.

In doing so, the courts have further empowered the carceral state. But not, as it turns out, the *state* within the carceral state. This is not a federalism story in which federal courts defer to the state's will. Instead, as *Ali's* refusal to engage with state law suggests, the courts' Except Clause jurisprudence seems to have *disempowered* state governments, which might pass laws restricting how prison slavery operates in their states.¹⁷⁴ In their stead, current Except Clause jurisprudence empowers *prison administrators*. As Part II will show, this has thus far been unproblematic, as the states have also overwhelmingly implemented the Except Clause through legislation that grants discretion to prison administrators.

official forcing an incarcerated person to work much longer than a known physician-mandated restriction stated a viable Eighth Amendment claim).

171. See *Ali*, 259 F.3d at 318 n.2.

172. See *id.*; see also *Reno v. Garcia*, 713 F. App'x 355, 356 (5th Cir. 2018) ("This court has held that an inmate sentenced to imprisonment, even when the prisoner is not explicitly sentenced to hard labor, cannot state a viable Thirteenth Amendment claim if the prison system requires him to work.").

173. See Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. Pa. L. Rev. 1361, 1361 (2004) ("When we think about judicial review, we tend to envision the Supreme Court as a 'countermajoritarian hero,' protector of minorities from tyrannical majority rule." (footnote omitted) (quoting Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 Va. L. Rev. 1881, 1933–34 (1995))).

174. This is not the only area within the criminal legal system in which the courts have chosen to undermine, rather than support, state attempts to be less carceral. See, e.g., *Virginia v. Moore*, 553 U.S. 164, 171 (2008) (holding that an arrest based on probable cause does not violate the Fourth Amendment even when the state prohibits arresting an individual for that offense).

But even without more radical interventions, this unity of purpose is shifting as more states ban slavery and involuntary servitude in all forms through state constitutional referenda.¹⁷⁵ The clash between prison administrators, empowered and protected by federal courts, and state law restrictions seems increasingly inevitable.

C. *The Other Exceptions: Housekeeping and “Exceptional” Involuntary Servitude*

There are two other categories of involuntary servitude¹⁷⁶ not covered by the Thirteenth Amendment.¹⁷⁷ The first of these is what the Court in *Butler v. Perry* called “exceptional” involuntary labor for certain historical practices.¹⁷⁸ The Supreme Court has approved such involuntary servitude for military conscription during wartime,¹⁷⁹ forced labor on the public roads,¹⁸⁰ mandatory jury service,¹⁸¹ contracts of sailors,¹⁸² parents controlling their children,¹⁸³ and the provision of evidence.¹⁸⁴ The second

175. See Ramirez, *supra* note 30 (reporting that Alabama, Tennessee, Vermont, and Oregon “approv[ed] constitutional amendments to abolish . . . involuntary labor as a form of punishment” while Louisiana failed to do so only “after the Democratic state lawmaker who proposed it . . . [old] voters to oppose it over an issue with the wording on the ballot”).

176. This Article uses the phrase “involuntary servitude” here to connote the sort of labor relationship generally forbidden by both the Thirteenth Amendment and federal statute, in which, but for the Court’s alternative holding, a refusal to work would be met by “force, . . . physical restraint, . . . serious harm[,] . . . abuse of law or legal process[,]” or threats of these. 18 U.S.C. § 1589(a) (2018).

177. For a more fulsome discussion of these cases within the specific context of unconvicted-but-incarcerated labor, see generally Andrea C. Armstrong, *Unconvicted Incarcerated Labor*, 57 *Harv. C.R.-C.L. L. Rev.* 1 (2022).

178. 240 U.S. 328, 333 (1916) (“[The Thirteenth Amendment] introduced no novel doctrine with respect of services always treated as *exceptional*, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc.” (emphasis added)); see also *Robertson v. Baldwin*, 165 U.S. 275, 282 (1897) (“It is clear, however, that the [Thirteenth] [A]mendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional . . .”).

179. *Arver v. United States*, 245 U.S. 366, 390 (1918). There are good reasons to consider military conscription as something other than involuntary servitude. See James Gray Pope, *The Thirteenth Amendment at the Intersection of Class and Gender: Robertson v. Baldwin’s Exclusion of Infants, Lunatics, Women, and Seamen*, 39 *Seattle U. L. Rev.* 901, 910 (2016) [hereinafter Pope, *Intersection of Class and Gender*] (opposing the public-oriented nature of wartime military conscription with the private nature of private servitude). This Article, however, classifies it as an exception because from the perspective of an individual who does not want to join the military, they are faced with the same choice of working against their will or suffering legal punishment that unites other examples of involuntary servitude.

180. *Butler*, 240 U.S. at 333.

181. *Id.*

182. *Robertson*, 165 U.S. at 283.

183. *Id.* at 282; see also Pope, *Intersection of Class and Gender*, *supra* note 179, at 914–25 (arguing for a renewed examination of the Thirteenth Amendment’s applicability to domestic settings).

184. *Hurtado v. United States*, 410 U.S. 578, 588–89 & n.11 (1973).

is “housekeeping” work forced onto not-convicted-but-imprisoned people.¹⁸⁵ The exceptional cases illuminate an alternative road not taken in the Except Clause’s past, while the housekeeping exception offers a road—and a warning—for the future.

1. *The “Exceptional” Historical Exceptions.* — The unwritten historical exceptions to the Thirteenth Amendment serve as examples of a particular oddity within Except Clause jurisprudence. The Except Clause’s text has been sufficient for courts deciding to strip imprisoned people of the Thirteenth Amendment’s protections. But courts have not always viewed that amendment’s text as the only consideration relevant to their decisions. Instead, these extratextual justifications have primarily arisen when *expanding* the possibility of involuntary servitude.¹⁸⁶

185. See, e.g., *Hause v. Vaught*, 993 F.2d 1079, 1085 (4th Cir. 1993) (holding that “[d]aily general housekeeping responsibilities’ are not inherently punitive and do not violate either the Due Process Clause or the Thirteenth Amendment’s ban on involuntary servitude” (alteration in original) (quoting *Bijeol v. Nelson*, 579 F.2d 423, 424 (7th Cir. 1978) (per curiam))); *Martinez v. Turner*, 977 F.2d 421, 423 (8th Cir. 1992) (“Requiring a pretrial detainee to perform general housekeeping chores, on the other hand, is not [punishment].” (citing *Bijeol*, 579 F.2d at 425)); *Bijeol*, 579 F.2d at 424 (finding that requiring a pretrial detainee to perform “housekeeping chores” for “between 45 and 120 minutes” daily without pay did not violate the Thirteenth Amendment); *Jobson v. Henne*, 355 F.2d 129, 131–32 & n.3 (2d Cir. 1966) (“[T]he states are not thereby foreclosed from requiring that a lawfully committed inmate perform without compensation certain chores designed to reduce the financial burden placed on a state by its program of treatment for [those with intellectual disabilities] . . . [or] chores of a normal housekeeping type and kind.”); see also 26 C.F.R. § 545.23(b) (2023) (“A pretrial inmate may not be required to work in any assignment or area other than housekeeping tasks in the inmate’s own cell and in the community living area, unless the pretrial inmate has signed a waiver of his or her right not to work . . .”).

186. Modern Thirteenth Amendment scholarship has amply demonstrated that this did not have to be the case. The Court’s early recognition that the Thirteenth Amendment also meant to eliminate the “badges and incidents” of slavery has given rise to numerous articles arguing that this more expansive view of the Thirteenth Amendment should have large ramifications for both the law and society writ large. See, e.g., Balkin & Levinson, *supra* note 45, at 1461–62 (“If the Thirteenth Amendment were taken as seriously as the Fourteenth has been taken, one would expect considerable political and legal efforts to make sense of its underlying purposes and apply its terms (and purposes) to new situations.”); William M. Carter, Jr., *The Thirteenth Amendment and Pro-Equality Speech*, 112 *Colum. L. Rev.* 1855, 1856 (2012) (arguing that “[t]he Thirteenth Amendment . . . protects the freedom to speak for equality under the shelter of law”); Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 *Duke L.J.* 1609, 1614 (2001) (recounting how “Civil Rights Section lawyers [in the mid-twentieth century] came to use the Thirteenth Amendment as a vehicle for instituting ‘free labor,’ broadly defined, and for prohibiting various kinds of legal and economic coercion”); Goodwin, *Modern Slavery*, *supra* note 8, at 975–89 (2019) (arguing that the Thirteenth Amendment’s Except Clause leaves open a form of slavery within the prison system and that constitutional amendment is unlikely but worth the attention of lawmakers and scholars who are “concerned about human rights and the continued racialized exploitation of labor”); Pope, *Contract, Race, and Freedom of Labor*, *supra* note 39, at 1525 (arguing that “Congress may be empowered to enact legislation protecting various rights under its Section 2 enforcement power even though the Court would not, on its own, hold those rights to be protected under Section 1”); Lea S.

Instead of relying on the Amendment's text, these decisions addressing "exceptional" historical relics often rely on the long history of the expected service¹⁸⁷ as well as the Court's belief about the intent of the Thirteenth Amendment—specifically, that while it intended to end "compulsory labor akin to African slavery," the Amendment did not mean to upset other forced-labor traditions.¹⁸⁸ To explain why a man could be forced to provide free labor for the state on the public roads, for example, the Court noted that such labor had been expected at least as far back as eleventh-century England, and "[f]rom Colonial days to the present time conscripted labor has been much relied on for the construction and maintenance of roads."¹⁸⁹ This historic practice had survived the Northwest Ordinance's prohibition on involuntary servitude, and it was the language of that ordinance that the Court believed had found its way into the Thirteenth Amendment.¹⁹⁰

To explain why sailors could not abandon their contracts, the Court began by noting that sailors' contracts were exceptional "[e]ven by the maritime law of the ancient Rhodians, which is supposed to antedate the birth of Christ by about 900 years."¹⁹¹ It then traced centuries of European and United States law before concluding

[i]n the face of this legislation upon the subject of desertion and absence without leave, which was in force in this country for more than 60 years before the Thirteenth Amendment was adopted, and similar legislation abroad from time immemorial, it cannot be open to doubt that the provision against involuntary servitude was never intended to apply to [sailors'] contracts.¹⁹²

Given that these histories were enough to overcome the Thirteenth Amendment's seemingly clear text, perhaps it is unsurprising that military conscription likewise survived a Thirteenth Amendment challenge in *Arver v. United States*.¹⁹³ Indeed, the idea that compulsory military labor could constitute involuntary servitude seems to have beggared belief for the *Arver* Court. Instead, being conscripted into the military was simply being required to perform one's "supreme and noble duty of contributing

VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. Pa. L. Rev. 437, 498 (1989) ("As we have contemplated removing the badges of slavery that persist in race relations, the labor vision invites us to begin stripping away the vestiges of slavery and involuntary servitude that have remained in employment relations law and that continue to influence legal opinions and popular expectations." (footnote omitted)).

187. See *Butler v. Perry*, 240 U.S. 328, 329–33 (1916) (discussing the history of compulsory roadwork laws and their continuation both before and after the Northwest Ordinance's prohibition on slavery and involuntary servitude).

188. *Id.* at 332.

189. *Id.* at 331.

190. *Id.* at 331–32.

191. *Robertson v. Baldwin*, 165 U.S. 275, 283 (1897).

192. *Id.* at 283–88.

193. 245 U.S. 366, 390 (1918).

to the defense of the rights and honor of the nation.”¹⁹⁴ The Court was “unable to conceive upon what theory” the performance of this “duty . . . can be said to be the imposition of involuntary servitude” and so was “constrained to the conclusion that the contention to that effect is refuted by its mere statement.”¹⁹⁵

But of course, the reason these cases resorted to history or to grand statements of principle about the role of a citizen was because the text of the Thirteenth Amendment flatly opposes their conclusion.¹⁹⁶ The Thirteenth Amendment’s text is broad, permitting a lone exception to an otherwise-total prohibition on slavery and involuntary servitude. While nearly every other provision of the Constitution attempts to regulate government behavior, the Thirteenth Amendment goes further and regulates all of American society by prohibiting slavery and involuntary servitude wherever it may be found (unless the enslaved was convicted of a crime).¹⁹⁷ The Court could have reasonably concluded, for reasons of history and policy, that the Amendment “introduced no novel doctrine with respect of services always treated as exceptional.”¹⁹⁸ Particularly when considering public-oriented forced service like drafting people to war, the Court might have believed it both sound legal reasoning and good policy that the Amendment was intended to ensure “liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers.”¹⁹⁹ But the Court did not have to go down this path. Instead of ignoring the breadth—and uniqueness—of the Amendment’s text, courts could have embraced it.

2. *Housekeeping*. — While the “exceptional” cases reflect a more expansive jurisprudential road not taken, the housekeeping exception is a potential preview of the Thirteenth Amendment’s future. It suggests a road that Thirteenth Amendment jurisprudence might take to maintain much of the status quo even in the face of an end to administrative enslavement. Courts have held that while pretrial detainees and people

194. *Id.*

195. *Id.*

196. See *Robertson*, 165 U.S. at 288–303 (Harlan, J., dissenting). Justice Harlan, relying overwhelmingly on the text of the Amendment, would have held that seamen serving on a private vessel were not excepted from the Thirteenth Amendment’s prohibition on involuntary servitude. See *id.* at 303. Nevertheless, he believed public involuntary service, like that of a soldier, was outside the Amendment’s scope. *Id.* at 298.

197. See *The Civil Rights Cases*, 109 U.S. 3, 20 (1883) (“[T]he amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.”). Interestingly, the provision of the Constitution that comes closest to the Thirteenth Amendment’s attempt at societal regulation failed. The Eighteenth Amendment’s prohibition on alcohol was similarly sweeping in that it applied to all manufacture, sale, and transportation of liquors, public and private. See U.S. Const. amend. XVIII, repealed by U.S. Const. amend. XXI, § 1.

198. *Butler v. Perry*, 240 U.S. 328, 333 (1916).

199. *Id.*

who are civilly committed—primarily in immigration detention,²⁰⁰ youth correctional facilities, and facilities for those with mental illness—do not fall within the Except Clause’s ambit,²⁰¹ they can nevertheless be made to work doing “housekeeping” labor or other labor that is sufficiently “therapeutic.”²⁰²

In some limited fashion, these exceptions seem unobjectionable. It seems almost absurd to think that an imprisoned person could refuse (or would have to be paid) to, for example, make their bed or throw out their trash after they eat. And something similar could be said for civilly committed people. If a task provided some genuine therapeutic benefit for someone struggling with mental illness or in a youth correctional facility, few people would say that task could not be required without forming an employment relationship.

But moving away from these idealized examples quickly reveals how this exception might swallow the Thirteenth Amendment rule. Take *Jobson v. Henne*, one of the most cited cases discussing this exception.²⁰³ Warren Jobson, who had been committed to the New York State Newark State School for Mental Defectives most of his life,²⁰⁴ alleged that he “was forced to work in the Newark State School’s boiler house eight hours a night, six nights a week, while working eight hours a day at assigned jobs in the village of Newark.”²⁰⁵ The Second Circuit found that these onerous requirements *could*, but did not necessarily, state a violation of the Thirteenth Amendment.²⁰⁶ By contrast, the district court dismissed the claim, and the Second Circuit dissent would have affirmed the lower court’s dismissal, because a psychiatrist provided an affidavit that these work requirements benefitted Jobson.²⁰⁷

Or, for a less extreme example, take *Bijeol v. Nelson*.²⁰⁸ There, Paul Bijeol was incarcerated pretrial because he was “unable to afford bond” on a bank robbery charge for ten months before he was acquitted by a

200. See, e.g., *Channer v. Hall*, 112 F.3d 214, 218–19 (5th Cir. 1997) (applying a Thirteenth Amendment analysis to a person in immigration detention and finding that, absent compulsion, “his labor was not forced because he had been paid”).

201. See *Martinez v. Turner*, 977 F.2d 421, 423 (8th Cir. 1992) (“Pretrial detainees are presumed innocent and may not be punished. . . . Requiring a pretrial detainee to work or be placed in administrative segregation is punishment.” (citations omitted)).

202. See, e.g., *Jobson v. Henne*, 355 F.2d 129, 131–32 & n.3 (2d Cir. 1966).

203. *Id.*

204. *Id.* at 130.

205. *Id.* at 132.

206. *Id.* at 131–32 (“As we cannot say that any such work program would not go beyond the bounds permitted by the Thirteenth Amendment, the complaint states a claim under § 1983.”).

207. *Id.* at 133 n.6; *id.* at 134–36 (Moore, J., dissenting) (“Only when a course of treatment is prescribed which cannot reasonably be defended as therapeutic should a suit of this type be able to withstand a defense motion for summary judgment. This is not such a case.”).

208. 579 F.2d 423 (7th Cir. 1978).

jury.²⁰⁹ During that time he was forced to perform “general housekeeping duties without pay,” which included “keeping [his] own room clean” but also “dusting, vacuuming, or emptying ashtrays in the television area three times daily; setting up and cleaning tables after meals; . . . vacuuming the general purpose area after each meal and prior to retiring”; and “clean[ing] windows, wash[ing] heel marks off the wall, . . . and keep[ing] books in order.”²¹⁰ Many, if not all, of these requirements likely seem unobjectionable based on the belief shared by many people that, as the Seventh Circuit said, “A pretrial detainee has no constitutional right to order from a menu or have maid service.”²¹¹

But Bijeel’s case is emblematic of the reasons that, perhaps, people incarcerated pretrial should be so entitled. While postconviction incarceration might be justified by a desire to impose a retributive deprivation, “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”²¹² Therefore, the more utilitarian goals of assuring presence at trial and community safety justify pretrial detention.²¹³ But instead of doing the minimal amount to fulfill these nonpunitive goals, current doctrine facilitates grave government-inflicted harms on vulnerable people who are both presumed and, for some, actually innocent.

Bijeel was incarcerated because he was poor. Most likely, had he been a rich man, he would have simply paid his bond and been free until his trial date.²¹⁴ And Bijeel, it turns out, was *wrongly* imprisoned. When he finally made it to trial after ten months of incarceration,²¹⁵ Bijeel was acquitted.

Beyond the problem of innocence (both presumptive and actual), the lack of “maid service”—as the Seventh Circuit put it—is not due to

209. *Id.* at 424.

210. *Id.* at 424 & n.1 (footnote omitted).

211. *Id.* at 424. *Channer v. Hall*, 112 F.3d 214 (5th Cir. 1997), perhaps sits between these two cases. *Channer* was forced to “work[] in the Food Services Department from 4:30 a.m. to 12:30 p.m. each day” that he was in immigration detention, and this labor was held to be within the housekeeping exception. *Id.* at 215, 217–19.

212. *United States v. Salerno*, 481 U.S. 739, 755 (1987).

213. See *id.* at 742 (discussing the Bail Reform Act of 1984, 18 U.S.C. § 3142(e) (1986), which allows judges to detain persons before trial if other measures would not be sufficient to ensure public safety or the person’s appearance at trial).

214. Cf. *McGinnis v. Royster*, 410 U.S. 263, 277–78, 283 (1973) (Douglas, J., dissenting) (lamenting the Court’s decision to allow “invidious discrimination” in calculating good time credits between “those rich or influential enough to get bail or release on personal recognizance and . . . those without the means to buy a bail bond or the influence or prestige that will give release on personal recognizance”).

215. Such lengthy pretrial stays are not a thing of the past. See, e.g., Reuven Blau, 10 Years a Detainee: Why Some Spend Years on Rikers, Despite Right to Speedy Trial, *The City* (Aug. 17, 2022), <https://www.thecity.nyc/2022/08/17/why-some-spend-years-rikers> [<https://perma.cc/D6QD-7WET>] (“The average number [of days spent in New York City jails pretrial] was 125 days as of July [2022], up from 105 in 2021, 90 in 2020, and 82 in 2019. Those figures include people who were in and out of custody within one day.”).

impossibility. Instead, it saves costs for the state because the alternative would be to hire cleaners. But perhaps most importantly, even if one believes that people incarcerated pretrial should have to do some personal housekeeping work, that seems a far cry from believing that they should be totally unpaid and sent to solitary confinement if they refuse to work. But that, too, is what happened to *Bijeol*.²¹⁶

Although these cases dealt with people seemingly in a different legal status from someone who has been duly convicted of a crime, they are mentioned here because that difference evaporates under a stricter reading of the Except Clause. If, as Part III argues, courts, prosecutors, defense attorneys, or states place more demanding requirements on the abdication of Thirteenth Amendment rights, these cases provide a possible preview of how imprisoned people who retain their Thirteenth Amendment rights may nevertheless be forced to work under the threat of grave punishment. Particularly if courts remain reluctant participants in other groups' attempts to end the administrative-enslavement regime, one might expect them to begin expanding these sorts of non-Except Clause exceptions at the behest of the prison bureaucrats who make up the defendants in these cases.²¹⁷ For example, about eighty percent of current prison labor is intraprison maintenance work that could plausibly be labeled "housekeeping."²¹⁸

* * *

As other scholars have noted, the courts have been highly deferential to prison administrators in a wide range of areas related to running prisons.²¹⁹ Given that courts have largely interpreted prison slavery as coterminous with being imprisoned, it is perhaps not surprising that they have similarly deferred to, and so empowered, prison administrators in the Except Clause context as well.

216. See *Bijeol*, 579 F.2d at 424.

217. Indeed, the *Jobson* dissent makes exactly that move by deferring to a psychiatrist's affidavit that said the sixteen-hour days *Jobson* worked were for his therapeutic benefit. See *Jobson v. Henne*, 355 F.2d 129, 132 (2d Cir. 1966) (sixteen-hour days); *id.* at 135 (Moore, J., dissenting) (therapeutic benefit).

218. See *Captive Labor*, *supra* note 1, at 8 ("The vast majority of incarcerated workers perform maintenance work, keeping the facilities that confine them running.")

219. See, e.g., *Driver & Kaufman*, *supra* note 35, at 522 (2021) (arguing that the Court has adopted a "strangely transsubstantive approach to prison law" that "encourages courts to make broad, unsupported claims about the nature of prison life"); *Raghunath*, *supra* note 8, at 398 (arguing that "the logic of the prison deference doctrine" drives the courts' broad reading of "punishment" in the Thirteenth Amendment and narrow reading in the Eighth Amendment); Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 *Cornell L. Rev.* 357, 362 (2018) (arguing for rethinking Eighth Amendment jurisprudence because "our jails and prisons should not be shielded from accountability").

What is surprising, however, is that all fifty states and the federal government have made the same choice. Throughout the Union, governments have empowered prison administrators to implement their prison enslavement regimes to the exclusion of the branch that traditionally doles out criminal punishment: the judiciary. While there is some variation, overwhelmingly these statutes provide prison administrators with broad discretion to fashion involuntary work programs as they see fit. It is to these statutes that Part II turns.

II. ADMINISTRATIVE ENSLAVEMENT'S STATUTORY FRAMEWORK

Every state, the District of Columbia, and the federal government all have at least one statute, regulation, or (in Oregon's case) constitutional provision regulating the labor of the people they imprison.²²⁰ While the prison-labor regimes these statutes create are diverse—some purport to be voluntary,²²¹ some speak in terms of broad state policies,²²² some mandate work²²³ while others merely raise the possibility²²⁴—there are also astounding similarities.

Chief among these similarities is the siting of these statutes and regulations. Overwhelmingly, the statutes developing states' prison-labor regimes are not placed in the section of their code detailing the punishments for a crime. Instead, they are situated alongside other statutes that deal with the regulation of prisons.²²⁵ This placement decision is not merely ministerial, as these statutes often explicitly empower prison bureaucrats to create and control the prison-labor regime.²²⁶ Beyond this

220. Unless otherwise specified, references to “statutes” throughout this Article should generally be read as a shorthand that encompasses the occasional regulations or constitutional provisions that create a jurisdiction’s administrative-enslavement regime in the absence of, or in addition to, a statute. E.g., Or. Const. art. I, § 41; 28 C.F.R. § 545.23 (2023).

221. See, e.g., S.C. Code Ann. § 17-25-70 (2024) (“Notwithstanding another provision of law, a local governing body may authorize the sheriff or other official in charge of a local correctional facility to require any able-bodied convicted person committed to the facility to perform labor in the public interest.”); Utah Code § 64-9b-4(1) (2023) (“Rehabilitative and job opportunities at the Utah state prison and participating county jails shall not be forced upon any inmate contrary to the Utah Constitution, Article XVI, Section 3 (2), but instead shall be on a completely voluntary basis.”).

222. See, e.g., Alaska Stat. § 33.30.191(a) (2023) (“It is the policy of the state that prisoners be productively employed for as many hours each day as feasible.”).

223. See, e.g., Cal. Penal Code § 2700 (2024) (“The Department of Corrections shall require of every able-bodied prisoner imprisoned in any state prison as many hours of faithful labor in each day and every day during his or her term of imprisonment as shall be prescribed by the rules and regulations of the Director of Corrections.”).

224. See, e.g., Ariz. Rev. Stat. Ann. § 31-251(A) (2024) (“The director has the authority to require that each able-bodied prisoner under commitment to the state department of corrections engage in hard labor for not less than forty hours per week . . .”).

225. See *infra* section II.A.1.

226. See, e.g., Ariz. Rev. Stat. Ann. § 31-251 (giving the director “authority” to require labor).

apparent choice of prison administration and administrators as the stewards of prison-labor programs, another aspect of the Except Clause is striking in its absence: punishment. With rare exceptions, these statutes do not mention or even allude to the idea that the forced labor they enable is constitutionally required to be punishment for a crime.²²⁷ Instead, to the extent they discuss it, most suggest that their purpose is either rehabilitative, idleness defraying, or cost saving.²²⁸

This Part explores how these features form the core of administrative enslavement and then discusses two other dormant parts of this regime—(1) the distinction between mandatory and permissive statutes, and (2) “voluntary” work statutes—that could allow administrative enslavement to survive even a constitutional amendment.²²⁹

A. *Situating Enslavement Within Prison Administration*

The Thirteenth Amendment limits the ability to impose either slavery or involuntary servitude to only one situation: punishment for a crime. It is surprising, then, that almost no statute across the country situates the infliction of enslavement or involuntary servitude alongside the other punishments laid out in a jurisdiction’s criminal code. Instead, these statutes regulating prison labor are placed alongside the various sections and subsections regulating prison administration. This choice reflects more than just how these statutes are cited. Instead, this structural decision mirrors a substantive one. These statutes also place control over prison labor in the hands of prison bureaucrats, even as the judiciary imposes a jurisdiction’s other criminal punishments. The rest of this section discusses these choices in more detail.

1. *Placement Within the Code.* — With rare exceptions,²³⁰ neither states nor the federal government treat the punishment of enslavement like they

227. Compare Ark. Code Ann. § 12-30-202(1) (2023) (alluding to punishment by saying that employment is to be “consistent with proper penal purposes”), with Conn. Gen. Stat. Ann. § 18-90a (West 2023) (explaining that the Commissioner of Correction may allow imprisoned people under their jurisdiction to work without any reference to punishment).

228. See, e.g., Ark. Code Ann. § 12-30-202(2) (stating that prison labor is intended to “further utilize the labor of prisoners for self-maintenance and for reimbursing this state for expenses incurred by reason of their crimes and imprisonment”).

229. While this Article occasionally discusses hard labor statutes, it largely brackets statutes that explicitly call for a sentence of hard labor for conviction of a particular crime as well as statutes that call specifically for sentences to a “workhouse” or similar explicitly labor-based penal institution. See, e.g., D.C. Code § 24-201.03 (2024) (providing for employment of prisoners in the “Workhouse”); Me. Rev. Stat. Ann. tit. 15, § 1793 (West 2023) (allowing for a sentence of imprisonment to instead be to a “work-jail”); Ohio Rev. Code Ann. § 5147.17 (2024) (specifically allowing for sentences of hard labor). With few exceptions, see *infra* note 230, these statutes, while sometimes illuminating, rarely seek to or can justify the near-universal practice of mass prison labor.

230. Alabama and Wisconsin both mention hard labor as being required in conjunction with prison sentences. See Ala. Code § 13A-5-6 (2024) (felonies); *id.* § 13A-5-7 (misdemeanors); Wis. Stat. & Ann. § 973.013(b) (2024) (indeterminate sentences to Wisconsin

do other criminal punishments within their code. Perhaps the most glaring example is the near-total separation within a jurisdiction's code between those things traditionally viewed as punishment—imprisonment, supervised release (and its equivalents), and fines—and enslavement.

Two variations of this phenomenon arise in state and federal codes. In some codes, both enslavement and other punishments are placed in the criminal law or criminal procedure part of the code, but that occurs because these jurisdictions put *almost all* prison regulation under this heading. And prison labor is invariably placed not under the subsection detailing other criminal punishments but rather alongside those subsections regulating prisons. In other jurisdictions, even this nominal overlap does not occur, and incarcerated labor is totally separate from the jurisdiction's other criminal punishments. Whichever variant a jurisdiction uses, the end product is the same: Enslavement is separated from other punishments. A few examples will illustrate how this phenomenon occurs throughout the country.

Wyoming is an example of the first group. Both its statutes dealing with prison labor and some other aspects of its criminal law are under the same statutory heading, Title 7, which is labeled "Criminal Procedure."²³¹ Title 7 deals with various sentencing issues like indeterminate sentences²³² and parole.²³³ But Title 7 also addresses prison regulation broadly. In separate chapters, it speaks to private correctional facilities,²³⁴ the Western Interstate Corrections Compact,²³⁵ and community corrections programs.²³⁶ Relevantly here, it also has a separate chapter for "Labor by Prisoners."²³⁷

While it may not seem striking that prison labor is described in a separate subsection of the same title that deals with the regulation of the criminal system generally, what *is* striking is the differential treatment of prison slavery from the other criminal punishments in the state's code. Those punishments are detailed in Wyoming's Title 6, "Crimes and Offenses."²³⁸ That is where Wyoming informs someone of the punishment

state prisons). But Alabama's law is in flux. While Alabama, Vermont, and Oregon were previously at least nominal exceptions to the structural regime described—Alabama because of its explicit treatment of labor as a punishment, Vermont and Oregon because of the treatment of mandatory labor in their constitutions, see Or. Const. art. I, § 41; Vt. Const. ch. II, § 64—all three states recently voted to amend their state constitutions to forbid slavery and involuntary servitude entirely. See Ramirez, *supra* note 30.

231. See Wyo. Stat. Ann. § 7 (2023).

232. *Id.* § 7-13-201.

233. *Id.* § 7-13-401.

234. *Id.* §§ 7-22-101 to -115.

235. *Id.* § 7-3-401.

236. *Id.* §§ 7-18-101 to -115.

237. *Id.* §§ 7-16-101 to -206.

238. See Wyo. Stat. Ann. § 6 (2023).

to which the state will subject them for a given crime, and there the only compulsory labor mentioned is in the punishment for littering.²³⁹

Oklahoma serves as another example of this blend.²⁴⁰ It sites prison-labor statutes in two places within its code—Title 57, “Prisons and Reformatories,” which contains various regulations regarding imprisoned labor,²⁴¹ and Title 22, “Criminal Procedure,” which lays out the state’s general policy that “offenders should work when reasonably possible.”²⁴² Title 57, as its description suggests, deals exclusively with the regulation of prisons. While Title 22 could explain criminal punishments more broadly, it ultimately does not. Instead, the portion of Title 22 that discusses prison labor is contained within a subsection titled “Sentencing Commission,” which lays out broad state criminal legal system policies on everything from the purposes of punishment to the “mission of the Department of Corrections.”²⁴³ By contrast, if one wanted to discover the punishment for a crime in Oklahoma, they would have to go to Title 21, aptly named “Crimes and Punishments.” It is there that they would learn that Oklahoma defaults to punishing felonies with up to two years’ imprisonment, a fine of up to \$1,000, or both²⁴⁴—unless a specific punishment is directed elsewhere in the criminal code.²⁴⁵ What they will not find, however, is any discussion or requirement of prison labor.²⁴⁶

239. Id. § 6-3-204 (“The court may suspend all or a part of a sentence imposed under this section and require the person convicted of littering to perform up to forty (40) hours of labor in the form of cleaning litter debris from public roads, parks or other public areas or facilities.”).

240. Oklahoma also serves as an example of another phenomenon that is beyond the scope of this Article. In several places, its statutes reference a judge explicitly sentencing individuals to hard labor. See, e.g., Okla. Stat. tit. 57, § 6 (2024) (“Any court . . . shall have full power and authority to sentence such convict to hard labor as provided in this article.”); id. § 58 (“Wherever any person shall be confined in any jail pursuant to the sentence of any court, if such sentence or any part thereof shall be that he be confined at hard labor . . .”). But while prison slavery is widespread, these statutes appear to be little used. Section 6, which contains the broad permission for judges to sentence to hard labor, has only been referenced twice—in a 1935 Oklahoma Supreme Court case and in an ALR report summarizing that case. See *Savage v. City of Tulsa*, 50 P.2d 712, 714 (Okla. 1935); Annotation, Liability for Death or Injury to Prisoner, 61 A.L.R. 569 (1929).

241. See, e.g., Okla. Stat. tit. 57, § 7 (regarding labor in towns); id. § 58 (providing for the employment of imprisoned people in the county jail); id. § 212 (providing for imprisoned labor at eleemosynary institutions); id. §§ 215–228 (Prisoners Public Works Act).

242. Okla. Stat. tit. 22, § 1514 (2024) (“It is the policy of this state that offenders should work when reasonably possible, either at jobs in the private sector . . . , or at community service jobs . . . , or at useful work while in prison or jail, or at educational or treatment endeavors . . .”).

243. Id.

244. Okla. Stat. tit. 21, § 9 (2024).

245. See id. §§ 380–2200 (detailing crimes and punishments for crimes against public justice, the person, public decency and morality, public health and safety, public peace, and property).

246. Interestingly, some Oklahoma statutes used to explicitly call for “imprisonment in the penitentiary at hard labor” but no longer do. See, e.g., id. § 1836 (noting that prior to a 1945 amendment the statute explicitly called for hard labor).

This separation repeats itself around the country. Only ten states and the District of Columbia even have this level of commingling between prison labor and other parts of criminal law and procedure.²⁴⁷ The other states cabin their prison-labor regimes entirely to sections of the code addressing *only* prison regulation.²⁴⁸

To be clear, the placement of these statutes may not be outcome determinative if they are challenged. But courts do consider the structure of the law when interpreting statutes.²⁴⁹ And the decision to place these statutes alongside others having to do with prison administration instead of criminal punishment may be suggestive of legislative intent.²⁵⁰

2. *Empowering Prison Bureaucrats.* — Perhaps more important than where these statutes are situated within the code is with whom they site decisionmaking power. And almost uniformly, these statutes empower prison administrators. In one respect, this is predictable. There are innumerable decisions that *someone* must make to run a prison, and so delegating those decisions to a prison administrator—who presumably has some expertise in the subject—makes sense.

But once again, what makes empowering administrators here odd is the differential treatment of enslavement compared to other criminal

247. See Cal. Penal Code § 2700 (2024) (located within the Penal Code under Title 1, “Imprisonment of Male Prisoners in State Prisons”); Del. Code tit. 11, § 6532 (2024) (located within Title 11, “Crimes and Criminal Procedure,” but under the subcategory “Department of Correction”); D.C. Code § 24-201.12 (2024) (located within Division IV, “Criminal Law and Procedure and Prisoners,” within Title 24, “Prisoners and Their Treatment”); Fla. Stat. Ann. § 946.002 (West 2023) (located within Title XLVII, “Criminal Procedure and Corrections,” but under Chapter 946 “Inmate Labor and Correctional Work Programs”); Iowa Code § 904.701 (2024) (located within Title XVI, “Criminal Law and Procedure,” but under Chapter 904, “Department of Corrections”); La. Stat. Ann. § 15:832 (2024) (located within Title 15, “Criminal Procedure,” but under Chapter 7, “Prisons and Correctional institutions”); Me. Rev. Stat. tit. 15, § 1793 (West 2023) (located within Title 15, “Court Procedure—Criminal”); N.H. Rev. Stat. Ann. §§ 622:26–622:32 (2024) (located within Title LX, correction and punishment); Okla. Stat. Ann. tit. 22, § 1514 (located in Title 22, criminal procedure); S.C. Code Ann. § 17-25-70, § 17-25-80 (2024) (located within Title 17, criminal procedures); Wyo. Stat. Ann. § 7-16-202 (2023) (located within Title 7, “Criminal Procedure,” but separated from Chapter 13, “Sentence and Imprisonment”).

248. See, e.g., Tenn. Code Ann. § 41-1-402 (2024) (“Correctional Institutions and Inmates”); Tex. Gov’t Code Ann. § 497.099 (West 2023) (“Corrections”); Utah Code § 64-9b-1 (2023) (“State Institutions”); W. Va. Code Ann. § 25-7-1 (LexisNexis 2023) (“Division of Corrections”); Wis. Stat. & Ann. § 303.19 (2024) (“Corrections”).

249. See, e.g., *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 25 (1982) (discussing the structure of the Internal Revenue Code).

250. See, e.g., *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 810 (1986) (noting the importance of legislative intent in interpreting certain statutes); see also *Hamer v. City of Trinidad*, 441 F. Supp. 3d 1155, 1166 (D. Colo. 2020) (describing the basic principle of statutory interpretation that “the court’s ‘primary task’ is to decipher ‘[legislative] intent, using traditional tools of statutory interpretation’” including the statute’s “structure and context . . . as well as its purpose, history, and relationship to other statutes” (first quoting *Izzo v. Wiley*, 620 F.3d 1257, 1260 (10th Cir. 2010); then citing *In re Mallo*, 774 F.3d 1313, 1317 (10th Cir. 2014); and then citing *New Mexico v. Dep’t of Interior*, 854 F.3d 1207, 1223–24 (10th Cir. 2017))).

punishments. While the law expects judges to impose other criminal punishments, here the judiciary is absent. Indeed, in jurisdictions with some permissive administrative-enslavement statutes, prison administrators seemingly have the power to decide whether to impose this punishment at all.²⁵¹

In Delaware, for example, the Department of Correction “*may* establish compulsory programs of employment, work experience and training for all physically able inmates.”²⁵² Likewise, in Arizona, “[t]he director has the authority to require that each able-bodied prisoner under commitment to the state department of corrections engage in hard labor for not less than forty hours per week.”²⁵³ Georgia is much the same: “The department or any state correctional institution or county correctional institution operating under jurisdiction of the board shall be authorized to require inmates coming into its custody to labor on the public roads or public works or in such other manner as the board may deem advisable”²⁵⁴ Each of these states would seem to give prison administrators the power to decide not only how to implement enslavement as punishment but also whether to impose that punishment at all on individuals and within the jurisdiction generally.

Other jurisdictions do not give prison administrators the ability to decide whether to have enslavement regimes but do entrust them with implementing those regimes. Practically, this seems to mean that prison administrators, although not able to decide wholesale whether to have a forced labor program, are given control over whether any individual prisoner is subjected to that program.

This discretion occurs because of practical limitations that many statutes recognize. Florida may mandate that “[t]he department shall require of every able-bodied prisoner imprisoned in any institution as many hours of faithful labor in each day and every day during his or her term of imprisonment as shall be prescribed by the rules of the department.”²⁵⁵ But that mandate is subjected to the reality that there may simply not be enough work to employ every prisoner.²⁵⁶ What appears to be a strong mandate, then, is in reality aspirational.

251. See *infra* section II.C.1 (discussing the differences between mandatory and permissive statutes).

252. Del. Code tit. 11, § 6532 (emphasis added).

253. Ariz. Rev. Stat. Ann. § 31-251 (2024).

254. Ga. Code Ann. § 42-5-60(e) (2023).

255. Fla. Stat. Ann. § 946.002(1)(a) (West 2023).

256. See *id.* § 946.002(1)(b) (“A goal of the department shall be for all inmates . . . to work at least 40 hours a week. Until this goal can be accomplished, the department shall maximize the utilization of inmates within existing resources.”); see also, e.g., 730 Ill. Comp. Stat. Ann. 5 / 3-12-1 (West 2023) (“The Department [of Corrections] shall, in so far as possible, employ at useful work committed persons confined in institutions and facilities of the Department”).

Of course, not all statutes explicitly recognize these practical limitations. Iowa, for example, states plainly that “[a]n inmate of an institution shall be required to perform hard labor . . . in the industries established in connection with the institution, or at such other places as may be determined by the director.”²⁵⁷ Oregon’s constitutional provision is similarly unequivocal.²⁵⁸

Despite these differences, what unites almost all of the statutes discussed is the absence of the judiciary. It is rare that states give a judge any role to play, and to the extent the judiciary is mentioned, it is usually in the context of hard labor or “workhouses.”²⁵⁹ But the role these sorts of statutes play in the current system of prison labor appears minimal. For example, Ohio’s statute explicitly providing for courts to sentence a person to hard labor has been cited only twice in Westlaw and never by a court.²⁶⁰ By contrast, Ohio’s involuntary manslaughter statute has been cited by over 2,000 cases.²⁶¹ This comparison is not perfect—perhaps explicit hard labor sentences are common but rarely litigated and so rarely generate published opinions—but it is not surprising because these sentences operate against the backdrop of an administrative-enslavement regime. There is little need to provide an explicit sentence of hard labor when the unspoken default provides it anyway.

There are, however, a few states that envision a relatively limited role for the judiciary outside of the “workhouse.” Tennessee allows judges to

257. Iowa Code § 904.701(1) (2024).

258. Or. Const. art. I, § 41(2) (“All inmates of state corrections institutions shall be actively engaged full-time in work or on-the-job training.”).

259. See, e.g., Me. Rev. Stat. Ann. tit. 15, § 1793 (West 2024) (discussing work-jails); Ohio Rev. Code Ann. § 5147.17 (2024) (“[A] court or magistrate may sentence persons convicted of offenses, the punishment of which is, in whole or in part, imprisonment in the county jail or workhouse, to be imprisoned at hard labor within such county for the same terms or periods as are prescribed for their confinement . . .”); Wis. Stat. & Ann. § 303.18(1) (2024) (allowing for sentences to “the house of correction . . . at hard labor”). Note, however, that even here the punishment of labor often gets no mention in the states’ sentencing regime. See, e.g., Me. Rev. Stat. Ann. tit. 17-A, § 1602 (West 2024) (detailing sentencing procedures); Ohio Rev. Code Ann. § 2929.12 (2024) (explaining factors to consider in felony sentencing); id. § 2929.19 (detailing how felony sentencing hearings are to be conducted). But see Wis. Stat. & Ann. § 973.013(1)(b) (2024) (noting that “the sentence [of an indeterminate prison term] shall have the effect of a sentence at hard labor for the maximum term fixed by the court”).

260. A Westlaw search of Ohio Rev. Code Ann. § 5147.17 shows that it has been cited twice as of January 27, 2024: once in another part of the Ohio code, id. § 5147.20, and once by a treatise, Russell J. Davis, 73 Ohio Juris. Penal Institutions § 191 (3d ed. 2024). See Westlaw, <https://westlaw.com> (last visited Jan. 27, 2024) (first open Ohio Rev. Code Ann. § 5147.17; and then select “Citing References”).

261. A Westlaw search of Ohio Rev. Code Ann. § 2903.04 found 2,147 cases cited. See Westlaw, <https://westlaw.com> (last visited Jan. 27, 2024) (first open Ohio Rev. Code Ann. § 2903.04; then select “Citing References”; and then select “Cases” within the “Content types” tab). Nearly all of these cases are appeals, perhaps reflecting the dearth of Ohio trial court indexing on Westlaw.

declare that an individual is “too dangerous . . . or physically unable” to work.²⁶² And North Dakota allows the court to prohibit work release.²⁶³

Four states would seem to allow relatively broad judicial intervention, at least for some defendants. Oklahoma states that someone “may be assigned work duties as ordered or approved by the judge.”²⁶⁴ This is perhaps the most explicit recognition of a judge’s ability to shape slavery or involuntary servitude in the same way that they fashion other punishments. But the reach of this statute is limited: It applies only to a person convicted of a nonviolent felony in the county jail.²⁶⁵

South Dakota seemingly requires judges to decide whether defendants’ confinement will be at hard labor.²⁶⁶ Unsurprisingly, however, this requirement is not imported into South Dakota’s rule listing punishments for felonies,²⁶⁷ and its rule stating what must be listed in a judgment for felony and certain misdemeanor cases does not mention prison labor.²⁶⁸

New Mexico and Colorado, by contrast, are not as explicit, but the role the judiciary might take under these statutes is broad. Both make an exception to their forced labor requirement for those “precluded [from labor] by the terms of the judgment.”²⁶⁹ Presumably, then, judges in both states could take advantage of this statutory exception to the administrative-enslavement regime to reinsert their traditional role in deciding criminal punishment.²⁷⁰

262. Tenn. Code Ann. § 41-1-402 (2024) (“All inmates within the correctional system, except those designated by a judge, warden or medical personnel as being either too dangerous to society or physically unable, shall be required to perform some type of work.”).

263. See N.D. Cent. Code § 12-44.1-18.1 (2023) (“A correctional facility may provide for a work release program for inmates unless the court has ordered that an inmate may not receive work release.”).

264. Okla. Stat. tit. 22, § 991a-2(C) (2024) (“Any person incarcerated in the county jail pursuant to the provisions of this section may be assigned work duties as ordered or approved by the judge.”).

265. *Id.* § 991a-2(A).

266. See S.D. Codified Laws § 24-11-28 (2024) (“Such court, when passing judgment of imprisonment, shall determine and specify whether such confinement shall be at hard labor or not.”).

267. See *id.* § 22-6-1.

268. See *id.* § 23A-27-4.

269. Colo. Rev. Stat. § 17-20-115 (2024) (“All persons convicted of any crime and confined in any state correctional facilities under the laws of this state, except such as are precluded by the terms of the judgment of conviction, shall participate in a rehabilitation and work program . . .”); N.M. Stat. Ann. § 33-8-4 (2024) (“All persons convicted of crime and confined in a facility under the laws of the state except such as are precluded by the terms of the judgment and sentence . . .”).

270. It is unclear how this statute currently functions in Colorado after the recent amendment to its state constitution to abolish slavery and involuntary servitude in totality. See P.R. Lockhart, Colorado Passes Amendment A, Voting to Officially Abolish Prison Slavery, Vox, <https://www.vox.com/policy-and-politics/2018/11/6/18056408/colorado-election-results-amendment-a-slavery-forced-prison-labor-passes> [<https://perma.cc/3B3Q->

These statutes show some holes in the administrative-enslavement regime, but it is important to remember their limited reach. Few reach all sentences a judge might impose, and many states make no mention of the judiciary at all.

B. *The Overwhelming Absence of Punishment*

Thus far, this Article has primarily contrasted administrative-enslavement statutes with other parts of the criminal code to show how they treat enslavement differentially from other criminal punishments. Now it turns to a different question: What do these statutes envision as the purpose of forced labor?

Not every statute explicitly states its purposes, but some do. And conspicuously absent from all of them is the one purpose that is constitutionally required: punishment. Indeed, only Vermont's constitutional provision providing for hard labor explicitly mentions the word "punishment."²⁷¹ Instead, those statutes that explicate reasons for requiring imprisoned people to work center four themes: providing

4XT5] (last updated Nov. 7, 2018) (explaining Colorado's vote to remove "except clause" language from its constitution); see also Colo. Const. art. II, § 26 ("There shall never be in this state either slavery or involuntary servitude.").

271. Vt. Const. ch. II, § 64 ("To deter more effectually from the commission of crimes, by continued visible punishments of long duration . . . means ought to be provided for punishing by hard labor . . ."). It is an open question how Vermont intends to harmonize this provision with its recently passed amendment to prohibit slavery and involuntary servitude entirely. See id. ch. I, art. 1 ("That all persons are born equally free and independent, and have certain natural, inherent, and unalienable rights . . . therefore slavery and indentured servitude in any form are prohibited."); PR.2, Vt. Gen. Assembly, <https://legislature.vermont.gov/bill/status/2020/PR.2> [<https://perma.cc/XP8W-9LTG>] (last updated Jan. 23, 2020) (tracking the passage of the amendment).

restitution, preventing idleness, encouraging rehabilitation,²⁷² and saving the jurisdiction money.²⁷³

The first three goals seem facially laudable, as they could benefit both the imprisoned person and society more broadly. Minnesota, for instance, seems to require its labor regime to serve rehabilitative ends.²⁷⁴ And Oklahoma provides multiple work possibilities that could serve different purposes. A convicted person might work “at jobs in the private sector to pay restitution and support their dependents,” or they might participate in “educational or treatment endeavors as a part of a rehabilitation program.”²⁷⁵

But saving the state money seems more problematic. The most obvious way that administrative enslavement allows the state to save money, after all, is by cutting some labor costs near or to zero.²⁷⁶ California, for instance, recently raised the minimum wage for some nonincarcerated food service employees to twenty dollars per hour.²⁷⁷ But as Tue Kha, a writer incarcerated in California, explained, “A wage above 50 cents an

272. There is, of course, some “inherent overlap and . . . difficulty in drawing lines between rehabilitative and punitive or deterrent sanctions.” *People v. Letterlough*, 655 N.E.2d 146, 149 (N.Y. 1995). Recognizing both this overlap and rehabilitation’s role as one of the traditional justifications for criminal punishment, this Article draws a distinction between rehabilitation and punishment *qua* punishment for two reasons. First, the structural choices discussed in these statutes suggest that legislatures thought of rehabilitation as a separate goal from punishing someone convicted of a crime. That belief is bolstered by the presence of reasons for imposing forced labor that are clearly unrelated to punishment, like saving the state money. Given the modern shift to retribution as the primary justification for criminal punishment, this differentiation is perhaps unsurprising. See, e.g., Edward Rubin, *Just Say No to Retribution*, 7 *Buff. Crim. L. Rev.* 17, 17–21 (2003) (arguing against a proposal for the Model Penal Code to adopt retribution as the primary justification for criminal punishment). Second, while rehabilitation might serve as a theoretical basis for punishment, it should be differentiated from rehabilitation *as* punishment, which has historically provided a basis for horrific abuses. See Francis A. Allen, *Address, The Decline of the Rehabilitative Ideal in American Criminal Justice*, 27 *Clev. St. L. Rev.* 147, 149 (1978) (noting that the “techniques of rehabilitation” have “included the use of the whip and the club” and “drastic therapies like psycho-surgery, behavior modification, and the like” and contrasting those with rehabilitative “efforts to overcome illiteracy and training in job skills”).

273. While Vermont’s constitution mentions punishment for hard labor, its statute explicating prison labor generally discusses nonpunishment purposes. See, e.g., *Vt. Stat. Ann. tit. 28, § 751b(a)* (2023) (“To return value to communities, to assist victims of crime, to establish good habits of work and responsibility, to promote . . . vocational training . . . to enhance offender employment opportunities, and to reduce the cost of operation of the Department of Corrections and of other State agencies, offenders may be employed . . .”).

274. *Minn. Stat. § 241.20* (2023) (limiting forced labor to “[w]henver the commissioner of corrections deems it conducive to the rehabilitation of inmates”).

275. *Okla. Stat. tit. 22, § 1514* (2024).

276. See, e.g., *S.D. Codified Laws § 24-2-30* (2024) (“Any inmate may be required to work without compensation as a condition of confinement.”).

277. See Kelly McCarthy, *Fast-Food Workers in California to Earn \$20 an Hour in 2024*, ABC News (Sept. 29, 2023), <https://abcnews.go.com/GMA/Food/fast-food-workers-california-earn-20-hour-highest/story?id=103593696> [<https://perma.cc/3ANY-4YFV>].

hour is rare” in California’s prisons, even as incarcerated people work as “electricians, carpenters, cooks, orderlies, fire crew members, braille transcribers and more.”²⁷⁸ And indeed, some states explicitly say that an imprisoned person’s labor is not for their own benefit but for the benefit of the public.²⁷⁹ That is so even when an imprisoned person does dangerous, emergency labor. New Mexico calls for imprisoned people “to work on natural resource projects on public lands, fire suppression and emergency response activities as directed in an emergency declaration issued by the governor.”²⁸⁰ The fact that this work is for the benefit of the state and not the individual is made devastatingly clear by incarcerated people’s inability to perform similar work once free. The City of Albuquerque, for example, disqualifies cadets “convicted of any misdemeanor violation within the last 3 years” and specifies that “[a] felony conviction will automatically disqualify an applicant.”²⁸¹

The laudability or problematic nature of each of these justifications for prison enslavement is beside the point. Whether beneficent or predatory, none of them are constitutionally permissible. These programs are not about labor generally. They are about forced labor—slavery. And much to the chagrin of the enslaved, enslavers have long argued that many such benefits purportedly accrue to those held in bondage.²⁸²

C. *The Future of Administrative Enslavement*

Finally, this Article briefly notes two facets of these statutes that, while seemingly unimportant today, could lead to distinctions in courts’ interpretations of them as prison slavery increasingly comes under attack.

1. *Mandatory, Permissive, and “Policy” Statutes.* — First, not all jurisdictions require that every imprisoned person work. Instead, some

278. Tue Kha, Opinion, Working Salary in Prison, Prison Journalism Project (July 30, 2021), <https://prisonjournalismproject.org/2021/07/30/working-salary-in-prison> [<https://perma.cc/LZQ4-KP6G>]. Wages for incarcerated people in California prisons have remained stagnant for over four decades. John L. Orr, In 40 Years, Not a Single Raise for California Prisoners, Prison Journalism Project (June 6, 2023), <https://prisonjournalismproject.org/2023/06/06/california-prison-wages-stagnant-for-40-years> [<https://perma.cc/ADL6-EL6V>].

279. See, e.g., N.C. Gen. Stat. § 148-26 (2023) (“Work assignments and employment shall be for the public benefit to reduce the cost of maintaining the inmate population while enabling inmates to acquire or retain skills and work habits needed to secure honest employment after their release.”).

280. N.M. Stat. Ann. § 33-13-3 (2024).

281. Become a Firefighter, City of Albuquerque, <https://www.cabq.gov/fire/become-a-firefighter> [<https://perma.cc/6XTJ-7Y9A>] (last visited Jan. 27, 2024).

282. See, e.g., Nicole Phillip, ‘It Was Very Humiliating’: Readers Share How They Were Taught About Slavery, N.Y. Times Mag. (Sept. 27, 2019), <https://www.nytimes.com/interactive/2019/09/27/magazine/slavery-education-school-1619-project.html> (on file with the *Columbia Law Review*) (“In the fifth grade, my textbook said that many enslaved people were ‘sad’ that slavery ended, because their enslavers took care of them and gave them food and clothing.” (quoting the *New York Times Magazine* reader Kian Glenn)).

statutes use mandatory language, and some use permissive language.²⁸³ Within mandatory statutes, there are two variations. There are statutes that use strong mandatory language, stating that each imprisoned person shall work or is required to work.²⁸⁴ Other states use language that could, but need not, be interpreted as mandatory. Generally, these statutes use some mandatory language but grant a prison bureaucrat the authority to decide whether to actually force prisoners to work. Arizona, for example, states that “[t]he director has the authority to require that each able-bodied prisoner under commitment to the state department of corrections engage in hard labor for not less than forty hours per week.”²⁸⁵

Permissive statutes, by contrast, either speak about prison-labor regimes in general terms without explicitly saying that all imprisoned people are required to work or imply that not every imprisoned person is required to work. Arkansas is an example of this first category, while the District of Columbia and federal law are examples of the second. Despite extensive regulation of imprisoned people’s labor,²⁸⁶ Arkansas does not describe whether any imprisoned person *must* work. Instead, the closest Arkansas comes is a statement of intent that more imprisoned people should be working.²⁸⁷ The D.C. Code, meanwhile, frames prison labor as a possibility. It says that “[p]ersons sentenced to imprisonment in the Jail may be employed at such labor and under such regulations as may be prescribed by the Council of the District of Columbia.”²⁸⁸ Digging into the Department of Corrections regulations, however, suggests that this “may” is actually a “will.”²⁸⁹ Permissive statutes can also direct the creation of a

283. Within these categories, states will sometimes couch mandatory language as a “policy of the state.” See, e.g., Md. Code Ann., Corr. Servs. § 9-502 (West 2023); N.C. Gen. Stat. § 148-26 (2023).

284. See, e.g., Cal. Penal Code § 2700 (2024) (“The Department of Corrections shall require of every able-bodied prisoner imprisoned in any state prison as many hours of faithful labor . . . prescribed by the rules and regulations . . .”); Fla. Stat. Ann. § 946.002 (West 2023) (“The department shall require of every able-bodied prisoner imprisoned in any institution as many hours of faithful labor . . . as shall be prescribed by the rules of the department.”); Idaho Code § 20-101 (2024) (“All persons . . . sentenced to confinement in the state prison . . . must . . . perform such labor under such rules and regulations as may be prescribed by the state board of correction.”).

285. Ariz. Rev. Stat. Ann. § 31-251 (2024); see also Ga. Code Ann. § 42-5-60 (2024) (“The board shall provide rules and regulations governing the hiring out of inmates . . .”).

286. See Ark. Code Ann. §§ 12-30-101 to -503 (2023) (state prisons); id. §§ 12-42-101 to -118 (city and county jails). There is one exception to the statute’s silence on voluntariness involving voluntary imprisoned labor by those in certain county jails working in graveyards and on public projects. See id. § 12-42-117.

287. See id. § 12-30-202 (“Whereas, the means now provided for the employment of prison labor are inadequate to furnish a sufficient number of prisoners with diversified employment . . .”).

288. D.C. Code § 24-201.12 (2024).

289. See D.C. Dep’t of Corr., Pol’y & Proc. 4210.2I 2 (2017), <https://doc.dc.gov/sites/default/files/dc/sites/doc/publication/attachments/PP%204210.2I%20Inmate%20Institutional%20Work%20Program%2006202017.pdf> [https://perma.cc/WL4E-ADTC] (“It is DOC policy to employ eligible inmates to assist with maintaining day-

labor program without explicitly directing imprisoned people to work. The federal government is perhaps the prototypical example. Section 4001 of the federal criminal code states that “[t]he Attorney General *may* establish and conduct” various work industries.²⁹⁰ Again, though, the relevant regulation clarifies that, in fact, labor in Bureau of Prison facilities is mandatory.²⁹¹ The distinction between statutory and regulatory mandates could prove important, but courts’ historical deference to prison administrators suggests that courts will likely uphold administrative decisions like these.²⁹²

2. “*Voluntary*” Labor. — Second, there are already some regimes that either explicitly or implicitly call for prison labor to be voluntary. Rhode Island, for example, has had a total constitutional prohibition on slavery since 1842.²⁹³ Nevertheless, its current prison-labor statute does not seem to account for this prohibition. Like many other states, Rhode Island says plainly and expansively that “[a]ll persons imprisoned in the adult correctional institutions on account of their conviction of any criminal offense . . . or for not giving the recognizance required of them to keep the peace upon complaint for threats, shall be let or kept at labor.”²⁹⁴ Even before its recent constitutional amendment,²⁹⁵ a Utah statute added a voluntariness requirement to its prison-labor regime.²⁹⁶ And both South Carolina and Connecticut explicitly say that participation in at least some prison industries must be voluntary.²⁹⁷ Finally, Colorado, despite its 2018

to-day facility operations and to reduce inmate idleness, while allowing the inmate to improve and/or develop useful job skills, work habits, and experiences that will assist in post-release employment.”).

290. See 18 U.S.C. § 4001 (2018) (emphasis added).

291. 28 C.F.R. § 545.23 (2024) (“Each sentenced inmate who is physically and mentally able is to be assigned to an institutional, industrial, or commissary work program.”).

292. See Raghunath, *supra* note 8, at 399–404 (describing the prison deference doctrine).

293. R.I. Const. art. I, § 4; see also Simeon Spencer, *Emancipation on the Ballot: Why Slavery Is Still Legal in America—And How Voters Can Take Action*, NAACP Legal Def. Fund (June 17, 2022), <https://www.naacpldf.org/13th-amendment-emancipation> [<https://perma.cc/E73H-BWA7>] (last updated Oct. 18, 2022).

294. 42 R.I. Gen. Laws § 42-56-21(a) (2024).

295. See Edwin Rios, *Movement Grows to Abolish US Prison Labor System that Treats Workers as ‘Less Than Human’*, *The Guardian* (Dec. 24, 2022), <https://www.theguardian.com/us-news/2022/dec/24/us-prison-labor-workers-slavery-13th-amendment-constitution> [<https://perma.cc/N3FD-X3H3>] (discussing the Utah constitutional amendment).

296. See Utah Code § 64-9b-4 (2023) (“Rehabilitative and job opportunities at the Utah state prison and participating county jails shall not be forced upon any inmate contrary to the Utah Constitution, Article XVI, Section 3 (2), but instead shall be on a completely voluntary basis.”).

297. See Conn. Gen. Stat. Ann. § 18-90a (West 2023) (“The Commissioner of Correction may permit any inmate of a correctional facility under his jurisdiction to be employed by . . . the state . . . or any private, nonprofit entity which desires to make use of the services of such inmates, provided participation by such inmates shall be voluntary.”); S.C. Code Ann. § 24-3-315 (2024) (“The Department of Corrections shall ensure that

constitutional amendment prohibiting slavery and involuntary servitude,²⁹⁸ requires that “[e]very inmate shall participate in the work most suitable to the inmate’s capacity.”²⁹⁹ And a lawsuit filed by incarcerated people in Colorado alleges that they worked under threat of punishment in kitchens despite health concerns during the pandemic, suggesting that Colorado’s on-the-ground forced labor practices, much like its statutes, have not changed.³⁰⁰

But all of these “voluntary” statutes play into the question raised in *Watson*, which will quickly become vital as more incarcerated people maintain their Thirteenth Amendment (or state-equivalent) rights: voluntary compared to what?³⁰¹

* * *

Except Clause jurisprudence and this constellation of statutes have thus created what this Article calls administrative enslavement. To reiterate, administrative enslavement is the prevailing regime of forced labor in United States jails and prisons that the Thirteenth Amendment’s Except Clause enables. While that clause limits enslavement to punishment for a crime, the administrative-enslavement regime instead treats it—both procedurally and substantively—like an aspect of nonpunishment prison administration. Most dramatically, this means that while other criminal punishments are tied to specific criminal offenses and imposed by the judiciary, the punishment of enslavement is separated into distinct parts of a jurisdiction’s code and controlled by prison bureaucrats. Having explicated the genesis of administrative enslavement’s jurisprudence and created a taxonomy of its statutory framework, this Article now turns to the questions of how and whether administrative enslavement might end.

III. ENDING ADMINISTRATIVE ENSLAVEMENT

Thus far, this Article has engaged in an overwhelmingly descriptive project. Tracing the history of Except Clause jurisprudence and uncovering the taxonomy of administrative enslavement through the nation’s statutes does not inherently suggest whether those aspects of our

inmates participating in any prison industry program pursuant to the Justice Assistance Act of 1984 is on a voluntary basis.”).

298. See Lockhart, *supra* note 270.

299. Colo. Rev. Stat. § 17-20-117 (2024).

300. See *Captive Labor*, *supra* note 1, at 16 (citing and discussing Class Action Complaint, *Lilgerose v. Polis*, No. 2022CV30421 (Colo. Dist. Ct. filed Feb. 15, 2022)); see also *Lamar v. Williams*, No. 21CA0511, 2022 WL 3639545, at *7 (Colo. App. Aug. 18, 2022) (holding that the Colorado Department of Corrections’ work program was not involuntary servitude and so was permissible despite Colorado’s removing the Except Clause from its state constitution).

301. See *Watson v. Graves*, 909 F.2d 1549, 1552–53 (5th Cir. 1990) (finding no Thirteenth Amendment violation because *Watson* could either labor or remain in his cell).

society are good or bad. Now it shifts to arguments that administrative enslavement is legally unsound. To that end, this Part will suggest several ways that different actors might work to end the administrative-enslavement regime. Finally, it will address several hurdles that attempts to end the administrative-enslavement regime may face and conclude with suggestions for future research.

Before turning to these arguments, I begin with several admissions and caveats. The first admission is about my priors: I, like many but not all people, believe that slavery and involuntary servitude should be eradicated in their totality.³⁰² Given that, I believe that the first-best solution to the problem of administrative enslavement isn't to make it less administrative but to end enslavement through constitutional amendment. I recognize, however, that currently the federal and most state constitutions allow the legal enslavement of convicted people—even if, as I argue, they do not allow our current system of *administrative* enslavement. What follows, then, are second-best solutions to the broader problem of enslavement and involuntary servitude that instead target the administrative nature of our current regime. They seek to align the process of and thought given to imposing that punishment with how we treat other criminal punishments, while also hopefully shrinking the number of people who are legally enslaved. Finally, each of these arguments likely merits an article (or more) to fully probe them. Because this is the first Article to catalogue the administrative nature of administrative enslavement, this section intends only to introduce some potentially promising arguments against the current system, as opposed to unearthing the full depth of any one of them.

A. *Legal Attacks: Must Administrative Enslavement End?*

There are numerous plausible legal attacks on the administrative-enslavement regime. The courts' decisions to speak in broad strokes, with little analysis and sparse precedent, served to rubber stamp (and expand)

302. Then-Professor Stephanos Bibas, in *The Machinery of Criminal Justice*, has suggested that forced labor in the carceral context may be a positive good. See Stephanos Bibas, *The Machinery of Criminal Justice* 133–40 (2012). While he identifies many of the same benefits of imprisoned people working that this Article might—developing skills, fostering discipline, even creating a sense of purpose—he suggests these are the benefits of *forcing* imprisoned people to work. *Id.* at 137–38. What he does not fully contend with, however, is the possibility that the personal and societal benefits that might accrue from working could be significantly blunted if that work comes not through the typical inducements to work that our society has, but through enslavement. The connections between our current system of mass incarceration and history of chattel enslavement underscore that harm, as does the long history of imprisoned people striking—sometimes employing violent tactics—against forced labor. See Note, *Striking the Right Balance: Toward a Better Understanding of Prison Strikes*, 132 *Harv. L. Rev.* 1490, 1491–501 (2019). Regardless of the answer to this empirical, functional question, however, we must also grapple seriously with the moral question of whether we would like to be a society that continues to enslave people either for functional or punitive reasons. Neither Bibas nor this Article grapples with that difficult question with the rigor it deserves, although it is one that I hope to analyze in future research.

the regime. But they have also left the theoretical and jurisprudential underpinnings of administrative enslavement weak and underdeveloped. Here the Article outlines four legal problems and weaknesses within administrative enslavement. The first three are constitutional arguments that might be litigated, while the fourth suggests that prosecutors and defense attorneys use the plea-bargaining process to preserve Thirteenth Amendment rights.

1. *Improper Delegation and Usurpation of the Judicial Role.* — This first argument is the legal version of an oddity noted earlier in the Except Clause context.³⁰³ While judges are often fiercely protective of their sentencing discretion, here they have overwhelmingly supported placing everything about enslavement and involuntary servitude punishment decisions into the hands of prison administrators.

This key aspect of administrative enslavement may be more than just an oddity; it may also be a violation of the separation of powers. This separation of powers problem can be seen through the lens of an improper delegation of the judicial power, or it might be characterized as a usurpation of the judicial power over criminal sentencing.³⁰⁴

The first variation of this argument draws on a line of cases dealing with supervised-release conditions. In those cases, defendants successfully argued that certain conditions impermissibly delegated Article III's judicial authority to decide cases or controversies to nonjudicial actors, specifically probation officers.³⁰⁵ There, cases turned on whether the court "retain[ed] and exercise[d] ultimate responsibility" to decide the case or if it instead delegated to the probation officer final decisionmaking authority.³⁰⁶ Often, the key to this distinction was whether the probation

303. See *supra* note 12 and accompanying text.

304. The overlap between the improper delegation and usurpation variants of these arguments can most clearly be seen in the attacks on the creation and use of magistrate and bankruptcy court judges. See *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 683 (2015) ("[Respondent] contends that to the extent litigants may validly consent to adjudication by a bankruptcy court, such consent must be express."); *Roell v. Withrow*, 538 U.S. 580, 583–84 (2003) (challenging the use of inferences to determine that a prisoner consented to proceedings before a magistrate judge); *Peretz v. United States*, 501 U.S. 923, 932 (1991) (considering whether magistrate judges can be delegated *voir dire* duties).

305. See, e.g., *United States v. Boles*, 914 F.3d 95, 110 (2d Cir. 2019) (striking a requirement that a defendant notify another person when "the probation officer determines that [they] pose a risk to another person"); *United States v. Voelker*, 489 F.3d 139, 154 (3d Cir. 2007) (striking down a condition prohibiting contact with minors because the court "delegated absolute authority to the Probation Office to allow any such contacts while providing no guidance whatsoever for the exercise of that discretion"). But see *United States v. Janis*, 995 F.3d 647, 653 (8th Cir. 2021), cert. denied, 142 S. Ct. 483 (2021) (finding the same risk provision from *Boles* not an impermissible delegation because there was no "affirmative indication" that the district court would "not retain ultimate authority over all of the conditions of supervised release" (quoting *United States v. Robertson*, 948 F.3d 912, 920 (8th Cir. 2020), cert. denied, 141 S. Ct. 298 (2020))).

306. *United States v. Kent*, 209 F.3d 1073, 1078 (8th Cir. 2000) (quoting *United States v. Johnson*, 48 F.3d 806, 808–09 (4th Cir. 1995)).

officer could decide not only the administrative details necessary to implement a condition, such as approving a specific drug treatment program, but also whether the condition would be imposed at all.³⁰⁷

Taking seriously the idea that enslavement is a punishment and not an administrative matter would seem to place administrative enslavement in this doctrine's crosshairs. The judiciary writ large has delegated to prison administrators not only power over how this punishment will be imposed—for example, through setting an imprisoned person's hours, pay, or assigned task—but in many cases the decision whether to impose this punishment at all. But here, there is an additional wrinkle in that the judiciary has even delegated its traditional role of *informing* defendants that this punishment will be imposed. Instead, that role too has been passed on to prison administrators.

Similar to this argument is one suggesting that administrative enslavement usurps the judicial role.³⁰⁸ While the delegation argument targets the judiciary's actions, a usurpation argument instead targets the legislature's. Over a century ago, the Court stated that “[i]ndisputably under our constitutional system the right to try offenses against the criminal laws, and, upon conviction, to impose the punishment provided by law, is judicial.”³⁰⁹ And judges ever since have taken their assigned role seriously.

An excellent example of this is the attempt to have mandatory federal sentencing guidelines. While the separation of powers arguments leveled at the Guidelines ultimately proved unsuccessful before the Supreme Court,³¹⁰ they gained significant purchase in the lower courts³¹¹ and, perhaps most importantly, represented only the first shot across the bow in sustained and successful judicial resistance to a perceived encroachment on the judicial role.³¹² Separation of powers arguments like these may therefore serve two roles: a potential substantive attack on the administrative-enslavement regime and a way to galvanize the judiciary.

307. See *id.* at 1079 (“[W]e find that the lower court improperly delegated a judicial function to Kent’s probation officer when it allowed the officer to determine whether Kent would undergo counseling.”).

308. See U.S. Const. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

309. *Ex parte United States*, 242 U.S. 27, 41 (1916).

310. See *Mistretta v. United States*, 488 U.S. 361, 412 (1989) (“The Constitution’s structural protections do not prohibit Congress from delegating to an expert body located within the Judicial Branch the intricate task of formulating sentencing guidelines consistent with such significant statutory direction as is present here.”).

311. See *United States v. Brown*, 690 F. Supp. 1423, 1426 & n.3 (E.D. Pa. 1988) (noting that of almost 200 challenges, “116 district court judges ha[d] declared the [G]uidelines unconstitutional” on a variety of grounds); *United States v. Arnold*, 678 F. Supp. 1463, 1469–72 (S.D. Cal. 1988) (striking down the Guidelines on separation of powers grounds).

312. See *United States v. Booker*, 543 U.S. 220, 245–46 (2005) (holding the Guidelines advisory).

Begin with the substantive argument, captured well by the extended discussion of the then-new mandatory Sentencing Guidelines in *United States v. Scott*.³¹³ There, after striking down the Guidelines as an unconstitutional violation of the separation of powers, Judge Guerrero Burciaga opined at length on a list of “[o]ther [c]oncerns” the Guidelines raised.³¹⁴ His “first and fundamental concern with the new sentencing system [was] that the sentencing process usurps and undermines the function of the judiciary in our system of government.”³¹⁵ The argument against the then-mandatory Guidelines was simple: Congress acted impermissibly when it allowed the Executive Branch,³¹⁶ through the Sentencing Commission, to not only implement a sentence decided by the judiciary but also to create rigid, mandatory structures that functionally decided the sentence for each individual defendant.³¹⁷ This, as James Madison once wrote, was an example of “subvert[ing]” the Constitution’s structures by allowing “the *whole* power of one department [to be] exercised by the same hands which possess the *whole* power of another department.”³¹⁸ And Judge Burciaga was far from alone in protecting the judiciary’s sentencing power from the Guidelines’ encroachment. Judge Clarence C. Newcomer noted in his own 1988 decision striking down the Guidelines that out of 194 challenges, “116 district court judges have declared the [G]uidelines unconstitutional.”³¹⁹ While these bromides against the mandatory Guidelines were ultimately unsuccessful,³²⁰ that does not mean all such attacks have been. In a noncriminal area, the idea of usurping judicial power has motivated the increasingly successful attacks on administrative deference.³²¹

313. 688 F. Supp. 1483 (D.N.M. 1988).

314. *Id.* at 1493.

315. *Id.*

316. The Sentencing Commission is an odd creature. It is technically located within the Judicial Branch, but the Executive has the power to both appoint its members (several of whom must be federal judges) and to remove them from the Commission for cause. See *Mistretta v. United States*, 488 U.S. 361, 408–11 (1989).

317. See *Scott*, 688 F. Supp. at 1493–94.

318. *Id.* at 1494 (quoting *The Federalist* No. 47, at 245 (James Madison) (Wills ed., 1982)).

319. *United States v. Brown*, 690 F. Supp. 1423, 1426 (E.D. Pa. 1988), *aff’d sub nom.* *Appeal of Brown*, 869 F.2d 587 (3d Cir. 1989), *aff’d*, 869 F.2d 592 (3d Cir. 1989).

320. See *Mistretta*, 488 U.S. at 676 (rejecting both separation of powers and improper delegation arguments to the Guidelines). This was not without consequence, as a number of judges retired from the bench instead of acquiescing to the mandatory Guidelines regime. See Ricardo J. Bascuas, *The American Inquisition: Sentencing After the Federal Guidelines*, 45 *Wake Forest L. Rev.* 1, 20–21 (2010) (“Over the next several years [after *Mistretta*], judges experienced in the pre-Guidelines sentencing regime would clear the bench and be replaced by judges who were comfortable viewing sentencing as a ministerial, computational chore rather than a judicial act freighted with political and moral responsibility.”).

321. See, e.g., *Michigan v. Env’t Prot. Agency*, 576 U.S. 743, 760–62 (2015) (Thomas, J., concurring) (“Such a transfer [of decisionmaking authority in interpreting statutes] is in

The potential usurpation here is, if anything, more extreme. While the mandatory Sentencing Guidelines envisioned a role for the judiciary, albeit a more limited one,³²² administrative-enslavement statutes rarely mention the judiciary. And fewer still imagine any formal role for the judiciary to play. Instead, everything about the imposition of the punishment of enslavement is placed in the hands of departments of corrections and other prison bureaucrats—that is, executive branch officers.

Ultimately, from an advocate's perspective, the exact form of these arguments may matter less than their ability to highlight for the judiciary how administrative enslavement has encroached on this core part of their judicial role. After all, the judicial-usurpation argument failed to undo the mandatory Guidelines. But a significant part of the federal judiciary continued to voice its displeasure until those Guidelines were made advisory in *Booker*.³²³

2. *Constitutional Interpretation.* — Both originalists and living constitutionalists have strong reasons to consider the administrative-enslavement regime suspect. This section sketches the basic contours of both sides.

a. *The Originalist Argument.* — The originalist argument against the broad reading of the Except Clause underpinning administrative enslavement has best been made across several articles by scholars doing excellent historical research,³²⁴ and so this Article only summarizes it briefly here. The thrust of that argument is that the Thirteenth Amendment's Republican framers held a narrow view of what the Except Clause allowed.³²⁵ While forced labor could be used as a punishment, it could not be used for any other purpose, such as raising public or private revenue or subjugating Black labor.³²⁶ Instead, it was Southern Democrats

tension with Article III's Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies.”).

322. Judges were required to calculate the Guidelines for each individual defendant, which often required deciding which Guidelines applied—and so which sentence was imposed—in each case. See, e.g., *United States v. Booker*, 543 U.S. 220, 227 (2005) (noting that the judge “held a post-trial sentencing proceeding and concluded by a preponderance of the evidence that Booker had possessed an additional 566 grams of crack and that he was guilty of obstructing justice”).

323. See, e.g., David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 *SMU L. Rev.* 211, 220–24 (2004) (describing judicial attempts to push back against the Guidelines and mandatory minimums through policy changes, media, and arrangements with U.S. Attorney's Offices).

324. See Balkin & Levinson, *supra* note 45 (using originalist interpretation to argue against a broad interpretation of the Except Clause); Goodwin, *A Spectacle of Slavery*, *supra* note 14, at 53–66 (same); Howe, *supra* note 37, at 987–88 (same); Pope, *Mass Incarceration*, *supra* note 8, at 1469 (same); cf. Rebecca E. Zietlow, *James Ashley's Thirteenth Amendment*, 112 *Colum. L. Rev.* 1697, 1703–07 (2012) (making an originalist argument for a “broad labor view” of the Thirteenth Amendment aimed at curbing exploitative labor employment).

325. See Pope, *Mass Incarceration*, *supra* note 8, at 1491 (“Republicans, on the other hand, held that the clause left intact the Amendment's protection against a variety of practices.”).

326. See *id.*

who put forward the Clause's current interpretation, which allows for convicted people to be forced to labor for the rest of their lives for less-than-clear penal motives.³²⁷ Though Republicans originally fought back against this interpretation,³²⁸ it ultimately took hold when Democrats took back the Deep South, ending Reconstruction through violence.³²⁹

As Pope recounts, the Republican reading of the Except Clause led these Republican Framers to “appl[y] a version of what we would today call critical or strict scrutiny, looking past the fact of a conviction to probe whether servitude had actually been imposed as a punishment for the particular crime of which the person had been duly convicted.”³³⁰ Under this heightened scrutiny, the Republican Framers condemned any number of practices that occur today, such as allowing enslavement for insufficiently serious crimes, allowing “anyone other than the sentencing authority” to impose the punishment, and allowing private control over imprisoned labor.³³¹ Instead, the Framers read the Except Clause narrowly to allow “only those features of slavery or involuntary servitude that fell within what they conceived as the ‘ordinary’ or ‘usual’ operation of a penal system.”³³²

b. *The Living Constitutionalist Argument.* — The living constitutionalist argument against administrative enslavement is more ambitious and so is one of the few that might be able to end legal enslavement as we know it. Like the originalist argument, it relies on history. But unlike the originalist argument, that history stretches beyond the Second Founding through the “constitutional moment” of the Civil Rights Movement.³³³

In short, a living constitutionalist might base their argument in our experience with a post-Civil War criminal legal system that evolved from the Black Codes to Jim Crow to mass incarceration. This evolution suggests that just as separate-but-equal proved theoretically possible but practically

327. See *id.* at 1478–85 (discussing passage of the Civil Rights Act of 1866, ch. 31, 14 Stat. 27–30, in response to the South's broad interpretation of the Except Clause and subsequent reenslavement of recently freed Black peoples); *id.* at 1486–87 (citing Cong. Globe, 39th Cong., 2d Sess. 238–39 (1867)) (discussing statements from Democrats Willard Saulsbury Sr. of Delaware and Reverdy Johnson of Maryland on the permissibility of convict leasing).

328. *Id.* at 1478–90, 1491–93 (discussing the passage of the 1866 Civil Rights Act and the debate over the unpassed Kasson Resolution).

329. See *id.* at 1493–94 (“Instead of relying on contemporary debates and congressional actions, the Court sometimes chooses to emphasize opinions expressed after Democratic paramilitaries had terminated Reconstruction by violence . . .”).

330. *Id.* at 1491.

331. *Id.* at 1491–92, 1538–50.

332. *Id.* at 1492 (first quoting Cong. Globe, 39th Cong., 2d Sess. 238 (1867) (statement of Sen. Sumner); and then quoting *id.* at 324 (Kasson Resolution)).

333. See Bruce Ackerman, *We the People: The Civil Rights Revolution* 5 (2014) (arguing that the Civil Rights Era served as a constitutional moment); William M. Carter, Jr., *The Second Founding and the First Amendment*, 99 *Tex. L. Rev.* 1065, 1065–66 (2021) (discussing the Reconstruction Era as a “Second Founding”).

impossible, any broad reading of the Except Clause, while initially appearing theoretically sound, inevitably snowballs toward something akin to the “African slavery” the Thirteenth Amendment sought to eradicate.³³⁴ Instead, courts and Congress should limit the Except Clause to a few, rare situations. Those might include requiring someone to hold a market-rate job to garnish wages for restitution or as a condition of probation or parole.

This line of argument would not be unprecedented. Instead, in true common law constitutionalism fashion, in addition to drawing on the logic of the desegregation cases mentioned above, it could also build off of the Supreme Court’s cases striking down aspects of convict leasing.³³⁵ Although those cases did not rely directly on the Thirteenth Amendment, they addressed the same problem the Amendment sought to remedy: the economic and social incentive (and desire) to maintain a system akin to chattel enslavement. Essentially, the Thirteenth Amendment could serve as a check on itself.

Scholars have already produced research supporting this argument’s premise. Both Michelle Alexander’s *The New Jim Crow* and modern abolitionist scholarship like Dorothy Roberts’s *Abolition Constitutionalism* detail how the post–Civil War criminal legal system has evolved into our current mass-incarceration regime, seemingly as a way to maintain longstanding racial, gendered, and economic hierarchies.³³⁶ Professor Goodwin’s work likewise focuses on this evolution and does so within the context of the Thirteenth Amendment’s Except Clause.³³⁷ And Professor Pope has explained why Thirteenth Amendment arguments should not be dismissed in this space, even though they were not raised in cases challenging convict leasing.³³⁸

3. *The Problem of Notice: Ineffective Assistance and Due Process.* — Another problem in the administrative-enslavement system is that it may have given rise to widespread ineffective assistance of counsel in the provision of guilty pleas. *Padilla v. Kentucky* explains why.³³⁹ *Padilla* held that failing to

334. See *Butler v. Perry*, 240 U.S. 328, 332 (1916) (arguing the Thirteenth Amendment was adopted to extinguish types of involuntary labor similar to the “African Slavery” that dominated much of the pre–Civil War United States).

335. See Pope, *Mass Incarceration*, supra note 8, at 1515–20 (discussing *United States v. Reynolds*, 235 U.S. 133 (1914); *Bailey v. Alabama*, 219 U.S. 219 (1911); and *Clyatt v. United States*, 197 U.S. 207 (1905)); see also *United States v. Kozminski*, 487 U.S. 931, 942–48 (1988) (discussing these cases as well as statutes prohibiting and criminalizing placing someone into involuntary servitude).

336. Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2012); Roberts, *Abolition Constitutionalism*, supra note 38.

337. See Goodwin, *Modern Slavery*, supra note 8.

338. See Pope, *Mass Incarceration*, supra note 8, at 1520–21 (finding that “[m]ore likely, however, the convict lease was ‘unquestioned’ because the beneficiaries of convict leasing wielded sufficient power to discourage challenges”).

339. 559 U.S. 356 (2010). Ineffective assistance claims generally are decided by a two-part test: first, “whether counsel’s representation ‘fell below an objective standard of

inform a client of sufficiently serious and certain immigration consequences—in that case, deportation—constitutes ineffective assistance of counsel.³⁴⁰ This was because “deportation is a particularly severe ‘penalty’” even if “it is not, in a strict sense, a criminal sanction.”³⁴¹ The penalty of deportation, moreover, was “nearly an automatic result” of being convicted of certain offenses.³⁴² And so, at least in instances in which a conviction all but guarantees deportation, counsel is constitutionally deficient for failing to advise their client of this outcome.³⁴³ Indeed, in *Padilla*, “*Padilla*’s counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute.”³⁴⁴

Padilla is part of the species of cases attempting to find the line between those consequences about which defense attorneys must inform their clients and those consequences sufficiently attenuated that they do not have to be mentioned.³⁴⁵ Usually, this problem is thought of through the lens of collateral and direct consequences, but as courts and commentators have noted, those are not easily identified categories.³⁴⁶ *Padilla* did not define this line, but it did make clear that there are some penalties (or at least one penalty) beyond the express criminal sanction that competent defense counsel must advise their client about.³⁴⁷

As in *Padilla*, ineffective assistance regarding administrative enslavement likely depends on how clear it was that enslavement or involuntary servitude would be imposed. In states with mandatory statutes, ineffective assistance claims seem strongest. In states that speak in permissive or more

reasonableness,” and second, “whether ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Id.* at 366 (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)).

340. *Id.* at 368–69.

341. *Id.* at 365 (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)).

342. *Id.* at 366.

343. *Id.* at 368–69.

344. *Id.* at 368.

345. See *id.* at 369 (noting that defense attorneys face different requirements to inform their clients “[w]hen the law is not succinct and straightforward”).

346. See Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 *Iowa L. Rev.* 119, 124 (2009) (arguing that “[t]he Court should reject the artificial, ill-conceived divide between collateral and direct consequences” and proposing “a rule of full information about any severe consequences of a criminal conviction”); Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators”*, 93 *Minn. L. Rev.* 670, 680, 683–99 (2008) (discussing the pre-*Padilla* jurisprudence that developed around determining whether a consequence was direct or collateral in the due process and ineffective assistance contexts).

347. *Padilla*, 559 U.S. at 365 (“We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance’ required under *Strickland* Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.” (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984))).

voluntary terms, the consequences may have been sufficiently indeterminate that not mentioning them was not ineffective assistance. But, as this Article noted while discussing permissive and “policy” statutes, often there is a regulation building on the statute and making clear that involuntary labor will be required in the jurisdiction’s prisons and jails.³⁴⁸

The weakness in this ineffective assistance argument—and the reason courts need not fear a massive and immediate flood of litigation from people who have already been convicted—is *Strickland*’s second prong. That prong requires a defendant prove prejudice, that is, that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”³⁴⁹ While it would not be impossible to prove that an individual would have risked trial instead of accepting a guilty plea to avoid forced labor, it would probably be difficult.³⁵⁰ Here, the practices of a particular institution and the postconviction actions of incarcerated individuals could shed significant light on the likelihood that an accused person would have risked trial.

The Louisiana State Penitentiary at Angola offers an excellent example. Angola has a decades-long history of requiring imprisoned people to do hard, manual, agricultural labor.³⁵¹ And while that is not the only labor an imprisoned person at Angola might be forced to do, “every incarcerated person at Angola, a vast majority of whom are Black, begins their work in the fields.”³⁵² An accused person made aware of this fact might reasonably choose to risk trial to avoid this labor. And ex post protestations that they would have gone to trial could be bolstered if they had, in fact, chosen to be punished instead of doing their mandated labor.³⁵³

If we take seriously the Except Clause’s language, then *Padilla*, while instructive, is not entirely on point. That is because enslavement would not be a collateral consequence or a noncriminal penalty but part of the

348. See *supra* notes 288–292 and accompanying text.

349. *Strickland*, 466 U.S. at 694.

350. Cf. Stephen B. Bright, *The Future of the Death Penalty in Kentucky and America*, 102 Ky. L.J. 739, 748–50 (2014) (describing death penalty representations held effective by the courts that included one lawyer giving his client the number for a bar as contact information and another who did not know his client’s name or that he “was brain damaged”).

351. See Selby, *A Mistaken Identification*, *supra* note 43 (“In his first three years at Angola, Malcolm picked cotton and corn, okra and watermelon, then broccoli, cauliflower, and potatoes, depending on the season. He harvested crops from the same land where, 150 years before, slaves had done the same.”).

352. Alex Woodward, *Four States Voted to End Slavery as a Form of Criminal Punishment. Here’s Why Louisiana Voters Didn’t*, *The Independent* (Nov. 9, 2022), <https://www.independent.co.uk/news/world/americas/us-politics/midterm-elections-2022/louisiana-slavery-amendment-prison-labor-b2221820.html> [<https://perma.cc/8T6S-KKSE>].

353. See, e.g., Johnson, *supra* note 43 (“I have always refused to perform labor inside prison, ever since I was convicted of murder in 1990 when I was 18 years old. . . . I see prison labor as slave labor that still exists in the United States in 2018.”).

“direct” punishment itself.³⁵⁴ Because of that wrinkle, failure to inform the defendant of this consequence might not only be a problem of ineffective assistance on the part of defense counsel but also a due process violation by the judiciary.³⁵⁵ Due process requires that guilty pleas “not only must be voluntary but must be knowing, intelligent acts done with *sufficient awareness of the relevant circumstances and likely consequences*.”³⁵⁶

The federal courts implement this due process guarantee through Federal Rule of Criminal Procedure 11, which states plainly that federal courts accepting either guilty or nolo contendere pleas “must inform the defendant of, and determine that the defendant understands . . . any maximum possible penalty, including imprisonment, fine, and term of supervised release; [and] any mandatory minimum penalty.”³⁵⁷ While Rule 11 does not perfectly track the requirements of due process, the Court has recognized that it serves as a rough approximation of that doctrine.³⁵⁸

While both due process and Rule 11 require less of judges accepting pleas than the Sixth Amendment requires of defense counsel advising them, here too the administrative-enslavement regime seems like an obvious violation with a simple fix going forward. To the extent that either enslavement or involuntary servitude is a punishment for the crime being pled guilty to, judges should inform defendants of, and ensure that defendants understand, that fact before accepting the plea.³⁵⁹

354. See *Brady v. United States*, 397 U.S. 742, 755 (1970) (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), rev’d on other grounds, 356 U.S. 26 (1958)). The logic of this argument suggests that there are some conditions of confinement that should require similar notice. Particularly, those deemed cruel and unusual punishments under the Eighth Amendment might seem ripe for such a challenge. Realistically, however, this seems like an argument with little practical application. What makes this challenge possible in the administrative-enslavement context is the presence of statutes describing the ubiquitous and often mandatory nature of forced labor. By contrast, most of the conditions of confinement challenged would be more ad hoc and so less susceptible to the advanced notice *Padilla* requires.

355. See *id.*

356. *Id.* at 748 (emphasis added). Justice Thomas has made a related argument in the context of other restrictions that come as a result of imprisonment. In *Overton v. Bazzetta*, he explained his belief that while a state may make any number of things a part of a criminal punishment, *Turner v. Safley*, 482 U.S. 78 (1987), should be read as requiring certain procedural safeguards before that deprivation can occur. See 539 U.S. 126, 139–40 (2003) (Thomas, J., concurring in the judgment). While this Article does not endorse Justice Thomas’s conclusion that the only limit on the scope of criminal punishment is the Eighth Amendment, it does agree that whatever the scope of a punishment, it should be sufficiently clearly communicated to the person being punished.

357. Fed. R. Crim. P. 11(b)(1)(H)–(I).

358. See *Padilla v. Kentucky*, 559 U.S. 356, 391 n.1 (2010) (Scalia, J., dissenting) (noting that “we have said [that Rule 11’s required colloquy] approximates the due process requirements for a valid plea” (citing *Libretti v. United States*, 516 U.S. 29, 49–50 (1995))).

359. This is not the only form this due process argument might take. For example, because defendants are entitled to be present for the pronouncement of their sentence, judges may not make the sentence more harsh—such as by adding incarceration or nonmandatory conditions of supervised release—in the written judgment issued after the

4. *Prosecutors and Plea Bargaining.* — One last, and potentially highly promising, possibility bears mentioning. While the previous arguments addressed altering the administrative-enslavement regime through litigation, that regime might also be significantly changed through the discretionary choices available in the plea-bargaining process. Because the Thirteenth Amendment limits enslavement to criminal punishment and few, if any, statutes clearly label their enslavement requirements as a punishment, prosecutors and defense attorneys seemingly have the ability to bargain for the retention of a defendant's Thirteenth Amendment rights. They could do this by formalizing in plea agreements that the agreed-upon punishment does not include being either enslaved or made an involuntary servant. Indeed, a progressive prosecutor's office could include this sort of language in plea agreements for all of its cases. Moreover, these pleas could take advantage of federal and state laws requiring judges to accept the chosen punishment as a condition of accepting the plea.³⁶⁰ Note that a plea agreement excluding slavery and involuntary servitude as a punishment does not mean that an incarcerated person cannot or would not work. It simply means that they cannot be forced to do so. Not being enslaved as a punishment simply shifts incarcerated labor to the same, or at least a similar, starting point as free labor.

B. *Maintaining the Status Quo: How Administrative Enslavement Might Evolve if Attacked*

This Part concludes with what might be construed as counterarguments to many of the legal issues raised above but are instead best viewed as predictions. These are predictions about how the legal system that has enabled and expanded administrative enslavement might attempt to evolve to maintain that status quo as it is attacked.

sentencing hearing. See *United States v. Rogers*, 961 F.3d 291, 296 (4th Cir. 2020) (“The primacy of the oral sentence over the written judgment is well established[] in our circuit and others”); *United States v. Diggles*, 957 F.3d 551, 556–59 (5th Cir. 2020) (requiring district courts to announce all discretionary conditions of supervised release at sentencing to comply with both due process and Federal Rule of Criminal Procedure 43). Nevertheless, as with an ineffective assistance claim, the retroactive potential of these due process arguments is constrained—here because of the limitations imposed by both habeas corpus law and plain error review. See 28 U.S.C. §§ 2254–2255 (2018); Fed. R. Civ. P. 51(d), 52(b); *Greer v. United States*, 141 S. Ct. 2090, 2100 (2021) (“When a defendant advances . . . representation on appeal, the court must determine whether the defendant has carried the burden of showing a ‘reasonable probability’ that the outcome . . . would have been different. Because [defendants] did not make any such argument or representation on appeal . . . they have not satisfied the plain-error test.”). But see *Bartone v. United States*, 375 U.S. 52, 53 (1963) (per curiam) (holding that it was plain error under Federal Rule of Criminal Procedure 43 to increase a sentence by one day in the written judgment).

360. See, e.g., Fed. R. Crim. P. 11(c)(1)(C); S.D. Codified Laws § 23A-7-8(3) (2024) (allowing prosecutors and defense attorneys to “[a]gree that a specific sentence is the appropriate disposition of the case”).

Some of these predictions have already begun to come to pass. In Colorado, which began the recent wave of states removing Except Clauses from their state constitutions, multiple judges have turned back challenges to the status quo prison-labor regime.³⁶¹

1. “*Voluntary*” *Labor*. — The problem of voluntariness is the most likely next evolution of American enslavement if administrative enslavement (or Except Clause enslavement more generally) continues to come under attack. Indeed, it has already reared its head in past Thirteenth Amendment and involuntary servitude cases. In those cases, the courts have held that a person’s labor is “voluntary” so long as they are not threatened with physical or legal punishment for refusing.³⁶² This means that even if an imprisoned person’s only choices are working for free doing hard, manual labor or remaining in a cell, their decision to perform that labor is voluntary.

The voluntariness problem is ultimately a baseline issue.³⁶³ Depending on what we view as the baseline entitlement of imprisoned (or convicted) people, courts can and have characterized as voluntary any labor required that lifts someone above that baseline.³⁶⁴ Another way to frame this problem is through the lens of incentives and punishments. Anything that lifts someone above the baseline is a permissible incentive, and the only prohibited actions in response to someone refusing to work are punishments that take them below that baseline.

The problem, of course, is deciding what that baseline is. If the baseline legal minimum for every imprisoned person is moldy bread, a multivitamin, and enough water to avoid dehydration served to you in

361. See *Lamar v. Williams*, No. 21CA0511, 2022 WL 3639545, at *1 (Colo. Ct. App. Aug. 18, 2022) (affirming the district court’s dismissal of an alleged violation of the state prohibition on involuntary servitude by the Colorado Department of Corrections); *Lilgerose v. Polis*, No. 2022CV30421 (D. Ct. Colo. Oct. 27, 2022) (Trellis) (granting in part and denying in part defendants’ motion to dismiss facial and as-applied state constitutional challenges to Colorado’s prison-labor statutes).

362. *United States v. Kozminski*, 487 U.S. 931, 952 (1988) (defining the criminal prohibition on “involuntary servitude” as forcing someone to work “by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process,” including “placing the victim in fear of” such consequences); *Burrell v. Staff*, 60 F.4th 25, 35–36 (3d Cir. 2023), cert. denied sub nom. *Lackawanna Recycling Ctr., Inc. v. Burrell*, 143 S. Ct. 2662 (2023) (relying on *Kozminski* to conclude that “using an otherwise legal process for a purpose for which it was not created or intended to be used is not, on its own, sufficient to constitute the threat of legal sanction necessary to find a Thirteenth Amendment violation”).

363. Cf. Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 *Colum. L. Rev.* 1, 5–13 (1992) (using constitutional law examples to explain how the propriety of various interventions—such as whether something is state action, a case has a neutral principle, or whether rights are positive or negative—depends on the baseline assumptions from which one starts).

364. See, e.g., *Lilgerose*, at *14 (Trellis) (finding that refusal to grant “earned time” to imprisoned people who do not work does not constitute involuntary servitude because “inmates are not entitled to be paroled sooner than their mandatory release date”).

permanent solitary confinement to a cell smaller than a parking space,³⁶⁵ then the Thirteenth Amendment could be amended tomorrow with essentially no change to the operation of prison labor in this country. While this hypothetical may seem hyperbolic, it is not too far off from what the obvious check on this baseline problem—the Eighth Amendment—seems to allow. Courts have long permitted extended, indeed decades-long, stints in solitary confinement,³⁶⁶ and prison administrators have also used food restrictions in attempts to, for example, break prison strikes.³⁶⁷

Many readers will likely find abhorrent the idea that these conditions are all that an imprisoned person is entitled to. The lessons of this Article about the common law development of the Except Clause suggest that those readers are right to be concerned. For courts wishing to maintain the status quo, the shift from a condition being permissible under the Eighth Amendment to not being a punishment under the Thirteenth is the sort of analogical move that is normal in common law development.

Even though this type of jurisprudential move is normal, it is not inevitable. Both courts and legislatures have tools to target this problem, if they wish to use them. Courts could reconsider their Eighth Amendment (or state equivalent) jurisprudence. If the Eighth Amendment did not allow solitary confinement or allowed it only for limited purposes, that could disarm one of the most potent weapons that prison administrators have to force imprisoned people to work. Likewise, the Eighth Amendment might reasonably limit some other common punishments for refusing to work like curtailing visitation rights, prohibiting phone contact

365. Compare Tiana Herring, *The Research Is Clear: Solitary Confinement Causes Long-Lasting Harm*, Prison Pol’y Initiative (Dec. 8, 2020), https://www.prisonpolicy.org/blog/2020/12/08/solitary_symposium [<https://perma.cc/M9D3-PGXW>] (noting “that cells generally measure from 6x9 to 8x10 feet” (citing Lisa Dawson, *Infographic: How Big Is a Solitary Confinement Cell?*, Solitary Watch, <https://solitarywatch.org/resources/multimedia/infographics-2/how-big-is-a-solitary-confinement-cell> [<https://perma.cc/ACL5-TX6X>] (last visited Mar. 27, 2024))), with *Parking Lot Specifications, Requirements and Guidelines*, Vill. of Westmont (Nov. 2018), <https://westmont.illinois.gov/DocumentCenter/View/1146/Parking-Lot-Specification—Revised-11-2018?bidId=> [<https://perma.cc/M358-D7Y8>] (“The standard dimensions for an automobile parking space shall be ten (10) feet wide by twenty (20) feet long.”).

366. See, e.g., Albert Woodfox, *Solitary: Unbroken by Four Decades in Solitary Confinement. My Story of Transformation and Hope* 344 (2019) (“If I dwelled on the pain I have endured and stopped to think about how 40 years locked in a cage 23 hours a day affected me, it would give insanity the victory it has sought for 40 years.” (internal quotation marks omitted)).

367. See, e.g., John H. Glenn, *Incarcerated Individuals Allege ADOC Is Using Starvation to Stop Strike*, Ala. Pol. Rep. (Sept. 28, 2022), <https://www.alreporter.com/2022/09/28/incarcerated-individuals-allege-adoc-is-using-starvation-to-stop-strike> [<https://perma.cc/S2CG-AVTC>] (reporting that prison officials had begun giving incarcerated people on strike only two meals instead of three “with the first meal being a peanut butter sandwich with a small bowl of stewed prunes and the second meal consisting of a bologna sandwich with canned turnip greens”).

with friends and family, or more generally limiting access to activities that occur outside of an imprisoned person's cell.³⁶⁸

Courts might also protect an incarcerated person's Thirteenth Amendment rights through an equality principle.³⁶⁹ This principle might require equal treatment between those imprisoned people who retain their Thirteenth Amendment rights and those who don't. This would ensure that if a prison administrator wanted to lower the baseline from which to judge voluntary labor, they at least must take the costly step of doing it for every imprisoned person under their purview. More likely, though, this equality principle would ensure that imprisoned people who retain their Thirteenth Amendment rights are able to participate in the full slate of rehabilitative programming available to other incarcerated people and do not otherwise have a more punitive experience purely because they cannot be forced to work.

An equality principle like this one would also protect first movers. Without it, prison administrators could respond to a small number of imprisoned people retaining their Thirteenth Amendment rights—for example those sentenced by a single enterprising judge, represented by an aggressive defense attorney, or facing an especially progressive prosecutor—by simply banning them from any positive programming that could be termed labor, or worse, by segregating them in solitary confinement.³⁷⁰ This would not have to be irrational or vindictive. An

368. See *Captive Labor*, *supra* note 1, at 47 (“Some states threaten the loss of basic ‘privileges,’ like family visitation and access to the commissary to buy food and other necessities.”).

369. Cf. *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (“To punish a person because he has done what the law plainly allows him to do is a due process violation . . . and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is ‘patently unconstitutional.’” (citation omitted) (quoting *Chaffin v. Synchcombe*, 412 U.S. 17, 32–33 n.20 (1973))). The equality principle sketched here is a relatively thin one involving disparate treatment. That is for both practical reasons—disparate treatment is the most uncontroversial method of litigating difference—and because there are likely to be many comparators to make proving disparate treatment relatively easy. A thicker conception of equality based on disparate impact liability or broader antisubordination principles would likely be even more protective. See, e.g., Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. Rev. 1357, 1360–65 (2017) (discussing theories of proving discrimination in the employment law context); Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. Rev. 255, 259 (2010) (using the Thirteenth Amendment “[t]o illustrate the anti-subordination theory of equality”).

370. The commonly recognized problem of retaliation by prison officials against jailhouse lawyers suggests that protection, or something like it, is necessary. See, e.g., Jessica Feerman, “The Power of the Pen”: Jailhouse Lawyers, Literacy, and Civic Engagement, 41 Harv. C.R.-C.L. L. Rev. 369, 373 (2006) (“While it is difficult to quantify the amount of retaliation faced by prisoners engaging in litigation, a 1989 study found that jailhouse lawyers constituted the largest number by far of prisoners confined to control units, and that solitary confinement was the most common disciplining strategy used against jailhouse lawyers.” (citing *The Prison Discipline Study: Exposing the Myth of Humane Imprisonment in the U.S.*, in *Criminal Injustice: Confronting the Prison Crisis* 92, 96 tbl.5, 97 tbl.7 (Elihu

imprisoned person who retains their Thirteenth Amendment rights represents more of a litigation risk than a comparable person who does not, and so a prison administrator might believe segregation is the most risk-averse option. The equality principle described above would change this calculus to make unequal treatment a greater perceived risk.

While the solutions described above involved the courts, legislatures might be the most likely and promising avenue to address this voluntariness baseline problem. Legislatures could easily create rights for imprisoned people that raise their baseline treatment above constitutional minima. Indeed, they already have. Courts have long recognized that a statutory provision can create a liberty interest that is protected by the Due Process Clause in addition to whatever other remedy a state might fashion of its own accord.³⁷¹ Legislatures³⁷² could prohibit solitary confinement and require minimum levels of visitor access, nonlockdown hours, and dietary options, among a panoply of other ways to raise the baseline to which imprisoned people's voluntariness is compared.

2. *The Housekeeping Exception.* — As mentioned in Part I, the housekeeping exception to the Thirteenth Amendment is an obvious way that prisons could maintain much, but not all, of the forced labor status quo. To reiterate, that exception states that it does not violate the Thirteenth Amendment to force imprisoned people—whether convicted of a crime or not—to perform “housekeeping” or other sufficiently therapeutic work.³⁷³

A significant amount of the forced labor within prisons today is intraprison work.³⁷⁴ While this work is currently justified by the Thirteenth Amendment's Except Clause, it could easily be recharacterized as the sort of personal housekeeping that courts have long approved. This means that even in the increasing number of states that have total bans on slavery and involuntary servitude, the on-the-ground reality of forced labor for many imprisoned people does not have to change. And because this labor is not a “punishment,” it does not necessarily suffer from many of the legal faults discussed above and so can remain administratively imposed.

Rosenblatt ed., 1996)); Jhody Polk & Tyler Walton, *Legal Empowerment Is Abolition*, 98 *NYU L. Rev. Online* 282, 284 (2023), https://www.nyulawreview.org/wp-content/uploads/2023/06/NYULawReview98_PolkWalton.pdf [https://perma.cc/QDD6-H6RL] (“In fact, effective jailhouse lawyers are often retaliated against by facilities through removal from law clerk positions in the prison.”).

371. See *Wolff v. McDonnell*, 418 U.S. 539, 555–58 (1974) (holding that Nebraska's good-time-credit statute created such an interest).

372. While this Article discusses legislatures here, it is also worth noting that in many jurisdictions prison administrators could also use their ample discretion to implement these sorts of substantive changes. That wide discretion, however, might also make these prison-administrator-created “rights” difficult to enforce if violated.

373. See *supra* section I.C.2.

374. See *Captive Labor*, *supra* note 1, at 27 (finding that approximately eighty percent of prison labor is “maintenance labor”).

Nonetheless, the housekeeping exception does not seem expansive enough to permit the entire administrative-enslavement regime to survive. At a minimum, work to benefit private businesses, produce goods sold by the state, and maintain facilities outside of the prison seems difficult to characterize as “housekeeping.” While there may be an economic argument for this—the moneys produced or saved by the labor for these outside parties can be directed to the care and maintenance of the prison and those housed there—that argument seems to stretch the exception beyond its breaking point.

3. *Reading Mandatory Statutes Broadly.* — Finally, courts faced with arguments for a defendant to retain their Thirteenth Amendment rights or plea bargains asserting that neither enslavement nor involuntary servitude is part of the agreed-to punishment might read statutes with mandatory language broadly.³⁷⁵ The basic argument would be that these statutes are akin to mandatory minimum sentences set by the legislature. Like traditional mandatory minima, then, neither the court nor the prosecutor would have the power to ignore them.

While this interpretation is not farcical, it is nevertheless just one of several reasonable interpretations of these statutes. As this Article has shown, even most mandatory statutes bear few hallmarks of criminal punishment. They are not described as a punishment for any particular crime, they are often separated from other criminal punishments within the code, and they almost always empower prison administrators instead of the judiciary. Indeed, it does not appear that either the judiciary or defense attorneys consider enslavement—whether mandated or potential—as a punishment that a defendant must be given notice of before pleading guilty or that must be described and explained during a sentencing hearing. In short, whatever these statutes are, they do not look like a legislatively imposed mandatory minimum criminal punishment.

CONCLUSION

Over 150 years after the end of the Civil War, the United States remains a slave state. Through the same amendment that sought to end slavery, that institution has continued—only now it continues through our criminal legal processes. The Except Clause of the Thirteenth Amendment calls for slavery and involuntary servitude to be imposed only as a punishment for a crime. But we have failed to live up to this mandate.

Instead of treating enslavement as the criminal punishment it is supposed to be, we have configured a legislative and jurisprudential system of *administrative enslavement*. Administrative enslavement removes the solemnity, thought, and procedural protections that we give to other criminal punishments and instead shunts it into the opaque and near-total control of prison administrators. Statutes requiring and explicating

375. See *supra* section II.C.

enslavement are separated from other criminal punishments, forced instead into those parts of the code detailing the running of prisons. Judges, prosecutors, and even defense attorneys fail to mention, much less explain, that the accused people before them are about to be enslaved as punishment. And the courts support all of this through loosely reasoned decisions that utilize an amendment often thought to be a beacon of freedom to instead constrict the rights of incarcerated people who too often are the descendants of those the Thirteenth Amendment attempted to free.

Even if this is who we are, it is not who we should be. There is a movement to end this enslavement quickly growing in the states, but doing away with that peculiar institution nationally would seem to require a constitutional amendment beyond our current political imagination. Nevertheless, we can and should at least engage with our decision to impose punishments as dire as slavery and involuntary servitude with the thoughtfulness and gravity that decision deserves.

This Article has described the jurisprudence and statutory landscape of the current administrative-enslavement regime, and it has begun to sketch a way forward. But there is much work, both practical and theoretical, still to do. As courts in states that have already entirely forbidden slavery and involuntary servitude begin to encounter incarcerated people who retain a version of their Thirteenth Amendment rights, litigants will need to help them develop a jurisprudence that does not merely recreate the status quo. And even in jurisdictions where the Except Clause retains its force, courts may face challenges to the administrative-enslavement regime. This will force them—and us—to grapple with not only the more practical line drawing problems discussed in this Article but also the deeper, soul-searching questions that administrative enslavement has thus far allowed our society to avoid: What makes a person deserve to be a slave? And why have we allowed this institution to continue?

While administrative enslavement has allowed the continuation of our shameful institution to hide in the shadows, it is rapidly becoming apparent that this shame will be brought to light. Future work by not only scholars but also lawyers, judges, activists, and American society writ large must begin to ask and find answers to these most difficult questions.

NOTES

THE WEAPONIZATION OF TRADE SECRET LAW

*Lena Chan**

In criminal proceedings, courts are increasingly relying on automated decisionmaking tools that purport to measure the likelihood that a defendant will reoffend. But these technologies come with considerable risk; when trained on datasets or features that incorporate bias, criminal legal algorithms threaten to replicate discriminatory outcomes and produce overly punitive bail, sentencing, and incarceration decisions. Because regulators have failed to establish systems that manage the quality of data collection and algorithmic training, defendants and public interest groups often stand as the last line of defense to detect algorithmic error. But developers routinely call upon trade secret law, the common law doctrine that protects the secrecy of commercial information, to bar impacted stakeholders from accessing potentially biased software.

This weaponization of trade secret law to conceal algorithms in criminal proceedings denies defendants their right to present a complete and effective defense. Furthermore, the practice contravenes the early policy objectives of trade secret law that sought to promote a public domain of ideas on which market actors could fairly compete and innovate. To remedy this misalignment, this Note proposes a novel framework that redefines the scope of trade secret protection and revives the first principles underlying the doctrine. It concludes that while algorithms themselves constitute protectable trade secrets, information ancillary to the algorithm—such as training data, performance statistics, or descriptions of the software’s methodology—do not. Access to ancillary information protects accused parties’ right to defend their liberty and promotes algorithmic fairness while aligning trade secret law with its first principles.

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INTRODUCTION

When a Wisconsin circuit court sentenced Eric Loomis to six years of initial confinement and five years of extended supervision, it did so based on three bar charts, measured on a scale from one to ten.¹ These charts were generated by the Correctional Offender Management Profiling for

1. See Petition for Writ of Certiorari at 3–4, *Loomis v. Wisconsin*, 137 S. Ct. 2290 (2017) (No. 16-6387) (noting that “the State and the trial court referenced the COMPAS assessment and used it as a basis for incarcerating Mr. Loomis” and “COMPAS is in the form of a bar chart . . . on a scale of one to ten”).

Alternative Sanctions (COMPAS) tool, a risk-assessment algorithm that provides “decisional support” to courts determining bail, parole, and sentencing outcomes.² COMPAS concluded that Mr. Loomis posed a “high risk to the community”;³ in light of that judgment, the circuit court denied Mr. Loomis parole.⁴ Mr. Loomis suspected that COMPAS impermissibly considered his gender⁵ and incorrectly assessed his “risk” given that the program was not designed as a sentencing tool.⁶ But trade secret law, the common law doctrine that protects the secrecy of commercial information,⁷ barred Mr. Loomis from viewing COMPAS’s source code and confirming his suspicions.⁸ Mr. Loomis appealed his sentence on the grounds that the secrecy surrounding COMPAS violated his due process rights by undermining his right to raise an effective defense and challenge the validity of his accusers’ technology.⁹ Despite the heavy liberty interests at stake, the Wisconsin Supreme Court determined that COMPAS was a protected trade secret and refused to grant Mr. Loomis access to the algorithm.¹⁰

2. *State v. Loomis*, 881 N.W.2d 749, 754 (Wis. 2016); see also *State v. Loomis*, No. 2015AP157-CR, 2015 WL 5446731, at *1 n.2 (Wis. Ct. App. Sept. 17, 2015) (describing the court’s reliance on COMPAS to “make decisions about prison incarceration versus community supervision[] [and] to make decisions about bond”).

3. For a discussion of the circuit court’s analysis of Loomis’s COMPAS score in sentencing, see *Loomis*, 881 N.W.2d at 755 (“You’re identified, through the COMPAS assessment, as an individual who is at high risk to the community.” (quoting *Loomis*, 2014 WL 5446731, at *1)).

4. See *id.* (“In terms of weighing the various factors, I’m ruling out probation because of the seriousness of the crime and because your history, your history on supervision, and the risk assessment tools that have been utilized, suggest that you’re extremely high risk to re-offend.” (internal quotation marks omitted) (quoting the circuit court’s opinion)).

5. See *Loomis*, 2015 WL 5446731, at *3 (certifying to the Wisconsin Supreme Court the question of “whether a sentencing court’s reliance on a COMPAS assessment runs afoul of *Harris*’s prohibition on gender-based sentencing” (cleaned up)).

6. *Id.* at 2 (“Loomis asserts that COMPAS assessments were developed for use in allocating corrections resources and targeting offenders’ programming needs, not for the purpose of determining sentence.”).

7. E.g., Amy Kapczynski, *The Public History of Trade Secrets*, 55 U.C. Davis L. Rev. 1367, 1380 (2022) (explaining how modern applications of trade secret law protect “all commercially valuable business secrets” from wrongful acquisition, use, or disclosure by third parties).

8. The state did not dispute Loomis’s assertions that “the company that developed and owns COMPAS maintains as proprietary the underlying methodology that produces assessment scores” and that “the courts are relying on ‘a secret non-transparent process.’” *Loomis*, 2015 WL 5446731, at *2.

9. *Id.* at *1 (certifying to the Wisconsin Supreme Court the question of “whether this practice violates a defendant’s right to due process, either because the proprietary nature of COMPAS prevents defendants from challenging the COMPAS assessment’s scientific validity, or because COMPAS assessments take gender into account”).

10. *State v. Loomis*, 881 N.W.2d 749, 761 (Wis. 2016) (finding that COMPAS was “a proprietary instrument and a trade secret”). The U.S. Supreme Court denied Mr. Loomis’s petition for writ of certiorari. See *Loomis v. Wisconsin*, 137 S. Ct. 2290, 2290 (2017).

This weaponization of trade secret law to conceal algorithms in criminal proceedings denies defendants like Mr. Loomis their right to present a complete and effective defense against their accusers.¹¹ Courts increasingly rely on automated decisionmaking to inform their judgments¹² even though these technologies come with significant risks.¹³ Algorithms produce inaccurate¹⁴ or discriminatory¹⁵ outcomes when developers build them on datasets or features that incorporate bias.¹⁶ In the criminal legal setting, the consequences are severe: Algorithmic errors generate overly punitive bail, sentencing, or incarceration outcomes that disproportionately harm racial and gender minorities.¹⁷ Given the absence

11. See, e.g., *State v. Pickett*, 246 A.3d 279, 299 (N.J. Super. Ct. App. Div. 2021) (“[A] criminal trial where the defendant does not have ‘access to the raw materials integral to the building of an effective defense’ is fundamentally unfair.” (quoting *State ex rel. A.B.*, 99 A.3d 782, 790 (N.J. 2014))).

12. Courts often consider algorithmic predictions about the likelihood that a defendant may one day reoffend. Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 *Stan. L. Rev.* 1343, 1347–48 (2018) [hereinafter Wexler, *Life, Liberty, and Trade Secrets*] (describing how “judges and parole boards rely on risk assessment instruments, which purport to predict an individual’s future behavior, to decide who will make bail or parole and even what sentence to impose”).

13. Ziad Obermeyer, Brian Powers, Christine Vogeli & Sendhil Mullainathan, *Dissecting Racial Bias in an Algorithm Used to Manage the Health of Populations*, 366 *Science* 447, 447 (2019) (“There is growing concern that algorithms may reproduce racial and gender disparities via the people building them or through the data used to train them.” (citations omitted)).

14. See, e.g., Danielle Keats Citron, *Technological Due Process*, 85 *Wash. U. L. Rev.* 1249, 1256 (2008) (describing state-administered algorithms that “issued hundreds of thousands of incorrect Medicaid, food stamp, and welfare eligibility determinations and benefit calculations”).

15. See, e.g., Amanda Levendowski, *How Copyright Law Can Fix Artificial Intelligence’s Implicit Bias Problem*, 93 *Wash. L. Rev.* 579, 601 (2018) (describing how a criminal legal algorithm was twice as likely to misclassify Black defendants as posing a high risk for reoffending relative to white defendants).

16. Biased datasets reproduce racial and gender disparities. See *id.* at 592 (describing how “training data infused with implicit bias can result in skewed datasets that fuel both false positives and false negatives”). Programmers train algorithms to perform a specified task (e.g., prediction or pattern recognition) by exposing the system to an input dataset and providing select examples of model decisionmaking. See M. I. Jordan & T. M. Mitchell, *Machine Learning: Trends, Perspectives, and Prospects*, 349 *Science* 255, 255 (2015) (describing how a programmer may develop a machine learning algorithm by “showing it examples of desired input-output behavior”); Levendowski, *supra* note 15, at 591 (explaining how developers train artificial intelligence systems by providing an “example” of decisionmaking and exposing the system to other “variations” from which it learns to make comparable decisions). From these examples, the algorithm learns to detect certain patterns or rules that guide future automated assessments. Harry Surden, *Machine Learning and Law*, 89 *Wash. L. Rev.* 87, 91 (2014).

17. Andrea Roth, *Trial by Machine*, 104 *Geo. L.J.* 1245, 1270 (2016) (describing the risk of “illegitimate or illegal discrimination” among algorithms that influence bail, testimony, verdicts, and sentencing in criminal trials (internal quotation marks omitted) (quoting Omer Tene & Jules Polonetsky, *Judged by the Tin Man: Individual Rights in the Age of Big Data*, 11 *J. on Telecomm. & High Tech. L.* 351, 358 (2013))).

of uniform regulation over data collection and algorithmic training,¹⁸ individuals like Mr. Loomis often stand as the last line of defense to detect the inaccuracies of programs deployed against them. But when trade secret law allows developers to block defendants from reviewing their code's accuracy and methodology, the risks of algorithmic error and discrimination abound.¹⁹ Without access to source code, individuals like Mr. Loomis cannot challenge the scientific validity of sentencing algorithms or present an effective defense against their accusers.²⁰

The current state of trade secret law lets corporations conceal their algorithms to the detriment of people in the criminal legal system.²¹ But the doctrine has not always been this way. While modern courts broadly seclude algorithmic information,²² early courts narrowly protected secret inventions to encourage greater innovation than would otherwise exist in an unregulated market.²³ In fact, trade secret law first articulated principles of *restraint*: Courts were to protect secret ideas and inventions just enough to incentivize innovation and creation but not so much as to award intellectual monopolies and stifle competition.²⁴

18. See François Candelon, Rodolphe Charme di Carlo, Midas De Bondt & Theodoros Evgeniou, *AI Regulation Is Coming*, Harv. Bus. Rev., Sept.–Oct. 2021, at 102, 106 (“In dealing with biased outcomes, regulators have mostly fallen back on standard antidiscrimination legislation. That’s workable as long as there are people who can be held responsible for problematic decisions. But with AI increasingly in the mix, individual accountability is undermined.”); Jon Kleinberg, Jens Ludwig, Sendhil Mullainathan & Cass R. Sunstein, *Discrimination in the Age of Algorithms*, J. Legal Analysis, 2018, at 1, 2 (suggesting that the lack of regulatory oversight over algorithms may exacerbate efforts to detect discrimination).

19. Sonia K. Katyal, *The Paradox of Source Code Secrecy*, 104 Cornell L. Rev. 1183, 1248 (2019) [hereinafter Katyal, *The Paradox of Source Code Secrecy*] (“[A]ssertions of trade secret protection . . . remain a key obstacle for researchers and litigants seeking to test the efficacy and fairness of government algorithms and automated decision making.”).

20. See *State v. Pickett*, 246 A.3d 279, 301 (N.J. Super. Ct. App. Div. 2021) (arguing that defendants have a “competing and powerful” interest in forensic software used to incriminate them and that “shrouding the source code and related documents in a curtain of secrecy substantially hinders defendant’s opportunity to meaningfully challenge reliability”).

21. Rebecca Wexler, *It’s Time to End the Trade Secret Evidentiary Privilege Among Forensic Algorithm Vendors*, Brookings Inst. (July 13, 2021), <https://www.brookings.edu/blog/techtank/2021/07/13/its-time-to-end-the-trade-secret-evidentiary-privilege-among-forensic-algorithm-vendors/> [<https://perma.cc/M967-3T7R>] (“Developers who sell or license forensic algorithms to law enforcement routinely claim that they have a special trade secret entitlement to entirely withhold relevant evidence about how these systems work from criminal defense expert witnesses.”).

22. See, e.g., *Q-Co Indus. v. Hoffman*, 625 F. Supp. 608, 617 (S.D.N.Y. 1985) (“Computer software, or programs, are clearly protectible under the rubric of trade secrets . . .”).

23. See Adam D. Moore, *A Lockean Theory of Intellectual Property*, 21 Hamline L. Rev. 65, 65 (1997) (“In order to enlarge the public domain, permanently society protects certain private domains temporarily.”).

24. See *infra* section I.A. for a discussion of trade secret law’s limited scope.

Given this misalignment with early policy objectives, courts and scholars alike must reassess the propriety of extending trade secret protection to algorithmic information. Part I reviews the origins of trade secret law to clarify the first principles that shaped the doctrine. Rather than conceal proprietary information, early trade secret law sought to promote a *public* domain of ideas on which market actors could fairly compete and innovate. Part II examines how trade secret protection of “ancillary information”²⁵ contravenes those principles by (1) secluding non-trade-secret information about algorithmic development and performance and (2) restricting competition.²⁶ Part III proposes a novel framework that redefines the scope of trade secret protection in the algorithmic context and revives trade secret law’s early policy objectives. This Note concludes that while algorithms themselves constitute protectable trade secrets, ancillary information—such as training data, performance statistics, or descriptions of the software’s methodology—does not. The disclosure of ancillary information comports with first principles and public demands for algorithmic transparency while maintaining trade secret holders’ proprietary interests.

I. THE HISTORY OF TRADE SECRET LAW

A. *Early Trade Secret Law’s Liability Regime*

Trade secret law developed amid disputes between employers, employees, and market competitors over the use of secret manufacturing processes.²⁷ The Supreme Judicial Court of Massachusetts first expounded on the doctrine in the 1868 case *Peabody v. Norfolk*,²⁸ in which a manufacturer of gunny cloth sued to restrain his employee from revealing the firm’s secret production techniques to a competitor.²⁹ The court ordered an injunction against the employee to protect the manufacturer’s production technique. This injunction would ensure that the value the manufacturer brought to the production process through his unique “skill and attention” would be shielded from improper use by third parties.³⁰ In deriving the manufacturer’s interest in his trade secret from the skill and attention he invested in its development, *Peabody* recognized what courts

25. This Note adopts the term “ancillary information” to describe nonprotected materials related to protected algorithms. For a more detailed explanation of ancillary information, see *infra* notes 132–136 and accompanying text.

26. See *infra* section II.D (discussing how secluding information on algorithmic methodology and performance limits efforts to improve existing technologies).

27. Catherine L. Fisk, *Working Knowledge: Employee Innovation and the Rise of Corporate Intellectual Property, 1800–1930*, at 82 (2009) (describing how trade secret law emerged in the employment context as firms sought “to wrest control of the production process from their skilled workers”).

28. 98 Mass. 452, 459 (1868).

29. *Id.* at 454.

30. *Id.* at 457.

would later term “the *labor*—the so-called ‘sweat equity’—that goes into creating a work.”³¹ Importantly, as a practical consequence of awarding injunctive relief, *Peabody* shielded the manufacturer’s valuable creation from his competitors.³²

But secluding the manufacturer’s techniques served the larger policy goal of generally encouraging “invention and commercial enterprise” for the public interest.³³ Although it guarded individuals’ secrets, *Peabody* cautioned that trade secret protection must further “the advantage of the public.”³⁴ To expand “invention and commercial enterprise,”³⁵ the law could not bar new innovators from examining valuable knowledge and information for purposes of improving them.³⁶ Indeed, early courts recognized that trade secret overprotection risked stunting innovation by secluding too much information from the public.³⁷ In 1908, a Michigan circuit court considered whether to extend trade secret protection to a manufacturing process that, while “limited” in use in the complainant’s industry, was in “common use” in other industries.³⁸ The court declined to grant the innovator “exclusive use” of a process that was in “common use,” cautioning that such broad protections “would foster monopoly and exclude others from the use of well-known and much-used prior devices.”³⁹ By awarding narrow trade secret protections and taking an expansive view of non-trade-secret knowledge, the law encouraged competing innovators to build upon existing products in the market.⁴⁰

31. *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 788 (5th Cir. 1999). See *Peabody*, 98 Mass. at 457.

32. See Kapczynski, *supra* note 7, at 1396 (cautioning that trade secret law “can be used to prevent the dissemination of information *indefinitely*”).

33. *Peabody*, 98 Mass. at 457.

34. *Id.*

35. *Id.*

36. See Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 Calif. L. Rev. 241, 284 (1998) (“Keeping information secret denies other innovators opportunities to express their creativity, deprives persons of the fruits of further research based on the secret, and forces consumers to pay higher prices.”).

37. See Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 Yale L.J. 1575, 1581 (2002) (“Intellectual property rights, if made too strong, may impede innovation and conflict with other economic and policy objectives.”).

38. *Hamilton Mfg. Co. v. Tubbs Mfg. Co.*, 216 F. 401, 405–06 (C.C.W.D. Mich. 1908) (describing how “machines doing the same character of work and involving the same principles found in the complainant’s machines were in common use in woodworking establishments”).

39. *Id.* at 407.

40. See Mark A. Lemley, *The Surprising Virtues of Treating Trade Secrets as IP Rights*, 61 Stan. L. Rev. 311, 313–14 (2008) (arguing that when applied coherently, trade secret law increases efficient collaboration and communication between parties who would otherwise be too distrustful to share information); Intell. Prop. Off., *The Economic and Innovation Impacts of Trade Secrets*, Gov.UK (Apr. 19, 2021), <https://www.gov.uk/government/publications/economic-and-innovation-impacts-of-trade-secrets/the-economic-and-innovation-impacts-of-trade-secrets#economic-construction> [<https://perma.cc/3SRA-D2VN>]

Trade secret law, then, faced an inherent tension. On the one hand, the doctrine safeguarded intellectual labor to encourage innovation at the individual level.⁴¹ On the other hand, overbroad trade secret protections could prevent the improvement of products by concealing “well-known” and “much-used” processes from other innovators.⁴² To balance these competing interests in secrecy and public access, the law established a liability regime that limited the scope of exclusionary rights to foster fair competition.⁴³

Although it shielded secret production techniques from wrongful disclosure, *Peabody* clarified that the manufacturer “has not indeed an exclusive right to it as against the public, or against those who in good faith acquire knowledge of it.”⁴⁴ Rather than establish an absolute property right in the trade secret,⁴⁵ the court conditioned its protection on the invention’s value and the propriety of the employee’s behavior.⁴⁶ First, the law limited injunctive relief to trade secrets made commercially “valuable” by the creator’s efforts.⁴⁷ By requiring economic value, the court sought to avoid overbroad protections for general noncommercial knowledge or processes that may nonetheless benefit the public.⁴⁸ Second, the court qualified that it would “restrain a party [only] from making a disclosure of secrets communicated to him in the course of a confidential employment.”⁴⁹ Rather than granting a property right against the world, *Peabody* established a liability rule that guarded valuable business secrets against parties involved in the “violation of contract and breach of confidence.”⁵⁰ By restricting its jurisdiction to circumstances involving

(explaining how overbroad trade secret protections “restrict the acquisition of ideas” and cause “reduced innovation and lower productivity growth”).

41. See *supra* notes 30–31 and accompanying text.

42. See *Hamilton Mfg.*, 216 F. at 407.

43. See Eric R. Claeys, *The Use Requirement at Common Law and Under the Uniform Trade Secrets Act*, 33 *Hamline L. Rev.* 583, 595 (2010) (“By refusing to recognize any property rights, trade secrecy promotes competition and consumer access, and it also frees all competitors to innovate or gather useful information by sparing them the transaction costs associated with bargaining with a right holder.”).

44. *Peabody v. Norfolk*, 98 Mass. 452, 458 (1868).

45. Sharon K. Sandeen, *The Evolution of Trade Secret Law and Why Courts Commit Error When They Do Not Follow the Uniform Trade Secrets Act*, 33 *Hamline L. Rev.* 493, 499 (2010) (describing how “courts were unwilling to find an absolute property interest in secret information”).

46. See *Peabody*, 98 Mass. at 458.

47. *Id.* at 457.

48. See Camilla A. Hrdy, *The Value in Secrecy*, 91 *Fordham L. Rev.* 557, 559 (2022) [hereinafter Hrdy, *The Value in Secrecy*] (describing how the value requirement “performs an essential line-drawing function” because it “distinguishes mere secrets, which abound in human society, from trade secrets”).

49. *Peabody*, 98 Mass. at 459 (quoting 2 Joseph Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* § 952 (1836)).

50. *Id.* at 458.

dishonest behavior, trade secret law vindicated “interests not of property but of fair competition and commercial morality.”⁵¹

The reverse engineering exception is a central component of trade secret law’s liability regime.⁵² Because liability depends on whether the defendant used unfair means to access the trade secret, trade secret law does not penalize “those who in good faith acquire knowledge.”⁵³ Consequently, third parties may discover otherwise protected secrets as long as they do so through fair and lawful means,⁵⁴ such as reverse engineering.⁵⁵ Courts have long recognized reverse engineering as a proper method of studying public information on trade secrets to recreate or improve them.⁵⁶ For example, to reverse engineer the trade secret formula for Coca-Cola,⁵⁷ a competitor may conduct any number of experiments on the Coca-Cola product,⁵⁸ the ingredients publicly disclosed by the company,⁵⁹ or other fairly obtained information⁶⁰ to reinvent it. They may

51. Kapczynski, *supra* note 7, at 1389. In 1939, the Restatement of Torts reiterated these principles, stating that trade secret law reflected a “general duty of good faith” in the marketplace, not any “right of property in the idea.” Restatement of Torts § 757 cmt. a (1939).

52. Trade secret law confines liability to misappropriation, which is narrowly defined as improper acquisition, use, or disclosure. Because reverse engineering is not a form of misappropriation, it is legal. See Jessica M. Meyers, *Artificial Intelligence and Trade Secrets*, *Landslide*, Jan.–Feb. 2019, at 17, 19 (describing how trade secret law “does not give its owner a monopoly over the subject of the trade secret” because the “information is only protected against misappropriation—improper acquisition, use, or disclosure”).

53. *Peabody*, 98 Mass. at 458.

54. Bone, *supra* note 36, at 257 (describing how “independent discovery and reverse engineering were perfectly lawful because they did not cross the boundaries of the owner’s secrecy and violate his factual exclusivity”).

55. Reverse engineering is a “method for studying protected products in an attempt to develop a more thorough understanding of the relevant art in order to create superior products.” Craig L. Uhrich, *The Economic Espionage Act—Reverse Engineering and the Intellectual Property Public Policy*, 7 *Mich. Telecomm. & Tech. L. Rev.* 147, 170 (2001). The Uniform Trade Secret Act defines reverse engineering as “starting with the known product and working backward to find the method by which it was developed.” *Unif. Trade Secrets Act* § 1 cmt. (Unif. L. Comm’n 1985).

56. Samuelson & Scotchmer, *supra* note 37, at 1582 n.23 (describing how competitors may reverse engineer for numerous purposes, such as “learning, changing or repairing a product, providing a related service, developing a compatible product, creating a clone of the product, and improving the product”); Samuel J. LaRoque, *Comment, Reverse Engineering and Trade Secrets in the Post-Alice World*, 66 *U. Kan. L. Rev.* 427, 437 (2017) (describing how “courts have traditionally recognized reverse engineering as a proper means of learning trade secrets”).

57. See *Coca-Cola Bottling Co. of Shreveport v. Coca-Cola Co.*, 107 F.R.D. 288, 294 (D. Del. 1985) (holding that Coca-Cola’s “secret formulae are trade secrets”).

58. See *id.* at 291 (describing the Coca-Cola product’s “tremendous market recognition”).

59. See *id.* at 289 (describing how “most of the ingredients are public knowledge”).

60. Kurt M. Saunders & Nina Golden, *Skill or Secret?—The Line Between Trade Secrets and Employee General Skills and Knowledge*, 15 *N.Y.U. J.L. & Bus.* 61, 75 (2018) (explaining how “one who independently invents or discovers information identical to

not, however, misappropriate or access the secret through unfair means,⁶¹ such as seeking employment at Coca-Cola for purposes of publicizing the formula.⁶²

The reverse engineering exception limits the scope of trade secret protection to avoid granting intellectual monopolies that would stunt fair competition and innovation.⁶³ In 1992, the Ninth Circuit articulated these antimonopolistic concerns when considering the lawfulness of reverse engineering computer code.⁶⁴ The court discussed how prohibitions on reverse engineering would confer on the software holder an impermissible “*de facto* monopoly over those ideas and functional concepts.”⁶⁵ The Ninth Circuit determined that reverse engineering was “fair use . . . as a matter of law” in part because it was “the only way” that a competitor may “gain access” to the code.⁶⁶ Finding that competitors must enjoy some lawful means to access certain “ideas and functional concepts,” the court declined to establish a monopoly over the software at issue.⁶⁷ In 1989, the Supreme Court described reverse engineering as “an essential part of innovation,”⁶⁸ recognizing that competitors must enjoy the right to lawfully reinvent trade secrets to devise “new and improved products”⁶⁹ and produce “significant advances in the field.”⁷⁰ Thus, trade secret law sought to facilitate a competitive market on which competitors could reverse engineer and enhance trade secrets for the public good.⁷¹

another’s trade secret, without relying on improper means to do so, is not liable for misappropriation”).

61. See Meyers, *supra* note 52, at 19 (noting that trade secrets are protected against misappropriation).

62. Such conduct would constitute a “violation of contract and breach of confidence.” *Peabody v. Norfolk*, 98 Mass. 452, 458 (1868).

63. Lemley, *supra* note 40, at 340 (“To avoid inadvertently encouraging secrecy rather than disclosure, trade secret law incorporates limits on the scope of the right, notably the defenses of independent development and reverse engineering.”); see also Samuelson & Scotchmer, *supra* note 37, at 1625–26 (“Reverse engineering . . . may also lessen a monopoly platform provider’s market power by providing application developers with an alternative means of entry . . .”).

64. See *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1526 (9th Cir. 1992).

65. *Id.* at 1527; see also *Chi. Lock Co. v. Fanberg*, 676 F.2d 400, 405 (9th Cir. 1981) (noting that the removal of the reverse engineering exception would “convert the . . . trade secret into a state-conferred monopoly akin to the absolute protection that a federal patent affords”).

66. See *Sega Enters.*, 977 F.2d at 1527–28.

67. *Id.* at 1527.

68. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 160 (1989).

69. Samuelson & Scotchmer, *supra* note 37, at 1590; see also Urich, *supra* note 55, at 149 (“Since reverse engineering plays a significant role in the exploitation of knowledge committed to the public domain through the grant of patents and copyrights, prohibiting reverse engineering may stifle the drive to study and improve upon the existing knowledge base.”).

70. See *Bonito Boats*, 489 U.S. at 160.

71. Deepa Varadarajan, *Trade Secret Fair Use*, 83 *Fordham L. Rev.* 1401, 1420 (2014) (“Scope-limiting doctrines in intellectual property law . . . reconcile owners’ rights to

In conclusion, trade secret law's liability regime balanced the innovator's interest in their business secret against the public's interest in knowledge and invention. Although it protected creators' secrets, the law permitted competitors to reverse engineer products to study and improve them.⁷² Because it reduced the risk of intellectual monopolies and allowed competitors to recreate and enhance existing secrets, the reverse engineering exception was "an important part of the balance implicit in trade secret law."⁷³

B. *Incentives for Competition and Innovation Under the Liability Regime*

By narrowly secluding commercial secrets and broadly permitting reverse engineering, early trade secret law sought to promote fair competition and innovation for the public interest.⁷⁴ Because it incentivized efficient market behavior, the reverse engineering exception played a central role in realizing these policy objectives. First, because innovators could decide to license their trade secrets based on how easily competitors could reverse engineer them, the exception facilitated greater information sharing than would exist without it.⁷⁵ Second, by permitting competitors to lawfully enter the market, the exception advanced fair use over misappropriation.⁷⁶ Importantly, trade secret law's incentive structure achieved these outcomes only in certain circumstances, namely when reverse engineering was costly but feasible.⁷⁷

1. *Reverse Engineering Facilitates Information Sharing.* — Trade secret law's liability rule influenced innovators to engage in efficient market decisions that minimized overinvestment and overprotection. Because the law shielded their products from misappropriation, trade secret holders could avoid "overinvesting in actual secrecy" or "mak[ing] wasteful investments in locks and fences and encryption."⁷⁸ In addition to advancing efficiency, the doctrine encouraged innovators to license rather

exclude with the public's interest in furthering innovation and access."); see also *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 485 (1974) (describing how "[c]ompetition is fostered and the public is not deprived of the use of valuable, if not quite patentable, invention" under trade secret law).

72. Uhrich, *supra* note 55, at 155 (explaining how reverse engineering permits the "study of, and improvement upon, discoveries that have been committed to the public domain").

73. Samuelson & Scotchmer, *supra* note 37, at 1584; see also *Chi. Lock Co. v. Fanberg*, 676 F.2d 400, 402–03 (9th Cir. 1982) (distinguishing trade secret law's reverse engineering exception from the "absolute" monopoly awarded by patent law).

74. Lemley, *supra* note 40, at 314 (arguing that trade secret law "advances the goals of innovation and promotes responsible business conduct without limiting the vigorous competition on which a market economy is based").

75. See *infra* section I.B.1.

76. See *infra* section I.B.2.

77. See *infra* section I.B.3.

78. Dan L. Burk, *Law and Economics of Intellectual Property: In Search of First Principles*, 8 *Ann. Rev. L. & Soc. Sci.* 397, 410 (2012).

than seclude products that competitors could otherwise easily reverse engineer.⁷⁹ Because they would lose their market share to competitors who successfully reverse engineered their products, innovators sought to maximize profits by licensing “weak” trade secrets (i.e., ones competitors could easily reverse engineer) subject to a fee and secluding “strong” trade secrets (i.e., ones that were difficult to reverse engineer).⁸⁰ In turn, if the cost of licensing a trade secret was less than the cost of reverse engineering it, competitors paid to license it.⁸¹ Consequently, the reverse engineering exception avoided overseclusion by protecting trade secrets only as long as they were valuable enough to evade recreation. As a result, the law returned products and processes that failed to derive a competitive advantage from their secrecy to the public domain, allowing society to enjoy inventions that would otherwise be secluded.

2. *Reverse Engineering Incentivizes Fair Use.* — By permitting competitors to lawfully enter the market, this liability regime incentivized greater innovation than would otherwise exist if the law awarded no protection (i.e., underprotection) or granted a legal monopoly to the first innovator (i.e., overprotection). Without legal safeguards over their creations, people would decline to develop trade secrets because free riders could reap the benefits of their labor without consequence.⁸² By shielding valuable inventions from misappropriation, trade secret law ameliorated these harms; because innovators could recoup the investment costs from trade secrets, they enjoyed legal incentives to develop those secrets.⁸³ Trade secret law also addressed the adverse consequences of overprotection. If the law gave innovators an absolute property right, certain products and techniques would remain secret in perpetuity, preventing competitors from reverse engineering them.⁸⁴ Consequently, by permitting third parties to profit from products that they fairly recreate, the reverse engineering exception encouraged competitors to improve existing products rather than invest in “wasteful industrial espionage” and misappropriate those products.⁸⁵ Because it vindicated trade secret

79. See Samuelson & Scotchmer, *supra* note 37, at 1589 (describing how innovators may allow “some measure of competition from licensees (e.g., by licensing with low royalties)” to “avoid reverse engineering by unlicensed entrants”).

80. See *id.* (explaining how licensing permits innovators to maintain “market power” and “profit”).

81. Burk, *supra* note 78, at 410 (“Competitors will instead license the information if the cost of a license is less than the expected cost of independently discovering or reverse engineering the information.”).

82. Jonathan R. Chally, Note, *The Law of Trade Secrets: Toward a More Efficient Approach*, 57 *Vand. L. Rev.* 1269, 1270 (2004) (describing how “the law must protect commercial secrets to insure that those secrets will be developed”).

83. *Id.* at 1274 (2004) (“Without the ability to exclude free-riders from profiting from one’s idea, innovators cannot recoup experimentation costs to the extent necessary to justify the decision to innovate.”).

84. See *supra* notes 36–40, 63–67, and accompanying text.

85. Burk, *supra* note 78, at 410.

owners' interest in their products until competitors reverse engineered them, trade secret law's liability rule offered market actors greater incentives to innovate than alternate regimes.

3. *Reverse Engineering Must Be Difficult but Feasible.* — But the incentives for information sharing⁸⁶ and fair use⁸⁷ disappeared when reverse engineering was either too easy or too difficult. As a consequence of the liability rule, innovators could decide to enter certain sectors of the market over others based on the ease of reverse engineering within that sector.⁸⁸ If competitors could easily and cheaply reverse engineer a product, potential innovators would decline to develop in that industry because they would capture the market only for the brief period before successful reverse engineering by others.⁸⁹ Conversely, if reverse engineering a product was virtually impossible, the first market entrant could monopolize the good, and competitors would enjoy no incentive to develop in that industry and improve existing products.⁹⁰ Consequently, trade secret law struggled to maximize innovation if reverse engineering was too easy or too difficult because innovators and competitors would enjoy fewer incentives to develop and enhance products.

In contrast, trade secret law accomplished its goals when reverse engineering was expensive but feasible. Under such conditions, trade secret holders would reap the benefits of their inventions and continue innovating because competitors would require greater time before they could reverse engineer the product.⁹¹ And as long as reverse engineering was feasible and lucrative, competitors would nonetheless invest in those costs of reverse engineering to eventually capture the market.⁹² Thus, when reverse engineering was *difficult but feasible*, trade secret law maximized the incentives for trade secret holders and competitors to innovate.

86. See *supra* section I.B.1.

87. See *supra* section I.B.2.

88. See Samuelson & Scotchmer, *supra* note 37, at 1587 n.49 (“In general, the more difficult reverse engineering is, the greater value the secret will have, the longer lead time advantage the trade secret holder will enjoy in the market, and the less incentive the holder may have to license the secret.”).

89. *Id.* at 1652 (“When a particular means of reverse engineering makes competitive copying too cheap, easy, or rapid, innovators may be unable to recoup R&D expenses.”).

90. *Id.* at 1613 (“[R]everse engineering of object code is generally so difficult, time-consuming, and resource-intensive that it is not an efficient way to develop competing but nonidentical programs.”).

91. See J.H. Reichman, *Computer Programs as Applied Scientific Know-How: Implications of Copyright Protection for Commercialized University Research*, 42 *Vand. L. Rev.* 639, 659 (1989) (“Because this task of catching up to the originator’s head start takes time, it presumably endowed traditional innovators with a period of natural lead time that enabled them to gain a foothold in the market.”); Samuelson & Scotchmer, *supra* note 37, at 1625 (describing how incentives to develop and innovate are “generally adequate owing to the high costs and difficulties of reverse-engineering”).

92. See Samuelson & Scotchmer, *supra* note 37, at 1587–88 (describing how a competitor or “second comer” may “compete in the same market” after successfully “reverse-engineering the innovator’s product”).

C. *The Haphazard Development of Trade Secret Law*

Although early courts clearly articulated trade secret law's liability rule and reverse engineering exceptions, they struggled to offer a precise definition of a trade secret itself.⁹³ As a result, subsequent developments in trade secret law proceeded haphazardly, state by state, as a "creature of common law."⁹⁴ The Restatement of Torts ("First Restatement"), published in 1939,⁹⁵ sought to provide a uniform definition for trade secrets from this unruly precedent.⁹⁶ Until the late 1900s, the First Restatement was "the sole authority to which most courts looked to define the scope of trade secret protection."⁹⁷ Section 757 of the First Restatement described a trade secret as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it."⁹⁸ It instructed courts to determine whether a trade secret exists by considering:

(1) the extent to which the information is known outside of [the] business; (2) the extent to which [the information] is known by employees and others involved in [the] business; (3) the extent of measures taken . . . to guard the secrecy of the information; (4) the value of the information to . . . competitors; (5) the amount of effort or money expended . . . in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.⁹⁹

Despite the First Restatement's efforts to promote uniformity, trade secret law continued to develop inconsistently.¹⁰⁰ In turn, the 1979 Uniform Trade Secrets Act (UTSA) sought to reintroduce clarity to trade secret law.¹⁰¹ Under the UTSA, a trade secret:

93. See, e.g., *Peabody v. Norfolk*, 98 Mass. 452, 458 (1868) (noting "a process of manufacture" or "medicine" as examples of protected trade secrets but not otherwise defining trade secret subject matter). The *Peabody* court acknowledged that courts had previously defined trade secret matter in only "the broadest terms." See id. at 459.

94. Camilla A. Hrdy, *The General Knowledge, Skill, and Experience Paradox*, 60 B.C. L. Rev. 2409, 2426 (2019) [hereinafter Hrdy, *The General Knowledge*].

95. Restatement of Torts § 757 cmt. b (1939).

96. Bone, *supra* note 36, at 247 ("The First Restatement of Torts, published in 1939, extracted a relatively clear definition and a set of liability rules from a confusing body of precedent." (footnote omitted) (citing Restatement of Torts § 757)).

97. Annemarie Bridy, *Trade Secret Prices and High-Tech Devices: How Medical Device Manufacturers Are Seeking to Sustain Profits by Propertizing Prices*, 17 Tex. Intell. Prop. L.J. 187, 198–99 (2009).

98. Restatement of Torts § 757 cmt. b.

99. *Id.*

100. Sandeen, *supra* note 45, at 502 (noting the "slow pace and frequently inconsistent development of the common law" following the First Restatement).

101. Deepa Varadarajan, *Business Secrecy Expansion and FOIA*, 68 UCLA L. Rev. 462, 470, 474–75 (2021) (describing how the National Conference of Commissioners on Uniform State Laws enacted the UTSA as a model state statute). To date, all states except New York and North Carolina have codified the UTSA. Trade Secrets Act, Unif. L. Comm'n,

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.¹⁰²

In 1995, the Third Restatement of Unfair Competition offered another attempt to organize trade secret doctrine. The Third Restatement adopted a “sweepingly expansive articulation” of trade secret subject matter,¹⁰³ providing that a trade secret is “any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.”¹⁰⁴ Unlike the First Restatement, the Third Restatement did not distinguish between trade secrets and confidential yet non-trade-secret information.¹⁰⁵ Because the Third Restatement offered no rationale for its departure from the First Restatement, some scholars have suggested that its definition of trade secrets “lack[ed] a coherent vision.”¹⁰⁶ Courts have thus favored the First Restatement over the Third Restatement when determining the scope of trade secrets.¹⁰⁷

II. THE PROBLEM WITH MODERN APPLICATIONS OF TRADE SECRET LAW TO ALGORITHMS

A. *Inconsistent Determinations of Trade Secret Subject Matter*

The divergent views of trade secret subject matter in the Restatements and the UTSA introduced tremendous confusion in the courts.¹⁰⁸ As a result, the definition of trade secrets varies across state and federal law,¹⁰⁹

<https://www.uniformlaws.org/committees/community-home?CommunityKey=3a2538fb-e030-4e2d-a9e2-90373dc05792> [<https://perma.cc/VS8C-M48B>] (last visited Oct. 31, 2023).

102. Unif. Trade Secrets Act § 1(4) (Unif. L. Comm’n 1985).

103. Eric E. Johnson, Trade Secret Subject Matter, 33 *Hamline L. Rev.* 545, 552 (2010).

104. Restatement (Third) of Unfair Competition § 39 (1995).

105. Johnson, *supra* note 103, at 552 (“[W]hile the First Restatement carefully distinguished between trade secrets and other sorts of confidential business information, the Third Restatement concerned itself solely with trade secrets.”).

106. *Id.* at 554.

107. Hrды, *The General Knowledge*, *supra* note 94, at 2428 (describing how “the Third Restatement has not been as influential as other sources, with many courts instead continuing to reference the First Restatement”).

108. See Johnson, *supra* note 103, at 556 (“Given the mixed signals sent about trade secret subject matter by blackletter sources, it should be no surprise that considerable confusion has arisen in the courts.”).

109. Harry First, Trade Secrets and Antitrust Law, *in* *The Law and Theory of Trade Secrecy: A Handbook of Contemporary Research* 332, 334 (Rochelle C. Dreyfuss & Katherine J. Strandburg eds., 2011) (describing how trade secrets “now also find some definition in state statutory law” and “in federal law”).

inviting inconsistent adjudication.¹¹⁰ Although determining trade secret subject matter is a “terrifically confounding” exercise, the issue has received “scant attention” from scholars and courts.¹¹¹

At minimum, common law and statutory definitions require that trade secrets are valuable.¹¹² But courts follow “no clear guidance” on determining the value of a trade secret.¹¹³ While some jurisdictions determine value according to the trade secret owner’s interest in keeping the invention secret,¹¹⁴ others measure value based on a competitor’s gain from misappropriating the product.¹¹⁵ Judges also weigh the value of a trade secret relative to the competitive advantage it offers to either the innovator or their competitors.¹¹⁶ Meanwhile, some courts adopt a “sweat-of-the-brow” theory,¹¹⁷ which either evaluates value according to the “effort and expense” in developing the innovation¹¹⁸ or the ease of reverse engineering it.¹¹⁹ To make matters worse, judges often fail to inquire into a creation’s value at all.¹²⁰ Although innovators carry the burden of proving economic value,¹²¹ courts routinely assume that a product is

110. Johnson, *supra* note 103, at 558 (“The confusion found in explications of permissible subject matter is echoed in the confusion surrounding the results of trade secret lawsuits.”).

111. *Id.* at 546; see also Hrdy, *The Value in Secrecy*, *supra* note 48, at 560 (describing the “paucity of law review articles” on the requirement that trade secrets are valuable).

112. The First Restatement notes that “the value of the information” and “the amount of effort or money expended . . . in developing the information” are relevant factors for determining if a trade secret exists. Restatement of Torts § 757 cmt. b (1939). Similarly, the UTSA requires that trade secrets derive independent economic value from their secrecy. Unif. Trade Secrets Act § 1(4)(i) (Unif. L. Comm’n 1985).

113. Johnson, *supra* note 103, at 557.

114. *Id.* (“Some courts have held that the core inquiry in determining whether information has independent economic value relates to the value placed by the plaintiff, the putative trade secret owner, on keeping the information secret from persons who could exploit it to the owner’s relative disadvantage.”).

115. *Id.* at 557–58 (“Other courts have held that information has economic value if the defendant, the putative trade secret thief, derives value from using it.”).

116. Olson v. Nieman’s, Ltd., 579 N.W.2d 299, 314 (Iowa 1998) (defining “economic value” in the context of Iowa Code § 550.2(4)(a) (1991) as the “value of the information to either the owner or a competitor” (quoting U.S. W. Commc’ns, Inc. v. Off. of Consumer Advoc., 498 N.W.2d 711, 714 (Iowa 1993))).

117. Johnson, *supra* note 103, at 558.

118. See *McCallum v. Allstate Prop. & Cas. Ins. Co.*, 204 P.3d 944, 950 (Wash. Ct. App. 2009).

119. See *Walker Mfg., Inc. v. Hoffmann, Inc.*, 261 F. Supp. 2d 1054, 1082 (N.D. Iowa 2003) (holding that “the ease with which the device can be ‘reverse engineered’ is certainly relevant to the question of whether or not the device *remains* a ‘trade secret’”).

120. Hrdy, *The Value in Secrecy*, *supra* note 48, at 559–60 (describing how “courts sitting in trade secret litigation have not closely scrutinized plaintiffs’ assertions of independent economic value”).

121. *Rent Info. Tech., Inc. v. Home Depot U.S.A., Inc.*, 268 F. App’x 555, 558 (9th Cir. 2008) (finding that the complainant “failed to carry its burden of proving that any specific business [secrets] derive their value from not being generally known”).

valuable enough based on “circumstantial evidence, such as the time, money, and effort invested in developing the information.”¹²²

Because courts lack a coherent test for measuring value and often fail to investigate value altogether, determinations of trade secret subject matter vary widely.¹²³ While some judges extend trade secret protection to business information on consumer purchases,¹²⁴ others find that such materials are not trade secrets because they lack economic value.¹²⁵ Similarly, courts disagree on whether financial data about a company’s pricing and sales are sufficiently valuable to receive legal protection.¹²⁶ The trade secret status of “negative know-how”—knowledge about processes that are nonbeneficial or detrimental to the trade secret holder—varies by jurisdiction.¹²⁷ In the algorithmic context, the propriety of trade secret protection for training data remains in dispute.¹²⁸ Consequently, when courts fail to carefully scrutinize trade secret claims, they risk erroneously secluding non-trade-secret materials.¹²⁹

122. Hrdy, *The Value in Secrecy*, supra note 48, at 560 (“Independent economic value, if it appears at all, is an afterthought, something that courts assume can be shown easily from circumstantial evidence, such as the time, money, and effort invested in developing the information.”).

123. Johnson, supra note 103, at 559 (discussing inconsistent trade secret treatments of consumer, marketing, and business strategy data).

124. See *Star Sci., Inc. v. Carter*, 204 F.R.D. 410, 415 (S.D. Ind. 2001) (finding that data on product sales and use were trade secrets because the “information is not readily obtainable, and possesses economic value”).

125. *Vigoro Indus., Inc. v. Cleveland Chem. Co. of Ark.*, 866 F. Supp. 1150, 1164 (E.D. Ark. 1994) (declining to protect consumer purchasing data because “its independent economic value is scant”).

126. Compare *Whyte v. Schlage Lock Co.*, 125 Cal. Rptr. 2d 277, 287 (Cal. Ct. App. 2002) (finding that financial data on profit margins, production costs, and accounting information had “independent economic value because Schlage’s pricing policies would be valuable to a competitor”), with *United States v. IBM Corp.*, 67 F.R.D. 40, 49 (S.D.N.Y. 1975) (finding that the value of financial data on profits, loss, and sales to “competitors is speculative”).

127. Charles Tait Graves, *The Law of Negative Knowledge: A Critique*, 15 *Tex. Intell. Prop. L.J.* 387, 392 (2007) (describing how the extension of trade secret protection over “negative information . . . is a difficult subject”).

128. Compare *Zabit v. Brandometry, LLC*, 540 F. Supp. 3d 412, 424 (S.D.N.Y. 2021) (“[A]lthough Plaintiffs cannot lay claim to the [training] data, the algorithm and its methodology for using that data might still be protected.”), with *Lab. Ready, Inc. v. Williams Staffing, LLC*, 149 F. Supp. 2d 398, 412 (N.D. Ill. 2001) (granting trade secrecy protection to a corporation’s “models and data”). Scholars have noted that “[i]solated data as such may not necessarily have any commercial value,” which “begs the question whether we should extend trade secrets protection also to databases obtained by aggregating data.” Guido Noto La Diega & Cristiana Sappa, *The Internet of Things (IoT) at the Intersection of Data Protection and Trade Secrets. Non-Conventional Paths to Counter Data Appropriation and Empower Consumers*, 2020 *Eur. J. Consumer L.*, 419, 440.

129. In *State v. Chun*, the New Jersey Supreme Court ordered a breathalyzer manufacturer to share its source code with an independent third party for an assessment of its scientific validity. See 943 A.2d 114, 123 (N.J. 2008). In addition to identifying errors in the software, the examination revealed that the allegedly proprietary software consisted of

B. *Barriers to Accused Parties' Right to Present a Complete Defense*

Despite the absence of a coherent test for trade secrets, courts consistently award trade secret protection to algorithms.¹³⁰ An algorithm is a computational procedure that automates decisionmaking processes by predicting future outcomes or identifying patterns from complex datasets.¹³¹ This Note adopts the term “ancillary information” to describe all non-trade-secret information that is related to but separate from the protected algorithm.¹³² Ancillary information encompasses three general categories of material: (1) summary information providing context on the algorithm’s development, methodology, or performance; (2) input data used to train the algorithm; and (3) output data produced by the algorithm. Summary information offers intelligible, high-level analyses or descriptions to clarify a software’s methodology and performance.¹³³ Broadly speaking, algorithms receive input information to calculate unique output values.¹³⁴ Output values may consist of predictions or pattern detection, such as the likelihood that a defendant will recidivate

general algorithms that arguably failed to meet the elements of a trade secret. See Report on Behalf of the Defendants at 14, *Chun*, 943 A.2d 114 (No. 58,879) (stating that “the code is not really unique or proprietary” because it “consists mostly of general algorithms”); see also Charles Short, Note, *Guilt by Machine: The Problem of Source Code Discovery in Florida DUI Prosecutions*, 61 Fla. L. Rev. 177, 190 (2009) (“The resulting examination of the code revealed that it consisted primarily of *general* algorithms and, as a result, was arguably not unique or proprietary.”). *Chun* demonstrates the need for courts to strictly police overbroad trade secrecy claims over programs that are not entitled to protection.

130. See Short, *supra* note 129, at 189–90 (describing how courts have protected algorithms and source code as trade secrets since the 1980s).

131. See Levendowski, *supra* note 15, at 590 (“Most AI systems are trained using vast amounts of data and, over time, hone the ability to suss out patterns that can help humans identify anomalies or make predictions.”); Surden, *supra* note 16, at 90 (describing how “researchers often employ machine learning methods to analyze existing data to predict the likelihood of uncertain outcomes”).

132. For an explanation of why ancillary information is not a trade secret, see *infra* section III.C.

133. See Maayan Perel & Niva Elkin-Koren, *Black Box Tinkering: Beyond Disclosure in Algorithmic Enforcement*, 69 Fla. L. Rev. 181, 185 (2017) (describing the necessity of “proper tools to analyze massive amounts of data”). Summary information is crucial to clarify convoluted algorithmic operations as the sheer volume of input and output data may be so vast that they are “unintelligible” in isolation. *Id.*; see also Katyal, *The Paradox of Source Code Secrecy*, *supra* note 19, at 1250 (arguing that the “disclosure of source code is a deceptively simple solution to the problem of algorithmic transparency . . . because of the complexity and dynamism of machine-learning processes” (citing, among others, Frank Pasquale, *The Black Box Society: The Secret Algorithms that Control Money and Information* 142 (2015))); David S. Levine, *Confidentiality Creep and Opportunistic Privacy*, 20 Tul. J. Tech. & Intell. Prop. 11, 41 (2017) (arguing that “contextual and relational information is needed to fully assess an algorithm’s function and impact”).

134. See Surden, *supra* note 16, at 90 (describing how “machine learning algorithms may produce automated results” based on “existing data”).

or reoffend.¹³⁵ Input values include existing data related to the problem or phenomenon of interest, such as a defendant's prior criminal record.¹³⁶

Modern courts designate both algorithms and ancillary information about their development, methodology, and performance as trade secrets.¹³⁷ But because there is no coherent test for determining the trade secret status of automated software, courts risk secluding non-trade-secret materials¹³⁸ that are essential for confirming the methodology, accuracy, and fairness of otherwise inscrutable algorithms.¹³⁹ Such overprotection raises due process concerns in criminal proceedings, in which errors may produce overly punitive bail outcomes, verdicts, and sentences.¹⁴⁰ In light of the “competing and powerful” liberty interests¹⁴¹ implicated by automated decisionmaking, algorithmic transparency is more important than ever.¹⁴² But when defendants seek information about the accuracy and performance of criminal justice technologies,¹⁴³ the companies that own and license these programs to courts routinely object to such disclosure on the grounds that their algorithms are trade secrets.¹⁴⁴

135. See, e.g., *State v. Loomis*, 881 N.W.2d 749, 753–54, 753 n.10 (Wis. 2016) (describing how a risk assessment algorithm called the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) tool is “intended to predict the general likelihood that those with a similar history of offending are either less likely or more likely to commit another crime following release from custody”).

136. See, e.g., *id.* at 754 (describing how the “COMPAS risk assessment is based upon information gathered from the defendant’s criminal file and an interview with the defendant”).

137. See, e.g., *GlobeRanger Corp. v. Software AG U.S., Inc.*, 836 F.3d 477, 491–93 (5th Cir. 2016) (extending trade secret protection to proprietary computer software); *Loomis*, 881 N.W.2d at 761 (awarding trade secret protection to the COMPAS algorithm and information related to its performance because the developer “considers COMPAS a proprietary instrument”).

138. See Hrdy, *The Value in Secrecy*, *supra* note 48, at 606–07 (arguing that courts must assess the statutory elements of trade secrets “more comprehensively and consistently” to avoid granting trade secret status to mere confidential information).

139. For an explanation of how summary information may clarify algorithmic outcomes and methods, see *supra* note 133 and accompanying text.

140. See Wexler, *Life, Liberty, and Trade Secrets*, *supra* note 12, at 1346 (“At every stage—policing and investigations, pretrial incarceration, assessing evidence of guilt at trial, sentencing, and parole—machine learning systems and other software programs increasingly guide criminal justice outcomes.”).

141. *State v. Pickett*, 246 A.3d 279, 301 (N.J. Super. Ct. App. Div. 2021).

142. Wexler, *Life, Liberty, and Trade Secrets*, *supra* note 12, at 1402 (arguing that the seclusion of automated criminal justice technologies harms “anyone who is affected by a criminal justice outcome and for whom greater transparency could provide assurance that the outcome was proper”).

143. See, e.g., *State v. Loomis*, 881 N.W.2d 749, 757 (Wis. 2016) (considering whether “the proprietary nature of COMPAS prevents [defendants] from assessing its accuracy”).

144. Wexler, *Life, Liberty, and Trade Secrets*, *supra* note 12, at 1358–64 (describing how developers invoke trade secrecy protection in criminal litigation to withhold evidence on their source code, methodology, and software performance).

The seclusion of summary information about the COMPAS algorithm demonstrates these harms. Owned by commercial vendor Northpointe, COMPAS purports to calculate an individual's likelihood of "recidivism," or reoffending,¹⁴⁵ based on criminal records and questionnaires.¹⁴⁶ In 2016, the Wisconsin Supreme Court upheld Mr. Loomis's eleven-year sentence based on COMPAS's determination that he posed a high risk for general recidivism and violent recidivism.¹⁴⁷ Mr. Loomis appealed his sentence on the grounds that COMPAS's proprietary nature prevented him from challenging its accuracy and validity.¹⁴⁸ But the Wisconsin Supreme Court rejected Mr. Loomis's claims and declined to compel the disclosure of COMPAS source code or summary information, finding that Northpointe "considers COMPAS a proprietary instrument and a trade secret."¹⁴⁹

Loomis raises numerous concerns about the seclusion of summary information. Given that algorithms and ancillary information are entitled to distinct legal protections, courts must independently determine the trade secret status of these materials.¹⁵⁰ Because the Wisconsin Supreme Court failed to differentiate between the COMPAS algorithm and its ancillary summary information, however, it withheld non-trade-secret data from interested parties.¹⁵¹ The nondisclosure of summary information prevents defendants like Mr. Loomis from exercising their right to present a complete defense and challenge algorithmic decisions that implicate

145. Jeff Larson, Surya Mattu, Lauren Kirchner & Julia Angwin, How We Analyzed the COMPAS Recidivism Algorithm, ProPublica (May 23, 2016), <https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm> [<https://perma.cc/A86C-25CW>] ("Across the nation, judges, probation and parole officers are increasingly using algorithms to assess a criminal defendant's likelihood of becoming a recidivist—a term used to describe criminals who re-offend.").

146. Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, Machine Bias, ProPublica (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [<https://perma.cc/QK5L-CWQ6>] ("Northpointe's core product is a set of scores derived from 137 questions that are either answered by defendants or pulled from criminal records."). The COMPAS questionnaire measures defendants' prior education, employment, substance use, and other factors. Equivant, Practitioner's Guide to COMPAS Core 31–32 (2019), <https://www.equivant.com/wp-content/uploads/Practitioners-Guide-to-COMPAS-Core-040419.pdf> [<https://perma.cc/29MW-YGQ9>].

147. See *Loomis*, 881 N.W.2d at 755–56, 772.

148. *Id.* at 753 (considering "the specific question of whether the use of a COMPAS risk assessment at sentencing 'violates a defendant's right to due process, either because the proprietary nature of COMPAS prevents defendants from challenging the COMPAS assessment's scientific validity, or because COMPAS assessments take gender into account.'" (quoting *State v. Loomis*, No. 2015AP157-CR, 2015 WL 5446731, at *1 (Wis. Ct. App. Sept. 17, 2015))).

149. *Id.* at 761.

150. For a discussion of why algorithms are entitled to trade secrecy protection while ancillary information is not, see *infra* section III.C.

151. See *Loomis*, 881 N.W.2d at 761 (withholding COMPAS's source code and ancillary data).

their life and liberty.¹⁵² Indeed, the Wisconsin Court of Appeals noted this catch-22 for criminal defendants before the Wisconsin Supreme Court denied Mr. Loomis's due process claims.¹⁵³ Mr. Loomis sought to appeal his sentence on the grounds that COMPAS (1) impermissibly considered his gender¹⁵⁴ and (2) inaccurately assessed his "risk."¹⁵⁵ But to prove these claims, he required access to information about COMPAS's algorithm, its assessment of gender, and its accuracy—information barred by Northpointe's invocations of trade secret protection.¹⁵⁶ Considering this "lack of transparency," the Wisconsin Court of Appeals questioned how Mr. Loomis could meaningfully articulate his due process claims and "explain how the [COMPAS] assessments work' absent access to COMPAS's underlying proprietary methodology."¹⁵⁷

Yet the Wisconsin Supreme Court's refusal to share COMPAS code with Mr. Loomis reflects the failure of modern courts to closely police trade secret subject matter. Statutory and common law authorities on trade secret law all require that courts investigate the value and secrecy of an invention.¹⁵⁸ Despite these commands, the Wisconsin Supreme Court designated the COMPAS algorithm and its summary information as trade secrets without closely analyzing their trade secret status. Rather than inquiring into the software's value, the court relied on Northpointe's conclusory allegation that COMPAS was "a proprietary instrument and a trade secret."¹⁵⁹ Despite the harms of overprotection, several courts have arrived at the same outcome as *Loomis*, denying defendants' requests to access risk-assessment programs on the grounds that such programs are trade secrets.¹⁶⁰ Like *Loomis*, these decisions extend trade secret protection

152. See Charles Tait Graves & Sonia K. Katyal, From Trade Secrecy to Seclusion, 109 *Geo. L.J.* 1337, 1375 (2021) ("Denying source code availability makes it literally impossible for the defendant to present a full and complete defense . . .").

153. See *Loomis*, 2015 WL 5446731, at *2 (noting that the lack of transparency in COMPAS's methodology raises potential questions of due process).

154. *Id.* at *3 (certifying the question of "whether a sentencing court's reliance on a COMPAS assessment runs afoul of *Harris*'s prohibition on gender-based sentencing" (cleaned up)).

155. *Id.* at *2 ("Loomis asserts that COMPAS assessments were developed for use in allocating corrections resources and targeting offenders' programming needs, not for the purpose of determining sentence.") Mr. Loomis argued that both grounds constituted violations of his due process rights. *Id.*

156. See *id.*

157. *Id.* (quoting Brief of Plaintiff-Respondent at 10, *Loomis*, 2015 WL 54467321).

158. For a discussion of the secrecy and value requirements for trade secrets, see *infra* section III.A.

159. *State v. Loomis*, 881 N.W.2d 749, 761 (Wis. 2016).

160. See Graves & Katyal, *supra* note 152, at 1375 ("Several other cases have followed this reasoning, concluding that source code is proprietary and therefore essentially immune from investigation by the defendant."); see also *People v. Super. Ct.*, No. B258569, 2015 WL 139069, at *6 (Cal. Ct. App. Jan. 9, 2015) (denying a death-penalty-eligible defendant the right to examine a forensic program after determining that its source code was a trade secret); *People v. Carter*, No. 2573/14, 2016 WL 239708, at *1, *7 (N.Y. Sup. Ct. Jan. 12,

based on mere allegations that the technology is proprietary.¹⁶¹ These opinions also fail to separately analyze the trade secret statuses of algorithms and ancillary summary information.¹⁶² By secluding non-trade-secret information, *Loomis* and its progeny wield trade secret law as a weapon against people in the criminal legal system.

C. *Barriers to Bias Mitigation*

Algorithmic opacity not only harms defendants but also undermines third parties' efforts to mitigate technological bias and discrimination. Public interest groups play a crucial role by using publicly available data to expose algorithmic harms and unveil discriminatory outcomes in criminal sentencing,¹⁶³ housing,¹⁶⁴ healthcare,¹⁶⁵ and other technologies.¹⁶⁶ But trade secret protection over algorithms impedes these empirical investigations.¹⁶⁷ To address this problem, public interest groups often rely on a form of reverse engineering that does not require access to the source code itself.¹⁶⁸ Using only input and output data from previous applications of the technology, researchers can reverse engineer algorithms and

2016) (denying a defendant's discovery motion for the Forensic Statistical Tool because "the source code is proprietary software"); *People v. Lopez*, 23 N.Y.S.3d 820, 829 (N.Y. Sup. Ct. 2015) (refusing to turn over software to a defendant on the grounds that it was proprietary).

161. See Katyal, *The Paradox of Source Code Secrecy*, supra note 19, at 1270 (arguing that the determination of trade secret status "risks becoming somewhat circular in nature: something is secret because it is said to be secret, not because the information, in actuality, is secret or because its secrecy is proven with particularity").

162. See, e.g., *GlobeRanger Corp. v. Software AG U.S., Inc.*, 836 F.3d 477, 492, 502 (5th Cir. 2016) (extending trade secrecy protection to a software and its related "documentation" based on limited evidence that "at least some portion of its . . . [software] constituted a trade secret").

163. E.g., *Larson et al.*, supra note 145 (identifying racial bias in the COMPAS algorithm).

164. E.g., Julia Angwin, Ariana Tobin & Madeleine Varner, Facebook (Still) Letting Housing Advertisers Exclude Users by Race, *ProPublica* (Nov. 21, 2017), <https://www.propublica.org/article/facebook-advertising-discrimination-housing-race-sex-national-origin> (on file with the *Columbia Law Review*) (uncovering the racial bias of Facebook's algorithm for advertising housing opportunities by measuring the outputs of ProPublica's inputs into Facebook's system).

165. E.g., Obermeyer et al., supra note 13, at 448–49 (discovering that a nationwide healthcare algorithm disproportionately underestimated the health needs of Black patients).

166. E.g., Julia Angwin & Surya Mattu, Amazon Says It Puts Customers First. But Its Pricing Algorithm Doesn't, *ProPublica* (Sept. 20, 2016), <https://www.propublica.org/article/amazon-says-it-puts-customers-first-but-its-pricing-algorithm-doesnt> (on file with the *Columbia Law Review*) (simulating customer activity and examining public product listings to identify that Amazon's pricing algorithm was biased toward Amazon products).

167. See Obermeyer et al., supra note 13, at 447 ("Algorithms deployed on large scales are typically proprietary, making it difficult for independent researchers to dissect them.").

168. See Levendowski, supra note 15, at 604 ("Reverse engineering can be a critical means of examining bias in AI systems."); Obermeyer et al., supra note 13, at 447 ("Instead, researchers must work 'from the outside[]' . . . and resort to clever work-arounds such as audit studies.").

investigate their accuracy, fairness, and methodology.¹⁶⁹ In 2016, the investigative journalism organization ProPublica successfully reverse engineered the COMPAS algorithm using input and output information obtained from public access requests and determined that the software was racially biased.¹⁷⁰ Because input and output data are ancillary materials that do not constitute trade secrets,¹⁷¹ reverse engineering enables members of the public to check against algorithmic unfairness without accessing proprietary software itself.¹⁷²

The issue is that companies like Northpointe regularly claim trade secret protection over *all* materials related to their software, including non-trade-secret datasets,¹⁷³ which undermines bias-mitigation techniques that rely on reverse engineering.¹⁷⁴ To make matters worse, the law is ill-equipped to police overbroad trade secrecy claims. Because developers seldom voluntarily disclose their source code to the public, courts adjudicating those technologies' trade secret status lack virtually any information about them.¹⁷⁵ To meaningfully assess trade secrecy claims, courts may require that trade secret holders disclose their algorithms and ancillary information subject to protective orders.¹⁷⁶ Protective orders prevent nonparties from accessing the materials at issue to maintain the confidentiality of algorithmic information.¹⁷⁷ Despite these safeguards,

169. See Levendowski, *supra* note 15, at 602 (“Reverse engineering is a way of leveraging available inputs or outputs to understand the mechanics of what happens inside a black box system.”). Specifically, competitors require training data and output values from previous iterations of an algorithm to reverse engineer its functions. See, e.g., Larson et al., *supra* note 145 (reverse engineering the COMPAS algorithm from criminal records and risk assessment scores in previous applications of the tool).

170. See Larson et al., *supra* note 145 (finding that Black defendants “who did not recidivate over a two-year period were nearly twice as likely to be misclassified as higher risk compared to their white counterparts”); see also *infra* section III.C.3 (discussing ProPublica’s reverse engineering).

171. See *infra* section III.C.

172. See Wexler, Life, Liberty, and Trade Secrets, *supra* note 12, at 1374 (describing how reverse engineering “uses known inputs, outputs, and knowledge of the general function of a system but not of its internal contents or implementation”).

173. See Levendowski, *supra* note 15, at 600 (describing how Northpointe refused to disclose COMPAS’s source code or performance metrics).

174. See Obermeyer et al., *supra* note 13, at 447 (“Without an algorithm’s training data, objective function, and prediction methodology, we can only guess as to the actual mechanisms for the important algorithmic disparities that arise.”).

175. Sonia K. Katyal, Private Accountability in the Age of Artificial Intelligence, 66 UCLA L. Rev. 54, 125 (2019) [hereinafter Katyal, Private Accountability] (“[W]ithout first disclosing and examining the source code, it is impossible to know whether an algorithm even qualifies as a trade secret.”).

176. See Unif. Trade Secrets Act § 5 (Unif. L. Comm’n 1985) (“[A] court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings . . .”).

177. Wexler, Life, Liberty, and Trade Secrets, *supra* note 12, at 1353 (describing how “courts may issue protective orders to limit the use and distribution of trade secrets beyond the needs of the proceeding”).

however, companies routinely object to examination under protective order on the grounds that the risk of inadvertent disclosure jeopardizes their proprietary interests.¹⁷⁸ As a result, corporate entities often take advantage of the difficulties in policing trade secret matter by broadly claiming protection over all algorithmic materials, “even when the underlying information may not actually qualify as a trade secret.”¹⁷⁹ In criminal proceedings, when defendants demand access to programs that determine their verdicts and sentences, the vendors of these risk-assessment tools object that their technology is proprietary.¹⁸⁰ And in civil proceedings, credit reporting companies and social media powerhouses like Facebook call upon trade secret law to defend against lawsuits claiming that their algorithms are discriminatory.¹⁸¹ Consequently, developers’ tendency to claim trade secret protection over algorithmic materials at large, alongside courts’ failure to police these broad allegations, exacerbates issues of technological opacity.

D. *Departure From First Principles*

The nondisclosure of summary data marks a profound departure from the first principles underlying early trade secret law. Public access to information on a product’s performance and accuracy plays a crucial role in improving available technologies on the market.¹⁸² When summary information exists in the public domain, consumers (e.g., courts licensing risk-assessment programs) can make informed purchases based on product qualities of accuracy and fairness.¹⁸³ As consumers identify and select

178. *Id.* at 1349–50 (noting that developers often “claim entitlements to withhold that information from criminal defendants and their attorneys, refusing to comply even with those subpoenas that seek information under a protective order and under seal”).

179. Katyal, *Private Accountability*, *supra* note 175, at 125.

180. See, e.g., *State v. Loomis*, 881 N.W.2d 749, 761 (Wis. 2016) (declining to compel Northpointe to disclose the COMPAS algorithm based on Northpointe’s objection that its technology is a protected trade secret).

181. See Mikella Hurley & Julius Adebayo, *Credit Scoring in the Era of Big Data*, 18 *Yale J.L. & Tech.* 148, 158 (2016) (“A number of emerging companies use proprietary ‘machine-learning’ algorithms to sift and sort through thousands of data points available for each consumer. These companies treat their machine-learning tools as closely-guarded trade secrets, making it impossible to offer a comprehensive picture of the industry.”); Meghan J. Ryan, *Secret Algorithms, IP Rights, and the Public Interest*, 21 *Nev. L.J.* 61, 66 (2020) (describing how “companies such as Facebook rely on secret algorithms in their advertisement targeting, which could discriminate against certain types of individuals in critical markets like housing”); Joseph Blass, Note, *Algorithmic Advertising Discrimination*, 114 *Nw. U. L. Rev.* 415, 450 (2019) (noting that lawsuits against Facebook for discriminatory advertisement “would require inspecting the actual algorithms used by companies like Facebook—algorithms that form the basis of their revenue-raising business and are fiercely guarded trade secrets”).

182. For an explanation of summary information, see *supra* note 133 and accompanying text.

183. Courts have directed the state to fix and declined to accept into evidence results from criminal justice technologies that yield incorrect results. In *State v. Chum*, a court-

high-quality algorithms over discriminatory software, programmers face market pressures to develop new technologies that minimize error and bias.¹⁸⁴ Consequently, when courts withhold summary data from the public, they stymie bias mitigation and software improvement in the industry.

Similarly, secluding input and output data disrupts incentives for competition and innovation by rendering reverse engineering functionally impossible.¹⁸⁵ Algorithmic development involves complex mathematical operations and data preparation processes.¹⁸⁶ Even when third parties do have access to relevant input and output information (which is seldom the case), reverse engineering a software system is a difficult enterprise.¹⁸⁷ Consequently, when the law entirely withholds input and output data from third parties, reverse engineering is near impossible,¹⁸⁸ allowing algorithm owners to maintain a virtual monopoly over their software.¹⁸⁹ This protection of intellectual monopolies

ordered investigation into the scientific validity of a breathalyzer technology revealed a “significant flaw in the program’s source code that, in limited circumstances, can lead to an inaccurate reported BAC test result.” 943 A.2d 114, 157 (N.J. 2008). The court declared that it would “reject all of the tests” if it was “without confidence in the accuracy of the individually reported results.” *Id.* at 158; see also *People v. Thompson*, No. 4346/15, 2019 WL 4678813, at *1 (N.Y. Sup. Ct. Sept. 25, 2019) (unpublished table decision) (declining to use evidence produced by a forensic analysis software on the grounds that its “results were not the product of procedures generally accepted in the ‘community’ of DNA forensic scientists”).

184. See Levendowski, *supra* note 15, at 601 (“Bias mitigation techniques, like reverse engineering and algorithmic accountability processes, provide a means of identifying where competitors may be able to make gains over incumbents: by rectifying a known bias.”).

185. See *id.* at 604–06 (discussing how the nondisclosure of training data impedes reverse engineering).

186. See Katyal, *The Paradox of Source Code Secrecy*, *supra* note 19, at 1249 (“[B]ecause algorithms increasingly depend on the input of unique personal data, the outcomes may be obscure and difficult to study in a systematic capacity without access to the data.”); Michael Mattioli, *Disclosing Big Data*, 99 *Minn. L. Rev.* 535, 557, 566–67 (2014) (describing how “big data” algorithms are “difficult to uncover through reverse engineering” because their training data is often aggregated from multiple sources and stripped of information that can be used to identify individuals).

187. See Katyal, *The Paradox of Source Code Secrecy*, *supra* note 19, at 1249 (“If the source code is unavailable, the only way to obtain the code is to engage in reverse engineering, but this is often difficult, costly, and restricted . . .”); Wexler, *Life, Liberty, and Trade Secrets*, *supra* note 12, at 1374 (describing how reverse engineering is “limited by the volume and scope of known test inputs, the difficulty of testing for unforeseen circumstances, and the possibility of fraud” (footnotes omitted)).

188. Access to input and output data is necessary for reverse engineering algorithms. Katyal, *The Paradox of Source Code Secrecy*, *supra* note 19, at 1251 (“[E]ven if source code disclosure reveals some elements of a decision reached through automated processing, it cannot be fully evaluated without an accompanying investigation of the training data . . .”). Consequently, “assertions of trade secret protection . . . remain a key obstacle for researchers and litigants seeking to test the efficacy and fairness of government algorithms and automated decision making” through reverse engineering. *Id.* at 1248.

189. See *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1527 (9th Cir. 1992) (finding that prohibitions on reverse engineering would confer on the software holder an

contradicts trade secret law's policy goals of encouraging competition and innovation and reflects an unprecedented shift in the doctrine.

Finally, early trade secret law originated as a means to prevent misappropriation and unfair use in the workplace, not to shield corporate entities from accountability when their technology incriminates, penalizes, or otherwise discriminates against members of the public. At first, trade secret law awarded injunctive relief to manufacturers seeking to prevent wrongful disclosure and acquisition by employees and competitors.¹⁹⁰ In contrast, algorithm owners now claim trade secret protection not to prevent misappropriation but to evade investigations into the fairness and accuracy of their technology by defendants and public interest groups—parties who are neither competitors nor employees.¹⁹¹ These novel applications of trade secret law introduce immense confusion and invite courts to forget that the doctrine was narrowly concerned with commercial exchanges between market actors.¹⁹² As a result, these unprecedented fact patterns increase the risk of overprotection and algorithmic opacity.¹⁹³

III. REVISITING THE VALUE REQUIREMENT OF TRADE SECRETS

When courts fail to carefully scrutinize the boundaries of trade secret subject matter, they risk secluding information that does not qualify as a trade secret.¹⁹⁴ This practice withholds information necessary for defendants to challenge the accuracy, fairness, and validity of algorithms¹⁹⁵ and

impermissible “*de facto* monopoly over [the program’s] ideas and functional concepts”); Chally, *supra* note 82, at 1274–76 (“By precluding potential competitors from entering a market, government protection of ideas creates a state-sponsored monopoly regardless of the method of protection.”).

190. See, e.g., *Peabody v. Norfolk*, 98 Mass. 452, 459–61 (1868) (finding a manufacturer entitled to injunctive relief against misappropriation by a former employee); *Tabor v. Hoffman*, 23 N.E. 12, 13 (N.Y. 1889) (finding a manufacturer entitled to preventative injunctive relief against misappropriation by a competitor).

191. See, e.g., *State v. Loomis*, 881 N.W.2d 749, 761 (Wis. 2016) (considering the trade secret status of a risk assessment program employed against a defendant who was neither a competitor nor a former employee); see also Katyal, *The Paradox of Source Code Secrecy*, *supra* note 19, at 1247 (noting that recent defendants’ motivations are “not to compete with a trade secret holder but rather to investigate a particular source of information”).

192. See, e.g., *Loomis*, 881 N.W.2d at 761 (failing to consider the absence of a confidential or competitive relationship between the algorithm owner and the defendant).

193. See Robin Feldman & Charles Tait Graves, *Naked Price and Pharmaceutical Trade Secret Overreach*, 22 *Yale J.L. & Tech.* 61, 82 (2020) (“Although over broad trade secrecy assertions are not new, the problem now extends far beyond traditional civil litigation disputes between former employers and departing employees—the customary domain of trade secret law.”).

194. See, e.g., *Loomis*, 881 N.W.2d at 761 (extending trade secrecy protection over the COMPAS algorithm and its ancillary information without scrutinizing the trade secret status of those materials).

195. See *supra* section II.B (addressing the effects on accuracy, fairness, and validity challenges).

for competitors to reverse engineer and improve existing software.¹⁹⁶ But such invocations of trade secret protection surpass the bounds anticipated by the doctrine.¹⁹⁷ To address this departure from first principles, courts and scholars must revisit the foundations of trade secret law to determine whether algorithmic materials deserve trade secret protection.¹⁹⁸

A. *The Value and Secrecy Requirements of Trade Secrets*

To start, this Note identifies the principles shared across early trade secret authorities. Common law jurisdictions that follow the First Restatement adopt a multifactor balancing test that generally examines (1) the invention's investment costs and value to the creator,¹⁹⁹ (2) the difficulty among competitors of reverse engineering the invention,²⁰⁰ and (3) the invention's secrecy.²⁰¹ States under the UTSA require that trade secrets (1) derive independent economic value from their secrecy and (2) are subject to reasonable efforts to maintain their secrecy.²⁰² Although they articulate different factors, these authorities share fundamental requirements that: (1) the value of the trade secret is derived from its secrecy ("value requirement"), and (2) the trade secret is indeed secret ("secrecy requirement").

Because developers routinely conceal their technology from the public,²⁰³ algorithms and ancillary information typically satisfy the secrecy requirement. But because courts adopt conflicting approaches to assessing value²⁰⁴—or even fail to scrutinize value altogether²⁰⁵—algorithm owners routinely enjoy trade secret protection over materials that do not satisfy

196. See *supra* section II.C (discussing the effect on competition).

197. See *supra* section II.D.

198. See *Fla. ex rel. Atty. Gen. v. U.S. Dep't of Health & Hum. Servs.*, 648 F.3d 1235, 1282, 1289 (11th Cir. 2011) (deciding to "begin with first principles" when addressing a "novel" extension of constitutional doctrine), *rev'd in part, aff'd in part sub nom. NFIB v. Sebelius*, 567 U.S. 519 (2012).

199. The First Restatement states that "the value of the information" and "the amount of effort or money expended . . . in developing the information" are relevant factors for determining the subject matter of trade secrets. Restatement of Torts § 757 cmt. b (1939).

200. According to the First Restatement, courts should also consider "the ease or difficulty with which the information could be properly acquired or duplicated by others" when defining trade secrets. *Id.*

201. The First Restatement notes the relevance of the extent to which the information is known outside the business, the extent to which those involved with the business know the information, and the extent to which measures are taken to protect the information's secrecy in defining trade secrets. See *id.*

202. See Unif. Trade Secrets Act § 1(4) (Unif. L. Comm'n 1985).

203. See, e.g., *State v. Pickett*, 246 A.3d 279, 301 (N.J. Super. Ct. App. Div. 2021) (describing how developers are "shrouding the source code and related documents in a curtain of secrecy").

204. See *supra* notes 113–119 and accompanying text.

205. See *supra* notes 120–122 and accompanying text; see also, e.g., *State v. Loomis*, 881 N.W.2d 749, 761 (Wis. 2016) (failing to scrutinize the COMPAS algorithm's trade secret status).

the value requirement.²⁰⁶ Furthermore, developers now claim trade secret protection to evade public access efforts by parties who are neither competitors nor employees, departing from the traditional structure of misappropriation claims.²⁰⁷ Because secluding algorithmic materials deviates from first principles and opposes the public's profound interest in transparency, courts must reassess the protection they award to automated programs and ancillary information. To redefine the trade secret status of algorithmic materials, this Note derives a new framework based on *Tabor v. Hoffman*,²⁰⁸ an 1889 case that clarifies the value requirement.

B. *Revisiting the Value Requirement*

Currently, no coherent test or principles exist to guide courts in determining whether an invention is valuable enough to constitute a trade secret.²⁰⁹ But the early case *Tabor v. Hoffman* offers key guiding principles to assess the value of particular types of inventions—specifically, ones that produce a valuable output based on an input, such as blueprints, formulas, and algorithms.²¹⁰ In the late 1800s, a manufacturer sought to restrain a competitor from using his “patterns” or blueprints for manufacturing a pump.²¹¹ The New York Court of Appeals considered whether the patterns for the pump were valid trade secrets in light of the fact that, while the complainant guarded the patterns in his private possession,²¹² he sold the pumps on the public market.²¹³ Because the patterns were secret, the issue for the court was whether they derived enough value to warrant trade secret protection.²¹⁴ Finding a valid secret in the patterns,²¹⁵ *Tabor* articulated a coherent set of principles for measuring value.²¹⁶

1. *Reverse Engineering Must Be Difficult.* — *Tabor* evaluated an innovation's value based on the advantage that it offered competitors for purposes of reverse engineering. To introduce the concept of reverse

206. For an explanation of why ancillary information is not a trade secret, see *infra* section III.C.

207. See *supra* notes 190–193 and accompanying text.

208. 23 N.E. 12, 13 (N.Y. 1889).

209. See *supra* section II.A.

210. 23 N.E. 12–13. For a comparison between the materials at issue in *Tabor* and *Loomis*, see *infra* note 238 and accompanying text.

211. See *Tabor*, 23 N.E. at 12 (discussing whether the plaintiff could bar the defendant from copying a secret blueprint plan for producing the plaintiff's pump technology).

212. *Id.* at 12 (describing how even though the pump technology was public, the plaintiff devoted considerable efforts to keeping the patterns secret).

213. *Id.* (describing how “the plaintiff had placed the perfected pump upon the market”).

214. See *id.* at 13 (“As more could be learned by measuring the patterns, than could be learned by measuring the component parts of the pump, was there not a secret that belonged to the discoverer . . . ?”).

215. *Id.* (holding that the “patterns were a secret device”).

216. *Id.* at 12 (determining that the patterns “greatly aided, if they were not indispensable, in the manufacture of the pumps” through the logic of reverse engineering).

engineering, the court presented a hypothetical involving “a secret formula for compounding medicines”:²¹⁷

If a valuable medicine, not protected by patent, is put upon the market, any one may, if [they] can by chemical analysis and a series of experiments, or by any other use of the medicine itself, aided by [their] own resources only, discover the ingredients and their proportions. If [they] thus find[] out the secret of the proprietor, [they] may use it to any extent that [they] desire[] without danger of interference by the courts.²¹⁸

First, the court described reverse engineering as a lawful method of competition, stating that a competitor may “use [the medicine] to any extent that [they] desire[]” as long as they discover its formula through “chemical analysis,” “experiments,” or “any other use of the medicine.”²¹⁹ Next, the court determined that the formula was a valuable invention deserving of trade secret protection²²⁰ because it would be difficult for competitors to reverse engineer the medicine without its guidance. Without the formula, competitors could recreate the medicine only by conducting “chemical analysis and a series of experiments” on “ingredients.”²²¹ In other words, the formula derived value from its secrecy because, had it been public knowledge, competitors could have reaped its benefits without investing in the costs and labor of reverse engineering.

Extending this reasoning to the materials at issue, the court concluded that the patterns were also valuable secrets because reverse engineering the pump from “brass or iron” materials²²² would be difficult, requiring a “series of experiments, involving the expenditure of both time and money.”²²³ Just as the formula specified “the ingredients and their proportions” for “valuable medicine,”²²⁴ the patterns “greatly aided, if they were not indispensable, in the manufacture of the pumps.”²²⁵ Both inventions were thus entitled to protection.

Through the logic of reverse engineering, *Tabor* presents a key principle for measuring value: An innovation is valuable if its absence makes it difficult for competitors to reverse engineer its output from its component parts. Furthermore, because the court’s protection turned on the complexity of the “experiments” and “expenditure” involved in reverse

217. Id. at 13.

218. Id.

219. See id.

220. See id. (“The courts have frequently restrained persons who have learned a secret formula for compounding medicines . . . while in the employment of the proprietor, from using it themselves or imparting it to others to his injury . . .”).

221. Id.

222. Id. at 12 (describing how “[t]he pump consists of many different pieces, the most of which are made by running melted brass or iron in a mould”).

223. Id. at 13.

224. Id.

225. Id. at 12.

engineering, the decision clarifies a corollary proposition: An invention is not valuable if competitors can easily reverse engineer its output from its component parts alone.

These concepts of value comport with first principles by conditioning trade secret protection on the ease with which competitors can reverse engineer a product. *Tabor's* key principle—that a creation is valuable only until competitors reverse engineer it—resists awarding intellectual monopolies and secluding information into perpetuity.²²⁶ And the corollary principle—that trade secret law does not protect inventions when competitors can easily recreate them—avoids withholding general, noncompetitive knowledge, which may nonetheless benefit the public.²²⁷ Together, these concepts restrain the parameters of trade secret subject matter and encourage innovation and market improvement by inviting third parties to lawfully profit when they reverse engineer more valuable products.²²⁸ In doing so, these principles uphold trade secret law's policy objectives of promoting fair competition and innovation.²²⁹

2. *Reverse Engineering Must Be Feasible.* — Unlike the patterns, the pump and its component parts did not receive trade secret protection.²³⁰ The court reasoned that the pump did not derive its value from its secrecy because competitors could access it in the public domain.²³¹ The component parts of the pump similarly derived no value from their secrecy because they constituted basic “brass or iron” materials that competitors could fairly use to reverse engineer the pump.²³² Due to these structural differences between the invention, its output, and its component parts, the court identified a valid trade secret only in the patterns.

The pump and its component parts also did not receive trade secret protection because secluding them would frustrate reverse engineering.²³³ By permitting competitors to reverse engineer the patterns through

226. See *supra* notes 63–67.

227. See *supra* note 48 and accompanying text.

228. See *supra* notes 68–71, 85, 92, and accompanying text.

229. These principles also comport with the practices of many modern courts. Consistent with the first principle, some jurisdictions find that “the ease with which the device can be ‘reverse engineered’ is certainly relevant to the question of whether or not the device *remains* a ‘trade secret.’” See *Walker Mfg. v. Hoffmann, Inc.*, 261 F. Supp. 2d 1054, 1082 (N.D. Iowa 2003). Similarly, the second principle aligns with requirements that trade secrets are neither “readily ascertainable,” Unif. Trade Secrets Act § 1(4) (Unif. L. Comm'n 1985), nor “readily duplicated without considerable time, effort, or expense,” *Stenstrom Petrol. Servs. Grp., Inc. v. Mesch*, 874 N.E.2d 959, 972 (Ill. App. Ct. 2007).

230. *Tabor*, 23 N.E. at 12 (limiting trade secret protection to the patterns for the pump).

231. See *id.* (“As the plaintiff had placed the perfected pump upon the market, without obtaining the protection of the patent laws, he thereby published that invention to the world, and no longer had any exclusive property therein.”).

232. *Id.* at 12–13 (describing how competitors may reverse engineer the pump by engaging in a “series of experiments, involving the expenditure of both time and money” upon the “brass or iron” pieces that compose the pump).

233. See *id.* at 13. For a discussion of the barriers to reverse engineering algorithms when competitors lack access to input data, see *supra* notes 185–189 and accompanying text.

“chemical analysis and a series of experiments,” the *Tabor* court anticipated that competitors could access the “component parts” necessary for conducting those experiments.²³⁴ Similarly, when stating that competitors could reverse engineer the patterns by “any other use of the [product] itself,” the court assumed that the pump would be available in the public domain for competitors to fairly reference, study, and deconstruct.²³⁵ Thus, implicit in the design of reverse engineering was the expectation that trade secret law would not obscure the product and its component parts from competitors. As a result, *Tabor* reveals an additional rule for defining the parameters of trade secret subject matter: The materials necessary for competitors to fairly reverse engineer a valuable invention are not themselves trade secrets.

This element upholds the first principles of trade secret law by effectuating the reverse engineering exception. Without this requirement—that the materials necessary for reverse engineering are public—reverse engineering would be impossible in certain circumstances, and trade secret holders could monopolize their creations.²³⁶ This rule thus protects the fundamental design of trade secret law by ensuring that reverse engineering is always possible.²³⁷

3. *Three-Element Framework.* — *Tabor* is a paragon case to guide courts in determining the trade secret status of software like COMPAS because the patterns at issue structurally resemble algorithms; importantly, the patterns and algorithms both produce valuable output from a given input.²³⁸ The opinion clarifies that for creations to constitute valuable secrets, it must be difficult²³⁹—but not impossible²⁴⁰—for competitors to reverse engineer them. In light of *Tabor*, this Note derives the following elements for determining whether innovations similar to the patterns (i.e., blueprints, formulas, or algorithms that produce an output from a given input) satisfy the value requirement:²⁴¹

1. An invention is a valuable trade secret if it is difficult for competitors to reverse engineer its output from component parts.

2. An invention is not a valuable trade secret if competitors can easily reverse engineer its output from component parts.

234. See *Tabor*, 23 N.E. at 13.

235. See *id.*

236. See *supra* notes 63–67 and accompanying text.

237. See *supra* notes 68–71, 85, 92, and accompanying text.

238. The patterns and algorithms are inventions of similar design. In *Tabor*, the patterns (i.e., the innovation) produced a pump (i.e., the output) from brass or iron component parts (i.e., the inputs). See *Tabor*, 23 N.E. at 12. Similarly, algorithms like COMPAS (i.e., the innovation) produce risk scores (i.e., the output) from training data (i.e., the inputs). See *State v. Loomis*, 881 N.W.2d 749, 761 (Wis. 2016).

239. See *supra* section III.B.1.

240. See *supra* section III.B.2.

241. To constitute a trade secret, the invention must also satisfy the secrecy requirement. See *supra* section III.A.

3. The materials necessary for competitors to reverse engineer a valuable invention are not themselves trade secrets.

C. *Reconsidering Algorithmic Materials*

This framework clarifies the parameters of trade secret subject matter in the algorithmic context. Like the medicinal formula and patterns at issue in *Tabor*, algorithms are secret inventions that produce an output (i.e., predictions of future recidivism) from an input (i.e., criminal records).²⁴² By measuring value through the logic of reverse engineering, *Tabor* guides courts to separate trade secret from non-trade-secret information when developers seek broad protection for algorithmic materials.²⁴³ To demonstrate, this Note revisits the COMPAS algorithm and ancillary information under its three-element framework.

1. *COMPAS Algorithm*. — COMPAS's source code falls squarely within this Note's definition of trade secrets. To meet the value requirement, an invention's output must be difficult but not impossible to reverse engineer.²⁴⁴ Because of their complex development and methodology, algorithmic functions are costly and challenging to reverse engineer from their component parts.²⁴⁵ Algorithmic source code, then, satisfies the value requirement of trade secrets. As long as creators protect their programs from wrongful disclosure in satisfaction of the secrecy requirement, trade secret law will protect source code until competitors reverse engineer them.²⁴⁶ The COMPAS software is thus a valid secret under this Note's framework.²⁴⁷

242. See *supra* note 238 and accompanying text.

243. See *supra* notes 233–235 and accompanying text; see also Katyal, *Private Accountability*, *supra* note 175, at 125 (cautioning that corporate entities often claim overbroad assertions of trade secrecy status over their algorithms and related information).

244. See *supra* section III.B.2.

245. See Kapczynski, *supra* note 7, at 1410 (“The ‘black boxes’ created by AI . . . make reverse engineering more difficult . . .”); Perel & Elkin-Koren, *supra* note 133, at 185 (describing how an algorithm’s “mathematical complexity and learning capacities make it impenetrable”).

246. For a description of reverse engineering in *Tabor*, see *supra* text accompanying notes 217–221.

247. Although this Note does not object to the trade secret status of source code, it maintains that ancillary information should not receive trade secret protection in an effort to further algorithmic transparency. The disclosure of ancillary information is crucial because access to the source code in isolation may not elucidate algorithmic operations and performance. See Katyal, *The Paradox of Source Code Secrecy*, *supra* note 19, at 1249 (arguing that “simply reading the code does not make it interpretable without the ability to plug in data and see how the algorithm actually functions”); Levine, *supra* note 133, at 40 (“Public access to an algorithm’s source code does not guarantee that the public will have the resources and knowledge needed in order to understand it, scrutinize it, or even care.”); Anupam Chander, *The Racist Algorithm?*, 115 *Mich. L. Rev.* 1023, 1024–25 (2017) (reviewing Frank Pasquale, *The Black Box Society: The Secret Algorithms that Control Money and Information* (2015)) (arguing that developers must provide “transparency of inputs and results” for the public to determine whether “the algorithm is generating discriminatory impact” (emphasis omitted)).

2. *Summary Information.* — Under this Note’s proposed framework, an invention is not valuable if competitors can easily reverse engineer its output from its component parts.²⁴⁸ Unlike the patterns in *Tabor*, which were derived from “experiments” and “expenditure of both time and money,”²⁴⁹ summary information is readily calculated from output data. Developers may determine a software’s accuracy across different categories and groups by analyzing algorithmic output alone.²⁵⁰ Because summary information is either “readily ascertainable” or easily reverse engineered, it is not a trade secret.²⁵¹

This determination avoids secluding beneficial summary information from the public. Access to intelligible information on algorithmic performance enables consumers to identify high-quality software and competitors to create new technologies that minimize discriminatory outcomes.²⁵² Because it improves the software marketplace, classifying summary information as non-trade-secret material comports with first principles.

Access to summary information also protects accused parties’ right to defend their liberty. Mr. Loomis challenged the Wisconsin Supreme Court’s consideration of automated risk assessments on the grounds that (1) COMPAS’s proprietary nature prevented him from assessing its scientific validity, and (2) COMPAS impermissibly considered gender in its calculation of risk scores.²⁵³ Because the court refused to compel Northpointe to share summary information on the algorithm’s accuracy or analysis of gender, however, Mr. Loomis could not offer empirical bases to support his claims. As a result, he was unable to effectively appeal his sentence.²⁵⁴ After the court’s unfavorable ruling against Mr. Loomis, ProPublica reverse engineered the COMPAS algorithm and determined that the software was racially biased.²⁵⁵ ProPublica’s findings suggest that

248. See *supra* section III.B.3.

249. See *Tabor v. Hoffman*, 23 N.E. 12, 13 (N.Y. 1889).

250. For example, ProPublica reverse engineered summary information on COMPAS’s overall accuracy and accuracy by race and gender using risk scores (i.e., output data) and criminal and incarceration records (i.e., input data). See Larson et al., *supra* note 145.

251. See *Fin. Info. Techs., LLC v. iControl Sys., USA, LLC*, 21 F.4th 1267, 1273 (11th Cir. 2021) (stating that “aspects of computer software that *are* readily ascertainable don’t qualify” as trade secrets).

252. See *supra* section II.C.

253. *State v. Loomis*, 881 N.W.2d 749, 753 (Wis. 2016).

254. See Wexler, *Life, Liberty, and Trade Secrets*, *supra* note 12, at 1353 (arguing that trade secret evidentiary privilege should not exist in criminal proceedings because it bars defendants from challenging the validity of algorithms and defending their liberties); Alyssa M. Carlson, Note, *The Need for Transparency in the Age of Predictive Sentencing Algorithms*, 103 Iowa L. Rev. 303, 306 (2017) (objecting to court reliance on algorithmic risk scores as “defendants have no way of validating the accuracy of the formulas”).

255. See Larson et al., *supra* note 145 (finding that the COMPAS algorithm misclassified Black defendants as posing a high risk for recidivism almost two times more often than white defendants); see also *infra* section III.C.3 (discussing ProPublica’s reverse engineering).

court-ordered disclosure of summary information would have called into question COMPAS's accuracy and fairness. Had the court permitted Mr. Loomis to access this evidence, he may have successfully appealed his sentence on his two initial grounds and the additional ground that the software impermissibly considered race.²⁵⁶ The ProPublica investigation demonstrates how people like Mr. Loomis can meaningfully challenge the validity and propriety of risk assessment tools when courts decline to extend trade secret protection to summary information.²⁵⁷ Furthermore, given that ProPublica's analysis did not require access to COMPAS source code, courts may preserve the proprietary interests of developers by limiting disclosure to summary information and maintaining trade secret protection over algorithms.²⁵⁸

3. *Input and Output Information.* — Like summary information, input and output information fall outside the scope of trade secret protection. *Tabor* clarifies that trade secret law may not seclude materials necessary for competitors to fairly reverse engineer a valuable invention.²⁵⁹ The input data upon which developers train their programs are component parts of the algorithm necessary for its reverse engineering.²⁶⁰ Output information is the product generated from each iteration of the algorithm.²⁶¹ Like input information, algorithmic outputs are not entitled to protection because competitors must reference them for purposes of reverse engineering.²⁶²

The classification of input and output information as non-trade-secrets aligns with trade secret law's policy objective. Algorithms are distinct from other trade secrets in that they are extremely difficult to reverse engineer even if competitors have access to relevant inputs and

256. ProPublica's analysis also revealed that (1) the COMPAS algorithm was accurate only 63.6% of the time, and (2) female defendants were more likely to receive higher risk scores than male defendants despite "their lower levels of criminality overall." See Larson et al., *supra* note 145. These findings support Loomis's initial claims that COMPAS was inaccurate and impermissibly considered gender.

257. In 2016, the Maryland Court of Special Appeals recognized the need for courts to access intelligible algorithmic information when evaluating claims of constitutional deprivations. See *State v. Andrews*, 134 A.3d 324, 338–39 (Md. Ct. Spec. App. 2016) (finding that courts must analyze "the functionality of the surveillance device and the range of information potentially revealed by its use . . . to make the necessary constitutional appraisal"). The court rejected that algorithms' proprietary nature may bar courts from accessing this valuable information. See *id.* at 338 ("We observe that such an extensive prohibition on disclosure of information to the court . . . prevents the court from exercising its fundamental duties under the Constitution.").

258. See Graves & Katyal, *supra* note 152, at 1415–16 ("[O]btaining information necessary to understand such decisionmaking may not require disclosure of actual algorithms . . .").

259. See *supra* section III.B.3.

260. For a description of inputs, see *supra* note 134, 136, and accompanying text.

261. For a description of outputs, see *supra* note 134–135 and accompanying text.

262. For a discussion of *Tabor's* assumption that inputs and outputs are not trade secrets, see *supra* text accompanying notes 233–237.

outputs.²⁶³ Should input and output data receive trade secret protection, the first developer of a software would hold a monopoly over the program because it would be virtually impossible for competitors to reverse engineer this technology.²⁶⁴ But trade secret law never intended to grant enduring intellectual monopolies.²⁶⁵ Instead, early courts assumed that reverse engineering would be a feasible yet difficult enterprise.²⁶⁶ In light of this departure from first principles, courts must refrain from protecting input and output data as trade secrets.

The decision to not seclude input or output information also reduces algorithmic discrimination. In 2016, ProPublica reverse engineered the COMPAS program to identify and mitigate bias. The journal filed public record requests to obtain input data (criminal histories and incarceration records) and output data (risk scores for more than 11,000 defendants) from previous iterations of the software.²⁶⁷ From these inputs and outputs, ProPublica reverse engineered COMPAS and calculated summary information that elucidated the program's methodology and performance.²⁶⁸ The analysis revealed that COMPAS yielded an accuracy rate of approximately sixty-four percent and was twice as likely to wrongly predict that Black defendants would likely reoffend as compared to white defendants.²⁶⁹ From these results, ProPublica concluded that COMPAS adopted biased racial predictors.²⁷⁰

The reverse engineering of the COMPAS tool comports with first principles by exposing algorithmic harms to market actors. By filing public records requests, ProPublica accessed input and output data (which this Note categorizes as non-trade-secret) to replicate COMPAS's functions.

263. Jeanne C. Fromer, *Machines as the New Oompa-Loompas: Trade Secrecy, the Cloud, Machine Learning, and Automation*, 94 N.Y.U. L. Rev. 706, 718 (2019) (arguing that advances in artificial intelligence have strengthened trade secret law by technically undermining "independent discovery, reverse engineering, and the free use of an employee's general knowledge and skill").

264. For an explanation of why secluding input and output data renders reverse engineering functionally impossible, see *supra* notes 185–189 and accompanying text.

265. See *supra* notes 36–40, 63–67, and accompanying text.

266. For an analysis of the disincentives to innovate when reverse engineering is easy or impossible, see *supra* section I.B.3.

267. See Larson et al., *supra* note 145.

268. See *id.* ("To test racial disparities in the score controlling for other factors, we created a logistic regression model that considered race, age, criminal history, future recidivism, charge degree, gender and age. We used those factors to model the odds of getting a higher COMPAS score."); see also Levendowski, *supra* note 15, at 600 ("Armed with COMPAS risk scores and a dataset built from those individuals' criminal records, ProPublica reverse engineered which characteristics caused the COMPAS algorithm to predict higher recidivism risk scores.")

269. Larson et al., *supra* note 145 (calculating an overall accuracy rate of 63.6% and finding that the COMPAS algorithm was "nearly twice as likely" to misclassify Black defendants compared to white defendants).

270. Levendowski, *supra* note 15, at 601 (describing how, "based on ProPublica's testing, the scores were also racist").

The journal's investigation then yielded summary information (also envisioned by this Note as non-trade-secret) that unveiled the program's error rate and biased performance. Because ProPublica's analysis revealed crucial summary information to consumers and competitors, it enabled the market to trade on key product features—such as accuracy and fairness—that may improve the quality of algorithms.²⁷¹

D. *Balancing Proprietary Interests With Calls for Algorithmic Transparency*

The conclusion that trade secret law does not protect ancillary information furthers transparency efforts and upholds first principles while maintaining developers' proprietary interests. At a minimum, trade secret law should not bar defendants from scrutinizing the accuracy of risk assessment programs²⁷² or prohibit competitors or public interest groups from obtaining input and output data necessary for reverse engineering.²⁷³ Outside of trade secret law, program developers already benefit from statutory and common law protections over ancillary information. Courts routinely issue protective orders to protect the confidentiality of disclosed materials,²⁷⁴ and public access laws like the Freedom of Information Act (FOIA) exempt government agencies from disclosing information in numerous circumstances, such as when data implicate national security interests.²⁷⁵ Statutes like the Health Insurance Portability and Accountability Act (HIPAA) impose heightened data security protections over certain types of personal information that limit third-party access.²⁷⁶ Consequently, even without trade secret protection, sensitive input data receives robust safeguards.

Even if ancillary information enters the public domain, source code will continue to receive legal protection.²⁷⁷ Since the nineteenth century, courts have granted trade secret status to hidden blueprints or formulas for a product even though the product and its component parts were

271. *Id.* at 609 (“A newcomer may be motivated to create an AI system without the race and gender biases of systems from the incumbent AI creators.”).

272. See *supra* section III.C.2.

273. See *supra* section III.C.3.

274. See, e.g., *Flores v. Stanford*, No. 18 Civ. 02468, 2021 WL 4441614, at *1 (S.D.N.Y. Sept. 28, 2021) (ordering that Northpointe produce the underlying data and analytics of the COMPAS algorithm subject to a protective order); see also *Wexler, Life, Liberty, and Trade Secrets*, *supra* note 12, at 1429 (arguing that “narrow criminal discovery and subpoena powers combined with protective orders should suffice to safeguard the interests of trade secret owners to the full extent reasonable”).

275. See, e.g., 5 U.S.C. § 552(b) (2018) (exempting nine categories of data from disclosure requirements).

276. HIPAA requires that health care providers implement safeguards to maintain the confidentiality of patient information. 42 U.S.C. § 1320d-2(d)(2) (2018). In turn, FOIA exempts the disclosure of health information protected by HIPAA. 5 U.S.C. § 552(b)(3) (permitting agencies to withhold matters “specifically exempted from disclosure by statute”).

277. See *Tabor v. Hoffman*, 23 N.E. 12, 13 (N.Y. 1889) (clarifying that the public nature of an invention's inputs and outputs do not deprive the trade secret status of the invention itself).

publicly available.²⁷⁸ Furthermore, the right of competitors to fairly reverse engineer software from public ancillary data will “not typically threaten an innovative manufacturer” due to the “costliness of reverse engineering.”²⁷⁹ Given the complexity of algorithmic development and execution, reverse engineering will remain difficult even when competitors have access to input and output information.²⁸⁰ Sophisticated programs will enjoy extended periods of protection because competitors can reverse engineer those algorithms only if they invest in high development costs.²⁸¹ The law and market will thus continue to safeguard programs deserving of trade secret status.

Lastly, the treatment of ancillary information as non-trade-secret aligns with new efforts by courts to answer calls for algorithmic transparency. Recently, judges have ordered companies to disclose their source code under protective order after defendants questioned the validity of criminal justice software.²⁸² One investigation revealed that certain breathalyzer technology contained a “significant flaw”²⁸³ and consisted of general algorithms that arguably failed to meet the elements of a trade secret.²⁸⁴ Courts frequently note that access to source code, summary information, and other “raw materials” is “integral to the building of an effective

278. See *AirFacts, Inc. v. de Amezaga*, 909 F.3d 84, 96 (4th Cir. 2018) (holding that “a trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain” as long as the unique combination “affords a competitive advantage and is a protectable secret” (quoting *Imperial Chem. Indus. v. Nat’l Distillers & Chem. Corp.*, 342 F.2d 737, 742 (2d Cir. 1965))); *Coca-Cola Bottling Co. of Shreveport v. Coca-Cola Co.*, 107 F.R.D. 288, 289, 291 (D. Del. 1985) (finding that the “tremendous market recognition” of the Coca-Cola product did not implicate the trade secret status of its formula “kept in a security vault”); *Tabor*, 23 N.E. at 13 (holding that the “patterns were a secret device that was not disclosed by the publication of the pump”).

279. *Samuelson & Scotchmer*, supra note 37, at 1586; see also *Tabor*, 23 N.E. at 13 (describing the investment costs that prevent competitors from easily reverse engineering valuable trade secrets).

280. See supra notes 185–189 and accompanying text for a discussion of the unique difficulties in reverse engineering algorithms.

281. See *Rycoline Prod., Inc. v. Walsh*, 756 A.2d 1047, 1055 (N.J. Super. Ct. App. Div. 2000) (“The more difficult, time consuming and costly it would be to develop the product, the less likely it can be considered to be ‘reverse engineerable.’”); *McClary v. Hubbard*, 122 A. 469, 473 (Vt. 1923) (“The simpler and commoner the principles entering into the combination constituting a secret device are, the more likely is the device to be discovered and copied or reproduced.”); see also *Reichman*, supra note 91, at 659 (arguing that reverse engineering does not undermine the profits of the “first on the market” as third parties must also establish themselves on the market through reliable production and marketing strategies).

282. See, e.g., *Flores v. Stanford*, No. 18 Civ. 02468, 2021 WL 4441614, at *1 (S.D.N.Y. Sept. 28, 2021) (requiring the disclosure of the COMPAS tool’s regression models and training data to determine whether the algorithm overpenalizes juveniles); *State v. Chun*, 943 A.2d 114, 123 (N.J. 2008) (ordering a breathalyzer manufacturer to share its source code with an independent third party for an assessment of its scientific validity); *State v. Pickett*, 246 A.3d 279, 279 (N.J. Super. Ct. App. Div. 2021) (permitting a defendant to access the source code and documentation of a forensic software for purposes of challenging the technology’s validity).

283. *Chun*, 943 A.2d at 157.

284. See supra note 129 and accompanying text.

defense.”²⁸⁵ Recently, a federal district court in New York ordered that Northpointe produce the underlying data and methodology of COMPAS subject to a protective order.²⁸⁶ These decisions illustrate contemporary courts’ willingness to address opacity concerns by ordering companies to disclose their source code, summary information, and input and output data. Furthermore, given that these court-ordered investigations have yet to divulge the secrecy of the software in question,²⁸⁷ limited disclosure regimes—such as the framework adopted by this Note—achieve algorithmic transparency goals without jeopardizing proprietary interests.

CONCLUSION

Rather than seclude proprietary information, early trade secret law protected a public market of ideas and creations where “competition reign[ed].”²⁸⁸ But recent invocations of trade secret law to conceal risk assessment algorithms and their ancillary information contravene these first principles.²⁸⁹ Such safeguards prevent accused parties from defending their liberty, competitors from improving existing programs, and public interest groups from mitigating algorithmic bias.²⁹⁰ To remedy this shortcoming, this Note argues that trade secret law does not prevent the disclosure of algorithmic summary information to defendants like Mr. Loomis or of input and output data to public interest groups. ProPublica’s successful reverse engineering of COMPAS illustrates how public access to ancillary information furthers algorithmic transparency while still maintaining the proprietary interests of trade secret holders.²⁹¹ By meaningfully policing the trade secret status of algorithmic materials, courts can address public demands for algorithmic fairness and align the doctrine with its first principles.

285. See, e.g., *Pickett*, 246 A.3d at 299 (internal quotation marks omitted) (quoting State ex rel. A.B., 99 A.3d 782, 790 (N.J. 2014)).

286. See *Flores*, 2021 WL 4441614, at *1 (requiring the disclosure of “the normative dataset used to create and normalize COMPAS” (i.e., ancillary input data) and “the regression models for two COMPAS ‘scales’: (a) the General Recidivism Risk Scale, and (b) the Violent Recidivism Risk Scale” (i.e., the algorithm)). The court compelled this disclosure to determine “how or whether COMPAS considers the diminished culpability of juveniles and the hallmark features of youth.” *Id.* (quoting Second Amended Complaint at 54, *Flores*, 2018 WL 10626399).

287. See, e.g., *id.* at *4 (finding that expert review of compelled materials “is paramount to Plaintiffs’ prosecution of this case” and disclosure “poses minimal risk of competitive injury in light of the Protective Orders”); *Chun*, 943 A.2d at 123 (designating “an independent software house to review the source code” to protect its secrecy); *Pickett*, 246 A.3d at 283–84 (“Hiding the source code is not the answer. The solution is producing it under a protective order. Doing so safeguards the company’s intellectual property rights and defendant’s constitutional liberty interest alike.”).

288. Kapczynski, *supra* note 7, at 1390.

289. See *supra* section II.D.

290. See *supra* sections II.B–C.

291. Levendowski, *supra* note 15, at 599 (“ProPublica’s groundbreaking exposé on the black box algorithm behind Northpointe’s COMPAS algorithm has quickly become a canonical example of using both techniques to reveal and interrogate bias.”).

DEAD IN THE WATER? ADDRESSING THE FUTURE OF WATER CONSERVATION IN THE COLORADO RIVER BASIN

Harmukh Singh*

The Colorado River Basin is drying up, and with it, the water supply of seven states in the American West. Historically, the West relied on consumption-based laws to fuel development despite the arid landscape. The Colorado River Compact allocated water among the states, but those allocations suffered from two basic flaws: (1) The agreed-upon water flow of the river was based on a particularly wet season in the region, and (2) the Compact was not designed to adapt to changing environmental circumstances. As climate change decreases rainfall and increases temperatures, water availability will sharply decline. But outdated legal doctrines incentivize farmers to use all their water or otherwise see their water allocations dwindle, increasing water waste. Furthermore, water rights and agriculture are mostly within the jurisdiction of states, which are often paralyzed to act due to either economic competition or a lack of resources.

This Note argues that the federal government must step in to overcome the collective action problem and realign market incentives. It proposes a program focused on improving water efficiency, paying farmers not to plant harmful crops, and allowing farmers to exit the market entirely. Particularly, the Department of the Interior’s Bureau of Reclamation has rulemaking authority to implement necessary programs to counteract harmful incentives in the region. Other agencies, like the Department of Agriculture, can bolster this approach. Effectively, the end result would be a market that promotes conservation as an economically beneficial and rational decision for every farmer.

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INTRODUCTION

In 1890, John Wesley Powell presented a map of the American West to the Senate Select Committee on Irrigation and Reclamation of Arid Lands.¹ The map was visually enthralling.² It was a culmination of all the knowledge he had gained from a three-month expedition to explore the Colorado River.³ The map divided the region based on watersheds, each

1. John F. Ross, *The Visionary John Wesley Powell Had a Plan for Developing the West, But Nobody Listened*, *Smithsonian Mag.* (July 3, 2018), <https://www.smithsonianmag.com/smithsonian-institution/visionary-john-wesley-powell-had-plan-developing-west-nobody-listened-180969182/> [<https://perma.cc/C5EE-X856>] [hereinafter Ross, *Plan for the West*].

2. See *id.* (discussing Powell's 1890 map, which "offered a radical new vision of the American West centered on watersheds rather than on traditional political boundaries").

3. See John Wesley Powell, *Exploration of the Colorado River of the West and Its Tributaries*, at ix–xi (1875), <https://pubs.usgs.gov/unnumbered/70039238/report.pdf>

of which represented a different state.⁴ Powell argued that the federal government needed to control the water supply, keep water within watersheds,⁵ legally tie water to the land within which it flowed, and create mechanisms for monitoring meteorological and ecological developments. Already wary of settlement in a harsh region, Powell felt these steps were necessary to avoid “environmental ruin and mass human suffering” from land development.⁶ Powell’s view on the limited viability of settlement in the West was not new. As early as 1819, the West had been described as a “Great Desert” and “wholly unfit for cultivation.”⁷

Fast forward 150 years since Powell’s expedition, and his fears have materialized. The Colorado River Basin has not only been in a drought for twenty-three years but, from 2002 through 2021, saw the driest period recorded in more than one hundred years.⁸ In 2021, the federal government announced water shortages, requiring unprecedented water cuts in both Arizona and Nevada.⁹ The various reservoirs throughout the basin, responsible mainly for water storage and hydropower generation, have gone from being ninety-five percent full in 2000 to a record low of thirty-nine percent in 2021.¹⁰ Climate conditions are only expected to worsen, and states in the basin have “no plan” for how to cut water use in the region.¹¹ If drought conditions continue, parts of the region will likely

[<https://perma.cc/F7PP-Q5MZ>] (discussing the summer he spent developing “a survey embracing the geography, geology, ethnography, and natural history” of Colorado).

4. Ross, Plan for the West, supra note 1.

5. A watershed is defined as “an area of land that drains rainfall and snowmelt into streams and rivers.” Watershed, Nat’l Geographic, <https://education.nationalgeographic.org/resource/watershed/> [<https://perma.cc/N3NN-SEVL>] (last updated Oct. 19, 2023); see also What Is a Watershed?, Nat’l Ocean Serv., <https://oceanservice.noaa.gov/facts/watershed.html> [<https://perma.cc/YM3X-J8JL>] (last updated Jan. 20, 2023).

6. John F. Ross, How the West Was Lost, *The Atlantic* (Sept. 10, 2018), <https://www.theatlantic.com/ideas/archive/2018/09/how-the-west-was-lost/569365> (on file with the *Columbia Law Review*); see also Abrahm Lustgarten & Naveena Sadasivam, Holy Crop: How Federal Dollars Are Financing the Water Crisis in the West, *ProPublica* (May 27, 2015), <https://projects.propublica.org/killing-the-colorado/story/arizona-cotton-drought-crisis> [<https://perma.cc/VZH4-2UD2>].

7. Stephen Long, who was dispatched to explore the West by President James Monroe, labeled his report on the region “Great Desert.” Richard H. Dillon, Stephen Long’s Great American Desert, 111 *Proc. Am. Phil. Soc’y* 93, 95, 102 (1967).

8. Colorado River Drought Conditions and Response Measures: Hearing Before the Subcomm. on Water, Oceans, and Wildlife of the H. Comm. on Nat. Res., 117th Cong. 7–12 (2021) (statement of Tanya Trujillo, Assistant Sec’y for Water and Sci., Dep’t of the Interior) [hereinafter Colorado River Drought Conditions].

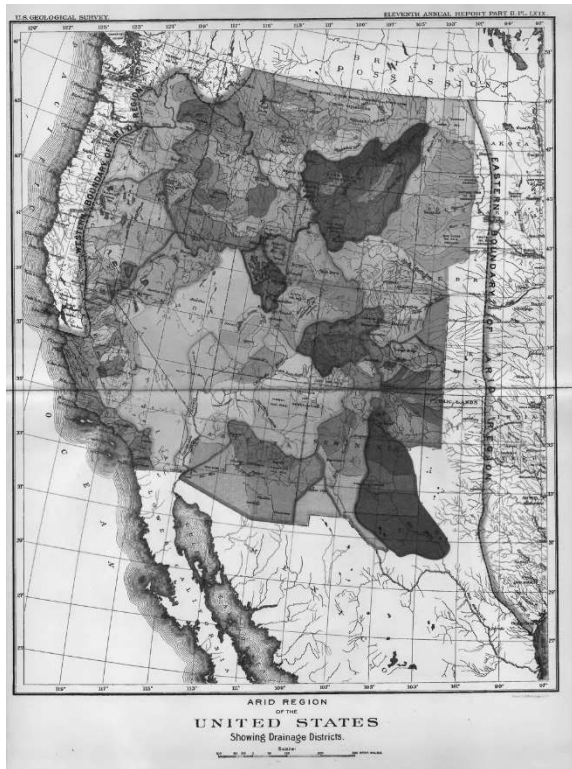
9. Joshua Partlow & Karin Brulliard, U.S. Announces More Water Cuts as Colorado River Hits Dire Lows, *Wash. Post* (Aug. 16, 2022), <https://www.washingtonpost.com/climate-environment/2022/08/16/colorado-river-bureau-of-reclamation/> (on file with the *Columbia Law Review*).

10. *Id.*

11. Rachel Estabrook & Michael Elizabeth Sakas, The Colorado River Is Drying Up—But Basin States Have ‘No Plan’ on How to Cut Water Use, *CPR News* (Sept. 17, 2022), <https://www.cpr.org/2022/09/17/colorado-river-drought-basin-states-water-restrictions/>

run dry within forty to fifty years.¹² Currently, forty million people rely on the Colorado River Basin for water, a number that is expected to grow.¹³ Residents in many cities are subjected to conservation measures, including restrictions on grass lawns, and some farmers have been forced to leave their fields fallow.¹⁴

FIGURE 1. JOHN WESLEY POWELL'S PROPOSAL TO THE SENATE¹⁵



This is the new reality for the American West. Decades of mismanagement and misuse have seen water supplies dwindle. The failure to address water conservation threatens everyone from farmers to the federal

[<https://perma.cc/QB2U-LBMR>] (quoting J.B. Hamby, Vice President of the Board of Directors, Imperial Irrigation District).

12. *Id.*; Abraham Lustgarten, *As Colorado River Dries, the U.S. Teeters on the Brink of Larger Water Crisis*, ProPublica (Aug. 25, 2022), <https://www.propublica.org/article/colorado-river-water-shortage-jay-famiglietti> [<https://perma.cc/8Q3Z-22LU>] [hereinafter Lustgarten, *As Colorado River Dries*].

13. Estabrook & Sakas, *supra* note 11; Lustgarten, *As Colorado River Dries*, *supra* note 12.

14. See Gabrielle Canon & Richard Luscombe, *US Issues Western Water Cuts as Drought Leaves Colorado River Near 'Tipping Point'*, *The Guardian* (Aug. 16, 2022), <https://www.theguardian.com/us-news/2022/aug/16/dramatic-water-cuts-expected-as-megadrought-grips-western-us-states> [<https://perma.cc/U64C-UPCU>].

15. Ross, *Plan for the West*, *supra* note 1.

government. The Colorado River Compact, which governs interstate water allocations, and state laws have incentivized the overuse of river water. The Compact was an agreement among the several states in the region that allocated more water than actually existed in the Colorado River.¹⁶ State laws incentivize farmers to use all their water; if they don't, they will lose access to it to someone else downstream—commonly known as “use it or lose it” laws.¹⁷ Federal subsidies incentivize growing water-intensive crops, like cotton, by providing insurance that covers farmers' costs during bad harvests.¹⁸ For farmers as market players wanting to take every advantage available, conserving water is an irrational decision.¹⁹ Farmers have no incentive to conserve water in the Colorado River Basin, and their use is unsustainable.

Current literature posits that water markets are the solution to address the water crisis in the American West.²⁰ These markets, akin to cap-and-trade markets for pollution, would price water based on its availability, allowing individuals to trade based on their needs while other market players opt to invest in less water-wasting methods.²¹ In theory, this system would result in water's price accurately reflecting its scarcity and removing the market to a more efficient water allocation.²² But such discussions fail to consider the general economics facing farmers. Farmers, often cash-strapped and subsidy-dependent, would likely be immediately priced out by municipalities and cash-rich industries—essentially hung out to dry, threatening a vital industry in one fell swoop.

To address this issue, this Note advocates for government intervention that focuses on facilitating private market transactions that offer financial

16. See Naveena Sadasivam, *Politicians Knew the Inconvenient Truth About the Colorado River 100 Years Ago—And Ignored It*, *Grist* (Dec. 3, 2019), <https://grist.org/climate/politicians-knew-the-inconvenient-truth-about-the-colorado-river-100-years-ago-and-ignored-it/> [https://perma.cc/M96E-LVPZ] (“Eugene Clyde LaRue, a young hydrologist with the U.S. Geological Survey, concluded that the Colorado River’s supplies were ‘not sufficient to irrigate all the irrigable lands lying within the basin.’”).

17. See Abraham Lustgarten, *Use It or Lose It Laws Worsen Western U.S. Water Woes*, *Sci. Am.* (June 9, 2015), <https://www.scientificamerican.com/article/use-it-or-lose-it-laws-worsen-western-u-s-water-woes/> [https://perma.cc/ZFY9-GYLL] [hereinafter *Lustgarten, Use It or Lose It*] (“‘Use it or lose it’ clauses, as they are known, are common in state laws throughout the Colorado River basin and give the farmers, ranchers and governments holding water rights a powerful incentive to use more water than they need.”).

18. *Lustgarten & Sadasivam*, *supra* note 6.

19. See *Understanding the Economic Crisis Family Farms Are Facing*, *Farm Aid* (Sept. 14, 2020), <https://www.farmaid.org/blog/fact-sheet/understanding-economic-crisis-family-farms-are-facing/> [https://perma.cc/U9EJ-JAAW] (describing the historical and contemporary context for the economic struggles that family farms are facing).

20. See Jonathan H. Adler, *Water Rights, Markets, and Changing Ecological Conditions*, 42 *Env't L.* 93, 102 (2012) (“Insofar as water rights are currently allocated to comparatively inefficient uses, water markets can help reallocate water to where there is greater need.”).

21. See *id.*

22. *Id.*

benefits to act as a counterweight to pernicious incentives. To provide a financially beneficial alternative, this Note outlines the informational and resource gaps that prevent farms, the largest consumers of water, from being able to efficiently use water. Agriculture is responsible for up to eighty percent of water usage in the Colorado River Basin, and most water used in agriculture is wasted by low-tech irrigation techniques.²³ To combat these inefficiencies as water supplies dwindle, the federal government would need to reduce transaction costs, which would allow parties to contract for implementing water-conserving practices. This would allow for a marketplace in which farmers have a financial incentive through the possibility of receiving either (1) funding to implement highly efficient irrigation methods or (2) market rates for fallowing their fields. These incentives would result in environmentally beneficial outcomes including the decrease in agricultural water usage and preservation of water for growing urban areas.

This Note proceeds in three parts. Part I discusses the current legal regime governing the allocation of water as well as basic water operations in the Colorado River Basin. Additionally, it outlines important federal policies that shape decisionmaking for many farmers in the region. Part II highlights the effects of the legal regime, including the detrimental incentives on water use for farmers who rely mainly on the Colorado River. Part III provides a solution, suggesting that the Bureau of Reclamation, the primary federal agency in charge of water management, should introduce a market to facilitate market transactions by counteracting negative incentives created by the current legal regime.

I. BACKGROUND: THE LAW OF THE RIVER

This Part outlines the myriad laws that collectively govern or influence water rights in the Colorado River Basin. Section I.A discusses the background and formation of the prior appropriation doctrine, a uniquely American West invention that governs how water rights are obtained. It also explores how current state laws, heavily influenced by the doctrine, limit water use and transfers. Section I.B recounts the creation of an interstate Compact to manage water in the Colorado River Basin and discusses current jurisprudence that shapes the mechanics of Compacts. Section I.C focuses on the statutory authority and other responsibilities of the United States Bureau of Reclamation, the federal agency whose role is to manage water in the region. Lastly, section I.D discusses the origin of federal agricultural subsidies, which play a substantial role in influencing what farmers grow and indirectly affect water usage.

23. Alex Hager, *As the Colorado River Shrinks, Can New Technology Save Water on Farms? The Answer Is Complicated*, KUNC (Jan. 11, 2022), <https://www.kunc.org/environment/2022-01-11/as-the-colorado-river-shrinks-can-new-technology-save-water-on-farms-the-answer-is-complicated> [<https://perma.cc/5M2N-V5VT>]; see also Lustgarten & Sadasivam, *supra* note 6.

A. *Water Law in the West*

1. *Prior Appropriation Doctrine.* — The generally arid environment of the American West prompted the development of a unique water usage doctrine: prior appropriation. Water is scarce in the West.²⁴ Precipitation is less than what is required for crop growth during a growing season in the region.²⁵ Along with its low quantity, water tends to be found in scattered areas, far from places in which it could be used for the typical productive industries like agriculture, mining, and other common ventures.²⁶ This geographic reality necessitated a doctrine that allowed individuals to use water wherever it was needed and not necessarily have it tied to a piece of land. To deal with the sparse presence of water, early settlers relied heavily on irrigation to fuel their growth.²⁷

Prior appropriation generally relies on a first-in-time, first-in-right principle.²⁸ The doctrine gives priority rights to the earlier appropriators of a water source.²⁹ Later appropriators may have their water use cut if a more senior appropriator does not receive their full allotment of water.³⁰ This occurs when a senior appropriator “place[s] a call on the river,” which requires junior appropriators to cease use until the senior rights can be fulfilled.³¹ This call commonly occurs during water shortages in which not all rights can be fulfilled.

In addition to being first in time, a claimant generally must show that they have diverted water and put it to beneficial use to receive an entitlement. The diversion requirement is based on the precedent that assumes all legitimate “beneficial uses” are off stream, a result of the unique environment in which water is located.³² “Beneficial use” is often

24. See A. Dan Tarlock, *The Future of Prior Appropriation in the New West*, 41 Nat'l Res. J. 769, 769–70 (2001) (describing how prior appropriation grew out of the fear that there would not be adequate reliable water in the region).

25. See *id.* at 774 (explaining how climate change warps water allocation patterns, either decreasing precipitation due to droughts or increasing precipitation in distorted weather patterns that may not be enough to support crop growth).

26. See Chennat Gopalakrishnan, *The Doctrine of Prior Appropriation and Its Impact on Water Development: A Critical Survey*, 32 Am. J. Econ. & Socio. 61, 62 (1973) (“The quantity of water available is far short of the quantity that would be required for the farming of all agricultural lands.”).

27. See *id.* (describing how the arid nature of the region affected irrigation practices and the development of the prior appropriation doctrine).

28. *Id.* at 63.

29. *Id.*

30. See *id.* at 64 (describing a hypothetical whereby a stream can only provide sufficient water during a dry time to its first three claimants and then cuts off water rights to everyone else “at the very time they feel the greatest need for irrigation water”).

31. Energy & Env't Rsch. Ctr., *Water Appropriation Systems 2*, <https://undeerc.org/water/decision-support/water-law/pdf/water-appr-systems.pdf> [<https://perma.cc/ZG7Z-YW5K>] (last visited Jan. 25, 2024) (internal quotation marks omitted).

32. See Douglas S. Kenney, *Water Allocation Compacts in the West: An Overview 3* (2002), <https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1132&context=>

defined as what is socially accepted as beneficial, and any beneficial use must be in connection with particular land.³³ “Beneficial use” is broad, and what is included is ever expanding.³⁴ Some uses that meet this requirement include those for agriculture, mining, environmental protection, and even recreation.³⁵ Once water meets the requirement of “beneficial use,” however, an appropriator’s right is considered absolute and cannot be defeated by later uses, even if those are deemed more important or valuable.³⁶

2. *State Laws on Water Usage.* — State laws entrench the prior appropriation doctrine and impose further restrictions on water rights. States own and regulate the water within their respective borders.³⁷ Several states, including Arizona, Colorado, Nevada, and New Mexico, maintain either water abandonment or forfeiture clauses in their water-use statutes.³⁸ These statutes require all individuals to use water for a beneficial purpose. Otherwise, water can be deemed abandoned or forfeited.³⁹ These states also maintain a “salvaged water doctrine” that prohibits deriving benefits from water conservation, as such water could be used by other downstream appropriators in need of the resource.⁴⁰ Other rules

books_reports_studies [<https://perma.cc/N79D-E35B>] (discussing general approaches to water apportionment, including formulas based on diversion).

33. See Kait Schilling, Addressing the Prior Appropriation Doctrine in the Shadow of Climate Change and the Paris Climate Agreement, 8 *Seattle J. Env’t L.* 98, 102 (2018).

34. See *id.* (“As populations continue to grow, bodies of water in the West have become increasingly appropriated . . . leading to a shift in what states consider to be a ‘beneficial use’ of water[,] with many becoming more explicit in their definitions or exclusions of what qualifies . . .”).

35. See *id.* (“As a general rule, when not used for domestic purposes, a water user’s withdrawal is beneficial when it adds some value to the land or an enterprise on that land. The added value does not always have to be economical, but can be recreational or ecological in nature.” (footnote omitted)).

36. *Id.*

37. Samuel T. Ayres, *State Water Ownership and the Future of Groundwater Management*, 131 *Yale L.J.* 2213, 2258 (2022) (“As such, states have a ‘practically plenary capacity . . . to legislatively characterize the legal category that water occupies’ for the purposes of state law. Exercising this authority, every state has through common or positive law defined the amount and type of *private* rights obtainable in its water.” (alteration in original) (quoting Gerald Torres, *Liquid Assets: Groundwater in Texas*, 122 *Yale L.J. Online* 143, 155 (2012), https://www.yalelawjournal.org/pdf/1118_kt9z6o78.pdf [<https://perma.cc/469C-CXGZ>])).

38. *Ariz. Rev. Stat. Ann.* § 45-141 (2024); *Colo. Rev. Stat.* § 37-92-401 (2024); *Nev. Rev. Stat. Ann.* § 534.090 (West 2024); *N.M. Stat. Ann.* § 72-5-28 (2024); see also *State ex rel. Off. of the State Eng’r v. Romero*, 521 P.3d 56, 57 (N.M. 2022) (upholding state water-forfeiture laws).

39. *Ariz. Rev. Stat. Ann.* § 45-141; *Colo. Rev. Stat.* § 37-92-401; *Nev. Rev. Stat. Ann.* § 534.090; *N.M. Stat. Ann.* § 72-5-28.

40. There are more claims on the water than water that exists in the river. See Peter W. Culp, Robert Glennon & Gary Libecap, *The Hamilton Project & Stanford Woods Inst. for Env’t, Shopping for Water: How the Market Can Mitigate Water Shortages in the American West* 14 tbl.2 (2014), https://www.brookings.edu/wp-content/uploads/2016/06/market_mitigate_water_shortage_in_west_glennon.pdf [<https://perma.cc/JTA8-8BX9>].

include requirements that any water transfer must demonstrate that other appropriators will not be harmed and that appropriators precisely indicate the new location, purpose, and use of that water.⁴¹

B. *The Need for an Interstate Governance System*

Water does not stop at borders, and with the complex laws governing water use within each state, a governance system was needed to quell interstate disputes. This section explains the current interstate governing mechanism and relevant jurisprudence.

1. *The Colorado River Compact.* — The Colorado River Compact of 1922 created a governance system for water in the region. The Compact's creation was prompted by states' concerns that each would be unable to secure rights to a large portion of the Colorado River.⁴² Specifically, there were concerns that rapidly growing states—like California, which saw its population grow sixty percent between 1900 and 1910—would establish priority rights to the river water.⁴³ Such concerns were further intensified by a Supreme Court decision holding that the law of prior appropriation applied regardless of state lines.⁴⁴ States like California, with a larger population, would have more individuals with senior rights compared to residents of other states.

The Compact divided the river into two basins: the Upper Basin (Colorado, New Mexico, Utah, and Wyoming) and the Lower Basin (Arizona, California, and Nevada).⁴⁵ Subsequent documents went on not only to establish allotments for each of the two basins (at about 7.5 million acre feet (MAF) each) but also to partition smaller allotments for each U.S. state and Mexico.⁴⁶ The Compact prohibited the Upper Basin from depleting more than a total of seventy-five MAF over any ten-year period, allowing for averaging over time to make up for drought years.⁴⁷ The allotments were based on data showing a river flow of around 16.4 MAF.⁴⁸

41. *Id.*

42. Specifically, the Compact “divide[d] the Basin in two Divisions The Upper Division was concerned the Lower Division states were growing so rapidly that they would . . . secure rights to a large portion of the Colorado River. The Lower Division states did not want to limit their current growth and wanted secure, reliable rights” Colo. River Governance Initiative, Nat. Res. L. Ctr., Univ. of Colo. L. Sch., Colorado River: Frequently Asked Law & Policy Questions 1 (2011), https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1005&context=books_reports_studies [<https://perma.cc/4HLE-H8FJ>].

43. See *id.*; see also Historical Population Change Data, U.S. Census Bureau (Apr. 26, 2021), <https://www.census.gov/data/tables/time-series/dec/popchange-data-text.html> [<https://perma.cc/JX96-Y7YU>].

44. *Wyoming v. Colorado*, 259 U.S. 419, 470 (1922).

45. Colo. River Governance Initiative, *supra* note 42, at 1.

46. Colorado River Basin Project Act, Pub. L. No. 90-537, § 301(b), 82 Stat. 885, 888 (1968) (codified as amended at 43 U.S.C. §§ 1501–1556 (2018)).

47. Colo. River Governance Initiative, *supra* note 42, at 1.

48. Joe Gelt, *Sharing Colorado River Water: History, Public Policy and the Colorado River Compact*, 10 *Arroyo* 1, 3 (1997).

Apportionments are based on only mainstream water; any use based on tributaries does not count toward a state's allotment.⁴⁹

FIGURE 2. COLORADO RIVER BASIN⁵⁰



2. *Compact Jurisprudence.* — The Constitution authorizes interstate compacts subject to congressional approval.⁵¹ When Congress approves a compact, its consent transforms the compact into federal law.⁵² The Supreme Court has stated it has the final authority to interpret interstate compacts.⁵³ Compacts also function as a contract between the states.⁵⁴ This

49. See *Arizona v. California*, 376 U.S. 340, 353 (1964).

50. Bureau of Reclamation, U.S. Dep't of the Interior, *Colorado River Basin Water Supply and Demand Study 2* fig.1 (2012), https://www.usbr.gov/watersmart/bsp/docs/finalreport/ColoradoRiver/CRBS_Executive_Summary_FINAL.pdf [<https://perma.cc/LDT5-QFVL>] [hereinafter Bureau of Reclamation, Colorado River Basin].

51. U.S. Const. art. I, § 10, cl. 3.

52. See, e.g., *Cuyler v. Adams*, 449 U.S. 433, 438 (1981) (“[T]he Detainer Agreement is an interstate compact approved by Congress and is thus a federal law subject to federal rather than state construction.”).

53. *Petty v. Tenn.–Mo. Bridge Comm’n*, 359 U.S. 275, 278 (1959) (“Moreover, the meaning of a compact is a question on which this Court has the final say.”).

54. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (“[A] Compact is, after all, a contract.” (quoting *Petty*, 359 U.S. at 285 (Frankfurter, J., dissenting))).

provides a court with the power to provide contractual remedies in case of a breach by another.⁵⁵ Previously, the Supreme Court has considered monetary damages in instances of a breach, along with specific performance.⁵⁶ Other contractual remedies include injunctions, which require parties to omit specific actions, and rescissions—that is, the cancellation of a contract.⁵⁷

C. *Bureau of Reclamation's Statutory Authority*

The United States Bureau of Reclamation (USBR), housed within the Department of the Interior, is the federal agency responsible for water management for twenty states in the American West.⁵⁸ The Reclamation Act of 1902 established the USBR to oversee water resource management, including diversion, delivery, and storage projects for irrigation, water supply, and hydroelectric power generation.⁵⁹ Today, the agency is responsible for delivering water to more than thirty-one million people and providing irrigation water for ten million acres of farmland, making it the nation's largest wholesale water supplier.⁶⁰ The agency operates various water storage projects, including those that generate hydroelectric power throughout the region, the Hoover Dam in Nevada and the Glen Canyon Dam in Utah being the most prominent.⁶¹ Due to the region experiencing the worst eleven-year drought in the last century, current practices heavily rely on diverting water from storage projects to meet all requested deliveries.⁶² The Hoover and Glen Canyon Dams have thus

55. *Id.* (“[T]his power includes the capacity to provide one State a remedy for the breach of another.”).

56. *Id.* at 130 (“[W]e are quite sure that the Compact itself does not prevent our ordering a suitable remedy, whether in water or money.”). Specific performance is “a contractual remedy in which the court orders a party to perform its promise as closely as possible.” Specific Performance, Cornell L. Sch., https://www.law.cornell.edu/wex/specific_performance [<https://perma.cc/W75X-WCPY>] (last visited Nov. 4, 2023).

57. Injunction, Cornell L. Sch., <https://www.law.cornell.edu/wex/injunction> [<https://perma.cc/6JVT-JMVP>] (last visited Nov. 4, 2023); Rescission, Cornell L. Sch., <https://www.law.cornell.edu/wex/rescission> [<https://perma.cc/C46X-458Z>] (last visited Jan. 25, 2024).

58. 43 U.S.C. §§ 373–390 (2018).

59. *Id.*

60. About Us—Fact Sheet, Bureau of Reclamation, <https://www.usbr.gov/main/about/fact.html> [<https://perma.cc/R3FN-RK3W>] (last updated Jan. 19, 2024) [hereinafter Bureau of Reclamation Fact Sheet].

61. These two dams together represent about ninety percent of storage capacity. See Charles V. Stern, Pervaze A. Sheikh & Kristen Hite, Cong. Rsch. Serv., R45546, Management of the Colorado River: Water Allocations, Drought, and the Federal Role 10 (2022), <https://crsreports.congress.gov/product/pdf/R/R45546> [<https://perma.cc/H3AK-G6B7>] (last updated Nov. 1, 2023) (discussing the importance of observing water levels in the Hoover and Glen Canyon Dams); see also *id.* at 8 fig.2.

62. Bureau of Reclamation, Colorado River Basin, *supra* note 50, at 17–19 (evaluating options to resolve supply and demand imbalances in the Colorado River Basin).

become particularly important in determining water availability and whether the agency must implement water cuts.⁶³

Along with USBR's duty to promote development of the arid West, the agency was later given the responsibility to lead water-conservation efforts. In 1982, Congress passed the Reclamation Reform Act (RRA), which modified and expanded the role of the USBR.⁶⁴ The statute allowed the agency to consider and incorporate water-conservation measures for nonfederal recipients of irrigation waters if those measures were economically feasible for recipients.⁶⁵ Additionally, the agency was authorized to enter into agreements with other federal agencies that have capabilities to assist in implementing water conservation, thereby ensuring coordination with the program.⁶⁶ These agreements could include coordination with states, Indian tribes, and water-use organizations.⁶⁷

The Secretary of the Interior is authorized by the Reclamation Act of 1902 to "perform any and all acts and to make rules and regulations necessary and proper for carrying out the purposes" of the Act.⁶⁸ Such rulemaking is subject to the Administrative Procedure Act (APA), which requires use of notice-and-comment procedures for promulgating "legislative" rules that have the "force and effect of law."⁶⁹ Interpretative rules and policy guidance clarifying existing statutes or regulations can be issued without notice-and-comment procedures because they do not have the force and effect of law and are not accorded that weight in adjudicatory processes, enforcement actions, or policy settings.⁷⁰

63. This was the case in 2022, when Lake Powell's water level reached a Level One Shortage. See *infra* note 161 and accompanying text.

64. 43 U.S.C. § 390aa (2018).

65. *Id.* § 390jj(a).

66. *Id.* § 390jj(c).

67. *Id.*

68. *Id.* § 375f.

69. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302–03 (1979)); see also 5 U.S.C. § 551(4) (2018) ("'[R]ule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . ."); *id.* § 553(b)–(c) (establishing a rulemaking procedure under which an agency must (1) issue a notice of the proposed rulemaking, typically in the Federal Register; (2) give interested persons an opportunity to comment on the proposed rulemaking; and (3) include in the rule "a concise general statement of [its] basis and purpose").

70. 5 U.S.C. § 553(b)(3)(A) (establishing that notice-and-comment procedures are not required for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice"); *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) ("Interpretive rules do not require notice and comment, although . . . they also do not have the force and effect of law and are not accorded that weight in the adjudicatory process . . ." (citation omitted)).

D. *Federal Agricultural Subsidies*

The USBR is not the only federal influence in the region when it comes to water. This section lays out how other federal policies affect water usage.

In the 1930s, Congress authorized the first federal crop insurance program as an experimental attempt to help agriculture recover from the combined effects of the Great Depression and the Dust Bowl.⁷¹ The program was created to encourage farmers to participate in crop insurance by heavily subsidizing insurance premiums so that the government could avoid large disaster assistance program payouts in which farmers would pay nothing.⁷² The program proved popular. Crop insurance has been part of each “Farm Bill,” which is passed approximately every five years.⁷³ Crop insurance is mainly dominated by two types of protections: yield protection and revenue protection.⁷⁴ Yield protection, as the name implies, covers farmers when their yields are below expectations.⁷⁵ Revenue protection is used when revenue falls below expected levels, including instances such as price slumps.⁷⁶ Major crops—which are defined to include corn, cotton, grain, potatoes, rice, soybeans, and wheat—are widely insured, at about eighty-nine percent of all acres planted.⁷⁷

In addition to these two coverage plans, supplemental insurance programs can be bought alone or in conjunction with traditional policies.⁷⁸ One such policy is the Stacked Income Protection Plan (STAX), which covers primarily producers of upland cotton.⁷⁹ STAX is calculated using the difference between expected and actual revenues, and federal subsidies cover eighty percent of the premium.⁸⁰ Dairy Revenue Protection

71. History of the Crop Insurance Program, USDA, <https://legacy.rma.usda.gov/aboutrma/what/history.html> [<https://perma.cc/38L8-W6HR>] (last visited Nov. 3, 2023).

72. See Keith H. Coble & Barry J. Barnett, Why Do We Subsidize Crop Insurance?, 95 *Am. J. Agric. Econ.* 498, 498 (2013) (“[P]olicy-makers expressed an objective of increasing federal crop insurance participation to a level where federal *ex post* disaster assistance would no longer be necessary.” (citation omitted)).

73. See Kate Giessel, Note, On the Permanence of Permanent Law: An Argument for the Continued Presence of the Permanent Law Provisions in the Farm Bill, 13 *Cardozo Pub. L. Pol’y & Ethics J.* 765, 791 (2015).

74. See Title XI: Crop Insurance Program Provisions, USDA, <https://www.ers.usda.gov/topics/farm-economy/farm-commodity-policy/crop-insurance-program-provisions-title-xi/> [<https://perma.cc/8R94-AS7P>] [hereinafter Title XI: Crop Insurance Program Provisions] (last updated Feb. 7, 2023).

75. *Id.*

76. *Id.*

77. Dennis A. Shields, Crop Insurance Covers Most Major Crops, *Farm Credit Admin.* (Sept. 28, 2017), <https://www.fca.gov/template-fca/download/EconomicReports/CropInsuranceCoversMostMajorCrops.pdf> [<https://perma.cc/LSU8-Y7M7>].

78. Title IX: Crop Insurance Program Provisions, *supra* note 74.

79. *Id.*

80. *Id.*

is livestock insurance that provides protection against declines in revenues resulting from reduced yield or price on milk produced.⁸¹

II. THE PROBLEM: WATER WOES

The current legal regime in the Colorado River Basin has created notable market failures, causing substantial inefficient use and outright waste of water as well as imposing significant costs on the government and general public. Section II.A analyzes how the legal regime has incentivized inefficient use of water through various legal mechanisms, including the interstate compact, state laws, and federal subsidies. Section II.B then examines the unintended costs to the federal government and to state governments, and section II.C turns to the economic burden such inefficient uses impose on the general public.

A. *Farmers' Incentives and Inefficient Use of Water*

1. *State Laws.* — State laws have incentivized the overconsumption of water. Nonuse of water leads to the loss of the right, also known as the “use it or lose it” principle.⁸² Several states in the West still maintain some form of a water abandonment or forfeiture clause in water-use statutes.⁸³ When a state finds that water rights have been abandoned or forfeited, the rights will revert back to the state.⁸⁴ Aware that they risk their water by nonuse and intent on preserving their access to water in the future, farmers are incentivized to use every drop they receive.⁸⁵ Wasting water is an entirely rational decision for farmers under the current legal regime.⁸⁶ It is a resource that is necessary for their livelihoods, and they see no personal benefit for conserving water for the next growing season.

What makes this situation even more tragic is that farmers are using significantly more water than they need to effectively grow their crops. The most common irrigation method in the region is the gravity system, in which water is diverted from man-made channels (ditches) that transport water to the fields, essentially flooding the fields.⁸⁷ Gravity irrigation

81. *Id.*

82. See *supra* note 17 and accompanying text.

83. See *supra* notes 38–39 and accompanying text.

84. See, e.g., Lustgarten, *Use It or Lose It*, *supra* note 17 (“If Ketterhagen piped every ditch on the ranch he runs, the pipes might not even carry enough water for the owners to be able to take their full allotment out of Ohio Creek. The Colorado authorities could confiscate their water rights.”).

85. *Id.*

86. See Janet C. Neuman & Keith Hirokawa, *How Good Is an Old Water Right? The Application of Statutory Forfeiture Provisions to Pre-Code Water Rights*, 4 *U. Denv. Water L. Rev.* 1, 3–5 (2000) (discussing the policies in abandonment systems that incentivize ranchers to waste water instead of using it).

87. Nathan Lee & Alice Plant, *State of the Rockies Project, Agricultural Water Use in the Colorado River Basin: Conservation and Efficiency Tools for a Water Friendly Future*

systems are rated as having between thirty percent and sixty percent efficiency range in water usage.⁸⁸ An efficiency rating is calculated by measuring the amount of water beneficially used and then dividing by the amount of water applied.⁸⁹ Water of beneficial use is water that sustains crops without eroding the soil, leeching nutrients, or resulting in water runoff.⁹⁰ Systems that tend to have higher efficiency ratings use less water because they are much more precise in delivering water to crops and avoiding soil damage.⁹¹ These systems also lead to higher crop productivity on average and can result in as high as twenty-five percent increased productivity compared to traditional gravity systems.⁹²

The incentive to overuse water is reflected in the prevalence of inefficient irrigation systems throughout the Colorado River Basin. Gravity systems have the lowest efficiency range and, in 2018, were present in 78.1% of farms in Arizona, 33.1% of farms in California, 77.6% of farms in Colorado, 80.2% of farms in Nevada, 78.3% of farms in New Mexico, 55.7% of farms in Utah, and 81.4% of farms in Wyoming.⁹³ Accordingly, states in the Colorado River Basin have the highest water use per acre for farming in the country.⁹⁴

Not only is there no incentive to conserve water—federal policies actively influence farmers to grow water-intensive crops. The next subsection focuses on how federal policies contribute to the overuse of water.

2. *Federal Subsidies.* — Federal subsidies are incentivizing farmers to plant water-intensive crops regardless of environmental concerns.⁹⁵ The

48–49 (2013), https://www.coloradocollege.edu/other/stateoftherockies/_documents/2013RC/Agriculture.pdf [<https://perma.cc/7N8V-L8TC>].

88. *Id.* 50 fig.4 (listing estimated efficiencies and costs for irrigation methods).

89. Cal. Dep’t of Water Res., WUES-DWR-2021-03, Recommendations for Commercial, Industrial, and Institutional Outdoor Irrigation of Landscape Areas With Dedicated Irrigation Meters Water Use Efficiency Standard 6-2 (2022), https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/Water-Use-And-Efficiency/2018-Water-Conservation-Legislation/Performance-Measures/CIIDIMWUS_STD_-WUES-DWR-2021-03_COMPLETE.pdf [<https://perma.cc/9S4J-AK25>] (ranking the top fifteen farming commodities by gross value of production).

90. See Lee & Plant, *supra* note 87, at 49 (discussing the benefits of precise water application).

91. *Id.*

92. See *id.* at 50.

93. Nat’l Agric. Stat. Serv., USDA, AC-17-SS-1, 2018 Irrigation and Water Management Survey 100 tbl.28 (2019), https://www.nass.usda.gov/Publications/AgCensus/2017/Online_Resources/Farm_and_Ranch_Irrigation_Survey/fris.pdf (on file with the *Columbia Law Review*).

94. *Id.* at 108 tbl.32 (listing each state’s average acre-feet of water applied per acre of land).

95. See Ann Jaworski, Note, Encouraging Climate Adaptation Through Reform of Federal Crop Insurance Subsidies, 91 NYU. L. Rev. 1684, 1697–98 (2016) (“Because of highly subsidized crop insurance, farmers are more likely to continue to grow crops that have a high chance of harming the environment and a high likelihood of failure, leading to both wastefulness and increased indemnity costs to the federal government.”); see also Joseph W. Glauber, The Growth of the Federal Crop Insurance Program, 1990–2011, 95 Am.

mere existence of insurance can distort people's perception of risks when choosing crops.⁹⁶ The fact that these premiums are subsidized only further exacerbates the problem.⁹⁷ These crops often require two-to-three times more water than other staple crops like tomatoes, grain, and dry beans.⁹⁸ Farmers receive not only subsidies on costs but also robust protections against losses during bad harvests.⁹⁹ Arizona, one of the driest states in the nation, saw its farmers collect more than \$1.1 billion in cotton subsidies over the last twenty years, nine times the amount of the second-most-subsidized crop.¹⁰⁰ For a farmer in the drying American West where water is increasingly rare, it is rational to plant crops knowing they will receive some monetary benefit regardless of the crop's success, thereby avoiding the risk of planting uninsured crops.

Even subsidies on non-crop-related aspects of the agricultural industry, like dairy, have an impact on water use. Dairy subsidies result in a larger milk industry and thereby increase demand for dairy feed, including alfalfa.¹⁰¹ Alfalfa is a highly intensive water user, more so than cotton or wheat.¹⁰² California is the largest producer of alfalfa,¹⁰³ the crop has the highest overall water use out of any crop in the state at about 5.2 MAF of water.¹⁰⁴ Yet alfalfa is only the twelfth-most-valuable crop in terms of contribution to California's economy.¹⁰⁵ For comparison, grapes, which

J. Agric. Econ. 482, 483 (2013) (describing criticisms of the program because it can create moral hazard in the form of incentives to plant crops in arid areas in order to capture more payments).

96. See Jaworski, *supra* note 95, at 1686 (explaining that subsidizing premiums results in farmers not internalizing the full risks of their planting decisions).

97. See 7 U.S.C. § 9013(e) (2018) (discussing yield coverage for cotton).

98. Heather Cooley, Pac. Inst., *California Agricultural Water Use: Key Background Information* 4 fig.3 (2015), <https://pacinst.org/wp-content/uploads/2015/04/CA-Ag-Water-Use.pdf> [<https://perma.cc/25QW-WEK9>].

99. See 7 U.S.C. §§ 1508, 9017 (detailing the Secretary of Agriculture's agricultural risk coverage payment framework).

100. Lustgarten & Sadasivam, *supra* note 6.

101. See Matthew T. Ford, *Trends in Alfalfa Growth and Ground-Water Levels in Arizona*, 8 *Ariz. J. Interdisc. Stud.* 1, 1 (2022) (describing federal dairy subsidies as "incentiviz[ing] dairy production[,] which increases agricultural production" and noting that "alfalfa is a major source of feed for [the] dairy cow population"); see also Grey Moran, *Could Climate Change Put an End to Arizona's Alfalfa Heyday?*, *Civil Eats* (Sept. 15, 2021), <https://civileats.com/2021/09/15/climate-change-could-put-an-end-to-arizonas-alfalfa-heyday/> [<https://perma.cc/AS6E-EU67>] ("Similarly, the dairy and meat industries receive billions in federal subsidies, propping up the industries driving the demand for alfalfa.").

102. Cooley, *supra* note 98, at 4.

103. Daniel H. Putnam, Charles G. Summers & Steve B. Orloff, U.C. Div. of Agric. & Nat. Res., ANR Pub. 8287, *Alfalfa Production Systems in California* 1 (2007), https://alfalfasyposium.ucdavis.edu/irrigatedalfalfa/pdfs/ucalfalfa8287prodsystems_fre_e.pdf [<https://perma.cc/GBW5-LTNE>].

104. Cooley, *supra* note 98, at 3.

105. Cal. Dep't of Food & Agric., *California Agricultural Statistics Review, 2018–2019*, at 19 (2019), <https://www.cdfa.ca.gov/statistics/PDFs/2018-2019AgReportnass.pdf> [<https://perma.cc/KQJ2-KKQS>] (ranking the top fifteen farming commodities by gross value of production).

are the most valuable crop in the state's agricultural sector, only use 1.6 MAF of water.¹⁰⁶

3. *Irrigation and Farming Economics.* — Even if the government were to simply realign incentives so farmers would benefit from water conservation, most farms would be unable to afford or justify the cost of improving water use. The agricultural industry in the United States has been able to stay afloat, notwithstanding increasing tariffs and competition, due to significant federal aid.¹⁰⁷ Such programs have allowed American net farm income to reach a five-year high in 2019 despite increasing farm debt and the fact that twenty million acres were left unplanted that year.¹⁰⁸

Yet this increase in income has not been enough to justify investment in water conservation through efficient irrigation methods. Average costs for sprinkler and drip irrigation systems can reach between \$568 and \$1,000 per acre respectively for initial implementation costs.¹⁰⁹ Additionally, general annual maintenance costs are \$80 per acre for a sprinkler system and \$120 per acre for a drip system, both of which significantly exceed the annual cost of \$30 per acre for a gravity system.¹¹⁰ Sprinkler and drip systems provide between eighty-five percent and ninety percent water application efficiency and result in an approximately twelve percent increase in net operating profits.¹¹¹ These costs significantly surpass the amount most farms make in selling crops. In 2021, fifty-one percent of all farms had less than \$10,000 in sales, and just over eighty-one percent of all farms had less than \$100,000 in sales.¹¹² Only a very select few, around 7.4%, of farms had sales of \$500,000¹¹³—and even for those farms, implementation of such systems would prove to be a huge financial barrier. The average farm in New Mexico, making less than \$10,000 per

106. See Cooley, *supra* note 98, at 3 fig.2.

107. See Tara O'Neill Hayes & Katerina Kerska, *Primer: Agricultural Subsidies and Their Influence on the Composition of U.S. Food Supply and Consumption*, Am. Action F. (Nov. 3, 2021), <https://www.americanactionforum.org/research/primer-agriculture-subsidies-and-their-influence-on-the-composition-of-u-s-food-supply-and-consumption/> [<https://perma.cc/F57R-7A7W>] (“The federal government has long subsidized America’s farmers, significantly affecting our food supply and what we eat.”).

108. See John Newton, *Is Farm Income Really Up?*, Farm Bureau: Mkt. Intel (Sept. 9, 2019), <https://www.fb.org/market-intel/is-farm-income-really-up> [<https://perma.cc/B6TP-FGLP>] (“The USDA-Economic Research Service’s . . . forecast for farm sector income and finances puts net farm income . . . at \$88 billion for 2019, up \$4 billion from 2018 and up \$10 billion from 2017.”).

109. See Lee & Plant, *supra* note 87, at 50 fig.4 (reporting these average costs in 2008).

110. See *id.*

111. *Id.*

112. See USDA, *Farms and Land in Farms 2021 Summary 4* (2022), https://www.nass.usda.gov/Publications/Todays_Reports/reports/fnlo0222.pdf [<https://perma.cc/G2HS-SNCH>] [hereinafter USDA, *Farms in 2021 Summary*].

113. See *id.*

year, has 298 acres (the average among the Colorado River Basin states).¹¹⁴ Multiplying the number of acres by the per-acre technology identified above,¹¹⁵ a sprinkler system for a farm of that size would cost around \$169,264, and a drip system would cost upwards of \$298,000 for implementation alone. These upgrades would not be economically feasible for such farms because of the negligible economic benefit from implementing such systems. Even in California, which has the lowest average farm size (fifty-three acres) for those with less than \$10,000 in sales,¹¹⁶ it would require between \$30,104 and \$53,000 to implement such systems,¹¹⁷ for a net increase of at most \$1,200 in profits annually.¹¹⁸

B. *Costs Imposed on State and Federal Government*

1. *The Compact Call*. — The incentive to overuse water has raised potential legal issues that will force states to litigate ambiguities in the Colorado River Compact. The most pressing of these concerns is determining what occurs during a Compact Call. Senior appropriators can initiate a “call” when flows in a river are insufficient to satisfy all rights on the river.¹¹⁹ This forces any newer appropriators to stop using water until the older water rights are satisfied. Should this occur, states would have to undergo three phases to return to compliance: (1) an assessment of deliveries to determine a violation and bring Upper Basin states back into compliance, (2) an allocation of user curtailment among Upper Basin states, and (3) a devising and enforcement of curtailments by state water officials within their borders.¹²⁰ Each step poses a serious challenge and requires the resolution of ambiguities in the Compact.¹²¹ This includes determining whether Upper Basin states did violate the agreement, given that the Compact never considered the realities of a twenty-year

114. See *id.* at 7.

115. See *supra* note 109 and accompanying text.

116. See USDA, Farms in 2021 Summary, *supra* note 112, at 7.

117. These figures were calculated by multiplying the average acreage amount by the cost per acre to implement each system. See Lee & Plant, *supra* note 87, at 50 fig.4. (reporting average capital cost and average annual cost per acre for each irrigation system).

118. Implementing drip irrigation generally leads to a twenty-five percent crop yield, but accounting for other additional costs due to increased yields, such as chemical, fertilizer, and seed costs, the net operating profit is just twelve percent, hence only \$1,200 in additional profits for a farm making \$10,000. See *id.* at 51 fig.7 (calculating the potential gains of implementing drip irrigation over furrow irrigation).

119. See Stern *et al.*, *supra* note 61, at 17.

120. Anne Castle & John Fleck, The Risk of Curtailment Under the Colorado River Compact 33–34 (2019), <https://ssrn.com/abstract=3483654> [<https://perma.cc/HH6Q-L3NP>].

121. See Colo. River Governance Initiative, Nat. Res. L. Ctr., Univ. of Colo. L. Sch., Does the Upper Basin Have a Delivery Obligation or an Obligation Not to Deplete the Flow of the Colorado River at Lee Ferry? 2–5 (2012), https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1006&context=books_reports_studies [<https://perma.cc/9788-5ASV>] (“The language of the Compact (specifically Article III(a) and (d)) support different interpretations as to the priority of water rights between the Upper and Lower Basins.”).

megadrought and instead assumed the river would always contain the same amount of water.¹²² Moreover, Upper Basin states might be reluctant to accept the position that they violated the agreement, fearing even greater curtailments of their uses to ensure deliveries to Lower Basin states.¹²³

2. *Constitutional and Ethical Concerns for the Federal Government.* — As conditions worsen due to the incentive structure created by the current legal regime, the quagmire in the Colorado River could raise serious constitutional (and ethical) concerns for the federal government. A critical issue will be what occurs when states seek contractual remedies, such as an injunction, specific performance, or even rescission in Compact disputes. These are all in the realm of possibility as the situation continues to deteriorate based on precedent in dealing with interstate agreements.¹²⁴ A judge could enjoin additional Upper Basin water use or issue a rescission that nullifies contractual obligations.¹²⁵ Under the latter, the water in the river would revert to the traditional system, resulting in an inequitable apportionment of water because the Lower Basin states have rights senior to those of the Upper Basin states.

C. *Burdens to the General Public*

The current water-use regime places additional economic costs on those living in the region. The region has already seen higher prices for water, decreased energy output from hydroelectric plants, fewer farms, and restrictions on green lawns with a shift towards xeriscape.¹²⁶ This is the case in Arizona, where water rates for residents are expected to increase 31.6% by 2028.¹²⁷ Arizona already has the ninth-highest water prices in the country, and other Colorado River Basin states are not far behind.¹²⁸ These issues are only expected to worsen, as states that rely on the Colorado River are rapidly growing, with projections putting growth at a staggering rate

122. *Id.* at 4 (explaining that the Upper Basin's violation will hinge on how "obligation not to deplete" is interpreted).

123. See *id.* at 6–7 (discussing how this interpretation of the Compact inspired Upper Basin concerns regarding future violations and further cession to the Lower Basin).

124. See *supra* notes 52–57 and accompanying text.

125. See *supra* notes 55–57 and accompanying text.

126. Xeriscaping is the practice of designing landscapes to need little to no water, relying solely on the natural climate. See Xeriscaping, Nat. Geographic, <https://education.nationalgeographic.org/resource/xeriscaping> [<https://perma.cc/DQ29-ZK9Q>] (last updated Oct. 19, 2023).

127. See Cent. Ariz. Project, Final 2023–2028 Rate Schedule 1 (2022), <https://library.cap-az.com/documents/departments/finance/2023-2028-CAWCD-Final-Water-Rate-Schedule.pdf> [<https://perma.cc/FMW6-KRH9>].

128. Erick Burgeño Salas, Average Monthly Water Prices in the United States as of July 2022, by Selected State, Statista (Apr. 17, 2023), <https://www.statista.com/statistics/1244458/monthly-water-prices-in-the-united-states-by-state/> (on file with the *Columbia Law Review*).

of nineteen percent (close to twelve million people) between 2020 and 2040.¹²⁹

Additionally, the current situation could result in a transition to the use of more environmentally harmful energy sources. Hydroelectric power is a clean, renewable source of energy fueled by water stored in reservoirs.¹³⁰ For the American West, hydroelectric power can provide up to twenty percent of annual electricity demand and up to thirty percent in particularly wet years.¹³¹ With the continuing drought and high water usage, however, many dams, including the Hoover Dam, are seeing their water stores decline.¹³² In California, drought conditions in 2021 were expected to result in hydropower generation nosediving from fifteen percent in a normal year to just eight percent.¹³³ The dip in hydropower meant a projected six-percent increase in carbon dioxide emissions from other sources as well as projected energy price hikes of about five percent.¹³⁴

The failure to conserve any water also threatens to accelerate environmental damage caused by rising global temperatures. As temperatures increase, the atmosphere can extract more water from the surface, drying it out.¹³⁵ States like Arizona could see temperatures soar above ninety-five degrees for six months in a year.¹³⁶ Increasing temperatures

129. The largest growth is expected in states like Arizona (twenty-six percent), California (fifteen percent), Colorado (thirty-two percent), Nevada (thirty percent), and Utah (thirty-four percent). Samuel Stebbins, *How Arizona's Population Will Change in the Next 20 Years*, Ctr. Square (Feb. 24, 2022), https://www.thecentersquare.com/arizona/how-arizona-s-population-will-change-in-the-next-20-years/article_86c80054-4e38-5825-b0d1-ed98be1c649.html [<https://perma.cc/W8FD-V4F3>].

130. Benefits of Hydropower, Off. of Energy Efficiency & Renewable Energy, <https://www.energy.gov/eere/water/benefits-hydropower> [<https://perma.cc/L6U5-8HQD>] (last visited Nov. 3, 2023).

131. Study Finds Hydropower Provides Reliable Electricity Even During Historic Droughts, Off. of Energy Efficiency & Renewable Energy (Sept. 20, 2022), <https://www.energy.gov/eere/water/articles/study-finds-hydropower-provides-reliable-electricity-even-during-historic> [<https://perma.cc/336Q-AKKW>].

132. Joshua Partlow & Karin Brulliard, U.S. Announces More Water Cuts as Colorado River Hits Dire Lows, *Wash. Post* (Aug. 16, 2022), <https://www.washingtonpost.com/climate-environment/2022/08/16/colorado-river-bureau-of-reclamation/> (on file with the *Columbia Law Review*).

133. Kavya Balaraman, California Drought Could Halve Summer Hydropower Generation, Leading to More Natural Gas, *EIA Finds*, *Util. Dive* (May 27, 2022), <https://www.utilitydive.com/news/california-drought-could-halve-summer-hydropower-share-leading-to-more-nat/624489/> [<https://perma.cc/FFJ3-K2F7>].

134. *Id.*

135. Justin S. Mankin, Isla Simpson, Andrew Hoell, Rong Fu, Joel Lisonbee, Amanda Sheffield & Daniel Barrie, NOAA Drought Task Force Report on the 2020–2021 Southwestern U.S. Drought 4 (2021), <https://www.drought.gov/sites/default/files/2021-09/NOAA-Drought-Task-Force-IV-Southwest-Drought-Report-9-23-21.pdf> [<https://perma.cc/3LKW-QDVJ>].

136. Al Shaw, Abraham Lustgarten & Jeremy W. Goldsmith, New Climate Maps Show a Transformed United States, *ProPublica* (Sept. 15, 2020), <https://projects.propublica.org/climate-migration/> (on file with the *Columbia Law Review*).

contribute to highly variable precipitation cycles that result in more periods of extreme precipitation and drought.¹³⁷ Conserving water can help mitigate environmental issues during periods of intense droughts, similar to what the region is currently experiencing. Water conservation will become increasingly necessary as the climate rapidly continues to change and warm.

The entire country will suffer from the lack of water conservation in the Colorado River Basin, especially as water supplies dwindle. The region produces ninety percent of the nation's annual supply of winter vegetables.¹³⁸ If conditions continue to deteriorate, the nation might need to develop a new food system to obtain staple vegetables.¹³⁹ The United States may find it difficult to find a replacement even abroad, as the climate in the Colorado River Basin is uniquely suited to grow vegetables year-round.¹⁴⁰ Consumer prices will likely increase as the supply of crops continue to diminish.

D. *Current Scholarship in This Area Fails to Solve the Problem*

In this area, scholarship has generally focused on the creation of water markets as a solution to dealing with increasing water scarcity.¹⁴¹ Although these proposals seem promising, they fail to consider the economics of agriculture, which is a heavily subsidy-dependent industry.¹⁴²

In essence, proponents claim that water markets would facilitate the movement of water to where there is a greater need and higher value use.¹⁴³ A market would generally focus on the creation of a cap that limits

137. See Drought and Climate Change, Ctr. for Climate & Energy Sols., <https://www.c2es.org/content/drought-and-climate-change/> [<https://perma.cc/DF7S-ZQ2E>] (last visited Mar. 20, 2024).

138. Water Risks and Opportunities in the Colorado River Basin, Feeding Ourselves Thirsty, <https://feedingourselfsthirsty.ceres.org/regional-analysis/colorado-river> [<https://perma.cc/8QSY-58RM>] (last visited Nov. 3, 2023).

139. Hunter Bassler, No More Winter Vegetables? Upcoming Yuma Water Cuts to Threaten Entire US Food System, Experts Say, KPNX (Aug. 25, 2022), <https://www.12news.com/article/news/local/water-wars/arizona-farmers-struggle-to-find-solutions-after-unprecedented-colorado-river-water-cuts/75-d677a202-8687-480c-94b4-63784044002f> [<https://perma.cc/37RH-UG4F>] (indicating that finding a replacement for winter staples such as lettuce, spinach, broccoli, and cauliflower may be difficult due to the unique climate existing in Arizona).

140. See *id.*

141. See *infra* note 143.

142. See *supra* section II.A.

143. See Adler, *supra* note 20, at 102 (“Insofar as water rights are currently allocated to comparatively inefficient uses, water markets can help reallocate water to where there is greater need.”); Vanessa Casado-Pérez, Missing Water Markets: A Cautionary Tale of Governmental Failure, 23 N.Y.U. Env’t L.J. 157, 161 (2015) (“[G]overnment needs to play [a role] in order for water markets to thrive and make overall allocation more efficient.”); James L. Huffman, Water Marketing in Western Prior Appropriation States: A Model for the East, 21 Ga. St. U. L. Rev. 429, 429 (2004) (“This Article concludes, optimistically, that the future will lead to more water marketing and, as a result, to better use and protection of scarce water

how much water can be used, the establishment of water rights with a legal basis, and then the implementation of trading rules to facilitate reallocation.¹⁴⁴ A cap would ensure that the market reflects actual water supplies so that all rights could be satisfied.¹⁴⁵ In addition, a properly set cap would ensure enough baseline water to sustain rivers and aquifers over time to avoid environmental harm. Ignoring the legal hurdles of creating an interstate water market,¹⁴⁶ such a market would immediately price out farmers in both the short and long term. Farmers' incomes are generally relatively low and dependent on federal subsidies, with around fifty percent of farms making less than \$10,000 in sales a year.¹⁴⁷ A water market would inevitably shift water from farmers to cities or high-value-add industries.¹⁴⁸ Water is one of the essential inputs in agriculture. Increasing the costs of obtaining a basic and necessary input would have large-scale effects on the agricultural sector in terms of output or crop choice. These drastic shifts in the farming sector could have spillover effects in other industries, including pesticides, dairy, and seed dealing.¹⁴⁹ A better approach to addressing water scarcity would focus on water efficiency, as farmers still provide valuable services.¹⁵⁰ The following Part proposes a

resources.”); see also Aliya Gorelick, *California Is Thirsty for Groundwater: Could a Trading Market Encourage Year-Round Sustainable Groundwater Management?*, 52 U. Pac. L. Rev. 473, 487 (2021) (“A groundwater trading market and Chapter 678 will work together to incentivize wet- and dry-season recharge to maintain groundwater storage and increase sustainable groundwater management.”).

144. See D. Garrick, T. Iseman, G. Gilson, N. Brozovic, E. O'Donnell, N. Matthews, F. Miralles-Wilhem, C. Wight & W. Young, *Scalable Solutions to Freshwater Scarcity: Advancing Theories of Change to Incentivize Sustainable Water Use*, Water Sec., Apr. 2020, at 1, 3–4 (describing the general mechanics of water markets).

145. See *id.* at 3.

146. See Micah Goodwin, *Environmental and Economic Pitfalls of Interstate Water Transfers*, 80 La. L. Rev. 739, 762 (2020) (“A few things are clear under current Supreme Court jurisprudence. Express limitations on interstate water transfers, or those that burden the markets in practical effect, must pass strict scrutiny because they are facially discriminatory and burden an item of commerce.”).

147. USDA, *Farms in 2021 Summary*, *supra* note 112, at 5.

148. See *Managing Water Sustainability Is Key to the Future of Food and Agriculture*, Org. for Econ. Coop. & Dev., <https://www.oecd.org/agriculture/topics/water-and-agriculture/> (on file with the *Columbia Law Review*) (last visited Jan. 25, 2024) (“[F]armers in many regions will face increasing competition from non-agricultural users due to rising urban population density and water demands from the energy and industry sectors.”); Reuben Siegman, *Water Banking: A Potential Solution or Misguided Idea*, *Geo. Env't L. Rev.* (Mar. 13, 2022), <https://www.law.georgetown.edu/environmental-law-review/blog/water-banking-a-potential-solution-or-misguided-idea/> [<https://perma.cc/5KXC-V2Y7>] (discussing concerns that financial firms may seek to purchase water as a speculative asset).

149. See George A. Gould, *A Westerner Looks at Eastern Water Law: Reconsideration of Prior Appropriation in the East*, 25 U. Ark. Little Rock L. Rev. 89, 112–13 (2002) (discussing indirect externalities created by water transfers, including reduction in business activity in the community from which water is transferred).

150. See Goodwin, *supra* note 146, at 775 (“Most of the country's water use issues can be addressed by better consumption and conservation management at the local level—that is, dealing with demand.”).

different mechanism than the traditional water market solution, allowing for water conservation but avoiding negative economic outcomes for farmers and the greater agricultural sector.

III. THE SOLUTION: REALIGNING INCENTIVES

The previous two Parts have discussed how the current legal regime has caused market failures as a result of the water-use practices it has engendered throughout the Colorado River Basin. Farmers, acting as rational market players, see no economic benefit—and indeed risk economic harm¹⁵¹—from conserving water. To rectify this issue, Part III suggests that the USBR could use its regulatory authority to create a marketplace in which cities are able to fund farmers in return for water-conservation efforts. Such a market would change the economic incentives so that farmers are no longer penalized for water conservation. Under this framework, water usage would move toward an efficient allocation, the first step in alleviating environmental strain. Section III.A explains why private market action alone cannot address this issue. Section III.B discusses why the USBR is best suited to tackle this issue and what the agency can do to remedy the situation. Section III.C lays out important considerations for designing the program, including how to involve other key stakeholders and minimize conflicting incentives. Section III.D dissects international case studies that provide a promising look into the application of a solution focused on providing economic incentives for environmental issues. Lastly, section III.E addresses two key counterarguments concerning whether the agency may exceed its statutory authority in implementing this program.

A. *Private Market Action Is Not Enough*

State laws restrict water use and water transfer, raising transaction costs for private parties attempting to address water conservation.¹⁵² Laws requiring that parties seeking to transfer water show that the transfer will not harm other appropriators and demonstrate the new location and use of the water raise transaction costs the most.¹⁵³ For farmers, most of whom make less than \$10,000 per year from on-farm sales,¹⁵⁴ addressing water conservation may seem prohibitively costly. Furthermore, because this is a collective-action problem, it might seem an entirely futile effort to pursue water conservation for any environmental benefit.¹⁵⁵ Any attempt to address water conservation would necessarily require a large-scale response and participation to stabilize water supplies and avoid free riders.

151. See Lustgarten, *Use It or Lose It*, *supra* note 17.

152. See *supra* section II.A.

153. See Culp et al., *supra* note 40, at 13–16, 14 tbl.2 (providing an overview of “legal doctrines [that] impede the transfer of water in the West”).

154. See USDA, *Farms in 2021 Summary*, *supra* note 112, at 5.

155. See *supra* Part II.

To be effective, conservation efforts would inherently have to address the demand for water, and private parties are ill-equipped to handle this problem. The most cost-effective approach to water scarcity is decreasing demand as the supply is limited.¹⁵⁶ Water rights assigned far exceed the amount of water existing in rivers.¹⁵⁷ It has become increasingly difficult to manage or even satisfy most of these claims, which are commonly referred to as “paper rights.”¹⁵⁸ California, for example, has granted five times its average annual river flow.¹⁵⁹ Solely reforming restrictions on water transfers to allow private parties to guide the market to efficient use would be insufficient. Market participants would have difficulty ascertaining whether parties transacting have access to “wet water” or just “paper rights.”¹⁶⁰

Water conservation is not a new issue; the market has been unable to address the problem, and the situation has reached a critical point. In August 2021, USBR declared the first-ever Level One Shortage, and one year later the agency was forced to institute a Level 2a Shortage, triggering water cuts for states.¹⁶¹ The drought in the Colorado River Basin has persisted for over two decades and has no end in sight.¹⁶² Put frankly, it is clear that the market needs intervention to correct its failure to address water conservation.

B. *USBR's Unique Role*

The USBR should develop its own program to allow parties to contract around water conservation. The USBR has the expertise,

156. See G. Tracy Mehan III, *Coping With Water Scarcity, Risk & Uncertainty: Resilience & Hope*, 1 *Tex. A&M J. Prop. L.* 1, 5–7 (2013) (“[I]t is necessary to redefine proper water management to encompass demand-side management as much as the supply-side, and proper pricing of water and water services to include not just the cost of collection, treatment, and delivery, but also water’s scarcity value.”).

157. See Sadasivam, *supra* note 16.

158. See, e.g., Stephanie Sy & Lena I. Jackson, *Despite Owning Rights to Colorado River, Tribes Largely Cut Off From Accessing Water*, PBS NewsHour (July 18, 2023), <https://www.pbs.org/newshour/show/despite-owning-rights-to-colorado-river-tribes-largely-cut-off-from-accessing-water> (on file with the *Columbia Law Review*) (“American Indian tribes own rights to about a quarter of the [Colorado River]. In reality, for most tribes, they are only ‘paper rights’ not amounting to water they can use.”).

159. Culp et al., *supra* note 40, at 15.

160. See A. Lynne Krogh, *Water Right Adjudications in the Western States: Procedures, Constitutionality, Problems & Solutions*, 30 *Land & Water L. Rev.* 9, 12–18 (1995) (explaining that water right adjudications exist because of “the lack of an accurate record of water rights”).

161. See Press Release, Dep’t of Interior, *Interior Department Announces Actions to Protect Colorado River System, Sets 2023 Operating Conditions for Lake Powell and Lake Mead* (Aug. 16, 2022), <https://www.doi.gov/pressreleases/interior-department-announces-actions-protect-colorado-river-system-sets-2023> [<https://perma.cc/V44Y-T8NZ>]; Press Release, Bureau of Reclamation, *Reclamation Announces 2022 Operating Conditions for Lake Powell and Lake Mead* (Aug. 16, 2021), <https://www.usbr.gov/newsroom/news-release/3950?filterBy=year&year=2021> [<https://perma.cc/2VN3-MJFT>].

162. Colorado River Drought Conditions, *supra* note 8, at 2 (statement of Rep. Jared Huffman).

resources, relationships, and statutory authority to implement a large-scale water-conservation program. The agency is responsible for delivering and managing water to a large swath of farmland in the Colorado River Basin (4.5 million acres).¹⁶³ Any program or initiative would have to work with the agency to encourage water conservation. The agency has the expertise and resources to deal with programs of an interstate magnitude, including a team of over 550 scientists, engineers, and other staff.¹⁶⁴ Along with its specialized knowledge, the USBR already has working relationships with state water agencies managing water issues in the region.¹⁶⁵ The USBR also has the statutory authority from Congress to implement water conservation and the ability to coordinate with other federal agencies to ensure a unified federal response.¹⁶⁶ These factors can empower the agency to lower transaction costs for parties, allow for interstate cooperation, and provide the necessary resources. Its position within the water legal regime can allow it to become the primary vehicle to institute water conservation in the region.

The current climate provides an excellent opportunity to implement such a program. Against dwindling water supplies, absent an efficient irrigation system, farmers in the region will likely face decreases in revenues and yields. Financially, however, this option may be out of reach for many farms. This situation provides farms an economic incentive to participate in the program, as it would provide a source of funding. The agency should minimize transaction costs, including informational gaps, and counteract other pernicious incentives.

C. *Designing the Program*

1. *Identify Problematic Areas/Use Statutory Authority to Create a Program.* — The USBR should pilot a program that limits parties to contracting around three main efforts: implementing efficient irrigation systems, fallowing fields, or exiting the market. The participating parties

163. Bureau of Reclamation, U.S. Dep't of the Interior, Colorado River Basin SECURE Water Act Section 9503(c) Report to Congress 1 (2021), <https://www.usbr.gov/climate/secure/docs/2021secure/basinreports/ColoradoBasin.pdf> [<https://perma.cc/9AFT-C4WG>]; see also *supra* section I.C.

164. See Technical Service Center, Bureau of Reclamation, <https://www.usbr.gov/tsc/> [<https://perma.cc/3T36-4SBM>] (last visited Nov. 3, 2023) (“The TSC consists of approximately 565 scientists, engineers, and other professional and office staff . . .”); see also Research and Development Office, Bureau of Reclamation, <https://www.usbr.gov/research/> [<https://perma.cc/UB2C-J9YU>] (last visited Nov. 3, 2023) (discussing the Research and Development Office’s programs to address resource-related problems).

165. See, e.g., Press Release, U.S. Bureau of Reclamation & Cal. Dep’t of Water Res., Agreement Between U.S. Bureau of Reclamation and California Department of Water Resources Supported by Public Water Agencies (Dec. 12, 2018), <https://www.ca.gov/wp-content/uploads/2018/12/VA-Joint-Contractor-Press-Release.pdf>

[<https://perma.cc/557K-EG99>] (discussing the Bureau of Reclamation’s efforts in fostering cooperation among intrastate agencies in California for water storage projects).

166. See *infra* note 181.

would create contractual duties to provide funding and implementation for one of three measures for water conservation. Parties could opt to rely on the water-transfer process through their state agencies or require the farm to abandon or forfeit their water pursuant to state laws.

The narrow scope of the program will lower transaction costs for water conservation. It is imperative that the program removes barriers that would otherwise provide disincentives for water transfers. One such way is through the scope of the program. The agency should narrow the program's focus to solely enabling additional water availability for growing residential areas. This would lower the compliance costs regarding state law requirements such as precise location, purpose, and use of water.¹⁶⁷ Additionally, the agency should provide any other information the parties would require in fulfilling their contractual obligations. This may include assisting in providing state agencies with information on how such a transfer may affect other appropriators.¹⁶⁸

The program's limited focus on mutually beneficial methods such as irrigation, fallowing, or exiting the market provides financial incentives to conserve water. Efficient irrigation systems increase productivity and, on average, increase net operating income.¹⁶⁹ As water cuts are implemented throughout the region, farmers will have to grow with less water, unless they can use water more efficiently to sustain current output. Alternatively, paying for fallow fields during certain years would save water and allow farmers to cover costs. In this case, it would be important to offer rates similar to or slightly higher than those of federal crop insurance (which covers expected revenue or yield, based on historical data, between fifty percent and eighty-five percent).¹⁷⁰ Lastly, parties can contract around paying expenses for a farm to exit the market.¹⁷¹ Discussions around exit would likely focus on providing funds to pay for any outstanding loans or costs in selling equipment. Transition plans would likely be unnecessary because nearly half of farms in the country already rely on off-farm work to generate income and receive benefits, including health care.¹⁷²

167. See *supra* notes 32–37 (discussing how water rights are formed in Western states).

168. See Culp et al., *supra* note 40, at 26 (discussing the federal government's role in supporting states in governing water transfers).

169. See Lee & Plant, *supra* note 87, at 50 (discussing various efficient irrigation systems and their resulting crop productivity).

170. See Title XI: Crop Insurance Program Provisions, *supra* note 74 (“The farmer selects a yield-coverage level, which can range from 50 to 75 percent of average yield (up to 85 percent in some areas) . . .”).

171. Concerns regarding the economic impact of having farmers exit the market are not without merit, but this impact on production would have likely occurred regardless, as farms are already struggling. See *supra* note 19 (discussing the current issues facing farmers, even with subsidies).

172. See Christine Whitt, A Look at America's Family Farms, USDA Blog (Jan. 23, 2020), <https://www.usda.gov/media/blog/2020/01/23/look-americas-family-farms> [<https://perma.cc/WS75-XX58>] (“Where the spouses of principal operators held an off-farm job, a majority cited ‘health care benefits’ as one reason for working off the farm.”); Debbie

Providing the means to exit would allow a party to transition into areas outside of agriculture while reducing water use and decreasing the number of appropriators.

These methods can have outsized impacts when it comes to water conservation. Reports indicate that small increases in efficiency on farms can result in large gains in water available for cities and businesses.¹⁷³ For example, it would likely cost around \$12 billion to implement better irrigation techniques if applied to all ten million acres of farm within the agency's purview.¹⁷⁴ Paying for fallowed fields would help counteract incentives to grow high-risk crops by federal crop insurance.¹⁷⁵ The growing of high-risk groups coincides with higher use of pesticides, negative impacts on wildlife and future ability to grow crops, and soil erosion rates.¹⁷⁶ These negative outcomes would be avoided if farmers are paid to forgo planting in a certain year.

The agency should identify which areas would be better suited to contract to maximize the effect of water conservation. In designing the program, the agency should partner farmers with municipalities directly affected by their current agricultural water use. Pairing would be based on several factors, including whether the parties share a watershed and determinations on immediate downstream effect by agricultural practices.¹⁷⁷ Identifying which areas are inextricably linked based on

Weingarten, *Quitting Season: Why Farmers Walk Away From Their Farms*, Civil Eats (Feb. 12, 2016), <https://civileats.com/2016/02/12/quitting-season-why-farmers-walk-away-from-their-farms/> [https://perma.cc/G7TD-HMDA] (“[A]pproximately 90 percent of [farming] income came from off-farm occupations. . . . Nearly half (or 1 million) of the 2.1 million farms in the U.S. require at least one member of the family to work off the farm.”).

173. See, e.g., Frank A. Ward & Manuel Pulido-Velazquez, *Water Conservation in Irrigation Can Increase Water Use*, 105 Proc. Nat. Acad. Scis. 18,215, 18,215 (2008) (indicating that gains can be achieved from more efficient irrigation methods); Jeff Guo, *Agriculture Is 80 Percent of Water Use in California. Why Aren't Farmers Being Forced to Cut Back?*, Wash. Post: GovBeat Blog (Apr. 3, 2015), <https://www.washingtonpost.com/blogs/govbeat/wp/2015/04/03/agriculture-is-80-percent-of-water-use-in-california-why-arent-farmers-being-forced-to-cut-back/> (on file with the *Columbia Law Review*) (“In 2010, irrigated agriculture consumed four times as much water as urban users. The state could easily save the same amount of water if it required farms to increase water efficiency by about 5 percent.”).

174. Currently, it costs about \$1,000 per acre to implement drip irrigation and an additional \$120 for annual upkeep. See Lee & Plant, *supra* note 87, at 50 fig.4 (estimating the cost of implementing new efficient irrigation systems); Bureau of Reclamation Fact Sheet, *supra* note 60 (stating that the Bureau of Reclamation provides “irrigation water for 10 million farmland acres”).

175. See Jaworski, *supra* note 95, at 1689.

176. *Id.*

177. Taeyoon Yoon, Charles Rhodes & Farhed A. Shah, *Upstream Water Resource Management to Address Downstream Pollution Concerns: A Policy Framework With Application to the Nakdong River Basin in South Korea*, 51 Water Res. Rsch. 787, 787 (2015) (“[E]xcessive upstream water withdrawals reduce the dilution capacity of a river, and may thereby significantly degrade water quality of downstream river reaches.” (citation omitted)); see also *Benefits of Healthy Watersheds*, EPA, <https://www.epa.gov/>

hydrological data will ensure that parties will see increased water for their immediate surroundings. Additionally, such efforts would also promote environmental health, as keeping water within watersheds provides protection against flooding and improves soil formation.¹⁷⁸ Such benefits would also prove positive for agricultural industries and residential communities alike.¹⁷⁹

2. *Matching Program.* — The USBR should include a matching program for municipalities that may struggle in obtaining capital to participate in this program. Growing cities such as Phoenix and Denver may not have as much of an issue as smaller cities or towns raising the capital to participate in this program. The USBR could match any funds provided by a party to ensure that the funds could cover costs to implement any measures. The federal government recently passed the Inflation Reduction Act, which set aside \$4 billion for water-conservation efforts in the Colorado River Basin.¹⁸⁰ Such funds could be used by the USBR in piloting this program without concern that it could stretch its budget. Increased funds would ensure that the program could have as broad public participation as possible for the greatest effect.

3. *Ending Federal Subsidies.* — Harmful federal subsidies that incentivize water waste need to be minimized to ensure that farmers will participate in this program. A farmer may not want to participate in this program if they are recipients of federal subsidies that could cover most costs. The USBR needs to exercise its statutory authority to work with federal agencies that have capabilities to assist in implementing water conservation.¹⁸¹ The Bureau would need to partner with agencies such as the USDA to suspend eligibility for such subsidies and related programs. In these instances, the USBR would likely need to provide funds to allow farmers dependent on these water-intensive crops to transition to other financially viable alternatives. This funding would be provided in conjunction with any agreement farms would negotiate under the program to

hwp/benefits-healthy-watersheds [https://perma.cc/XE5E-QBYT] (last updated Mar. 18, 2024) (explaining the necessity of keeping water within a watershed).

178. See Caleb Aldridge & Beth Baker, *Watersheds: Role, Importance, & Stewardship* 1–2 (2017), <http://extension.msstate.edu/sites/default/files/publications/publications/p3082.pdf> [https://perma.cc/99TE-9ER4] (stating that watersheds provide critical ecosystem functions and services like controlling floods, nutrient cycling, and soil formation).

179. See *id.* (“[H]uman well-being is fundamentally dependent on ecosystem services, subcategorized as provisioning, cultural, regulating, and supporting services. While it’s difficult to put an exact value to every ecosystem function and service, some estimate the cost of ecosystem losses between \$4.3 trillion and \$20.2 trillion per year.” (citations omitted)).

180. Press Release, U.S. Dep’t of the Interior, *Biden-Harris Administration Announces New Steps for Drought Mitigation Funding From Inflation Reduction Act* (Oct. 12, 2022), <https://www.doi.gov/pressreleases/biden-harris-administration-announces-new-steps-drought-mitigation-funding-inflation> [https://perma.cc/4JYS-PC6E].

181. 43 U.S.C. § 390jj(c) (2018).

secure funding for new and efficient irrigation systems. Alternatively, the agency could provide a means for the party to exit the market entirely.¹⁸²

4. *State Agencies as Enforcement Mechanisms.* — The USBR would need to partner with state water agencies to act as intermediary enforcers for deals created in this program. Water is owned by the public, and state water agencies are responsible for managing it.¹⁸³ This responsibility includes settling water disputes, maintaining water records, and reallocating water. In terms of information and expertise on their local conditions, these agencies are invaluable for the USBR. As state agencies already provide a forum for adjudicating water disputes, they could provide a forum for the contracting parties to work within and provide a monitoring mechanism to ensure that the water being conserved is directed to the parties.¹⁸⁴

D. *Case Studies on China and Costa Rica*

This section will highlight two international case studies that illustrate how a framework focused on realigning market incentives can address environmental externalities. It is important to note that these case studies do not fully comport with this Note's framework, but they are great examples showing how such programs can prompt positive environmental change.

Soil erosion, which is a form of soil degradation, increases pollution and sedimentation in waterways, clogging them and causing harm to fish and other species.¹⁸⁵ Such land has a weakened ability to retain water, resulting in more severe flooding.¹⁸⁶ Soil erosion posed a serious environmental challenge to China, which sees two-to-four billion tons of silt released into the Yangtze and Yellow rivers annually.¹⁸⁷ Approximately

182. Other concerns deal with the economic impact on communities tied to agriculture seeing farmers exit the market; however, such impact was likely to occur regardless as revenues decline with a worsening climate and implementation of water cuts. See *supra* notes 6, 17.

183. Kelly Bennett, W. Landowners All., *Water Rights in the West* 1, 2 (2017), https://westernlandowners.org/wp-content/uploads/2017/11/2017_Water-Rights_KB.pdf [<https://perma.cc/47L4-J8X7>] (“The water in nearly all western natural surface water systems like rivers, creeks, lakes and even springs, is owned by the people of their respective state and regulated by a state agency. This is also often the case for groundwater that is stored in aquifers, no matter how deep.”).

184. John E. Thorson, *Clarifying State Water Rights and Adjudications* 15–21 (2001), <https://scholar.law.colorado.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1009&context=water-law-and-policy-reform> [<https://perma.cc/T3MA-L3YU>] (discussing the existence of state forums to adjudicate water disputes separate from the court system); see also *supra* note 160.

185. See, e.g., *Soil Erosion and Degradation*, World Wildlife Fund, <https://www.worldwildlife.org/threats/soil-erosion-and-degradation> [<https://perma.cc/9XN7-BT27>] (last visited Nov. 3, 2023).

186. *Id.*

187. Yifan Xie, Liye Wang, Rui An, Xuan Luo, Yanchi Lu, Yaolin Liu, Shunbo Yao & Yanfang Liu, *The Effect of Sloping Land Conversion Program on Soil Erosion in Shaanxi Province, China: A Spatial Panel Approach*, 10 *Frontiers Env't Sci.* 1, 2 (2022) (explaining the mechanics of the environmental program in China).

thirty-eight percent of China's total land is affected by soil erosion, which is three times the world average.¹⁸⁸ In 1999, China, in an attempt to combat soil erosion, implemented a program called Grain for Green that offered farmers in-kind subsidies for grain, cash, and free seedlings in return for land being converted from cropland back to forests.¹⁸⁹ The government provided the funds and paid out a flat rate per hectare converted.¹⁹⁰ The program proved successful. Since 1999, China has returned 15.31 million hectares of cropland back to forests; for comparison, that is roughly equivalent to about fifty-eight thousand square miles, an area slightly bigger than the country of Bangladesh.¹⁹¹ Recent studies indicate decreases in soil erosion as well as increasing droughts, floods, and other natural disasters.¹⁹² The program also increased public awareness among other villages and mobilized participation in both Green for Grain and other environmental protection programs.¹⁹³

Similarly to China, Costa Rica faced misaligned market incentives. The country was facing a dwindling timber supply in the 1970s, which led the nation to consider providing incentives for reforestation.¹⁹⁴ This led to the creation of the Forest Credit Certificate, which provided tax rebates to participating companies for planting forests.¹⁹⁵ This program would later provide a foundation for a payments for ecosystem services (PES) program that would expand to individuals and different types of environmental services, including water quality, carbon sequestration, and biodiversity conservation.¹⁹⁶ The government created an independent agency that determined rates, managed funds, and set regulations.¹⁹⁷ The agency's funding is derived from a fossil fuel sales tax, water tariffs, and funding from international organizations like the United Nations Framework Convention on Climate Change (UNFCCC).¹⁹⁸ Overall, the small nation has been able to prevent the total loss of seventy-two thousand hectares of forest between 1999 and 2005, with recipients having sixty-one percent of

188. Michael T. Bennett, *China's Sloping Land Conversion Program: Institutional Innovation or Business as Usual?*, 65 *Ecological Econ.* 699, 709 (2008).

189. *Id.* at 703.

190. *Id.* at 703–04.

191. See Qianru Yu, Chen-Chieh Feng, NuanYin Xu, Luo Guo & Dan Wang, *Quantifying the Impact of Grain for Green Program on Ecosystem Service Management: A Case Study of Exibe Region, China*, 16 *Int'l J. Env't Rsch. & Pub. Health* 2311, 2312 (2019); Bangladesh, *Encyc. Britannica*, <https://www.britannica.com/facts/Bangladesh> [<https://perma.cc/H4SH-Q97J>] (last visited Feb. 24, 2024).

192. Yu et al., *supra* note 191, at 2323.

193. See *id.*

194. Stefano Pagiola, *Payments for Environmental Services in Costa Rica*, 65 *Ecological Econ.* 712, 712–13 (2008).

195. *Id.* at 713.

196. *Id.* at 712.

197. *Id.* at 713–16.

198. *Id.* at 715.

their farms covered by forests compared to only twenty-one percent for nonrecipients.¹⁹⁹

As these two case studies indicate, it is possible to implement programs that provide incentives for farms to consider the externalities from harmful agricultural practices. Key differences do exist between the framework proposed in this Note and how the programs were administered in Costa Rica and China. The implementation of these programs differs from the proposed framework because of differences in legal and political structure within China and Costa Rica: Both have strong centralized governments and lack any division of laws or rights between local and national levels.²⁰⁰ Any similar programs in the United States would have to be focused on the state level or require cooperation between the different levels of government.

These proposals are encouraging; however, programs designed around direct payments, if not managed properly, could result in decreased productivity and harm to valuable industries. Due to the popularity of direct payments, some programs can be overtaken by local political interests, transforming them into blunt subsidies.²⁰¹ These programs would result in the market wildly overvaluing environmental services over other productive ventures such as farming.²⁰² If taken to its extreme, farmers might be incentivized to actively worsen their land management practices to increase the payments received.²⁰³ The proposal in this Note is able to avoid those issues with repeated direct-payment programs by offering a narrowly tailored program that allows markets to determine the value they are willing to pay for water conservation. In essence, it ensures that the program could not result in another federal incentive, similar to crop insurance, promoting certain harmful behaviors.²⁰⁴ Nonetheless, these two nations provide an endorsement in implementing a largely similar system focused on addressing environmental issues.

199. *Id.* at 720.

200. See David N. Barton, *Payments for Ecosystem Services: Costa Rica's Recipe*, *Int'l Inst. for Env't & Dev. Blog* (Nov. 29, 2013), <https://www.iied.org/payments-for-ecosystem-services-costa-rica-s-recipe> [<https://perma.cc/9UMU-7YSF>]; Xianchun Tan & Henry Lee, *Comparative Assessment of China and U.S. Policies to Meet Climate Change Targets 3* (2017), <https://www.belfercenter.org/sites/default/files/files/publication/Comparative%20Assessment%20-%20final.pdf> [<https://perma.cc/ETH7-3FC8>] (finding that “China has a greater ability to require all levels of government to implement mandates from the central government” and so “does not have the same problem as a federal system (as in the United States), but its implementation capacity deficit is much larger”).

201. Jim Salzman, *The Promise and Perils of Payments for Ecosystem Services*, 1 *Int'l J. Innovation & Sustainable Dev.* 5, 13–15 (2005) (discussing the problems with direct payments).

202. See *id.* (pointing out that recurring direct payments do not pay for “ecosystem services but, rather, for improvements in service provision” (emphasis omitted)).

203. *Id.*

204. See Jaworski, *supra* note 95, at 1694 (“[T]he fact that premiums are subsidized means that farmers are not internalizing the full risks of their planting decisions.”).

E. Addressing Counterarguments

This section attempts to anticipate and discuss two counterarguments regarding whether the agency may exceed its authority when promulgating this program in the face of the nondelegation doctrine and major questions doctrine, which have cabined agency power in recent years.

One criticism likely to be raised is whether the agency, in promulgating this program, would violate the rising nondelegation doctrine that limits what authority agencies can exercise. The Supreme Court's increasing wariness of administrative agencies is evident from its recent attempts to revitalize doctrines limiting agency powers.²⁰⁵ Chief among these efforts is the focus on retooling and reviving the previously obscure nondelegation doctrine.²⁰⁶ The premise of the nondelegation doctrine is simple: Congress cannot delegate its legislative powers to other entities, including administrative agencies.²⁰⁷ The doctrine is premised on the idea that the Constitution vests "[a]ll such legislative powers" within Congress and to delegate such authority would make it difficult to determine who is politically accountable when policy goes awry.²⁰⁸ Currently, the doctrine has permitted Congress to delegate decisionmaking discretion as long as the agency's discretion is cabined by an "intelligible principle."²⁰⁹ This requirement had been essentially a nonexistent standard, with most delegations by Congress easily meeting the standard.²¹⁰ The current Supreme Court, however, has indicated that it is seeking to change and strengthen the requirement, and with the appointment of Justice Brett Kavanaugh and Justice Amy Coney Barrett, there may be enough votes to change the doctrine.²¹¹ An approach outlined by Justice Neil Gorsuch

205. See Joshua C. Macey & Brian M. Richardson, Checks, Not Balances, 101 Tex. L. Rev. 89, 102 (2022) ("[T]he Court seems poised to breathe new life into the nondelegation doctrine In 2019, in *Gundy v. United States*, Justice Gorsuch wrote in dissent that the intelligible principle test 'has been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional.'" (footnote omitted) (quoting 39 S. Ct. 2116, 2140 (2019) (Gorsuch, J., dissenting))).

206. *Id.*

207. Chad Squitieri, Towards Nondelegation Doctrines, 86 Mo. L. Rev. 1239, 1245 (2021).

208. *Id.* (emphasis omitted) (internal quotation marks omitted) (quoting U.S. Const. art. I, § 1).

209. *Id.* at 1247 ("In considering whether Congress could delegate the authority to promulgate the code, the Court 'look[s] to the statute to see' if Congress had 'itself established the standards of legal obligation, thus performing its essential legislative function, or . . . has attempted to transfer that function to others.'" (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935))).

210. Kathryn A. Watts, Rulemaking as Legislating, 103 Geo. L.J. 1003, 1016 (2015) ("Rather than stressing the necessity of serious standards to guide agencies and to constrain their delegated discretion, the Court seems to look only at whether there is a complete lack of an intelligible principle."); see also Squitieri, *supra* note 207, at 1248–49 ("Another complaint lodged at the intelligible principle test is that after nearly 100 years, the test has failed to produce a judicially manageable standard.").

211. Macey & Richardson, *supra* note 205, at 102 (noting that Justice Gorsuch's proposition that the intelligible principle test has been abused to permit delegations of

known as the “guiding principles” seems to be one of the frontrunners in strengthening the doctrine’s standard.²¹² Gorsuch’s approach outlines that agency rulemaking governing “private conduct” is permissible only if it (1) involves filling in details, (2) incorporates the exercise of fact-finding, or (3) implicates the authority the Constitution separately vests in another branch (executive or judicial).²¹³

Even under Gorsuch’s “guiding principles” approach, the agency’s plan would likely satisfy the standards for a nondelegation challenge. They could do so namely by arguing that the agency is not governing “private conduct” but rather defining its role in removing transaction costs to facilitate negotiations between private actors. There would be no imposition of duties on private actors because they would be making the important decisions in what deals to pursue. Even if the agency’s conduct is considered to be governing “private conduct,” its role would still be relegated to an exercise of fact-finding. Its main objective would be providing parties with the necessary information and resources that would satisfy state requirements for water transfers.²¹⁴

The other counterargument that could be raised is whether such a program would implicate the major questions doctrine. The doctrine defines a requirement that Congress must delegate with a clear statement when it “intends to give an agency economy-transforming abilities to decide major questions.”²¹⁵ What defines a regulation as involving major questions is whether the regulation has major “economic and political significance,” but the specifics of what constitutes “major” is frequently evolving.²¹⁶ Based on recent usage by the courts, however, this Note’s proposed program is unlikely to warrant concerns. Previous invocations of

legislative power that should otherwise be unconstitutional has been supported by Chief Justice John Roberts, Justice Clarence Thomas, Justice Samuel Alito, and Justice Kavanaugh); Mark P. Nevitt, *The Remaking of the Supreme Court: Implications for Climate Change Litigation & Regulation*, 42 *Cardozo L. Rev.* 2911, 2923 (2021) (“Given Judge Barrett’s skepticism of the ‘intelligence principle’ test in her academic writings . . . we could witness the first successful nondelegation challenge since 1935 . . .”).

212. Thomas B. Griffith & Haley N. Proctor, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 132 *Yale L.J. Forum* 693, 725 (2022), https://www.yalelawjournal.org/pdf/F7.GriffithProctorFinalDraftWEB_ew6xbq9e.pdf [<https://perma.cc/7S3M-UP9T>] (“While there are at least five votes to strengthen the nondelegation doctrine, there is no single answer about how to do so. In an opinion joined by Chief Justice Roberts and Justice Thomas, Justice Gorsuch identified three ‘important guiding principles’ that should inform the Court’s approach . . .” (footnotes omitted) (quoting *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting))).

213. Macey & Richardson, *supra* note 205, at 103.

214. See *supra* section III.C.

215. Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 *Va. L. Rev. Online* 174, 192 (2022), https://virginialawreview.org/wp-content/uploads/2022/04/Richardson_Book.pdf [<https://perma.cc/VAB5-SMM6>] (quoting *Brief for Petitioners at 14*, *West Virginia v. Env’t Prot. Agency*, 142 S. Ct. 2587 (2022) (No. 20-1530), 2021 WL 5982772).

216. Chad Squitieri, *Who Determines Majorness?*, 44 *Harv. J.L. & Pub. Pol’y* 463, 473 (2021).

the doctrine struck down agency regulations based on lack of clear statements from Congress, the novelty of the statute's use, or the unprecedented nature of the regulation.²¹⁷ Unlike other agency regulations that have been struck down, the USBR has a clear statement from Congress directing it to implement water-conservation measures, and the statute clearly indicates that agency can implement water-conservation measures with nonfederal recipients.²¹⁸ The agency is not diverging from its statutory authority in some novel or unprecedented way similar to, for example, the CDC enacting measures related to housing policy. Lastly, it is important to highlight that the courts were concerned about agency action (namely the vaccine mandate and eviction moratorium) creating new regulations that impose additional duties on individuals.²¹⁹ The pilot program implemented by the USBR would not be imposing new duties on parties, as the program is focused on facilitating private action.²²⁰ The role of the USBR would be relegated to providing the necessary inputs for parties to allow for water transfers.

CONCLUSION

The situation in the Colorado River Basin is reaching a critical point. The legal regime has promoted wasteful practices because it values consumption and growth. Most of the water is needlessly wasted in low-tech irrigation systems. These practices are no longer sustainable in a drying climate. As the population continues to expand and demand for water rises, the region will need to change how it views water to thrive. Regulators must realize that water is scarce and manage it accordingly. Investing in water-efficient agriculture will be necessary to ensure water is available. Current laws at the state and federal levels, however, serve as roadblocks in allowing the market to pursue water-conscious practices. They raise transaction costs for an agricultural industry increasingly reliant on debt to survive until the next fiscal year. As this Note outlines, it will be imperative for initiatives to change the incentive structure and provide economic benefits for conserving water. This can be done by minimizing

217. Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 *Va. L. Rev.* 1009, 1024 (2023) (discussing the Court's reasoning in overturning the CDC's eviction moratorium); Ilya Shapiro, *Regulating "Every Breath You Take": Police Power and OSHA's Vax Mandate*, 26 *Tex. Rev. L. & Pol.* 393, 394–95 (2021–2022) (discussing the Court's concerns for the breadth of OSHA's vaccine mandate).

218. See 43 U.S.C. § 390jj(a) (2018) ("The Secretary shall, pursuant to his authorities under . . . Federal reclamation law, encourage the full consideration and incorporation of prudent and responsible water conservation measures in the operations of non-Federal recipients of irrigation water from Federal reclamation projects . . .").

219. Lee A. Steven, *Non-Delegation, Major Questions, and the OSHA Vaccine Mandate*, *Yale J. on Regul. Notice & Comment* (Nov. 8, 2021), <https://www.yalejreg.com/nc/non-delegation-major-questions-and-the-osha-vaccine-mandate-by-lee-a-steven/> [<https://perma.cc/JB9P-TU7Z>] (explaining that Congress must expressly indicate that it wants the agency to regulate and enforce).

220. See *supra* section III.B.

transaction costs and providing resources where needed. Recalibrating the market can make rational actors value water conservation over production. This value shift will only become more important as the climate shifts to drier and drier conditions.

ESSAY

THE CHICKEN-AND-EGG OF LAW AND ORGANIZING: ENACTING POLICY FOR POWER BUILDING

Kate Andrias & Benjamin I. Sachs***

In a historical moment defined by massive economic and political inequality, legal scholars are exploring ways that law can contribute to the project of building a more equal society. Central to this effort is the attempt to design laws that enable the poor and working class to organize and build power with which they can countervail the influence of corporations and the wealthy. Previous work has identified ways in which law can, in fact, enable social-movement organizing by poor and working-class people. But there's a problem. Enacting laws to facilitate social-movement organizing requires social movements already powerful enough to secure enactment of those laws. Hence, a chicken-and-egg dilemma plagues the relationship between law and organizing: power-building laws may be needed to facilitate social-movement growth, but social-movement growth seems a prerequisite to enactment of power-building laws. This Essay examines the chicken-and-egg puzzle and then offers three potential solutions. By engaging in disruption, shifting political jurisdictions, and shifting from one branch of government to another, organizations of poor and working-class people can enact laws to enable the construction of countervailing power.

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INTRODUCTION

In an era defined by stark economic and political inequality,¹ legal scholars are devoting increased attention to the ways law might enable people to demand equality. Among the most promising of these approaches is the use of law to enable the construction of countervailing power among the poor and working class.² The idea taking root among

1. See Larry M. Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age 2* (2d ed. 2016); Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* 12 (2012); Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 *Persps. on Pols.* 564, 572–73 (2014) (explaining that politicians adopt the policies preferred by the wealthiest Americans); Emmanuel Saez & Gabriel Zucman, *The Rise of Income and Wealth Inequality in America: Evidence From Distributional Macroeconomic Accounts*, 34 *J. Econ. Persps.* 3, 5, 7–13 (2020); see also *Income Inequality in the United States*, *Econ. Pol’y Inst.*, <https://www.epi.org/multimedia/unequal-states-of-america/> [https://perma.cc/WVJ5-RSGM] (last visited Jan. 16, 2024) (noting the average annual income of the top 1% of earners is 26.3 times higher than that of the bottom 99%); Juliana Menasce Horowitz, Ruth Igielnik & Rakesh Kochhar, *Trends in Income and Wealth Inequality*, *Pew Rsch. Ctr.*, (Jan. 9, 2020), <https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality/> [https://perma.cc/3EFV-QXWP] (the share of U.S. aggregate wealth held by upper-income families in 2016 was 79% and rising, while the share of U.S. aggregate wealth held by lower-income families was 4% and falling).

2. See generally Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 *Yale L.J.* 546 (2021) (proposing a series of legal reforms that would enable organizing by the poor and working class to counteract political inequality).

academics and activists is that if law can be deployed to facilitate organizing by the poor and working class, organizations of poor and working-class people can build for themselves the power they need to countervail the outsized influence of corporations and the wealthy.³

In our previous work, we argued that law can, in fact, facilitate organizing by poor and working-class people.⁴ History contains examples of the

3. See *id.* at 558–59. For a collection of essays by organizers and activists discussing how law can be used to facilitate social movement organizing, see *Countervailing Power*, Am. Prospect, <https://prospect.org/topics/countervailing-power/> [<https://perma.cc/U883-4L3E>] (last visited Jan. 16, 2024); see also Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 *Stan. L. Rev.* 821, 847 (2021) (describing production of legal scholarship in conversation with left social movements); Amna A. Akbar, *Non-Reformist Reforms and Struggles Over Life, Death, and Democracy*, 132 *Yale L.J.* 2497, 2527–31 (2023) (exploring nonreformist reforms that build mass organization and prepare the people to govern); Greg Baltz, *Resurrecting the Rent Strike Law*, 26 *U. Pa. J.L. & Soc. Change* 1, 31–34 (2023) (proposing reforms to enable tenants to leverage New York City’s Rent Strike Law); Maggie Blackhawk, *Federal Indian Law as a Paradigm Within Public Law*, 132 *Harv. L. Rev.* 1787, 1799 (2019) (urging a focus on federal Indian law as an alternative paradigm that focuses on power rather than rights and “that envisions minority rule as a natural and integral aspect of our democracy”); Nikolas Bowie, *Antidemocracy*, 135 *Harv. L. Rev.* 160, 214 (2021) (characterizing labor law as an example of the ability of organized workers to exact concessions from the political order and highlighting how the Supreme Court’s recent jurisprudence undermines worker power); Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, 90 *Fordham L. Rev.* 1999, 2004–16 (2022) (describing the American penal system’s vulnerability to the potentially transformative power of plea bargain unions); Hiba Hafiz, *Rethinking Breakups*, *Duke L.J.* 1491, 1579–95 (2022) (proposing antitrust remedies that are attentive to facilitating countervailing worker power); Kelly Hogue & Heather K. Way, *The Role of the Law in Protecting Tenant Organizing: Opportunities for Local and State Legal Reforms*, 31 *J. Affordable Hous. & Cmty. Dev. L.* 391, 414–24 (2023) (proposing legal protections to facilitate tenant organizing); Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 *Va. L. Rev.* 1483, 1516–34 (2022) (discussing the necessary preconditions for private enforcement laws to further rather than hinder eliminating structural power disparities); K. Sabeel Rahman, *Policymaking as Power-Building*, 27 *S. Cal. Interdisc. L.J.* 315, 333–40 (2018) (arguing for designing administrative processes in ways that enhance the countervailing power of ordinary citizens); Zoë Robinson & Stephen Rushin, *The Law Enforcement Lobby*, 107 *Minn. L. Rev.* 1965, 1974–75 (2023) (joining the “growing calls for democratization and power-shifting in the criminal justice system” with proposals to curtail “the power of the law enforcement lobby”); Samantha Gowing, Note, *Rent Strikes and Tenant Power: Supporting Rent Strikes in Residential Landlord–Tenant Law*, 120 *Mich. L. Rev.* 877, 894 (2022) (arguing that legislation to benefit tenants should focus on fostering tenant power); *Laws That Create Countervailing Power*, Am. Prospect (July 7, 2022), <https://prospect.org/power/laws-that-create-countervailing-power/> [<https://perma.cc/9TV7-CN3C>] (publishing a roundtable discussion focusing on Andrias & Sachs, *supra* note 2); cf. Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 *UCLA L. Rev.* 443, 447–50 (2001) (exploring lawyers’ roles in movements for social change and collecting earlier scholarship in this vein); Catherine L. Fisk, *The Once and Future Countervailing Power of Labor*, 130 *Yale L.J. Forum* 685, 688 (2021), https://yalelawjournal.org/pdf/FiskEssay_z3d9e4jz.pdf [<https://perma.cc/WDL2-8GKR>] (exploring “the difficulties of using law to build sustainable class-based social movements”).

4. As we emphasized, law is by no means the only factor that determines the success of social movement organizing. As important, if not more so, are factors such as an

dynamic, including the role played by the 1933 National Industrial Recovery Act and the 1935 Wagner Act in enabling an explosive increase in union organizing.⁵ Theory supports the contention too. The sociological literature on movement growth and the burgeoning literature on law and countervailing power clarifies the mechanisms through which properly designed legal regimes—what we will call “organizing-enabling” or “power-building” laws—can spur organizing among poor and working-class people.⁶ In our earlier work, we delineated an ideal-type organizing-enabling legal regime with six interdependent features.⁷ We argued that an organizing-enabling law should grant collective rights explicitly; provide organizations with access to a reliable source of financial and other resources; guarantee free spaces for organizing; remove barriers to participation, including by preventing retaliation; permit organizations to make material change in members’ lives, at a scale commensurate with the problem; and allow for contestation and disruption.⁸ Another important feature of an organizing-enabling law is effective enforcement, including robust and expeditious remedies.⁹ But law can enable organizing—more or less successfully—by performing one or any combination of these (or other) features, and we use the term organizing-enabling law here to denote any such law. The key is that the legal interventions facilitate the growth, durability, and power of the social-movement organization.¹⁰

organization’s membership and leadership, its commitment to organizing, and broader political and economic conditions. But law is an important factor; indeed, the existing weakness of organizations among the poor and working class—and the comparative strength of organizations representing corporate interests—is in part a product of legal structures and rules. Andrias & Sachs, *supra* note 2, at 556–57.

5. See Irving Bernstein, *Turbulent Years: A History of the American Worker, 1933–1941*, at 37–61 (1970); Nelson Lichtenstein, *State of the Union: A Century of American Labor 43–48* (2013) [hereinafter Lichtenstein, *State of the Union*]; Robert H. Zieger, *The CIO 1935–1955*, at 16–17, 42 (1995).

6. See generally Andrias & Sachs, *supra* note 2; sources cited *supra* note 3.

7. See Andrias & Sachs, *supra* note 2, 560, 586–87. The precise contours of any particular organizing-enhancing legislation must depend on the social, political, and economic context in which the organizing occurs. Thus, a regime that enables organizing among workers would look different from one that enables organizing among tenants, debtors, or students.

8. See *id.* at 560.

9. We thank Sharon Block for emphasizing the importance of disaggregating enforcement as a key factor of any organizing-enabling law. On the importance of enforcement generally, see Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. Rev. 698, 699 (“The law in books is different from the law in action. Enforcement determines the distance between the two.” (footnote omitted) (citing Roscoe Pound, *Law in Books and Law in Action*, 44 Am. L. Rev. 12 (1910), as reprinted in *American Legal Realism* 39, 39–40 (William W. Fischer III, Morton J. Horwitz, & Thomas A. Reed eds., 1993))); Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1769, 1787–95 (1983) (explaining deficiencies in the NLRA remedial regime and their contribution to organizing failures).

10. Critically, the focus is on building countervailing *organizations* that have the capacity to exercise sustained political power. This is not necessarily the same as facilitating

There is, however, a problem: Enacting laws designed to facilitate social-movement organizing generally requires social-movement organizations already influential enough to secure the enactment of those laws.¹¹ Thus, the relationship between law and social-movement organizing by the poor and working class is plagued by a chicken-and-egg problem: Organizing-enabling laws may often be needed to facilitate social movements, but social movements are needed to enact organizing-enabling laws.¹²

Although the problem is a general one, a contemporary example usefully illustrates the puzzle that this Essay attempts to solve. The labor movement, and labor scholars, have long argued that labor law reform is needed to revitalize union organizing in the United States.¹³ A bill currently pending in Congress, the Protect the Right to Organize Act (PRO Act), would go a long way toward accomplishing the goal of facilitating a significant increase in successful unionization.¹⁴ The problem is that the labor movement does not currently possess enough legislative influence to secure enactment of the PRO Act. Hence, the chicken-and-egg dilemma: The labor movement needs the PRO Act to build power, but enactment of the PRO Act depends on the labor movement having already built more of that power. The same dynamic would undoubtedly confront tenant organizers who sought a tenant organizing law, welfare rights organizers who sought legal reforms to enable welfare rights organizing, debtor organizers and student organizers who sought laws to facilitate organizing among borrowers and students, and many other groups.

mass protest or diffuse social movements. See generally Vincent Bevins, *If We Burn: The Mass Protest Decade and the Missing Revolution* (2023) (detailing the failures of mass protest movements undertaken without organization).

11. For discussion of financial elites' disproportionate power over political decisionmaking in the absence of countervailing organization, see, e.g., Bartels, *supra* note 1, at 2 (describing the increasing influence of wealthy actors, and the decreasing influence of public interest groups, in the political process); Gilens, *supra* note 1, at 12 (noting the "enormous inequalities in the responsiveness of policy makers to the preferences of more- and less-well-off Americans").

12. Cf. Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 *U. Chi. L. Rev.* 1743, 1747–49 (2013) (critiquing public law literature for offering deeply pessimistic accounts of the ambitious, partisan, or self-interested motives of relevant actors in the legal system, while subsequently issuing an optimistic proposal for public-spirited solutions).

13. There is a voluminous amount of literature on this point. See, e.g., Kate Andrias, *The New Labor Law*, 126 *Yale L.J.* 2, 8 (2016) [hereinafter Andrias, *New Labor Law*] (collecting sources and urging fundamental reform of labor law, including sectoral bargaining); Sharon Block & Benjamin Sachs, *Clean Slate for Worker Power: Building a Just Economy and Democracy* 11–12 (2020), <https://clje.law.harvard.edu/app/uploads/2020/01/Clean-Slate-for-Worker-Power.pdf> [<https://perma.cc/6YEJ-7NRL>] (arguing that comprehensive reform that "enable[s] workers to build collective organizations that can countervail corporate power wherever that power impacts workers' lives" is necessary).

14. Richard L. Trumka, *Protecting the Right to Organize Act of 2023*, H.R. 20, S.567, 118th Cong. (2023) (strengthening labor law by making it harder to misclassify workers as independent contractors, providing greater protection for the rights to organize and strike, providing for first contract arbitration, and augmenting penalties for violations of law).

This Essay identifies three potential solutions to this chicken-and-egg problem: disruption, jurisdiction shifting, and changing branches of government.¹⁵ The first approach—disruption—flows from the observation that, in certain contexts, social movements that lack traditional political power may possess significant (if untapped) disruptive capacity to elicit a response from government. Put simply, social-movement organizations can solve the chicken-and-egg dilemma by translating their disruptive capacity into the political power necessary to enact organizing-enabling laws.¹⁶ In their now-classic formulation, Professors Francis Piven and Richard Cloward describe disruption as follows:

Factories are shut down when workers walk out or sit down; welfare bureaucracies are thrown into chaos when crowds demand relief; landlords may be bankrupted when tenants refuse to pay rent. In each of these cases, people cease to conform to accustomed institutional roles; they withhold their accustomed cooperation, and by doing so, cause institutional disruptions.¹⁷

Crucial to the analysis here, when important-enough social institutions are disrupted to a sufficient extent, government may be forced to respond so as to secure the continued functioning of the institution. This response can take multiple forms, including, of course, repression. But, in certain contexts, when the disruption is significant and widespread enough, and repression is not a feasible response, the government may respond by offering legislative concessions to ensure the return to social cooperation—to end the ongoing disruption.¹⁸ Such cycles of disruption and concession are not common in U.S. history, but they have been present at highly significant political moments. For example, the National Labor Relations Act (NLRA) likely would not have been enacted if not for the strike wave of 1934; the Civil Rights Act of 1964 and the Voting Rights Act of 1965 likely owe their enactment to the sit-ins, boycotts, and mass

15. Much of what this Essay explores is relevant to social-movement organizations generally—including organizations that represent the interests of diverse economic groups—and not exclusively to organizations of the poor and working class. Indeed, at various points in the Essay we make reference to the environmental movement, the LGBTQI+ movement, and the cannabis legalization movement, among others, and these groups might also pursue some of the strategies analyzed below. Our focus is on movements of the poor and working class, however, because of the essential role that such groups can play in redressing economic and political inequality. See Andrias & Sachs, *supra* note 2, at 562–77.

16. See, e.g., Frances Fox Piven, *Challenging Authority: How Ordinary People Change America* 16–18 (2008) (describing multiple instances where disruptive power was used to enact reform).

17. Frances Fox Piven & Richard A. Cloward, *Poor People's Movements: Why They Succeed, How They Fail* 24 (1977) [hereinafter Piven & Cloward, *Poor People's Movements*] (emphasis omitted).

18. *Id.* at 29 (describing the “placating efforts” of governments in this position, including legislative concessions).

demonstrations of the Civil Rights Movement, leading up to and including the protests in Birmingham and Selma.¹⁹

In our context, then, a social movement may lack sufficient political influence to ensure enactment of organizing-enabling legislation through ordinary political advocacy but may nonetheless possess sufficient disruptive power to secure enactment in the form of legislative concessions meant to restore social order. To return to the previous example, the labor movement today lacks enough supportive votes in Congress to pass labor law reform,²⁰ but it might change those political facts by disrupting key sectors of the U.S. economy with a wave of strike actions. Lest the approach seem fanciful, this is in fact what happened in the 1930s: Strikes disrupted the national economy to such an extent that Congress was forced to respond with the NLRA.²¹ A similar dynamic may nearly have played out toward the end of 2022. If the railroad unions had carried out their threat to strike over the lack of paid sick leave, the consensus view was that they would have shuttered huge sectors of the national economy.²² What might

19. See, e.g., Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 436, 440 (2004); Michael Goldfield, *Worker Insurgency, Radical Organization, and New Deal Labor Legislation*, 83 *Am. Pol. Sci. Rev.* 1257, 1273–77 (1989) [hereinafter Goldfield, *Worker Insurgency*].

20. See Emily DiVito, *The Filibuster Strikes Again: How It Inhibited Workers' Rights in the 117th Congress*, *Roosevelt Inst.* (Jan. 3, 2023), <https://rooseveltinstitute.org/2023/01/03/the-filibuster-strikes-again-how-it-inhibited-workers-rights-in-the-117th-congress/> [<https://perma.cc/5TMN-X8YL>] (describing the PRO Act's failure to advance after House passage because of a threatened filibuster by Republicans in the Senate).

21. See Piven & Cloward, *Poor People's Movements*, *supra* note 17, at 28–29. As Piven and Cloward write,

[W]hen the disrupted institutions are central to economic production or to the stability of social life, it becomes imperative that normal operations be restored if the [government] is to maintain support among its constituents. Thus when industrial workers joined in massive strikes during the 1930s, they threatened the entire economy of the nation Under these circumstances, government could hardly ignore the disturbances.

Yet neither could government run the risks entailed by using massive force to subdue the strikers in the 1930s. It could not, in other words, simply avail itself of the option of repression.

Id. See also *National Labor Relations Act of 1935*, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169 (2018)).

22. See, e.g., Stephanie Lai, *Congress Moved to Avert a Rail Strike. Here's How and Why*, *N.Y. Times* (Dec. 2, 2022), <https://www.nytimes.com/article/railroad-strike-explained.html> (on file with the *Columbia Law Review*) (noting that the strike would have caused “dire economic damage”). Or consider the Teamsters who threatened to strike UPS, which handles about one-quarter of the tens of millions of parcels shipped each day in the United States, Noam Scheiber, *UPS Workers Authorize Teamsters Union to Call Strike*, *N.Y. Times* (June 16, 2023), <https://www.nytimes.com/2023/06/16/business/economy/ups-union-workers-strike.html> (on file with the *Columbia Law Review*), or the dockworkers who nearly crippled the importation of goods into the United States, Lori Ann LaRocco, *Tentative Agreement Ends Worker Slowdowns and Stoppages that Crippled West Coast*

Congress have offered had the unions engaged in such an exercise of disruptive power with the goal of achieving power-building legislative reform? Looking forward, too, perhaps the political prospects of labor law reform will improve if the recent strike wave continues to build.²³

If the first approach to resolving the chicken-and-egg dilemma is disruption, the second approach is more conventional: It involves shifting the attempt to secure organizing-enabling legislation from one level of government to another. More specifically, this approach involves refocusing political effort from a level of government where the social movement lacks sufficient influence to a level of government where the movement possesses adequate legislative power. Typically, this will involve shifting from the federal government to state or local jurisdictions where partisan alignments favor the social movement.

This deployment of “partisan federalism” depends on two primary factors for its viability.²⁴ First, the movement that lacks power to enact organizing-enabling legislation at the national level must nonetheless possess enough legislative influence in some state or locality to make enactment of the legislation feasible there. These political conditions are not guaranteed, of course, but it is frequently the case that a movement will be unable to move legislation in Congress and yet succeed in doing so in state legislatures or city councils.²⁵ Second, the relevant legislation must not only be *politically* feasible at the state or local level—it also must be

Ports, CNBC (June 15, 2023), <https://www.cnbc.com/2023/06/15/tentative-agreement-ends-worker-slowdowns-and-stoppages-that-crippled-west-coast-ports.html> [<https://perma.cc/3MQV-DS87>].

23. See Brennan Doherty, How ‘Strike Culture’ Took Hold in the US in 2023, BBC: Worklife (Sept. 27, 2023), <https://www.bbc.com/worklife/article/20230927-how-strike-culture-took-hold-in-the-us-in-2023> [<https://perma.cc/4YKT-Q6EE>] (predicting that strikes are “poised to become a common part of American workers’ playbooks as they negotiate working conditions”); Labor Action Tracker, Cornell Univ. Sch. Indus. & Lab. Rels., <https://striketracker.ilr.cornell.edu/> [<https://perma.cc/LA3K-EJE7>] (last visited Jan. 17, 2024) (showing active labor strikes across the United States).

24. We borrow the term from Professor Jessica Bulman-Pozen, *Partisan Federalism*, 127 *Harv. L. Rev.* 1077, 1080 (2014) [hereinafter Bulman-Pozen, *Partisan Federalism*] (“Partisan federalism . . . involves political actors’ use of state and federal governments in ways that articulate, stage, and amplify competition between the political parties, and the affective individual processes of state and national identification that accompany this dynamic.”); see also Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 *Yale L.J.* 1920, 1948–49 (2014) [hereinafter Bulman-Pozen, *From Sovereignty and Process*].

25. The contemporary Fight for \$15 campaign provides a relevant analogue: Unable to secure a national minimum wage of \$15/hour, that movement was enormously successful in enacting \$15/hour minimum wage laws in states and cities across the country. See, e.g., Andrias, *New Labor Law*, *supra* note 13, at 51 (noting that Fight for \$15 achieved the passage of minimum wage laws across the country, including in major cities like Chicago, San Francisco, and Seattle). Among the many other recent examples are marriage equality, marijuana legalization, and emissions controls. See *infra* notes 199–203 and accompanying text.

legally permissible at that level, thus implicating questions of home rule along with federal and state preemption.²⁶

As we will describe, there are two major variants of this jurisdiction-shifting approach to resolving the chicken-and-egg dilemma. The first involves a static transition from federal to state or local policymaking: Accepting that the social movement is unable to secure a federal law that facilitates organizing growth, it instead tailors its vision and pursues change in a smaller jurisdiction. The second variant is a more dynamic one. Here, the social movement abandons federal legislative change only for the present. On this approach, once the social movement secures organizing-enabling legislation in a state or city, it uses that legislation to build power that it exports across jurisdictional lines, potentially to enact similar laws in other states or cities. Ultimately, the social movement can use state and local legislation to build sufficient power so that it can return to the federal government and move the legislation that it previously was too weak to enact.²⁷

The third approach we offer involves shifting political effort from one branch of government to another: most likely from the legislative to the executive branch. The viability of this approach depends on a social movement possessing enough influence to obtain administrative rulemakings or other executive branch actions with organizing-enabling effects. In some instances, a social movement might also be able to shift its efforts from the political branches to the judiciary. Indeed, conservative social movements have done just that with great success,²⁸ as have some

26. Under current rules, this poses a significant barrier for the labor movement, but less of a hurdle for other social movements where states and cities maintain significant authority to legislate in the relevant subject areas—housing law, for example, remains largely the province of state and local governments. Or, at least, state governments. See *infra* section II.B. As discussed below, state law is increasingly being used to preempt local discretion in some areas of concern to us here. See *infra* notes 243–245 and accompanying text.

27. Although she does not consider organizing-enabling legislation or its effect of growing social-movement power, Professor Bulman-Pozen makes a related observation when she writes, “Because it is easier to pass new state laws than new federal laws, time and again states prove more accessible fora for nationwide movements to promote their ultimately national agendas.” See Bulman-Pozen, *From Sovereignty and Process*, *supra* note 24, at 1951; cf. Jamila Michener, *Medicaid and the Policy Feedback Foundations for Universal Healthcare*, 685 *Annals Am. Acad. Pol. & Soc. Sci.* 116, 125–30 (2019) (showing that well-designed laws enacted in progressive states and localities can demonstrate the efficacy and plausibility of reform, create administrative capacity, and expand supportive constituencies in ways that increase the likelihood of reform both in other states and at the national level).

28. See Amanda Hollis-Brusky, *Ideas With Consequences: The Federalist Society and the Conservative Counterrevolution* 147–56 (2015) (detailing the Federalist Society’s efforts to change Court jurisprudence and to lock in conservative power); Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* 221–64 (2012) (describing the conservative movement’s focus on transforming the courts and legal doctrine to achieve political power); Mary Zeigler, *Dollars for Life: The Anti-Abortion Movement and the Fall of the Republican Establishment* 11–81, 205–12 (2022) (detailing the antiabortion movement’s court-centered strategy, including its efforts to transform campaign finance law, to build more political power).

civil rights movements.²⁹ Yet, at least as presently constituted, the judiciary is less likely to be a hospitable forum for advancing the agendas of poor and working-class social movements, nor is it as well suited to crafting the legal regimes necessary for facilitating durable organization.³⁰

The viability of the branch-shifting approach is, in part, simply a question of political power. And, again, it is not uncommon for political actors to succeed in securing favorable administrative action when legislation is beyond reach.³¹ The viability of this third approach, though, also depends on a less contingent factor, namely the *capacity* of administrative action to facilitate organizing. As noted above, we have described six interdependent features of organizing-enabling laws.³² Accomplishing such a comprehensive organizing-enabling law likely requires legislation; it is highly unlikely that any administrative action could, by itself, produce such a regime. Nevertheless, executive action—including rulemakings; adjudications by administrative agencies; and federal, state, or local procurement-related action by executive actors—can undoubtedly perform some of the organizing-enabling functions we sketched. To the extent that such partial interventions fuel movement growth, this third approach constitutes a viable means to escape the chicken-and-egg dilemma.

It is worth emphasizing that these three approaches—disruption, jurisdiction switching, and branch shifting—are not only dynamic over time but can also be used in combination with one another. For example, movements may persuade the federal executive branch to partner with state actors to achieve organizing-enhancing ends that could not be achieved with either party acting alone. Meanwhile, to produce local and state legislation or executive action, disruption may be necessary, albeit on a smaller scale.

A few other points bear mention at the outset. First, the three paths out of the chicken-and-egg dilemma on which this Essay focuses are not the only plausible paths. For example, there are numerous political contexts in which a social movement lacks the requisite influence to secure legislative change when acting on its own but would possess sufficient power if it were part of a coalition of organizations from across movements or in alliance with components of a fractured opposition.³³ Likewise, social

29. See generally Klarman, *supra* note 19 (detailing the transformation of Supreme Court jurisprudence in response to efforts by the Black Civil Rights Movement).

30. See *infra* notes 293–298 and accompanying text.

31. Indeed, this dynamic is in play today: The PRO Act is stalled in Congress, but the NLRB (and particularly the NLRB General Counsel) is doing what it can, within existing statutory constraints, to reshape labor law so as to better facilitate union organizing. See *infra* section III.B.

32. See *supra* notes 7–8 and accompanying text.

33. See, e.g., David S. Meyer & Suzanne Staggenborg, *Thinking About Strategy, in* *Strategies for Social Change* 14 (Gregory M. Maney, Rachel V. Kutz-Flamenbaum, Deana A. Rohlinger eds., 2012) (discussing how building coalitions can increase movement

movements may increase their political power through effective use of media and social media³⁴ that helps garner enough public support to shift legislative alignments. So too, external factors—like international conflict or economic crisis—can affect the power and influence of social movements in a given historical moment.³⁵ Although this Essay will not address those dynamics in any detail, they are often critical to winning legal reforms that facilitate social-movement organization.³⁶ Finally, it is important to note that while the three approaches outlined here can be attempted under existing legal frameworks, there are a set of legal design features that make the approaches more or less viable.³⁷ Although we note some possible legal changes that could facilitate the securing of organizing-enabling laws, we leave a full discussion of those possibilities for another day.

I. DISRUPTION

Disruption is often frowned upon as antithetical to the rule of law.³⁸ Yet social-movement disruption in the form of strikes, protests, boycotts,

influence). This Essay has less to say about coalition building than about the three approaches described above. But that should not imply that coalition work across social movements is anything less than essential to securing organizing-enabling legislation.

34. See Jane Hu, *The Second Act of Social Media Activism*, *New Yorker* (Aug. 3, 2020), <https://www.newyorker.com/culture/cultural-comment/the-second-act-of-social-media-activism> (on file with the *Columbia Law Review*) (describing how digital tactics, such as organized use of hashtags, can have “material consequences”).

35. See, e.g., Daniel S. Lucks, *Selma to Saigon: The Civil Rights Movement and the Vietnam War 8* (2014) (describing the “profound and tragic consequences” of the Vietnam War on the American Civil Rights Movement).

36. As discussed throughout the Essay, our three paths out of the chicken-and-egg dilemma require social movements to possess differing types and degrees of political power. But each of our three paths also requires different types of movement *capacity*: membership, resources, skills, relationships, and know-how necessary to enable movements to operationalize political power in different lawmaking and regulatory contexts. (For example, moving legislation at the state level requires social movements to possess capacities specific to state-level politics, and securing administrative policy change requires movements to have capacities specific to the administrative context.) We assume for purposes of this discussion that movements will have or develop the capacities and infrastructure necessary to take advantage of the paths we describe. But future work in cognate fields might usefully delineate the capacities necessary for movements to do so.

37. With respect to disruption, for example, law might impose stricter or weaker sanctions for disruptive activity or law might actually protect disruptive activity. With respect to the federalism approach, preemption and home-rule powers determine exactly how much organizing-enabling legislation can be enacted at the state and city level. And with respect to the executive branch approach, administrative and constitutional law help determine the robustness of potential organizing-enabling lawmaking that administrative agencies are empowered to conduct. Throughout the Essay, we consider the ways that law can alter the viability of each approach to securing organizing-enabling laws.

38. See Burke Marshall, *The Protest Movement and the Law*, 51 *Va. L. Rev.* 785, 785–92 (1965) (arguing that the Civil Rights Movement of the 1960s may have negative

and civil disobedience can be a potent tool for achieving legal change.³⁹ In certain political, social, and economic contexts, a social movement can translate its disruptive capacity into institutional political power and secure legislation that otherwise would be out of reach.⁴⁰ This is true even when existing law proscribes such disruptive activity. Indeed, as this Part recounts, this dynamic describes in large part the history of federal labor and civil rights law in the United States as well as numerous victories at the local level. It also describes the first way that social movements can resolve the chicken-and-egg problem that plagues organizing-enabling law.

A. *Conditions for Successful Disruption*

The basic political mechanism of disruption is, in theory, straightforward: First, a social movement disrupts an institution or facet of socioeconomic life; and then the government, to end the disruption and restore normal socioeconomic functioning, grants political concessions that the movement seeks.⁴¹ If those concessions take the form of

consequences for societal regulation because it was “depende[nt] upon and fostering . . . disrespect for law”); Jennifer Nou, *Civil Servant Disobedience*, 95 *Chi.-Kent L. Rev.* 349, 368–69 (2019) (arguing that civil disobedience by civil servants must be a measure of last resort to be even potentially legitimate); Lewis F. Powell, Jr., *A Lawyer Looks at Civil Disobedience*, 23 *Wash. & Lee L. Rev.* 205, 205 (1966) (arguing that “[o]ne would have supposed that lawyers . . . [would] denounce civil disobedience as fundamentally inconsistent with the rule of law”).

39. A normative defense of disruption as a means of democratic change is beyond the scope of this paper. For exploration of this issue, see Daniel Markovits, *Democratic Disobedience*, 114 *Yale L.J.* 1897, 1936–37 (2005) (arguing that disruption and lawbreaking can end up serving democracy and that “democratic disobedience” is a natural part of the democratic process); see also Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 25–29 (2004) (describing lawbreaking and popular uprisings in colonial America as efforts by citizens to protect their liberty interests and protest laws they perceived as unjust); Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 *U. Pa. L. Rev.* 1095, 1103–04 (2007) (arguing that property rights are inextricable from analyses of protest movements and that high penalties for violations of property rights can stifle democratic deliberation that civil disobedience and other disruption generates).

40. For the sociological literature on disruption, see generally Doug McAdam, Sidney Tarrow & Charles Tilly, *Dynamics of Contention* 6 (2001) (searching for and analyzing “causal mechanisms and processes in a wide variety of struggles”); William A. Gamson, *The Success of the Unruly*, in *Readings on Social Movements: Origins, Dynamics and Outcomes* (Doug McAdam & David A. Snow eds., 2d ed. 2010) (analyzing the success of movements using disruptive methods).

41. See Doug McAdam, *Tactical Innovation and the Pace of Insurgency*, 48 *Am. Socio. Rev.* 735, 735–36 (1983) [hereinafter McAdam, *Tactical Innovation*] (describing this phenomenon); see also Frances Fox Piven & Richard Cloward, *The Weight of the Poor: A Strategy to End Poverty*, *The Nation* (May 2, 1966), reprinted in Frances Fox Piven & Richard Cloward, *The Weight of the Poor: A Strategy to End Poverty*, *The Nation* (Mar. 8, 2010), <https://www.thenation.com/article/archive/weight-poor-strategy-end-poverty/> (on file with the *Columbia Law Review*) (“We tend to overlook the force of crisis in precipitating legislative reform By crisis, we mean publicly visible disruption in some institutional

organizing-enabling legislation, the dilemma has been resolved. But, it bears emphasis at the outset, the historical and political factors required for successful disruptive action of this kind are uncommon. The basic challenge stems from the fact that the viability of this approach to resolving the chicken-and-egg dilemma depends on the existence of a social movement that cannot secure the desired legislation through traditional political means and yet possesses sufficient disruptive capacity to do so. In most historical moments, most social movements simply lack this type of disruptive capacity.

To see why, it is helpful to delineate factors that contribute to successful disruptive actions—the conditions under which disruption can in fact have its desired political effect. As Piven and Cloward explain, disruption is more likely to lead to political or legislative reform when the movement (1) organizes or mobilizes participation by the relevant population sufficient to (2) disrupt the operation of a social or economic institution that (3) is important enough such that the government is forced to respond to restore normal operation of the institution and (4) to respond with concessions to the disrupting group rather than with repression.⁴²

The first factor is the basic challenge of social-movement organizing, which, for reasons that are well known, is a significant challenge indeed, perhaps particularly among those “who are the most oppressed by inequality.”⁴³ We have both explored the challenges of organizing in previous work,⁴⁴ and the key point here is that the threshold for successful disruptive action involves a level of movement participation that is difficult to achieve.⁴⁵ The second factor requires that participants, even if mobilized, have a social or economic position through which they can in fact disrupt a social institution. Of course, even those without such a social

sphere. . . . Public trouble is a political liability, it calls for action by political leaders to stabilize the situation.” (emphasis omitted)).

42. See Piven & Cloward, *Poor People’s Movements*, *supra* note 17, at 24, 27–30 (describing in greater detail the factors influencing each step of this framework).

43. *Id.* at 6. Although such participants generally have the most to gain and generally are the populations that most often have to resort to disruption to protect their interests, they also often “have little defense against the penalties that can be imposed for defiance.” *Id.*

44. E.g., Andrias, *New Labor Law*, *supra* note 13, at 13–39; Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 *Harv. L. Rev.* 655, 664–67, 697–700 (2010); Benjamin I. Sachs, *Law, Organizing, and Status Quo Vulnerability*, 96 *Tex. L. Rev.* 351 (2017).

45. To Piven and Cloward, the distinction between organizing participation and mobilizing participation would be highly relevant. See Piven & Cloward, *Poor People’s Movements*, *supra* note 17, at 5 (distinguishing “mass movement[s]” from the “formalized organizations” that arise from them). In fact, the authors were highly critical of the effects of “organization” and far more optimistic about less organized forms of participation that would be better characterized as mobilization. *Id.* For present purposes, what matters is that ensuring the requisite level of participation in disruptive action—whether through organizing or mobilizing—is a hurdle to the viability of the approach.

or economic position may have the capacity to cause sufficient disruption by interfering with social life—for example, by occupying public spaces or blocking streets and bridges.⁴⁶ But those who perform functions marginal to major social or economic institutions may have a harder time causing disruption than their counterparts whose social or economic position places them at the heart of key institutions.⁴⁷ The third factor requires that participants, even if mobilized and able to disrupt a social institution, disrupt a social or economic institution whose functioning is significant enough that the government will be forced to respond to the disruption.⁴⁸ And, again, this is often not the case: If a group of workers succeeds in disrupting the operation of a garment sweatshop, or a group of tenants manages to disrupt the operation of a substandard apartment building, the relevant political authorities often simply ignore the disruption.⁴⁹

Finally, if the disruption is significant enough to prompt governmental response, the response—to constitute a win for the disrupters—must come in the form of political concessions desired by the disrupters and not in successful repression of the social movement. Predicting when governments will respond to disruption with concessions is difficult, but Piven and Cloward offer three relevant variables that, when present, make concessions a likely outcome. According to these theorists, concessions are most likely to be granted (1) when the social institution being disrupted is “central to economic production or to the stability of social life,” (2) at a time when the “political leadership [is] unsure of its support,” and (3) when the disrupters have “aroused strong sympathy among groups that [are] crucial supporters of the regime.”⁵⁰ In such contexts, the government is unlikely to be able to quell disruption through the use of force because doing so would risk alienating critical political support and escalating disruption through “the reactions of other aroused groups.”⁵¹

More recent work in sociology attempts to develop additional hypotheses as to when and how disruption produces the kind of legislative

46. See *infra* section I.C (describing disruption by civil rights protesters). Piven and Cloward, for example, write, “[S]ome [poor people] are sometimes so isolated from significant institutional participation that the only ‘contribution’ they can withhold is that of quiescence in civil life: they can riot.” Piven & Cloward, *Poor People’s Movements*, *supra* note 17, at 25.

47. See Piven & Cloward, *Poor People’s Movements*, *supra* note 17, at 25.

48. The institution disrupted could be an arm or office of the government itself. See, e.g., Nick Kotz & Mary Lynn Kotz, *A Passion for Equality: George A. Wiley and the Movement 266–70* (1977) (detailing the actions of the National Welfare Rights Organization).

49. See, e.g., Piven & Cloward, *Poor People’s Movements*, *supra* note 17, at 27. Such actions may still build power for the social movements, but they do not result in *legal change* that facilitates organizing.

50. *Id.* at 28–29.

51. *Id.* at 29.

concessions sought by participants.⁵² In their study of the effect of Vietnam-era antiwar protests on congressional voting, for example, Professors Doug McAdam and Yang Su hypothesize various mechanisms through which protest activity can impact legislative outcomes, several of which are relevant for present purposes.⁵³ For example, McAdam and Su explore whether the disruptive “intensity” of protest activity might account for the success of the disruption in moving legislators to act.⁵⁴ And, in this regard, the authors consider whether the use of violence by protesters or the use of violence by police in response to protests impacts legislative outcomes.⁵⁵ The authors also study whether disruption functions not only directly, by forcing legislators to act to quell the disruption, but also *indirectly*, by contributing to shifts in public opinion on the subject being protested.⁵⁶ Finally, McAdam and Su take up the interaction between these two dynamics, looking at whether the use of violence by demonstrators or by police might shift public opinion in ways that ultimately move legislators to act.⁵⁷ On this point, and to foreshadow our discussion of the Civil Rights Movement, McAdam and Su write, “[S]tudies of the civil rights movement suggest that it is not disruption per se, but disruption characterized by violence directed against the movement that is especially productive of favorable government response.”⁵⁸

Sociological research and historical examples also indicate that disruption is more likely to be successful when the movement mobilizes broad support and sympathy from the general public and when it is perceived to maintain a “commitment to democratic practices and the general politics of persuasion.”⁵⁹ Thus, as historian Nelson Lichtenstein recounts, successful U.S. reform movements “from the crusade against slavery onward” have used disruption and protest while also defining

52. A second-order question, to our knowledge as yet unaddressed in the literature, is when legislative concessions take the form of organizing-enabling law and when they take other forms, for example, laws that aim to more directly address substantive needs of the social movement involved. Of course, the demands of the social movement will have a major influence: When a movement demands organizing-enabling law, it is much more likely to secure it than when it demands other concessions. But a full exploration of this important question is beyond the scope here.

53. See Doug McAdam & Yang Su, *The War at Home: Antiwar Protests and Congressional Voting, 1965 to 1973*, 67 *Am. Socio. Rev.* 696, 700 (2002).

54. See *id.* at 706–07.

55. See *id.* at 701.

56. See *id.* at 703–04.

57. See *id.* at 702.

58. *Id.* (citing Doug McAdam, *Political Process and the Development of Black Insurgency, 1930–1970* (1982)); McAdam, *Tactical Innovation*, *supra* note 41, at 735. Why? Plausibly because violence directed against protesters shifts public opinion in the protesters’ direction. See *id.* at 703.

59. McAdam & Su, *supra* note 53 at 718 (emphasis omitted). Thus McAdam and Su write, “To be maximally effective, movements must be disruptive/threatening, while nonetheless appearing to conform to a democratic politics of persuasion.” *Id.* (emphasis omitted).

“themselves as champions of a moral and patriotic nationalism, which they counterpoised to the parochial and selfish elites who stood athwart their vision of a virtuous society.”⁶⁰

Finally, scholarship in these fields suggests that disruption will more likely succeed when it occurs in the context of divided—or unstable—social and political opposition.⁶¹ For example, and as the next section details, the strike wave of 1934 succeeded in forcing Congress to enact the NLRA in 1935, but relevant to that success was the fact that business was partly divided on the statute. As Professor Colin Gordon explains, “By 1935, many employers saw federal labor law as a partial and necessary solution to market instability, the persistence of the Depression, and the failure of [the National Recovery Act].”⁶² Gordon thus concludes, “[H]ad business opposition [to the NLRA] been as heartfelt and uniform as some of the act’s more vocal detractors claimed, there is little likelihood that it would have passed.”⁶³

While persuasive historical studies support the sociological theories, empirical tests of them remain indeterminate.⁶⁴ Our point, however, is not to develop a full-fledged predictive theory of when disruption is likely to achieve a desired political impact, but rather to highlight that such politically impactful disruption is possible and is more likely to occur when certain interlocking conditions are present. These conditions may be quite rare, but they are not nonexistent, and social movements can work to bring them about—or at least can remain attuned to whether such conditions exist in order to decide whether disruption is likely to be a successful tactic. Indeed, there have been several key moments in American history in which such conditions existed and social movements secured landmark legislative victories through disruptive action.⁶⁵

60. Lichtenstein, *State of the Union*, *supra* note 5, at 34–35.

61. See, e.g., Piven & Cloward, *Poor People’s Movements*, *supra* note 17, at 28–29 (stressing the relevance of “electoral instability” to the success of disruption).

62. Colin Gordon, *New Deals: Business, Labor, and Politics in America, 1920–1935*, at 204 (1994); see also Steven Fraser, *Labor Will Rule: Sidney Hillman and the Rise of American Labor* 331–33 (1991) (describing business support for the Wagner Act).

63. Gordon, *supra* note 62, at 205. International dynamics have also proved relevant in certain settings. For example, early successes of the Civil Rights Movement may have been in part facilitated by the politics of the Cold War, when “U.S. democracy was on trial[] and southern white supremacy was its greatest vulnerability.” Klarman, *supra* note 19, at 182. Similarly, the “decolonization of Africa . . . may help to explain why direct-action protest broke out in 1960 rather than a few years earlier.” *Id.* at 376.

64. See McAdam & Su, *supra* note 53, at 700–01, 711–15.

65. Our focus in this section is on the ability of social-movement organizations to secure federal legislative change through the exercise of disruptive power, and we save our in-depth discussion of state and local strategies for the next section. Of course, disruption can be used to secure state and local legislative change as well, a point we briefly address at the end of this Part. See *infra* section I.D.

B. *Labor Upheaval and the Passage of the NLRA*

One such moment was the massive industrial strike wave of 1934 and 1935, which helped ensure the passage of the NLRA and the granting of a federally protected right to organize unions.⁶⁶ For contemporary readers, living in an era when strikes are—at least until recently—infrequent and largely mild-mannered, it may be difficult to imagine the disruptive force of strikes like the ones that roiled American politics in 1934. But, in that year, “labor erupted,” with more than 1,800 separate strikes involving nearly 1.5 million workers.⁶⁷ And, in large part due to the response of employers and the police, the ’34 strike wave took on the character of industrial warfare, garnered broad public support, and raised fears of industrial (and political) revolution among elected officials.

Two of these strikes are illustrative of the power of disruption: the autoparts strike in Toledo, Ohio, and the longshore strike in California.⁶⁸ What came to be known as the “Battle of Toledo” centered around a strike at automobile parts manufacturer Autolite.⁶⁹ The workers, who were paid little and endured brutal working conditions, sought wage increases, seniority, and union recognition. When Autolite rejected their demands, the union called a strike,⁷⁰ which involved mass picketing that blocked entrances to the factory.⁷¹ Autolite responded violently by hiring and arming company guards. As union meetings outside the plant gates grew in size to six thousand people, the Toledo sheriff deputized company

66. The labor movement had already achieved some organizing-enabling statutory gains by this point. The Norris-LaGuardia Act, passed in 1932, denied federal courts authority to issue injunctions in most labor disputes, and the National Industrial Recovery Act of 1933 (NIRA) declared a right to organize, albeit without an enforcement mechanism (and was ultimately struck down by the Supreme Court on other grounds). See Luke P. Norris, *Labor and the Origins of Civil Procedure*, 92 *N.Y.U. L. Rev.* 462, 468, 499–508 (2017) (discussing the history of the Norris-LaGuardia Act and how it facilitated workers’ countervailing power in the context of civil procedure); see also Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 *Yale L.J.* 616, 656–69 (2019) [hereinafter Andrias, *Forgotten Promise*] (discussing NIRA’s role in building countervailing power for workers, as well as its limits). Like the NLRA, these Acts followed significant labor unrest and disruption, although they were less directly responsive to a particular strike wave. See William E. Forbath, *Law and the Shaping of the American Labor Movement* 61–97, 158–166 (1991) [hereinafter Forbath, *American Labor Movement*] (detailing labor strikes and boycotts in the decades leading up to the passage of the NLG); Michael Goldfield, *The Southern Key: Class, Race, and Radicalism in the 1930s and 1940s* 61–63 (2020) (describing labor militancy among coal miners in the years immediately preceding the passage of NIRA).

67. Bernstein, *supra* note 5, at 217.

68. See *id.* at 222; see also Goldfield, *Worker Insurgency*, *supra* note 19, at 1272.

69. See Bernstein, *supra* note 5, at 218–19.

70. See *id.* at 220.

71. Significantly, striking employees were aided by unemployed workers (organized through the American Workers Party), who, rather than seeking to replace the strikers, joined them on the picket lines. See *id.* at 221.

guards and arrested a union leader.⁷² Concerned about the escalating violence, Adjutant General Frank D. Henderson ordered the National Guard to the Autolite Factory. Over the course of the next days, the battle raged between thousands of strikers and their supporters and more than one thousand guardsmen. Two strike supporters were killed, while more than fifteen others were shot and injured.⁷³ The city's unions threatened a general strike, and against this background, Autolite finally settled.⁷⁴

Across the country in San Francisco, the disruption began as a conflict over the “shape-up” hiring system in the longshore industry—one in which foremen doled out work to however many workers and whichever particular workers the employers wanted on that shift.⁷⁵ When the shipowners refused the International Longshoremen's Association demand that the shape-up be replaced with a union-run hiring hall (a system in which the union plays a lead role in determining who gets hired), “longshoremen in all ports from San Diego to Puget Sound voted almost unanimously for a walkout,” and by early May “[a]lmost 2000 miles of coastline were shut tight.”⁷⁶ The situation escalated when a group of employers attempted to restart shipments from the ports by operating their own trucking company.⁷⁷ Widespread violence followed, including a day that came to be known as Bloody Thursday, when the employers' 800-member private police force confronted thousands of picketing longshoremen. The result was sixty-seven injured and two dead.⁷⁸

The California Governor responded by declaring a state of emergency in San Francisco. The labor movement called for a general strike, which virtually all unions and approximately 130,000 workers joined:⁷⁹ Restaurants closed, hot water stopped flowing in hotels, taxis disappeared from the streets, the trolleys stopped running, and shops, theaters, bars,

72. Irving Bernstein describes what followed:

From the roof and upper-story windows deputies rained tear gas bombs on the people in the streets below. . . . The crowd replied with a seven-hour barrage of stones and bricks, which were deposited in piles in the streets and then heaved through the factory windows. Fires broke out in the shipping room and the parking lot. In the latter cars were overturned, saturated with gasoline, and set on fire. During the evening strikers broke into the factory at three points, and there was a hand-to-hand fighting before they were driven out. The area for blocks around was blanketed with tear gas

Id. at 223.

73. Id. at 224; see also Tedd Long, *Battle of Chestnut Hill*, Toledo.com (May 24, 2023), <https://www.toledo.com/toledo-time-travels/on-this-day/battle-of-chestnut-hill> [<https://perma.cc/8KRP-4F46>].

74. Bernstein, *supra* note 5, at 226–29.

75. Id. at 255–56.

76. Id. at 262–63.

77. Id. at 272.

78. Id. at 276–78 (noting that strikers and supporters, facing off with police in gas masks “were fighting desperately for something that seemed to be life for them”).

79. See id. at 291.

and nightclubs shut down.⁸⁰ General Hugh Johnson, a member of the Roosevelt Administration, flew to California and denounced the general strike as “civil war.”⁸¹ The San Francisco Mayor deputized hundreds of additional police officers to deal with the strike, and the Governor then imposed military control on the city, deploying more than five thousand national guardsmen. The general strike lasted only three days, but it succeeded in ending the shape-up system.⁸² Reflecting on both the economic and political implications of the strike, California Senator Hiram Johnson sent a message warning Roosevelt: “Not alone is this San Francisco’s disaster but it is [the] possible ruin of the Pacific Coast.”⁸³

These strikes were illustrative of the serious labor unrest during 1934 and 1935, and there were hundreds of similar conflagrations across the country in those years.⁸⁴ As Professor Nelson Lichtenstein recounts, in cities and towns across the nation, “pitched battles in the streets put a set of fledgling unions at odds with the police, the national guard, and employer-sponsored militia,” placing “resolution of the labor question at the very center of American politics.”⁸⁵ As Professor Michael Goldfield describes it, “the labor insurgency, with its accompanying conflict and violence caused by intransigent company resistance, had reached proportions truly alarming to the economic and political elites.”⁸⁶ The political anxiety brought on by the labor disruption was voiced on the floor of Congress, with Senator Robert LaFollette describing the strike wave as threatening to lead to “open industrial warfare in the United States,” while Representative William Connery—the NLRA’s House sponsor—stated: “You have seen strikes in Toledo, you have seen Minneapolis, you have seen San Francisco, . . . [but] you have not yet seen the gates of hell opened, and that is what is going to happen from now on.”⁸⁷ Professor Mark Barenberg recounts that “Roosevelt and Wagner, in particular, were highly sensitive to the perceived threat to recovery posed by mass labor unrest.”⁸⁸

Congress responded to the unrest—and the threat of even greater disruption—by passing the NLRA, thereby granting “the strikers’ main demand—the right to organize.”⁸⁹ For labor’s allies within Congress (and in the executive branch), the disruption was an opportunity to highlight

80. See *id.* at 283, 290–91.

81. See *id.* at 292.

82. See *id.* at 297.

83. *Id.* at 287–88 (internal quotation marks omitted).

84. See *id.* at 316 (“In 1934 anybody struck.”).

85. Lichtenstein, *State of the Union*, *supra* note 5, at 32–33.

86. Goldfield, *Worker Insurgency*, *supra* note 19, at 1273.

87. *Id.* (internal quotation marks omitted) (first quoting 78 Cong. Rec. 12027 (1934) (statement of Sen. LaFollette); then quoting *id.* at 9888 (statement of Rep. Connery)).

88. See Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 *Harv. L. Rev.* 1379, 1400 (1993).

89. Piven & Cloward, *Poor People’s Movements*, *supra* note 17, at 173.

the problem of “industrial tyranny.”⁹⁰ It enabled them “to put in place a permanent set of institutions situated within the very womb of private enterprise” so that the law would offer workers a collective voice, laying the groundwork for greater democracy and the protection of fundamental rights.⁹¹ Meanwhile, among those legislators who were less sympathetic to labor, the disruption needed to be quelled, and the legislation was seen as a necessary step to that end. As Ohio Representative Martin L. Sweeney stated during the floor debates on the NLRA, “[u]nless this Wagner-Connelly dispute bill is passed we are going to have an epidemic of strikes that has never before been witnessed in this country.”⁹² By conceding to workers a statutory right to form and join unions, Congress could help persuade the labor movement to substitute contract bargaining for mass disruption and, in turn, help ensure that the economy (and society) could operate without the disruptive effects of mass work stoppages. Hence, the “dominant political response to the increasingly powerful labor upsurge between 1933 and 1935 . . . was to support the NLRA.”⁹³

Congress therefore addressed the threat that labor disruption posed to the functioning of the economy—indeed, to the peaceful functioning of American society more generally—through legislative concessions rather than continued attempts at repression. Even more recalcitrant political leaders had decided they needed a way to convince labor to moderate its tactics while avoiding federal action that would risk further radicalizing an already militant movement and its supporters in the public at large. Accordingly, labor legislation that could channel disputes into collective bargaining, and away from the picket line and the street, met the moment.⁹⁴ Of course, the NLRA also *protected* the right to organize and to strike, thereby giving labor not only a pathway to leaving the streets and

90. Lichtenstein, *State of the Union*, supra note 5, at 32.

91. *Id.* at 32, 36; see also *id.* at 32 (attributing to President Roosevelt a commitment to industrial democracy as a means “to assist the development of an economic declaration of rights, an economic constitutional order” (internal quotation marks omitted) (quoting Sidney M. Milkis, Franklin D. Roosevelt, the Economic Constitutional Order, and the New Politics of Presidential Leadership, in *The New Deal and the Triumph of Liberalism* 31, 35 (Sidney M. Milkis & Jerome M. Mileur eds., 2002))); Barenberg, supra note 88, at 1389 (examining Wagner’s effort to build a more social democracy and observing that “[t]he opportunity for such a dramatic legislative initiative was generated by ‘mass politics’ in the form of popular electoral realignment, populist political organization, and mass labor unrest”); William E. Forbath, *The New Deal Constitution in Exile*, 51 *Duke L.J.* 165, 175 (2001) (describing Wagner’s belief that the rights to strike, organize, and bargain collectively through unions were fundamental rights of national citizenship).

92. Goldfield, *Worker Insurgency*, supra note 19, at 1275 (internal quotation marks omitted) (quoting 78 *Cong. Rec.* 9705 (1934) (statement of Rep. Sweeney)).

93. *Id.* at 1274; see also Barenberg, supra note 88, at 1400 (discussing congressional concerns that mass work stoppages threatened economic growth).

94. Goldfield, *Worker Insurgency*, supra note 19, at 1275. Goldfield quotes historian Arthur Schlesinger for the proposition that “[i]t was now not just a matter of staving off hunger. . . . It was a matter of staving off violence, even (at least some thought) revolution.” *Id.* (alteration in original) (quoting Arthur M. Schlesinger, *The Coming of the New Deal* 3 (1958)).

coming to the bargaining table in the volatile days of 1935 but also the ability to engage in future disruptive activity when bargaining proved an insufficient mechanism to secure its demands.⁹⁵

Importantly, popular support for the labor movement at this point in the Great Depression was critical to the federal government's decision to grant concessions rather than attempt further repression. This support raised the possibility that repression would cost the Democratic Party electoral support from a wide swath of the public. As Piven and Cloward sum up the dynamics:

[W]ith the workers' movement still unabated, and with violence by employers escalating, reluctant political leaders finally chose sides and supported labor's demands. The disruptive tactics of the labor movement had left them no other choice. They could not ignore disruptions so threatening to economic recovery and to electoral stability, and they could not repress the strikers, for while a majority of the electorate did not support the strikers, a substantial proportion did, and many others would have reacted unpredictably to the serious bloodshed that repression would have necessitated. And so government conceded the strikers' main demand—the right to organize.⁹⁶

The labor movement capitalized on the new law, using it to build more power: In just six years following the enactment of the NLRA, more than six million workers organized,⁹⁷ a massive increase from the earlier period in which law punished collective action among workers.⁹⁸

C. *The Civil Rights Movement*

The labor movement is not alone in having used disruption to help bring about major federal legislation. Both the Civil Rights Act of 1964 and

95. Indeed, the incidence of strikes continued to rise across 1935, '36, and '37, often over workers' demands for the right to recognition provided in the NLRA. See, e.g., Lichtenstein, *State of the Union*, supra note 5, at 18, 48–53; Piven & Cloward, *Poor People's Movements*, supra note 17, at 133.

96. Piven & Cloward, *Poor People's Movements*, supra note 17, at 172–73 (footnote omitted). Of course, not all strikes lead to legislative gains, or even victories, for workers. For example, the strike wave of 1919, although it involved up to four million workers, was largely a failure for the labor movement, in part because the unions lacked “allies in government.” Melvyn Dubofsky, *The State and Labor in Modern America* 76–79 (1994). This fact reinforces the point we make above that the success of disruptive tactics depends on a constellation of factors. See supra section I.A.

97. Gerald Mayer, Cong. Rsch. Serv., RL32553, *Union Membership Trends in the United States 22–23 & tbl.A1* (2004) (noting an increase in union membership from 3.5 million in 1935 to over ten million in 1941).

98. On the use of courts against labor, see generally Forbath, *American Labor Movement*, supra note 66. Ultimately, however, the passage of the Taft–Hartley Act in 1947—which significantly constrained union rights—as well as aggressive anti-union tactics by business, broader changes in the political economy, and numerous subsequent doctrinal developments narrowing labor rights brought the growth in the labor movement to an end. See Andrias & Sachs, supra note 2, at 568; Andrias, *New Labor Law*, supra note 13, at 13–36.

the Voting Rights Act of 1965 are attributable, in large measure, to the Civil Rights Movement's protest activities in Birmingham and Selma, Alabama.⁹⁹ And while not clearly organizing-enabling laws themselves, the successful use of disruption to move major federal civil rights legislation is equally instructive.¹⁰⁰

Birmingham and Selma, of course, were preceded by years of coordinated civil rights activism: By 1962, thousands of activists had participated in sit-ins across the South, with about one-in-six sit-in participants arrested for doing so.¹⁰¹ Over 50,000 people had participated in demonstrations, with more than 3,600 spending time in jail, in the single year following the initiation of the sit-in efforts.¹⁰² The freedom rides—aimed at desegregating bus terminals—also predated Birmingham and Selma. Freedom Riders, numbering approximately one thousand in total, were met by “some of the worst mob violence of the era” that “became so intense and open that Attorney General Robert Kennedy sent 400 U.S. marshals to Montgomery to maintain order.”¹⁰³

Prior to Birmingham, President John F. Kennedy and his Administration had moved cautiously on civil rights legislation. In fact, when Kennedy was elected in 1960, “he was not a civil rights enthusiast, and his victory depended on the support of southern whites.”¹⁰⁴ Accordingly, during his first two years in office, Kennedy refused to push for civil rights legislation on the ground that Congress would refuse to enact it.¹⁰⁵

99. See generally Glenn T. Eskew, *But for Birmingham: The Local and National Movements in the Civil Rights Struggle* (1997) (detailing the connection between the Birmingham civil rights movements and the subsequent Civil Rights Act); David J. Garrow, *Protest at Selma: Martin Luther King, Jr., and the Voting Rights Act of 1965* (1978) [hereinafter Garrow, *Protest at Selma*] (arguing that protest in Selma was critical to the passage of the Voting Rights Act); Klarman, *supra* note 19 (describing how televised brutality against civil rights activists motivated the passage of the Acts); Diane McWhorter, *Carry Me Home: Birmingham, Alabama: The Climactic Battle of the Civil Rights Revolution* (2001) (describing how the civil rights struggle in Birmingham motivated the passage of the Civil Rights Act of 1964).

100. Unlike the NLRA, the Voting Rights Act and the Civil Rights Act are not comprehensive organizing-enabling statutes by our definition. See generally Andrias & Sachs, *supra* note 2 (identifying six necessary components of organizing-enabling statutes). Yet, both statutes have some organizing-enabling or power-building components. Title VII of the Civil Rights Act, for example, reduces barriers to participation in efforts to achieve civil rights by preventing retaliation on the basis of protected characteristics, while the Voting Rights Act helps build greater political power for the social movement and thereby increases its ability to make material change in members' lives.

101. See Piven & Cloward, *Poor People's Movements*, *supra* note 17, at 224.

102. *Id.*

103. *Id.* at 229–30 (quoting Robert M. Bleiweiss, *Marching to Freedom: The Life of Martin Luther King Jr.* 84–85 (1969)).

104. Klarman, *supra* note 19, at 435.

105. See *id.* For example, at a news conference on March 8, 1961, Kennedy was asked when he intended to introduce civil rights legislation, and he replied, “When I feel that

Based on its legislative inaction, advocates called the Administration “timid and reluctant” and charged it with “dragging its feet” on civil rights;¹⁰⁶ Martin Luther King, Jr. and NAACP executive secretary Roy Wilkins accused Kennedy of “vacillation, equivocation, and retreat.”¹⁰⁷

Even in 1963, Kennedy’s assessment was that a strong civil rights bill was not politically achievable, and he declined to devote political capital to one.¹⁰⁸ Unable to pass legislation, movement actors responded to Administration and Congressional inaction by “provok[ing] mass civil disorder” through nonviolent mass protest.¹⁰⁹ James Farmer, cofounder of the Congress of Racial Equality (CORE), explained the movement’s legislative strategy as follows: “We put on pressure and create a crisis, . . . and then they react.”¹¹⁰ Thus, in 1962 the Southern Christian Leadership Conference (SCLC), led by King, decided to join the Alabama Christian Movement for Human Rights (ACMHR), led by Reverend Fred Shuttlesworth, in a direct action campaign in Birmingham.¹¹¹ Dubbed by the SCLC as “Project C,” for “confrontation,” the Birmingham campaign featured many of the tested tactics of the movement: sit-ins at lunch counters at downtown stores, picket lines outside those same stores encouraging consumer boycotts, and kneel-ins at segregated churches.¹¹² Those tactics, combined with marches and street demonstrations—and the police violence that resulted—ultimately forced Congress to act on civil rights legislation.

there is a necessity for a Congressional action, with a chance of getting that Congressional action, then I will recommend it to the Congress.” See News Conference 6, March 8, 1961, John F. Kennedy Presidential Lib. & Museum, <https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-press-conferences/news-conference-6> [https://perma.cc/DFZ9-VCX2] (last visited Feb. 5, 2024). For a time, the Administration attempted to channel the Civil Rights Movement’s own activism away from desegregation of public accommodations and toward voter registration, on the ground that voting was less likely to “incite” opposition from white southerners. Piven & Cloward, *Poor People’s Movements*, supra note 17, at 231 (quoting Arthur M. Schlesinger, *A Thousand Days* 935 (1965)); see also Klarman, supra note 19, at 435–36 (noting how the Kennedy Administration diverted civil rights attention to voter registration).

106. Klarman, supra note 19, at 435 (internal quotation marks omitted).

107. Theodore C. Sorensen, *Kennedy* 476 (1965).

108. For example, Joseph Rauh, Jr., a civil rights lawyer who was instrumental to the Civil Rights Act’s eventual passage, attributes Kennedy’s failure to advance a CRA-like bill in 1963 to “wise political calculation.” See Robert D. Loevy, *To End All Segregation: The Politics of the Passage of the Civil Rights Act of 1964*, at 6 (1990). Robert Loevy explains that Kennedy “was bowing to the generally accepted view that a strong civil rights bill, one that would end racial segregation and racial oppression in the United States, was simply not politically achievable, no matter how much a president might throw his political will and his political strength into the battle.” *Id.* at 6–7.

109. Piven & Cloward, *Poor People’s Movements*, supra note 17, at 235.

110. *Id.*

111. See Lee E. Bains, Jr., *Birmingham 1963: Confrontation Over Civil Rights*, in *Birmingham, Alabama 1956–1963: The Black Struggle for Civil Rights* 151, 175 (David J. Garrow ed., 1989).

112. See *id.* at 175, 177–78.

The SCLC had chosen Birmingham in large part because of “the strength of its local movement.”¹¹³ But Birmingham was also home to the notoriously violent police commissioner Bull Connor, whose presence would ultimately ensure confrontation.¹¹⁴ Connor lived up to his reputation, deploying vicious tactics—“made-to-order legal violence”¹¹⁵—to suppress the movement, including the use of high-pressure fire hoses and German shepherds to disperse and brutalize marchers.¹¹⁶ And, then, there were bombings. King’s brother’s house was hit, as was the motel where the SCLC had set up its temporary headquarters.¹¹⁷ The result was civil unrest in the city.¹¹⁸ As Glenn Eskew concludes, “[c]ivil order [had] collapsed in Birmingham.”¹¹⁹

By early April, the movement was anticipating—even attempting to prompt—such responses to their activism. As Klarman writes, “[t]he strategy worked brilliantly”¹²⁰:

Television and newspaper coverage featured images of police dogs attacking unresisting demonstrators, including one that President Kennedy reported made him “sick.” Congressmen condemned the “shocking episodes of police brutality.” Newspaper editorials called the violence “a national disgrace.” Citizens voiced their “sense of unutterable outrage and shame” and demanded that politicians take “action to immediately put to an end the barbarism and savagery in Birmingham.” Within ten weeks, spin-off demonstrations spread to more than 100 cities as Birmingham “detonated a revolution.”¹²¹

As King, Shuttlesworth, and Farmer predicted, the crisis created by the SCLC/ACMHR activism in Birmingham had a profound effect on the Kennedy Administration’s political calculus and on the underlying political math around civil rights legislation in the U.S. Congress. Klarman

113. Eskew, *supra* note 99, at 4.

114. See Klarman, *supra* note 19, at 434.

115. Eskew, *supra* note 99, at 4.

116. See, e.g., *id.* at 268. On May 2, 1963, for example, SCLC organizers allowed schoolchildren to march in the protests. “Silently filing out of Sixteenth Street Baptist Church in rows of two, the serious youngsters burst into cheerful song once placed under arrest.” *Id.* at 4. Bull Connor was “[f]lustered” by the children’s participation, and so on May 3 he “fortified his defenses.” *Id.* at 5. Then:

As the singing students stepped out of the sanctuary on Sixteenth Street and crossed the expanse of the park, Connor’s slickered-down firemen, standing tall in their black boots, loosed their swivel-mounted pressure hoses on the youngsters. . . . Snapping at the end of their leashes, the German shepherds lunged at their [B]lack victims, burying their snarling teeth in the stomachs of bystanders too slow to get out of the way.

Id. at 5–6.

117. See *id.* at 300.

118. See Piven & Cloward, *Poor People’s Movements*, *supra* note 17, at 243.

119. Eskew, *supra* note 99, at 3.

120. Klarman, *supra* note 19, at 434.

121. *Id.* (quoting a range of primary and secondary sources).

thus concludes that “Birmingham changed everything.”¹²² Opinion polls tracked the enormous impact that the Birmingham campaign had on Americans’ views of civil rights: The number of respondents who viewed civil rights to be the nation’s most urgent issue rose from four percent prior to Birmingham to fifty-two percent following the events there.¹²³ Press coverage of the civil unrest in the city, and particularly television coverage of police brutality inflicted on the movement’s peaceful demonstrators, “dramatically altered northern opinion on race and enabled the passage of the 1964 Civil Rights Act.”¹²⁴

Kennedy, along with his senior civil rights advisors, confirmed the impact that Birmingham had on the passage of the landmark civil rights bill. Burke Marshall, the Attorney General’s special assistant on Civil Rights, told the *New York Times* it was Birmingham that made it clear “the president had to act.”¹²⁵ Kennedy himself “identified Birmingham as the turning point.”¹²⁶ As he put it during a closed-door meeting, “[b]ut for Birmingham, we would not be here today.”¹²⁷

The legislative win resulting from the Birmingham campaign was followed shortly thereafter by a similarly successful effort in Selma, Alabama, which contributed to the passage of the Voting Rights Act.¹²⁸ In January 1965, King and the SCLC launched a voting rights campaign in Selma designed to “arouse the federal government by marching by the thousands.”¹²⁹ As early as February of that year, King was himself involved

122. *Id.* at 436.

123. *Id.*

124. *Id.* at 435. Disruptive pressure by the Civil Rights Movement continued through actual passage of the Act. As King stated when the bill was at risk of filibuster, “[i]f something is not done quickly, if Congress filibusters the civil rights bill . . . Negroes will have to engage in massive civil disobedience It would be a massive uprising, and all we would be able to do would be to try and channel it into nonviolent lines.” David J. Garrow, *Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference* 298 (1986) [hereinafter *Garrow, Bearing the Cross*] (quoting Martin Luther King, Jr.).

125. Eskew, *supra* note 99, at 311 (internal quotation marks omitted).

126. *Id.* at 312. In a nationally televised address on June 11, for example, the President referred to the “rising tide of discontent that threatens public safety,” and stated that this threat “cannot be met by repressive police action . . . [or] be quieted by token moves or talk. It is time to act in the Congress.” Piven & Cloward, *Poor People’s Movements*, *supra* note 17, at 244; see also John F. Kennedy, *Televised Address to the Nation on Civil Rights at 03:40–07:07* (June 11, 1963), <https://www.jfklibrary.org/learn/about-jfk/historic-speeches/televised-address-to-the-nation-on-civil-rights> (on file with the *Columbia Law Review*).

127. Eskew, *supra* note 99, at 312 (internal quotation marks omitted); see also Tomiko Brown-Nagin, *Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement* 247 (2011) (explaining that “Atlanta did not play the direct, causal role in Congress’s consideration and passage of the law that Birmingham did.”).

128. See, e.g., Garrow, *Protest at Selma*, *supra* note 99, at 1 (“The reason why the voting rights story cannot be understood without an appreciation of the dynamics of protest can be summarized in one word: Selma.”).

129. *Id.* at 39 (quoting John Herbers, *Alabama Vote Drive Opened by Dr. King*, *N.Y. Times*, Jan. 3, 1965, at 1, 20). The goal was “to appeal to the conscience of Congress.” *Id.* (quoting Martin Luther King, Jr.).

in discussions with the President and the Attorney General about the SCLC's vision for federal voting rights legislation.¹³⁰ But President Lyndon Johnson did not want to bring a voting rights bill to Congress in 1965. As David Garrow writes, Johnson "wanted the South to have time to 'digest' the 1964 act and feared harm to other legislation in the Senate if he moved for further civil rights legislation in 1965."¹³¹

The movement's decision to focus the 1965 voting rights effort on Selma resembled the strategic thinking behind the choice of Birmingham a few years earlier.¹³² As Birmingham's Bull Connor provided the demonstrators with the confrontation they sought there, Selma's Sheriff Jim Clark played that role for the new campaign. Clark thus "could be counted on to provide vivid proof of the violent sentiments that formed white supremacy's core."¹³³ Through the early months of 1965, thousands of Black residents marched on the courthouse to demand the right to register, and Clark's force responded with brutality.¹³⁴ During the first four days of February alone, more than three thousand demonstrators were arrested,¹³⁵ including hundreds of schoolchildren.¹³⁶ Police jailed thousands of marchers and brutalized many others. This police violence was captured by national media, including an Alabama state trooper's February 17 murder of activist Jimmie Lee Jackson during a peaceful nighttime march to the courthouse in a nearby town.¹³⁷

The campaign in Selma culminated in the planned march to Montgomery. On the afternoon of Sunday, March 7, approximately six hundred participants left Brown's Chapel African Methodist Episcopal Church prepared for police violence—they had been trained in protecting themselves from physical assault, and they were accompanied by four ambulances staffed with a dedicated medical team.¹³⁸ As the marchers walked toward the Edmund Pettus Bridge, they encountered forty of Sheriff Clark's "irregular possemen"; on the bridge were fifty Alabama state troopers and several dozen of Clark's force, including fifteen on horses.¹³⁹

130. See *id.* at 56–57.

131. *Id.* at 36.

132. See, e.g., Klarman, *supra* note 19, at 440.

133. *Id.* (quoting J. Mills Thornton, *Municipal Politics and the Course of the Movement* 60, in *New Directions in Civil Rights Studies* (Armstead L. Robinson & Patricia Sullivan eds., 1991)).

134. On January 19, for example, "the SCLC obtained the response from the sheriff that it had sought." Garrow, *Protest at Selma*, *supra* note 99, at 43. This response was to an incident in which a local movement leader, Amelia Boynton, was "grabbed by the back of her collar and pushed . . . roughly for half a block into a patrol car," an incident that was captured in the pages of the *New York Times* and *Washington Post*. *Id.* (internal quotation marks omitted) (quoting the *New York Times*).

135. See Piven & Cloward, *Poor People's Movements*, *supra* note 17, at 249.

136. See Garrow, *Protest at Selma*, *supra* note 99, at 48.

137. See *id.* at 43–61.

138. *Id.* at 73.

139. *Id.*

Major John Cloud of the Alabama state police ordered the marchers to halt. When Hosea Williams, who, along with John Lewis of the Student Nonviolent Coordinating Committee (SNCC), was leading the march, asked if she could have a word with the police, Cloud responded, “There is no word to be had. . . . You have two minutes to turn around and go back to your church.”¹⁴⁰ One minute later Cloud ordered his troopers to advance.

Violence and chaos ensued, with troopers knocking marchers to the ground as they wielded nightsticks and shot tear gas.¹⁴¹ Following the melee on the bridge, Clark’s “possemen” pursued the retreating marchers into downtown Selma “using both nightsticks and whips.”¹⁴² Tear gas was fired into a Black church. Dozens of marchers were treated at the hospital for injuries including fractured ribs and wrists, head wounds—including the one suffered by John Lewis—and broken teeth.¹⁴³

That night, ABC News interrupted its airing of *Judgment at Nuremberg* to show a report on the bridge assault.¹⁴⁴ The next morning, the *Washington Post* ran a large headline that read “Troopers Rout Selma Marchers,” under which the paper printed a “three-column photo showing the gas-masked state troopers dragging off an injured marcher.”¹⁴⁵ The *Times* had similar coverage.¹⁴⁶ The public reaction was intense:

Most of the nation was repulsed by the “ghastly scenes” from Selma that they watched on television. . . . Over the following week, huge sympathy demonstrations took place across the

140. *Id.* at 74 (internal quotation marks omitted).

141. The violence was documented by Roy Reed for the *New York Times*:

The troopers rushed forward, their blue uniforms and white helmets lowering into a flying wedge as they moved. The wedge moved with such force that it seemed almost to pass over the waiting column [of marchers] instead of through it. The first 10 or 20 [Black marchers] were swept to the ground screaming, arms and legs flying, and packs and bags went skittering across the grassy divider strip and on to the pavement on both sides. Those still on their feet retreated. The troopers continued pushing, using both the force of their bodies and the prodding of their nightsticks. . . . Suddenly there was a report like a gunshot and a gray cloud spewed over the troopers and the [Black marchers]. “Tear gas!” someone yelled. The cloud began covering the highway. Newsmen, who were confined by four troopers to a corner 100 yards away, began to lose sight of the action. But before the cloud finally hid it all, there were several seconds of unobstructed view. Fifteen or twenty night sticks could be seen through the gas, flailing at the heads of the marchers.

Roy Reed, Alabama Police Use Gas and Clubs to Rout [Black Marchers], *N.Y. Times*, Mar. 8, 1965, at 1, 20.

142. Garrow, Protest at Selma, *supra* note 99, at 75–76.

143. See *id.* at 76. Two white participants from the North were killed in the “events surrounding Selma”—one was a Unitarian minister; the other a mother who left behind five children. Klarman, *supra* note 19, at 440.

144. See Garrow, Protest at Selma, *supra* note 99, at 78.

145. *Id.*

146. See *id.* at 78–79.

country. Hundreds of clergymen from around the nation flocked to Selma to show their solidarity with King and his comrades. Citizens demanded remedial action from their congressmen . . .¹⁴⁷

And indeed, the reaction from Congress and from the Johnson Administration was similar and came swiftly. On the Monday following the bridge march, Senator Jacob Javits of New York called the police action an “exercise in terror,”¹⁴⁸ while Senator Walter Mondale of Minnesota said that “Sunday’s outrage in Selma, Alabama, makes passage of legislation to guarantee Southern [Black people] the right to vote an absolute imperative for Congress this year.”¹⁴⁹ On Tuesday, on the floors of Congress, forty-three representatives and seven senators “condemn[ed] Sunday’s attack and call[ed] for voting rights legislation.”¹⁵⁰ Johnson was also convinced that a voting rights law was now not only possible, but necessary: “[H]aving seen the film of Sunday’s attack, Johnson [wrote], he knew also that he must move ‘at once.’”¹⁵¹ And on Tuesday, two days after the bridge assault, the Johnson Administration announced that it was preparing the Voting Rights Act, a bill that was introduced the following week.¹⁵² Acting with “extraordinary dispatch,” Congress passed the law and Johnson signed it on August 6th.¹⁵³ As Klarman summarizes the developments: “Prior to Selma, administration officials had been divided over whether to pursue voting rights legislation in the near term, but national revulsion at the brutalization of peaceful protestors prompted immediate action.”¹⁵⁴

In sum, as these descriptive accounts reveal, under certain circumstances, disruptive action by social movements can induce an otherwise resistant federal government to act. The content of the government’s concessions will depend, of course, on the social movement’s demands. Those demands need not always include—indeed, have not always included—organizing-enabling legislation. But if a social movement that engages in successful disruptive action demands organizing-enabling legislation, and the government concedes it, the chicken-and-egg dilemma can be resolved: The movement translates its disruptive capacity into institutional political power and thereby is able to secure legislation that, absent the disruption, would have been out of reach.

147. Klarman, *supra* note 19, at 440 (quoting *The Central Points*, *Time*, Mar. 19, 1965, at 23–26, <https://content.time.com/time/subscriber/article/0,33009,833543-1,00.html> [<https://perma.cc/VV76-WQTF>]).

148. Garrow, *Protest at Selma*, *supra* note 99, at 81 (quoting 111 Cong. Rec. 4311, 4335 & 4350–52 (1965)).

149. *Id.* at 81–82 (internal quotation marks omitted) (quoting 111 Cong. Rec. 4311, 4335 & 4350–52 (1965)).

150. *Id.* at 88.

151. *Id.* at 89 (quoting President Johnson).

152. See *id.* at 89–90, 110.

153. Piven & Cloward, *Poor People’s Movements*, *supra* note 17, at 251.

154. Klarman, *supra* note 99, at 441.

D. *Local Disruption, Local Action*

Although our discussion in this Part has focused on disruption that prompts federal legislative action, more localized disruptive tactics can move state and local governments to act.¹⁵⁵ Sometimes the disruption is aimed at securing organizing-enabling law, other times at other types of policy. But in either case, the point is the same: Movement actors translate disruptive capacity into political power that they deploy to secure government concessions.

In the tenant context, for example, a wave of rent strikes in the early 1960s in New York—in which hundreds of tenant associations collectively withheld rent payments from landlords—led to the enactment of the Rent Strike Law.¹⁵⁶ The law “granted organized tenants representing at least one-third of apartments in a building the power to petition a court to appoint an independent receiver . . . to manage their buildings when the owner had permitted” serious enough conditions to persist in the building.¹⁵⁷

The disruptive tactic of squatting—the “unauthorized, illegal occupation of a residence”—has also succeeded in prompting local governmental response, albeit not legislative change, in the housing context.¹⁵⁸ In New York in the 1980s, the Association of Community Organizations for Reform Now (ACORN) led an organized squatting campaign in Brooklyn’s East New York neighborhood.¹⁵⁹ The group took “possession of twenty-five vacant, [c]ity-owned buildings.”¹⁶⁰ The city, “[u]ndoubtedly concerned about the precedent which would be set if a massive, well-publicized squatting effort were allowed to continue unimpeded,” initially responded by arresting eighteen squatters.¹⁶¹ But eventually the city was forced to negotiate and ultimately agreed to turn over ownership of fifty-eight buildings (with 180 units of housing) and to provide approximately three million dollars in funds for building rehabilitation to the Mutual Housing Association of New York, an organization created by ACORN and the squatters.¹⁶²

The 2018 teacher strikes in Republican-dominated states provide another example of state-level disruption that resulted in legislative

155. State and local legislation—as an approach to resolving the chicken-and-egg dilemma—is discussed at length in Part II.

156. See Baltz, *supra* note 3, at 2–3; see also Note, *Rent Strike Legislation—New York’s Solution to Landlord–Tenant Conflicts*, 40 *St. John’s L. Rev.* 253, 265 (1966) (noting that legislation was “[p]rompted by the recent New York rent strikes”).

157. Baltz, *supra* note 3, at 3.

158. See Eric Hirsch & Peter Wood, *Squatting in New York City: Justification and Strategy*, 16 *N.Y.U. Rev. L. & Soc. Change* 605, 605–06 (1987) (describing how a squatting effort in Brooklyn led to a legal homesteading program).

159. *Id.* at 606, 612.

160. *Id.* at 613–14.

161. *Id.* at 614.

162. See *id.* at 614–15; see also Julie Gilgoff, *Land Redistribution in the Aftermath of the COVID-19 Pandemic*, 67 *Wayne L. Rev.* 211, 246–47 (2022) (discussing recent use of squatting by tenant movements in Philadelphia, Los Angeles, and Oakland).

improvements. The so-named “Red for Ed” strikes began in West Virginia, when educators and staff in all fifty-five counties walked off the job to protest low wages and high healthcare costs.¹⁶³ Inspired by the activism in West Virginia, teachers in Kentucky, Oklahoma, Arizona, Colorado, and North Carolina also struck in the following months.¹⁶⁴ By late April, the strikes closed schools serving over a million students,¹⁶⁵ and state legislatures were forced to respond: West Virginia teachers received a five percent raise;¹⁶⁶ the threat of a strike produced an increase of \$51 million in school funding in Oklahoma;¹⁶⁷ and in Arizona, where legislators had previously committed to a one percent maximum raise, the legislature promised to raise teacher pay an average of twenty percent over three years.¹⁶⁸ This disruption echoed an earlier wave of strikes among teachers and other public sector workers in the 1960s and ’70s that resulted in numerous states enacting laws allowing public sector workers to organize unions and engage in collective bargaining.¹⁶⁹

In another recent example, the 2020 mass protests and organizing efforts by the Movement for Black Lives in response to police killings of George Floyd and other Black Americans led legislatures in states and cities

163. See Jess Bidgood, *West Virginia Raises Teachers’ Pay to End Statewide Strike*, N.Y. Times (Mar. 6, 2018), <https://www.nytimes.com/2018/03/06/us/west-virginia-teachers-strike-deal.html> (on file with the *Columbia Law Review*).

164. Moriah Balingit, *First, It Was West Virginia. Then, Kentucky and Oklahoma. Now, Arizona and Colorado Teachers Prepare to Walk Out.*, Wash. Post (Apr. 26, 2018), <https://www.washingtonpost.com/news/education/wp/2018/04/26/first-it-was-west-virginia-then-kentucky-and-oklahoma-now-arizona-and-colorado-teachers-prepare-to-walk-out/> (on file with the *Columbia Law Review*); Seth Cline, *North Carolina Teachers Walk Out*, U.S. News & World Rep. (May 16, 2018), <https://www.usnews.com/news/education-news/articles/2018-05-16/north-carolina-teachers-walk-out-for-better-pay-higher-spending> [<https://perma.cc/BHH9-UWKV>].

165. Balingit, *supra* note 164.

166. *Id.*

167. *Id.*

168. Eric Blanc, *The Red for Ed Movement, Two Years In*, New Lab. Forum (Oct. 3, 2020), <https://newlaborforum.cuny.edu/2020/10/03/the-red-for-ed-movement-two-years-in/> [<https://perma.cc/4HBM-HNA3>]; *Three Years After Red for Ed: Successes, Shortcomings, and What Comes Next?*, ABC15 Ariz. (Apr. 26, 2021), <https://www.abc15.com/news/state/three-years-after-red-for-ed-successes-shortcomings-and-what-comes-next> [<https://perma.cc/4AN3-GFQE>] (last updated May 6, 2021) (reporting that the pay raise is stretched over three years); see also Leo Casey, *The Teacher Insurgency: A Strategic and Organizing Perspective 6* (2020) (describing how teacher strikes focused “on the needs of teachers and education workers, as important as they were, but also on the chronic underfunding of the public schools and the fiscal policies that provided tax cuts to corporations and the wealthy while starving schools and other public services”).

169. See Joe Burns, *Strike Back: Using the Militant Tactics of Labor’s Past to Reignite Public Sector Unionism Today 12–37* (2014) (describing how strikes by public sector unions transformed law on public sector collective bargaining during the 1960s and ’70s).

across the country to enact police reform legislation.¹⁷⁰ While the lasting impact of these reform measures may be in doubt,¹⁷¹ it is clear that the legislatures responded in part to the disruptive power of the Movement for Black Lives, and the widespread support the movement garnered, at least for a period.¹⁷²

E. *Legal Protection for (or Limits on) Disruption?*

A set of important questions remains: If disruption can provide social-movement organizations with a mechanism for achieving legislative wins, what role does law play in such disruption? Do social-movement organizations need law to enable their disruptive activity? Can social-movement organizations use disruption where law prohibits such activity? To what extent does law limit the ability to engage in disruption? There are, in simplified terms, three different postures the law can take with respect to disruptive action: First, it can proscribe the disruptive activity and subject participants and their organizations to state sanction for engaging in the disruption; second, it can neither proscribe nor protect the disruptive activity, thereby removing state sanction as a risk but leaving participants vulnerable to retaliation by private actors (including private retaliation that relies on state support);¹⁷³ third, it can offer affirmative protection for the activity, proscribing both state sanctions and private retaliation for participation.

170. See Steve Eder, Michael H. Keller & Blacki Migliozi, *As New Police Reforms Sweep Across the U.S., Some Ask: Are They Enough?*, *N.Y. Times* (Apr. 18, 2021), <https://www.nytimes.com/2021/04/18/us/police-reform-bills.html> (on file with the *Columbia Law Review*) (last updated Oct. 10, 2021) (noting how “state and city lawmakers across the country have seized on a push for reform prompted by outrage at the killing of George Floyd”); see also Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 *NYU L. Rev.* 405, 407–10, 415–16 (2018) (describing the Movement for Black Lives’s vision and its impact); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 *Yale L.J.* 778, 810–13 (2021) (describing experiments in collective action against the carceral state).

171. See, e.g., Benjamin Schneider, *Is San Francisco Re-Funding the Police?*, *SFWeekly* (June 16, 2021), https://www.sfweekly.com/archives/is-san-francisco-re-funding-the-police/article_f7f50019-0eaf-51b0-bc84-585a8889e77a.html [<https://perma.cc/23N5-95WM>]; Stephanie Sierra, Lindsey Feingold & John Kelly, *Despite Calls to Defund the Police, Oakland’s PD Budget Increased Nearly 18% Since 2019, I-Team Found*, *ABC7 News* (Oct. 11, 2022), <https://abc7news.com/defund-police-oakland-crime-shooting/12311750/> [<https://perma.cc/V2G8-C54F>].

172. See, e.g., Eder et al., *supra* note 170. Although beyond the scope of this Essay, it is worth noting that there are numerous examples from other countries of mass disruption leading to legal change, including organizing-enabling change. In particular, strikes and mass protest by the labor movement and other social movements have proven pivotal to democratic reform and even regime change. See Kate Andrias, *Labour and Democracy*, in *Law of Work Handbook* (Guy Davidov, Brian Langille & Gillian Lester eds., Oxford U. Press) (forthcoming 2024).

173. The divide between state sanction and private sanction is blurry. If a private actor is permitted to retaliate—for example, through economic coercion, private violence, or by taking advantage of a private right of action in court—the state is implicated. It either fails to prohibit such retaliation or actively facilitates it; for example, by making the justice system

Extant law provides examples of each of these postures. First and most obviously, if disruption involves the destruction of property or physical violence, the activity will be subject to criminal prohibition and sanction. Indeed, even nonviolent disruptive tactics can violate the criminal law: Much of what the civil rights demonstrators did, for example, was deemed to be in violation of criminal statutes of one kind or another—such as trespassing, disorderly conduct, or parading without a permit—and, as noted in the descriptions above, thousands were arrested and jailed for their participation.¹⁷⁴

Certain forms of labor strikes are treated with the second posture, being neither legally prohibited nor legally protected. Thus, for example, if workers strike “intermittently”—striking, returning to work after a short

available to the private actor through laws of trespass, tort, and others. This tension mirrors the broader incoherence in the state action doctrine. For classic critiques of the state action doctrine and the private/public distinction, beginning with the legal realists, see Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* 161–95 (2008); Morris R. Cohen, *Property and Sovereignty*, 13 *Cornell L.Q.* 8, 22 (1927); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 *Pol. Sci. Q.* 470, 471 (1923); Robert L. Hale, *Force and the State: A Comparison of “Political” and “Economic” Compulsion*, 35 *Colum. L. Rev.* 149, 197–98 (1935); Cass R. Sunstein, *The Partial Constitution* 71–72 (1993); Cass R. Sunstein, *State Action Is Always Present*, 3 *Chi. J. Int’l L.* 465, 467 (2002).

174. See, e.g., Bains, *supra* note 111, at 177–78 (describing how protesters engaging in sit-ins were arrested for trespassing); Garrow, *Bearing the Cross*, *supra* note 124, at 184, 240–41 (describing how demonstrators were arrested for violating judicial orders and injunctions, as well as for disorderly conduct); Garrow, *Protest at Selma*, *supra* note 99, at 47–48 (describing how marchers were arrested for violating the city’s parade ordinance). The contemporary disruptive strategy of blocking traffic—employed by the labor movement, the Movement for Black Lives, and other organizations—is similarly in violation of law. See, e.g., Emily Badger, *Why Highways Have Become the Center of Civil Rights Protest*, *Wash. Post* (July 13, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/07/13/why-highways-have-become-the-center-of-civil-rights-protest/> (on file with the *Columbia Law Review*); Reid J. Epstein & Patricia Mazzei, *G.O.P. Bills Target Protesters (and Absolve Motorists Who Hit Them)*, *N.Y. Times* (June 16, 2021), <https://www.nytimes.com/2021/04/21/us/politics/republican-anti-protest-laws.html> (on file with the *Columbia Law Review*) (last updated June 23, 2023); Arit John, *Fast-Food Protesters Arrested in Pursuit of \$15 Minimum Wage*, *The Atlantic* (Sept. 4, 2014), <https://www.theatlantic.com/national/archive/2014/09/fast-food-protesters-arrested-in-pursuit-of-15-minimum-wage/379605/> (on file with the *Columbia Law Review*); Sam Levin, *Over 120 Arrested at North Dakota Pipeline Protests, Including Journalists*, *The Guardian* (Oct. 25, 2016), <https://www.theguardian.com/us-news/2016/oct/25/north-dakota-oil-pipeline-protest-arrests-journalists-filmmakers> [<https://perma.cc/9R4M-3KVU>]; Vimal Patel, *Climate Activists, Including Scientists, Are Arrested in Protests at Private Airports*, *N.Y. Times* (Nov. 10, 2022), <https://www.nytimes.com/2022/11/10/us/private-jets-climate-protests-airport.html> (on file with the *Columbia Law Review*); Sonja Sharp, *UC Academic Workers Block Westwood Intersection to Protest Pay, Policies*, *L.A. Times* (Apr. 26, 2022), <https://www.latimes.com/california/story/2022-04-26/uc-academic-workers-block-westwood-intersection-to-protest-pay-policies> (on file with the *Columbia Law Review*); WBZ-News Staff, *15 Arrested as Protesters Attempt to Block Boston Traffic During Rush Hour Commute*, *CBS News* (Sept. 21, 2022), <https://www.cbsnews.com/boston/news/boston-protest-traffic-wednesday-extinction-rebellion-somerville-massachusetts/> [<https://perma.cc/PDZ7-K3U8>].

time, and then striking again—they have violated no legal prohibition and thus are not vulnerable to state sanction but can nonetheless be fired by their employers for the strike.¹⁷⁵ Or, in an example that highlights the tension in the putatively neutral category: If a lawful strike causes financial harm to an employer, the union can, in certain narrow circumstances, be sued under tort law.¹⁷⁶ Rent strikes are typically treated similarly: Tenants who withhold rent are not in violation of any criminal law but nonetheless generally lack protection from evictions and other civil actions by their landlords.¹⁷⁷ So, in practice, putative neutrality in the law can still leave social movement members vulnerable to sanction.

Finally, other forms of labor strikes are treated by law's third posture: They enjoy formal affirmative legal protection, meaning that workers engaged in this kind of strike should be subject neither to state sanction nor to discharge or suit by their employers.¹⁷⁸ Similarly, a few jurisdictions affirmatively protect rent strikes, prohibiting retaliation against tenants who engage in such strikes, if they do so consistent with legal guidelines.¹⁷⁹ Meanwhile, the First Amendment provides affirmative protection from state sanction to some forms of peaceful protest. The Supreme Court has held, for example, that peaceful civil rights boycotts are protected by the First Amendment¹⁸⁰ and that the First Amendment prohibits government from criminalizing peaceful, noncoercive labor picketing.¹⁸¹

Perhaps the most important observation about legal regulation of disruptive activity is that the particular legal treatment of disruption does not

175. See, e.g., *Walmart Stores, Inc.*, 368 N.L.R.B. 24, slip op. at 1 (July 25, 2019) (finding intermittent strikes to be unprotected).

176. *Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174*, 143 S. Ct. 1404, 1415 (2023) (allowing state tort action to proceed because strike was, in the Court's view, not arguably protected by the NLRA due to foreseeable property damage).

177. In addition to eviction, landlords may have access to other civil actions against tenants who engage in rent strikes. See, e.g., *Delano Vill. Cos. v. Orridge*, 553 N.Y.S.2d 938, 940 (N.Y. Sup. Ct. 1990) (discussing four causes of action under state tort and antidiscrimination law against tenants who coordinated a rent strike).

178. See 29 U.S.C. § 157 (2018) ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining . . ."); *Nat'l Lab. Rels. Bd. v. Wash. Aluminum Co.*, 370 U.S. 9, 12–13, 18 (1962) (upholding determination that employer violated the NLRA by discharging workers who walked off the job in protest of working conditions). Notably, however, the Supreme Court has also interpreted the NLRA to limit protections for the right to strike, including by allowing employers to permanently replace—even though they may not discharge—economic strikers. See *Nat'l Lab. Rels. Bd. v. MacKay Radio & Tel. Co.*, 304 U.S. 333, 345–46 (1938).

179. See Baltz, *supra* note 3, at 3–4 (describing the history of the New York Rent Strike Law and recommending reforms).

180. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982).

181. *Thornhill v. Alabama*, 310 U.S. 88, 104–05 (1940) (holding that peaceful labor picketing could not be criminalized). But see *Int'l Bhd. of Teamsters, Loc. 695 v. Vogt, Inc.*, 354 U.S. 284, 294 (1957) (upholding against constitutional challenge prohibitions on secondary labor picketing on ground that such picketing constitutes coercive economic activity).

have a determinant impact on the viability of disruption. In other words, social-movement organizations may engage in successful disruptive activity however law regulates disruption. Thus, for example, social-movement organizations may engage in disruption despite the fact that such activity is unlawful, with participants willing to bear the consequences of the state sanctions deployed in response to the disruptive action. Going further, as was the case with certain of the Civil Rights Movement's tactics, organizations may elect disruptive activities to elicit repressive responses from the state, including from the police; that is, movements may choose certain disruptive tactics precisely *because those tactics are proscribed by law*.¹⁸² This aspect of the disruption approach is, as we will explain, unlike either of the other two approaches to the chicken-and-egg dilemma: The viability of shifting jurisdictions or shifting branches of government requires that the relevant legal regime—preemption or administrative law—permit social-movement organizations to pursue the approach.¹⁸³ By contrast, the very nature of disruption implies a willingness to challenge the law, to offer a different vision of what the law should be, or to appeal to a higher understanding of what the law is.¹⁸⁴

More often than not, however, the legal proscription of disruptive activity, or the vulnerability of participants to private retaliation, tends to impede participation. Conversely, legal protection for disruptive activity can facilitate it.¹⁸⁵ For example, when employers began widespread use of permanent replacements for striking workers—a form of employer retaliation permitted by the Supreme Court's interpretation of the federal right to strike¹⁸⁶—participation in strikes fell dramatically.¹⁸⁷ And when sit-down

182. These two categories encompass disruption that takes the form of civil disobedience. For a brief, excellent primer, see Martha Minow, *Breaking the Law: Lawyers and Clients in Struggles for Social Change*, 52 U. Pitt. L. Rev. 723, 733–39 (1991) (describing several reasons why civil disobedience and breaking the law can be advantageous to a social movement); see also Michael Walzer, *Obligations: Essays on Disobedience, War, and Citizenship* 3–70 (1970) (discussing the origins, existence, and limitations of the obligation to break the law to advance group aims).

183. See *infra* sections II.B, III.B. But see Heather K. Gerken, *Dissenting by Deciding*, 57 Stan. L. Rev. 1745, 1749 (2005) (arguing that “[d]issenting by deciding . . . should be understood as an alternative strategy for institutionalizing channels for dissent within the democratic process”).

184. See Kate Andrias, *Constitutional Clash: Labor, Capital, and Democracy*, 118 Nw. U. L. Rev. 985, 1019–22 (2024) [hereinafter Andrias, *Constitutional Clash*] (describing labor's alternative vision for the law of strikes instantiated through on-the-ground action).

185. See, e.g., Andrias & Sachs, *supra* note 2, at 627–31 (noting that protest is more likely to be effective when “[p]rotesters are able to protect themselves from reprisal” and discussing how law can facilitate such conditions).

186. See *Nat'l Lab. Rels. Bd. v. MacKay Radio & Tel. Co.*, 304 U.S. 333, 345–46 (1938) (declaring in dicta that striking workers could be permanently replaced).

187. See, e.g., Peter Cramton & Joseph Tracy, *The Use of Replacement Workers in Union Contract Negotiations: The U.S. Experience, 1980–1989*, 16 J. Lab. Econ. 667, 670 fig.1, 694–95 (1998) (observing that the incidence of strikes fell fifty percent during the 1980s and finding that a higher risk of replacement results in lower strike incidence).

strikes were ruled illegal by the Supreme Court in the 1930s, workers ultimately abandoned that tactic, despite its extraordinary success.¹⁸⁸ Although we lack similar data on the point, it is likely that tenants are dissuaded from engaging in rent strikes when they face the prospect of getting evicted in retaliation for such strikes.¹⁸⁹

What would a legal regime designed to protect disruptive concerted action look like? Sketching—and defending—such a regime is beyond this Essay’s scope,¹⁹⁰ but a few initial observations are in order. In the tenant context, protection for disruption—for example, an affirmative right to engage in rent strikes—would require substantial new law in most jurisdictions.¹⁹¹ In the labor context, it would require substantial broadening of existing protections. For example, current labor law only protects workers’ right to engage in full work stoppages at their own workplaces.¹⁹² Broader protection for disruption could involve extending the strike right to secondary boycotts and sympathy or solidarity strikes across multiple domains, prohibiting permanent replacements of strikers, and permitting nontraditional strikes short of full or indefinite stoppages.¹⁹³ In addition, protests and strikes that target the political process might also be protected. Under current doctrine, the NLRA protects workers’ concerted activity that occurs through political channels only if it relates to employment issues.¹⁹⁴ But the NLRB has opined that employers can terminate or discipline workers if they strike for an exclusively political cause—that is, if the target of their strike is the government rather than the employer.¹⁹⁵ The theory is that political strikes are not core to collective bargaining. Yet, failing to protect such political strikes may leave workers vulnerable to

188. The famous sit-down strikes in Flint, Michigan, were remarkably successful, but the strikers were ultimately held to be in violation of trespass laws. See *Nat’l Lab. Rels. Bd. v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 252 (1939). The workers, however, had a different vision of their legal rights, claiming that they rightfully occupied the factories in self-defense of their right to organize under the NLRA. See Jim Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935–1958*, 24 *Law & Hist.* 45, 47–48 (2006) (detailing workers’ vision of the law); see also Sidney Fine, *Sit-Down: The General Motors Strike of 1936–1937*, at 176 (1969) (describing the success of sit-down strikes which openly flouted trespass laws).

189. Cf. *Hogue & Way*, supra note 3, at 407–12 (describing threats faced by tenants).

190. For a related discussion about how law can facilitate effective protest, see generally Andrias & Sachs, supra note 2, at 629–31.

191. See *Gowing*, supra note 3, at 891–94 (discussing law of rent strikes).

192. See, e.g., 29 U.S.C. § 158(b)(4) (2018) (prohibiting strikes against a secondary employer); *Walmart Stores, Inc.*, 368 N.L.R.B. 24, slip op. at 3 (July 25, 2019) (deeming repeated, short strikes unprotected).

193. See Andrias & Sachs, supra note 2, at 629–31. As we acknowledge, limits ought to exist on the right to engage in disruptive protest—including by requiring that protests be peaceful, eschewing both destruction of property and violence against individuals.

194. See *Eastex, Inc. v. Nat’l Lab. Rels. Bd.*, 437 U.S. 556, 569–70, n.20 (1978).

195. Memorandum from Ronald Meisburg, Gen. Couns., NLRB, to All Regional Dirs., Officers-in-Charge, and Resident Officers 3, 6–7 (July 22, 2008) (on file with the *Columbia Law Review*).

economic retaliation when they engage in a form of disruption that is most likely to result in organizing-enabling laws.¹⁹⁶

II. STATE AND LOCAL LAW

Disruption in the form of strikes, protest, and civil disobedience is not the only way out of the chicken-and-egg dilemma. If a social-movement organization lacks the political power to secure organizing-enabling legislation from the federal government either through ordinary legislative channels or through disruptive activity, the organization might redirect its legislative efforts to a state or local jurisdiction where the political conditions allow it to win a substantively similar or analogous statute. Unlike with the disruption approach, where the organization's federal legislative goal remains unchanged but its approach to securing that goal expands, here the target of the organization's legislative efforts shifts. The strategy, at bottom, is to shift from a legislative target that is not attainable to one that is. It is to take advantage of the fact that, as this Part explains, it is often "easier to pass new state laws than new federal laws."¹⁹⁷ Successes can then potentially be exported to other jurisdictions or to the national level. Of course, as this Part also details, this strategy has limits, in part due to preemption and home rule doctrines. Moreover, this strategy is not necessarily separate and apart from disruption; rather, disruption can be an effective tool for achieving legislative change at the state and local level, as well as at the federal level.

A. *Partisan Federalism: Legislating Without Gridlock*

The federalism literature is replete with instances of political actors unable to move an agenda at the federal level but successful in doing so in states or cities. To take one example from the specific context of organizing-enabling legislation, the labor movement has attempted unsuccessfully for decades to secure a national ban on so-called captive audience meetings—anti-union meetings that employers force their employees to attend.¹⁹⁸ The PRO Act is just the most recent iteration of this failed federal effort.¹⁹⁹ So, unions have taken the campaign to the states and are winning at that jurisdictional level: Captive audience bans

196. For a defense of political strikes on democracy grounds, see Seth Kupferberg, *Political Strikes, Labor Law, and Democratic Rights*, 71 Va. L. Rev. 685, 687–89 (1985).

197. Bulman-Pozen, *From Sovereignty and Process*, *supra* note 24, at 1951.

198. See, e.g., Steven Greenhouse, *Democrats Drop Key Part of Bill to Assist Unions*, N.Y. Times (July 16, 2009), <https://www.nytimes.com/2009/07/17/business/17union.html> (on file with the *Columbia Law Review*) (reporting on an attempt to ban captive audience meetings in 2009 that ultimately failed to be enacted); Celine McNicholas, Margaret Poydock & Lynn Rhinehart, *How the PRO Act Restores Workers' Right to Unionize*, Econ. Pol'y Inst. (Feb. 4, 2021), <https://www.epi.org/publication/pro-act-problem-solution-chart/> [<https://perma.cc/TP6E-BD89>] (noting that the currently-stalled PRO Act would ban captive audience meetings).

199. See McNicholas et al., *supra* note 198.

have recently been enacted in Connecticut and Minnesota,²⁰⁰ and another bill is about to become law in New York.²⁰¹

Examples abound outside the organizing-enabling context as well. For instance, in the early 2000s environmentalists and the Democratic Party sought to address climate change by, among other tactics, enacting federal legislation to regulate emissions. When the legislative drive stalled in Congress, the campaign moved to the states, and California, Hawaii, and New Jersey “passed laws to reduce greenhouse gas emissions, succeeding where their national counterparts failed.”²⁰² Other legislative campaigns that succeeded at the state and local level having not initially prevailed in Congress include guarantees of marriage equality, cannabis legalization, nonpartisan redistricting commissions, and, on the other side of the political spectrum, restrictive voter ID laws and restrictive abortion laws.²⁰³

Why, in general terms, is it often easier for social-movement organizations to achieve their political goals in states and cities than in Congress? Why is it often easier to pass new state laws and local ordinances than to enact new federal legislation? Two factors reinforce one another: one, the prevalence of unified party control of all the branches of state and local governments combined with, two, the reduced prominence of the filibuster—a minority-empowering legislative tool—in states and cities. In short, where a single party has majority control of government and is unencumbered by filibuster-like rules, social-movement organizations aligned with that party have greatly improved prospects of enacting legislation, including organizing-enabling legislation.²⁰⁴

200. See Conn. Gen. Stat. Ann. § 31-51q (West 2023); Minn. Stat. Ann. § 181.531 (2023).

201. See Chris Marr, New York Ban on ‘Captive Audience’ Meetings Sent to Gov. Hochul, Bloomberg L. (June 11, 2023), <https://news.bloomberglaw.com/daily-labor-report/new-york-ban-on-captive-audience-meetings-sent-to-gov-hochul> (on file with the *Columbia Law Review*). Like all state and local legislation that facilitates labor organizing, these laws face preemption challenges of the sort we discuss below. See *infra* section II.B.1. As of this writing, the captive audience laws have not been invalidated on preemption grounds. Even if they are, the state enactments can play an expressive role relevant to ultimate legal change at the federal level. See *infra* note 287 and accompanying text.

202. Bulman-Pozen, *Partisan Federalism*, *supra* note 24, at 1101–02 (citation omitted).

203. *Id.* at 1103–04, 1129, 1135–36. For more detailed examination of the dynamics of particular campaigns, see, e.g., Ari Berman, *Give Us the Ballot: The Modern Struggle for Voting Rights in America* (2015) (voting); William N. Eskridge Jr. & Christopher R. Riano, *Marriage Equality: From Outlaws to In-Laws* (2020) (marriage equality); Mary Ziegler, *Abortion and the Law in America: Roe v. Wade to the Present* (2020) (abortion).

204. See, e.g., Steven Greenhouse, *Minnesota’s Democratic Trifecta Pays Benefits for Workers*, Century Found. (June 8, 2023), <https://tcf.org/content/commentary/minnesotas-democratic-trifecta-pays-benefits-for-workers/> [<https://perma.cc/HR5F-AFW2>]. As we discuss below, in certain states, the ballot initiative process makes available another mechanism for enacting legislation (or even amending the state constitution) at the state level which is unavailable at the federal level. See *infra* notes 218–221 and accompanying text.

Start with unified party control. As of January 2024, the governments of forty states—that is, *eighty percent* of all the states in the nation—were controlled by a single political party. In these forty states, either the Democratic or Republican Party had majority control over both branches of the state legislature and the governorship.²⁰⁵ Sixteen such “trifecta” states were Democratic, while twenty-three were Republican.²⁰⁶ As a result of what political scientists term “geographic partisan sorting,” this binary division of state government power into firmly Democratic or firmly Republican hands is at the highest level since the Civil War.²⁰⁷

The situation in cities is even starker. City governments are generally divided between a mayor and a unicameral legislative body (usually a city council). Taking the twenty largest cities in the United States, all but two for which members’ partisan affiliations are identifiable are currently governed by a unified party—the same party controls the mayor’s office and a majority of the seats in the city council.²⁰⁸ Again, geographic political sorting explains the phenomenon: As high as partisan sorting across states

205. See State Partisan Composition, Nat’l Conf. of State Legislatures, <https://www.ncsl.org/about-state-legislatures/state-partisan-composition> [<https://perma.cc/CUU5-FL92>] (last updated Nov. 28, 2023).

206. The Democrat-controlled states are California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Oregon, Rhode Island, and Washington. See *id.* The Republican-controlled states are Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, West Virginia, and Utah. In Alaska, seventeen of the twenty members of the state senate have formed a bipartisan coalition. See Yereth Rosen, In New Bipartisan Alaska Senate Majority of 17, Members Vow Compromise and Consensus, *Alaska Pub. Media* (Nov. 29, 2022), <https://alaskapublic.org/2022/11/29/in-new-bipartisan-alaska-senate-majority-of-17-members-vow-compromise-and-consensus/> [<https://perma.cc/QBB6-KZU3>]. Nebraska is unicameral and its members are elected on a nonpartisan basis, but it is well-recognized that the GOP controls the legislature. See, e.g., Paul Hammel, Republicans May Have Gained a Filibuster-Proof Majority in Nebraska Legislature, *Neb. Exam’r* (Nov. 9, 2022), <https://nebraskaexaminer.com/2022/11/09/republicans-appear-to-have-gained-a-filibuster-proof-majority-in-nebraska-legislature/> [<https://perma.cc/ZFG3-UB9E>].

207. See Ethan Kaplan, Jörg L. Spenkunch & Rebecca Sullivan, Partisan Spatial Sorting in the United States: A Theoretical and Empirical Overview, 211 *J. Pub. Econ.* 1, 9 (2022).

208. In horse-racing terms, not a trifecta but an exacta. See Types of Horse Racing Bets, TVG, <https://www.tvg.com/promos/horse-racing-betting-guide/wagering-types> [<https://perma.cc/2J9Z-GUGM>] (last visited Mar. 1, 2024). One recent exception is Jacksonville, the eleventh largest city, which has a Republican city council but last year elected a Democratic mayor. See Matt Dixon, Florida Democrats Flip the Jacksonville Mayor’s Office in a Major Upset, *NBC News* (May 16, 2023), <https://www.nbcnews.com/politics/elections/democrat-donna-deegan-flips-jacksonville-mayors-office-major-upset-rcna84791> [<https://perma.cc/SL54-FV8Q>] (last updated May 17, 2023). San Antonio, the seventh largest city, has an Independent mayor and a nonpartisan city council with majority-Democratic members. Dallas, the ninth largest city, has a nonpartisan city council with majority-Democratic members and a mayor who recently switched his party affiliation from Democratic to Republican. Fort Worth, the thirteenth largest city, has a nonpartisan city council with members whose political affiliations are not readily publicized. See the chart in Appendix A.

has become, sorting across counties and precincts within states is even higher and is currently at its peak level in United States history.²⁰⁹

By definition, unified party control of states and cities gives the majority party significant control over the lawmaking process in the jurisdiction. And the lack, at the state and city level, of the principal minority-empowering legislative tool available at the federal level—the filibuster—deepens this control. The filibuster, of course, functions to protect minority power by allowing the minority party in the U.S. Senate to insist that legislation be passed only if it secures supermajority support; it allows a minority of forty-one Senators to block legislation from passing the Senate.²¹⁰ If states and cities also had filibuster-type supermajority rules, the fact that one party had majority-control over the legislature (and control of the executive branch) would not give that party practical control over the lawmaking processes of the state or the city—unless the party had *supermajority* control in the relevant legislative chamber. But the vast majority of states and cities do not have filibuster-like processes, and even those that do lack a historical practice of requiring supermajority support for legislative enactments. In 2021, only seven states—Delaware, Hawaii, Idaho, Maine, Maryland, Utah, and Vermont—had legislative procedures equivalent to the U.S. Senate filibuster.²¹¹

States and cities are thus sites of unified party control unencumbered by the minority-empowering rules of the filibuster. This is in contrast to the situation in the United States Congress, where divided government is far more often the norm. For example, the federal government has been under trifecta political control for only sixteen of the last fifty years.²¹² But

209. See Kaplan et al., *supra* note 207, at 2, 7 (“Geographic sorting within states is currently at a historic high. . . . [T]he rise in state-level partisan sorting is not nearly as sharp as the increase in sorting across counties within the same state.” (footnote omitted)); see also Greg Martin & Steven Webster, *The Real Culprit Behind Geographic Polarization*, *The Atlantic* (Nov. 26, 2018), <https://www.theatlantic.com/ideas/archive/2018/11/why-are-americans-so-geographically-polarized/575881/> (on file with the *Columbia Law Review*) (analyzing the reasons behind geographic partisan sorting).

210. See *About Filibusters and Cloture*, U.S. Senate, <https://www.senate.gov/about/powers-procedures/filibusters-cloture.htm> [<https://perma.cc/6VKC-YBRP>] (last visited Jan. 16, 2024).

211. See *Is Your State as Gridlocked as the U.S. Senate?*, RepresentUs, <https://represent.us/state-filibuster-rules/> [<https://perma.cc/4PBG-MYBB>] (last updated Sept. 8, 2021). Counting states with filibuster-like procedural rules turns out to be tricky. One study, which counted any state without time limits on debate, put the number at fifteen. That same study found ten state legislative bodies with “no measures to limit debate on the floor” and seventeen states with supermajority requirements to cut off debate. See Meghan Reilly, *States Limiting Legislative Debate*, *Off. Legis. Rsch. Rsch. Rep.*, (July 8, 2009), <https://www.cga.ct.gov/2009/rpt/2009-R-0249.htm> [<https://perma.cc/MY3X-APWC>].

212. See *Party Government Since 1857*, U.S. House of Representatives: History, Art & Archives, <https://history.house.gov/Institution/Presidents-Coinciding/Party-Government/> [<https://perma.cc/G3A4-VNFK>] (last visited Jan. 16, 2024) (reporting unified party control of all three branches of federal government for the full terms of the 95th, 96th, 103rd, 108th, 109th, 111th, 115th, and 117th Congresses in the period of 1973 to 2023).

even in moments of unified party control of the federal government, the filibuster rule means that *majority* control is not enough—a supermajority in the Senate is required to ensure party control of the federal lawmaking process.²¹³ And here, the situation is more extreme: For only *two* of the last fifty years (1977–1979), plus a brief but significant part of 2009, has the Senate been controlled by a supermajority of the party that also holds the House and the Presidency.²¹⁴

Therefore, for a social-movement organization stymied at the federal level, state and local political conditions are potentially more hospitable. Where the legislative goals of the organization are aligned with the political orientation of the majority party, the ability to enact legislation is greatly enhanced by unified party control in a filibuster-free context; it is indeed easier to “pass new state laws than new federal laws.”²¹⁵ Of course, a social-movement organization can hope to move a political agenda only in a state or locality with the right valence of unified party control. And for social-movement organizations of poor and working-class people hoping to enact organizing-enabling legislation, that is likely to mean unified Democratic party control.²¹⁶ Today, this means that in seventeen states and

213. See About Filibusters and Cloture, *supra* note 210 (explaining that the Senate practice of unlimited debate can prevent or delay lawmaking absent sufficient support for a cloture vote).

214. Compare *supra* note 212 (noting Congresses in times of trifecta political control), with Party Division, U.S. Senate, <https://www.senate.gov/history/partydiv.htm> [<https://perma.cc/KX73-H84E>] (last visited Jan. 16, 2024). From 1973 to 2023, a period of unified party control of the Presidency and both chambers of Congress aligned with a sufficient majority in the Senate to invoke cloture to end the filibuster for a full Congressional term only during the 95th Congress, which met from 1977 to 1979. See *id.* In addition, during the unified party control of government that occurred with the 111th Congress from 2009 to 2011, Democrats achieved a filibuster-proof majority in the Senate for a brief period of time when Senator Arlen Specter became a Democrat in 2009. This switch gave the Democratic caucus sixty votes. Later that year, however, Democratic Senator Ted Kennedy died and his permanent replacement, Senator Scott Brown, was a Republican. See When Obama Had “Total Control of Congress”, *Akron Beacon J.* (Sept. 9, 2012), <https://www.beaconjournal.com/story/news/2012/09/09/when-obama-had-total-control/985146007/> [<https://perma.cc/KMN3-R4RM>].

215. See Bulman-Pozen, *From Sovereignty and Process*, *supra* note 24, at 1951.

216. See *Greenhouse*, *supra* note 204. It is important to note that not all Democrats are supportive of legislation that enables poor and working people to build power, particularly given the influence of corporate money within both political parties. Recent examples exist of organizing-enhancing legislation failing even under unified Democratic control. See, e.g., Shawn Hubler, *Newsom Vetoes Bill Allowing Workers to Collect Unemployment Pay While Striking*, *N.Y. Times* (Sept. 30, 2023), <https://www.nytimes.com/2023/09/30/us/newsom-veto-unemployment-pay-strikes.html> (on file with the *Columbia Law Review*) (last updated Oct. 2, 2023); see *supra* note 206 and accompanying text. Accordingly, we do not mean to suggest that organizing-enabling legislation necessarily will get enacted in trifecta states and cities, but to argue the more modest point that the political conditions we discuss can make enactment of organizing-enabling legislation more likely. Indeed, even in jurisdictions dominated by Democrats, poor and working-class social-movement organizations have had to engage the electoral process and back candidates sympathetic to

fifteen of the largest twenty cities in the country, such organizations have far better prospects for securing organizing-enabling legislation than they do in Congress.²¹⁷

And there is yet another reason why it can be easier to achieve reforms at the state level: Many state constitutions provide for mechanisms of direct democracy that are lacking at the federal level. Ballot initiatives are available in about half the states and in many localities, allowing voters to enact new statutes or amend the state constitution by majority popular vote.²¹⁸ In addition, every state provides for the legislative referendum, which allows and sometimes requires “the legislature (or sometimes another government actor) to place a measure on the ballot for popular approval by a majority of voters.”²¹⁹ Movements of poor and working-class people have sometimes been able to use the ballot initiative process to advance their goals, bypassing intransigent or gridlocked legislatures. Take the fact that every ballot initiative that proposed a minimum-wage increase since 2008 has been successful, including in Republican-dominated states where legislative reform has failed.²²⁰ Social-movement organizations have also occasionally used the initiative process to enshrine organizing rights. For example, worker movements in Illinois recently won a state constitutional amendment affirming that “[e]mployees shall have the fundamental right to organize and to bargain collectively through representatives of their own choosing for the purpose of negotiating wages, hours, and working conditions, and to protect their economic welfare and safety at work.”²²¹

their goals in primaries and through fusion ballot strategies. See, e.g., Juan Perez Jr. & Shia Kapos, ‘A Dangerous Force’: Chicago Mayor’s Race Tests Teachers Union Clout, *Politico* (Apr. 3, 2023), <https://www.politico.com/news/2023/04/03/teachers-union-chicago-mayor-runoff-0090022> [<https://perma.cc/ZTV8-MDL8>] (“Even in a Democratic stronghold awash with labor shops, the [Chicago Teachers Union] has spent more than a decade cultivating a distinct and influential brand of street-fighting, social justice-driven unionism that addresses more than classroom size and teacher pay.”).

217. This does not necessarily mean a permanent gulf between red and blue states. A political approach targeted at Democrat-controlled states or cities holds the most immediate promise for residents of those states and cities. But the dynamic version of the state and local approach, which we describe below, offers a means to translate this promise to other states and cities and, ultimately, to federal policy as well. See *infra* section II.D.

218. See Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 *Mich. L. Rev.* 859, 876–77 (2021) [hereinafter *Bulman-Pozen & Seifter, Democracy Principle*]; John G. Matsusaka, *Direct Democracy Works*, 19 *J. Econ. Persps.* 185, 185–86 (2005). Almost all the states that have ballot initiatives also provide for the popular referendum, “which allows the people to reject laws or constitutional amendments passed by the state legislature.” *Bulman-Pozen & Seifter, Democracy Principle, supra*, at 877.

219. *Bulman-Pozen & Seifter, Democracy Principle, supra* note 218, at 877.

220. Kate Andrias, *The Perils and Promise of Direct Democracy: Labour Ballot Initiatives in the United States*, 34 *King’s L.J.* 260, 272 (2023) [hereinafter *Andrias, Direct Democracy*].

221. S.J. Res. Const. Amend. 11, 102d Gen. Assemb., Reg. Sess. (Ill. 2021) (enacted). Of course, organizing-enhancing reforms are not always achievable through direct democracy.

B. *Preemption: Limits on State and Local Capacity*

The possibility of enacting organizing-enabling legislation in a statehouse or city council depends first and foremost on these political dynamics. But it also depends on a set of legal rules, primarily preemption—both federal and state—and “home rule” powers. With respect to preemption, the rules differ according to the substantive area of law in play. Rather than reviewing preemption regimes in all the contexts in which movements might seek organizing-enabling legislation, we use labor and landlord–tenant law as illustrative examples. We then turn to discuss home rule.

1. *Labor Law: Federal Preemption and Its Exceptions.* — Federal labor law contains one of, if not the, “most expansive preemption regimes in American law.”²²² An interlocking set of doctrines dictates that states and cities may not regulate conduct that is either arguably protected or prohibited by the NLRA,²²³ nor may they intervene in conduct that—while neither protected nor prohibited by the federal statute—was left by Congress to “the free play of contending economic forces.”²²⁴ States and cities are also prohibited from supplementing the remedies available under federal law, even for violations of that federal law.²²⁵ As Professor Cynthia Estlund summarizes, “labor law preemption essentially ousts states and municipalities from tinkering with the machinery of union organizing, collective bargaining, and labor-management conflict.”²²⁶ The upshot for present purposes is that state or local legislation aimed at enabling *labor* organizing is very likely to be constrained—if not rendered legally impermissible—by labor preemption law.²²⁷

There are, however, several important caveats to this general conclusion. First, federal law only preempts state and local regulations that

Research suggests that ballot initiative campaigns can be difficult to win when wealthy corporate interests are united on one side of a ballot measure, when a measure is complicated and difficult to decipher, and when business interests have particular control over communication or have the ability to exercise coercive economic pressure over voters. Conversely, ballot initiatives are more successful when they are clearly written and involve salient issues, unquestionably offer benefits to large numbers of voters, and are supported by well-organized groups. Andrias, *Direct Democracy*, supra note 220, at 283–84.

222. Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 *Harv. L. Rev.* 1153, 1154–55 (2011) [hereinafter Sachs, *Despite Preemption*].

223. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244–45 (1959).

224. *Lodge 76, Int’l Ass’n of Machinists v. Wis. Emp. Rels. Comm’n*, 427 U.S. 132, 149–50 (1976) (quoting Howard Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of Garmon*, 72 *Colum. L. Rev.* 469, 478 (1972)).

225. *Wis. Dep’t of Indus., Lab. & Hum. Rels. v. Gould, Inc.*, 475 U.S. 282, 287 (1986).

226. See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 *Colum. L. Rev.* 1527, 1571 (2002).

227. Because of this strong preemption doctrine, the labor movement’s efforts to enact and enforce organizing-enhancing legislation at the state level have often failed. See, e.g., *Gould*, 475 U.S. at 287 (striking down a Wisconsin statute that imposed penalties on firms that violated the NLRA).

cover workers who are “employees” within the meaning of the NLRA;²²⁸ if a group of workers is excluded from NLRA coverage, states and cities can enable their organizing efforts with little risk of being preempted by the federal statute.²²⁹ And while most workers are covered by the NLRA, many are not. For example, domestic workers and agricultural workers are explicitly carved out from the NLRA’s reach, leaving states and cities free to enact legislation that enables their organizing.²³⁰ Other groups of workers, including so-called gig workers who provide app-based driving and delivery services, are currently considered outside the NLRA’s definition of “employee,”²³¹ thus granting states and cities the opportunity to legislate on their behalf, albeit with attention to antitrust law and its preemptive force.²³²

Another exception provides that when a state or local government acts as a market participant rather than as a regulator—for example, through contracting or procurement—its actions are not subject to preemption review.²³³ Under this “proprietary exception” to labor preemption constraints, states and cities can enable organizing on certain public construction projects,²³⁴ among those employed on government

228. The NLRA only protects “employees.” *Nat’l Lab. Rels. Bd. v. United Ins. Co. of Am.*, 390 U.S. 254, 255 (1968). If workers fall outside the NLRA’s definition of an employee, then the law does not apply, so neither of the two NLRA preemption scenarios are implicated. See, e.g., *Chamber of Com. v. City of Seattle*, 890 F.3d 769, 790–95 (9th Cir. 2018) (“The Chamber has not made any showing or set forth any evidence showing that the for-hire drivers covered by the Ordinance are arguably employees subject to the NLRA. We thus hold that the Ordinance is not preempted . . .”).

229. With respect to workers not covered by the NLRA, states could preempt local regulatory efforts. See Paul Diller, *Intrastate Preemption*, 87 *B.U. L. Rev.* 1113, 1115–16 (2007) (providing an overview of how state law can preempt local laws).

230. See 29 U.S.C. § 152(3) (2018) (providing that the term “employee” does not include “any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home”). On the racist roots of these exclusions, see Ira Katznelson, *When Affirmative Action Was White* 54–79 (2005).

231. See *Atlanta Opera, Inc.*, 372 N.L.R.B. 95, slip op. at 2 (June 13, 2023) (noting that the NLRA “excludes independent contractors from statutory coverage”). The NLRB recently changed its test for employee status, which might result in at least some gig workers being properly classified as employees. See *id.* at 12.

232. To survive, state law providing collective action rights to nonstatutory employees who are classified as independent contractors must fall within either antitrust law’s labor exemption or its state action exemption. See *Confederación Hípica de P.R., Inc. v. Confederación de Jinetes Puertorriqueños, Inc.*, 30 F.4th 306, 314 (1st Cir. 2022) (holding that the labor exemption encompasses concerted action by independent contractors that relates to an employer–employee relationship); *Chamber of Com.*, 890 F.3d at 782, 787 (striking down Seattle ordinance providing collective bargaining rights to rideshare drivers for failing to fall within the state action exemption).

233. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246–48 (1959).

234. See, e.g., *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1016 (9th Cir. 2010) (finding a labor agreement for a municipality’s construction projects that provided collective bargaining protections not preempted by the NLRA).

contracts, or in government-supervised programs,²³⁵ or by those working for recipients of certain types of public financing.²³⁶

A third exception allows states and localities to pass employment laws of general applicability even when those laws have an effect on bargaining.²³⁷ For example, state and local laws can raise the floor above which collective bargaining occurs and can guarantee some of the goods that workers would otherwise achieve through bargaining, such as higher wages, benefits, or protections against unjust discipline.²³⁸ Moreover, these laws can be designed to give workers greater collective voice in the conditions of their industries. That is, states can create administrative worker boards or industry committees that provide worker organizations and business groups a formal role in setting wages and working conditions, including on an industry-by-industry basis, subject to government approval.²³⁹

Beyond these exceptions to labor law preemption, there are other potential avenues for state and local interventions to enable labor organizing. One involves labor organizations leveraging their existing political influence to secure state and local government action in areas of law that are unrelated to worker organizing, and thus invisible to preemption review, but that matter greatly to employers.²⁴⁰ These state and local government actions are then exchanged for “private contractual

235. See, e.g., *Airline Serv. Providers Ass’n v. L.A. World Airports*, 873 F.3d 1074, 1077, 1085–86 (9th Cir. 2017) (finding the preemption provisions of the NLRA inapplicable and thus concluding that the City was acting as a market participant).

236. See, e.g., *Hotel Emps. Union, Loc. 57 v. Sage Hosp. Res., LLC*, 390 F.3d 206, 217–18 (3d Cir. 2004) (finding a city ordinance requiring contractors and employers of hospitality employees to sign no-strike agreements that was “specifically tailored to protect its proprietary interest in the value of the tax-revenue-generating property” not preempted).

237. *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 749, 753–55 (1985).

238. See *Concerned Home Care Providers, Inc. v. Cuomo*, 783 F.3d 77, 85–86 (2d Cir. 2015) (holding that a New York law setting minimum wages for home care aides was not preempted by the NLRA); see also *Rest. L. Ctr. v. City of New York*, 90 F.4th 101, 106 (2d Cir. 2024); *Rest. L. Ctr. v. City of New York*, 585 F. Supp. 3d 366, 377 (S.D.N.Y. 2022) (holding that New York City’s just-cause ordinance was not preempted by the NLRA).

239. See David Madland, *Re-Union: How Bold Labor Reforms Can Repair, Revitalize, and Reunite the United States* 21–22 (2021) (describing the operation of workers’ boards, with examples from several states); Andrias, *The Forgotten Promise*, supra note 66 at 702–03 (listing several examples of state-level worker boards); Andrias, *New Labor Law*, supra note 13, at 64–66 (discussing the New York Wage Board); see also infra notes 274–277 and accompanying text for discussion of recent successes of this reform.

240. One of us has previously described this exception to preemption as “tripartite labor lawmaking,” Sachs, *Despite Preemption*, supra note 222, at 1157, which is distinct from the tripartism involved when governments, labor, and employers negotiate substantive labor standards through, for example, wage boards. See generally Andrias, *Forgotten Promise*, supra note 66 (describing the use of tripartite industry committees during the early years of the Fair Labor Standards Act through which unions and businesses helped set minimum wages on an industry-by-industry basis); Andrias, *New Labor Law*, supra note 13 (discussing recent efforts by the labor movement to set wages and working conditions on a sectoral basis using tripartite administrative structures such as wage boards).

agreements through which unions and employers bind themselves to new rules for organizing and bargaining.”²⁴¹ Another approach, untested as of this writing, would involve the NLRB ceding jurisdiction over a particular industry (or industries) to a state whose laws promise to enable organizing in a manner that the Board predicts will eliminate labor disputes in the industry.²⁴²

While the federal government preempts much state labor legislation, states, in turn, can preempt local labor and employment legislation. This has become increasingly common in recent years, with conservative state legislatures seeking to limit the ability of liberal cities to protect workers’ rights and other civil rights.²⁴³ In 2016, for example, after an organizing campaign by low-wage workers, the city of Birmingham increased its minimum wage to \$10.10 per hour. The state of Alabama responded by prohibiting localities from raising the minimum wage higher than the federal minimum of \$7.25.²⁴⁴ More recently, the State of Texas enacted a bill that strips cities of the ability to set standards for local workplaces (and to ensure civil rights or improve their environments).²⁴⁵

2. *Landlord–Tenant Law: State Discretion and State Preemption.* — The preemption rules governing organizing-enabling legislation in the tenant

241. Sachs, *Despite Preemption*, supra note 222, at 1155. In one example, the City of New Haven, the Yale–New Haven Hospital, and the New Haven hospital workers’ union engaged in three-way negotiations over the construction of a cancer facility. The union wanted new rules for organizing. The hospital needed zoning and development permits from the City. Following a series of meetings mediated by the New Haven mayor, a package deal was reached: The City issued the permits in exchange for the hospital’s agreement to reorder contractually the rules of organizing. *Id.* at 1156.

242. See 29 U.S.C. § 164(c)(1)–(2) (2018); Benjamin Sachs, *Unpreemption: The NLRB’s Untapped Power to Authorize State Experimentation*, OnLabor (Jan. 11, 2022), <https://onlabor.org/unpreemption-the-nlrbs-untapped-power-to-authorize-state-experimentation/> [<https://perma.cc/S9P2-5H4N>] (last updated Dec. 24, 2022) (describing how the NLRB could cede jurisdiction to states and thereby enable states to avoid preemption).

243. More often than not, the state legislatures depriving local communities of democratic power have been majority white and the local communities have been majority Black and Brown. Observers have argued that the preemption efforts are often “rooted in racism and designed to uphold white supremacy.” See Hunter Blair, David Cooper, Julia Wolf, & Jaimie Worker, *Econ. Pol’y Inst.*, *Preempting Progress 2* (2020), <https://files.epi.org/pdf/206974.pdf> [<https://perma.cc/NH6X-KQ6K>].

244. See *Lewis v. Governor of Ala.*, 896 F.3d 1282, 1288 (11th Cir. 2018) (describing the effects of the Minimum Wage Act which rendered the Ordinance raising Birmingham’s minimum wage void).

245. H.B. 2127, 88th Leg., Reg. Sess. (Tex. 2023). For detailed analysis of how conservative state legislatures are depriving liberal cities of authority to protect workers’ rights and other civil rights see, e.g., Nestor M. Davidson & Richard C. Schragger, *Do Local Governments Really Have Too Much Power? Understanding the National League of Cities’ Principles of Home Rule for the 21st Century*, 100 N.C. L. Rev. 1385, 1389–90, 1415–16 (2022); Miriam Seifter, *Counter-majoritarian Legislatures*, 121 Colum. L. Rev. 1733, 1750–51 (2021); see also Jacob M. Grumbach, *Laboratories Against Democracy 97–122* (2022) (describing how national groups are using state authority to suppress the vote and erode democracy).

context are distinct from the regime that governs labor law. Unlike in the labor context, there is very little federal preemption of state landlord-tenant law. Indeed, the Supreme Court has recently termed landlord-tenant relationships the “particular domain of state law”²⁴⁶ and declared that states “have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular.”²⁴⁷ Unlike the labor context, moreover, federal law does not provide a comprehensive regulatory regime for private rental housing.²⁴⁸ Where there is federal regulation, courts have generally construed the federal statutes as providing a floor for tenants’ rights, holding that state laws offering fewer such rights are preempted while state laws providing greater tenant protections—including, presumably, tenant organizing protections—can coexist with the federal statutory regimes.²⁴⁹

There is an important limitation here: These general principles govern the private rental market but not necessarily federally funded public housing or housing rented with federal housing assistance.²⁵⁰ For renters in public housing or who rent with assistance from the Section 8 program, the ability of states to legislate is constrained by the dictates of the relevant federal programs. Thus, for example, if the federal program requires eviction for certain tenant conduct, states are likely unable to offer just-cause eviction protections that prohibit eviction for the federally required reason.²⁵¹ Nonetheless, even here, state law will be preempted only if it *conflicts* with some provision of federal law,²⁵² allowing far greater

246. Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (citing *Lindsey v. Normet*, 405 U.S. 56, 68–69 (1972)).

247. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982) (citations omitted); see also Robert Van Someren Greve, Protecting Tenants Without Preemption: How State and Local Governments Can Lessen the Impact of HUD’s One-Strike Rule, 25 *Geo. J. on Poverty L. & Pol’y* 135, 158 (2017) (“Landlord-tenant relations are traditionally within the scope of the States’ police powers, and thus, the States ‘have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular.’” (quoting *Loretto*, 458 U.S. at 440)).

248. See Megan E. Hatch, Statutory Protection for Renters: Classification of State Landlord-Tenant Policy Approaches, 27 *Hous. Pol’y Debate* 98, 100 (2017) (providing an overview of the two major pieces of legislation in this area, one of which covers housing discrimination (the Federal Fair Housing Act of 1968) and the other of which is no longer in force (the 2009 Protecting Tenants at Foreclosure Act)).

249. See, e.g., *Mik v. Fed. Home Loan Mortg. Corp.*, 743 F.3d 149, 164–65 (6th Cir. 2014) (holding the 2009 Protecting Tenants at Foreclosure Act preempted state laws that are less protective of tenants’ rights but did not preempt more protective state laws); *Fair Hous. Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1175 (9th Cir. 2008) (en banc) (allowing state and federal claims of housing discrimination).

250. See Van Someren Greve, *supra* note 247, at 157 (describing HUD’s “One-Strike Rule” and its restrictive impact on state policies).

251. *Id.* at 160.

252. *Id.* at 159–66. These sections describe state laws that can protect federal housing tenants from evictions without directly conflicting with federal public housing regulations.

room for state laws facilitating organizing of public housing tenants than is available for state laws facilitating organizing in the labor context. And states are nearly unconstrained by preemption in their capacity to enact organizing-enabling legislation for tenants in the private rental market.²⁵³

Preemption has a much greater bite in state invalidation of local landlord–tenant law.²⁵⁴ Such preemption is a creature of state law and accordingly varies across states. Nonetheless, “[s]tate preemption of local housing policy is common,” with rent control and inclusionary zoning being common targets for such preemptive state rules.²⁵⁵ As Professor Jamila Michener shows, for example, thirty states “limit localities’ ability to enact rent control” while approximately nine prohibit localities from pursuing zoning policies meant to ensure access to affordable housing.²⁵⁶ Recently, some states have preempted—or their courts have found to be preempted—a broader swath of local tenant-protective ordinances. For example, in July 2021, Albany, New York, enacted a good-cause eviction law, prohibiting landlords from evicting tenants except for certain statutorily specified reasons and also prohibiting landlords from justifying evictions on failure-to-pay grounds if the rent increased by more than five percent.²⁵⁷ In March 2023, however, the appellate division in New York found that the good-cause eviction protection conflicted with landlords’

As Robert Van Someren Greve observes, courts have upheld these state laws against preemption challenges in at least some cases. See, e.g., *Chateau Foghorn v. Hosford*, 168 A.3d 824, 857 (Md. 2017) (concluding that a state law that vests courts with equitable discretion to prevent eviction for insubstantial infractions is not preempted by federal law because it does not conflict with federal regulations governing evictions from federally subsidized housing); *Hous. Auth. of Covington v. Turner*, 295 S.W.3d 123, 127 (Ky. Ct. App. 2009) (holding that a state law granting tenants a right to cure their eviction is not preempted by federal law on the same grounds). But see *Bos. Hous. Auth. v. Garcia*, 871 N.E.2d 1073, 1079–80 (Mass. 2007) (holding that federal law preempts state good-cause protections for tenants subject to federal housing eviction regulations that directly conflict with the protections).

253. Although certain forms of collective action among private actors in housing markets might raise antitrust concerns absent state legislation, states are permitted to enact policies that allow for putative anticompetitive conduct. See *Parker v. Brown*, 317 U.S. 341, 352 (1943) (elaborating upon the “state action” exception to antitrust law). To fall within this exception, “the challenged restraint must be ‘one clearly articulated and affirmatively expressed as state policy’; second, the policy must be ‘actively supervised’ by the State itself.” *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978) (plurality opinion) (Brennan, J.)). Thus, state legislation, including legislation that allows tenants and landlords to negotiate rents, should not pose antitrust problems if the policy is clearly articulated and permits state supervision.

254. See Jamila Michener, *Entrenching Inequity, Eroding Democracy: State Preemption of Local Housing Policy*, 48 *J. Health Pol., Pol’y & L.* 157, 161–62 (2023) [hereinafter Michener, *Entrenching Inequity*].

255. *Id.* at 164; see also Nestor M. Davidson & Timothy M. Mulvaney, *Takings Localism*, 121 *Colum. L. Rev.* 215, 252 (2021) (“[A]t least twenty-nine states preempt rent control ordinances.”).

256. See Michener, *Entrenching Inequity*, *supra* note 254, at 165 fig.1, 166, 167 fig.2.

257. *Pusatere v. City of Albany*, 185 N.Y.S.3d 350, 352–53 (N.Y. App. Div. 2023).

state law right to evict tenants “at will,” and was thus preempted.²⁵⁸ Florida’s state legislature recently passed a statute that broadly “ban[s] local governments from passing or retaining renter protections not currently afforded to Floridians under state law.”²⁵⁹

With Republican-controlled states increasingly wielding broad preemption powers to frustrate Democrat-controlled cities’ policies, other states may soon follow Florida’s lead.²⁶⁰ And although these preemptive state laws do not mention organizing rights explicitly, many would reach locally enacted protections for tenant organizing. Indeed, in *Constructing Countervailing Power*, we listed good-cause eviction protection as one component of a hypothetical tenant organizing law—the very protection now preempted by New York state law and clearly by a Florida-type statute too.²⁶¹ And, to the extent that state law does not currently preempt local organizing-enabling legislation, state legislatures have the power and discretion to amend state law to do so.

3. *Local Legislation and the Constraints of Home Rule.* — As noted above, before localities can legislate at all—in the labor, landlord–tenant, or any other context—they must possess adequate “home rule” power to do so. This is the case because “[l]ocal power in the United States is derived from state law [and] [u]nless states authorize their local governments to do something, they have no power to do it.”²⁶² The vast majority of states (all but two) have enacted home-rule provisions—either by statute or through constitutional amendments—that grant most local governments in the state (including the larger cities) authority to enact some range of local legislation.²⁶³ But there is great variation among the states when it comes to the extent of local authority granted by the relevant home-rule provision. As then-Professor David Barron and Professor Gerald Frug

258. *Id.* at 353.

259. McKenna Schueler, *New Tenant Protections in Orange County Could Be Threatened, Under Florida Housing Proposal*, *Orlando Wkly.* (Mar. 20, 2023), <https://www.orlandoweekly.com/news/new-tenant-protections-in-orange-county-could-be-threatened-under-florida-housing-proposal-33799460> [<https://perma.cc/M9JZ-YY6>]. While Florida’s law sweeps unusually broadly, approximately two-thirds of all states (both Republican- and Democrat-controlled) preempt at least certain kinds of housing laws that municipalities may wish to pass. See *State Preemption of Local Equitable Housing Policies*, *Loc. Sols. Support Ctr.*, <https://www.supportdemocracy.org/equitablehousing/#table> [<https://perma.cc/XNW8-PQWF>] (last visited Jan. 17, 2024).

260. See Joshua Fechter, Erin Douglas & Alex Nguyen, *Texas House Approves Sweeping Limits on Local Regulations in GOP’s Latest Jab at Blue Cities*, *Tex. Trib.* (Apr. 18, 2023), <https://www.texastribune.org/2023/04/18/texas-house-local-control/> [<https://perma.cc/ZAF9-ZEQG>] (last updated Apr. 19, 2023); Monica Potts, *Red States Are Fighting Their Blue Cities*, *FiveThirtyEight* (Mar. 13, 2023), <https://fivethirtyeight.com/features/how-red-states-are-fighting-their-blue-cities/> [<https://perma.cc/T8QS-J8MG>].

261. See Andrias & Sachs, *supra* note 2, at 592.

262. Gerald E. Frug & David J. Barron, *City Bound: How States Stifle Urban Innovation* 2 (2008); see also David J. Barron, *Reclaiming Home Rule*, 116 *Harv. L. Rev.* 2257, 2276 (2005).

263. See Frug & Barron, *supra* note 262, at 33.

explain, many home-rule provisions “expressly confine the power to initiate legislation to matters of ‘local’ concern,” a restriction that has led courts to void city ordinances regarding discrimination in housing and employment (on the ground that these issues are matters of superlocal concern).²⁶⁴ Such “local concern” limitations have also led courts to construe city power narrowly in order to avoid any conflict with state statutes on similar subject matters—a move that also explains judicial invalidation of city measures in the housing and employment spheres.²⁶⁵ Other home-rule provisions prohibit local legislation on “private or civil affairs,”²⁶⁶ a category that has “always been somewhat of a mystery,” but that again has provided courts “a way to restrain local efforts to undertake a wide range of actions that might mitigate the social impacts of private development, ranging from rent control to living wage ordinances.”²⁶⁷ Home-rule provisions also often limit localities’ ability to tax, a limitation with wide-ranging implications for city power.²⁶⁸

Given the great variation in home-rule power across states, and the concomitant variation in judicial construction of that power, it is difficult to predict with certainty which cities possess adequate authority to enact which varieties of organizing-enabling legislation. What we can say with certainty is that adequate home-rule power is a prerequisite to local organizing-enabling legislation and that some cities have the authority to enact a wide range of organizing-enabling law, some have the authority to enact a narrower range, and some probably lack the authority to enact any at all. At one end of the spectrum are cities like Seattle, which has the home-rule authority to pass a comprehensive union-organizing regime for gig drivers not classified as employees under federal labor law.²⁶⁹ At another end of the spectrum are cities like Boston, barred even from enacting rent control and minimum wage laws.²⁷⁰ Looking at the nation’s

264. See *id.* at 61.

265. See *id.*

266. *Id.* (internal quotation marks omitted).

267. *Id.*

268. See *id.*

269. That ordinance was eventually invalidated by the Ninth Circuit on other grounds in *Chamber of Com. v. City of Seattle*, 890 F.3d 769 (9th Cir. 2018). The Washington state legislature enacted four statutes that addressed municipal regulation of the for-hire transportation industry. See *id.* at 783. One declared “the intent of the legislature to permit political subdivisions of the state to regulate for hire transportation services without liability under federal antitrust laws.” *Id.* (quoting Wash. Rev. Code Ann. § 46.72.001 (West 2018)). The second enumerated examples of cities’ regulatory power, including the power to “license, control, and regulate all for hire *vehicles* operating within their respective jurisdictions.” *Id.* at 784 (quoting Wash. Rev. Code Ann. § 46.72.160). The remaining two statutes addressed similar concerns and applied specifically to the taxi industry. See Wash. Rev. Code Ann. §§ 81.72.200, 210.

270. See, e.g., David J. Barron, Gerald E. Frug & Rick T. Su, *Dispelling the Myth of Home Rule: Local Power in Greater Boston* 7–8 (2004); Letter from Nancy E. Glowa, Cambridge

cities as a whole, labor attorney Darin Dalmat conducted an extensive study of local power to pass living-wage laws, which, while themselves not organizing-enabling laws, operate directly on the employment sphere and likely implicate a similar analysis of the “local” and “private” affairs questions. Dalmat concludes that home-rule authority is broad enough to permit for citywide minimum wage ordinances in about half the states, while such ordinances are likely impermissible in one-fourth of the states and of questionable legal status in the remaining fourth.²⁷¹

C. *Successes at the State and Local Level*

Notwithstanding the preemption challenges and home-rule constraints, both the labor movement and the tenants’ rights movement have had significant successes in enacting power-building laws at the state and local level in recent years.

For example, much of the labor movement recognizes that sectoral bargaining—combined with worksite bargaining—is necessary in today’s economy to give workers real power over their wages, benefits, and working conditions. Yet, achieving a system of sectoral or broader-based bargaining at the federal level is politically infeasible. One of the key insights of the Fight for \$15 campaign, led by the Service Employees International Union (SEIU), was that advances can be made toward sectoral bargaining at the state level: States can structure their employment laws in ways that allow worker organizations and employers to participate in administrative processes—in “worker boards” or “industry committees”—to set wages, benefits, and working conditions for their own industries.²⁷² Thus, although states and localities are preempted from creating full-fledged sectoral bargaining, they can still enable sectoral standard setting. Moreover, workers can use such boards as a focal point for their organizing.²⁷³ To that end, the Fight for \$15 recently helped pass a new statute in California that raises wages for all fast-food workers, while also establishing a state-appointed council to set, on an ongoing

City Solicitor, to Richard C. Rossi, Cambridge City Manager (Sept. 28, 2015) (on file with the *Columbia Law Review*). See generally *Bannerman v. City of Fall River*, 561 N.E.2d 793, 796 (Mass. 1984) (holding invalid a city ordinance converting rental apartments into condominiums because the city had no “independent power” to pass such an ordinance); *Bloom v. City of Worcester*, 293 N.E.2d 268, 274–75 (Mass. 1973) (discussing state law that almost entirely bars municipalities from enacting law governing civil relationships).

271. See Darin M. Dalmat, *Bringing Economic Justice Closer to Home: The Legal Viability of Local Minimum Wage Laws Under Home Rule*, 39 *Colum. J.L. & Soc. Probs.* 93, 95 (2005).

272. See generally Andrias, *New Labor Law*, *supra* note 13 (detailing the Fight for \$15’s use of state wage boards and other state and local legislation as a means of moving toward sectoral bargaining).

273. *Id.* at 64; see also Kate Andrias, David Madland & Malkie Wall, *A How-To Guide for State and Local Workers’ Boards*, *Ctr. for Am. Progress* (2019), <https://www.americanprogress.org/article/guide-state-local-workers-boards/> [<https://perma.cc/EAK9-QMPR>].

basis, industry-wide minimum standards, including wages, hours, and working conditions, for fast-food workers.²⁷⁴ At SEIU's urging, Minnesota just enacted a board for the nursing home industry.²⁷⁵ Proposed legislation in New York would create a mechanism for nail salon owners and workers to set minimum prices and minimum wages for the industry.²⁷⁶ In Illinois, proposed legislation would create a standards board for child care.²⁷⁷

Workers not covered by the NLRA have also had recent successes with organizing-enabling legislation at the state and local level. In New York, farmworkers recently won the right to unionize and bargain.²⁷⁸ And domestic workers have successfully pushed for new “Bills of Rights” and protections in numerous states and cities, including California, Connecticut, Illinois, Nevada, New York, and Seattle.²⁷⁹ These ordinances give domestic workers rights to minimum wages, rest breaks, and meal breaks.²⁸⁰ Some also create Domestic Workers Standards Boards through which domestic worker organizations, the public, and hiring entities can engage in negotiations about conditions of employment.²⁸¹ Tenant movements, too, have had success at the state and local level. Consider the experience in New York State. After decades of struggle, the tenant movement played a key role in winning the Housing Stability and Tenant Protection Act of 2019 (HSTPA),²⁸² which contains what State Senate Majority Leader Andrea Stewart-Cousins called “the strongest tenant protections in history.”²⁸³ Among other reforms, HSTPA expands rent

274. A.B. 1228, 2023 Leg., Reg. Sess. (Cal. 2023). This statute represented a compromise between the industry and the union; it followed an initial, stronger bill that the fast-food industry sought to repeal through a ballot initiative. See A.B. 257, 2021 Leg., Reg. Sess. (Cal. 2021).

275. Minnesota Nursing Home Workforce Standards Board Act, H.F. 908 § 81.212, 93d Leg., Reg. Sess. (Minn. 2023); Max Nesterak, Worker Advocates Push for Nation-Leading Labor Standards Board in Minneapolis, *Minn. Reformer* (Sept. 22, 2023), <https://minnesotareformer.com/2023/09/22/worker-advocates-push-for-nation-leading-labor-standards-boards-in-minneapolis/> [<https://perma.cc/G6UU-MXB5>].

276. See S.B. 4638, 2021–2022 Leg., Reg. Sess. (N.Y. 2021).

277. H.B. 2310 § 15, 103d Leg., Reg. Sess. (Ill. 2023).

278. See Farm Laborers Fair Labor Practices Act, N.Y. Dep't Lab., <https://dol.ny.gov/farm-laborers-fair-labor-practices-act> [<http://perma.cc/A6KN-UW72>] (last visited Jan. 16, 2024).

279. Domestic Workers Bill of Rights, National Domestic Workers Alliance, <https://www.domesticworkers.org/programs-and-campaigns/developing-policy-solutions/domestic-workers-bill-of-rights/> [<https://perma.cc/V852-EN6L>] (last visited Jan. 17, 2024) (describing the basic components of the legislation and the jurisdictions that have adopted a version of it).

280. *Id.*

281. See, e.g., Seattle, Wash., Seattle Municipal Code ch. 14.23, § 14.23.030 (2018).

282. S. 6458, 2019–2020 Reg. Sess. (N.Y. 2019).

283. Press Release, N.Y. State Legislature, Statement From Senate Majority Leader Andrea Stewart-Cousins and Assembly Speaker Carl Heastie on Historic Affordable Housing Legislation (June 11, 2019), <https://nyassembly.gov/Press/files/20190611a.php> [<https://perma.cc/8YTX-PCSD>]; see also Celia Weaver, From Universal Rent Control to Cancel Rent: Tenant Organizing in New York State, 30 *New Lab. F.* 93, 94 (2021) (describing efforts of the New York tenant movement to win the HSTPA by forming a coalition of dozens of New York housing justice organizations across the state).

stabilization to cover the entire state of New York, bans the use of so-called “tenant blacklists” to protect tenants who enforce their rights, creates the crime of unlawful eviction, and strengthens protections against retaliatory evictions.²⁸⁴ Tenants in New York are now able to organize with far less fear of retaliation. They achieved this victory by forming the first viable statewide tenants’ rights coalition of organizing groups in New York since the 1990s and will be able to use the legislation to organize further.²⁸⁵

D. *Dynamic Federalism: From National to Local to National Again*

A final observation bears mention here. In one version of the state and local approach to resolving the chicken-and-egg dilemma, a social movement shifts its political efforts from federal legislation to state or local legislation, and there the story ends: Either the organization succeeds at the subfederal level or it fails. If successful, the organization will use the new legislation to build power in the jurisdiction where the law applies, but the effort to secure organizing-enabling legislation stops with this success.

In theory, however, there exists the possibility for another, more iterative and dynamic, version of the state and local approach. Here, again, the social-movement organization fails to secure legislation at the federal level and so shifts to state and local efforts. And, again, if the movement succeeds in passing organizing-enabling legislation in a state or a city, it uses that legislation to build power in the jurisdiction where the law was passed. But then, and this is the key difference, the social-movement organization exports power built with the organizing-enabling legislation in the original jurisdiction to other jurisdictions where it presses for additional organizing-enabling laws.²⁸⁶

This exporting of movement power from one jurisdiction to another can take multiple forms: It could consist of sending financial resources derived from increased membership levels, shifting human resources generated in one jurisdiction to another, leveraging economic or political relationships in the original jurisdiction to the new one, or simply celebrating political achievements such that they become a model for legislation elsewhere. Whatever the specifics, the basic dynamic is the same: Power built in one state or city is used to increase power in another state or locality and, ultimately, to secure new organizing-enabling legislation in the second state or city.²⁸⁷

284. S. 6458 at pt. E § 1, pt. M § 227-f, § 768, § 223-b.

285. Weaver, *supra* note 283, at 98.

286. For discussion of the dynamics of law reform in a federalist system generally, see sources cited *supra* note 27.

287. The effort can also be expressive or symbolic: sending a message about the importance of organizing rights and building support across jurisdictions, even when a local or state bill is ultimately found to be preempted. It can also be more radical, as when a

Again, in theory, this process can repeat itself, producing a virtuous circle whereby power building that begins with the enactment of organizing-enabling legislation in a single city or state can fuel such legislation, and also power building, across multiple cities and states. Ultimately, should the cycle lead to the building of sufficient power across states and cities, the social movement might amass sufficient national power such that it could enact the federal legislation that it originally lacked power to enact. So, in the end, the dynamic state and local approach to resolving the chicken-and-egg dilemma provides social-movement organizations with an iterative approach to securing not only state and local laws that enable organizing but, ultimately, enough political power to win *federal* organizing-enabling legislation.²⁸⁸

To make this approach less abstract, take labor organizing rights as the context for a hypothetical example. Imagine that the labor movement presses unsuccessfully in Congress for legislation that would establish unionization and collective bargaining rights for Uber and Lyft drivers. Lacking power to enact such a bill at the federal level, the labor movement takes the campaign to Massachusetts—a trifecta state with majority control by the Democratic party.²⁸⁹ In Massachusetts, the bill passes and eventually tens of thousands of app-based drivers become union members. The unions then take a percentage of the dues generated by this new membership and create a fund to enact similar laws in five other trifecta states; they also pay to train and send Massachusetts drivers to the other states to lead the organizing effort. When bills pass in these other states, the unions see their memberships increase commensurately, and now the labor movement is far better positioned to return to Congress and press for the federal bill.

III. JUDICIAL AND EXECUTIVE ACTION

A third way in which a social movement can mitigate the chicken-and-egg dilemma is by shifting its focus from the legislative branch to other parts of government. That is, when a social movement is unable to pass

locality engages in lawmaking that is theoretically off-limits. See Gerken, *supra* note 183, at 1749.

288. On a few historical occasions, this dynamic has occurred in the context of constitutional amendment as well. Following the Civil War, for example, the women's suffrage movement failed to win coverage for women in the Fifteenth Amendment, fought state-by-state for fifty years winning suffrage at the state level, and finally built enough political power that Congress passed the Nineteenth Amendment in 1919. See Carrie Chapman Catt & Nettie Rogers Shuler, *Woman Suffrage and Politics: The Inner Story of the Suffrage Movement* 107 (1923).

289. See Susannah Sudborough, *500+ Rideshare Drivers to Caravan Across Boston to Push for Union Rights*, Boston.com (July 10, 2023), <https://www.boston.com/news/local-news/2023/07/10/uber-lyft-drivers-union-rally-caravan-state-house/> [<https://perma.cc/JH3B-8WDU>] (describing efforts by rideshare drivers to win collective bargaining rights).

organizing-enabling legislation, it can turn to the other branches of government for reforms that make organizing easier. Both the judicial and the executive branches (at the federal and state levels) are potential targets, although the executive branch tends to offer more promise. And while executive branch action is more easily reversed and often more legally constrained than legislation, it can provide the groundwork for fundamental legislative reform.

A. *The Judiciary*

The judiciary is one available resource, particularly in states where the state constitution protects labor rights or social and economic rights and where the political economy and judicial selection system has produced a progressive judiciary.²⁹⁰ For example, the New York Appellate Division recently ruled that exclusion of farm workers from a state statute that protects workers' rights to organize and collectively bargain violated the state constitution.²⁹¹ And in an example outside the context of organizing-enabling law, but which suggests the capacity of courts to redistribute power and resources, in 1975 the New Jersey Supreme Court famously held that municipalities and state agencies dealing with land use have an affirmative obligation to promote low- and moderate-income housing.²⁹²

For a number of reasons, however, the judiciary is unlikely to be the most productive avenue for achieving organizing-enabling legal change, particularly of the kind that facilitates pro-labor or poor people's organizing.²⁹³ One problem is the scope of the reforms needed. As we have

290. See generally Emily Zackin, *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights* (2013) (detailing protection of social and economic rights in state constitutions); Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 218, at 872–83 (“The vast majority of states provide either for the election of judges in the first instance or for retention elections following appointment.”); Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 *Colum. L. Rev.* 1855 (2023) (highlighting distinctive features of state constitutions, including emphasis on democratic and positive rights).

291. See *Hernandez v. State*, 173 A.D.3d 105, 114–15 (N.Y. App. Div. 2019).

292. See *S. Burlington Cnty. NAACP v. Mount Laurel Twp.*, 336 A.2d 713, 731–32 (N.J. 1975); see also James E. Ryan, *Schools, Race, and Money*, 109 *Yale L.J.* 249, 267–68 (1999) (describing recalcitrance of state legislatures in response to redistributive judicial decisions by state courts in school finance litigation).

293. See Kate Andrias, *Building Labor's Constitution*, 94 *Tex. L. Rev.* 1591, 1609–15 (2016) (describing courts' historic hostility to labor rights and examining the tension between judicial supremacy and the labor movement's democratic commitments). Indeed, during the early twentieth century and again in recent years, the right turned to the judiciary to *undermine* countervailing social movements—that is, to enact an anti-organizing agenda. For example, between the 1880s and the 1930s, corporations and their allies challenged hundreds of democratically enacted and broadly popular laws aimed at raising labor standards and enabling workers to organize unions; courts struck down more than 200 such federal, state, and local laws. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 *N.Y.U. L. Rev.* 1383, 1393 (2001); William

previously argued, an organizing-enabling legal regime should explicitly grant collective rights; provide organizations with access to a reliable source of financial resources; guarantee free spaces for organizing; remove barriers to participation, including by preventing retaliation; permit organizations to make material change in members' lives, for example, through bargaining rights at multiple levels; and allow for contestation and disruption.²⁹⁴ Accomplishing such comprehensive change likely requires legislation; it is highly unlikely that any judicial decision could by itself produce such a regime, although it may be able to advance some elements of it. Thus, after the state court opined on the need for labor rights for farmworkers in the recent New York farmworker case, the New York legislature followed up with a statute creating a system for organizing and collective bargaining among agricultural workers.²⁹⁵ Conversely, a court decision may run into serious opposition from state legislatures, limiting its effects. The 1975 New Jersey decision required an additional nine years of litigation before the state legislature adopted a housing plan that courts deemed facially constitutional.²⁹⁶

Another problem with focusing on the judiciary as a source for organizing-enabling legal change is that the judicial system tends to be structurally biased against such change. Federal judges in particular are often drawn from the elite, and thus many are sympathetic to business interests.²⁹⁷ Even many judges appointed by Democratic Presidents have tended to be committed to existing structures and incremental reform and to be wary of change that redistributes power.²⁹⁸ Moreover, the kinds of legal rights that are required to facilitate organizing among working-class

E. Forbath, *The Shaping of the American Labor Movement*, 102 *Harv. L. Rev.* 1109, 1185–95, 1237 (1989). More recently, the right has turned to the courts, and to the Supreme Court in particular, to oppose democratically enacted laws that protect the political process and that are broadly popular. The Court has struck down campaign finance laws and key portions of the Voting Rights Act, giving “a green light to Republican legislatures seeking to suppress minority votes for electoral gain.” Terri Jennings Peretti, *Partisan Supremacy: How the GOP Enlisted Courts to Rig America’s Election Rules* 63 (2020).

294. See Andrias & Sachs, *supra* note 2, at 586–631.

295. *Farm Laborers Fair Labor Practices Act*, N.Y. Dep’t of Lab., <https://dol.ny.gov/farm-laborers-fair-labor-practices-act> [<http://perma.cc/A6KN-UW72>] (last visited Jan. 17, 2024).

296. See *Hills Dev. Co. v. Twp. of Bernards*, 510 A.2d 621, 634 (N.J. 1986).

297. See Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 *Geo. L.J.* 1515 *passim* (2010).

298. See Kate Andrias, *The Fortification of Inequality: Constitutional Doctrine and the Political Economy*, 93 *Ind. L.J.* 5, 10 (2018) (“[F]or several decades, even the Court’s more liberal members have offered only tepid opposition to economically regressive constitutional interpretations, sometimes helping shape them.”); Elliott Ash, Daniel L. Chen & Suresh Naidu, *Ideas Have Consequences: The Impact of Law and Economics on American Justice* 9–10 (Nat’l Bureau of Econ. Rsch., Working Paper No. 29788, 2022), <https://www.nber.org/papers/w29788> [<http://perma.cc/S4CZ-GAK8/>] (noting that a law and economics program funded substantially by “pro-business foundations and corporations” was popular among federal judges appointed by both Democratic and Republican Presidents).

people are unlikely to be found in the common law tradition and therefore are less judicially discoverable, particularly in a legal climate in which originalism and textualism dominate.²⁹⁹

B. *The Executive*

The executive branch provides an alternate and often more promising forum. Working-class social movements have, on numerous occasions, been able to garner support and achieve executive-led reform, be it from the mayor, governor, or President, and from administrative agencies, even when the movements lack sufficient support from the legislature. In most instances, these victories come in the form of substantive policy gains sought by the social movements. But in others, as we will detail, movements have secured organizing-enabling policies from the executive branch.

The viability of the executive branch approach as a means to escape the chicken-and-egg dilemma depends both on the executive's support for the social movements' goals, and on the capacity of administrative action to facilitate organizing. As noted above, establishing a comprehensive legal framework for organizing likely requires legislation; as with a judicial decision, it is highly unlikely that any administrative action could, by itself, produce such a regime. Executives, after all, execute the law; they do not create it. Moreover, developing Supreme Court jurisprudence threatens to undermine the ability of agencies to regulate in the public interest, including their ability to protect the right to organize.³⁰⁰ Nonetheless, for now, executive action—including rulemakings, adjudications, enforcement actions, guidance, executive orders, appointments, procurement-related action, and the use of the “bully pulpit,” whether at the federal, state, or local level—can perform some key organizing-enabling functions that can set the groundwork for future federal legislative reform. Notably, executive branch strategies can be used in conjunction with federalism and disruption strategies. Indeed, some of the most promising executive branch actions involve federal officials working with state actors to achieve goals neither could achieve alone, through waivers, grants, rulemaking, and

299. Indeed, given the current makeup of the federal courts generally and the Supreme Court in particular, pro-organizing legislative reforms may face constitutional challenge. See Andrias, *Constitutional Clash*, *supra* note 184, at 1072–73 (noting that in recent years, the Supreme Court has “claimed more and more power for itself” and “refus[ed] to defer to agencies’ interpretation of statutes” on labor issues). With related concerns in mind, scholars have suggested reforms such as stripping some jurisdiction from the Supreme Court and imposing term limits on Justices. See Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 *Calif. L. Rev.* 1703, 1706 (2021) (urging reforms to limit the power of the Court); Presidential Comm’n on the Sup. Ct. of the U.S., *Final Report 20–21* (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf> [<https://perma.cc/F6RS-85ML>] (discussing a range of possible reforms, including term limits and proposals to reduce the power of the Court).

300. See Andrias, *Constitutional Clash*, *supra* note 184, at 1057–64 (describing the range of efforts by business to curtail powers of the administrative state and the Supreme Court’s increasing embrace of this agenda).

enforcement.³⁰¹ And, as with legislation, such executive action sometimes comes about only after disruptive activity.

1. *The Executive Toolkit.* — To understand how the executive can further organizing-enhancing reforms, it is important first to appreciate the range of available executive tools and the strengths and weaknesses of each. Under the Administrative Procedure Act (APA), federal administrative agencies typically have a choice of how to pursue their policy goals, as long as they are exercising delegated power.³⁰² The agency's options include: issuing a legislative rule, bringing or deciding a case, or announcing its interpretation of the statute or some guidance regarding its implementation.³⁰³ An agency might choose to rely on one or all of those policymaking tools in the course of implementing its statutory mandate.³⁰⁴ Under long-settled administrative law doctrine, the agency will not be required to explain to a court why it chose one instrument or the other.³⁰⁵

The choice among these instruments matters because each brings with it a different process, legal effect, and degree of judicial review.³⁰⁶ For example, a federal agency that engages in legislative rulemaking must typically follow “notice-and-comment” procedures: informing the public of its proposal, soliciting feedback on the proposal, and responding in writing to objections.³⁰⁷ This approach has the advantage of producing a policy that is prospectively binding on both the issuing agency and the regulated public, much like a statute. In addition, although the Supreme Court has recently curtailed the extent of deference it will exercise and appears poised to cut back further, legislative rules are still entitled to some judicial deference.³⁰⁸

301. See Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 *Tex. L. Rev.* 265, 298 (2019) (describing the mutually beneficial relationship between state actors and presidential administrations); Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 *Va. L. Rev.* 953, 955 (2016) (referencing healthcare, marijuana, and climate change as three policy areas where federal and state enforcement intersect).

302. See M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 *U. Chi. L. Rev.* 1383, 1386–87 (2004).

303. *Id.* at 1386.

304. *Id.* at 1383.

305. See *Sec. Exch. Comm'n v. Chenery (Chenery II)*, 332 U.S. 194, 203 (1947).

306. See Magill, *supra* note 302, at 1383–84.

307. See 5 U.S.C. § 553 (2018) (stating the requirements for notice and comment rulemaking).

308. Nearly 40 years ago, in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984), the Supreme Court held that courts should defer to a federal agency's interpretation of an ambiguous statute as long as that interpretation is reasonable. But the Court has recently cut back on deference even in the context of legislative rules and threatens to do so again in upcoming cases. See *Sackett v. Env't Prot. Agency*, 143 S. Ct. 1322, 1348 (2023) (rejecting the EPA's authority to regulate under the Clean Water Act through aggressive statutory interpretation); *West Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2608–09 (2022) (holding that when a case presents a major question with “economic and political significance” the agency must point to “clear congressional authorization” for the authority it claims); *Petition for Writ of Certiorari at i–ii, Loper Bright Enters. v.*

But they are expensive and time consuming, often taking more than three years to complete.³⁰⁹

By contrast, interpretive rules, guidance documents, or policy statements are cheap and efficient for an administrative agency to pursue but lack the force of law and receive less deference from courts.³¹⁰ Enforcement actions fall somewhere in between: An enforcement action is less procedurally intensive than a legislative rule and it is binding, but only on an individual, although often with some precedential force. Meanwhile, agencies can also use enforcement policy and discretion, including nonenforcement or aggressive enforcement, to pursue particular goals.³¹¹

While the above policy tools are available to federal administrative agencies, Presidents can influence administrative agencies' use of such tools. Presidents frequently issue executive orders or presidential memoranda, directing their agencies to pursue particular regulatory actions, policies, or enforcement priorities.³¹² They also exercise the appointment power to choose administrative officials who will pursue particular policy goals.³¹³ More controversially, they sometimes use the

Raimondo, No. 22-451 (U.S. filed Nov. 10, 2022), 2022 WL 19770137 (presenting the question of whether the Court should overrule *Chevron* or “clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency”).

309. Gov't Accountability Off., *Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews* 17 (2009), <https://www.gao.gov/assets/gao-09-205.pdf> [<https://perma.cc/PWH7-92RH>]; Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 *Geo. Wash. L. Rev.* 1493, 1493 (2012) (finding that it takes an extended period of time and a significant commitment of agency resources to use the notice and comment process to issue a rule).

310. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 103 (2015) (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979)); cf. Connor N. Raso, Note, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 *Yale L.J.* 782, 787 (2010) (finding that agencies do not try to bypass rulemaking constraints through the guidance process).

311. See Kate Andrias, *The President's Enforcement Power*, 88 *NYU. L. Rev.* 1031, 1035 (2013) (describing how Presidents have played a role in enforcement policy and urging reform); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 *Vand. L. Rev.* 671, 674 (2014) (describing Presidents' decisions to decline to enforce federal law and arguing that constitutional authority for enforcement discretion is limited and defeasible); Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 *NYU. L. Rev.* 795, 807–15 (2010) (examining modes of deregulation through nonenforcement under the second Bush Administration).

312. Elena Kagan, *Presidential Administration*, 114 *Harv. L. Rev.* 2245, 2277–84 (2001); Kathryn A. Watts, *Controlling Presidential Control*, 114 *Mich. L. Rev.* 683, 699–700 (2016); see also Cristina M. Rodríguez, *The Supreme Court, 2020 Term—Foreword: Regime Change*, 135 *Harv. L. Rev.* 1, 7 (2021) (arguing that “[s]hifts in legal argument should not be met with skepticism, and they often should be credited as legitimate reinterpretations of law that, in turn, will help give rise to a new political regime”).

313. Christina M. Kinane, *Control Without Confirmation: The Politics of Vacancies in Presidential Appointments*, 115 *Am. Pol. Sci. Rev.* 599, 599 (2021); Nina A. Mendleson, *The*

power not to act. They leave key positions empty,³¹⁴ or they choose not to defend statutes with which they disagree.³¹⁵ In addition, executives can use the bully pulpit to influence behavior by both agency officials and private actors.³¹⁶ Finally, they have significant authority in their capacity as “employer-in-chief” to use procurement policy to affect other goals.³¹⁷

Most state systems offer a similarly flexible range of administrative tools, with governors wielding significant executive power, often more than Presidents, that is subject to fewer checks.³¹⁸ Most state judiciaries also defer to administrative agencies’ reasonable interpretations of their governing statutes.³¹⁹ Moreover, states elect a variety of executives beyond their governors, including attorneys general, secretaries of state, treasurers, auditors, controllers, and superintendents.³²⁰ These democratically accountable officials all may have capacity to make policy changes that can enhance organizing. State attorneys general, for example, have the ability to issue positions clarifying state law; they can target enforcement of the

Permissibility of Acting Officials: May the President Work Around Senate Confirmation?, 72 Admin. L. Rev. 533, 541 (2020); Anne Joseph O’Connell, Actings, 120 Colum. L. Rev. 613, 617–23 (2020) (chronicling President Trump’s use of appointed acting officials to pursue policy preferences).

314. See Kinane, *supra* note 313, at 599–600.

315. Aziz Z. Huq, Enforcing (But Not Defending) “Unconstitutional” Laws, 98 Va. L. Rev. 1001, 1005 (2012) (asking when an executive should decline to defend in court a federal law it has determined to be unconstitutional, yet still enforce that same statute against third parties and concluding that the President is on weaker ground when the rights of individual third parties are in play); Daniel J. Meltzer, Executive Defense of Congressional Acts, 61 Duke L.J. 1183, 1235 (2012) (describing examples of nondefense and concluding that the question of the executive branch’s responsibility to enforce and defend statutes is not governed by a legal rule derivable from the Constitution itself, but “is instead a matter of judgment, informed by a welter of historical and institutional concerns”); cf. Katherine Shaw, Constitutional Nondefense in the States, 114 Colum. L. Rev. 213, 214–17 (2014) (examining how states have engaged in executive nondefense).

316. Kagan, *supra* note 312, at 2301; Katherine Shaw, Beyond the Bully Pulpit: Presidential Speech in the Courts, 96 Tex. L. Rev. 71, 84–85 (2017).

317. See Kagan, *supra* note 312, at 2292; David Madland & Karla Walter, Uncle Sam’s Purchasing Power: How to Leverage Government Spending to Promote Good Jobs, 31 Berkeley J. Emp. & Lab. L. 425, 435–36 (2010).

318. Miriam Seifter, Gubernatorial Administration, 131 Harv. L. Rev. 483, 499–500 (2017).

319. While deference remains the norm at the state level, due to a concerted campaign by right-wing legal organizations, some state courts have recently cut back on their deference doctrines. See Daniel Dew, Opinion, 11 States Have Ended Judicial Deference to Executive Agencies—More Should Follow Their Lead, The Hill (Jan. 17, 2023), <https://thehill.com/opinion/judiciary/3809650-11-states-have-ended-judicial-deference-to-executive-agencies-more-should-follow-their-lead/> (on file with the *Columbia Law Review*).

320. Bulman-Pozen & Seifter, Democracy Principle, *supra* note 218, at 872; see also Miriam Seifter, Understanding State Agency Independence, 117 Mich. L. Rev. 1537, 1552 (2019) (“Forty-three states popularly elect an attorney general; thirty-seven elect a secretary of state, thirty-four elect a treasurer, twenty-four elect an auditor, and twenty-two elect a superintendent of public instruction or members of a board of education.” (footnotes omitted)).

law against entities that violate rights and repress organizing; and they wield a bully pulpit.³²¹

Interest groups are able to alter public policy outcomes through engagement with all of these executive actors and administrative processes.³²² Although corporations and elites typically dominate administrative governance, when working-class and poor people are well organized, the balance can shift.³²³ In particular, there have been several key moments in American history when working and poor people's social movements secured critical policy victories through the executive branch. Although not always organizing-enabling victories, and although executive victories can be rescinded by subsequent administrations, they often become sticky by shaping public debate, creating endowment effects, and helping build support for legislative change.

2. *Successes in the Executive Branch(es)*. — Consider the Civil Rights Movement. In the late 1950s and early 1960s, amid the context of growing mass protests but still lacking the power to pass federal civil rights legislation, civil rights leaders successfully pressed first President Dwight Eisenhower, then Kennedy, and then Johnson to act.³²⁴ Eisenhower oversaw the desegregation of schools and places of public accommodation in the District of Columbia; created a committee to promote equal employment opportunities within the federal government; pursued the desegregation of the armed forces; and, most famously, dispatched federal troops to Little Rock in September 1957 in the face of Arkansas' defiance of a federal court's school integration order—all actions taken using executive power and without enacting new legislation.³²⁵

321. Bulman-Pozen & Seifter, *Democracy Principle*, supra note 218, at 915–16.

322. Susan Webb Yackee, *Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking*, 16 J. Pub. Admin. Rsch. & Theory 103, 105 (2006).

323. Gilens, supra note 1, at 157–85 (“[U]nions would appear to be among the most promising interest group bases for strengthening the policy influence of America’s poor and middle class.”); Kay Lehman Schlozman, Sidney Verba & Henry E. Brady, *The Unheavenly Chorus: Unequal Political Voice and the Broken Promise of American Democracy* 565 (2012) (explaining how unions and other organizations on the left “mobilize working-class citizens to levels above what they could have achieved based on their individual resources and motivation”).

324. Harold Fleming points out that when asked on the campaign trail about civil rights legislation, then-candidate Kennedy responded first by emphasizing executive branch action. See Harold C. Fleming, *The Federal Executive and Civil Rights 1961–1965*, *Dædalus*, Fall 1965, at 921, 921–22. Indeed, even before these high-profile wins, threats of disruption brought about executive action in the realm of civil rights. In the summer of 1941, for example, labor leader A. Philip Randolph threatened a march on Washington to protest discrimination against African Americans in employment; President Roosevelt responded with an executive order creating the Fair Employment Practices Committee (FEPC), an agency intended to help African Americans and other minorities obtain jobs in defense industries during World War II. William P. Jones, *The March on Washington: Jobs, Freedom, and the Forgotten History of Civil Rights* 35–39 (2013).

325. Fleming, supra note 324, at 924–25.

Subsequently, Kennedy and then Johnson designated high-level officials in the White House with responsibility for the advancement of civil rights and created interagency civil rights committees composed of senior departmental staff members.³²⁶ In the years leading to the passage of the 1964 Civil Rights Act and the 1965 Voting Rights Act, they also used executive orders and enforcement policy to pursue civil rights policies that were not yet winnable through legislation. For example, Kennedy issued an executive order banning discrimination in federally aided housing and directed his Attorney General, Robert Kennedy, to use the Civil Rights Division of the DOJ to aggressively enforce previously neglected voting rights laws.³²⁷ Kennedy also used procurement power, issuing an executive order mandating nondiscrimination in employment among contractors, which Johnson later strengthened.³²⁸ Nearly all of these policies ultimately were codified in the Civil Rights Acts of 1964 and 1968.³²⁹

A more recent example emerges from the area of immigration. Unable to garner sufficient legislative support to pass comprehensive immigration reform, young immigrant rights activists—termed “Dreamers”—persuaded the Obama Administration to create a policy of “deferred action” to enable undocumented immigrants brought to the United States as children to remain in the United States.³³⁰ Deferred Action for Childhood Arrivals (DACA), announced in 2012, shielded from removal hundreds of thousands of young undocumented immigrants.³³¹ President Trump subsequently attempted to rescind the program, but the

326. *Id.* at 926–28.

327. *Id.* at 928, 931. Still, the Kennedy Administration’s fair housing policies were criticized for not being as extensive as presidential authority might have allowed. Additionally, Kennedy nominated several segregationist judges to the federal bench in southern district courts effectively hampering the efforts of civil rights litigants and the DOJ. *Id.* at 930–31.

328. Exec. Order No. 11,246, 3 C.F.R. 167–77 (1965 Supp.); Exec. Order No. 10,925, 3 C.F.R. 86–91 (1961 Supp.).

329. See 42 U.S.C. §§ 2000e to 2000e–17 (2018) (prohibiting discrimination in employment); *Id.* §§ 3601–3619 (prohibiting discrimination in housing).

330. Julia Preston & John H. Cushman Jr., Obama to Permit Young Migrants to Remain in U.S., *N.Y. Times* (June 15, 2012), <https://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html> (on file with the *Columbia Law Review*); see also Cristina M. Rodríguez, Reading *Regents* and the Political Significance of Law, 2021 *Sup. Ct. Rev.* 1, 5, 16 (describing how recipients of deferred action benefits relied on them and the transformative nature that these benefits have on immigrant lives); Miriam Jordan, Worried and Frustrated, ‘Dreamers’ Say They Won’t Give Up, *N.Y. Times* (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/us/dreamers-daca-trump.html> (on file with the *Columbia Law Review*); Julia Preston, How the Dreamers Learned to Play Politics, *Politico* (Sept. 9, 2017), <https://www.politico.com/magazine/story/2017/09/09/dreamers-daca-learned-to-play-politics-215588/> [<https://perma.cc/H4FY-QPUG>].

331. See Memorandum from Janet Napolitano, Sec’y, DHS, to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., USCIS, and John Morton, Dir., ICE (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/FAG7-4U7Q>].

Supreme Court held that, although the new Administration had the legal right to do so, it failed to follow proper procedures.³³² To date, although legislative reform has not yet been achieved, the DACA administrative policies continue to benefit many individuals.³³³ They have also had a lasting impact on the political debate over the status of the Dreamers. Polls show that over seventy percent of voters support the Dream Act, which would codify the executive branch policy.³³⁴

Examples exist at the state level as well. For instance, in response to pressure from worker movements, a number of state attorneys general (AGs) are focusing on protecting workers. As of 2020, eight state AGs (in California, Illinois, Massachusetts, Michigan, Minnesota, New Jersey, New York, and Pennsylvania) and the District of Columbia had a unit or bureau specifically focused on workers' rights, often contributing their enforcement resources during organizing campaigns.³³⁵

Occasionally, social movements have been able to obtain not only public policy victories but also executive action victories that are organizing-enhancing. Perhaps the most significant example is currently underway at the NLRB. In Congress, unions have urged enactment of the PRO Act, which would amend the NLRA.³³⁶ The bill is supported by President Joseph Biden and has passed the House of Representatives,

332. See *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2021). Subsequent attempts by the Trump Administration to rescind the program similarly failed, and DACA remains in effect. In contrast, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) was deemed unlawful by the Fifth Circuit. *Texas v. United States*, 809 F.3d 134, 181–82 (5th Cir. 2015), *aff'd* by an equally divided court, *United States v. Texas*, 599 U.S. 670 (2023) (concluding that DAPA was “manifestly contrary to the INA” because it “would make 4.3 million otherwise removable” noncitizens eligible to apply for work authorization and receive other benefits).

333. The Biden Administration has sought to fortify the DACA program through a Presidential Memorandum and then notice and comment. See *Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA)*, 86 Fed. Reg. 7053, 7053 (Jan. 20, 2021).

334. Jens Manuel Krogstad, *Americans Broadly Support Legal Status for Immigrants Brought to the U.S. Illegally as Children*, Pew Rsch. Ctr. (June 17, 2020), <https://www.pewresearch.org/short-reads/2020/06/17/americans-broadly-support-legal-status-for-immigrants-brought-to-the-u-s-illegally-as-children/> [<https://perma.cc/V9QY-P2YY>]; see also Suhan Kacholia, *A Majority of Voters Support Continuing DACA Program*, Data for Progress (Oct. 25, 2022), <https://www.dataforprogress.org/blog/2022/10/25/a-majority-of-voters-support-continuing-daca-program> [<https://perma.cc/MJ8N-DEF9>]. The key point again is that this form of executive action provides a way for social-movement organizations to secure policy victories that cannot yet be obtained legislatively. It is also worth noting that, although this particular policy does not represent a comprehensive organizing-enabling regime, it does help prevent retaliation against social-movement members for their immigrant rights organizing activity, while also providing a sense of collective power and identity among the social-movement members.

335. Terri Gerstein, *Workers' Rights Protection and Enforcement by State Attorneys General*, Econ. Pol'y Inst. (Aug. 27, 2020), <https://www.epi.org/publication/state-ag-labor-rights-activities-2018-to-2020/> [<https://perma.cc/JGP3-7VUX>].

336. *Protecting the Right to Organize Act of 2021*, H.R. 842, 117th Cong. (2021).

though not the Senate.³³⁷ The PRO Act would expand the coverage of the NLRA by changing the definition of “employee” so that fewer workers are excluded as putative independent contractors.³³⁸ It would also change the definition of “employer” to allow workers to bargain with the entity that exercises power over their terms and conditions of employment.³³⁹ In addition, the bill would vastly strengthen workers’ rights to organize, picket, strike, and ultimately to reach collective bargaining agreements.³⁴⁰ For example, the PRO Act would prohibit “captive audience” meetings during which employers require employees to listen to anti-union messages as a condition of employment,³⁴¹ amend the election process by requiring swifter elections and allowing mail ballots and other forms of nonworksite voting,³⁴² enable first contract mediation and arbitration,³⁴³ allow secondary boycotts,³⁴⁴ prohibit employers’ use of permanent replacements and lock outs,³⁴⁵ and allow workers to engage in intermittent strikes.³⁴⁶ In addition, the PRO Act would increase penalties, provide for swifter remedies, and create a private right of action so workers can go directly to court when employers violate the law.³⁴⁷

There is virtually no chance the PRO Act will be enacted in the next couple of years.³⁴⁸ However, significant innovation is occurring at the administrative level to achieve many of the same policy outcomes. Under new leadership appointed by President Biden, the NLRB has been interpreting the existing statute, consistent with its original statutory purpose, in ways that make it easier for workers to organize, bargain, and strike. In a series of memoranda, the General Counsel of the NLRB has announced her intention to “vigorously protect the rights of workers to freely associate and act collectively to improve their wages and working conditions.”³⁴⁹ She has issued a roadmap outlining doctrines the agency

337. DiVito, *supra* note 20.

338. H.R. 842 § 101(b).

339. *Id.* § 101(a).

340. *Id.* § 104.

341. *Id.*

342. *Id.* § 105.

343. *Id.* § 104.

344. Why the US PRO Act Matters for the Right to Unionize: Questions and Answers, Hum. Rts. Watch (Apr. 29, 2021), <https://www.hrw.org/news/2021/04/29/why-us-pro-act-matters-right-unionize-questions-and-answers> [<https://perma.cc/Z899-7ATQ>].

345. H.R. 842 § 104.

346. *Id.* § 110.

347. *Id.* § 109(a)(2).

348. See DiVito, *supra* note 20 (“The PRO Act passed the House and was endorsed by President Biden, but failed to earn a Senate vote after Republicans threatened to filibuster.”).

349. Press Release, NLRB, General Counsel Jennifer Abruzzo Releases Memorandum Presenting Issue Priorities (Aug. 12, 2021), <https://www.nlr.gov/news-outreach/news-story/general-counsel-jennifer-abruzzo-releases-memorandum-presenting-issue> [<https://perma.cc/7W37-XQZ2>].

will reconsider. It includes reconsidering a host of rules that limit workers' organizing rights, including: the permissibility of captive audience meetings,³⁵⁰ the legality of employer handbook rules that may chill organizing activity,³⁵¹ the permissibility of confidentiality provisions,³⁵² whether employees can use email systems for organizing activity,³⁵³ the standard of proof for terminating workers for engaging in expressive union activity,³⁵⁴ rights of off-duty employees and union organizers to access employer property to engage in union activity,³⁵⁵ and whether majority support for unionization can be demonstrated through signing of cards instead of through an election.³⁵⁶ Also up for reconsideration are various doctrines that limit workers' right to engage in concerted action, including intermittent or short strikes and collective protest of sexual harassment and unsafe working conditions.³⁵⁷ In addition, the agency has announced that it is returning to a prior, more expansive, standard for who qualifies as an employee (versus an independent contractor),³⁵⁸ and it has adopted a new, more expansive, standard for who qualifies as a joint employer.³⁵⁹ Finally, it is seeking swifter remedies and stronger penalties, within statutory limits.³⁶⁰

Because the NLRA is a comprehensive statutory framework, it provides the authority for the NLRB to advance these organizing rights, even without a new statute. Yet, executive action to advance organizing rights is possible outside of this context as well. Chief executives *can* use, and have effectively used, the bully pulpit to support labor organizing. Famously, President Franklin Roosevelt urged workers to join unions in the aftermath of the passage of the NLRA, contributing to a rapid rise in

350. Memorandum from Jennifer A. Abruzzo, Gen. Couns., NLRB on the Right to Refrain From Captive Audience and Other Mandatory Meetings to All Regional Directors, Officers-in-Charge, and Resident Officers, NLRB 1 (Apr. 7, 2022) (on file with the *Columbia Law Review*).

351. Memorandum from Jennifer A. Abruzzo, Gen. Couns., NLRB on Mandatory Submissions to Advice to All Regional Directors, Officers-in-Charge, and Resident Officers, NLRB 2 (Aug. 12, 2021) (on file with the *Columbia Law Review*) [hereinafter Abruzzo, Mandatory Submissions to Advice].

352. *Id.*

353. *Id.* at 3.

354. *Id.*

355. *Id.* at 4.

356. Memorandum from Jennifer A. Abruzzo, Gen. Couns., NLRB on Guidance in Response to Inquiries About the Board's Decision in *Cemex Construction Materials Pacific, LLC* to All Regional Directors, Officers-in-Charge, and Resident Officers, NLRB 4–5 (Nov. 2, 2023) (on file with the *Columbia Law Review*).

357. Abruzzo, Mandatory Submissions to Advice, *supra* note 351, at 7–8.

358. Atlanta Opera, Inc., 372 N.L.R.B. 95, slip op. at 2 (June 13, 2023).

359. Standard for Determining Joint Employer Status, 88 Fed. Reg. 73,946, 73,956 (Oct. 27, 2023) (to be codified at 29 C.F.R. pt. 103).

360. See Memorandum from Jennifer A. Abruzzo, Gen. Couns., NLRB on Seeking Full Remedies to All Regional Directors, Officers-in-Charge, and Resident Officers, NLRB 1 (Sept. 8, 2021) (on file with the *Columbia Law Review*).

unionization rights.³⁶¹ More recently, President Biden has repeatedly extolled the virtues of unions and emphasized their importance in the economy.³⁶² In 2023, he became the first sitting U.S. President to walk a picket line.³⁶³

President Biden also convened a White House task force to consider tools that executive agencies could use “in order to reduce barriers to worker organizing and position the federal government as a model employer.”³⁶⁴ As a result of Task Force recommendations, it has become easier for federal government employees to organize, with several agencies having granted union organizers more access to federal property.³⁶⁵ According to the Administration, as a result of these actions, the number of federal government employees in a union has increased by nearly twenty percent.³⁶⁶

In addition, federal procurement policy has changed to benefit unionized companies who are responsible employers; here, the goal is to ensure strong, high-quality labor standards and efficiency in contracting. To that end, “agencies have included requirements or preferences to encourage registered apprenticeships, project labor agreements, and other measures in investments as diverse as battery materials,

361. Nelson Lichtenstein, *Workers’ Rights Are Civil Rights*, Working USA, Mar.–Apr. 1999, at 57, 59 (describing the United Mine Workers’ massive campaign to unionize the coal mines and the exhortation that “[t]he President wants you to join a union.” (internal quotation marks omitted) (quoting John L. Lewis)).

362. See Joseph Biden, President of the U.S., *State of the Union Address* (Feb. 7, 2023), in 169 Cong. Rec. S245, S260 (daily ed. Feb. 7, 2023) (“I’m so sick and tired of companies breaking the law by preventing workers from organizing. Pass the PRO Act—because workers have a right to form a union.”); Matt Viser & Tyler Pager, Biden, in *Speech to Congress, Offers Sweeping Agenda and Touts Democracy*, Wash. Post (Apr. 29, 2021), https://www.washingtonpost.com/politics/biden-speech-congress/2021/04/28/f33615aca7a2-11eb-bca5-048b2759a489_story.html (on file with the *Columbia Law Review*).

363. See Katie Rogers & Erica L. Green, *Biden Joins Autoworkers on Picket Line in Michigan*, N.Y. Times (Sept. 26, 2023), <https://www.nytimes.com/2023/09/26/us/politics/biden-uaw-strike-picket-michigan.html> (on file with the *Columbia Law Review*).

364. Press Release, *The White House Task Force on Worker Organizing and Empowerment, Update on Implementation of Approved Actions* (Mar. 17, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/17/the-white-house-task-force-on-worker-organizing-and-empowerment-update-on-implementation-of-approved-actions/> [<https://perma.cc/Q3T8-K858>] [hereinafter *Task Force on Worker Organizing*].

365. *Id.*; White House Task Force on Worker Organizing and Empowerment, *Progress to Date as of March 20, 2023*, at 33 (2023), https://www.whitehouse.gov/wp-content/uploads/2023/03/WH-Task-Force-on-Worker-Organizing-and-Empowerment_3.17-Implementation-Update_Final.pdf [<https://perma.cc/8733-GCPR>] [hereinafter *Implementation Update*] (describing how the Office of Personnel Management will remove unnecessary barriers and obstacles impeding unions from increasing bargaining units for the more than 300,000 federal workers eligible to organize but not in a bargaining unit).

366. *Task Force on Worker Organizing*, *supra* note 364.

manufacturing, broadband installation, mega-infrastructure projects, and clean buses.”³⁶⁷ Finally, the DOL will lead a coordinated initiative across the government to increase workers’ awareness of their collective bargaining rights.³⁶⁸

Executive action to advance organizing rights is possible in areas other than labor as well, often at the state level. Recently, tenant organizers have engaged state administrative agencies to act in ways that strengthen tenant organizing. Often, this takes the form of using administrative levers to obtain greater protections against eviction or rent raises, which creates space for organizing by reducing the risk of retaliation.³⁶⁹ For example, in New York, tenant groups have pressed the rent stabilization board for lower rent increases and stronger protections against eviction.³⁷⁰ They then are able to use these policies to signal the power of their organization, which helps to recruit new members to the movement and to assure tenants they face little risk of retaliation if they become involved.

At the federal level, tenant groups have pressed President Biden to issue an executive order to require federal agencies “to identify avenues for protecting tenants in federally-assisted housing and in the private rental market against unreasonable rent hikes, wrongful and unjustified evictions, denial of a lease renewal, and retaliation for organizing.”³⁷¹ They also have urged the President to “[c]onvene a cabinet-level interagency task force charged with identifying avenues for longer-term, cross-agency collaboration to regulate rents and secure other tenants’ rights, including adequate legal representation in eviction proceedings, enforceable affordability and quality housing standards, and freedom from discrimination” and that he “[p]rovide a formal avenue for federal agencies to consult with tenant stakeholders, including tenants themselves, as part of a White House Tenant Council, launching with a White House summit on rent inflation and tenant protections this fall.”³⁷² Biden responded in January 2023 by announcing a series of agency actions that will ensure greater protections for renters. This includes a “Blueprint

367. *Id.*

368. Implementation Update, *supra* note 365, at 7 (explaining how the NLRA rights notice required under Executive Order 13,496 has been refreshed and distributed to agencies); see also Exec. Order No. 13,496, 74 Fed. Reg. 6107 (Jan. 30, 2009).

369. See Andrias & Sachs, *supra* note 2, at 560, 620–22 (arguing that “the law must protect all those involved in organizing efforts from retaliation”); Richard H. Caulfield, Tenant Unions: Growth of a Vehicle for Change in Low-Income Housing, 3 U.C. Davis L. Rev. 1, 17 (1971) (noting the trend of states enacting statutes prohibiting retaliatory evictions).

370. Linda Schmidt, Low-Income Tenants Rally Against Rent Increases at NYC Rent Board Hearing, Fox5 (June 5, 2023), <https://www.fox5ny.com/news/low-income-tenants-rally-against-rent-increases-at-nyc-rent-board-hearing> [<https://perma.cc/7HQ9-X6CB>].

371. People’s Action, Federal Actions to Regulate Rents 2 (2022), https://peoplesaction.org/wp-content/uploads/2022/08/Federal-Actions-to-Regulate-Rents_V3a.pdf [<https://perma.cc/S4ZA-4QEM>].

372. *Id.*

for a Renters Bill of Rights,” that “lays out a set of principles to drive action by the federal government, state and local partners, and the private sector to strengthen tenant protections and encourage rental affordability.”³⁷³ It also includes numerous actions by agencies, such as a notice of proposed rulemaking from HUD that would require public housing authorities and owners of project-based rental assistance properties to provide at least thirty days’ advanced notice before terminating a lease due to nonpayment of rent.³⁷⁴ Once implemented, these reforms should enhance the capacity for collective action among tenants by safeguarding them against eviction and other forms of retaliation for organizing.

A second way in which administrative power has been used to support tenant organizing is through the use of enforcement discretion. Tenant groups draw attention to the misdeeds of particular landlords through protests, press coverage, social media, or by petitioning government officials. Enforcers alerted to the violations then pursue those landlords, providing a victory for the organizing efforts.³⁷⁵ The tenant organizations can use these victories to draw more participants into their movements.³⁷⁶ For example, in Minneapolis, Isuroon, a local grassroots organization advocating for Somali women, advocated on behalf of a collection of more than thirty tenants who were unfairly facing eviction.³⁷⁷ Their combined efforts gained the attention of the Minnesota Attorney General, who launched an investigation into whether the landlords violated state landlord–tenant and race discrimination laws.³⁷⁸

Finally, tenants have worked to persuade agencies to engage tenant organizations in the process of administration. Such approaches not only strengthen housing law implementation, they also give tenant groups

373. Press Release, Fact Sheet, White House, Biden–Harris Administration Announces New Actions to Protect Renters and Promote Rental Affordability (Jan. 25, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/25/fact-sheet-biden-harris-administration-announces-new-actions-to-protect-renters-and-promote-rental-affordability/> [https://perma.cc/7NZ6-WGCG].

374. *Id.*

375. See Veronica Rose, HPD Releases Request for Proposals to Find Tenant Organizing Groups for Partners in Preservation Program, *CityLand* (Mar. 29, 2023), <https://www.citylandnyc.org/hpd-releases-request-for-proposals-to-find-tenant-organizing-groups-for-partners-in-preservation-program/> [https://perma.cc/MQU4-EX4W] (describing how a Department of Housing, Preservation, and Development Partners in Preservation pilot program led to the creation of seventy-two new tenant associations).

376. See Andrias & Sachs, *supra* note 2, at 623 (describing how material victories aid organizing).

377. Katie Wermus, Minneapolis Landlord Under Investigation for Possibly Overcharging Tenants, Filing Unlawful Evictions, *Fox9* (Apr. 26, 2023), <https://www.fox9.com/news/minneapolis-landlord-under-investigation-for-possibly-overcharging-tenants-filing-unlawful-evictions> [https://perma.cc/RN2M-AJ9J].

378. Press Release, Keith Ellison, Attorney General Ellison Investigating Minneapolis Landlord that May Have Filed Dozens of Baseless Evictions (Apr. 25, 2023), https://www.ag.state.mn.us/Office/Communications/2023/04/25_GreenwayApartments.asp [https://perma.cc/Y4S4-PAGH].

more credibility and more capacity to organize. In New York City, for example, tenant organizations convinced the Housing Preservation Department (HPD) to create a program that brings together various city agencies, legal service providers, and tenant organizing groups to address landlord harassment of tenants in rent-regulated buildings.³⁷⁹ The original pilot program ran in just a few neighborhoods but was highly successful at reducing the problem of landlords harassing low-rent tenants to get them to move out so that a future tenant could be charged more. It also helped build organization among tenants. Through the program, tenant organizations canvassed 272 buildings, reaching over 3,000 units; organized seventy-two new tenant associations; held 117 tenant leadership workshops; and developed 356 new tenant leaders and floor captains.³⁸⁰ The city is now expanding the program through a Request for Proposals that specifically asks “community-based organizations with a rich history of organizing” to submit plans.³⁸¹ For each proposal selected, HPD will select an organization that will oversee the implementation of the program and work to organize tenants in that community.³⁸²

C. *Dynamic Government: From Executive to Legislative*

To be sure, executive strategies come with some significant weaknesses. They can be easily reversed by a subsequent executive. And at the federal level, administrative capacity to regulate in the public interest is very much under attack by the Supreme Court.³⁸³ Yet, even with negative court rulings, significant power remains lodged in the executive branch at both the federal and state levels. And despite the ability of elections to shift executive policy, executive action can also be sticky: It creates endowment effects that make subsequent executives loath to roll back popular initiatives, and, in any event, doing so takes an investment of scarce resources and careful adherence to procedure.

More important, as with state and local strategies, the executive strategy can be iterative and dynamic, affecting future legislative action.³⁸⁴ When a social-movement organization fails to secure organizing-enhancing legislation at the legislative branch and so switches to the

379. Partners in Preservation, N.Y.C. Hous. Pres. & Dev., <https://www.nyc.gov/site/hpd/services-and-information/partners-in-preservation.page> [https://perma.cc/8WYC-J8TJ] (last visited Jan. 17, 2024).

380. *Id.*

381. *Id.*

382. *Id.*

383. See *supra* notes 300, 308, and accompanying text.

384. Consider the example of President Roosevelt’s establishment of the FEPC, which was followed, first, by New York’s strong employment discrimination law in 1945 and then by Title VII in 1964. See generally David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943–1972*, 63 *Stan. L. Rev.* 1071 (2011) (tracing the complicated path from the FEPC to Title VII).

executive branch with success, it need not rest on any executive gains. The social-movement organization can use its executive victory to build power—to increase membership and resources. It can also use the executive branch path to bring attention to its concerns and to garner public support while experimenting with different policy approaches. Once the executive affirms rights and popular support grows, the new protections may become entrenched, making it harder for legislatures to oppose those rights.³⁸⁵ The social-movement organization can thus export that new power, popular support, and lived experience to strengthen its efforts at legislative reform.

CONCLUSION

Democracy requires political equality. And political equality requires economic equality.³⁸⁶ As has become painfully clear over the last several decades, however, the United States is suffering from crisis levels of economic inequality. This economic inequality fuels political inequality, moreover, in a mutually reinforcing cycle: As wealth concentrates into the hands of a few, the wealthy convert their economic advantage into disproportionate political influence, which they then use to increase their wealth, and on and on until democracy fades into oligarchy.³⁸⁷

Breaking this cycle is thus of the utmost concern to the survival of democracy. While campaign finance restrictions, voting rights, and other traditional approaches to the problem of representational inequality are important, they have not provided complete solutions.³⁸⁸ Critical as well is

385. See E.E. Schattschneider, *Politics, Pressures and the Tariff* 288 (1935) (providing the classic analysis that “[n]ew policies create a new politics”); Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 *Yale L.J.* 400, 430–48 (2015) (showing that public policy often has the effect of mobilizing political support for that policy); Alexander Hertel-Fernandez, *How Policymakers Can Craft Measures That Endure and Build Political Power* 3 (June 2020) (unpublished manuscript), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_How-Policymakers-Can-Craft-Measures-that-Endure-and-Build-Political-Power-Working-Paper-2020.pdf [<https://perma.cc/S8WF-TFCA>] (analyzing when policy interventions “have significant *political* effects as well, changing the relationship that Americans, social movements, grassroots organizations, and private-sector businesses have with government and creating new opportunities for future policymaking”).

386. In the words of philosopher Elizabeth Anderson, democracy requires “effective access to levels of functioning sufficient to stand as an equal in society.” See Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 *Ethics* 287, 318 (1999); see also Robert A. Dahl, *Polyarchy: Participation and Opposition* 1 (1971) (“[A] key characteristic of a democracy is the continuing responsiveness of the government to the preferences of its citizens, considered as political equals.”).

387. See generally, e.g., Jacob S. Hacker & Paul Pierson, *Let Them Eat Tweets: How the Right Rules in an Age of Extreme Inequality* (2020); Joseph E. Stiglitz, *The Price of Inequality* (2012); Jeffrey A. Winters, *Oligarchy* (2011) (explaining that concentrated wealth is both the source of power unique to oligarchy and the ultimate political motive of all oligarchs).

388. See Andrias & Sachs, *supra* note 2, at 577–78.

the ability of the poor and working class to build organizations through which they can demand for themselves a greater voice in the economy and in politics. Among the tools that might be deployed in furtherance of this power-building effort are what we have described as organizing-enabling laws: laws that facilitate the construction of countervailing power among the poor and working class.

But organizing-enabling laws will only contribute to the project of economic and political equality if those laws get enacted, and enactment of such laws is beset by the chicken-and-egg problem described above. This Essay shows three routes to resolving this chicken-and-egg dilemma: disruption, jurisdiction switching, and branch shifting. As alluded to throughout, moreover, the three approaches need not be deployed in isolation but can be part of an integrated movement toolkit. With that toolkit, law can facilitate organizing and thereby contribute to the democratic project.

APPENDIX A

City	Population ³⁸⁹	Mayor ³⁹⁰	City Council Majority
1. New York	8,335,897	Democrat	Democrat ³⁹¹
2. Los Angeles	3,822,238	Democrat	Democrat ³⁹²
3. Chicago	2,665,039	Democrat	Democrat ³⁹³
4. Houston	2,302,878	Democrat	Democrat ³⁹⁴
5. Phoenix	1,644,409	Democrat	Democrat ³⁹⁵
6. Philadelphia	1,567,258	Democrat	Democrat ³⁹⁶

389. See City Population by Sex, City and City Type, UNdata, <https://data.un.org/Data.aspx?d=POP&f=tableCode%3A240> [https://perma.cc/2PL4-GKCM] (last updated Sept. 13, 2023).

390. List of Current Mayors of the Top 100 Cities in the United States, Ballotpedia, https://ballotpedia.org/List_of_current_mayors_of_the_top_100_cities_in_the_United_States [https://perma.cc/WKG5-7FVB] (last visited Feb. 7, 2024).

391. Council Members & Districts, N.Y. City Council, <https://council.nyc.gov/districts/> [https://perma.cc/FE8U-7Y3V] (last visited Feb. 7, 2024).

392. See Jim Newton, Commentary, Decline in Political Integrity Is at the Heart of Los Angeles City Council Scandals, *Cal Matters* (June 29, 2023), <https://calmatters.org/commentary/2023/06/los-angeles-city-council-scandals/> [https://perma.cc/8NHU-TXE9] (describing how the only Republican on the L.A. city council was “convicted of obstruction and sent to prison in 2021”).

393. Chicago’s city council is not a partisan body. However, the individuals serving on the council are Democrats and other progressives. See Heather Cherone, New City Council Set to Be Most Diverse as Center of Power Moves Left, *WTTW* (Apr. 5, 2023), <https://news.wttw.com/2023/04/05/new-city-council-set-be-more-diverse-center-power-moves-left> [https://perma.cc/EP4E-YFZT] (describing the political dynamics of the Chicago City Council).

394. Houston’s city council is not a partisan body. However, conservatives are in the minority on the city council. See Rebecca Noel, Election of GOP-Endorsed City Council Candidates in Houston Joint Runoff May Shift Power Dynamics in City Hall, *Expert Says*, *Hous. Pub. Media* (Dec. 11, 2023), <https://www.houstonpublicmedia.org/articles/news/politics/elections/2023/12/11/472086/election-of-gop-endorsed-city-council-candidates-in-houston-joint-runoff-may-shift-power-dynamics-in-city-hall-expert-says/> [https://perma.cc/V2U6-AD2U] (last updated Dec. 12, 2023).

395. Phoenix’s city council is not a partisan body. But a majority of the individuals serving on the city council are Democrats. See Taylor Seely, Who Is on the Phoenix City Council? What to Know, *azcentral* (Feb. 22, 2023), <https://www.azcentral.com/story/news/local/phoenix/2023/02/22/who-is-on-the-phoenix-city-council-what-to-know/69866408007/> [https://perma.cc/CWY3-MWF8] (last updated May 16, 2023).

396. See Councilmember Katherine Gilmore Richardson, At-Large, Majority Leader, City Council Phila., <https://phlcouncil.com/KatherineGilmoreRichardson/> [https://perma.cc/D66D-ZYAP] (last visited Feb. 7, 2024).

7. San Antonio	1,472,909	Independent	Democrat ³⁹⁷
8. San Diego	1,381,162	Democrat	Democrat ³⁹⁸
9. Dallas	1,299,544	Republican	Democrat ³⁹⁹
10. Austin	974,447	Democrat	Democrat ⁴⁰⁰
11. Jacksonville	971,319	Democrat	Republican ⁴⁰¹
12. San Jose	971,233	Democrat	Democrat ⁴⁰²
13. Fort Worth	956,709	Republican	Unknown ⁴⁰³
14. Columbus	907,971	Democrat	Democrat ⁴⁰⁴
15. Charlotte	897,720	Democrat	Democrat ⁴⁰⁵

397. San Antonio's city council is not a partisan body. But a majority of the individuals serving on the city council are liberal. See Andrea Drusch, What the Midterms Tell Us About the 2023 City Council Battlegrounds to Watch, *San Antonio Rep.* (Dec. 4, 2022), <https://sanantonioreport.org/new-san-antonio-city-council-maps-partisan-breakdown/> [https://perma.cc/RJC8-XA63].

398. See David Garrick, With Tuesday's Runoffs, San Diego Democrats Will Have a 9-0 City Council Majority for the First Time, *San Diego Union Trib.* (Nov. 9, 2022), <https://www.sandiegouniontribune.com/news/politics/story/2022-11-09/democrats-san-diego-city-council-9-0-majority> [https://perma.cc/HKA9-792H].

399. Dallas's city council is not a partisan body. However, it "is made up overwhelmingly of members who identify as Democrats." J. David Goodman, Dallas Mayor Switches to G.O.P. and Attacks Democratic Leaders, *N.Y. Times* (Sept. 22, 2023), <https://www.nytimes.com/2023/09/22/us/eric-johnson-dallas-mayor-republican.html> (on file with the *Columbia Law Review*).

400. Austin's city council is not a partisan body. But a majority of the individuals serving on the city council are Democrats. See Amy Smith, Mackenzie Kelly: A Collaborative Conservative Among Democrats, *Austin Monitor* (Dec. 22, 2021), <https://www.austinmonitor.com/stories/2021/12/mackenzie-kelly-a-collaborative-conservative-among-democrats/> [https://perma.cc/3XXK-932L] (describing the political dynamics of the Austin City Council).

401. See Claire Heddles, Meet Jacksonville's New City Council, *Jax Today* (June 22, 2023), <https://jaxtoday.org/2023/06/22/meet-jacksonvilles-new-city-council/> [https://perma.cc/7R4V-BJGG].

402. San Jose City Council, Santa Clara Cnty. Democratic Party, <https://sccdp.org/index.php/voter-resources/our-elected-officials/san-jose-city-council/> [https://perma.cc/8W8E-38AB] (last visited Feb. 7, 2024).

403. Fort Worth's city council is not a partisan body. Information about the partisan affiliations of the individual members is not readily available.

404. See Bill Bush, New Nine-Member 'Residential District' Columbus City Council Looks Much the Same as the Old One, *Columbus Dispatch* (Nov. 7, 2023), <https://www.dispatch.com/story/news/local/2023/11/07/six-democrat-incumbents-3-newcomers-win-columbus-city-council-seats/71494509007/> [https://perma.cc/JU5K-PQ5L] (last updated Nov. 9, 2023) (quoting the City Council president as saying, "Columbus voters elected nine Democrats to represent our city").

405. See 11/07/2023 Official Municipal Election Results—Mecklenburg, N.C. State Bd. of Elections, https://er.ncsbe.gov/?election_dt=11/07/2023&county_id=60&office=LOC&contest=0 [https://perma.cc/TZ58-Q8YA] (last updated Nov. 17, 2023).

16. Indianapolis	880,621	Democrat	Democrat ⁴⁰⁶
17. San Francisco	808,437	Democrat	Democrat ⁴⁰⁷
18. Seattle	749,256	Democrat	Democrat ⁴⁰⁸
19. Denver	713,252	Democrat	Democrat ⁴⁰⁹
20. Washington, DC	671,803	Democrat	Democrat ⁴¹⁰

406. See Democrats Keep Supermajority on Indy’s City-County Council, Indianapolis Bus. J. (Nov. 7, 2023), <https://www.ibj.com/articles/democrats-keep-supermajority-on-indys-city-county-council> [<https://perma.cc/B5K6-G29B>].

407. San Francisco’s legislative body is called the Board of Supervisors. It is not a partisan body. But the individuals who serve on the Board of Supervisors are overwhelmingly Democrats. See Nami Sumida, We Used an Algorithm to Score S.F. Supervisors From Progressive to Moderate, S.F. Chron. (Nov. 8, 2021), <https://www.sfchronicle.com/projects/2021/supervisor-scores/> [<https://perma.cc/TZS3-D3FL>] (noting that “the board is entirely Democratic”).

408. Seattle’s city council is not a partisan body. But an overwhelming majority of individuals who serve on the city council are Democrats. See Sarah Grace Taylor, Harrell, Nelson Celebrate as Results Suggest Moderate Seattle City Council, Seattle Times (Nov. 14, 2023), <https://www.seattletimes.com/seattle-news/politics/tuesday-count-keeps-seattle-council-races-close-though-few-ballots-remain/> [<https://perma.cc/NR8Y-Z6CM>] (predicting that “six moderate Democrats and two so-called progressives” will “take office in January” based on election results).

409. Denver’s city council is not a partisan body. But an overwhelming majority of the individuals who serve on the city council are Democrats. See Rebecca Tauber, What We Know About How the Next Denver City Council Will Look and Work—And How it Could Be Different, Denverite (Apr. 6, 2023), <https://denverite.com/2023/04/06/denver-election-results-denver-city-council/> [<https://perma.cc/3WRL-79H3>].

410. The District of Columbia’s city council is a partisan body. Ten members are Democrats and two are independents. See The D.C. City Council, Ctr. for Youth Pol. Participation (2023), <https://cyp.p.rutgers.edu/d-c/> [<https://perma.cc/8K8H-A9F6>].

BOOK REVIEW

THE FORESHADOW DOCKET

Philosophical Foundations of Precedent

Edited by Timothy Endicott, Hafsteinn Dan Kristjánsson & Sebastian Lewis. New York: Oxford University Press, 2023. Pp. 576. \$180.00.

*Bert I. Huang**

Imagine the Supreme Court issuing an emergency order that signals interest in departing from precedent, as if foreshadowing a change in the law. Seeing this, should the lower courts start ruling in ways that also anticipate the law of the future? They need not do so in their merits rulings. That much is clear. Such a signal does not create new binding precedent. Rather, it reflects the Justices' guess about the future of the law—and what if that guess is wrong?

Yet for a lower court ruling on a temporary stay or injunction, the task seems to call for a guess about a future decision and hence a future state of the law. And if the Justices have already made such a guess in a parallel case, doesn't the lower court have the answer it needs?

Not necessarily, this analysis shows. It looks closely at the architecture of stays and injunctions in the federal courts, while drawing upon ideas presented in a rich new compilation of essays, Philosophical Foundations of Precedent. Intriguing questions for theory arise, in turn. For instance, should an earlier judicial guess ever be deemed binding on a later guess? That would not be stare decisis, of course—but could there be such a thing as stare divinitis?

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INTRODUCTION

Imagine for a moment:

Scenario 1. A controversial case is moving through the federal courts toward possible review by the U.S. Supreme Court. Along the way, a lower court issues a preliminary injunction that is well grounded in existing precedent. The Supreme Court issues an emergency order staying that injunction, offering a brief explanation signaling that it might soon change the law. A year later, the Supreme Court grants certiorari and, in its eventual decision on the merits, does in fact overrule prior precedent.

Scenario 2. Same story. But contrary to the signal in its earlier emergency order, the Supreme Court’s decision on the merits actually reaffirms prior precedent.

Scenario 3. Same story. But the case never gets as far as a merits decision from the Supreme Court.

Now imagine the tricky questions faced by a lower court judge presiding over a parallel case. During that interim when the Supreme Court is signaling some interest in changing the law but has not yet done so through a decision on the merits,¹ what should this judge do? Should the Supreme Court's emergency order be viewed as a sort of binding precedent? If not, does it carry information that the judge should still be expected to consider?

The difficulty is that this judge does not know how the story of the other case will end. What if the judge's ruling is influenced by the Supreme Court's signal—but then the Court's merits decision goes the other way (Scenario 2)?² That is, what if the signal turns out to be wrong? Or what if

1. Consider Justice Elena Kagan's observation, joined by Justice Stephen Breyer and Justice Sonia Sotomayor, about the Supreme Court's emergency order in the recent Alabama redistricting case, *Merrill v. Milligan*:

Today's decision is one more in a disconcertingly long line of cases in which this Court uses its shadow docket to signal or make changes in the law, without anything approaching full briefing and argument. Here, the District Court applied established legal principles to an extensive evidentiary record. Its reasoning was careful—indeed, exhaustive—and justified in every respect. To reverse that decision requires upsetting the way Section 2 plaintiffs have for decades—and in line with our caselaw—proved vote-dilution claims. That is a serious matter, which cannot properly occur without thorough consideration. Yet today the Court skips that step, staying the District Court's order based on the untested and unexplained view that the law needs to change.

142 S. Ct. 879, 889 (2022) (Kagan, J., dissenting from grant of applications for stays). The concurrence by Justice Brett Kavanaugh, joined by Justice Samuel Alito, disavows signaling about the merits; however, it does address the merits-related "fair prospect" standard for relief. See *id.* at 881–82 & n.2 (Kavanaugh, J., concurring in grant of applications for stays) ("Even under the ordinary stay standard outside the election context, the State has at least a fair prospect of success on appeal—as do the plaintiffs, for that matter."). Reading the signal in this order is complicated further by the apparent role of the *Purcell* principle and uncertainty about how it works. See *id.* at 880–82; *Purcell v. Gonzalez*, 549 U.S. 1, 4–6 (2006). In its eventual merits ruling, the Supreme Court upheld the lower court injunction that its emergency order had earlier blocked. See *Allen v. Milligan*, 143 S. Ct. 1487, 1502 (2023).

2. See, e.g., Amy Howe, Divided Court Allows Biden to End Trump's "Remain in Mexico" Asylum Policy, SCOTUSblog (June 30, 2022), <https://www.scotusblog.com/2022/06/divided-court-allows-biden-to-end-trumps-remain-in-mexico-asylum-policy/> [https://perma.cc/543J-SARG] (describing a "major victory" for the government in a Supreme Court merits ruling in *Biden v. Texas*, one of the cases about the controversial Migrant Protection Protocol, after an earlier emergency ruling against the government); Amy Howe, Texas and Louisiana Lack Right to Challenge Biden Immigration Policy, Court Rules, SCOTUSblog (June 23, 2023), <https://www.scotusblog.com/2023/06/texas-and-louisiana-lack-right-to-challenge-biden-immigration-policy-court-rules/> [https://perma.cc/3V56-HKUB] (describing another "major victory" for the government in a Supreme Court merits ruling in *United States v. Texas*, an immigration policy case about prioritization, after an earlier emergency ruling against the government); see also Steve Vladeck, Emergency Applications and the Merits, One First (June 12, 2023), <https://stevevladeck.substack.com/p/31-emergency-applications-and-the> [https://perma.cc/V9L7-P6Q9] (discussing these examples as among "the meaningful (and growing) number of recent examples of cases in which the justices' ruling at the emergency application stage did not presage their ruling on the merits" (emphasis omitted)).

the accuracy of the signal is never revealed (Scenario 3)?³ Given these possibilities, should the judge just decide the case without regard to the signal?

The problem facing this judge brings new twists into our usual ways of thinking about Supreme Court precedent. It introduces a curious sort of judicial utterance, a guess about the future of the law—and yet a guess that cannot be dismissed as dicta, for it underpins an actual ruling. It also highlights a liminal moment in judicial time, an interim period during which the terrain of existing precedent has been unsettled—and yet no new precedent has been laid down.

Fresh thinking about precedent would be most welcome in untangling this knotty problem, and indeed a new resource is at hand. A rich and wide-ranging volume of forty essays, *Philosophical Foundations of Precedent*, has now been collected by Professors Timothy Endicott, Hafsteinn Dan Kristjánsson, and Sebastian Lewis.⁴ Such a vast compilation defies a conventional book review. But what better way to honor the innovative spirit of these essays than to see how their insights fare in addressing a strange new phenomenon?

Our judge's problem is illuminated, first off, by Professor Nina Varsava's provocative book chapter.⁵ Her argument begins with Professor Ronald Dworkin's metaphor of the common law as a chain novel written by multiple authors in sequence, all of whom are trying to craft a coherent narrative. Her conceptually powerful point is that in serving this aim each author "should consider not only what has already been written before their turn to contribute but also what will be or is likely to be written subsequently."⁶ And in particular, an author who can already foresee a turn in the plot may wish to "foreshadow" it, thereby smoothing the path to those future chapters.⁷

3. See, e.g., Amy Howe, Court Dismisses Title 42 Case, SCOTUSblog (May 18, 2023), <https://www.scotusblog.com/2023/05/court-dismisses-title-42-case/> [https://perma.cc/AN3J-PE38] (noting the Supreme Court's dismissal of an immigration policy case as moot after having granted an emergency stay and set an expedited schedule for briefing and argument); Amy Howe, Justices Take Immigration Cases Off February Calendar, SCOTUSblog (Feb. 3, 2021), <https://www.scotusblog.com/2021/02/justices-take-immigration-cases-off-february-calendar/> [https://perma.cc/G5H8-QZ25] (noting mootness and dismissal of a different immigration policy case concerning the so-called "Remain in Mexico" asylum program).

4. *Philosophical Foundations of Precedent* (Timothy Endicott, Hafsteinn Dan Kristjánsson & Sebastian Lewis eds., 2023). The book is fondly dedicated to the memory of Professor Joseph Raz.

5. Nina Varsava, The Gravitational Force of Future Decisions, *in* *Philosophical Foundations of Precedent*, supra note 4, at 281, 286–87.

6. *Id.* The reason is that authors "ought to view their own contribution in the context of the novel as a whole, and not only in the context of the novel so far." *Id.*

7. As Professor Varsava puts it, vividly: "[S]uppose further that you know that your successor novelists have bleeding hearts and will ultimately seek to redeem Scrooge regardless of the content of your section. That reality ought to inform your contribution.

When the Supreme Court issues an emergency order that signals some interest in departing from precedent,⁸ as if preparing the public for legal change, we might say it is thus “foreshadowing” the possible future of the law. We might even call the set of such rulings the Supreme Court’s “foreshadow docket.”⁹

Upon noticing such foreshadowing by the high court, shouldn’t our lower court judge start ruling in ways that also anticipate the expected turn in the plot?¹⁰ A ready counterpoint is found in Professor Richard Fallon’s book chapter. Elaborating on Professor H.L.A. Hart’s notions of “rules of recognition” and “rules of change,” his chapter urges careful attention to how such rules differ across the layers of a judicial hierarchy.¹¹ At the Supreme Court, he observes, a present belief that prior precedent was wrongly decided implies a permission to either adhere to the precedent or else to change it. But such an option is the sole province of the Supreme Court. By contrast, “the rule in the lower courts is settled and categorical: lower courts must adhere to the Supreme Court’s . . . [precedents], however demonstrably erroneous they may be, until the Court reverses

Perhaps you should foreshadow Scrooge’s redemption—as in fact early sections of *A Christmas Carol* do . . .” *Id.* (citing Charles Dickens, *The Illustrated Christmas Carol* 32 (200th anniv. ed., SeaWolf Press 2020) (1843)). She continues: “In so doing, you would construct a sort of bridge between the cold, miserly, and mean Scrooge we see in the first pages of the novella and the warm, generous, and kind Scrooge that you predict we will see by the end.” *Id.*

8. As with preliminary injunctions or stays pending appeal ordered by the lower courts, the Supreme Court’s emergency orders are a form of temporary relief that sets a holding pattern for the parties as litigation continues. The standards for such relief, though varied, all call upon the issuing court to guess at the requesting party’s eventual chances of success on the merits, which in turn would seem to entail predicting what the governing law will be at the time of that future merits ruling. For examples of such standards for relief, see *infra* note 105.

9. Many emergency rulings from the Supreme Court do not signal any future change in the law, and the present analysis is not concerned with those. Emergency rulings such as stays and temporary injunctions are a subset of a much broader range of orders and rulings by the Supreme Court that do not undergo the standard merits process wherein cases are granted certiorari, briefed and orally argued, and decided in full-dress opinions disclosing the votes and views of individual Justices. For canonical commentary, see generally Stephen Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (2023) [hereinafter Vladeck, *Shadow Docket*]; William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 *N.Y.U. J.L. & Liberty* 1 (2015).

10. Varsava, *supra* note 5, at 292 (“A higher court might decide some type of case in a particular way in the future regardless of how lower courts decide similar cases today. For the sake of equity, then, lower courts ought to predict and follow the higher court’s future decisions.”).

11. See Richard H. Fallon, Jr., *Constitutionally Erroneous Precedent as a Window on Judicial Law-Making in the US Legal System*, in *Philosophical Foundations of Precedent*, *supra* note 4, at 405, 406–17, 413 (“The discontinuity between the Supreme Court and lower courts illustrates the need . . . for a friendly amendment to Hart’s account of the rule of recognition: it should be emphasized that different officials, including the judges of different courts, can be subject to different rules of recognition.”). To be clear, Professor Fallon’s and Professor Varsava’s chapters are presented in the book as independent contributions, not as responses to each other.

those decisions.”¹² As the chapter emphasizes, the Supreme Court has said to the lower courts: Don’t get out ahead of us.¹³

Now we start to see more clearly the conundrum that our judge faces. What would it mean to look ahead to the future, guided by the Supreme Court’s foreshadowing, if the judge’s rulings must also remain firmly rooted in the past?¹⁴

We can begin by eliminating the quickest way out of this dilemma, which would be to assume that such an emergency ruling does not merely foreshadow a future change in the law, but rather *is* a change in the law, creating new binding precedent in the conventional sense. This view seems untenable under the law of precedent,¹⁵ and Part I works through

12. *Id.* at 412. For further elaboration of the permissive and prohibitory aspects of precedent, see generally Richard M. Re, *Precedent as Permission*, 99 *Tex. L. Rev.* 907 (2021).

13. See, e.g., *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (*per curiam*) (chastising the lower court for partial implicit overruling and reiterating that “[i]t is this Court’s prerogative alone to overrule one of its precedents” (internal quotation marks omitted) (quoting *United States v. Hatter*, 532 U.S. 557, 567 (2001))); *Am. Tradition P’ship v. Bullock*, 565 U.S. 1187, 1188 (2012) (Ginsburg, J., respecting grant of application for stay) (“Because lower courts are bound to follow this Court’s decision until they are withdrawn or modified, however, I vote to grant the stay.” (citation omitted)); *Hohn v. United States*, 524 U.S. 236, 252–53 (1998) (“Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.”); *Agostini v. Felton*, 521 U.S. 203, 237–38 (1997) (“We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. . . . [The trial court was] correct to recognize that the motion had to be denied unless and until this Court reinterpreted the binding precedent.”); *Rodriguez de Quijas v. Shearson*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”).

14. Professor Lawrence Solum has argued: “Predictions about what the Supreme Court will do are not law and deciding on the basis of such prediction is improper. The shadow docket, by encouraging this predictive approach, has resulted in a serious breach of judicial duty by the lower courts.” Mike Fox, *Supreme Court Shadow Docket Leaves Reasoning in the Dark*, *Professors Say*, *Univ. Va. L. Sch.* (Sept. 22, 2021), <https://www.law.virginia.edu/news/202109/supreme-court-shadow-docket-leaves-reasoning-dark-professors-say> [<https://perma.cc/MYR9-6A25>] (quoting Professor Solum). Other scholars, however, have suggested that it may be permissible or even useful—for example, in resolving novel questions or ambiguities—for lower courts to rule in alignment with certain signals from the Justices when doing so does not overrule or depart from existing Supreme Court precedent. See, e.g., Richard M. Re, *Narrowing Supreme Court Precedent From Below*, 104 *Geo. L.J.* 921, 943–45, 950 (2016) [hereinafter *Re, Narrowing Precedent*] (proposing a “signals model” in which lower courts attend to signals that come from a majority of the Supreme Court and are reasonably consistent with conventional precedent, including stay decisions and other preliminary rulings).

15. See *infra* Part I. As of now, there seems to be no Supreme Court decision fully addressing this question, though lately a number of Justices have issued statements emphasizing that emergency rulings are not decisions on the merits and indicating an aversion to even allowing “previews” of the merits through emergency rulings. See *infra* notes 41, 64. In the voice of the Court, there seems to be only one brief reference to stay denials. *Ind. State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 960 (2009) (*per curiam*) (“A denial of a stay is not a decision on the merits of the underlying legal issues.”).

why, focusing on the contrast between emergency rulings and certiorari review: The very purpose of an emergency stay or injunction is to set a temporary holding pattern for the parties so that the contested legal question need not be settled right away.¹⁶ Such a ruling turns upon law-prediction rather than law-declaration, and this guess can be modified at any time by the issuing court. It is no more “the law” than a draft opinion would be.¹⁷ Indeed, every emergency ruling anticipates its own erasure.

Even in the absence of stare decisis effect, however, do any lower court decisions nonetheless entail taking note of the Supreme Court’s foreshadowing?¹⁸ It turns out that for particular stays and injunctions, the lower court’s task seems to require predicting its own future merits ruling—and hence guessing at a future state of the law. If the Justices have also expressed such a guess in an emergency ruling in a parallel case, must not this lower court take heed? Not necessarily, as Part II details—not unless the lower court expects that by the time of its own merits ruling, the Justices will already have changed the law through a merits ruling of their own.¹⁹ Even then, a simpler judicial approach that avoids any such guesswork may be available to the lower court.²⁰

16. One potential source of confusion should be cleared up at the outset: Sometimes a higher court will exercise appellate review over a preliminary injunction or a stay by a lower court and, in doing so, choose to settle the contested question of law (even when reviewing for abuse of discretion rather than *de novo*). See *infra* note 25. That is *not* the same thing as the higher court deciding whether to issue a stay or temporary injunction itself, though at times these functions will coincide.

17. Accordingly, Part I also argues that the Justices should make amply clear that if they ever wished to lay down binding precedent through a case arising in an emergency posture, they would do so by granting certiorari (possibly certiorari before judgment, as recently seen) and setting the case for briefing and oral argument (possibly on an expedited schedule). See *infra* section I.B.

18. The present analysis is limited to whether taking heed of the foreshadowing in the Supreme Court’s emergency rulings is arguably *required* by the task at hand for the lower court. It does not address whether lower courts *should* do so, as a matter of prudence or good judging, even when doing so is not required. It also does not address other sorts of signals, such as questions asked at oral argument, speeches by the Justices, and the like. For a rich discussion of whether lower courts can and should attend to this broader range of signals, see *Re, Narrowing Precedent*, *supra* note 14, at 943–45, 950. For empirical research about lower courts following certain kinds of signals, see, e.g., Thomas B. Bennett, Barry Friedman, Andrew D. Martin & Susan Navarro Smelcer, *Divide & Concur: Separate Opinions & Legal Change*, 103 *Cornell L. Rev.* 817, 820–22 (2018) (showing that lower courts often give weight to a category of concurrences that should not be seen as controlling opinions); David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 *Wm. & Mary L. Rev.* 2021, 2041 (2013) (showing that lower courts give great weight to dicta in higher court opinions).

19. As Part II observes, a second, distinct situation in which the lower court may need to take heed of the Supreme Court’s signal is in ruling on a stay *pending certiorari* (as opposed to pending appeal). Note that initial consideration by a lower court is typically required before the Supreme Court itself will consider a request for emergency relief pending certiorari. See *Sup. Ct. R.* 23 (“Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof.”).

20. See *infra* section II.B.4.

The informational value of the Supreme Court's signal, in any event, is capped by a basic constraint: An earlier judicial guess made at a lower threshold of confidence does not supply the answer for a later guess (on the same question) that requires a higher threshold of confidence. This limitation matters because stays and temporary injunctions throughout the judiciary are governed by standards for relief that set varying thresholds of confidence (such as "fair prospect") for the guesswork required.²¹

The role of confidence thresholds and the possibility of mistaken guesses remain novelties in the theoretical study of precedent, which has yet to focus much attention on judicial utterances that are guesses rather than declarations of law. Part III ventures into this inquiry, asking: What would it mean to deem one court's guess about the future of the law to be "binding" on another court's guess? That would not be *stare decisis*, of course. No new law is *decisis* yet—only *divinatis*. But could there be such a thing as *stare divinatis*? How would it work? And when, if ever, would it be needed?

The practical dilemma faced by our judge thus presents an occasion to think afresh on foundational questions about precedent. For a theorist of precedent, the foreshadow docket must seem like a bizarre thought experiment come to life. Theory has something new here to ponder and may well have something new to learn.

I. AN EMERGENCY RULING IS NOT BINDING PRECEDENT

Are the Supreme Court's emergency stays and injunctions considered binding precedent for the lower courts in the usual sense? That is, do they settle a contested question of law, with the full force of *stare decisis*? According to a singularly authoritative treatise on the law of precedent—one with many state and federal judges among its authors (two of whom are now Justices)—such a preliminary ruling does not even create law of the case, never mind creating law for any other cases.²² Thus the answer seems to be a simple "no."²³

21. See *infra* section III.A. For examples of such standards for relief, see *infra* note 105. As of now, however, the meanings of these standards in practice seem to be highly fluid and inconsistent—making it hard to know whether an earlier court's guess was made at a higher or lower threshold of confidence than is required for a later court's guess. See *infra* notes 105–107, 110.

22. Bryan A. Garner, Carlos Bea, Rebecca White Berch, Neil M. Gorsuch, Harris L. Hartz, Nathan L. Hecht, Brett M. Kavanaugh, Alex Kozinski, Sandra L. Lynch, William H. Pryor, Jr., Thomas M. Reavley, Jeffrey S. Sutton & Diane P. Wood, *The Law of Judicial Precedent* 230–32 (2016); see also Adam Liptak, *Alito Responds to Critics of the Supreme Court's 'Shadow Docket'*, *N.Y. Times* (Sept. 30, 2021), <https://www.nytimes.com/2021/09/30/us/politics/alito-shadow-docket-scotus.html> (on file with the *Columbia Law Review*) (last updated Oct. 4, 2021) (noting that, in a speech, Justice Alito denied that emergency rulings have precedential value about questions of law).

23. In practice, even judges who choose in a given ruling to follow the Supreme Court's signal will sometimes offer a disclaimer that it is not because they are conflating the signal

Because the reasons for this answer are rarely worked out in detail, however, this Part devotes some space to doing so.²⁴ Some spelling out is useful because the contrary view may also be very appealing, grounded in this intuition: If the Supreme Court says something that matters for a decision, don't those utterances become the law?

This Part responds by focusing on how emergency rulings differ from certiorari review at the Supreme Court.²⁵ The point of an emergency ruling is to set a temporary holding pattern so that the contested question of law can be sorted out later, not right now.²⁶ Hence its nonfinality²⁷—the emergency ruling can be revised or withdrawn at any time, without anyone calling that an “overruling.” And it comes with a limited shelf life, anticipating its own expiration.²⁸

Altogether, then: A temporary, revisable guess about the future state of the law is all that has been necessarily decided in an emergency ruling.²⁹

with binding precedent. See, e.g., *CASA de Md., Inc. v. Trump*, 971 F.3d 220, 230 (4th Cir. 2020) (Wilkinson, J.) (“We may of course have the technical authority to hold that, notwithstanding the Supreme Court’s view, the plaintiffs are likely after all to succeed on the merits of their challenge. But every maxim of prudence suggests that we should decline to take [that] aggressive step”); *Navy SEAL 1 v. Austin*, 600 F. Supp. 3d 1, 8 (D.D.C. 2022) (Kollar-Kotelly, J.) (“[A] majority of the Supreme Court has already held (in a nonbinding, shadow docket decision), that the Government is likely to succeed on the merits [in a parallel case] Although this decision is nonbinding, it is the most persuasive authority on which a District Court may rely.”).

24. To be fair, explanatory commentary may be sparse because, to some, the conclusion seems obvious. See, e.g., Lisa Schultz Bressman, *The Rise and Fall of the Self-Regulatory Court*, 101 *Tex. L. Rev.* 1, 56 (2022) (“Treating shadow docket orders as precedential, and expecting lower courts to do so as well, compounds the effect of circumventing the merits process and the Court’s rules governing it. It also makes no sense.”).

25. The key distinction here is the posture of the Supreme Court’s ruling, not the lower court’s ruling. A higher court can exercise appellate review over a preliminary injunction or a stay by a lower court and, in doing so, choose to issue a merits ruling settling the contested question of law. See, e.g., *Munaf v. Geren*, 553 U.S. 674, 691 (2008) (“Adjudication of the merits is most appropriate [on appellate review of a preliminary injunction] if the injunction rests on a question of law and it is plain that the plaintiff cannot prevail.”).

26. For statements from the Justices to this effect, see *infra* notes 31, 41. For a lower-court example, see *Cook County v. Wolf*, 962 F.3d 208, 233–34 (7th Cir. 2020) (Wood, C.J.) (“The Court’s stay decision was not a merits ruling. . . . There would be no point in the merits stage if an issuance of a stay must be understood as a *sub silentio* disposition of the underlying dispute.”).

27. See *Garner et al.*, *supra* note 22, at 231 (explaining that “interlocutory orders may be reconsidered and modified”).

28. *Id.* at 230 (stating that nonfinal decisions are “by . . . nature interlocutory, tentative, and impermanent” (alteration in original) (internal quotation marks omitted) (quoting *Madison Square Garden Boxing, Inc. v. Shavers*, 562 F.2d 141, 144 (2d Cir. 1977))). If the case settles or otherwise disappears, so does any emergency stay or injunction.

29. See Thomas P. Schmidt, *Orders Without Law*, 122 *Mich. L. Rev.* (forthcoming 2024) (manuscript at 20), <https://ssrn.com/abstract=4630015> [<https://perma.cc/853S-MK86>] (“Any such statement is an equitable prediction that will govern the legal status of the parties while a case is pending and nothing more.”).

Moreover, that guess is made only to meet a confidence threshold set by the standard for relief. Thus, the lower courts should view any statements accompanying the ruling in this limited light. All this is quite the opposite of a typical merits ruling on certiorari review, in which a “question presented” has been taken up because the time and occasion are right for trying to settle that question for good.

But is this nonprecedential status merely a presumption that can be overridden? After reviewing some experimentation by the Supreme Court in recent years, this Part concludes that the proper way to indicate stare decisis effect is to grant certiorari and bring the case within both the posture and the process of full appellate review.

A. *It Is a Guess About the Law of the Future*

When deciding an emergency application, the Justices’ inner monologue should go something like this: *We are not faced with deciding this legal question yet, and maybe we’ll never get to it. But if we’re likely to take up this case later, here is a guess at what we might say when the case comes back. Informed both by this guess and by the equities of the moment, we will now set an interim holding pattern for the parties.*³⁰ By its very nature, such a guess is just good enough for setting that temporary holding pattern, which is all that’s at stake until a proper merits ruling takes over.³¹

1. *The Opposite of Final.* — As with any federal court’s preliminary injunctions or stays,³² the Supreme Court can modify or dissolve its own order at any point while the case works its way toward certiorari.³³ It would be most unusual for someone to say that in altering its own emergency stay

30. This thought process reflects the typical articulations of the standards for emergency relief at the Supreme Court. For example, the Court stated the standard for a stay pending certiorari in *Hollingsworth v. Perry* as requiring

(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent.

558 U.S. 183, 190 (2010). For a temporary injunction pending certiorari, the “applicant must demonstrate that ‘the legal rights at issue are “indisputably clear.”” *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (quoting *Turner Broadcasting Sys., Inc. v. Fed. Comm’n’s Comm’n*, 507 U.S. 1301, 1303 (1993) (Rehnquist, C.J., in chambers)).

31. See, e.g., *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring in grant of applications for stays) (“The stay order is not a ruling on the merits, but instead simply stays the District Court’s injunction *pending a ruling on the merits.*”).

32. See John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 *Harv. L. Rev.* 525, 541 (1978) (“[T]he court’s interlocutory assessment of the parties’ underlying rights is fallible in the sense that it may be different from the decision that ultimately will be reached.”).

33. For insightful scholarship on the mechanics, purpose, and history of stays, see generally Rachel Bayefsky, *Administrative Stays: Power and Procedure*, 97 *Notre Dame L. Rev.* 1941 (2022); Portia Pedro, *Stays*, 106 *Calif. L. Rev.* 869 (2018).

or injunction, the Supreme Court is thereby “overruling precedent.”³⁴ This makes perfect sense. A guess about the future is, by its very nature, unstable.³⁵ Consider: For those cases in which the foreshadowing turns out to be wrong, whatever the Justices were guessing about the merits ruling must have changed somewhere along the way.

Contrast this with the finality of a merits ruling on full appellate review, which at the Supreme Court normally occurs through a certiorari process that includes briefing and oral argument. This process also specifies at least one carefully vetted question of law (a “question presented”) that the Court has curated with the intention to answer for good.³⁶ The resulting answer is a durable one, fixed as law of the case within the litigation—and beyond the present case, of course, sustained by the doctrine of stare decisis.

It is possible for an emergency ruling of the Supreme Court to become its last word on the issue, but this should not be conflated with finality. Such a ruling is usually made not only before any of the briefing, argument, and opinion-writing that attends the Supreme Court’s merits review, but even before certiorari.³⁷ It remains preliminary even if the case

34. Saying so would sound just as strange if the Supreme Court were to reach a merits result that does not match its earlier guess in that same case, or if it were to guess differently in a later emergency ruling in another case.

35. As Justice Alito put it, “[A]s is almost always the case when we decide whether to grant emergency relief, I do not rule out the possibility that further briefing and argument might convince me that my current view is unfounded.” *Ritter v. Migliori*, 142 S. Ct. 1824, 1824 (2022) (Alito, J., dissenting from denial of application for stay).

36. It is true that the Justices may end up dropping that “question presented” and decide on other grounds. See Bert I. Huang, *A Court of Two Minds*, 122 *Colum. L. Rev. Forum* 90 (2022), https://columbialawreview.org/wp-content/uploads/2022/05/Huang-A_Court_Of_Two_Minds.pdf [<https://perma.cc/V28M-WGVC>] [hereinafter Huang, *A Court of Two Minds*] (describing ways for the Justices to avoid answering a “question presented”). But that is rare. The general expectation remains that the curated question will be answered for good—that is, subject to overruling only when the force of stare decisis is overcome for good reason.

37. Several Justices have recently emphasized that ruling on emergency relief involves predicting whether the Supreme Court will likely grant certiorari. In a pandemic-related case, Justice Amy Coney Barrett, joined by Justice Kavanaugh, explained:

When this Court is asked to grant extraordinary relief, it considers, among other things, whether the applicant “is likely to succeed on the merits.” I understand this factor to encompass not only an assessment of the underlying merits but also a discretionary judgment about whether the Court should grant review in the case. Were the standard otherwise, applicants could use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take—and to do so on a short fuse without benefit of full briefing and oral argument.

Does 1–3 v. Mills, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in denial of application for injunctive relief) (citations omitted) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). Justice Kavanaugh, joined by Justice Barrett, later elaborated that relief might therefore be denied if the case turned out to be a bad vehicle for deciding the question presented and hence not certworthy. *Griffin v. HM Florida-ORL, LLC*, 144 S. Ct. 1, 2 (2023) (Kavanaugh, J., respecting denial of application for stay). Likewise, Justice Alito, joined by Justices

never gets as far as a grant of certiorari. An emergency ruling does not morph into a merits ruling just because the case disappeared.

As a benchmark, consider that even *after* the Supreme Court grants certiorari, the operative law in lower courts remains unchanged until the merits decision comes down months later. If a granted case disappears—say, due to mootness—nothing is considered to have changed in the law.³⁸ Any circuit split remains as it was. Any cases held in abeyance carry on as if nothing happened.

One does not say, on the day after the Supreme Court holds oral argument in the case, that the law of the land has already changed. And think about the leak of the *Dobbs* draft, after which there was still hope in some quarters that at least one vote might yet switch.³⁹ Even after a draft opinion is circulated, with at least five Justices tentatively signing on, the law is not said to have changed. The effective date of a future ruling does not start when a prediction about it is deemed to be accurate enough.

2. *Not “Law for Now.”*— Yet, one might respond, an emergency order differs from other signals in that it is an actual ruling. Even if such a ruling has a short shelf life and can be altered at any time without anyone sensibly calling that an “overruling,” why not have the lower courts view it as declaring a sort of interim law?

Such a characterization might sound odd. But recall Professor Varsava’s proposal of a Dworkinian obligation to bridge the law of the past with the law of the future.⁴⁰ In such a model, isn’t the law of the present always serving as a kind of interim law, and properly so? One might further suggest that this is an especially useful notion when an emergency ruling seems to be smoothing the path toward an anticipated future state of the world.

The answer is that setting a “status quo for now” during litigation does not entail laying down any “law for now.” To the contrary, the emergency ruling, by setting an equitable holding pattern informed by law-prediction, obviates the need for actual law-declaration—for now.⁴¹

Clarence Thomas and Neil Gorsuch, observed straightforwardly that “[a] stay pending certiorari is appropriate only if the Court is likely to grant review.” *Ritter*, 142 S. Ct. at 1824 (Alito, J., dissenting from denial of application for stay).

38. Likewise, if the Court ends up evenly divided in a 4-4 vote, or if it chooses not to answer the question of law for whatever reason, the law is considered unchanged.

39. This is not to ignore the realities on the ground, as lawmakers and the public began to prepare for a post-*Dobbs* world. For scholarship about the effects of such anticipation, which began well before the leak of the draft, see *infra* note 115. For coverage of the leak, see generally Jodi Kantor & Adam Liptak, *Behind the Scenes at the Dismantling of Roe v. Wade*, N.Y. Times (Dec. 15, 2023) (on file with the *Columbia Law Review*).

40. Varsava, *supra* note 5, at 285–90.

41. As Justice Kavanaugh, writing about the grant of stays in *Milligan*, emphasized:

The stay will allow this Court to decide the merits in an orderly fashion—after full briefing, oral argument, and our usual extensive internal deliberations—and ensure that we do *not* have to decide the merits on the

3. *More Like a Rough Draft.* — Nevertheless, one might insist, isn't an emergency ruling still an utterance from the high court? Whether it takes up five words or five pages, shouldn't it be seen as authoritative by lower courts within a judicial hierarchy?⁴² Even Supreme Court dicta sometimes weighs heavily on the lower courts,⁴³ and this utterance may deserve greater weight than dicta.

These are worthy points to consider, although they speak more to the informative value of such a ruling for lower courts making similar *guesses*, which is the subject of Parts II and III. This Part addresses only the narrower question of whether such utterances should be considered binding precedent that settles the contested question of law.⁴⁴

emergency docket. To reiterate: The Court's stay order is not a decision on the merits.

Merrill v. Milligan, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring in grant of applications for stays); see also, e.g., *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 72 (2020) (Kavanaugh, J., concurring in grant of application for injunctive relief) ("Importantly, the Court's orders today are not final decisions on the merits. Instead, the Court simply grants *temporary* injunctive relief until the Court of Appeals in December, and then this Court as appropriate, can more fully consider the merits.").

42. The most thorough articulation of such a position comes from Judge Trevor McFadden and Vetan Kapoor, who in sum propose the following:

When the full Supreme Court grants a stay application, lower courts should accord that decision great weight, unless there is compelling reason not to do so. This is true even if the stay grant features little legal reasoning, and may well be true even when there is no reasoning. Of course, any discussion of the merits of a question increases the confidence with which a lower court can act. But a statement by the full Court about the movant's likelihood of success on the merits ought not to be simply ignored or cast aside.

Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 *Harv. J.L. & Pub. Pol'y* 827, 882 (2021). The set of rulings included in this proposal are those "in which a majority of the Supreme Court has clearly indicated that the applicant is likely to succeed on the merits of the question(s) presented." *Id.* at 832. The proposal excludes denials of stay applications and decisions issued by a single Justice, though the latter may gain persuasive value if the Justice presents a view of the merits in a written opinion. *Id.* at 831.

43. *Id.* at 847 (comparing signals in emergency rulings with dicta); see also Randy J. Kozel, *Settled Versus Right: A Theory of Precedent* 70–83, 145–57 (2017) (observing variation in the judicial treatment of Supreme Court dicta, including by the Court itself); Klein & Devins, *supra* note 18 (empirically demonstrating lower courts' tendency to follow dicta from higher courts), at 2032–42; Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 *N.Y.U. L. Rev.* 1249, 1268–74 (2006) (lamenting that courts appear overeager to create and rely on dicta); cf. Charles W. Tyler, *The Adjudicative Model of Precedent*, 87 *U. Chi. L. Rev.* 1551, 1556–74 (2020) (assessing the competing "adjudicative" and "necessity" models for drawing the holding–dicta distinction).

44. This analysis sets aside statements that relate to how a preliminary ruling works—such as articulations of the standards for an emergency stay or injunction—as these statements have a stronger claim to be law-declaration. They are not predictions, to begin with; and besides, emergency orders may be the best or only occasions for certain law-declaration about how emergency orders work. See Pedro, *supra* note 33, at 919 ("[W]riting more opinions [in stay orders] would allow federal courts to build stays doctrine to ensure

Recall that in such preliminary rulings, the entire explanatory writing is in service of a guess that is temporary and revisable. Even the most confident-sounding statements within it are subject to change at any time as the case progresses and, more importantly, are meant to be replaced by the eventual merits ruling (or otherwise expire). Thus, one might view such a writing as akin to a rough draft of a possible future opinion.⁴⁵

The occasion for that future opinion may not materialize, however, for a host of reasons: Certiorari may yet be denied;⁴⁶ the case may become moot;⁴⁷ or the Supreme Court may punt the question.⁴⁸ Or, after further briefing and oral argument, the Justices may go a different way on the merits than some of them had predicted—in effect, tossing aside the old draft.⁴⁹

B. *Certiorari as the Bright Line*

Still, what if the Justices *want* to use a case arising in an emergency posture to lay down new precedent? Should the nonprecedential nature of an emergency ruling be seen as a presumption that can be overridden? Suppose the Justices issued a per curiam opinion, for an emergency ruling, formatted to look like a merits opinion and chock-full of declarative sentences about the law. And what if such an opinion were preceded by extra briefing and oral argument?

At some point on the continuum of mimicry, a nonmerits ruling may closely resemble the real thing. One might then feel awkward arguing against following it based on process values, depth of explanation, or intended durability.⁵⁰

Doubts remain, however. By its very nature, an emergency ruling requires only a guess at a given threshold of confidence (such as a “fair

that stays are not unreasoned or poorly reasoned procedural decisions that preempt underlying orders.”). Supposing that such process-related utterances do form binding precedent, they offer a useful contrast to the merits-related guessing that is our focus. See Edward L. Pickup & Hannah L. Templin, *Emergency-Docket Experiments*, 98 *Notre Dame L. Rev.* 1, 31 (2022) (arguing that emergency-docket opinions are “precedential in so far as they show lower courts how to balance the stay factors, illustrating harms significant enough to warrant emergency relief,” but that “[t]hey are not precedential as to the *merits*”).

45. Notably, this preliminary ruling is made far earlier—and with far less information—than any actual draft opinion.

46. This may still occur even if one of the criteria for an emergency stay is that the case and the contested legal question seem certworthy. See *supra* note 37.

47. For examples, see *supra* note 3.

48. See Huang, *A Court of Two Minds*, *supra* note 36, at 104–09 (describing off-ramps and other ways for the Justices to avoid answering the “question presented”).

49. See *supra* notes 2, 35.

50. The greater the resemblance between an emergency ruling and a full-dress merits process, however, the greater the risk of “role confusion” for the Supreme Court. See Schmidt, *supra* note 29 (manuscript at 22 & n.103) (discussing and citing commentary about a striking example of “role confusion,” the Supreme Court’s emergency ruling in a vaccine mandate case, *NFIB v. OSHA*, in which the Court seemed to disavow weighing the equities—as if forgetting that the ruling was about a stay).

prospect” of future success on the merits). Thus, even if such a ruling were asserted to have binding effect, in principle its relevance should be limited only to other rulings that require the same threshold of confidence (or a lower one).⁵¹ For the Supreme Court to use an emergency ruling to lay down all-purpose precedent instead—to bind *all* future rulings by the lower courts on the same legal question—would require overcoming this epistemic constraint.

At the very least, then, a broadly accepted marker of such an intent is needed. It will not do to toggle the absolute force of vertical stare decisis using only mushy indicia.⁵² But exactly where along that continuum of mimicry, as an emergency ruling looks more and more like a merits ruling, would the lower courts all agree that the stare decisis switch has been flipped?

A universally understood indicator is at hand, of course: granting certiorari for full-dress merits review. And the Justices have shown that they can set expedited briefing and oral argument and issue a merits opinion very quickly, sometimes granting “certiorari before judgment” in cases that have not yet run their course in the lower courts.⁵³

One obvious advantage is that bringing a case into full-dress merits review will usually improve the quality of that decision.⁵⁴ Drawing a bright line at certiorari may benefit the nonprecedential emergency rulings, too, if the Justices feel more free to offer explanations without worrying that

51. This logic is explored more fully in Part III.

52. Confident-sounding words are not enough. They can still be later modified or withdrawn even within the same litigation—and everyone knows it. True, some embarrassment may result, but again, this leaves the mushiest of mind-reading indicia: Just how much risk of such embarrassment would be enough for the lower courts to universally agree that the Justices must really, really mean it?

53. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 923, 924 (2018) (mem.) (granting certiorari on a case arising in an emergency posture and specifying which exact “questions presented” were to be argued and briefed). Certiorari before judgment is not usually available, however, for cases still proceeding through a state court system. There may also be some instances when certiorari before judgment is not available even after a case has arrived at a federal court of appeals: Consider the OSHA vaccine mandate case, in which the Supreme Court issued a per curiam opinion that seemed to be mimicking a merits opinion, after also holding oral argument. See *NFIB v. Occupational Health & Safety Admin.*, 142 S. Ct. 661 (2022) (per curiam). It seems quite possible the Court might have granted certiorari before judgment in the OSHA case had there not been a procedural quirk that raised some doubt about its jurisdiction to take the case up on appellate review via certiorari. See Response in Opposition to the Applications for a Stay at 85–86, *NFIB*, 142 S. Ct. 661 (No. 21A244), 2021 WL 8945197. The existence of jurisdictional limits on the availability of certiorari should counsel against (not for) the use of mimicry of a merits ruling.

54. Given the still-hurried process, however, this benefit ought not be overstated. Even with briefing and oral argument, such an expedited process might still be viewed as lying somewhere in between standard merits-docket review and summary dispositions—and thus better suited for reinforcing or adjusting existing precedent than for crafting truly novel precedent. On summary dispositions, see generally Baude, *supra* note 9; Richard C. Chen, Summary Dispositions as Precedent, 61 *Wm. & Mary L. Rev.* 691 (2020); Edward A. Hartnett, Summary Reversals in the Roberts Court, 38 *Cardozo L. Rev.* 591 (2016).

lower courts might view them as binding.⁵⁵ Think of “unpublished” opinions in the circuit courts.⁵⁶

Another advantage is that this solution not only relies upon but also reinforces accepted rules of recognition and rules of change. This benefit is highlighted by considering Professor Katharina Stevens’s analytically rich book chapter on “precedent slippery slopes.”⁵⁷ The chapter’s core insight is that a judge who cares about being perceived as upholding rule-of-law values may feel compelled to follow a prior decision even though there are good and valid reasons not to follow it. This may occur if those reasons are too subtle or complicated to be legible to the broader public audience of legal subjects.⁵⁸

55. See Pickup & Templin, *supra* note 44, at 32 (noting that “the Court might feel free to write more frequently” if it has made clear that emergency rulings are not binding precedent). But if there is not a broadly shared understanding that emergency rulings are not binding precedent, then strong arguments in favor of minimal merits-related explanation apply. See, e.g., Pedro, *supra* note 33, at 922 (arguing that “there is almost no benefit from the Court issuing reasoning for likelihood to grant writs of certiorari or likelihood of success[,]” given the risk of “unintentionally influen[ing]” the lower courts through “smoke signals[,]” even if lower courts might try to read the “tea leaves” anyway). On the risk of such a “scarecrow” effect, see Schmidt, *supra* note 29 (manuscript at 20) (“Even the Court’s single sentence on the cause of action question—belying the complexity of the issue—may have a scarecrow effect going forward.”).

56. See, e.g., 2d Cir. R. 32.1.1(a) (“Rulings by summary order do not have precedential effect.”); 7th Cir. R. 32.1 (“Every order bears the legend: ‘Nonprecedential disposition. . . .’”). On the variation across the circuits in their usage of nonprecedential opinions, see, e.g., Allison Orr Larsen & Neal Devins, *Circuit Personalities*, 108 Va. L. Rev. 1315, 1327–29 (2022) (discussing the rates of unpublished opinions); Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in The Circuit Courts*, 61 Duke L.J. 315, 322, 360–64 (2011) (discussing various circuit approaches to nonprecedential opinions); Merritt E. McAlister, “Downright Indifference”: Examining Unpublished Decisions in the Federal Courts of Appeals, 118 Mich. L. Rev. 533, 549–60 (2020) (assessing the widespread use of nonprecedential opinions).

57. Katharina Stevens, *Precedent Slippery Slopes*, in *Philosophical Foundations of Precedent*, *supra* note 4, at 459, 459–74.

58. See *id.* at 473 (“Judges are usually concerned with rule-of-law values, or at least they have good reason to appear concerned with them. If judges want to avoid seeming activist, they may be overly hesitant to distinguish surprisingly, and they may overestimate what will surprise legal subjects.” (footnote omitted)). Professor Stevens elaborates that even for an “amazing” judge who can always distinguish a precedent when appropriate, no matter how complex the argument, there may yet be a set of cases

where the judge realizes that while *she* can see why distinguishing is warranted, a reasonable legal subject would probably not. The legal subject would *fail to distinguish* because the successful argument is too complex for her, or the required background knowledge too hard to acquire. For this subset of cases, the amazing judge sees that the distinction between precedent and the present case is reasonable but, with respect to the *audience of reasonable legal subjects*, not effective. Therefore, distinguishing would undermine the predictability of the law and the legal subject’s confidence that they are being judged by the law, not the judge.

Id. at 472. The upshot, in Professor Stevens’s account, is that such a prior precedent should not have been set in the first place. As adapted for the present context, the analogous point

The risk for the judge, Professor Stevens observes, is to be mistakenly viewed by that audience as politically or personally biased for declining to follow the prior ruling—here, the Supreme Court’s emergency ruling.⁵⁹ This would be an unnecessary hit to public perceptions of the credibility of lower court judges.⁶⁰ It may also invite potential distortions in their rulings, especially if other judges in parallel cases *do* follow the Supreme Court’s signal without clarifying that it is not binding precedent.⁶¹ Averting such risks for their lower court colleagues is further reason for the Justices to emphasize that their emergency stays and temporary injunctions are not binding precedent on the underlying merits.

As of this writing, the Justices seem to be shifting toward this cleaner solution.⁶² As close observers have surmised,⁶³ it appears that a majority of the Justices now look back warily at their pandemic-era experimentation with using emergency orders to send precedent-ish signals to the lower courts.⁶⁴ There was a stretch of months when the Supreme Court acted as

is that emergency rulings should be clearly understood as nonprecedential on the merits of the underlying legal issue.

59. The mirror-image risk that comes with declining to follow existing precedent (by following the foreshadowing instead) will be addressed in Part II.

60. See Bert I. Huang, *Judicial Credibility*, 61 *Wm. & Mary L. Rev.* 1053, 1080–82 (2020) (discussing lower court credibility and legitimacy in light of findings from a survey experiment). On the relationship between the complexity of rulings and judicial legitimacy, see Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 *Duke L.J.* 1, 22 n.101 (2016) (“If complexity may serve to enhance legitimacy, there is nevertheless bound to be a point when complexity begins to undermine legitimacy.”). For various meanings of judicial legitimacy, see Richard R. Fallon, Jr., *Law and Legitimacy in the Supreme Court* 20–46 (2018) (discussing sociological, moral, and legal legitimacy); see also Tara Leigh Grove, *The Supreme Court’s Legitimacy Dilemma*, 132 *Harv. L. Rev.* 2240, 2250–72 (2019) (book review) (discussing potential practical tensions among these categories).

61. For examples of judges both following such a signal while also clarifying that it is not binding precedent, see *supra* note 23.

62. The shift can be seen in the decreasing use of *per curiam* opinions accompanying emergency rulings relative to several years ago as well as the increasing use of granting *certiorari* in cases arising in an emergency posture. See Vladeck, *Shadow Docket*, *supra* note 9, at 250–55 (providing examples of these changing practices).

63. See, e.g., Bressman, *supra* note 24, at 7 (noting that Chief Justice Roberts and Justices Barrett and Kavanaugh have “joined the liberal Justices to prevent the court from providing a ‘merits preview’ in a case the Court is unlikely to take”); cf. Vladeck, *Shadow Docket*, *supra* note 9, at 191–92 (suggesting a change in approach by Justices Barrett and Kavanaugh); Josh Blackman, *A Deeper Dive on Justice Barrett’s Concurrence in *Does v. Mills*, Reason: Volokh Conspiracy* (Oct. 30, 2021), <https://reason.com/volokh/2021/10/30/a-deeper-dive-on-justice-barretts-concurrence-in-does-v-mills/> [<https://perma.cc/J2BN-P3QB>] (“Ironically enough, two Justices have significantly curtailed the shadow docket on the shadow docket with only a few sentences.”).

64. Consider how assiduously the Justices have been disavowing signals or previews of the merits. See, e.g., *Robinson v. Ardoin*, 144 S. Ct. 6, 6 (2023) (Jackson, J. concurring in denial of applications for stays) (“I concur in the denial of emergency relief. I write separately to emphasize . . . [that] nothing in our decision not to summarily reverse the Fifth Circuit should be taken to endorse the practice of issuing an extraordinary writ of mandamus in these or similar circumstances.”); *Merrill v. Milligan*, 142 S. Ct. 879, 879–82 (2022) (Kavanaugh, J., concurring in grant of applications for stays) (disavowing sending any “signal” about a

if some of its emergency orders should have been treated as binding precedent.⁶⁵ Ample criticism followed, including from several Justices, about the confusion that resulted.⁶⁶ The present course correction is well advised.⁶⁷ Future confusion about what counts as a change in the law can be avoided by reinforcing a bright line based on certiorari.

II. WHEN TO APPLY THE LAW OF THE FUTURE

If the Supreme Court's emergency rulings do not create binding precedent in the usual sense, when might a lower court ever need to heed such foreshadowing? And how can it do so while also fulfilling a duty to follow existing precedent?

These questions arise because a lower court is sometimes tasked with making an equitable call that seems to require looking into the future—for instance, when ruling on a preliminary injunction or a stay pending

change in the law); *Does 1–3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in denial of application for injunctive relief) (expressing an aversion to giving a “merits preview”).

65. See, e.g., Vladeck, *Shadow Docket*, supra note 9, at 179–92 (detailing these “eleven months” between the first indication that the Supreme Court might be expecting lower courts to give great or even binding precedential weight to its emergency rulings about COVID-19 restrictions, and the apparent end of this stretch when the Supreme Court finally “balked”).

66. See *id.*; Pickup & Templin, supra note 44, at 7–9, 31–32; Cole Waldhauser, *Unprecedented Precedent: The Case Against Unreasoned “Shadow Docket” Precedent*, 37 *Const. Comment.* 149, 154–62 (2022). Consider, too, the criticism in Justice Kagan’s dissent, joined by Justices Breyer and Sotomayor, in the Alabama redistricting case. See supra note 1. Another example is Justice Kagan’s dissent, joined by Chief Justice Roberts and Justices Breyer and Sotomayor, criticizing the Court’s emergency stay in a Clean Water Act case:

[The Court] provides a stay pending appeal, and thus signals its view of the merits, even though the applicants have failed to make the irreparable harm showing we have traditionally required. That renders the Court’s emergency docket not for emergencies at all. The docket becomes only another place for merits determinations—except made without full briefing and argument.

Louisiana v. Am. Rivers, 142 S. Ct. 1347, 1349 (2022) (Kagan, J., dissenting).

67. To note one more sign of this change of heart: The Supreme Court’s majority opinion in *Fulton*, a fully briefed and argued merits decision, pointedly ignored the *Tandon* emergency ruling that had been issued with a per curiam opinion only two months earlier. See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); see also Josh Blackman, *The Precedential Value of Shadow Docket Cases, Reason: Volokh Conspiracy* (July 6, 2022), <https://reason.com/volokh/2022/07/06/the-precedential-value-of-shadow-docket-cases/> [<https://perma.cc/R43J-HSVD>] (observing that “*Fulton* quite deliberately did not cite *Tandon v. Newsom* or *Roman Catholic Diocese*” (citing *Fulton*, 141 S. Ct. 1868; *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam))). For a sense of the confusion created by uncertainty about the precedential effect of the *Tandon* ruling, see Alexander Gouzoules, *Clouded Precedent: Tandon v. Newsom and Its Implications for the Shadow Docket*, 70 *Buff. L. Rev.* 87, 107–20 (2022) (detailing the widely varying ways in which lower courts have treated the *Tandon* emergency ruling—ranging from citing it as if binding precedent, to citing it while ignoring part of its reasoning, to ignoring it altogether).

appeal.⁶⁸ And if in a parallel case, the Supreme Court has already made its own guess about the law of the future, then it might seem that the lower court has the answer it needs.⁶⁹

But the matter is not so simple. This Part looks closely at the architecture of stays and temporary injunctions across the judicial hierarchy, asking: What is each preliminary ruling meant to achieve? How long is it meant to last? What future ruling will displace it? What other ruling is it overriding, for now? Seeing how the lower courts' various tasks fit together reveals that only a limited set of such rulings seems to call for heeding the Supreme Court's signals.

A. *On the Architecture of Stays and Injunctions*

It will help to begin by distinguishing among three categories of lower court rulings: First, and most familiar, is a court's ruling on the merits of a contested legal question. Second, this court may have made an earlier ruling setting a temporary holding pattern for the parties until it rules on the merits.⁷⁰ Third, upon ruling on the merits, this same court may set another temporary holding pattern, one that lasts until a *higher* court makes a ruling on appeal.⁷¹

These three categories of rulings are repeated at each level of the judicial hierarchy, and the way they link up with one another is highly instructive. The overarching architecture of these rulings illuminates when a

68. A clarifying word is in order here, given the various jurisprudential meanings of "prediction": The present analysis focuses on the *formal* tasks facing the lower courts—some of which seem to entail predicting a future ruling and hence a future state of the law. It does not address the legal realist's expectation that judges may try to predict higher courts' views to avoid being reversed nor the premise that law is merely a prediction of how courts will rule. Finally, it plainly does *not* endorse a general predictive approach to adjudication wherein lower courts are supposed to mind-read the Justices at all times. (For that debate, see the sources listed in note 78, *infra*.) To the contrary, this analysis shows how the presence of *specific* formally predictive tasks also implies that other tasks—most notably merits rulings—are *not* formally predictive.

69. See McFadden & Kapoor, *supra* note 42, at 876 (arguing that "while it is true that the Justices themselves are not bound by their preliminary views on a case . . . [a]bsent compelling reasons, it will typically be prudent for lower courts to address these signals when considering the same merits question"). As Judge Jeffrey Sutton put it, in dissenting from the Sixth Circuit's denial of a stay after the Supreme Court had granted a similar stay: "Ours is a hierarchical court system, one that will not work if the junior courts do not respect the lead of the senior court." *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 222–23 (6th Cir. 2016) (Sutton, J., dissenting). For more on the specific context in which Judge Sutton made this comment, see *infra* note 86.

70. For a federal district court, this would be a ruling that grants or denies a preliminary injunction. See Fed. R. Civ. P. 65. For a circuit court, this would be a ruling on a stay or injunction pending appeal. See Fed. R. App. P. 8. The Supreme Court's equivalent would be its emergency ruling on a stay or injunction pending certiorari (and maybe also pending further proceedings in the lower court before the certiorari stage). See Sup. Ct. R. 23.

71. For a district court, this would be a ruling on a stay or an injunction pending appeal. See Fed. R. Civ. P. 62; Fed. R. App. P. 8. For a circuit court, this would be ruling on a stay pending certiorari. See Fed. R. App. P. 41; Sup. Ct. R. 23.

court's task is to decide for itself, when its task is to anticipate its own future decision, and when its task is to anticipate *another* court's future decision.

FIGURE 1. PREDICTING WHICH RULING?

This ruling sets a holding pattern anticipating and lasting until this ruling
District court's preliminary injunction <i>Informed by prediction about district court's future merits ruling</i>	District court's future merits ruling
A stay or injunction "pending appeal" <i>Issued by district court or circuit court as temporary override of district court's merits ruling</i> <i>Informed by prediction about circuit court's future merits ruling</i>	Circuit court's future merits ruling
A stay or injunction "pending certiorari" <i>Issued by circuit court or Supreme Court as temporary override of circuit court's merits ruling</i> <i>Informed by prediction about Supreme Court's future rulings on certiorari and possibly merits</i>	Supreme Court's future rulings on certiorari and possibly merits

1. *Guessing About Whom?* — First, notice that the precise function of each temporary injunction or stay tells the court which future ruling ought to be predicted. That is, the purpose of each holding pattern should determine what the “likelihood of success on the merits” (or similar notion) is referring to, in the governing standard for relief.

A district court's ruling on a preliminary injunction, which sets a holding pattern meant to last only until it is displaced by this same court's merits ruling, should therefore be predicting how its *own* ruling will come out. By contrast, a district court's ruling on a stay or injunction pending appeal, which sets a holding pattern meant to last until it is displaced by the circuit court's ruling on appellate review, should be predicting what that *other* court's ruling will be.⁷²

72. Reinforcing this distinction is the fact that the moment a district court's preliminary injunction ends—upon the arrival of its merits decision—is typically also the point when a stay or injunction pending appeal would begin. Note that the ruling being appealed can also be the preliminary injunction itself; for ease of exposition, the discussion refers only to a district court's merits ruling being appealed, but the analysis of stays or injunctions pending appeal also extends to an interlocutory appeal of a district court's preliminary injunction.

Similarly, a circuit court's stay or injunction pending appeal is looking ahead at its own future appellate ruling on the merits, and so that is the ruling to be predicted as part of the standard for relief.⁷³ By contrast, a circuit court's stay pending certiorari (as opposed to pending appeal) is looking ahead at the Supreme Court's future certiorari decision and possible ruling on the merits—and so this particular task requires the circuit court to guess at what the Supreme Court might do.⁷⁴

2. *When Not to Guess.* — Whether a court should be deciding something for itself—or instead guessing at a higher court's views—is also revealed by how these rulings link up with each other.

For example, a circuit court's merits ruling occurs at essentially the same time as its additional decision on whether to stay that merits ruling pending certiorari. These are different tasks. That is why they are not redundant. The stay pending certiorari is not a do-over but rather a way for the circuit court to override its own merits ruling temporarily.⁷⁵ It turns on the circuit court's guess about what *another* court might do—namely, what the Supreme Court might do at the certiorari stage.

Conversely, this need for the circuit court to make a guess about the Supreme Court when ruling on a stay pending certiorari does *not* imply that the circuit court should also have based its own merits ruling on such a guess in the first place. Quite the opposite. The possibility of such a temporary override frees up the circuit court to make its merits ruling based on its own best reading of existing precedent, laid down by past Justices, *without* any need to read the minds of the current Justices.⁷⁶ If the circuit court suspects that the Supreme Court may later take a different view of existing precedent or even overrule it, that prediction should influence not the circuit court's merits ruling but only the stay that temporarily overrides it.

73. The circuit court's ruling on a stay or injunction pending appeal follows shortly after the district court's ruling about the same thing. Likewise, shortly after a circuit court rules on a stay pending certiorari (as opposed to pending appeal), the Supreme Court may also make a ruling about the same thing. The repetition seems to draw on both courts' relative advantages in institutional competence—the lower court being closer to the equities on the ground and the higher court being better at reading its own mind.

74. Reinforcing this distinction is the fact that the moment when a circuit court's stay or injunction *pending appeal* dissolves—with the arrival of its merits decision—is typically also the point when a stay *pending certiorari* would begin.

75. Notably, it is distinct from a motion to reconsider, which is already provided for as a separate corrective device. See Fed. R. App. P. 27(b). When a stay pending certiorari blocks a merits ruling from going into effect, it does not undo the merits ruling.

76. A similar logic repeats at the level of the district courts: A district court making any appealable ruling (whether final or interlocutory) is similarly freed up to decide for itself about the best understanding of existing precedent—without regard to guessing at what the circuit court might do on appeal. It, too, has a temporary override mechanism available in the form of a stay or injunction pending appeal—and this is the ruling that entails anticipating what the circuit court will do.

B. *Existing Law or Future Law?*

This architecture of stays and injunctions thus informs when a lower court's task might entail taking account of the Supreme Court's foreshadowing in an emergency ruling in a parallel case. Let's proceed from the easier to the trickier categories.

1. *Merits Rulings*. — First, an easy “no”: For a merits ruling, as noted, it is clear that the lower court can decide based on its best understanding of existing precedent without regard to the current Justices' apparent views.⁷⁷ If there is any need to set a different holding pattern for the parties because it seems like the Supreme Court might reverse, that is the job of the stay pending certiorari—and not a consideration for the merits ruling.

This structure reinforces a principle ingrained in the current rules of recognition and rules of change in our federal courts, one which Professor Fallon's book chapter emphasizes: Lower courts are *not* to get out ahead of the Supreme Court in overruling or departing from prior precedent.⁷⁸ The Supreme Court has repeatedly reminded the lower courts of this constraint.⁷⁹ Although it may be intuitive to think that the judicial hierarchy requires a lower court judge to ask what the current Justices would do, prevailing doctrine says that the judge must abide instead by what *past* Justices have said in opinions laying down precedent. No amount of signaling by the Supreme Court—whether in an emergency ruling, comments during oral argument, concurrences or other separate writings, speeches, or even leaks of actual drafts—would allow a judge to displace

77. As detailed in Part I, an emergency ruling does not create binding precedent in the conventional sense. The lower courts remain free to consider these signals (or not) in reaching their best understanding of *existing* precedent. For scholarship on this topic, see *supra* note 18.

78. See *supra* notes 11–13 and accompanying text. For academic debate about this constraint, the classic sources are Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 *Tex. L. Rev.* 1 (1994); Michael C. Dorf, *Prediction and the Rule of Law*, 42 *UCLA L. Rev.* 651 (1995); and Pauline T. Kim, *Lower Court Discretion*, 82 *N.Y.U. L. Rev.* 383 (2007).

79. The Supreme Court has said, in various articulations, that the lower courts are bound by prior precedent until it is “reconsider[ed],” “reinterpreted,” or “overruled” by the Supreme Court; and Justice Ruth Bader Ginsburg, joined by Justice Breyer, has also used the term “modified.” See *supra* note 13. Even implicit partial overruling is barred. See *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (*per curiam*). Certain Justices have chastised a lower court for basing its own ruling on a prediction that the Supreme Court might overrule prior precedent, even when the prediction is correct. See, e.g., *Rodriguez de Quijas v. Shearson*, 490 U.S. 477, 484 (1989) (“We do not suggest that the Court of Appeals on its own authority should have taken the step of renouncing [*Wilko v. Swan*, 346 U.S. 427 (1953)].”); *id.* at 486 (Stevens, J., dissenting) (calling it “an indefensible brand of judicial activism”). The Supreme Court holds the prerogative not only for altering precedent but also for choosing when to do so. *Hohn v. United States*, 524 U.S. 236, 252–53 (1998) (“Our decisions remain binding precedent until we see fit to reconsider them . . .”). It remains possible, of course, that at times the Justices may tolerate or even agree with a lower court's departure from prior precedent and thus not call it out.

existing precedent with guesswork about the views of the Supreme Court of today, much less of the future.

2. *Stays or Injunctions Pending Certiorari*. — Second, an easy “yes”: A circuit court ruling on a stay pending certiorari (as opposed to pending appeal) ought not ignore a Supreme Court ruling on a stay or injunction pending certiorari in a parallel case with the same contested legal issue. These are the only rulings that expressly call upon a lower court to read the minds of the *current* Justices, asking: “Will these Justices likely grant certiorari, and if so, how might the case come out?” One might see this task as an extension of the traditional role of an individual Circuit Justice in guessing at other Justices’ views, when ruling in chambers on a stay pending certiorari.⁸⁰

3. *Preliminary Injunctions and Stays Pending Appeal*. — Third, and trickiest, are those temporary rulings by a lower court made in anticipation of a future merits ruling by a court that is *not* the Supreme Court. Think of a district court ruling on a preliminary injunction. Or think of a circuit court making a ruling about a stay or injunction pending appeal (as opposed to pending certiorari).⁸¹ And suppose that this court is aware of an emergency ruling in a parallel case that has not yet reached a final merits decision from the Supreme Court.

In principle, the task for such a lower court in assessing the “likelihood of success on the merits” is to make a prediction about its own future ruling. This entails asking: What will the law be when that moment arrives? In particular, will the Supreme Court have already changed the law by then? Or will prior precedent still be governing law?

If the lower court’s own merits ruling is expected to occur first, then its task is to use prior precedent to make its guess about the likelihood of success on the merits. This is because that prior precedent is also expected to be governing law for its own merits ruling later.⁸² If, however, the lower court expects its own future merits decision to come *after* a new Supreme Court ruling on point, then in theory it must guess at that future state of the law in order to make its preliminary ruling now. It is as if the predictive task facing the lower court introduces a touch of time travel into the familiar rules of recognition and rules of change.⁸³

80. See, e.g., Dorf, *supra* note 78, at 690–94. For a remarkable historical example, see *infra* note 125.

81. The analysis for this category is easily adapted to a district court’s ruling on a stay or injunction pending appeal—which is in anticipation not of its own merits ruling but of the circuit court’s ruling on appellate review. For ease of exposition, these adaptations will be addressed here in the notes rather than in the text.

82. The lower court’s own merits ruling would occur earlier, most obviously, if the Supreme Court never gets to a relevant merits ruling. But it could also happen earlier due simply to the relative pace of the parallel litigation.

83. See *supra* notes 11–13 and accompanying text.

How is the lower court supposed to manage this extra guesswork about timing?⁸⁴ The task may be easier if certiorari has already been granted in the other case, thus allowing some sense of the Supreme Court's timeframe and also more clarity about the legal question to be answered. The lower court might then hold its own case in abeyance. Because this option would nearly ensure that the Supreme Court will rule first,⁸⁵ the lower court would set a holding pattern informed by a guess about that future merits ruling from the Supreme Court.⁸⁶

Or to the contrary, the lower court might choose to proceed apace, with the expectation that it will reach a merits ruling before the Supreme Court does. The lower court should then set the holding pattern based on a guess about its own future ruling under existing precedent.⁸⁷ There would be no need to take heed of any foreshadowing. Meanwhile, if the Justices saw fit to put this lower court's proceedings on pause, or to set a different holding pattern, they could do so themselves.⁸⁸

The latter approach should be the default for the lower court, of course, if certiorari has *not* yet been granted in the parallel case. A Supreme Court merits ruling (if any) would still be a ways off; moreover,

84. For a recent example of a district judge working through the possible timing of a parallel case (one that may or may not eventually get Supreme Court review) to decide whether to hold her own case in abeyance, see *Chelius v. Becerra*, No. 17-00493 JAO-RT, 2023 WL 5041616, at *4–7 (D. Haw. Aug. 8, 2023).

85. *Id.* at *4 (discussing the district court's power to hold a case in abeyance to await the outcome of a related parallel case). Recall, however, that the case in which the Supreme Court made an emergency ruling may never reach the merits stage at the Supreme Court or the relevant legal question might not get answered. This is why holding a case in abeyance does not completely guarantee that there will be new precedent to consider by the time of the lower court's own merits ruling.

86. Cf. *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 222 (6th Cir. 2016) (Sutton, J., dissenting) (“The only material difference between this stay request and the stay requests in [a parallel case] is that the Supreme Court has now *granted* the school board's certiorari petition [in the parallel case] [This] distinction makes a stay *more* appropriate in our case.”); *supra* note 69. The stay being requested would have matched the one the Supreme Court granted in the parallel case. Judge Sutton's rationale is that “[j]ust as the plaintiff in [the parallel case] must wait for Supreme Court review before changing the status quo, so should the plaintiff in our case be required to wait for that decision before changing the status quo.” *Id.*

87. After its merits ruling, however, the lower court may be asked to temporarily override it with a stay or injunction pending appellate review by the next court up in the hierarchy. For a district court ruling on a stay or injunction pending appeal, there is the new timing question: “Will the *circuit court* reach its merits ruling before the Supreme Court does?”

88. One way for the Supreme Court to put this lower court's case on pause would be to construe an emergency application as a petition for certiorari and to grant it; this case could then be consolidated with or held for eventual “GVR” in light of the parallel case already on the merits docket. On the GVR process, see Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—And an Alternative*, 107 *Mich. L. Rev.* 711, 712 (2009) (providing an overview of GVR orders—“the [Supreme Court's] procedure for summarily *granting* certiorari, *vacating* the decision below without finding error, and *remanding* for further consideration by the lower court”).

it may be unclear what legal question (if any) will be taken up. Holding one's own case in abeyance in light of a nonexistent Supreme Court merits case may well be seen as shirking or gamesmanship.

This flowchart of guesswork for the lower court may seem convoluted, but it should be workable in most cases. Even so, a general problem remains: The compounding of prediction upon prediction may make any result seem iffy or arbitrary to the broader legal audience. And lower courts may very sensibly wish to avoid such an appearance. But how?

4. *A Simpler Approach.* — One might imagine a far simpler alternative. Most of the messy guesswork would vanish if a lower court were to adhere to existing precedent—always—in assessing the “likelihood of success on the merits” for its own temporary ruling. How might such an approach work?

The judge could set the initial holding pattern based on prior precedent, with the understanding that as soon as new precedent appears, the holding pattern can be adjusted accordingly.⁸⁹ The judge could explain that guessing about future law change and its timing would all be just too speculative to serve as principled grounds for decision. The upshot would be that the holding pattern, even if it evolves over time, would always remain grounded in precedent that already exists.

This avoids any extraneous disruptions, for the parties and for conditions on the ground, based on mistaken guesses about what a higher court might do. As Professor Varsava's book chapter recognizes in working out how judges might bridge the past and the future of the law: If the available information about the future is thin or speculative, then its consideration deserves little weight.⁹⁰

A further benefit, focusing on the legibility of a judge's decisions, draws once more on the logic in Professor Stevens's book chapter.⁹¹ Even

89. This discussion excludes stays pending certiorari, which as part of the standard for relief require guessing what the Supreme Court might do on certiorari—and hence also guessing about a possible change in the law. The analysis can, however, be adapted for a district court's ruling on a stay or injunction pending appeal: Even if it eschews any guesswork about future law change coming from the Supreme Court's parallel case, the district court would still need to guess how the circuit court might rule *under existing precedent*—as this might not be how the district court itself has just ruled on the merits under existing precedent.

90. Professor Varsava's book chapter observes:

For example, if a judge has a mere inkling that courts will depart from some line of precedent in the coming years, that prediction should not play much of a role in their adjudication of a present dispute, whereas if the judge is relatively certain in their prediction then it should have greater force. If a judge has no reasonable basis whatsoever on which to predict how future judges will handle a past line of cases, then speculation about the future of those cases should probably have no bearing at all on the present decision.

Varsava, *supra* note 5, at 293.

91. See *supra* note 58.

if a judge has good reason to guess that a later merits ruling will need to depart from prior precedent—because it will be governed by a future Supreme Court ruling that will have modified or rejected that precedent—such reasoning may not be easily conveyed to the broader audience of legal subjects. It may be tricky to say that a quirk of timing seemingly allows a judge to escape the bounds of existing precedent. The explanatory difficulty is amplified by the layers of guesswork involved, especially if the judge is not confident about those guesses.

The primary risk to such a judge is being perceived as making unprincipled decisions or undermining rule-of-law values, even when the choice is valid.⁹² This risk may be amplified if the quirk of timing is seen as manipulable by the judge. There may also be a risk that in areas of legal ambiguity, the judge's internalization of the signal from the Supreme Court's emergency ruling may be misunderstood as dubiously suggesting that the signal is faithful to, rather than departing from, prior precedent.

The irony here is that this inexpressibility concern is itself not readily expressible to the broader legal audience. But the adjust-as-needed approach is simple enough to convey and justify, on its own terms, to anyone.

5. *A Conceptual Shortcut?* — There is another approach a lower court might take that also implies applying only existing precedent without regard to foreshadowing: The judge might adopt the view that assessing the “likelihood of success on the merits” is not about guessing about a future merits ruling—despite how it sounds—but rather about guessing who would win if the merits had to be decided right now. And hypothetically deciding the merits “right now” would mean following existing precedent.⁹³ As a practical matter, this approach is nearly equivalent to the adjust-as-needed method described above. The conceptual difference is that the judge here would be assuming that the future state of the law is irrelevant, not just too speculative. There is some dissonance with the fact that the judge must still look into the future when assessing the interim hardships for the parties as part of the standard for granting relief. But there is no logical inconsistency.

Taking this “right now” perspective might also seem at odds with what the Supreme Court has done in foreshadowing a possible departure from existing precedent—looking to the future—in its own emergency ruling.

92. Notice that the present concern (about perceptions of the judge not following prior precedent) is the mirror image of the one raised in Part I (about perceptions of the judge not following the emergency ruling). This double-bind for the judge is, of course, the product of the very nature of such an emergency ruling—the foreshadowing has already happened (and thus is available to follow) and yet the prior precedent is also still good law (and thus is also available to follow). These concerns are not equivalent, however; one concern involves following prior precedent, which is the law, and the other concern involves following a signal, which is not the law.

93. For reasons given above, *supra* note 89, again this analysis excludes stays pending certiorari; and again, a district court ruling on a stay or injunction pending appeal will still need to guess how the circuit court might rule.

But this is reconcilable if the Supreme Court can also be imagined to be adopting a “right now” perspective. Again, as Professor Fallon notes in his book chapter, there are far-reaching implications to how the rules of recognition and rules of change differ across the layers of the judiciary.⁹⁴ Here is one of them: The Supreme Court gets to say, “If we were to decide the merits *right now*, we would do so based on new precedent that we would craft *right now*, departing from prior precedent”—even though a lower court cannot say the same.

C. *The Problem of Coordination*

But what about the problem of consistency—“treating like cases alike”—across parallel cases while they are all working their way through the courts? If some judges follow existing precedent while others follow the foreshadowing, won’t contradictory rulings be likely to result? Isn’t the Supreme Court’s emergency ruling a salient “focal point” around which all other judges can coordinate theirs?⁹⁵

Let’s untangle these questions. First, there may be a concern about inconsistency for its own sake. But in principle, for multiple courts to rule differently in parallel cases need not imply a failure to “treat like cases alike.” Even parallel cases may be distinguishable on the facts or the equities; if anything, one might be skeptical of complete uniformity in outcomes as perhaps too much of a coincidence.⁹⁶ Moreover, any inconsistency among preliminary rulings in parallel cases would be fleeting relative to the usual durational tolerance for circuit splits. And what better occasion is there for percolation among the lower courts than in the period after the Supreme Court foreshadows a potential change in the law and before it makes that call for real?⁹⁷ One might see this as a crucial moment for a sort of “judicial notice and comment.”

Second, there may be a distinct concern about clashing injunctions. Or there may be a special urgency in achieving uniform holding patterns in parallel cases involving the federal government. To address such concerns, the Supreme Court will often be able to step in with its own stay or injunction pending certiorari—if it sees fit to impose such uniformity.⁹⁸

94. Fallon, *supra* note 11, at 412.

95. See Bert I. Huang, *Coordinating Injunctions*, 98 *Tex. L. Rev.* 1331, 1336–45 (2020) [hereinafter Huang, *Coordinating Injunctions*] (examining “focal points” for the coordination problem in which lower courts with parallel cases are trying to avoid clashing injunctions).

96. See Bressman, *supra* note 24, at 58 (finding it highly questionable that the Supreme Court expected so many COVID-19 emergency orders to come out the same way, given factual differences in the regulations and in their impact). Professor Bressman’s view is that this shows the Court was only looking at these cases superficially.

97. See Schmidt, *supra* note 29 (manuscript at 20) (“It can, after all, be quite helpful to the Supreme Court for lower courts to give their full and honest analyses of the pending case measured against current law.”).

98. Presumably, such a situation would very often satisfy the governing standard for at least a stay (though maybe not a temporary injunction) pending certiorari. See *infra* note 105.

Other coordination devices can also avoid inconsistency or relieve conflicts. As deployed in a recent set of cases that led to a high-profile emergency ruling at the Supreme Court,⁹⁹ a formal process exists for the multicircuit consolidation of cases that challenge the same federal agency action.¹⁰⁰ At the level of the federal district courts, there is also the more widely known multidistrict litigation device.¹⁰¹ The limitation is that these devices can consolidate cases only in the federal courts.

Even without such consolidation, however, courts with parallel cases may be able to coordinate among themselves.¹⁰² Consider a circuit court's ruling on a stay pending appeal: In part of the opinion, the court says what it thinks about applicable law and what this means for setting a suitable holding pattern. But if the court's intended order would create a clash with the holding pattern in another case, it can fully or partially stay its order to avoid the conflict.¹⁰³ This solution encourages candor by decoupling the judges' legal analyses from the task of coordinating the operative holding patterns on the ground.

III. COULD THERE BE *STARE DIVINATIS*?

Let's now try to imagine more fully how a lower court might take heed of the Supreme Court's foreshadowing when doing so is called for. Further practical and theoretical questions rapidly appear.

Notice, first, that if the signal in an emergency ruling from the Supreme Court were to be deemed authoritative in some sense for the lower courts, any such constraint would not look like *stare decisis*. For one thing, there cannot be horizontal *stare decisis* here,¹⁰⁴ as it would be incoherent to say that the Supreme Court somehow binds itself to not

99. See *NFIB v. Occupational Health & Safety Admin.*, 142 S. Ct. 661, 664 (2022).

100. 28 U.S.C. § 2112 (2018) (providing for consolidation of multicircuit petitions for review).

101. *Id.* § 1407 (providing for consolidation of multidistrict litigation in federal courts).

102. See Huang, *Coordinating Injunctions*, *supra* note 95 (detailing and proposing ways for both district courts and circuit courts to coordinate their preliminary rulings so as to avoid clashing injunctions).

103. As parallel cases accumulate, these courts may continue to adjust their stays or underlying orders as needed. See *id.* at 1352–53 (describing the adjustment process). This includes the Supreme Court.

104. The term “horizontal” here refers to the *stare decisis* effect of the Supreme Court's past decisions on its own future decisions. For more on the distinction between vertical and horizontal *stare decisis* (or horizontal and vertical precedent), see, e.g., Garner et al., *supra* note 22, at 27–43; Barry Friedman, Margaret H. Lemos, Andrew D. Martin, Tom S. Clark, Allison Orr Larsen & Anna Harvey, *Judging in a Hierarchical System*, in *Judicial Decision-Making: A Coursebook* 434–37 (2020); Kozel, *supra* note 43, at 7–8, 19–21, 157–59; John C.P. Goldberg & Benjamin C. Zipursky, *A Precedent-Based Critique of Legal Positivism*, in *Philosophical Foundations of Precedent*, *supra* note 4, at 299–302; Sebastian Lewis, *On the Nature of Stare Decisis*, in *Philosophical Foundations of Precedent*, *supra* note 4, at 36–48; Frederick Schauer & Barbara A. Spellman, *Precedent and Similarity*, in *Philosophical Foundations of Precedent*, *supra* note 4, at 240–42.

change its mind when guessing about its own future rulings. Moreover, for temporary stays and injunctions, the whole point is to not have to settle the contested question of law right away. The legal answer is not yet *decisis*—only *divinatis*.

So one might ask: Can there be such a thing as a doctrine of *stare divinatis*? What would it mean for a higher court's guess to "bind" a lower court's guess? When would such a limitation be needed? What sorts of information should be allowed to overcome it?

This Part highlights such questions while venturing only a few tentative answers. It begins, though, with one fundamental point: Any authoritative influence of the Supreme Court's guess must be limited to only those lower court guesses (on the same question) that require the same or a lesser degree of confidence.

A. *An Inherent Limitation*

For courts making rulings about temporary stays or injunctions, the embedded guesses about the future of the law have a built-in level of confidence specified by the standard for relief. For example, a stay pending appeal might require a "strong showing that [the requesting party] is likely to succeed on the merits," whereas a stay pending certiorari might require a "fair prospect" of eventual reversal after certiorari has been granted.¹⁰⁵

An earlier guess made at a lower threshold of confidence does not supply the answer for a later guess (on the same question) that requires a higher threshold of confidence. Consider a familiar analogy found in the law of preclusion: A factual finding from a case with a lower burden of proof ("preponderance of the evidence") cannot be preclusive in a case with a higher burden of proof ("beyond a reasonable doubt"). Here, the same logic applies.

105. See, e.g., *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (articulating the merits-related component of the standard for a stay pending certiorari as showing "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari" and "(2) a fair prospect that a majority of the Court will vote to reverse the judgment below"); *Nken v. Holder*, 556 U.S. 418, 434 (2009) (articulating the merits-related component of the standard for a stay pending appeal in the circuit courts as "whether the stay applicant has made a strong showing that he is likely to succeed on the merits" (internal quotation marks omitted) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987))). Due to the variation across circuits in how the *Nken* standard is understood, there is no simple answer to whether it demands greater confidence about the merits-related guess than does the *Hollingsworth* standard (even if one views the latter as the Supreme Court's adaptation of the former for a stay pending certiorari). See *infra* note 110. As for injunctions: For a preliminary injunction in the lower courts, a typical articulation is that the requesting party must show a "likelihood of success on the merits." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). For a temporary injunction (as opposed to a stay) pending certiorari, a typical articulation is that the "applicant must demonstrate that 'the legal rights at issue are "indisputably clear."'" *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (quoting *Turner Broadcasting Sys., Inc. v. Fed. Comm'n's Comm'n*, 507 U.S. 1301, 1303 (1993) (Rehnquist, C.J., in chambers)).

Thus, for example, foreshadowing in a Supreme Court stay issued based on a “fair prospect” level of confidence should not count as authoritative guidance for any lower-court rulings that might call for a higher likelihood of success on the merits.¹⁰⁶ By contrast, foreshadowing in a Supreme Court injunction issued based on an “indisputably clear” level of confidence would presumably inform a wider range of future guesses.¹⁰⁷

One new question for the theory of precedent is how best to conceptualize such an (un)certainly-based constraint on informational value. At first glance, it may bear a passing resemblance to the holding–dicta distinction. But calling it dicta is unsatisfying. As noted in the Introduction, what is special about this kind of judicial guess is that it has the quality of a holding because the outcome of a ruling does turn upon it.¹⁰⁸ Still, what is necessarily relied upon is a guess made at a given threshold of confidence. Thus, any intimation of greater certainty by the earlier court would be extraneous, and any inference of greater certainty by the later court would be unsound. Might this limitation, then, point to an unexplored interaction between the strength and the scope of a precedent?¹⁰⁹

106. The “fair prospect” threshold appears to be lower than a fifty-fifty chance of success on the merits. See *Merrill v. Milligan*, 142 S. Ct. 879, 881 n.2 (2022) (Kavanaugh, J., concurring in grant of applications for stays) (“Even under the ordinary stay standard outside the election context, the State has at least a fair prospect of success on appeal—as do the plaintiffs, for that matter.”). If so, then an express statement that there is *not even* a “fair prospect” of a certain outcome might be read as a signal that there is a better-than-even chance of the opposite outcome. Such an inference may be unsound, however, if the reason for denial is that the requesting party failed to produce enough information to demonstrate a “fair prospect.” That shortcoming would not necessarily imply that the other side has any particular chance of winning. Moreover, it also must be emphasized that an unexplained stay denial by the Supreme Court allows no useful inference about the underlying merits, because other reasons (including the lack of certworthiness) may be partly or wholly responsible for the denial. See *supra* note 37.

107. But see *infra* note 111. Also, to be clear, the foreshadowing in a *denial* of such an injunction would be quite uninformative for a lower court. Even setting aside the possibility that the equities account for the denial, the failure of an asserted legal position to be “indisputably clear” does *not* imply that the opposite position is likely to be correct. To draw again on the analogy of proof: When an allegation has not been proved “beyond a reasonable doubt”—or even if there is an express finding of reasonable doubt—this does *not* imply that it is likely to be false.

108. In this sense, it resembles other nondefinitive yet dispositive assertions, such as the Supreme Court saying that a right is not “clearly established” in a qualified immunity case. For incisive analyses of such standards, see Leah Litman, *Remedial Convergence and Collapse*, 106 *Calif. L. Rev.* 1477, 1481, 1483–92 (2018) (examining the Supreme Court’s use of the “clearly established” rubric in qualified immunity and habeas corpus cases); Richard M. Re, *Clarity Doctrines*, 86 *U. Chi. L. Rev.* 1497, 1509, 1522–31, 1540–47 (2019) (discussing usages of the “clearly established” rubric in light of a conceptual distinction between first-person and third-person perspectives on clarity).

109. On the distinction between the strength and the scope of a precedent, see Kozel, *supra* note 43, at 21–25.

Recognizing this constraint also raises a practical, doctrinal challenge: For the Supreme Court's emergency rulings to have any well-defined degree of influence on preliminary rulings by the lower courts in parallel cases, there would also need to be a clear hierarchy among the confidence thresholds embedded in the varying standards for relief. And this would require greater doctrinal precision about these standards—most of which are vaguely phrased, some of which are worded or understood differently across circuits,¹¹⁰ and some of which may in practice fail to reflect their seeming verbal meaning.¹¹¹ Wiggle words won't do.

B. A “Binding” Guess?

Suppose, though, that the confidence thresholds are clarified and do line up properly between a Supreme Court emergency ruling and the decision that a lower court faces. Should the high court's guess then be adopted by the lower court as its own, as if it were “binding”?¹¹²

For a circuit court ruling on a stay pending certiorari (as opposed to pending appeal), the Supreme Court's earlier emergency ruling will usually enjoy a natural epistemic superiority. Recall that this is the sole kind of lower court ruling that expressly calls for reading the minds of the current Justices; and it also comes closest to what the Supreme Court has just done in the parallel case, which is similarly ruling on a stay or injunction pending certiorari. By contrast, the overlap is not so neat for a district court ruling on a preliminary injunction or a circuit court ruling on a stay pending appeal: There, the predictive task is not to guess what the Justices will do, but what the law of the future will be. Still, a similar epistemic advantage may apply, given that the Supreme Court determines the future of the law.

But then why would such a signal ever need to be deemed “binding”? If its informational value is so dominant, wouldn't the lower court

110. See Pedro, *supra* note 33, at 892–96 (showing differences across circuits). For a clear-eyed account of the doctrinal murkiness about which standards for stays or injunctions pending appeal might be more demanding than others, see Jill Wieber Lens, *Stays of Injunctive Relief Pending Appeal: Why the Merits Should Not Matter*, 43 Fla. St. U. L. Rev. 1319, 1322–25 (2016).

111. See, e.g., Richard M. Re, *Must SCOTUS Injunctions Abide by Precedent?*, Re's *Judicata* (Sept. 27, 2021), <https://richardresjudicata.wordpress.com/2021/09/27/must-scotus-injunctions-abide-by-precedent/> [<https://perma.cc/DWW2-F55H>] (doubting whether the Supreme Court has been consistently applying the “indisputably clear” standard for temporary injunctions, given its issuance of such relief when the apparent rationale is highly contestable or even at odds with existing precedent).

112. One might think of an analogous question raised by federal appellate rulings that make *Erie* guesses about state law: Should federal district judges within that circuit nonetheless be free to make their own *Erie* guesses in later cases, or must they adopt the federal appellate court's earlier guess as their own? What if new information has become available? See, e.g., Garner et al., *supra* note 22, at 591–92 (in making an *Erie* guess, “if state law shifts after a federal circuit court has issued its decision, a district court on remand must still conform its interpretation to the law of the state”).

naturally give it the great weight that it deserves? This question is a variation on the “paradox” of precedent. As elaborated in the opening book chapter by Professors Endicott, Kristjánsson, and Lewis, as well as in the chapter by Professor Stevens,¹¹³ here is the paradox: The bindingness of a precedent only matters when all other information combined calls for a different result—that is, when the precedent is pushing the wrong way.

This paradox is not, on its own, an argument against binding effect. But it highlights a principal cost—that of forcing mistaken decisions by excluding other information. The paradox thus calls for either a strong justification for allowing such an imposition of mistakes; or a safety valve that allows a court to avoid being bound, at least when it would force certain kinds of wrong results; or both.

The usual justifications for binding effect, however, seem to do little work in the context of preliminary rulings. To begin with, as Part II has observed, there is less oomph in the standard rationale about “treating like cases alike” across parallel cases. But what about the proposal from Professor Varsava’s book chapter about trying to “treat like cases alike” across past, present, and future?¹¹⁴ Can’t it be applied to stays and injunctions, too? As adapted to rulings that turn on guesses, though, the proposal translates into giving weight both to the earlier guess (in the emergency ruling) and to imagined later guesses (which may evolve up to the moment of the merits ruling). This weighing process amounts to using the best available information to anticipate how future guesses might change as the merits ruling approaches. It does not confer epistemic dominance on the earlier guess—quite the opposite.

Rationales grounded in reliance or predictability also seem weak, for what is there to rely upon but a guess? And it is a guess, no less, about a future *change* in the law. Such a signal itself unsettles expectations. The resulting sense of instability may already be diminishing reliance.¹¹⁵ After

113. Timothy Endicott, Hafsteinn Dan Kristjánsson & Sebastian Lewis, Introduction to *Philosophical Foundations of Precedent*, *supra* note 4, at 1–4 (exploring this “pragmatic paradox” and noting that a “precedent, you might say, can only have independent force when it was decided incorrectly, and then today’s court should depart from it”); Stevens, *supra* note 57, at 464–65 (addressing an articulation of the paradox attributed to Professor Frederick Schauer and noting that “precedent-setting decisions can *make* a later decision correct by existing” but “surely the mere performance of an otherwise all-things-considered-wrong action should not make that action *less wrong* in the future”).

114. See Varsava, *supra* note 5, at 285–90; see also *supra* text accompanying note 40.

115. For example, there is some debate about whether reliance interests were already eroding before *Dobbs* in a way that matters for the force of stare decisis. See Nina Varsava, Precedent, Reliance, and *Dobbs*, 136 *Harv. L. Rev.* 1845, 1902–06 (2023) (assessing arguments about changes in reliance interests before *Dobbs*, based both on evidence about public perceptions and on a rule-of-law conception of reliance and predictability). There is also the further question, in this context, of the unsettling of reliance on “precedent on precedent”; for incisive analysis, see Melissa Murray & Katherine Shaw, *Dobbs* and Democracy, 137 *Harv L. Rev.* 728, 749–56 (2024) (tracing changes in the Supreme Court’s approach to precedent in the years leading up to *Dobbs* as well as in *Dobbs* itself).

all, isn't that the very point of foreshadowing?¹¹⁶ Moreover, even confident guesses about the future will generally not do better than existing precedent in fostering predictability and reliance. If anything, it seems that lower courts might better serve these values just by following existing precedent and ignoring the signal altogether.

Maybe stronger justifications can be called to mind. But it appears more promising to turn now to the second option, asking: How might one design a safety valve that allows a lower court to avoid being made to repeat certain kinds of mistakes? The way this is supposed to work in the doctrine of *stare decisis* (concerning mistakes about the law) may be familiar, but how should it work in a new doctrine of *stare divinatoris* (concerning mistaken guesses)? A good place to start is to imagine how lower courts might assess the informational value of the Supreme Court's guesses.

C. *Second-Guessing*

When a lower court does take heed of the Supreme Court's foreshadowing, how should it assess the informative value of that signal? What other information should it allow in—or not?¹¹⁷

The characteristics of the emergency ruling itself will matter. If it offers no explanation at all, the informational value is vanishingly small.¹¹⁸ But if a written explanation accompanies the emergency ruling, then a lower court has something to work with; and all the more so if certiorari has already been granted in the other case with specific “questions presented” drawn up.

And what about the vote count? Doesn't an apparent 5-4 vote on an emergency application foretell a future 5-4 vote on the merits ruling? Not

116. One might see the foreshadowing as suggesting that easy cases under prior precedent are turning into hard cases. And as the book chapter by Professor Hillary Nye observes:

[A]s many have acknowledged, in hard cases we may worry *less* about predictability. In such cases, the judge's decision does not cause uncertainty, because there is *already* uncertainty in the law The decision can only go one way, and one or the other party is going to have their expectations upset. But both parties know this, so we might think uncertainty is not really the key worry here.

Hillary Nye, *Predictability and Precedent*, in *Philosophical Foundations of Precedent*, supra note 4, at 445–46 n.18 (citation omitted).

117. For a thoughtful sorting of various kinds of signals from the Supreme Court, grounded in norms of judging with integrity, see *Re, Narrowing Precedent*, supra note 14, at 943–45.

118. But see *McFadden & Kapoor*, supra note 42, at 864 (noting that in their proposed approach, “even a decision with little or no reasoning can be authoritative if it is clear from the decision that the Supreme Court has expressed a view on the merits of a question”). Yet without *any* reasoning expressed for the emergency ruling, even for a grant of relief, how often will it be clear what exact legal question was guessed about—and what exact answer was guessed—as the grounds for decision for a majority of the Justices? Cf. Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 *Mich. L. Rev.* 1, 10 (2012) (“[Suppose a judge] hears a case and then just points silently to one of the parties, indicating who has won. Is it possible, on this basis, for anyone beyond the two litigants in the case to form expectations about how the courts will reach their decisions in the future?”).

necessarily, if the interim equities are driving the result.¹¹⁹ And if the Justices vote 9-0 to deny relief because they expect certiorari to be denied, that certainly does not imply 9-0 agreement on the underlying legal issue.¹²⁰ In practice, of course, individual Justices can—and often do—choose to convey their own views through separate statements or noted dissents.¹²¹ Yet they need not. One might even imagine (if only in theory) the Justices granting emergency relief without dissent because each can already see that, after a grant of certiorari, the requesting party will win 5-4 on the merits.¹²²

What about information drawn from outside the ruling itself? For example, what if the judge knows that the Supreme Court’s foreshadowing sometimes turns out to be wrong? Or what if the judge knows that the Supreme Court will never get to a merits ruling because its case has become moot? Or what if a related merits ruling from the Supreme Court has appeared in the meantime? These seem to be not only allowable but essential reasons for discounting an emergency ruling’s informative value.

Or what if a pivotal Justice has been replaced since the emergency ruling—and the new Justice, known to see things differently, is expected to participate in the future merits ruling?¹²³ Such “nose-counting” seems generally taboo.¹²⁴ Yet it also seems to be what a single Justice traditionally did when deciding an emergency ruling alone “in chambers” as the

119. See, e.g., Pickup & Templin, *supra* note 44, at 8 (observing that in an emergency ruling about the federal eviction moratorium during the pandemic, “even though Justice Kavanaugh thought the moratorium was unlawful, he voted to keep it in place for prudential reasons”). Even such an express reliance on the equities, however, may not always be internalized by the lower courts. See *id.* (noting further that “when another version of the moratorium was challenged, lower courts did not feel free to grant a stay, even though they knew that Justice Kavanaugh would flip his vote when the issue returned to the Court”).

120. Recall that Justice Kavanaugh’s statement explaining his vote to deny relief in *Griffin*, joined by Justice Barrett, expressly highlights this possibility. See *supra* note 37; see also McFadden & Kapoor, *supra* note 42, at 849–50 (explaining why denials of stays receive no precedential weight, in their proposed system, emphasizing the possibility that a lack of certworthiness may be the reason).

121. On the tendency of some Justices to maintain public-facing consistency across cases in their votes and in the positions they take, see generally Richard M. Re, *Personal Precedent at the Supreme Court*, 136 *Harv. L. Rev.* 824 (2023).

122. If you were to ask a class of students whether there are probably more right-handed or left-handed people in the room, you will get total agreement that there are probably more right-handed people—including agreement about this among all the left-handed students in the class. See Huang, *Coordinating Injunctions*, *supra* note 95, at 1347–48 (presenting this illustration).

123. Or what if this new Justice is expected to participate in the certiorari decision? See Tejas N. Narechania, *Certiorari in Important Cases*, 122 *Colum. L. Rev.* 923, 976–84 (2022) (demonstrating empirically the impact of the arrival of new Justices on certiorari decisions at the Supreme Court).

124. See, e.g., *People v. Lopez*, 286 P.3d 469, 485 (Cal. 2012) (Liu, J., dissenting) (“[N]ose-counting is a job for litigators, not jurists. . . . [O]ur role is not simply to determine what outcome will likely garner five votes on the high court. Our job is to render the best interpretation of the law in light of the legal texts and authorities binding on us.”).

assigned Circuit Justice on behalf of the Supreme Court.¹²⁵ And now counting votes is expressly mentioned in the standard for a stay pending certiorari.¹²⁶ So how can a lower court look away?

The range of information that seems essential for a lower court to consider, to avoid following inapt or obsolete signals, would seem to be quite broad. Would a well-crafted safety valve for a new doctrine of *stare divinitatis* just end up swallowing the rule?

CONCLUSION

What might it mean for lower courts to take heed of the foreshadowing in the Supreme Court's emergency rulings? Such signals do not create binding precedent in the conventional sense. Rather, they reflect guesses about the future of the law. Strange but intriguing questions thus arise: When, if ever, would it make sense to deem an earlier court's guess to be "binding" on a later court's guess? Why should new information, tending to make guessing more accurate, ever be excluded? Recall too the core epistemic constraint: An earlier guess made at a lower threshold of confidence cannot provide the answer for a later guess requiring a higher threshold of confidence. How does this limitation map onto familiar notions of the bounds of precedential force? Or does it hint at a dimension yet to be explored? As theory pursues these newfound questions, more will emerge, it's fair to guess.

125. For a lively account of a historic example of this expectation being variously observed and flouted by different Justices, see Vladeck, *Shadow Docket*, supra note 9, at 1–10. As then-Justice William H. Rehnquist put it, in *Board of Education v. Superior Court*:

[A]s has been noted before in many Circuit Justices' opinions, the Circuit Justice faces a difficult problem in acting on a stay. The Justice is not to determine how he would vote on the merits, but rather forecast whether four Justices would vote to grant certiorari when the petition is presented, predict the probable outcome of the case if certiorari were granted, and balance the traditional stay equities. All of this requires that a Justice cultivate some skill in the reading of tea leaves as well as in the process of legal reasoning.

Bd. of Educ. v. Super. Ct. of Cal., 448 U.S. 1343, 1347 (1980); see also Joseph Avery, *Predicting Up and Down: A Framework for Legal Prediction*, 24 *J. Const. L.* 480, 495 (2022) (describing Justice William Brennan counting votes, as the Circuit Justice, in ruling in chambers on a stay). Cf. *id.* at 491–93 (describing the Third Circuit counting votes of state court justices to make an *Erie* guess about state law in a diversity jurisdiction case).

126. See supra note 105 (citing the *Hollingsworth* standard as asking whether there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari" and "(2) a fair prospect that a majority of the Court will vote to reverse the judgment below").

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